HUMAN RIGHTS AND CAPITALISM

A Multidisciplinary Perspective on Globalisation

Edited by
Janet Dine and **Andrew Fagan**

Corporations, Globalisation and the Law

Human Rights and Capitalism

CORPORATIONS, GLOBALISATION AND THE LAW

Series Editor: Janet Dine, *Director, Centre for Commercial Law Studies, Queen Mary College, University of London, UK*

This new and uniquely positioned monograph series aims to draw together high quality research work from established and younger scholars on what is an intriguing and under-researched area of the law. The books will offer insights into a variety of legal issues that concern corporations operating on the global stage, including interaction with WTO, international financial institutions and nation states, in both developing and developed countries. Whilst the underlying foundation of the series will be that of company law, broadly-defined, authors are encouraged to take an approach that draws on the work of other social sciences, such as politics, economics and development studies and to offer an international or comparative perspective where appropriate. Specific topics to be considered will include corporate governance, corporate responsibility, taxation and criminal liability, amongst others. The series will undoubtedly offer an important contribution to legal thinking and to the wider globalisation debate.

Human Rights and Capitalism

A Multidisciplinary Perspective on Globalisation

Edited by

Janet Dine

Director, Centre for Commercial Law Studies, Queen Mary College, University of London, UK

and

Andrew Fagan

Human Rights Centre, University of Essex, UK

CORPORATIONS, GLOBALISATION AND THE LAW

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
Glensanda House
Montpellier Parade
Cheltenham
Glos GL50 1UA
UK

Edward Elgar Publishing, Inc.
136 West Street
Suite 202
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Cataloguing in Publication

Human rights and capitalism : a multidisciplinary perspective on globalisation / edited by
Janet Dine and Andrew Fagan.
p. cm. – (Corporations, globalisation and law series)
Includes index.
1. Globalization. 2. Human rights. 3. Capitalism. I. Dine, Janet. II. Fagan, Andrew, 1966– III. Series.

JZ1318.H84 2006
323'.09'051–dc22

2005049437

ISBN-13: 978 1 84542 268 4
ISBN-10: 1 84542 268 6

Typeset by Manton Typesetters, Louth, Lincolnshire, UK
Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall

Contents

Contributors

Steve Anderman, University of Essex, UK

'Gbenga Bamodu, University of Essex, UK

Michael Blecher, Senior Legal Advisor, Deutsche Geselschaft fur Technische Zusammerarbeit

Fernne Brennan, University of Essex, UK

Janet Dine, Director, Centre for Commercial Law Studies, Queen Mary College, University of London, UK

Andrew Fagan, Human Rights Centre, University of Essex, UK

Michael Freeman, Department of Government, University of Essex, UK

Paul Hunt, University of Essex, UK and University of Waikato, New Zealand

Rohan Kariyawasam, University of Essex, UK

Todd Landman, University of Essex, UK

Sheldon Leader, University of Essex, UK

Sabine Michalowski, University of Essex, UK

Tom Sorell, University of Essex, UK

Simon Walker, Office of the High Commissioner for Human Rights, Switzerland

Introduction

> The contemporary form of the ancient debate about the ethics of wealth is the human-rights challenge to capitalism … The well-being of many depends on this project. (Freeman, Chapter 1, p. 26)

Michael Freeman's 'Beyond capitalism and socialism' commences the first part of the book which considers conceptual and ethical issues. His contribution goes beyond the more familiar positive and negative empirical understanding of the relationship between capitalism and human rights and examines the way in which the two concepts relate to each other conceptually. Human rights concepts derive from the philosophy of natural law which formed the foundation for international law. On the other hand, 'capitalism' 'derives from late eighteenth and nineteenth century political economy, which was developed, especially in the works of Karl Marx, to displace not only the concept of natural rights – the conceptual ancestor of human rights – but also the natural-law philosophy that had provided its foundation'. Thus 'the two discourses could observe each other, but could not meet on the same epistemological terrain'. The empirical relationship is a different discourse again. Freeman points out that the relationship between capitalism and human rights is necessary only if they provide complementary or opposing understanding of human freedoms, if capitalism is necessary to the attainment of freedom or, on the contrary, if capitalism is associated with oppression and exploitation. In the light of these conflicting relationships it has become 'a common view that capitalism can, and should, be judged at the bar of justice, and that this includes, at least as an important component, its impact on human rights.' For Freeman, and, indeed, for all the contributors to this work, in its current manifestation, it fails. Details of particular failures follow in later contributions; Freeman's particular emphasis is on the conceptual relationship between our subjects and he sees the strongest foundation to their conceptual relationship to be theories of property rights. This insight provides a pervasive theme of the contributions, the 'freedom' to exercise property rights (including intellectual property rights and the right to trade) and the impact this has on human rights and justice are found in every contribution. The natural rights philosophy derived from theories of property. The commitment to 'rights' thus includes a strong commitment to private property 'and thus to complicity in the behaviour of capitalist organisations, even to acts which empirically can be seen as human

rights violations' (Freeman, Chapter 1, p. 6). Freeman unpacks the story of the property rights relationship which is revealed as more complex than it at first appears. Tracing natural rights discourse back to late medieval controversies and the struggle between the Franciscans' vows of poverty (including absence of power) with the opposing Catholic perspective and the relationship between man's understanding of his natural rights and his freedom to exercise them to the possible damage of fellow citizens, this debate reached the point at which the right to having, possessing, using, enjoying and disposing of things was understood as rooted in the divine creation of human freedom. Freeman here identifies 'some ideological materials for the justification of capitalism' (Freeman, Chapter 1, p. 12) and points up the close relationship between natural rights and property rights. Moving to the various and complex interpretations of Locke's theories, he shows that Locke himself had apparently inconsistent views on the relationship between individual property rights and a government's ability to regulate them. Locke clearly argued that the proper function of government was to secure natural rights (including property rights). However, the interpretation of Locke as an apologist for unlimited capitalist appropriation is much less clear, and his 'Christian–republican hostility to greed and luxury' makes it unlikely that Locke would be a present day apologist for the current regime. Nevertheless Freeman sees in Locke a precursor of 'a society in which Christian constraints and mercantilist goals were displaced by a secular society with limited government and a capitalist economy.' A further dimension of Locke's theories is their relationship with colonialism. This relationship raises severe problems for human rights theory in its relationship with indigenous peoples and their assertion of property rights conceptions opposed to the Lockean concepts. Freeman acknowledges the problem, calling for a revision of property rights dialogue. Freeman argues that it was Adam Smith, rather than Locke, who separated the right to property from social responsibility, leading to the current manifestation of capitalism where the utilitarianism of international capitalist trade meets the non-utilitarian liberalism of Locke and Kant, the consequentialist trading regime meets the deontological human rights discourse. 'Whereas rights may trump utility, utility may disregard human rights in the pursuit of its goals.' Freeman concludes by identifying 'mixed effects' of the relationship between our subjects; capitalism may erode civic virtue but it has had a role in the global rise of civil society; the concept of human rights has superseded socialism as the main discourse for the critique of capitalism; the property rights debate needs to be fought out in all the various arenas discussed in this work.

Freeman concludes 'The human rights idea has had important, though limited, success in eroding the concept of state sovereignty. Now it is taking on capitalism. The well-being of many millions depends on the success of this project.'

Sheldon Leader's chapter is concerned with studying how the application of human rights can be analysed so as to uncover the basis and implications of differing justificatory accounts of human rights practice. He argues that the justifications drawn upon directly affect the extent to which a human right is deemed valid and applicable. The setting for his analysis is labour law. In recent decades, human rights principles have increasingly seeped into the so-called 'private sphere' in an attempt to establish more rigorous standards of treatment and individual protection from potentially exploitative practices. The application of the spirit and the letter of human rights jurisprudence to relations between employer and employee appears to acknowledge this and represents a response to a view that many employees of capitalist enterprises are vulnerable to unfair treatment and exploitation as a consequence of a fundamental power imbalance. By extending human rights principles into fields such as these, it might appear as if the presence and effect of power has been acknowledged within capitalism, thereby dispelling the Marxist-inspired criticism that capitalist societies are constitutively incapable of recognising and responding to the inequalities which capitalist relations create and require. Leader cautions against drawing an overly optimistic conclusion that the mere extension of human rights principles to the field of private economic relations will ultimately eradicate persistent inequalities. The effective, rather than merely formal, application of human rights, he argues, must deal with the emergence and increasing influence of a justificatory account of the appropriate application of human rights which serves to subordinate human rights claims to a set of functional imperatives.

Leader distinguishes between three different forms of justification typically offered in support of human rights claims: civic justification, consensual justification, and functional justification. Though not determined by the institutional settings to which they are applied, their application to the sphere of private economic relations reveals a certain bias, he argues, in favour of the self-declared imperatives of the commercial organisation over those of its employees. Leader applies this frame of analysis to a recent legal case concerning the dismissal of a homosexual employee, which was subsequently upheld by the courts. On the face of it, such blatantly discriminatory action would appear to violate a fundamental human right that all parties are bound to respect. However, Leader argues that appeal was successfully made by the employers, in effect, to a functionalist perspective whose application trumped the rights of the employee. This particular outcome, he suggests, is indicative of the growing supremacy of a functionalist logic within contemporary capitalist societies. From this perspective value is determined by the needs and aspirations of the commercial organisation in its pursuit of profit and new markets. The individual employees of such organisations are increasingly, in effect, conceived of as means to the ends of the organisation: human capital.

On this view attempts to protect individuals' rights where such protection is deemed adversely to affect the organisation's pursuit of its ends are rendered invalid. The application of human rights to the sphere of private economic relations is therefore vulnerable to a widespread assumption that the functional imperatives of commercial organisations must take priority over the fundamental rights of their employees.

Janet Dine believes that the human rights approach will need to take on board the propensity of the rich to believe whatever is most comfortable. This includes using companies as 'moral deflection devices' (quoting Thomas Pogge), that is as agents to carry out misdeeds from which the rich world profits while simultaneously taking the moral high ground by condemning companies and still continuing to profit from their activities. Adopting Thomas Pogge's view that an active application of human rights implementation means designing institutions to deliver human rights, Dine notes that the way in which society has designed companies to be profit maximisation machines means that they will inevitably fail this test. The property rights debate is relevant here and it is important to understand different underlying political viewpoints on property rights. The more 'absolutist' view, that property rights should be stringently protected is, as Freeman pointed out, based in political realities perceived by the thinkers writing at the time. These underlying assumptions still inform the property rights debate. So far as companies are concerned it is claimed that shareholders 'own' the company and may therefore use it to maximise their investment. This is an 'absolutist' or 'expansionary' property claim which ignores the context in which these rights operate; that they represent power over people (a theme taken up later in the book by Fernne Brennan in the context of slavery), in terms of the spacial, time and stringency debates which form the social and political background to the exercise of property rights (a debate addressed further by Blecher). Arguing for a human-rights-consistent design for companies, Dine seeks to use risk assessment methods to argue that directors should not be seen as merely the custodians of shareholder rights but should be responsible for ensuring that systems are in place within the company which can deliver a range of human rights, from participation in decision making to protection of labour rights and the environment.

Michael Blecher picks up Freeman's observation concerning the global rise of civil society by examining the development of the new global civil movements. He points out that each social sphere such as law, politics and economics evolves as a separate entity using core distinctions to define its preoccupations, for example, law uses legal/illegal, politics power/non-power. Social movements, including the new social movements which are visible at the European and World social fora, put pressure on these traditional distinctions, requiring a redefinition of the values inherent within them and consequent

changes in discourses and in the law. Going beyond the distinctions to question their own validity (is the legal/illegal distinction itself legal or illegal?) means that the way in which society may reorder itself becomes a matter of infinite complexity and possibilities. However, in all spheres the range of possibilities often leads to decisions being made that defeat the original object pursued. This paradox is present in all human activity. In the human rights context, because human beings are both individuals and part of society, full human rights can only be delivered by institutions established by societies. The paradox is that societies (now global) have a great capacity for human rights violations. This tension reflects the historic tensions Freeman considers between the origin of human rights in the natural law philosophy of freedom and the free exercise of property rights, and the evolution of the human rights discipline into the situation where it is opposed to the free exercise of property rights through capitalism.

Understanding these paradoxes is not necessarily negative, according to Blecher. It should lead to an aspiration to achieve the best possible result for all; in law to the achievement of justice. Realisation of true justice will remain out of reach because the criteria used to make choices will always be flawed and 'asymmetric', therefore, law must seek to improve continuously in order to tend towards the delivery of justice, requiring 'permanent political negotiation'. This requires continuous reconsideration of boundaries within law (such as the definition of 'public' and 'private' spheres), and between law and other 'social spheres', law must at all times be seen in its multi-disciplinary context.

The new social movements (which are broadly seen as 'anti-capitalist') reflect aspirations to provide the best possible solution for every individual. Democracy should respond to the pressures exerted by these movements by becoming 'liquid democracy' since every time a choice is made and an institution established it is immediately suspect, since the choices which led to its establishment will benefit some over others. This vision of institution building reflects Thomas Pogge's concept of creating institutions to maximise the delivery of human rights. The paradox for these movements is that they seek 'to enlarge the possibilities of global development without producing new mechanisms of inclusion/exclusion' (Blecher, Chapter 4, p. 88). To achieve any real change the movements must 'pass from simply "being against" existing forms of the social system to defining concrete alternatives for the solution of social problems' (Blecher, Chapter 4, p. 88). It is inevitable that in doing so the movement will fragment and that this will cause 'an increasing detachment from the movement's starting point' (Blecher, Chapter 4, p. 89). However, so long as the resultant structures remain open to continuous pressure this 'defeat' for the aspirations of the movement must be seen as only an episode in the development of a search for justice.

Law represents a main target for social movements since it is the most obvious embodiment of the choices made by a particular society. In a search for justice, law must therefore establish methods of taking account not only of its political, economic and social context but of the internal reasoning which disciplines concerned with those contexts use in order to reach 'adequate, that is temporarily justified, standards'. In doing so it is necessary to understand the 'constructive selectivity' which determines the internal understanding of each discipline and be aware that there is no such thing as objectivity. Law must use an 'empty space' and allow all social pressures to be voiced. This will involve continuous risk assessment to ensure that the 'natural immunity' to change of institutions embodied in the law is not enhanced but that they are always open to change. The recognition and acceptance of continuous pressure should not be 'by permission' of the established order but flow from an understanding that the 'irreducible diversity' represented by human beings is central to any attempt to achieve justice.

Companies and groups of companies are central to the current legal organisation of capital. These legally established institutions cannot, as Teubner argues, be opposed by 'free market forces' since, just as human rights evolved out of a property rights context and now sit in opposition to some property rights, so 'free market forces' have a paradoxical tendency to undermine freedom, creating a systematic bias in favour of the 'property rights' of shareholders, excluding responsibility to stakeholders. The addition of concepts of 'corporate social responsibility' cannot cure the fundamental error in the legal design of companies; the current model needs to be opened to other influences to create a model which is likely to deliver common welfare.

Paradoxes also abound within the human rights debate. A human rights framework seeks to deliver global welfare while limitations on achieving this are imposed by the framework itself, for instance by prioritising civil and political rights and by limiting delivery to nation states. The human rights debate must be open to embrace some of the 'rights' suggested in this book, such as the right to refuse repayment of sovereign debt in certain circumstances (Michalowski) ot to reframe WTO rules with reparations for institutional racism in mind (Brennan). If positive freedoms are not delivered to those excluded from basic necessities, should there be a 'right' to take them?

Achieving justice will depend on a redefinition of the role of the judiciary (in the international sphere this would presumably include arbitrators) to enable them to take account of wider realities such as the hidden disparities of bargaining power behind apparent equality of position. It would also require significant procedural changes such as a greater role for collective actions, public participation and consultation in legal processes.

Taking one of the social movements' preoccupations, Andrew Fagan's contribution analyses a phenomenon that has received very little academic

attention: ethical shopping. Fagan questions whether it is possible to contribute to the protection and promotion of human rights through shopping; is the shopping mall a new human rights site? The very idea that ethical shopping, undertaken after all by individual consumers, may help to promote human rights presupposes the acceptance of a view which has become increasingly credible in recent years: that human rights obligations can and do fall upon private individuals and not just states or similar public bodies. On this view we may all possess certain obligations towards the general promotion of human rights 'at home' and 'abroad'. The 'ethical shopping' market is a small, but steadily growing, 'institution' within affluent, consumer societies. Advocates of ethical shopping argue that, in an increasingly globalised market-place, our consumer purchases do affect the living conditions of those who labour to produce the goods and services we consume in ever increasing numbers. Many consumer goods and services, it is argued, adversely affect the living conditions of those who produce them. Sweat shop or child labour, exploitative terms of exchange for agricultural producers, and the wholesale degradation of natural environments are presented as benefiting consumers (through lower prices, for example) while directly harming those whose livelihoods and dependants are exposed to these unfair and unethical practices. Ethical shopping represents both a condemnation of these practices and an opportunity to shop in an ethical manner. Ethical shopping casts consumption in a moral light. Casting his analysis in a philosophical framework, Fagan identifies ethical shopping as a harm-based approach to ethics. Advocates of ethical shopping define the practice as that which seeks to reduce the harm caused to others through our consumer choices and thereby promote the well-being of those at the other end of the shopping chain. This emphasis upon harm, Fagan argues, entails an appeal to an account of rights as serving to promote and protect people's basic interests, such as one may find in the work of Henry Shue. Shopping ethically is therefore related to human rights through the effects it has upon people's basic interests and the rights which aim to support these.

While ethical shopping may be associated with a long established tradition within moral philosophy, its ethical foundations are subject to critical scrutiny. Indeed, Fagan identifies and discusses three obstacles to a philosophical endorsement of the claims of ethical shopping: moral subjectivism; the view that ethical capitalism is, in effect, an oxymoron; and, finally, an argument that ethical shopping can only ever be a preserve of the more affluent consumers in the more affluent societies. Whilst acknowledging the apparent force of each of these objections, Fagan argues that shopping is a fundamental feature of contemporary, consumer societies to which we are all, irrespective of our very differing religious and ethical commitments, similarly exposed: few, if any, can avoid the need to consume. He proceeds to accept the claim

that the consumer choices we make can and do impact upon the lives and human rights of those who produce for us in a globalised consumer marketplace. Consuming ethical products can help to alleviate some degree of their suffering. One is, therefore, confronted with a series of choices between goods and services which, at the very least, do not harm people's human rights and those which do. To continue to opt for the latter is unethical. Fagan acknowledges that ethical products typically attract a financial surcharge; that ethical products tend to cost more precisely because they do not involve extensive exploitation. This does serve to restrict the equal capacity of consumers living within affluent societies to consume ethical products. However, drawing upon an argument presented by the philosopher Peter Singer, Fagan argues that a far greater capacity for ethical shopping exists within affluent societies than is currently being realised. Ethical products do cost more but many more people have the means for incurring this additional cost than are prepared to accept at present. Fagan concludes with the formulation of what he refers to as an 'axiom of ethical shopping': 'if one has sufficient means and opportunity to consume ethical products … then one ought to do so.'

Global poverty cannot be overcome by shopping alone. The socio-economic rights of the impoverished and the exploited will not be secured solely and exclusively through 'buying right'; these tasks require concerted governmental and inter-governmental action and structural change. However, in the meantime some action is available to us as consumers. Ethical shopping provides a forum within capitalism for promoting, rather than violating, people's socio-economic rights. Through ethical shopping we can make an important positive contribution to the promotion and protection of human rights. To choose not to do so, given the means and opportunity, appears morally wrong.

Turning to Part II which concerns specific inequities of the trading system, 'Gbenga Bamodu takes as a starting point the opposing views on globalisation and the consequent emergence of attempts to 'manage globalisation'. The UK has taken a leading role in developing strategies to manage globalisation through a White Paper and the subsequent Commission for Africa Report. Bamodu argues that as well as the practical proposals contained in these documents it is necessary to agree 'a clear agenda of a multi-layered approach encompassing doctrinal principles, internationally applicable norms'. At this level it is necessary to recognise the right of all people to democratic governance. In achieving this Bamodu calls for the use of the influence of the UK especially in respect of the repatriation of funds illegally siphoned from developing countries and use of economic leverage to insist on the eradication of official corruption. Taking the case of Nigeria, it is estimated that one family alone has looted some $US 2–5 billion from the country. Examining selected issues covered by the two UK initiatives, Bamodu examines the calls

for the promotion of effective governance and the possible role of the UK as economic actor and as a political influence over the Commonwealth. The initiatives both call for the 'untying of aid', the abandonment of aid as a tool to advance economic or political objectives of the donors and an increase in the 'quality of aid' by working with the donee countries to create an overall development strategy. Bamodu also discusses the importance of debt relief and the disappointing achievements of debt relief initiatives to date. Bamodu welcomes the admission in both documents of the destructive role played by barriers to trade created by the subsidised markets of the developed nations. He also emphasises that the negative impression that many have of the climate for foreign investment in Africa is inaccurate although he accepts that further change to the investment climate is needed. One important policy initiative examined in some detail is the harmonisation of business laws via the OHADA Treaty which should engender co-operation rather than a destructive 'race to the bottom' to attract foreign investment. Bamodu is sceptical of the rather positive picture of the behaviour of investors which is presented in the Report and echoes Blecher and Dine in calling for a fundamental change in the aims of business, away from short term maximisation of profits. Most importantly Bamodu calls for the recommendations in the UK initiatives to be swiftly followed by actions and hopes that they will not merely remain empty rhetoric.

Another facet of globalisation has been the standardisation of intellectual property rights with the impact of the Agreement on Trade-Related Intellectual Property Rights (TRIPS). The recent report by the Commission on Intellectual Property makes clear that in developed countries there is good evidence that 'intellectual property is, and has been, important for the promotion of invention, and that for developing countries, like the developed countries before them, the development of indigenous technological capacity has proved to be a key determinant of economic growth and poverty reduction.'[1] Steve Anderman and Rohan Kariyawasam examine in some detail the unbalanced nature of the protection afforded to intellectual and other property of Multinational Companies (MNCs) not only by the multilateral regime in the form of the Agreement on Trade-Related Intellectual Property Rights (TRIPs) but also by the proliferation of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). They argue that some countries are unable to make use of the checks and balances apparently available under TRIPS (such as compulsory licences) and point to the erosion of 'policy space' that arises either as a result of legislative, judicial or administrative capacity, lack of absorption capacity or as a result of BITs and FTAs. They argue that the balance might be partially addressed by the provision of strong competition laws as a method of regulating the abusive exercise by MNCs of Intellectual Property Rights (IPRs).

Competition law recognises that not only do some IPRs amount to a monopoly but that they do so in a situation where the holder is in control of an 'essential facility', that is, something without which operators in a different market cannot function (such as control over a port without which ferries cannot dock). Competition restricts the use of power in those circumstances on public interest grounds (in a subsequent chapter Kariyawasam shows how this public interest is linked to the collective Right to Development). Competition law also regulates the terms of technology transfer agreements. Anderman and Kariyawasam show how competition rules can assist technology transfer by regulating the terms of technology transfer agreements, for example, by eliminating contractual terms requiring the 'grant-back' of improvements to the licensor or tie-ins of non-IP protected products as a condition of a licence to use a patent. They argue that this type of regulation protects 'follow-on innovation' and can be adapted to ensure the effective take up of technology transfer in developing countries. The authors accept that these mechanisms will only work where competition laws can be effectively enforced, but question whether the WTO rules should be seen as imposing an obligation on all WTO members not to discriminate between the protection of national and international markets so that licencing agreements which are currently out of the jurisdiction of developed states would nevertheless be subject to scrutiny under the competition rules in developed states. This could be justified on the grounds that abusive use of IPRs is a restraint of trade, and would provide one possibility for the integration of human rights considerations into trade rules, a chance to develop policy coherence as called for by Hunt (below).

Anderman and Kariyawasam then examine the treaties outside the ambit of the WTO which might well militate against such policy coherence. There are now some 2265 BITs covering Foreign Direct Investment (FDI) which frequently prohibit any requirement that foreign investors should meet 'performance requirements' including requirements of technology transfer. These are supplemented by FTAs and regional agreements such as the North American Free Trade Agreement (NAFTA). NAFTA prohibits member states from imposing or enforcing requirements 'to transfer technology, a productive process or other proprietary knowledge to a person in its territory'.

The provisions of these agreements, while not uniform, often prevent states from imposing a requirement to train local personnel or use locally sourced goods. Anderman and Kariyawasam see one cause of the proliferation of these agreements as the failure of the multilateral negotiations at Cancun.

In WTO negotiations this caused the rich 'Quad' nations to bow to the concerns of developing countries but in order to circumvent these concessions they have been concluding treaties which avoid those concessions and restrict the 'policy space' in a number of areas including the public policy exceptions to strict IPR protection under TRIPS.

These bilateral agreements will undoubtedly 'limit the ability of governments to obtain patented medications placed on foreign markets at cheaper prices. This move flies in the face of paragraph 52 of the Doha Declaration'. Even if IPRs are not specifically mentioned in these treaties, they may be covered by the protection of 'investment activity' and anti-discrimination clauses. Least Developed Countries (LDCs) and Developing Countries (DCs) are thus caught in a pincer movement with US and EU trade positions embedded in domestic law requiring the promotion and strong protection of IPRs. In the US the aims for Trade Representatives are embedded in law and require the attainment of international protection of IPRs equivalent to domestic US protection, one of the strongest in the world. Since LDCs and DCs are net importers of IP such strict protection militates against their growth. General Systems of Preference are also of dubious assistance to LDCs and DCs since they may be withdrawn unilaterally at any time. Indeed, they may be counterproductive as the threat of withdrawal may be used to gain commitments to BITs and other treaties that are unfavourable to the weaker countries.

In a separate chapter, Rohan Kariyawasam explores the possibility of implementing the UN Declaration on the Right to Development (RTD) by creating national and international measures to enhance and measure technology transfer. Picking up the property rights debate he argues that ensuring beneficial technology transfer will require balancing foreign investor rights to protect intellectual property with restrictions imposed by competition law and WTO surveillance to check the possible misuse of market power by multinational companies. The proposed mixture of measures should, he argues, provide incentives for FDI. In particular, he proposes the introduction of a 'Right to Development Tax Relief'. Kariyawasam argues that the progressive realisation of the RTD depends to a considerable extent on the availability of technological processes (such as the processes necessary to build refrigerated trucks) and consequently on the transfer of knowledge surrounding these processes. He argues that RTD creates not only individual but collective rights which link it closely to the rules that regulate economic activity 'for the public good'. There is clear evidence for this, including the Vienna Declaration of 1993 which links RTD to 'a favourable economic environment at the international level'. Kariyawasam argues that *investor* states have a clear obligation in international law to provide effective technology transfer including adequate 'spillover', that is the effective absorption of new technology by developing states which is far more important than formal technology transfer. This obligation lies on the parties to the International Covenant for Economic, Social and Cultural Rights. Kariyawasam advances the concept of a RTD tax relief which could be claimed by investing companies that satisfy a 'minimum set of technological transfer criteria' to be

established by the WTO Working Group on Technology Transfer. This incentive would assist in promoting FDI in the context of the 'new growth theory' which emphasises the importance of FDI yielding 'social return' rather than simply 'private return' thus avoiding the possibility of destructive FDI. Kariyawasam also develops a new 'symbolic' equation, which he calls 'Equation 5', for linking the Right To Development with FDI. By way of Equation 5, he indicates clearly the economic indicators that need to be further researched if governments are to be able to enforce the RTD through economic law.

Paul Hunt and Simon Walker view WTO agreements through the prism of the right to health, concentrating on the position of states in international human rights law. All state members of the UN (which includes all members of WTO) have agreed to the eight millennium goals, at least four of which are health related. Hunt and Walker argue that one of the greatest challenges confronting international human rights law is the problem of 'disconnected' policy making by governments, that is the absence of integrated policy making and, in particular the lack of understanding of human rights issues when trade policy is made. A coherent approach to the national and international obligations of states is required. While human rights law does not take positions for or against any particular trade rule or policy in principle this is subject to two important practical conditions; the rule or policy in question must actually enhance enjoyment of human rights, including for the disadvantaged and marginal; secondly, the process by which the rule is formulated, implemented and monitored must be consistent with all human rights and democratic principles. Thus human rights law requires reliable evidence that a chosen rule or policy is delivering positive right to health outcomes, including for the disadvantaged.

Hunt and Walker explain that the right to health is an inclusive right extending to timely and appropriate health care, including access to essential medicines, but also underlying determinants of health, such as access to safe and potable water and adequate sanitation, as well as non-discriminatory treatment. Hunt and Walker agree with Kariyawasam that the duty of progressive realisation imposes immediate obligations despite resource constraints.

These authors argue that the relationship between trade and health arises in several ways; trade's potential for increasing resources can contribute to the progressive realisation of the right to health, and resources arising from trade must be allocated in such a way that they do, and the state must establish effective and transparent mechanisms to monitor whether or not this is happening. The fundamental human and democratic right to participate in decision making must inform the development of both trade and health policies.

With Brennan and Kariyawasam, Hunt and Walker see developed nations as having a duty to work 'actively towards equitable multilateral trading,

investment and financial systems that are conducive to the elimination of poverty and the realisation of the right to health.' Hunt and Walker sees this responsibility as arising from the duty of international cooperation and assistance in the International Covenant on Economic, Social and Cultural Rights. This means that states should respect the right to health in all jurisdictions and ensure that no trade agreement or policy will adversely affect these rights. Representatives in all international organisations in all policy matters should therefore take due account both of the right to health and the duty of cooperation and assistance.

While states bear primary responsibility for delivering the right to health, all actors have responsibilities, including private businesses. These responsibilities are further explored in the context of access to essential medicines and Hunt and Walker echo Kariyawasam and Anderman in calling for flexibility of interpretation of the TRIPS regime and the use of compulsory licences and parallel importation. Hunt and Walker believe that access requires delivery mechanisms that will ensure that medicines reach disadvantaged groups such as slum dwellers, indigenous peoples and rural communities, and that medicines must be economically accessible and accompanied by accurate information. The duties to respect, protect and fulfil rights translate these access objectives into a legal framework.

Hunt and Walker see the General Agreement on Trade in Services (GATS) which will open health care services to a higher level of international competition as both opportunity and threat. It might lead to the increase of available resources but could also lead to the establishment of a two-tier health system primarily geared to the wealthy and thus contravening the norms of non-discrimination. Human rights theory differs from that of some trade and development theorists since it emphasises the delivery of rights to all rather than accepting that there will be 'losers' in the path to development.

The authors discern wide support for the development of human rights impact assessments of trade rules and suggests that WTO Trade Policy Reviews should consider this aspect in their country reviews.

Fernne Brennan argues that the rules of the international trading system, especially those overseen by the WTO, should be adjusted to take account of reparations for the slave trade. She argues that the slave trade benefited Western states, boosting their economies at the expense of the people and economies of the target nations. Inequalities were compounded by colonialism and continue today through the imposition of trading rules which are shaped by and imposed by those rich trading nations that have already benefited from slavery and colonialism. Brennan argues that the WTO is institutionally racist, in that as an organisation it fails 'to provide an appropriate and professional service to people because of their colour, culture or ethnic origin'. This type of racism is often to be found in processes within the

organisation and in the operation of its rules rather than in the rules themselves. Brennan takes the case of Guyana, pointing out that the dependence of its economy on sugar, rice and bananas is a direct inheritance of the plantation system which was sustainable only with slave and indentured labour and which was the fundamental driving factor in creating limited diversity in agricultural exports, simultaneously suppressing the export of manufactured goods or value-added items. The philosophy on which WTO rules are based is equality, but predicated largely on the basis of 'equality of starting points' and mitigated only by preferential treatment agreements which have come under increasing pressure (not least from multinational companies pressurising governments to take action) in recent years through the dispute settlement mechanisms of the WTO. Brennan agrees with Fredman that the paramouncy given to equality in WTO rules 'may in practice reinforce discrimination' (Brennan, Chapter 10, p. 267). The inequalities are compounded by the subsidies paid to farmers by the richer trading blocs, particularly the US and EU.

Turning to the debate about reparations, Brennan acknowledges that difficulties with claims for reparation have been encountered because of the remoteness of the episodes of slavery and colonialism which led to the economic disadvantages suffered by countries such as Guyana. However, she argues that slavery constituted a tort against African peoples which continues today in the form of institutional racism; 'acts of the total White community against the total Black community' including 'the continuous economic and social deprivation that they experience as a consequence of past wrongs' (Brennan, Chapter 10, p. 268) and that this institutional racism is evident in the way WTO rules, while preaching equality, rig the rules against the poor (especially African) nations in two ways. The first is by adhering to the concept of formal 'equality' of treatment giving little or no balancing weight to the past wrongs of slavery and colonialism and the havoc wreaked on economies as a result. The second is by prioritising the interests of rich nations in a number of ways, including prioritising the protection of intellectual property and permitting the retention of agricultural subsidies by the EU and US. Brennan argues that slavery and colonialism are a cause (although not necessarily the sole cause) of the current impoverishment of the nations formerly subject to those regimes and that lingering racist attitudes still inform the priorities evident in the trading system. Brennan argues that the communities harmed should displace the concept of individual plaintiffs and monetary compensation in the quest for reparations and justice, and instead call for justice in the reform of WTO trading rules.

Tom Sorell looks at the attempt by the UN to apply human rights standards to transnational corporations by the UN Sub-Commission on the Promotion and Protection of Human Rights which, in August 2003 adopted the 'UN

Norms on the Responsibilities of Transnational Corporations'. Sorell points out that the coverage of these norms is wide, applying to any business operating in more than one country. This would cover quite small businesses although the inspiration for the norms was 'what are taken to be the good and bad practices of the biggest transnationals'. Predictably, industry response has mostly been negative while leading human rights Non-Governmental Organizations (NGOs) have been supportive. Sorell's question is 'whether there is anything more than predicable reluctance to submit to regulation' in the negative responses. The Norms seek to indicate which existing human rights instruments are likely to have a bearing on the activity of transnationals. Importantly, they assert that those involved in running transnationals have human rights obligations. Those obligations are seen as varying according to the degree of influence of a given company. Particular obligations are 'not to discriminate; to protect the security of those affected by their operations; to respect workers' rights; to abide by domestic law; respect the rights of indigenous peoples and general economic, social and cultural rights; as well as refraining from bribes and other forms of corruption' and 'engage in consumer and environmental protection'. Companies are urged to integrate the Norms into their internal procedures, hint at bringing the activities of companies under UN monitoring bodies and urge states to 'make legal arrangements to give the Norms force' (Sorell, Chapter 11, p. 286). Thus 'The Norms are an attempt to get transnationals to support or prompt action by states to fulfil human rights obligations'. Sorell examines the industry criticisms of the Norms and finds that they are not rooted in the possible limitations of the applicability of human rights law but 'the main objection is that businesses are not the right sort of corporate bodies to have human rights obligations, and that the Norms are an attempt to conjure up new and onerous legal obligations for businesses out of thin air'. Sorell finds that the objection that the Norms leave 'real duty-bearer – the State – out of the picture' to be flatly contradicted by the wording. Reflecting Fagan's careful arguments about moral norms, Sorell argues that where serious violations of human rights, such as torture, are being carried out there is a 'pretty strict' moral obligation to protest and to attempt to stop such human rights violations. Sorell notes that where transnationals have failed to act on such obligations they have come to the attention of aggressive NGOs who may not have all the facts and 'who do not feel constrained to make sure their negative publicity is accurate, or fair to transnationals.' Sorell argues that, far from encouraging this behaviour (as some business lobbies suggest) it will have the opposite effect because the Norms are 'indirectly, a way of setting standards for reasonable criticism of transnationals by NGOs.' Sorell also argues that, in the case of torture being carried out by host countries 'low-profile activity' would be sufficient for compliance with the Norms; protests need not be in a blaze of activity.

However, where a government is known to carry out torture, Sorell argues that a transnational should not start operations in that country as to do so will be seen as a gesture of support for that government. Turning to a preoccupation central to the Norms, Sorell considers the economic, social and cultural rights embodied in the Norms and argues that these impose weaker obligations which may be rebutted by duties to others including shareholders. However, Sorell also argues that when companies make a commercial decision to start operations in a poor country they will gather commercial information which will reveal much about the vulnerabilities of the local communities. This knowledge is a good reason to impose a duty to fulfil economic, social and cultural rights unless the company shows that it is not in a position to do so.

However, the industry criticisms of the Norms are 'Friedmanite' in asserting that 'corporate social responsibility begins and ends with providing increased value for share-holdings and obeying local laws or local rules of the game'. Sorell finds this view old-fashioned and so finds no need to engage with the call by Dine and Blecher to consider fundamental reforms of company structure to change this position.

In some areas Sorell finds that the Norms 'stray into requirements that it is hard to see as obligatory at all, either because most transnationals are not equipped to comply' (Sorell, Chapter 11, p. 295) or because they are within the remit of others beyond the control of the companies. According to Sorell this includes suppliers, distributors and parties to contracts with transnationals. Sorell argues that the real value of the Norms lies in the possibility of influencing the 'companies in the middle', that is those neither cynically avoiding all obligations nor in the vanguard of social responsibility.

The third part of the book contains two studies focusing on South America but with wider significance in the debate concerning human rights and capitalism. Sabine Michalowski's contribution to this volume focuses upon the issue of the relationship between human rights and international debt from a legal perspective. Taking the case of Argentina as her example, Michalowski raises a number of important questions of wider significance for other countries whose impoverishment appears to be exacerbated rather than relieved by indebtedness. Her analysis is motivated by questions such as; does an indebted state have a legal right to refuse to service loans and repay debt where to do so will severely restrict its ability to protect the basic social and economic rights of its citizens? And, does the exposure of vulnerable economies to neo-liberal economic forces and institutions ultimately undermine the protection and promotion of the human rights of the poorer citizens of such countries? Underlying her analysis is, thus, a concern about the relationship between capitalism and social and economic rights, a concern which resonates with a number of other contributors to this volume.

Her analysis is timely. 2005 has been marked by increasing calls to write-off the debts owed by the 'South' to the 'North'. This campaign is conducted in an almost entirely moral discourse. International indebtedness of poor countries is identified as an important factor in maintaining the conditions such countries labour under, and is condemned as immoral for the suffering this inflicts upon those most exposed to the effects of poverty. The United Nations' stated desire to reduce by half the number of under-nourished people in the world by 2015 is an important component of this campaign. However, many of these aspirations have little or no legal force and rely almost entirely on the goodwill of affluent governments and their peoples. Appeals to morality, though effective in mobilising opinion, are limited by the cold force of law. Michalowski restricts her analysis to the legal domain. She questions whether there is any legal justification for Argentina refusing to continue to service and repay its debts to foreign creditors, quite apart from the moral arguments that have been offered in support of Argentina's shifting stance on this issue.

Michalowski argues that Argentina's exposure to neo-liberal economic forces and institutions has proven positively harmful to the human rights situation in that country in recent years. She states 'many of the acute problems that led to the breakdown of the Argentine economy are the results of Argentina's neo-liberal policies, backed and partly required by the IMF, the World Bank, and the G7 governments.' Adopting a strictly legal perspective entails an examination of the legality of the contracts Argentina entered into with its numerous foreign creditors. Her examination does not provide a simple, unequivocal answer, however. Some have argued that at issue here is a simple case of the fulfilment of a contract entered into under good faith and requiring that Argentina continue to fulfil its obligations to its foreign creditors who are entitled to their money, when all is said and done. Others have responded with the claim that the very fact that the bulk of these debts were incurred during a period of Argentina's rule by a military dictatorship renders any such agreement invalid. For her part, Michalowski focuses upon the Argentine constitution in her attempt to determine the legality of Argentina's indebtedness. From this perspective two questions emerge as central to the issue: first, who incurred the debt; second, for what purpose or end was the debt incurred?

A legal analysis of Argentine constitutional law in respect of the first question centres upon the division of powers between the executive and the legislative assembly. Given the fact that there was a military dictatorship at the time many of these debts were initially incurred, it is reasonable to conclude that the legislature played little role in seeking and validating these debts. However, the Argentine constitution insists that the legislature must validate any foreign loans sought by the executive. On this basis, one might begin to argue that the debts are unconstitutional. However, this issue con-

cerns the division of powers and does not, in itself, directly involve any appeal to human rights or the basic social and economic duties of Argentina to its citizens. These human rights based duties enter the scene through a consideration of the ends or purposes for which foreign debts are incurred. Michalowski argues, on this point, that the constitution is unequivocal: foreign debts can only be incurred if their purpose is compatible with the state's duty to protect the basic human rights guarantees enshrined within the constitution, guarantees which extend to include the protection of citizens' basic social and economic rights. In many, if not all, cases debt was not incurred for this purpose and discharging the contractual obligations of the state has further eroded citizens' basic living standards. On this view, the state is not a purely economically free agent but is legally bound to respect basic human rights guarantees. Human rights and not, say, military strength, thus stand as the principal end or justification of the authority and competence of the Argentine state. On this approach it is ultimately incumbent upon the courts to take the appropriate action on the issue of whether Argentina would be justified in refusing to repay its foreign creditors. On the face of it, the debts were incurred unconstitutionally and there may be a case, therefore, to cease payment. An appeal to human rights would ultimately underpin any such course of action. Michalowski notes, however, that the situation is complicated by some recent international case law findings which have explicitly refused debtors' attempts to avoid repayment on the grounds that such loans are, in effect, contracts entered into in good faith on the part of the creditors who are, therefore, entitled to repayment. A logical and fundamental principle of capitalism would appear to carry the day. This, of course, takes us into the very heart of the matter and Michalowski's conclusions are important in this respect (and conform to similar perspectives defended by several contributors). She argues that the state cannot be considered a completely free economic agent on terms analogous with those utilised for 'private' economic agents. Through their ratification of various human rights instruments and covenants, states are obliged to uphold and protect the fundamental interests of their citizens. Failure to do so is both morally and legally unjustifiable. International creditors (and the institutions which regulate them) must begin to acknowledge the obligations states are subject to when proposing loans and the terms of their repayment. After all, in the case of Argentina, had constitutional law been complied with, many loans would never have occurred. On this view, human rights commitments do, indeed, serve to impose legal constraints upon the actions of international creditors and indebted countries. Human rights, as a legal rather than merely moral force, stake their place within the global financial sector.

Todd Landman's analysis of the relationship between capitalism and human rights focuses upon Latin America in the last quarter of the twentieth

century; a turbulent and frequently bloody period of the continent's recent history. Landman is a political scientist interested in the relationships between development, democracy and human rights. This particular enclave of mainstream political science has been heavily influenced by modernization theory which holds, to cut a long story short, that democratic institutions can only take hold and begin to thrive once an economic threshold has been achieved within a given nation state or region. Increasing economic wealth, and the means for continual economic enhancement, is the most effective means for securing the end of democracy and, with it, the consolidation of those civil and political rights upon which democracy rests. Modernization theory has been subject to some extensive critical scrutiny in recent years. This chapter takes a similarly critical approach to the claim that human rights are best realised through the pursuit of those neo-liberal economic policies with which modernization theory has been closely associated.

Landman bases his substantive claims upon an extensive comparative statistical analysis of a range of indicators upon the social, political and economic conditions experienced by 17 Latin American countries spanning a period from 1976 to 2000. The sample countries, ranging from Argentina to Venezuela, underwent profound changes during this period. Most significantly, the principal economic model adhered to shifted from a state-led to a market-led model of economic development rendering the Import Substitution Initiative of the early to mid-seventies very much a thing of the past, while 'opening up' Latin American markets to foreign investment and credit. During the same period the countries replaced authoritarian and military dictatorships with democratically elected governments. Latin America, it might appear, has been the subject of a veritable human rights 'revolution', powered by the generation of economic wealth and increasing prosperity. On this view, modernization theory may appear vindicated and its advocates might begin to turn their attention to other continents and regions languishing under economic impoverishment and authoritarian rule.

Landman acknowledges the undeniable transformations achieved in Latin America. Latin America, he avers, has become a key terrain for the practice of human rights. However, he insists upon the need to examine these changes politically, that is to say, beyond and underneath the formality of legal ratification of human rights instruments and economic indicators of national wealth. Landman's comparative analysis reveals that violations of both civil and political and social and economic rights remain a prominent feature of many Latin American countries and are all too readily overlooked by those who are too readily satisfied with *de jure* changes. Landman argues that his empirical findings hold a number of significant and substantive implications for our understanding of how best to promote human rights in any given context. Thus, for example, he insists that Latin America represents an incidence of

'regional exceptionalism' for the universalising assumptions of modernization theory. Landman aligns himself, in effect, with academic specialists in other fields, such as anthropology and political economy, who have challenged the universalising assumptions of modernization theory. For Landman the crucial variable for explaining this particular 'defiance' of modernization theory is politics and the actions of political agents which are, ultimately, not simply reducible to some monolithic and global 'structure'. In support of this claim he points to the importance of regional political mechanisms through which human rights principles are pursued. In stressing the importance of 'politics' for human rights, Landman echoes a position advocated most recently by Michael Ignatieff and, before him, Richard Rorty. Landman's thesis suggests, perhaps most importantly, that the promotion of human rights across different regions of the globe cannot be best achieved by adherence to a 'one size fits all' explanatory model: academic dogma, irrespective of the influence it may wield over international financial organisations, must not cloud attempts to deliver genuinely objective and accurate insights into those conditions which enhance and those which obstruct the pursuit and realisation of human rights. Contained within this focus upon political factors and conditions is an assumption that we who cherish human rights should not be complacent in relying upon once and for all legal or economic mechanisms for the delivery of human rights – the challenge is ongoing, in Latin America and elsewhere.

CONCLUSION

The contributions to this volume represent a response to two imperatives of academic research in the field of human rights. First, human rights is a global and globalising phenomenon whose diffusion is closely related to the globalising spread of capitalism. All of the contributors aim to expose the extent and depth of this relationship. It should come as no surprise to discover that the relationship between human rights and capitalism is a complex, multi-faceted one. Understanding this relationship is crucial to the promotion and protection of human rights. To some, capitalism may appear inherently incompatible with the moral imperatives of human rights. To others, human rights may still appear to be little more than an attempt to cloak an exploitative system in a humane garb. This volume suggests that any such simple conclusions rest upon overly-reductivist and dogmatic assumptions. For the foreseeable future the fate of human rights is entwined with that of capitalism (as indeed, is that of us all). Those of us who make our living through the academic study of human rights cannot ignore this relationship. This volume points to the need to assimilate analyses of capitalism into the study of

human rights. The second imperative of the academic study of human rights is the need to pursue multi-disciplinary research. While the academic field has long been dominated by law, it should be abundantly clear that a single academic discipline cannot provide a sufficiently comprehensive nor detailed representation of the object of study. Contributing to the promotion and protection of people's human rights requires academic expertise in, at the very least, the academic fields represented by the contributors to this volume: law, moral philosophy, political science, and political theory. This combination of perspectives and academic skills is unlikely to yield a single, intellectually homogeneous outcome. Singly, human rights and capitalism are complex phenomena so one ought not to be surprised by the complex picture that emerges when the two are combined. This volume both testifies to that complexity and aims to initiate a discourse that sheds new light on the relationship between the two dominant globalising forces of the current age.

NOTE

1. Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 1, p. 1, 2002.

PART I

Conceptual debates

1. Beyond capitalism and socialism

Michael Freeman

1. SOCIAL CONSTRUCTION, HISTORY AND CRITIQUE

Linking the concepts of 'human rights' and 'capitalism' suggests something obvious and something else that is puzzling. Advocates of capitalism believe it to be the most efficient known method for the production and distribution of goods, the creator of employment and prosperity, and friend to the rule of law. As such, it is the economic system most likely to fulfil economic and social rights, and, in doing so, to promote civil and political rights. Its critics believe, to the contrary, that capitalism creates enormous inequalities, exploits its workers, 'hollows out' the state with consequent violation of social and economic rights, corrupts political and economic elites in the developing countries, and cooperates with authoritarian governments in the repression of dissent, with consequent violation of civil and political rights. These ideas are familiar and clear enough, and it is plausible to suppose that capitalism and human rights are related in all these ways quite often. The fact that it is possible to tell plausible 'positive' and 'negative' stories about the *empirical* relations between human rights and capitalism suggests that they are complex, but that empirical research could, in principle, describe that complexity.

What is more puzzling is that the concepts of 'human rights' and 'capitalism' derive from different theoretical discourses, and therefore relating them systematically may be *conceptually* difficult. The concept of human rights derives primarily from international law, which in turn took it from the philosophy of natural law. This philosophy is generally out of favour with philosophers today, but there is no consensus on how, or even if, it should be replaced (Gewirth 1982; Rorty 1993; Freeman 1994, 2002: 55–75; Donnelly 2003: Part I). The concept of 'capitalism' derives from late eighteenth and nineteenth century political economy, which was developed, especially in the works of Karl Marx, to displace not only the concept of natural rights – the conceptual ancestor of human rights – but also the natural-law philosophy that had provided its foundation. The nineteenth-century discourse of 'capitalism' either rejected the concept of 'the rights of Man' (the expression favoured in the French Revolution) as unscientific or treated it as the ideo-

logical expression of material interests. Marx did not criticise capitalism for violating the rights of Man, but, rather, thought of 'rights' as elements of the ideology of the capitalist class (Freeman 2002: 30).

Historically, therefore, the discourse of rights was moralistic, whereas that of capitalism was 'scientific'. The former could evaluate the latter on ethical grounds, while the latter would treat the former as an ideological object of study. The two discourses could observe each other, but could not meet on the same epistemological terrain. The view that the relations between human rights and capitalism are *empirical* belongs to a third discourse. It shares with classical political economy the aspiration to be 'scientific', but seems to take the moral force of human rights more seriously by incorporating into its foundational assumptions some unarticulated legacies of natural law. Understanding the relations between human rights and capitalism requires clarity about the nature of these different discursive approaches, and the merits and limits of each.

The empiricist view of the relations between human rights and capitalism suggests that they are 'contingent' in the sense that, empirically, capitalist organizations and institutions are associated with, or cause, the fulfilment or the violation of human rights. These relations are likely to be variable, depending on various environmental conditions, and might be different in future. There is, on this view, no necessary connection between capitalism and human rights. Given certain assumptions about the positive value of human rights, such a conception encourages reformist activism to improve the human rights policies and behaviour of capitalist organizations.

There are two versions of the view that the relations between human rights and capitalism are *necessary*. The first holds that both human rights and capitalism are grounded, ontologically and morally, in freedom. This may mean that human rights and capitalism are historically necessary, that is, that they are destined to emerge triumphant from the pre-history of human enslavement. Alternatively, it may mean that human rights can be realised only in a capitalist society: such a society may or may not itself be realised historically. The second 'necessitarian' argument associates capitalism with exploitation and oppression. This conclusion is usually expressed in the Marxist discourse of emancipation rather than that of human rights, and the relations between these two discourses are problematic (Lukes 1985; Buchanan 1982). Theories that postulate a necessary relation, positive or negative, between capitalism and human rights, are, of course, vulnerable to criticism on empirical or analytical grounds. It may be, for example, that capitalism, as a matter of fact, restricts freedom more than it promotes it, on some reasonable conception of freedom, or that capitalism can be emancipatory and fulfil human rights. It may also be that these conceptions of capitalism are analytically deficient.

Marxism is sometimes interpreted as holding that, because the relations between capitalism and human rights are necessary, questions of *justice* do not arise. 'Justice' itself, in this account, is a 'bourgeois' concept, and no more than part of the ideological apparatus of capitalism. Some Marxists, and many others, have argued that capitalism does raise questions of justice, and that, indeed, it is often, perhaps always or even necessarily, unjust. The 'official' conception of human rights relates the concept to that of justice in that The Universal Declaration of Human Rights asserts that recognition of human rights is the 'foundation' of justice. Contemporary liberal theories of justice often endorse human rights, although they may endorse different conceptions of human rights (Pogge, ed., 2001; Pogge 2002; Rawls 1999). There is now a common view that capitalism can, and should, be judged at the bar of justice, and that this includes, at least as an important component, its impact on human rights (International Council on Human Rights Policy 2003).

'Human rights' is a concept of international law, but 'capitalism' is not. International law is mainly about the rights and obligations of *states*. States may make international laws that promote, protect, regulate, restrict or prohibit certain economic activities of their citizens, and thereby establish international legal regimes for capitalism. However, capitalist organizations have, at least until recently, generally denied that they have human rights obligations. They categorise human rights violations as 'political' and consequently beyond their authority and competence. Capitalist organizations, they say, are obliged to maximize 'shareholder value' and this entails non-interference in 'political' issues (Tangen, Rudsar and Bergesen 2000: 187; Le Billon 2000: 128). Whereas international law begins with states, liberal philosophy begins with *individuals*. Liberalism recognizes the human right to freedom of association. Voluntary associations are, however, no more permitted to violate the human rights of non-members than individuals are (Pogge 2002: 78–9). Capitalist organizations are consequently, on this view, subject to human rights obligations. These obligations should be re-affirmed because, in practice, capitalist organizations are often deeply involved in the politics of human rights violation (Le Billon 2000). Corporations work too closely with governments, and profit too much from this relationship, plausibly to deny responsibility for human rights violations that may result. Some corporations now recognize this, and have begun to develop the concepts of the corporate citizen and corporate responsibility, although it is still too early to know what the practical implications of this will be.

The Universal Declaration of Human Rights proclaims its end to be, among other things, that 'every individual and every organ of society' shall strive 'by progressive measures' to secure the universal and effective recognition and observance of the rights that it specifies. Article 28 says that everyone is

entitled to 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. It is not reasonably disputable that the present international order fails to meet the requirements of Article 28. The international financial system funds governments that violate human rights. The international trading and legal systems do business with dictators. If a dictator incurs a crippling debt, and is then overthrown, his democratic successors are held responsible for these debts, and are thus forced to pay for the weapons that were used to violate their human rights. In doing so, their economic and social rights are likely to suffer. International financial institutions, which combine the statism of international law with the logic of capitalist economics, have until recently denied responsibility for human rights. The World Trade Organization is not designed to fulfil human rights, and contributes to their violation. Powerful states and capitalist organizations combine to construct a global economic order that violates the human rights of many millions (Eide 2000; Pogge 2002; International Council on Human Rights Policy 2003).

The claim that there is a *conceptual* relation between human rights and capitalism is sometimes based on a historical narrative of theories of property rights. The concept of human rights, this story goes, derives from the eighteenth-century concept of natural rights, which itself derived from theories of property. The demand that capitalism respect human rights, it is concluded, is doomed to failure, because history shows 'rights' and 'property' to be *conceptually* linked in such a way. It is therefore not merely a contingent fact that our world is dominated both by the ideology of human rights and the global capitalist economy. The two have a strong conceptual affinity for each other. Empirically, capitalist organizations may perpetrate grave human rights violations. Their aim is profit, not the protection of human rights. Theoretically, however, this argument insists, the commitment to 'rights' entails a commitment to private property, to capitalism, and thus to complicity in the violation of human rights. This is why complaints about rights-violations by capitalist organizations are little more than self-deluding rhetoric.

I shall show that this story, though often told, is inaccurate. There *is* a historical relationship between rights, property and capitalism, but it is more complex than is usually recognised. Donnelly has proposed that the concept of 'rights' is socially constructed (Donnelly 2003: 16). So it is, and has been for centuries. The concepts of 'property' and 'capitalism' are also socially constructed. This conception of the social construction of concepts enables us to articulate the conceptual relations between 'human rights' and 'capitalism'. Because the social construction of these concepts has been complex, the relations between human rights and capitalism are complex. This analysis undermines all claims about necessary relations between human rights and capitalism. I shall show that the concept of natural rights was originally pre-

capitalist; that it developed a complex relationship with capitalism; that the tension between natural rights and capitalism contributed to the socialist critique of capitalism; and that the concept of human rights then partly transcended the debate between capitalism and socialism to become a post-socialist instrument for the critique of capitalism. This story of rights clarifies the present relations between human rights and capitalism, and provides a coherent theoretical basis for the critique of capitalism from a human rights point of view.

2. CHRISTIAN ORIGINS

The standard story tells us that the modern concept of human rights originated in the seventeenth-century European concept of natural rights (Donnelly 1989: 89). Recent scholarship has, however, shown that the seventeenth-century discourse of natural rights derived from late-medieval controversies (Tuck 1979; Tierney 1997; Brett 2003). These controversies were concerned with property, but with neither 'bourgeois property' nor 'capitalism', for these concepts belong to secular, nineteenth-century discourses, and are quite alien to the Middle Ages. The medieval controversies were conducted in Latin, and concerned the meaning of such terms as *ius* (law or right), *dominium* (control or ownership), *potestas* (power) and *facultas* (faculty). Generally, they concerned the rightful (required or permitted) control, ownership or use of persons and things.

The Franciscan doctrine of renunciation raised a set of theological, philosophical and legal problems for these thinkers. The dilemma facing theologians was that the Christianity of the Gospels seemed to be hostile to worldly wealth and power, while the Christianity of the later Middle Ages had come to terms with wealth and power. Was this reconciliation theologically justifiable? The Franciscans claimed to submit themselves wholly to God by giving up all their worldly goods, including control (*dominium*) of their own 'proper will'. Their opponents – the papacy and the Dominicans, in particular – called into question what the Franciscans could actually be giving up, since giving up your will might be logically, or ontologically, impossible, and giving up all worldly goods (in particular, food and drink) was physically impossible. Franciscans posited a radical disjunction between the individual subject and the world of things, in contrast with the philosophy of Aquinas, in which the individual was an integral part of the universal order. The roots of the liberal Western approach to human rights have been traced to this pre-capitalist debate about 'objective' and 'subjective' right, will, freedom, law and property (Brett 2003: 5–6, 13).

The Franciscans believed that voluntary poverty was the way to salvation. Poverty was not only the absence of material wealth but also the absence of

power (*potestas* or *dominium*). *Dominium* entailed legal status, and thus it was equivalent to *ius* (right). The primary *dominium* of man was that which he had over his own will. *Dominium* of external goods was secondary. Internal liberty, property in oneself, power over oneself and *dominium* of oneself were all equated. *Dominium* of externals was similarly equated with external liberty, property and power. Franciscan theologians repudiated the idea of having any *ius* or *dominium* in things, for to have right was to adopt an appropriative attitude to worldly things. *Ius*, *dominium* and *proprietas* were all the same in being the appropriative relation towards external goods, *ius seu proprietas*, opposed to *simplex usus* (simple use) that the Franciscans could not, and did not, renounce because it was necessary to life.

In 1328 Pope John XXII issued the bull *Quia vir reprobus*, rejecting the Franciscan distinction between use and *dominium*. Since the Franciscans used things, they were not absolute paupers. If the Franciscans used any thing justly, then they used that to which they had a right. Just or licit use was inseparable from *dominium*. Rational creatures had a moral obligation to act justly; to act justly was to act with right or *dominium*. The perfection of evangelical poverty consisted more in the soul's not loving earthly things, than in the lack of earthly things. In response, William of Ockham defined a right as a subjective potential of human action or licit power. The idea of right as licit power connected subjective with objective right (Brett 2003).

The human rights scholar, Jack Donnelly, has argued that there is a radical break between medieval and modern political theory, and that the concept of human rights can be found only in the latter. He makes this argument on the basis of a distinction between two senses of 'right', which he calls 'right that' and 'right to'. Whereas we have these two senses of 'right', Donnelly says, Aquinas had only one. Aquinas' *ius* is a different concept from our 'right'. Donnelly concludes that this distinction casts light on an important difference between high medieval and modern political thought, and is relevant to contemporary discussions of human rights. Medieval thought knew only the concept of 'objective right', whereas the moderns developed the concept of 'subjective rights', whose contemporary form is that of human rights (Donnelly 1980: 520, 529).

Donnelly's argument suffers from several weaknesses, however. Firstly, the philosophy of Aquinas was not the whole of 'high medieval' thought. Secondly, the concept of *ius* was not the only important concept in medieval debates about rights. Thirdly, Donnelly's concepts of 'right that' and 'right to' were not medieval concepts. Fourthly, in medieval thought, even in that of Aquinas, objective and subjective right were not always separated. Aquinas, following Aristotle and Roman law, speaks of 'justice' as rendering to each man what is his. This is very close to grounding subjective rights in objective right. The fourteenth-century Thomist theologian, Denis Rijkel, defined jus-

tice as rendering to each his dignity or due, which was his right (Brett 2003: 92, 102, 105–6). Fifthly, Donnelly ignores the controversy between the Dominicans and the Franciscans, as well as differences in conceptualisations of 'right' in both camps and the contributions of those medieval thinkers who belonged to neither camp. These considerations, taken together, support the thesis that the modern conception of 'human rights' emerged in a more complex and gradual way than Donnelly's simple distinction between high medieval and modern concepts suggests.

Some Dominicans associated *dominium* closely with *ius* in a way that was quite different from that of Aquinas. Conrad Summenhart wrote that all *dominium* was *ius*, and for someone to be *dominus* of a thing was for him to have right over that thing. *Ius* was, however, a wider concept than *dominium*, because *dominium* connoted superiority, and an inferior could have right over a superior. Man had right (is *dominus*) over himself and his body. 'Here', Brett comments, 'Summenhart introduces a notion of negative liberty which is very close to elements of the modern language of rights'. Liberty was the *ius* and *dominium* man had over himself. Ockham held that the right of using was a licit power of using an extrinsic object, of which no one should be deprived against his will without reasonable cause, and, if he should be so deprived, he could bring an action against the person who deprived him in court. In the Franciscan poverty literature liberty was that *dominium* whereby man was made in the image of God and set above irrational creatures. It was a positive dignity of man as a spiritual rather than a natural being. *Dominia* or rights in this doctrine were not negative freedoms of action, but positive ordinations in a divine scheme. Liberty was, according to Brett, not properly a *ius*, but something very close to what we might want to call a right. The equivalence of *dominium* and *ius*, therefore, did not bequeath to the sixteenth century a language of *ius* as sovereignty or freedom of indifferent choice (Brett 2003: 25–6, 37, 42, 47–8, 62–3).

Early sixteenth-century neo-Thomism distinguished between things that were of natural right, which were commanded and not merely permitted, and those things that were licit, which were those that were not prohibited by law but that might be repugnant to reason. Self-conservation was a naturally just thing and therefore belonged to the discourse of natural right. Right itself was a function of law. Natural rights were what were commanded by natural law. The right or the just (*iustum*) was 'objective' in the sense that it was not a quality of the subject, but it was 'subjective' in the sense that it was the right thing for the subject rather than a law governing the relations between subjects. Jacques Almain argued that God created man with the natural right to conservation, sustenance and self-defence. *Dominium* was the right of using a thing according to right reason. A right or *dominium* operated according to a binding precept of a law. One had a natural right to, or *dominium* in, only that

which one was obliged to do by natural law. The natural right to self-conservation was therefore an inalienable natural obligation. Subjective right had now developed as either *dominium* or control over another thing or person, related to liberty, or a power of action under a law, related to obligation or necessity. *Pace* Donnelly, objective right in later medieval scholasticism was not the direct opposite of subjective right (Brett 2003: 114–16, 118–20, 124).

The association of right and freedom was developed further by Spanish thinkers of the sixteenth century. Domingo de Soto held that man had natural inclinations of conservation, nutrition and growth. As an animal, he had the inclination of sense towards the objects of sense, and this was his natural law in so far as it was regulated by reason. As a rational being, his natural law was his inclination towards the good of reason, that is, God and virtue. The proper dignity of man was to live according to reason, for through that he was free and existed for the sake of himself, *sui juris* (autonomous), having *dominium* over himself and thus the supreme right in himself. When a man sinned, he betrayed his own rationality, and lost his freedom and thereby his proper right. Right was licit subjective power. *Dominium* was a species of right, and was defined as the proper faculty and right of a person in any thing that he could take for his own profit in any way permitted by law.

Francisco de Vitoria suggested that liberty had an absolute value, even if it were not directed towards the good. It was better that the subject be able to direct himself towards his perceived good than that he should be directed towards a real good by an external agency. Right could therefore be equated with *dominium*, liberty and spirituality, or with nature as that faculty justifying action which was the result of each individual's inclination to its own good. Right was a power or faculty pertaining to the individual under the law. This licit or legal power was the same as *dominium*. *Dominium*-right was the authority to do or not to do a good act. It was associated with the conception of man as a rational and free creature distinguished from the rest of nature, which operated necessarily. For Soto, while animals and other creatures had natural rights, man was alone in being aware of having natural rights and being able to make a conscious decision to exercise them or to renounce them. Fernando Vásquez defined the power by which the prince acted as a power regulated by right, by contrast with another power of action which was not determined by right, but which was free, operating at will, *de facto*, and belonging to a *dominus*. *Dominium* was, therefore, the natural faculty of doing that which it pleases anyone to do, unless it were prohibited by force or by right. In Vásquez freedom was dissociated from justice and right and associated with will and fact (Brett 2003: 133–80).

In nature, according to Vitoria, there was no political organization. By natural law all men were equal in the sense that none was superior and none

was inferior. Political community was necessary to man's natural end of preserving himself in being and in being good. Vásquez saw the natural as the undirected in opposition to the political as the regulated. Man sought to dominate nature, and man at liberty also attempted continually to dominate his fellow man. This required that each man's *dominium* be reduced to a sphere, guarded by the sword of justice, in which he could not damage his fellow citizen unduly. Soto held that man must be under his own direction, free, if he were to have the distinctive characteristics of man at all. Man must live in a community in order to live and to live well, and that community must be a political community. It was each individual man's natural right to live such a life that justified the right of the community to exercise power over him. But that public right extended only so far as each individual citizen played a necessary part in the survival of the whole community, that is, was a member rather than a separate individual. Beyond that, man must not only have his own rights as an individual, but he must also have their exercise within his own control: in other words, he must be *sui juris* (autonomous), have *dominium* of himself or his liberty. Criminals might forfeit their rights, and justly be punished by the community, but the community might not deprive an individual of his rights simply because its utility would be served thereby. Each individual was the guardian of his own life, whereas the commonwealth was the guardian of the common good. Vásquez set up an opposition between natural liberty and political right, thereby leading the way to Grotius, Selden and Hobbes. Vásquez's natural liberty was Hobbes's natural right. Hobbes's concern was to establish, and then to fix the political community against the flux of nature (Brett 2003: 132–75, 203–5).

The Spanish writers had led the way from the concept of natural right as liberty to that of the political community. What were the implications for the theory of property? The Franciscan Duns Scotus had held that originally everything was held in common by the law of nature or divine law. After the Fall the strong began to oppress the weak from avarice, and the first division of *dominia* occurred through positive law. This division was just in so far as it was ordained by legitimate authority and according to rational principles. *Dominium* was the right of having, possessing, using, enjoying and disposing of a certain thing at the pleasure of the will or according to a determinate mode defined by some kind of superiority or authority. Vitoria held that *dominium*-right was that whereby man was made in the image of his *dominus*, God. Only a rational creature had *dominium* in its act. Only a creature that was free could have *dominium*. According to Soto, the *dominium* that each has in his own actions is the cause and root of that which he has in other things (Brett 2003: 11–16, 26–30, 47, 128–9, 151). The divine creation of human freedom was, on this account, the source of the right to property. With this account of property, we have moved beyond Franciscan renunciation to

the association of God, rationality, freedom and *dominium*. One may detect here some ideological materials for the justification of capitalism, but, if this is so, the association of human rights with capitalism was not made in the seventeenth century on the basis of a radical break with late medieval thought, as Donnelly suggested, but, rather, as the culmination of a long and tortuous journey from Franciscan poverty through Dominican and late-medieval Spanish theology to the familiar territory of seventeenth-century theories of natural rights in Grotius, Hobbes and Locke.

3. LOCKE, LIBERALISM AND PROPERTY

In the political theory of John Locke, natural rights, property and the duties of government are internally linked. One's rights are one's property, and government is their protector. A government that ceases to protect rights is dissolved.

There has been considerable controversy about the relations between natural rights and capitalism in Locke's theory. Locke has often been interpreted as a founding theorist of human rights (Donnelly 1989: 88–106). C. B. Macpherson proposed that Locke's account of natural rights led him to a defence of 'bourgeois' property. Macpherson acknowledged that Locke's political theory included many of the values of modern liberal democracy, such as the moral supremacy of the individual, government by consent, and the sanctity of individual property, and these were all derived from the first principles of individual natural rights. However, Locke's doctrine that every individual was the owner of their labour provided the moral foundations for 'bourgeois appropriation'. Labour, according to Locke, created value and thereby justified appropriation. It followed that the individual right of appropriation overrode any moral claims of society. The traditional view that labour and property were social functions, and that ownership of property involved social obligations, was thereby undermined. The initial equality of natural rights could not last after the differentiation of property, for those without property lost the full proprietorship of their own persons that was the basis of equal natural rights (Macpherson 1962: 194, 220–21, 231, 245–6).

This interpretation of the relation between natural rights and bourgeois property has influenced human rights scholarship. Donnelly maintains, for example, that Locke's *Second Treatise of Government* is one of the standard sources of the conventional, liberal, natural-rights conception of politics. Macpherson correctly argued that Locke sought to justify largely unlimited accumulation of property, and that he held the end of civil society to be the preservation of property. This, however, was only one side of Locke's theory. Locke offered several alternative formulations of the ends of politics that

make sense only on a broad interpretation of property as roughly equivalent to all natural rights. Donnelly agrees with Macpherson that Locke, and many 'self-professed liberals', have attempted to give a special, higher status to the right to property. The historical record of the liberal-democratic West, especially prior to the twentieth century and in its relations with the Third World in particular, has given inordinate emphasis to individual property rights. But even in Locke's *Second Treatise* there are theoretical resources that allow, or require, a broader and more humane approach to human rights. The particular historical limits of Locke's project arose largely from 'the limited aims of the bourgeois political revolution'. Interpretations of Locke and liberalism such as Macpherson's accurately highlight the fact that liberalism in the seventeenth and eighteenth centuries 'was indeed principally about overthrowing traditional aristocratic rule and replacing it with bourgeois rule' (Donnelly 1989: 88–9, 93, 99–100, 104).

Donnelly does not provide any evidence for his claim that seventeenth-century liberalism sought to overthrow traditional aristocratic rule and replace it with bourgeois rule. There is little evidence that Locke, who formulated the arguments of the *Two Treatises* while in the employ of the Earl of Shaftesbury, had such an aim. David McNally has argued, to the contrary, that Locke supported the aristocratic politics of his time, and that his theory of property was compatible with its class structure (McNally 1989). Donnelly, however, agrees with Macpherson that the modern concept of human rights has its origins in the 'bourgeois' conception of rights proposed by Locke. Despite the apparent universalism of his language of natural rights, Locke clearly envisioned a political world of propertied, Christian men. 'Women, along with "savages", servants, and wage labourers, were never imagined to be holders of natural rights' (Donnelly 2003: 60).

The argument that the theory of natural or human rights begins by proclaiming universal, equal rights, but, by endorsing capitalist relations of production, ends by justifying, not only unequal property rights, but also unequal enjoyment of *all* human rights, is still the basis of a common criticism of the concept of human rights. This is the central 'negative' theoretical argument about the relation between human rights and capitalism. It is the core of the Marxist critique of 'bourgeois' rights. Donnelly holds that Locke's conception of human rights was too narrow, both in its subject and its substance, and that the modern concept of human rights is broader and more humane in both. However, since both Macpherson and Donnelly find the 'roots' of the modern, liberal conception of human rights in Locke's theory, it is worth noting that Macpherson's interpretation has been the subject of an intense critical debate. John Dunn, for example, reads Macpherson as arguing that Locke developed a theory of 'possessive individualism' that was once appropriate to a new bourgeois order, but which now threatened to legitimate

avoidable poverty for millions. Dunn challenges this interpretation on the ground that it fails to take account of Locke's religious commitments. Locke, he suggests, was not simply addressing the question of bourgeois appropriation, as Macpherson supposed. Locke may have derived from the concept of natural rights an argument for economic liberalism, but his argument was grounded in his theology. Without the theology, Locke's argument for 'bourgeois' appropriation collapses (Dunn 1969: 262–5).

Recent Locke scholarship has emphasised the need to interpret his theory of property, not only in connection with his religious beliefs, but also with his political theory. On this view, the primary aim of Locke's *Two Treatises of Government* was not to justify a particular economic system, but, rather, to advocate a particular theory of government. Locke insisted that the function of government was not to save souls, but to promote the secular, public good (Marshall 1994: 177–8). The public good included a robust set of property rights, but the justification of property was rooted in the requirement to preserve mankind, the divine mandate to labour, and the contribution that labour could make to society. This is a Christian and a republican rather than a 'bourgeois' theory of politics.

It might still be that Locke was providing a Christian argument for capitalism. The argument that he was doing this depends, in part, on a famous passage in the *Second Treatise*. Here Locke says that taking something out of common ownership is the origin of property, because, without such appropriation, common ownership is of no use. He then writes: 'Thus the Grass my Horse has bit; the Turfs my Servant has cut, and the Ore I have digg'd in any place where I have a right to them in common with others, become my *Property*, without the assignation or consent of any body' (Locke [1689] 1970: II.28).

The turfs my servant has cut become my property. This passage has been interpreted as implying that a capitalist employer would have the right to the whole product of the labour of his servants. Macpherson maintained that the passage shows that Locke was taking the wage relationship for granted. The postulate that each individual's capacity to labour is their own property and is alienable is one of the essential features of modern, capitalist societies. In assuming the alienation of labour and the right to its products to be 'natural', Locke 'erased the moral disability with which unlimited capitalist appropriation had hitherto been handicapped' (Macpherson 1962: 60, 215, 221).

James Tully argues against Macpherson that the master–servant relation in this passage is not the wage relationship of capitalism. He relies to an important extent on a passage from the *First Treatise*, in which Locke said that God would rather give everyone a right to food, clothes, 'and other conveniencies of life' than to make them depend on the will of a man for their subsistence who would have the power to destroy them all when he pleased, or to tie them

to 'hard service'. God did not leave one man to the mercy of another, so that he might starve him if he pleased. He gave property on condition that the needy had a right to the 'surplusage' of the goods of the propertied. No man could justly exploit another's necessity to make him his vassal by withholding from him the necessities of life (Locke [1689] 1970: I. 41–2). In paragraph 85 of the *Second Treatise* Locke defined a servant as a free man who sold to another, for a certain time, 'the service he undertakes to do', in exchange for wages. This sale of a service was, Tully maintains, not the alienation of labour, and did not involve the capitalist mode of production. Locke explicitly denied that landholders can force a person to work by the appropriation of all available land. This, Tully says, 'makes it impossible for the capitalist to appear in Locke's theory' (Tully 1980: 113, 136–42).

Jeremy Waldron counters with the *Second Treatise* §77, which says that God made Man 'under strong Obligations of Necessity, Convenience, and Inclination to drive him into Society'. The first society was between man and wife to which, in time, that between master and servant came to be added. The master–servant relation, therefore, might be based on necessity, after all. Waldron argues that the passage in the *First Treatise* on which Tully relies denied the legitimacy of *despotic* power, and that Locke himself, in the *Second Treatise* §2 distinguished the power of a magistrate over a subject from that of a master over his servant. Waldron reads §42 of the *First Treatise* as imposing the obligation not to let anyone starve. This is consistent with the capitalist's paying a wage to his labourers (Waldron 1988: 227–8).

Tully replies that Locke gave the needy a right to the 'surplusage' of the property owner, and that this included food, clothes 'and other conveniencies of life'. This right was inconsistent with the relations between the parties being those of capitalism. The relation between masters and servants in Locke's theory was, on the contrary, contractual, and not coercive. It is clear that Locke's theory gave landowners natural rights to the products of the labour of their 'servants', and Christian duties of charity to the needy. Tully may be right that the master–servant relation was not 'coercive', but it was *possessive*: the master had the right to the products of the labour of *his* servant. The landowner might use 'capital' (land) to appropriate the product of the labour of his 'servants'. If this was not capitalism as Marx understood it, it was capitalism of a kind. Waldron, however, shows only that necessity drove men into society, according to Locke; whether or not they became servants from necessity is unclear. Tully's reference to 'surplusage' is not decisive, either. It is not clear to what landless labourers were entitled beyond the means of 'preservation'. Tully says that, in political society, the government had the right to determine and regulate property, although it was bound by natural law in so far as this was consistent with the public good (Tully 1993: 119–24, 130–31). Locke was also unclear on this point. On the one

hand he said that, by the same act whereby anyone united his person, which had previously been free, to a political community, he also subjected his possessions, which had previously been free, to the government. He also said that, in governments, the laws regulated the right to property. On the other hand, he also said that the legislative power could not take from any man any part of his property without his consent (Locke [1689] 1970: II.50, 120, 138). It makes no sense to argue for political society without giving its government the power to regulate property for the sake of that society's preservation, but the fact that, in Locke's theory, property rights derived from natural law suggests that the power he gave to government to regulate property was very limited.

Locke was a founder of the political theory of human rights because he argued that the proper function of government was to secure our natural rights, and not to enforce religious or moral orthodoxy (Marshall 1994). In the beginning, when people first inhabited 'the great Common of the World', man's wants forced him to labour, and God commanded him to appropriate. Labour was the source of value and of property rights. Subduing or cultivating the earth gave title to dominion. God, by commanding man to subdue, gave him authority to appropriate. The condition of human life, which required labour and materials to work on, necessarily introduced private possessions. Locke, however, attributed the corruption of power to 'evil concupiscence', ambition and luxury, which taught princes to have distinct and separate interests from their people. Then men found it necessary to examine the rights of government, and to discover ways to prevent the abuse of power (Locke [1689] 1970: II.35, 111). This is a liberal, but not necessarily a 'bourgeois' idea. The Christian vice of greed was the source of the political problem of abusive government. Locke combined the Christian and republican animosity to the corrupting influence of luxury on good government, and thus, even if his theory of property legitimated a relatively free economy, this freedom was subject to political, moral and religious constraints. Rights were needed to protect the people from the abusive government that was produced by greed.

Alan Ryan interprets Locke's theory of property, not as a justification of unlimited capitalist appropriation, but, rather, of the Weberian Protestant work ethic that had capitalism as an unintended consequence (Ryan 1984). While Dunn and Ryan emphasise the Protestant character of Locke's theory, Marshall interprets Locke as the advocate of a secular conception of political society as established to achieve terrestrial public good, with the duty to preserve society and mankind, the creatures and property of God, by protecting their natural rights. Locke's religious individualism, which grounds his individualistic account of natural rights, also drives his advocacy of the separation of church and state (Marshall 1994: 206, 213–4). These interpreta-

tions suggest that Locke sought to limit governmental interference with both religion and property rights, but property rights were themselves limited by religious obligations and the duty of government to protect the public good. This does not amount to the justification of capitalism, but it is consistent with a moderate, regulated form of capitalism.

Nevertheless, Marshall suggests that the *Two Treatises* may have been addressed primarily to the gentry, the yeomanry and urban merchants, rather than to the artisans and tradesmen as proposed by Richard Ashcraft (Marshall 1994: 264–5; Ashcraft 1986). This may be a 'bourgeois' audience, but its enemy was the king, not the aristocracy. The *Two Treatises* defend property and freedom against absolute monarchy. They do, therefore, link natural rights with property, but that property is not necessarily 'bourgeois'. Marshall agrees with Dunn that the Christian duty to work for the public good was, for Locke, a fundamental value, and that this could 'trump' the right to subsistence. This reading might support the Macphersonian thesis that Locke was, after all, a defender of harsh capitalism. However, on this account, the duty to work was not class-based; the idle of all social classes forfeited the right to sustenance. This is inconsistent with the idea of the human right to food, although it is not clear what human rights theory has to say about the rights of those who are able to contribute to the public good, and who refuse to do so. The duty to work for the public good was, however, based on the Christian duty to serve others and not the 'possessive individualism' attributed to Locke by Macpherson. Marshall also agrees with Ashcraft that all social classes had enough reason to know the basic truths of morality and religion, and that even those who had never known Christianity had reason enough to know the laws of nature (Marshall 1994: 321–4, 443, 447). There may, therefore, be a gap between those who could be property owners and citizens in Locke's theory (almost everyone) and those to whom Locke was appealing as a matter of practical politics (possibly the middle ranks of society). Ironically (since Macpherson criticises Locke from a Marxist point of view), Locke's advocacy of political rights independently of class position is, according to Marxism, a typical liberal position (Ashcraft 1986: 494–503, 564–5, 579–84).

Tully holds that the specific groups of people who Locke believed were vulnerable to violation of their property rights were not capitalist landowners but oppressed religious minorities. These groups might, of course, have overlapped considerably, and Locke may have been concerned with both. Unlike Marshall and McNally, Tully believes that Locke's intended audience included 'servants', that is, independent contractors. There is no consensus among modern scholars, therefore, about the class basis of Locke's ideological appeal. It may be that, once again, Locke was not clear himself or deliberately left the matter unclear in his philosophical work in order to make its appeal as broad as possible.

Tully represents Locke as a pre-capitalist thinker who lived in a pre-capitalist society. He justified the possession of land for use and improvement, not the capitalist ownership of land, which carries with it no obligation to make it useful or fruitful. The Lockean state was mercantilist rather than capitalist: labour was a resource to strengthen the state rather than a commodity traded in a free market (Tully 1993: 3, 124–32, 165, 247). The Christian–mercantilist interpretation of Locke's theory of property and government makes him a man of his time. There is no doubt that Locke was defending 'property' against royal absolutism, nor that he believed that government should serve the public good. This good was constituted primarily by the protection of natural rights. These rights included the right to accumulate considerable wealth through one's own labour and through the employment (whether contractual or coercive) of the labour of others. Tully rejects the notion that Locke was a theorist in the transition between Christian and capitalist conceptions of property on the ground that *any* ideas can be interpreted as 'transitional', and thus this thesis cannot be tested against the evidence. This is unconvincing. Locke's theory combines the Christian–republican hostility to greed and luxury with the Protestant valorisation of labour. Both Tully and Marshall agree that Locke's theory of religious toleration supports his political theory in calling for a secular, liberal state based on robust, though not unrestricted, property rights. Macpherson may be wrong to attribute to Locke a defence of 'possessive individualism', and Ryan correct to see Locke as a precursor of capitalism. In so far as Locke, in Tully's view, was justifying a Christian, mercantilist polity based on an economy characterised by strong property rights, he was (whether he knew it or not) a precursor of a society in which Christian constraints and mercantilist goals were displaced by a secular society with limited government and a capitalist economy.

There is another dimension to Locke's theory of property with implications for human rights today. Several scholars have recently linked Locke's defence of property against the power of the British monarchy with his support for British colonialism. Locke was, in practice, deeply committed to both causes through his association with Shaftesbury. Tully interprets Locke as believing that America was a state of nature. Europeans were rational and industrious, whereas native Americans were wasteful. The industrious Europeans were therefore entitled to appropriate American land without the consent of the natives in order to subdue and cultivate it. Europeans had productive agricultural practices, modern states and property laws, while the native Americans had none of these. Locke's theory of property therefore provided a justification of colonialism. The legitimacy of colonial appropriation of indigenous land entitled Europeans to make war on native Americans who resisted it (Tully 1993: 129, 141–5, 151–64; see also Armitage 2004).

Today indigenous peoples are asserting the legitimacy of their traditional forms of government and property rights against modern, liberal nation states. This raises problems for human rights theory, because the modern concept of human rights presupposes the legitimacy of the liberal–democratic nation state (Donnelly 1989), so that its historical association with colonialism throws this legitimacy into question. It was Macpherson's thesis that Lockean universal, equal and individual rights were, when combined with his theory of property, self-destructive in that they legitimated the domination of the propertyless by the property owners. Tully's thesis is that this same combination of rights legitimated the oppression of indigenous peoples by colonialists.

The theoretical (as distinct from the historical) connection between liberalism and colonialism is, however, not as close as Tully and others have suggested. It requires the combination of three elements of Locke's theory: 1) natural rights; 2) the 'productivist' justification of property; 3) the harsh theory of punishment for rights violations. Liberalism is committed only to the first of these. Liberals may, as Donnelly suggests, have historically favoured something like Locke's theory of property, but that commitment is revisable, and has, to some extent, been revised. If the theory of property is revised, the theory of punishment can, and should, be revised also. This leaves a possible conflict between the liberal theory of human rights and the political claims of indigenous peoples. This is an important item on the current human rights agenda. The historical relation between liberalism and colonialism forms the background to this issue. Analysis of Locke's theory of property shows how liberalism can become involved in colonialism. It also indicates how it might disentangle itself by revising its theory of property. Modern liberalism has abandoned the Lockean Christian constraints on capitalism, and replaced them with stronger economic and social rights, as Donnelly rightly argues. The reconciliation of liberal, human rights universalism with indigenous rights to self-determination is a difficult problem, which Tully raises but does not solve, and which requires detailed analysis elsewhere.

Tully suggests that the debate about Lockean natural rights and capitalism was distorted by the capitalism v. socialism problematic of the Cold War. The Lockean liberal theory of natural rights is praised or condemned for its supposed connection to the justification of capitalist appropriation and exploitation. The capitalism v. socialism problematic, Tully argues, is inappropriate for understanding Locke, and may be inappropriate for understanding some features of the present. Both capitalism and socialism are compatible with gross violations of all categories of human rights. The forms of the relations of production do not provide the master framework for understanding early or late modernity (Tully 1993: 75, 134–6). In this sense, the importance of capitalism for understanding modern politics has been exaggerated.

4. THE RISE OF CAPITALISM

However much we grant to the Dunn–Tully argument that Locke's theory of property was Christian rather than capitalist, he did anticipate eighteenth-century thinkers such as Mandeville and Adam Smith by providing a theoretical justification for a self-sustaining commercial society and limited government (Tully 1993: 92). Lockean Christianity might find 'possessive individualism' repugnant, but it may have paved the way for its historical emergence. In the eighteenth century the idea that self-interest can lead to the public good increasingly took hold. Feudal and humanist conceptions of 'glory' began to lose their appeal, Cervantes and Hobbes leading the demolition of 'heroic' values. This transformation of values did not simply reflect the victory of the bourgeoisie over the aristocracy, for the options in the seventeenth and eighteenth centuries were not limited to the values of the military aristocracy and the commercial bourgeoisie (Thomas 1965). The rise of modern science and its associated philosophies undermined the appeal of religious moralising. Political theory was gradually secularised in a long process that stretches from Machiavelli to the eighteenth-century Enlightenment. The concept of 'interest' was given a positive value, as Albert Hirschman has shown. The sin of avarice was transformed into the concept of interest that could be mobilised for the common good. Reason and interest provided predictability and stability in a world of flux and danger in the political theories of both Hobbes and Locke. What came to be known as 'commercial society' in the eighteenth century gradually replaced Christian and republican conceptions of virtue. The theoretical culmination of this process took place with the political economy of the Scottish Enlightenment, and thinkers such as Adam Smith, Adam Ferguson and John Millar. Economic change came to be seen as the basic determinant of social and political transformation (Hirschman 1977).

The 'interest' view of politics enabled Hobbes to reconcile theoretically the interests of the monarch and the people. Some advocates of economic freedom believed that authoritarian government might be necessary to protect the market economy. Others, however, held that commerce placed limits on the abuse of political power. Lockean natural-law arguments against the abuse of power by governments were replaced by utilitarian arguments. The mercantilist state was replaced by the capitalist society. If there was a 'bourgeois revolution', it occurred, not in the seventeenth century, as Donnelly proposed, but in the eighteenth, when 'commercial society', which had funded the mercantilist state, became an independent and opposing social force. The new economy, according to its theorists, required the minimum of state intervention, and acted as protection from governmental despotism. The political implications of this new society were, however, ambiguous. Commerce might be a barrier to tyranny; but it might also flourish independently of

whatever political system happened to be in place. The displacement of republican virtue by commercial self-interest could lead to the depoliticisation of society. Capitalism was, therefore, a liberal force in so far as it created a source of power that could oppose governmental abuses. It was, however, potentially authoritarian in two ways: externally, it needed government to maintain an orderly society, while, internally, it needed a disciplined labour force (Hirschman 1977).

The eighteenth-century philosophers of political economy were the first to propose that the theoretical reconciliation of the claims of the propertied and those of the excluded could be achieved by shifting the terms of analysis from a language of rights to a language of markets. Adam Smith, like Locke, sought a theory of justice that would reconcile a productive economy with adequate subsistence for the poorest. In primitive societies, he held, all were equal, but all were poor. The division of labour increased productivity, and, as Locke had argued, property rights created incentives for improvements in agricultural productivity. Such improvements would lead to both luxury and subsistence. Smith criticised the supposed need to 'police' the economy in order to protect the most vulnerable, which Locke had endorsed on Christian grounds, in favour of the 'system of natural liberty'. The increase of natural liberty would resolve the antinomy between rights and needs. Smith lamented the decline of republican virtue that he thought that commercial society produced, but the gain was a beneficent society that did not have to rely on the benevolence of those who produced it, which was just as well, as benevolence was rare. Smith, rather than Locke, separated the right to property from social responsibility. The problem with his free-market solution is that free markets allow a free market in subsistence goods. The completely free market with an unconstrained right to property is therefore incompatible with the right to subsistence. Smith acknowledged that certain social parasites – such as slothful landlords, mean financiers, and 'indolent and frivolous retainers' at court – exploited the labour of the peasant and the merchant. The free society was, however, the source of the wealth of nations. Such views became widespread in the second half of the eighteenth century, but 'the party of humanity' – the company of Enlightenment liberals – was divided on the merits of free markets (Hirschman 1977: 25–6, 105–6; Hont and Ignatieff 1983).

The discursive move from rights to markets was intended to disempower the poor, but it had the opposite effect. As Marx saw, commercial society promoted urbanisation, and urbanisation promoted resistance to the new capitalism. This resistance was expressed both in terms of the interests of those excluded from the benefits of economic progress and of the stunting of the human personality. Both these themes are present in Marx's critique of capitalism: capitalism exploits and dehumanises (Hirschman 1977: 90–93, 132).

The 'interest' view of the economy has widely prevailed in modern times, and this has led to our characteristic mixed capitalist–socialist systems. The tyrannical character of actually existing socialism has helped to save capitalism from itself. Ironically, Macpherson's claim that Locke emancipated property from social responsibility not only was an inaccurate account of Locke's theory, but Locke's view of the social character of property has been secularised, and supports, in various ways, our modern conception of the capitalist welfare state (Ryan 1984: 10, 13, 177).

5. CONCLUSIONS

Donnelly argues that the modern capitalist economy created a new range of threats to human dignity and thus was one of the principal sources of the need and demand for human rights (Donnelly 1989: 64). The globalisation of capitalism may simultaneously promote the development and diffusion of international human rights law and subvert its implementation. It may, as its advocates claim, improve the fulfilment of economic and social rights through its productivity and efficiency, and it may, as some of its eighteenth-century supporters expected, undermine authoritarian regimes. Capitalist trading regimes, such as that of the European Union, sometimes incorporate human rights commitments. International trade law is no longer completely disconnected from human rights. Yet, just as the concept of human rights is often said to be 'alien' to certain cultures, so it may be argued that it is 'alien' to the norms of the international trading regime. Global capitalism rests upon an economic theory that includes a conception of human nature as self-interested and of the proper ends of economic activity as preference-satisfaction that may be too narrow to ground an adequate conception of human rights. Macpherson may have been mistaken to attribute the defence of 'possessive individualism' to Locke, but something like this idea may underlie actually existing capitalism (Garcia 2003: 361, 366–74).

The meta-ethic of economics is consequentialist, so that economic policies are evaluated by their outcomes. The evaluation of outcomes is usually derived from some form of utilitarianism. Relatively free international capitalist trade is thought to be good because it is the most efficient means to maximise aggregate welfare. The modern concept of human rights, by contrast, is almost always considered to be based on some form of the non-utilitarian liberalism of Locke and Kant. Human rights law, ethics and politics tend to be strongly deontological rather than consequentialist: the absolute prohibition of torture is a good example. In Ronald Dworkin's famous formulation, human rights 'trump' utilitarian values, at least sometimes (Dworkin 1977: xi, 92). Whereas rights may trump utility, utility may disregard human rights

in the pursuit of its goals. Human rights may be viewed as 'side constraints' on actions in the pursuit of goals (Nozick 1974: 28–33). The ideology of free trade tends to resist such side constraints, in theory and in practice (Garcia 2003: 375–83).

Tully has argued that, although Lockean natural rights may not entail capitalist appropriation of property and consequent exploitation of labour, it may be that liberal capitalism recognizes the right of workers to enter relations of production that destroy the capabilities to exercise their rights. The way in which capitalism organises the relations of production influences forms of subjectivity, and thereby the capabilities necessary to the practices of rights. Capitalist relations of production may constrict autonomy – the value that human rights are often said to have been designed to protect (Donnelly 2003: 44–5) – as much as an authoritarian government can. The tendency of Western governments, and some human rights activists, to emphasise civil and political rights at the expense of economic and social rights is often criticised on the ground of the value of such 'basic' rights as those to food, health and education. The critique of capitalism, however, draws our attention to the rather neglected ways in which private relations of production, as orders of power, can restrict the civil and political rights of workers. The post-Lockean critique of the liberal discourse of rights maintains that it hides, and thereby tacitly legitimates the capitalist mode of production, which undermines the social conditions necessary for engaging in the practices of rights, autonomy and freedom (Tully 1993: 255–7, 260–61). This supposedly 'hidden' effect of capitalism, whereby the enlargement of negative freedom diminishes positive freedom, deserves consideration, but, in this, as in other respects, the effects of capitalism may be complex and mixed. Capitalism may (as Smith feared) erode civic virtue, and thereby undermine democratic politics, but it may also empower civil society, as expressed today in the global rise of the NGO.

The story of the relations between capitalism and human rights can begin with St Augustine's denunciation of the lust for money and possessions as one of the principal sins of fallen man (Hirschman 1977: 9–10). Locke's God was more concerned that at least the rational and industrious should enjoy the conveniences that nature and labour could afford, whether or not the labour is done in 'capitalist' relations of production. By the time of Adam Smith theological limits on the theory of capitalism had largely disappeared. In the next century Marx developed his radical critique of capitalism as a system of exploitation and oppression. For more than 150 years the capitalism v. socialism problematic dominated social theory. Today it is clear that there is no simple relation between capitalism and human rights. Capitalism may at some times and in some places, as its advocates claim, improve living standards, strengthen the rule of law, and thereby enhance civil and political rights.

Recent history, for example in the late twentieth-century dictatorships of Latin America, has shown, however, that capitalism and political repression can be mutually supportive. Experiments in socialism – such as those of the USSR and Kampuchea – have shown that we have failed to find an alternative to capitalism as the economic basis for human rights. The capitalist economy and the liberal, legal state committed to human rights are legacies of the European Enlightenment that have reached the twenty-first century, by no means unchanged, but remarkably robust.

Amartya Sen has reminded us that markets not only produce utility but also express human freedom. A major obstacle to the fulfilment of human rights in developing countries is the persistence of *pre*-capitalist modes of production: the classical critiques of pre-capitalist production proposed by Adam Smith, Ricardo and Marx can be applied to some sectors of developing economies today. Markets are not sufficient for the fulfilment of human rights, but they may contribute to that fulfilment if combined with policies that take all human rights seriously. Markets may be very efficient in delivering private goods, but they are limited in providing public goods such as basic health and education for all. The fulfilment of human rights must be political, and not only economic. The successes of the East Asian tigers suggest that investment in economic and social rights, such as education and health, can be a precondition, not a luxurious consequence, of development (Sen 1999).

The problem that I have addressed is that, while there may well be straightforward empirical relations between capitalist organizations and the fulfilment or violation of human rights, there is a conceptual problem in describing these relations systematically. This problem arises from the fact that the concepts of 'human rights' and 'capitalism' derive from discourses, which, historically, were not only different, but also rested on mutually inconsistent assumptions. I have argued that this problem can be clarified by tracing the continuities and discontinuities in the history of rights. This requires a revision of the standard, oversimplified history. *Pace* Donnelly and other writers, the modern concept of human rights did not originate in the seventeenth century, and its association with 'bourgeois' theories of property has been exaggerated. Without denying the originality of the contributions made by Grotius, Hobbes and Locke, I have argued that their theories of natural rights were indebted to medieval debates about property. Since we are now concerned with the relations among human rights, capitalism and justice, it is noteworthy that medieval thinkers were concerned to find a language in which to think clearly (and correctly) about the relations among wealth, poverty, justice and rights. Donnelly has said, correctly, that the modern concept of human rights is socially constructed. I have argued that this process has been more complex than has generally been recognized. The

lesson of this story is that we will continue to debate the relations among rights, property and justice. These relations are not necessary. We make our own connections between human rights and capitalism, though we do not make them in conditions of our own choosing. To make the best choices, we need a clear and coherent set of concepts. Understanding the history of the available concepts is a contribution to that end.

Christian conceptions of property were challenged, and largely superseded by, secular capitalist conceptions. Christianity survived, however, to call into question amoral capitalism. The ethical critique of capitalism was carried forward, in the nineteenth century, by socialism, although it became confused with the new science of society. For much of the twentieth century the debate between capitalism and socialism dominated the social sciences. The experience of fascism led to the revival of rights-discourse. During the Cold War the concept of human rights lay uneasily between capitalism and socialism, which were friendly to it neither in theory nor in practice. After the end of the Cold War, socialism disappeared from the agenda, but ethical questions about capitalism have remained. The concept of human rights has superseded socialism as the main discourse for the critique of capitalism.

Because there is currently no plausible economic alternative to capitalism, and because liberalism and its concept of rights have grown up historically with capitalism, albeit in a complex and tense relationship, the human rights perspective on contemporary capitalism is reformist. The United Nations is committed to human rights, and accepts capitalism as its economic delivery system. The International Labour Organization has always accepted the legitimacy of capitalism, while seeking to reform it, and the new UN Global Compact makes similar assumptions. In June 1999, Mary Robinson, the UN High Commissioner for Human Rights, affirmed, in a speech on business and human rights, that the rights in the Universal Declaration 'contribute, both directly and indirectly, to the social and political conditions conducive to business' (Avery 2000: 26). Human rights NGOs pragmatically adopt the reformist posture towards contemporary capitalism (Avery 2000: 34–5; Schierback 2000: 169). Capitalist corporations have made concessions to human rights by withdrawing from certain countries whose governments are gross human rights violators (for example, Myanmar), from certain practices (for example, child labour), and by adopting mission statements and codes of conduct that include human rights commitments. Human rights observers have, however, been cautious in congratulating capitalism for lack of evidence that these moves are much more than public-relations gestures (Avery 2000: 48, 51, 62).

Capitalism won its historic battles with both Christianity and socialism, although it had to make significant concessions to do so. International human rights law embodies some of the most important of those concessions.

The contemporary form of the ancient debate about the ethics of wealth is the human rights challenge to capitalism. The human rights idea has considerable momentum. Capitalism is a powerful adversary because of its proven ability to create wealth. The human rights idea has had important, though limited, success in eroding the concept of state sovereignty. Now it is taking on capitalism. The well-being of many millions depends on the success of this project.

REFERENCES

Armitage, D. (2004), 'John Locke, Carolina, and the *Two Treatises of Government*', *Political Theory*, **32** (5), 2004, 602–27.

Ashcraft, R. (1986), *Revolutionary Politics and Locke's Two Treatises of Government*, Princeton, NJ: Princeton University Press.

Avery, C. L. (2000), *Business and Human Rights in a Time of Change*, London: Amnesty International.

Brett, A. S. (2003), *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge: Cambridge University Press.

Buchanan, A. E. (1982), *Marx and Justice: The Radical Critique of Liberalism*, London: Methuen.

Donnelly, J. (1980), 'Natural law and right in Aquinas' political thought', *Western Political Quarterly*, **33**, 520–35.

Donnelly, J. (1989), *Universal Human Rights in Theory and Practice*, Ithaca, NY: Cornell University Press.

Donnelly, J. (2003), *Universal Human Rights in Theory and Practice*, Ithaca, NY: Cornell University Press, second edition.

Dunn, J. (1969), *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'*, Cambridge: Cambridge University Press.

Dworkin, R. (1977), *Taking Rights Seriously*, London: Duckworth.

Eide, A. (2000) 'Globalisation and the human rights agenda: The petroleum industry at crossroads', in A. Eide, H. O. Bergesen and P. R. Goyer (eds), *Human Rights and the Oil Industry*, Antwerp: Intersentia, pp. 25–45.

Freeman, M. (1994), 'The philosophical foundations of human rights', *Human Rights Quarterly*, **16** (3), 491–514.

Freeman, M. (2002), *Human Rights: An Interdisciplinary Approach*, Cambridge: Polity Press.

Garcia, F. J. (2003), 'The global market and human rights: trading away the human rights principle', *Brooklyn Journal of International Law*, 1999, **25**, 51–97, in R. McCorquodale (ed.) *Human Rights*, Aldershot: Dartmouth/Ashgate, pp. 359–405.

Gewirth, A. (1982), *Human Rights: Essays on Justification and Applications*, Chicago, IL: The University of Chicago Press.

Hirschman, A. O. (1977), *The Passions and the Interests: Political Arguments for Capitalism before its Triumph*, Princeton, NJ: Princeton University Press.

Hont, I. and M. Ignatieff (1983), 'Need and justice in the *Wealth of Nations*: An introductory essay', in I. Hont and M. Ignatieff (eds), *Wealth and Virtue: The*

Shaping of Political Economy in the Scottish Enlightenment, Cambridge: Cambridge University Press, pp. 1–44.
International Council on Human Rights Policy (2003), *Duties sans Frontières: Human Rights and Global Social Justice*, Versoix, Switzerland: International Council on Human Rights Policy.
Le Billon, P. (2000), 'The Oil Industry and the State of War in Angola', in A. Eide, H.O. Bergesen and P.R. Goyer (eds), *Human Rights and the Oil Industry*, Antwerp: Intersentia, pp. 115–38.
Locke, J. [1689] (1970), *Two Treatises of Government*, Cambridge: Cambridge University Press.
Lukes, S. (1985), *Marxism and Morality*, Oxford: Clarendon Press.
McNally, D. (1989), 'Locke, levellers and liberty: Property and democracy in the thought of the first Whigs', *History of Political Thought*, **X** (1), 17–40.
Macpherson, C.B. (1962), *The Political Theory of Possessive Individualism*, Oxford: The Clarendon Press.
Marshall, J. (1994), *John Locke: Resistance, Religion and Responsibility*, Cambridge: Cambridge University Press.
Nozick, R. (1974), *Anarchy, State, and Utopia*, Oxford: Basil Blackwell.
Pogge, T. W. M. (ed.) (2001), *Global Justice*, Oxford: Blackwell.
Pogge, T. W. M. (2002), *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Malden, MA: Blackwell.
Rawls, J. (1999), *The Law of Peoples*, Cambridge, MA: Harvard University Press.
Rorty, R. (1993), 'Human rights, rationality, and sentimentality', in S. Shute and S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures*, New York, NY: Basic Books, pp. 111–34.
Ryan, A. (1984), *Property and Political Theory*, Oxford: Basil Blackwell.
Schierbeck, J. (2000), 'Operational measures for identifying and implementing human rights issues in corporate operations', in A. Eide, H. O. Bergesen and P. R. Goyer (eds), *Human Rights and the Oil Industry*, Antwerp: Intersentia, pp. 161–83.
Sen, A. (1999), *Development as Freedom*, Oxford: Oxford University Press.
Tangen, K., K. Rudsar and H. O. Bergesen (2000), 'Confronting the ghost: Shell's human rights strategy', in A. Eide, H. O. Bergesen and P. R. Goyer (eds), *Human Rights and the Oil Industry*, Antwerp: Intersentia, pp. 185–98.
Thomas, K. (1965), 'The social origins of Hobbes's political thought' in K. C. Brown (ed.), *Hobbes Studies*, Oxford: Blackwell.
Tierney, B. (1997), *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625*, Atlanta, GA: Scholars Press.
Tuck, R. (1979), *Natural Rights Theories: Their Origin and Development*, Cambridge: Cambridge University Press.
Tully, J. (1980), *A Discourse on Property: John Locke and his Adversaries*, Cambridge: Cambridge University Press.
Tully, J. (1993), *An Approach to Political Philosophy: Locke in Contexts*, Cambridge: Cambridge University Press.
Waldron, J. (1988), *The Right to Private Property*, Oxford: Clarendon Press.

2. Inflating consent, inflating function, and inserting human rights

Sheldon Leader

We have moved beyond one myth about economic life, but risk coming under the spell of another. The myth that has begun to loosen its grip is that human rights are only appropriate to control the state, and should be kept well away from private economic relations on the ground that in this domain there is no serious imbalance of power calling for regulation. Consent used to play a mystifying role here: entry into relations between employer and employee, or between consumer and many producers, might be formally free, in the sense that the state does not force people into the transaction, but if the costs of not making the agreement are considerable and there are no live options, then the agreement can be said to be materially unfree.[1] The myth consisted in inflating the formal quality of consent to cover, and obscure, all unequal power relations lying beyond the state.

This is a distortion of which many, if not all, systems that guarantee basic rights are aware of and take measures to counteract. For example, the European Court of Human Rights is ready to hold states responsible under the Convention not just for their abuse of their own power, but also for permitting certain holders of private power, such as employers, also to abuse their position of dominance.[2] Many national systems also penetrate civil society with the corpus of basic rights. They legislate for employee protection and will not allow any given employee to contract out of her basic rights to this protection, save under special circumstances. Even in those parts the law has yet to reach, such as many aspects of international investor activity, companies acknowledge that human rights follow them into their operational decisions. As a recent example, ExxonMobil has issued a recent statement concerning its petroleum operations in Chad and Cameroon, affirming that it

> is steadfast in promoting respect for human rights throughout the world. We believe corporations play an important role in supporting human rights, and that our presence in developing countries positively influences issues relating to the treatment of people. We condemn human rights violations in any form. We seek to

> be responsible corporate citizens, and recognize that we have both the opportunity and responsibility to improve the quality of life wherever we do business.[3]

The capitalist system can therefore no longer be straightforwardly accused of leading the individual into what Marx called a

> [D]ouble life … a heavenly one and an earthly one. … [A] life both in the political community, where he is valued as a communal being, and in civil society, where he is active as a private individual, treats other men as means, degrades himself to a means, and becomes the plaything of alien powers.[4]

However, Marx – via the methods of analysis he proposed – can help us to see a new distortion that has grown up in the shadow of the older one. In *Capital*, his account of exploitation by economic institutions in civil society is quite different from his 'double life' argument in his earlier writings. In analysing the capitalist wage bargain, Marx proposed that it should *not* be understood as an unequal exchange between powerful employer and powerless employee. Instead, he insisted that it be examined by notionally putting power relations to one side. One should take at face value the assumptions built into the exchange of labour power for a wage, which include the view that it is an exchange between equally powerful parties. It was at this stage, Marx argued, that what he took to be the most important element in the sale of labour power could be revealed: that it generated surplus value.[5] For our purposes, the important point about this analysis is that the mechanism of exploitation may be necessarily *accompanied* by imbalances of power between capitalist and worker, but the particular features of exploitation in the workplace are not *generated* by that imbalance. They would equally emerge between equally powerful parties to the wage bargain.[6]

There is a good deal to learn from this approach when trying to understand the present challenges to the project of inserting human rights obligations into private economic life. Imbalances of power are still a crucial part of the picture. However, if such an imbalance is introduced at too early a stage in the analysis, one fails to understand how it operates. To want to remedy abuses of unequal power per se is to push at an open door: all sides are beginning to converge on that objective. The crucial question becomes that of determining the particular forces and institutional principles that shape power in different settings.

A FRAMEWORK FOR ANALYSIS[7]

What has happened to human rights in a system that now no longer officially tries to conceal the problem of private power? The system still fails to

adequately come to terms with abuses of that power, but no longer does so in the old ways. Both diagnosis and remedy call for tools for analysis that can be deployed in the spirit that Marx suggested: seeing how principles structuring basic rights in economic relations work at face value and seeing what they can conceal in the process.

I shall suggest a framework within which the issues might be approached. The usefulness of the framework will be tested by examples drawn primarily (but not exclusively) from the workplace: the location in which social values and economic imperatives meet up with the greatest consequences for most people.

There are several alternative ways in which economic institutions and human rights can relate to one another.

Civic Justification[8]

According to this orientation, a human right is designed to control and to orient institutions at all sites in national and international society. This ranges from the state, to organizations and institutions which are narrower in their focus: the private employer; bodies such as the World Trade Organization, the World Health Organization, and so on. Civic justification holds these institutions to a scope of responsibility that extends in two directions: the institution must attend to all individuals affected by its actions; and for each individual to whom it is responsible, it must consider the totality of their rights. Thus, under civic principles the enterprise should construct its policies so as to further the basic rights of employees, shareholders, and members of the wider community. The WTO should see its mandate as that of furthering not only the property rights of producers of goods and services in an integrated world market, but also subject these entitlements to the need to respect the other human rights of those who use or are affected by those goods and services within the country whose markets are penetrated. Furthermore, for each such person whose rights are affected, civic justification holds the body responsible to respect the full range of interests that normally fall under the right in question. For example, respect for an employee's private life can cover a range of elements, extending from the way he or she uses their computers at work, through to the enjoyment of family life or unorthodox sexual relations.[9] Or, when the right of '… everyone to the enjoyment of the highest attainable standard of physical and mental health', comes into contact with international trade and investment, the right potentially includes a range of interests extending from the need to prevent direct damage done to a community such as Bhopal, through to the obligation to have access to adequate health care that can be provided as part of a company's installation in a poor country.[10] Civic justification attends to this full range.

Balances among potentially conflicting rights are also important to consider. The terms of a civic balance are familiar: it argues that a fundamental right cannot be limited except in order to give due respect to a competing right that, in the circumstances, deserves to take priority. There is more to this requirement than meets the eye: what precisely is meant by 'balance' and 'priority' here will be a central concern further on.

Consensual Justification

Alongside this, there is a second well known principle on which rights are grounded, according to which the legitimate expectations among people who agree to exchange mutual undertakings deserve satisfaction. Here, what was earlier called materially free consent continues to play an important and distinct role in justifying power and allied rights against its abuse. This is different from the civic form of justification, in that the interests to be satisfied here have none of the intrinsic qualities of the first set: the rights that arise may protect interests as trivial as the expectation that you meet me on the corner, or as important as the expectation that an organization will protect my life or health. It is the legitimacy of meeting the expectation that counts, and not any intrinsic importance of protecting life or health per se.

When human rights are located in this form of justification, then the existence, scope and weight accorded to a particular right is a purely contingent matter. It varies with the concrete choices made by the concerned parties. It may take on one form in a collective agreement concerning conditions in the workplace, and another form in an investment agreement between a state and a multinational corporation. Each domain of consensual agreement can be said, from the perspective of this form of justification, to constitute an autonomous ordering of values – and across these orders it is thought to be wrong to aim at any continuity. If the right to privacy in the workplace is excluded or narrowed by a collective agreement made between an independent trade union and an employer, then on this view there should be no higher power in society to intervene in order to impose a stronger guarantee of the right. The agreement gives all that can and should be provided by way of guiding principles.[11] Similarly, if an investment agreement between a multinational corporation and a government establishes that the state is not to make any changes in the law or other norms regulating the project that will add to operating costs during its lifetime, then this rightly freezes in place any human rights or environmental protection norms that should be applied to that investment.[12]

Functional Justification

We sometimes justify the use of power on the ground that it fulfils a particular legitimate purpose, and does not go beyond that purpose. This justification is goal-based, but it is not necessarily hostile to respect for basic rights.[13] Instead, it provides a distinct way of grounding such rights. The most typical example is found in those deliberations over whether certain activity is within or beyond the scope of an institution's legitimate powers, be the entity the state, a commercial corporation, a trade union, or other institution with defining objectives. If, for example, the state levies a tax for the stated objective of building a school, the citizen paying the tax has a right that it will not be used to build an airfield.

Functional justification is not limited to situations in which an institution is held to a tightly defined set of objectives. It also has an impact whenever we see vaguer notions such as 'a legitimate business purpose' required of an enterprise if it is to be allowed to impose its will on a shareholder or employee. The complaint that there is no valid institutional purpose behind the imposition in turn opens the door to a particular kind of resistance – based on the right that power be used only for the purpose for which it exists and for none other.

Although well developed in the law, this is a form of justification that makes few official appearances in the world of political theory. It is, however, of central importance in understanding the way basic rights have been inserted into modern economic relations. According to this perspective, it is the special identity and purpose of an organization, both public and private, that defines and sets the boundaries of its responsibilities. Functional justification is narrow precisely at the points at which civic justification is wide. The institution is accountable to a smaller range of individuals, and for each such individual it is responsible for damage to a smaller range of his interests. The domain of relevant individuals whose fundamental rights must be respected is fixed by the institution's identity and purpose, as is the range of interests for each such individual that will be considered relevant.

For the commercial corporation, this functional perspective can yield the classic notion that the company's interest is predominantly identified with the interests of its shareholders, whereas the interests of other stakeholders, such as employees or members of the wider community in which the enterprise is located, lie outside of and in competition with those of the company. Other functional orientations allow the interests of employees to count as part of the interests of the enterprise, rather than solely in competition with the enterprise, but only in so far as these employee interests also further enterprise goals. The individual within the enterprise counts in his or her capacity as employee, but not in their capacity as citizen, member of a family, religion,

and so on. The implication of this approach in practical terms can be quite important. It allows the employer to define the rights attaching to an employee's *role* in a way that does not go beyond the employee's *function*. For example, the employee on this approach has a right that his privacy be respected, but only for issues concerning the way in which she performs her tasks. She cannot, for example, be subjected to unreasonable surveillance over the content and pace of her work. However, the employee would not – on this approach – be allowed to bring under the umbrella of the right to privacy her entitlement to correspond with people outside of his work. In one recent human rights case, the UK took this approach in arguing (unsuccessfully) that the employee's right to privacy did not extend to her correspondence with her lawyers while at work in order to deal with a dispute with her employers. It is precisely this wider scope of the right to privacy that would be embraced by civic justification.[14]

There is an analogous functionalist outlook on bodies governing international economic relations. The WTO is, on this view, primarily responsible to the *producers* of goods and services who will benefit from its exercise of its particular mandate, and only secondarily to others. The organization's dominant concern should be that these producers in an exporting state not suffer discrimination at the hands of an importing state. The interests of others affected by trade, such as the users of goods and services, may be taken into account but will of necessity be secondary in order of importance as compared with producer interests.[15] From this perspective, the WTO is not accountable for the fact that in opening markets up to foreign competition certain local businesses might be forced into bankruptcy with the social consequences that this carries, even if it can be shown that these are an unavoidable by-product of the process of market integration. In so far as the organization does pay attention to this damage, says the functionalist, it must do so in a way that is subordinate to its primary mission of opening markets to trade.[16]

Balances among potentially conflicting rights are quite different according to functional justification than they are under its civic cousin. We will consider this point in the next section.

The Justifications Combined

In the law and in regulatory policy we often find that these three sorts of justification are combined. The mix can be quite dangerous, since it can create the appearance that a fundamental right is being respected, while in reality its scope for exercise is severely limited. This happens most strikingly when a particular fundamental right can *arise* on civic grounds, but then faces limitations on its *exercise* on functional or consensual grounds. That is,

a commercial enterprise or trade regulating body might have the formal obligation to respect a wide range of basic rights, from civil and political guarantees of privacy or freedom of expression through to social and economic rights to the protection of public health or access to water. Yet when it comes to the exercise of these rights, they are deprived of the weight they normally have, since they are limited to a role that least perturbs the smooth functioning of the organization. Their impact may also be varied by, say, a local collective agreement providing that the right to privacy is to have less weight in the workplace as compared with its significance elsewhere in the polity.

FUNCTIONAL VS CIVIC JUSTIFICATION

It is functional justification that has the greatest potential to prevent human rights from playing the role in economic relations that they appear to play at first glance. To see its effects, consider the different ways in which any given human right is balanced against competing considerations in a typical human rights instrument on the one hand, and inside an institution such as a commercial corporation on the other (see Figure 2.1).

In a human rights treaty such as the European Convention, a member state is required to recognize, say, the right to privacy (A), but then it is entitled to limit the exercise of that right in the name of the protection of its own public morality (Aϕ).[17] Under the principles of proportionality, the demands of public morality must be adjusted by finding a version of that concept from among reasonable alternatives, which does least damage to the basic right which the Convention starts by protecting. The direction in which this adjustment runs is decisive: it can substantially impede the state's attempt to interfere with people's private lives on the basis that the public disapproves of the choices they make. When we turn to the enterprise, the relationship between basic rights and grounds for limiting them is often reversed, and is so because of the impact of functional justification. If we regulate according to this logic, then the starting point in analysis is the need to allow the enterprise to act in accordance with the reasons for which it exists (B). The enterprise must still respect the right to privacy (Bϕ), but a version of that right must be found that does least to impede the company from fulfilling its mandate. A civic perspective would make quite a different demand. We can see the difference between the two approaches if we look at a particular example.

In *Saunders v Scottish Summer Camps*, Mr Saunders was a mechanic working on machinery in a children's summer camp. The employer discovered that he was a practising homosexual and dismissed him. It became clear at the hearing for unfair dismissal that there had been no attempt by the

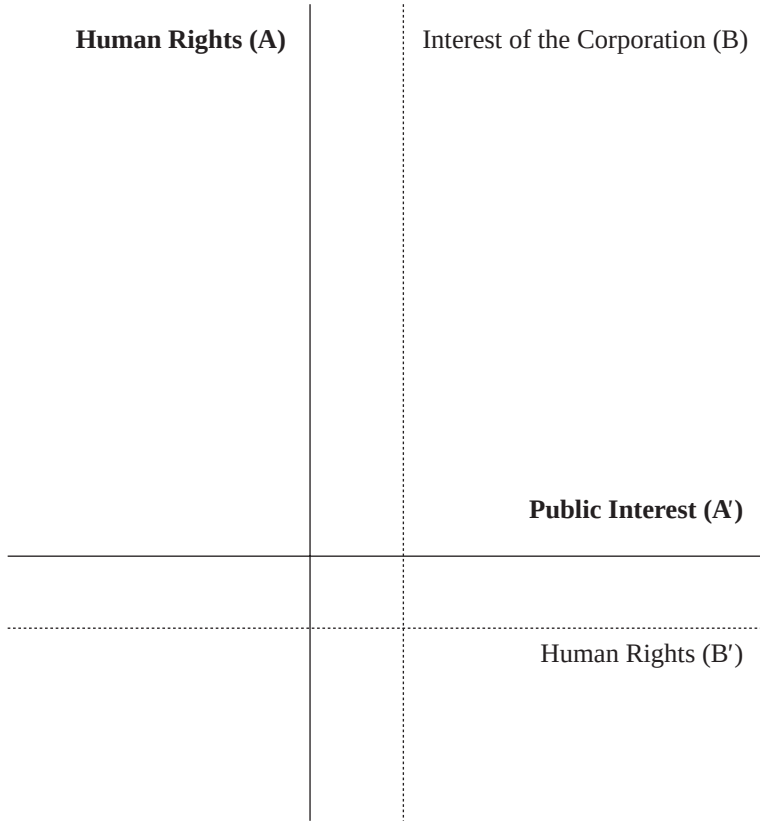


Figure 2.1 Two ways of limiting the exercise of human rights

employer to establish whether or not Mr Saunders had any contact with the children, or whether he had any history of interference with children in the past. Nevertheless, the Employment Appeal Tribunal decided that, even though the employer had no such information, it had acted as would other typical employers in the field of activity – out of fear – and that its decision to dismiss Mr Saunders was therefore a reasonable one.[18] This decision is an illustration of a damaging combination of civic and functional justifications. In the civic spirit, the court was clear that Mr Saunders had a right that the full scope of his private life be protected from employer pressure. The employer therefore could not dismiss Mr Saunders simply because he disapproved of his life style. However, as soon as the institutional function of the summer camp was affected, the scales shifted dramatically. The direction of adjustment moved against Mr Saunders. While he had an undoubted right to respect

for his private life, this was construed as a guarantee against a direct attack on his privacy by an employer simply acting out of prejudice against certain life styles. Once some actual or potential impact on institutional function existed, then a way had to be found for Mr Saunders to exercise his right that would have the least impact on the company: the least damaging from among the alternative ways of living his private life was the one he had to choose. If this requirement for adjustment of his life style to institutional demands required him to leave this job and try to find another, where there was less fear of the effect that a homosexual employee could have on the fortunes of the company, then on functional logic, so be it.

There was an alternative, civic, analysis possible. This would have changed the direction of adjustment, and hence it would have changed the burden of justification from being one-sided to being mutual. The enterprise would have been under an obligation to adjust to Mr Saunders: to find a mode of operation that had least impact on his right to respect for his private life. This does not necessarily mean that the enterprise must be prepared to cease to exist rather than function in a way that jeopardizes their employees' fundamental rights. It was also legitimate that Mr Saunders make certain adjustments as well. A civic order asks that one distinguish between two features of a fundamental right: its minimal conditions of exercise, and the domain of its exercise that lies beyond the minimum. For example, the minimal conditions for Mr Saunders' enjoyment of his right to privacy would involve his basic ability to have intimate relationships with partners. A further domain within which the right is exercised, lying beyond the minimum, would involve his ability to enjoy that relationship in a variety of public venues in which he and his partner should be free to manifest their affection by public displays.[19] On the other side of the conflict, there are the fundamental property rights bound up with the summer camp. These include rights of shareholders, but are also rights of other stakeholders who have an interest in the successful functioning of the camp, including Mr Saunders' fellow employees. In turn, there is the core of their rights, which is to see the camp being able to function; and a domain that lies beyond the core, in which the camp is concerned to earn as high a return as possible, and to function in other ways seen as optimal.[20]

If one party is operating beyond the core of his right, and the other party is at the core, then it is legitimate that the former should exercise his right so as to do least damage to the latter. In the circumstances of *Saunders' case*, it seems on the evidence that the employer was in the domain well beyond the core of his right, whereas Mr Saunders had been brought close to the core of his. The reason for saying this is that Saunders was dismissed not because he had done anything to damage his employers other than be known to have the life style he does outside of the workplace. On the reasoning of the court, he can look forward to not being able to get a job wherever an enterprise would

be likely to fear that its customers or other personnel would react badly to having someone of his private habits among them. The court should have insisted that the summer camp find a way of organizing its operation that would have least impact on Mr Saunders' ability to enjoy the core of his right to privacy: the opposite of the direction of adjustment that occurred in his case.

The adjustment must be mutual, as indicated earlier. That is, Mr Saunders is also required to adjust his behaviour so as to avoid damage to the core of the other stakeholders' rights in the enterprise. If, for example, the employer could show that the camp faced destruction because of an imminent and demonstrable threat of massive parent desertion if there was a public display of affection between Mr Saunders and his partner in the camp, then this might entitle the employer to condition his retaining the job on his freedom being limited in this way.

As a further possibility, one may come to a clash at the core of both rights, and so need to make a choice between ultimate priorities. It might be, for example, that the employer can *show* that his business faces closure because of customer defection simply because they learn that there is a homosexual in the camp, however remote he might be from children. They might be motivated by nothing more than their prejudice, making such a presence unacceptable to them. In this situation, we can assume, both employee and employer are innocents caught in a conflict. They each want to protect the core of their basic right, and claim to limit the other right in order to protect their own. Here, the core of the right to privacy conflicts with the core of the employer's fundamental property right in his investment and other features of his economic liberty. A civic form of justification demands that each adjust their way of exercising their right that allows the minimally legitimate form of exercise for the other. If they have made that adjustment, and still face the fact that the one right must prevail at the total cost of the other, then we no longer face a problem of priorities in *adjustment*, but instead an issue of ultimate priorities.

Ultimate priorities call for a ranking of one basic interest over another. This ranking is done both by legislation and by adjudication. For some fundamental rights, such as those concerning gender discrimination, the logic of the statutes seems to allow the enterprise to win its claim to survive over, say, a woman's or man's claim of indirect discrimination, since its survival would count as an objective justification for its discriminatory policies. The opposite is true for rights such as those concerning health and safety. No enterprise would be allowed to drop below the prescribed levels of safe machinery even if maintaining that level meant that it would have to cease doing business. In the area of civil liberties, there have been decisions which give the employee's right to freedom of expression ultimate priority over the

survival of the business, in the name of the public's right to know about the workings of the enterprise in question. The US Supreme Court, for example, has been prepared to see an enterprise face destruction as a result of protecting an employee's disclosures to the public rather than allow the employer to threaten dismissal for the exercise of free speech.[21] It is conceivable that a court or legislature would do the same for the right to be free of customers' threats of boycott in order to induce the employer to commit racial discrimination, such that an enterprise would have to close its doors rather than concede to such pressures. Whether the right to privacy for someone in the position of Mr Saunders should acquire that degree of primacy when it is in such fundamental conflict with a competing right, is a matter for separate discussion.

The problem we face is that basic rights are often dealt with in a way that is far from this civic way of adjusting competing claims. Rarely are we truly in front of a clash between the core of the employee's basic liberty and the core of the employer's right to a functioning enterprise. Our labour law, and the political and economic convictions that stand behind it, are instead imbued with the combination of justifications that we began by seeing: basic rights arise on a civic foundation, only to find themselves limited on functional grounds – grounds that lie very far from the desire to protect the core of the right that is favored. In this way, the system can *claim* formal respect for fundamental rights in the workplace, while at the same time they are so shrunken by functional concerns that they leave people with a shell.

So far, we can see how modern industrial society inserts human rights into working relationships between individuals and organizations lying outside the state. It does not close its eyes to imbalances of power in domains lying beyond the state. The imbalance is acknowledged and the rights accordingly given a regulative role. Indeed, as explained earlier, the rights are taken seriously in the sense that Professor Dworkin would demand. However, at the same time, the scope for legitimate exercise of those rights is adjusted in one direction only: that right are put in place which give a dominant place to institutional prerogatives, and which remove much of the substance of potential protection it can provide. The decision in the Saunders case illustrates how this happens through the combination of civic and functional logic: the courts identify the relevant fundamental right at stake under the influence of the former, while governing the exercise of the right with the latter.

FUNCTIONAL VS CONSENSUAL JUSTIFICATION

How does individual consent enter into this picture? The modern state is not insensitive to the forces that can vitiate the quality of individuals' agreement

to comply with the requirements of certain private bodies. It tries to protect the weaker party in two ways: by helping the vulnerable individual to find strength in numbers through building mechanisms for collective agreement; and by protecting individuals from being asked to consent to the wrong things – preventing them from being asked to limit or give up their rights, such as privacy, as a price for keeping a hold on other things that are important in their lives, such as work.

This concern to protect the quality of an individual's free consent to an organization's internal order – making sure that the promises made *to* them will be honoured and that the promises made *by* them are not exacted under the pressure of an imbalance of power – can then collide with the concerns lying behind a functional form of justification. Whereas consensual justification aims to satisfy the expectations created by agreements freely made, functional principles are more selective and exclusive: they will favour only those expectations that fit with corporate objectives, and frustrate the rest. Such an outlook often leads an organization to forge alliances among a subset of those who will best further institutional objectives, making sure that those who fall outside of this alliance do least damage to it with their own claims. 'Consent' is then transformed into a functional tool. There are two settings in which this happens: when society constructs the instruments of collective consent; and when it fixes the elements of individual consent.

Collective Consent

Consider collective agreements between employees and employers, and the role of these in regulating the pace of change in modern enterprises. The classic collective bargain has until recently been thought to legitimately bind an individual employee to its terms because the agreement benefits him or her. Some would benefit more than others, and possibly some were left where they were before the bargaining took place – but none could be expected to accept the results of collective bargaining that made them *worse* off. In the UK, this was reflected in the principle that individual employees consented, via their own individual contracts of employment, to be bound. This was an act of consent that projected the individual into an uncertain future, and it was thought by judges and commentators that there was therefore a 'hard core' of individual entitlements, covering matters of crucial importance such as the wage to be paid, that could not be worsened but only improved by a collective agreement. No one would be rational to commit themselves to anything else.[22]

The present law concerned with corporate restructuring is moving us in a very different direction. We see collective agreements emerging that push some down below what their individual contracts provide, while others are

made better off. Yet the state framing this activity with its laws has not let go of the root idea that the individual has consented in advance to this happening. He or she is taken not simply to consent to future improvements in her basic situation, but also to being made significantly worse off. Thus, in a recent UK case, it was decided that a collective agreement approved in a ballot by a majority in the workplace, where the trade union had customarily bargained on behalf of all employees, was effective to bind a minority, even though the latter had to accept a lower rate of pay as a result, so dismantling the previously protected core of their entitlement.[23] The individual did not need to offer fresh consent after the outcome of the collective bargaining: he was deemed to have consented in advance to this loss.

This is a functional interpretation of consent. It fits in with the alliance between capital and labour that the state often favours. Were this a truly consensual regime, where individual contracts of employment operate according to the logic of consensual justification, as defined earlier, then the collective bargaining representative – a trade union –would notionally have been the spokesman for each and every employee. In turn, as previous law had provided, each employee would have been able to turn away from and refuse to be bound by any result that undermined his reason for being willing to enter into the collective regime in the first place. In a world of functional legitimacy, that safeguard is irrelevant. The point of the individual contract of employment is not to express the free choices of the parties: it is to specify the links between the individual and his or her obligations. These obligations arise and are given further detail via principles that have little to do with the initial expectations of the parties to the contract, and are aimed instead to assist in the achievement of objectives of management.

Individual Consent

There are other situations in which society is not concerned with the way in which individual interests can be brought together into a single expression of collective will and agreement. Instead, it is concerned with individuals taken one by one. The situations of particular interest here do not involve adjustments between gainers and losers, as they do in collective bargaining. Instead, they have to do with individuals consenting to limitations on their basic rights. Here, examples will be drawn from principles developed by the European Court of Human Rights. As before, we focus on the workplace: that prime location for watching social values at work in economic relations.

The Court has made it clear in several cases that it will protect human rights within the employment relation, whether the employer is the state or is a private entity. For example, it will protect the right to freedom of association, so forbidding an employer demanding from its employees that they

agree to join a trade union – or that they agree not to do so – as a condition of keeping their jobs.[24] Individual consent cannot limit the exercise of the right. However, in other situations – where there is no less pressure coming from the employer – it is surprising to see that it is precisely this consent given by the *weaker* party that affects the shape of his basic right. For example, the Court rejected a complaint of violation of the right to freedom of religion when Mr Ahmad, a school teacher, was refused an hour of time off on a Friday in order to comply with his religious duty, as he understood it, to attend the local mosque.[25] The Court said that he had taken up work that carried this restriction 'of his own free will'.[26] The same reasoning was used in refusing a similar complaint by a Christian employee, Ms Stedman, who wanted to attend church on Sunday when her employer required her to work.[27] The choice put before her, said the Court, did not amount to pressure to change her religion, nor did it prevent her from manifesting her belief since she was free to resign in order to carry on holding to her spiritual commitments.[28] Finally, a Catholic hospital was allowed to dismiss a doctor, one Mr Rommelfanger, who had publicly criticized its policy on abortion. The Court insisted that the restriction on public statements imposed by the hospital was reasonable because, among other reasons, he had freely entered into the employment.[29]

It is tempting to think that the judiciary quietly forgets in the three decisions concerned with freedom of religion what the first one on freedom of association tacitly affirms: that one cannot consent to a limitation on a human right when confronted by pressures from an employer. The Court[30] seems to be saying of one and the same employer that he cannot oblige his employees to agree to forgo some basic rights while he can oblige him to forgo other rights, despite the pressure to consent coming from the same threat of dismissal. If the law is giving this mixed reception to choices made by vulnerable individuals in fixing the shape of their liberties, how can we make sense of the results? We can only toss them into the bin of erratic or malevolent judicial attitudes once we have tried and failed to provide an account of what is going on that shows a consistent, if unacknowledged orientation of the Court.

It is submitted that individual consent is being shaped here by the logic of functional justification. All three individuals who lost their cases were said to have entered into their respective organizations of their own free will, and had to live with the consequences or leave. But the judiciary was not thereby ignoring a century of development of employment law's principles by shutting its eyes to the real pressures on these employees, and many like them, to submit to the more powerful will of the employer. It is not trying to transform the unfree choice of individuals in a weak bargaining position into an artificially free choice by simply drawing a veil over the circumstances in which

they give their agreement for the future. Ms Stedman and Mr Ahmad, for example, may well have had no live options: there may well have been no jobs available to them which did not restrict their freedom to worship in exactly the same way as the ones they were in. This was not a facet of their situation to which the Court turns a blind eye: it is instead *irrelevant* to this particular use the Court is making of the notion of free choice. What individuals agree to in these cases serves to *link* them to a specific set of duties within an organization. In turn, that linkage defers to the demands of institutional function.

Ahmad and Stedman illustrate vividly this functional deployment of the notion of consent. The judiciary was confronted with religious convictions among employees that were stronger than those typical of others working in an establishment. Functional justification calls for accommodation of *some* civic interests under the mantle of freedom of religion, and this is often accomplished by solutions that fit the bulk of the population concerned. Their space for religious worship, for recreation and for family duties is worked out by a tacit reference to the habits of most people in contemporary society. In contemporary Britain most employees do not feel the need to worship on a weekday, nor indeed every Sunday. Mr Ahmad and Ms Stedman had intense convictions that took them outside this norm.[31] The message from these decisions is that if the employee is inclined to keep to an unusual degree of religious worship for which his or her fellows manifest no need, then he or she must choose either to hold to that extra commitment and so leave the job, or keep the job and abandon that degree of commitment.

The employee's choice to leave or to stay becomes an *allocating* device: it tells us into which of two groups, the normal or the exceptional, any given individual falls. Looked at in this way, one can see why it did not matter to the Court that an individual had not freely consented to be placed on one side of the line or the other. This is, from this perspective, an irrelevant concern. The line between what is a reasonable and unreasonable exercise of the right to freedom of religion is first drawn, and then individuals are deemed to have consented to obeying the requirement traced by that line. They are given an opportunity to remain on the side of that line that suits functional objectives, but if they choose to go onto the other side, then they will be separated from the enterprise. What this is not, despite the statement that these employees had taken up their jobs 'of their own free will', is a use of individual consent as a true *source* of personal responsibility. For the notion of consent to work as such a source, the individual would have to be in a strong bargaining position when facing the employer: there was no evidence that this was true of either Mr Ahmad or Ms Stedman; and a whole tradition of labour law and labour relations leads one to suspect that they did not have that bargaining power. Freely given consent intentionally creates expectations in others about

how one will behave in the future which it is wrong then to go back on. Functionally deployed consent does no such thing: it serves only to specify the content of someone's obligation. It pins down exactly what someone is engaged to do, such as work certain hours and not others. It does not take one further and permit one to say that the employees had 'only themselves to blame' when they found that those hours prevented them from making space for another important part of their lives.[32]

FUNCTIONAL PRINCIPLES, COLLATERAL IMPACTS, AND CHANGE

The civic demand that human rights be respected has become so strong that no enterprise is allowed to penalize a worker *simply* because he or she wishes to exercise those rights: simply, that is, because management disagrees with his or her conduct when he or she is away from work, be this in their sexual lives or religious or political activities. Yet while society prohibits such direct penalties, it is very ready to impose indirect, or collateral, restrictions on those rights under the influence of functional justification.[33] The restriction comes as a by-product of the enterprise pursuing its core objectives. At that point, the effect of institutional power on rights risks falling out of sight. When Ms Stedman refused to work on the Sunday shift, she was said by the Court of Human Rights not to have been dismissed 'because of her religious convictions', but rather because she refused to work the hours she had originally agreed to work. In one sense of the word 'because' – the sense that refers to the employer's intention – this is quite right: it was no part of the employer's objective to dismiss her simply because of her convictions, but rather because of her refusal to fit into his organization's working demands. However, in a second sense of 'because', – referring to what it was that brought about her dismissal quite independently of what was intended – Ms Stedman's convictions were the cause of her detriment: were it not for the fact that she had these convictions, she would not have lost her job. Reasoning in a functional order avoids giving attention to this second feature of the situation. The organization is thereby absolved from responsibility for the damaging side-effects of its activity.[34] Here again, institutional function takes too much space. It forces people to claim respect for their human rights in the shadow – a shifting shadow – of the organization's decision to pursue its objectives one way rather than another.

The organization continues to acknowledge its need to respect human rights, but also demands that any such opening to that ideal not compromise its functions. Its functions, in turn, reflect both the disciplined and the restless spirit of the market-place competitor: the organization demands the right to

be constantly ready to change methods and direction in order to stay level with or ahead of the others, and to demand that employees tailor their expectations about respect for their basic rights in order to adapt to the new direction. Yet the conflict within modern capitalism that is often engendered here is not as it is usually portrayed: it is not between an organization anxious for change and employees resistant to change. Instead, there is often a clash between two agendas for change – the one is shaped by the goals of enterprise, and the other shaped by the often equally dynamic goals of the individuals bound up with and affected by the enterprise. Employees often want to be open to evolution in their lives as much as the enterprise. They want the space for alterations in their priorities: having begun work unmarried, they may want to have a partner and found a family; having started their career as atheists, they may come to feel that far more of their lives should be devoted to worship.

Many of the human rights – including the basic freedoms of religion and association – are not only designed for those who have a fixed set of priorities in their lives, but also for those who experience shifts in those priorities.[35] At the same time, most people who experience these shifts carry on with their other concerns that correspond to other basic rights, such as non-discrimination in employment. They usually don't feel that their new religious views should totally overtake their ambitions to function well as teachers, computer programmers, or law professors; just as they don't feel that their professional ambitions should totally overtake their religious convictions. They aspire to holding both in an organic balance. That does not mean that this balance takes automatic priority over the interests of the enterprise, but it does mean that this is what the enterprise should, on civic principles, respect. Balancing its needs with those of its employees should include respect for their personal evolution over time. This is precisely what functional justification places out of sight. It was, for example, held by the Court against Mr Ahmad that he had come to work at the school not wanting to worship on a Friday afternoon, and had then changed. The fact that there had been that alteration weakened his claim to the protection of his religious freedom.[36] This is the natural result of pursuing a functional rather than an organic balance between fundamental rights and the interests of the enterprise. It is a perspective fuelled by, and in turn reinforcing, an inclination to test all claims to change against one benchmark: the answer to the functionalist's root question: does a change fit within an organizational objective? With this as the guide to enquiry, institutional interests will take priority, and the employee's space to enjoy a basic liberty will automatically shrink.

Civic justification aims at a more comprehensive solution. As was argued when considering *Saunders' case*, a civic solution to the conflicting claims there calls for mutual rather than one-way adjustment between employer and

employee. Neither side is automatically entitled to the optimal range of exercise of its right, when there is competition with the basic right of the other. The employer's fundamental right to property does not have automatic priority over the employee's right to freedom of religion; nor does the latter automatically take second place. Civic solutions call for mutual adjustments. Once the room for those adjustments has been exhausted, then society, via a judgement about which of the competing interests should prevail, must decide which if any of the employee's rights take priority over those of the employer, and which do not. It is the virtue of a civic order to give society the tools for selective intervention. In doing so, it creates more room for the legitimate desire that all sides have for meeting their own agendas for healthy change.

CONCLUSION

We return to the point of departure. The law's resort to functional justification has introduced a new way of committing an old abuse: that of obscuring the impact of organizations on individual lives. The classic way in which this happened was to so inflate the notion of free consent to an organization's authority that one could conclude, with Hayek, that '(e)ven if the threat of starvation … impels me to accept a distasteful job at a very low wage, even if I am 'at the mercy' of the only man willing to employ me, I am not coerced by him or anybody else.'[37] The human rights law we have considered signals that this is no longer the potent myth in politics and law that it once was. Instead, the inflation of free consent has been replaced with the inflation of institutional function. Here, no one flirts with the mythical equality of power between organizations and individuals. No one needs to. The law regulating modern enterprise is more accommodating of human rights, and is more understanding of the pressured circumstances under which individuals consent to forgo the full exercise of those rights. The threat posed by the modern economy to human rights cannot therefore be combated by simply declaring and repeating that citizens' rights have to be extended into places such as the workplace, since most would today agree with that sentiment. The threat can instead only be confronted by working through the implication and challenges of a new ideology: one that has replaced the inflated role for consent with an inflated role for appeals to institutional function.

NOTES

1. L. Becker, *Property Rights: Philosophical Foundations* (London, Boston: Routledge and Kegan Paul: 1977), pp. 76–77.

2. See *Young, James and Webster v UK* (1976) IRLR and more on the Court's jurisprudence below.
3. www.exxonmobil.com/corporate/Citizenship/Corp_citizenship_Com_transparency.asp
4. On the Jewish Question' in *Writings of the Young Marx on Politics and Society*, ed. L. Easton and K. Guddat (Doubleday, 1968) p. 86.
5. The exchange between capital and labour was, Marx famously quipped, '…[A] piece of good luck for the capitalist, but by no means an injustice to the worker.' *Capital* Vol I (New York: International Publishers: 1967) Part I, Chapter 1.
6. Cf. S. Leader, 'Law and the mode of production' in *Law and Economics* ed. R. N. Moles (Stuttgart: Franz Steiner Verlag) *Archiv Recht und Sozialphil*, 1988) pp. 83–95; Marx, *Grudsrisse* ed. M. Nicolaus (Penguin: 1973) p. 100ff; and T. Carver (ed.), *Marx: Texts on Method*, (Blackwell: 1975) Part I.
7. This section draws on S. Leader, 'Three ways of linking economic activity to human rights' in *International Social Science Journal* (UNESCO: 2005) (forthcoming); and S. Leader, 'Collateralism' in R. Brownsword (ed.) *Global Governance and the Search for Justice* (Hart Publishing: 2005) pp. 53–67.
8. I use the term partly in the sense developed in the important work of the social theorists Luc Boltanski and Laurent Thevenot *De La Justification* (Paris: NRF, 1991) pp. 137 ff, and Parts III–V. See also the investigation of forms of justification and their mutual conflict in Luc Boltanski and Laurent Thevenot, 'The sociology of critical capacity', *European Journal of Social Theory*, **2**(3) 359–77 (1999). The conception of functional justification below has also benefited from the analysis of what the authors call an industrial order of justification. My approach places emphasis on the articulation between the different forms of justification whereas the authors treat them more as distinct alternatives. For a more elaborate treatment of these distinctions, see S. Leader 'Three faces of justice and the management of change' *Modern Law Review*, **63**(1) (2000) p. 55.
9. Both items are included within the scope of the right to privacy as guaranteed by Article 8 of the European Convention on Human Rights.
10. The right to an adequate standard of health is in the International Covenant on Economic and Social Rights Art 12, and the potential responsibility for companies is in the *OECD Guidelines for Multinational Enterprises*, Principle 2.
11. For an articulation of this view, see H. Wellington, *Labor and the Legal Process* (Yale University Press, 1968) p. 250 ff ; cf. G. Teubner, *Law as an Autopoietic System* (Blackwell: 1993) p. 127 ff.
12. For an analysis of the human rights implications of these stabilization clauses in international investment agreements, see *Human Rights on the Line* (Amnesty International: 2003).
13. It is thus not goal-based justification of the sort Ronald Dworkin has been concerned with in his writings. See, for example, R. Dworkin, *Taking Rights Seriously* (London: Duckworth: 1977) *passim*.
14. *Halford v UK* Application No. 20605/92, 25 June 1997. The Court of Human Rights rejected the UK's argument importing the civic version of the right to privacy into employment, and then balancing this right against the legitimate needs of the employer. The latter was found to have imposed a disproportionate restriction.
15. For an account of the producer bias, see Ernst-Ulrich Petersmann, 'Human rights, cosmopolitan democracy, and the law of the WTO' in I. Fletcher et al., eds *Foundations and Perspectives of International Trade Law* (London: 2001) para 8-023.
16. For an analysis of the impact of functional logic on understanding the role of human rights in international trade, see S. Leader 'Human rights and international trade' in *Understanding the World Trade Organization*: *Perspectives from Law, Economics and Politics* ed. P. Macrory et al. (Springer: 2005) pp. 2235–68.
17. See Articles 8 (1) and (2) of the European Convention on Human Rights.
18. *Saunders v Scottish Summer Camps* (1980) IRLR 174.
19. For this aspect of a fundamental right, see S. Leader, 'Toleration without liberal foundations' *Ratio Juris* **10**(2), (June 1997) pp. 139–64.

20. For an exploration of these stakeholder rights, see S. Leader, 'Participation and property rights' *Journal of Business Ethics* **21** (Kluwer: 1999) pp. 97–109.
21. In *Pickering v Board of Education*, the US Supreme Court said that a school board could not control a teacher's critical statements made to a newspaper, since the school's interest 'was not significantly greater than its interest in limiting a similar contribution by any member of the general public.' 391 US 563, 573 (1968).
22. For example, *Ellis v Brighton Corp* (1976).
23. *Henry v London General Transport Services* [2001] IRLR 132 (EAT); 2002 IRLR 472 (CA).
24. *Young, James and Webster v UK* Applications 00007601/76; 00007806/77, decided 13/08/1981 (Court of Human Rights). Even though it is formally the state that is deemed to have violated the right and not the private employer, the state is held responsible for what the private body has done, via having permitted it to act. The law actually emerging from this decision in *Young* about freedom of association is narrower than is stated here, but this is not a relevant issue for these purposes. For further discussion of the case, see S. Leader, *Freedom of Association* (Yale University Press: 1992) Ch. 6.
25. *Ahmad v. United Kingdom*, Application No. 8160/78, March 1981.
26. Ibid. p. 134 para 9. Indeed, it used the conclusion that Mr Ahmad had freely taken up this job as a reason for saying that the state had therefore not interfered at all with his religious liberty, rather than – as in other similar cases – being deemed to have interfered and having to justify the interference for valid countervailing reasons of protecting the rights of others and other elements of the public interest.
27. *Stedman v. United Kingdom*, Application No. 29107/95, 9 April 1997.
28. *Stedman v. United Kingdom*, Application No. 29107/95, 9 April 1997 para 1.
29. *Rommelfanger v Federal Republic of Germany* Application No. 12242/86, 6 September 1989.
30. Some of these cases were decided by the now defunct Commission on Human Rights – its functions absorbed into an enlarged Court.
31. Not only was Mr Ahmad's desire to worship on Fridays out of the ordinary, but so was Ms Stedman's wish to worship *every* Sunday. Taking the habits of a secular minded population as its tacit benchmark, the Commission noted that she was only required to be present on a rota basis, not systematically on Sundays. *Stedman v. United Kingdom*, Application No. 29107/95, 9.
32. The distinction between a functional and civic order might also clarify what is otherwise puzzling in another, related domain. While industrial democracies refuse to allow workers to alienate basic rights in the workplace, at the same time they have insisted in the recent past that workers may waive these rights if they are on temporary or part time contracts. The latter have then often been placed on inferior wages and other terms as compared with their colleagues. As with the earlier examples, these special contracts have not mysteriously been transformed into free agreements, alongside the long-term contracts, which face the obstacle of an imbalance of bargaining power. Instead, political systems that aim to bring more people into employment have used the *device* of consent, in which certain job protection rights are signed away.
33. For this defect in a functional order, and a comparison with the qualities of a civic order, see S. Leader, 'Collateralism' in R. Brownsword (ed.) *Global Governance and the Search for Justice* (Hart Publishing: 2004).
34. It is noteworthy that the law has elsewhere moved beyond this functional perspective, taking a step towards the civic. Thus, in the UK one is now entitled to claim discrimination in both of these situations: either when there has been an intentional assault on one's religion, gender, etc, or when the courts can see that even if there has been no such intention, one is subjected to a detriment that one would not have suffered had one not been of that religion or gender. See *Birmingham City Council v EOC* [1989] AC 1155.
35. This argument is further developed in S. Leader, 'Freedom and futures', forthcoming.
36. *Ahmad v UK* Application No. 8160/78, March 1981, p. 134.
37. F.A. Hayek, *The Constitution of Liberty* (Routledge: 1960) p. 137.

3. Using companies to oppress the poor[1]

Janet Dine

THE TRIUMPH OF CAPITALISM?

Using almost any statistics 'we certainly know that the problem of world poverty is catastrophic'.[2] Of 6133 million human beings, in 2001 some

- 799 million are undernourished[3]
- 50 000 humans *daily* die of poverty-related causes[4]
- 1000 million lack access to safe drinking water[5]

This means that 'the global poverty death toll over the 15 years since the end of the Cold War was around 270 million, roughly the population of the US.'[6]

And the figures go on and on;

- 34 000 children under 5 die *daily* from hunger and preventable diseases[7]
- 1000 million lack access to safe drinking water[8]

Why?

> Imagine some visionary statesman, in 1830 say, posing the question of how the advanced states of Europe and North America can preserve and, if possible, expand their economic dominance over the rest of the world even while bringing themselves into compliance with the core norms of Enlightenment morality. Find the best solution to this task you can think of and then compare it to the world today. Could the West have done any better?[9]

This question is posed by Thomas Pogge explaining the ability of rational humans to shape their thinking to suit their interests. Pogge does not believe that any such grand plan existed or exists, but nevertheless believes that the existence of extreme poverty and the reasons given for not tackling the issue are a prime example of avoidance techniques by the rich;

> moral norms, designed to protect the livelihood and dignity of the vulnerable, place burdens on the strong. If such norms are compelling enough, the strong make an effort to comply. But they also, consciously or unconsciously, try to get

> around the norms by arranging their social world so as to minimise their burdens of compliance.[10]

One of the most important devices for achieving this effect is the limited liability company and the demands made on its managers to maximise the profits of shareholders. A common method of minimising the burden of compliance with ethical norms is to interpose an agent to carry out reprehensible acts: Pogge gives the example of a lawyer to manage an apartment block. The most efficient use of the block would be to convert the flats into luxury accommodation and double the rent. Some of the flats are occupied by poor elderly tenants who would be forced to leave and would have difficulty finding accommodation elsewhere. The lawyer is appointed to manage the block 'efficiently' thus saving the owner from having to evict the elderly residents himself. Pogge argues that this solution cannot absolve the owner of his moral responsibility.[11] Companies are used by rich societies in an exactly equivalent way, to be the agents carrying out reprehensible moral acts from which rich societies benefit.[12] Companies are doubly useful in this respect as they can also be blamed for the reprehensible acts while those who invented them and profit from them can express moral outrage, thus feeling good about taking the moral high ground. Pogge explains how companies are used to provide ethical 'loopholes';

> Consider the ethical view that as a member of a social arrangement one may sometimes – when acting on behalf of other members or of the entire group – deliberately harm outsiders in some specific way, even though one may not do so when acting on one's own. Such views are, I believe, widely held. In the business world, those who implement a corporate policy that is harmful to consumers, employees, or to the general public often stress their status as managers and their obligations towards the firm's owners, whose financial interests they were hired to promote. How is this supposed to be ethically relevant? … Ethical views of this sort guide their adherents to form or join social arrangements in order to effect, through the special ties these involve, a unilateral reduction of responsibility toward those left out of these arrangements.[13]

This points up both the concept of exclusion, that the company is an exclusive club, and hints at the mechanism by which the connection between 'ownership' of the company as property and the polarisation of income and power can come about because of the sloppy ethical understanding that creation of a corporation can, in some way, reduce ethical and human rights responsibilities. Pogge argues that where an ethic has fixed

> those basics that persons owe all others in the absence of any special ties and relations … it should not enable persons unilaterally to reduce or dilute them. Specifically, it should not allow them, by forming or joining a social arrangement, to subject themselves to new, countervailing obligations to its members that may outweigh, trump, or cancel their minimal obligations to everyone else.[14]

Companies are created by laws adopted by societies. Creating a company to obtain or manufacture goods cheaply and to provide investment opportunities means that rich societies are benefiting from the cheap prices obtained for resources from poorer societies; resources here includes labour. Thus appointing a company to achieve objectives which would be ethically deplored in an individual means that we can conveniently blame others while reaping the reward of their behaviour. This is the first moral deflection device.

A second moral deflection device comes into play when we vilify companies for their behaviour. This gives us the moral high ground while we are still living comfortably because of the benefits they provide. Moral indignation at the terrible behaviour of some corporations must not be allowed to obscure the fact that companies are designed by societies and their profits underpin much of our wealth. So when they strike bargains with evil regimes, repatriate their profits and sell us goods produced at low prices because of sweated or slave labour, this is not because of the inherent evil of the people that work in corporations but as a direct result of the legal design of corporations and the operation of the international legal system which provides them with many opportunities and fails to regulate. In truth it is necessary (to rephrase a slogan from the British New Labour party) to be tough on companies and *on the causes of companies*. The US/UK model of companies has shareholders as the primary focus; the company must serve the interests of shareholders, and directors are appointed and dismissed by shareholders. Nevertheless directors are to act in the interest of the company and usually owe no direct duties to shareholders. This structure does not *necessarily* equate shareholders with the company, nor does it equate shareholder interests with 'profit maximisation' and impose a duty on directors to achieve such a goal. Nevertheless recent discourse has imposed the concept of profit maximisation on the assumption that this is what shareholders require, and adopted the second assumption that shareholders and the company are one and the same thing. Such an understanding of corporate aims has wide implications for their behaviour since all considerations other than profit are seen as 'negative externalities' to be adhered to in a minimalist way or bargained away if possible. It has also been one of the underlying causes of spectacular bankruptcies such as Enron and Worldcom. In terms of moral responsibility such a construct of corporations explains why they become another method of moral deflection: because the purpose of corporations is to make as much money as possible, those who tolerate and profit from their existence have no responsibility for the methods they pursue. This ignores the fact not only that companies are structured by national laws but also that those who profit from an activity have a responsibility to prevent that activity harming others. Much of this focus has been informed by the fiction that companies are 'owned' by shareholders and the consequent 'strong' claim

that shareholders have to protection of their property rights. We design companies according to this understanding. Are the resulting companies designed in compliance with human rights?

HUMAN RIGHTS AS INSTITUTION BUILDING

Institutions and the mechanisms they use to deliver a good life style are important because of the complex relationship between institutions and human flourishing. In essence this is a causation or *mens rea* relationship: injustice arises not only through deprivation of certain goods or rights but because of the reason that deprivation occurs. Pogge illustrates this by arranging the same deprivation in order of injustice inflicted:

> a certain group of innocent persons is avoidably deprived of some vital nutrients V – the vitamins contained in fresh fruit, say, which are essential to good health. The six scenarios are arranged in order of their injustice, according to my preliminary intuitive judgment. In scenario 1, the shortfall is *officially mandated*, paridigimatically by the law: legal restrictions bar certain persons from buying foodstuffs containing V. In scenario 2, the shortfall results from *legally authorized* conduct of private subjects: sellers of foodstuffs containing V lawfully refuse to sell to certain persons. In scenario 3, social institutions *foreseeably and avoidably engender* (but do not specifically require or authorise) the shortfall through the conduct they stimulate: certain persons, suffering severe poverty within an ill-conceived economic order cannot afford to buy foodstuffs containing V. In scenario 4 the shortfall arises from private conduct that is *legally prohibited but barely deterred*: sellers of foodstuffs containing V illegally refuse to sell to certain persons, but enforcement is lax and penalties are mild. In scenario 5 the shortfall arises from social institutions *avoidably leaving unmitigated the effects of a natural defect*: certain persons are unable to metabolise V owing to a genetic defect, but they avoidably lack access to the treatment that would correct their handicap. In scenario 6, finally, the shortfall arises from social institutions *avoidably leaving unmitigated the effects of a self-caused defect*: certain persons are unable to metabolise V owing to a treatable self-caused disease – brought on perhaps, by their maintaining a long-term smoking habit in full knowledge of the medical dangers associated therewith – and avoidably lack access to the treatment that would correct their ailment.[15]

Emphasis is also on the avoidability of the shortfall. As Pogge points out, correcting injustice has its own costs and the degree of injustice is proportional not only to its causation but with the costs that would be imposed in trying to correct it. This complex understanding of justice has far-reaching effects on judgments that need to be made about the design of companies. In particular this insight leads also to a different perspective on human rights, pointing out that none are absolute: the right to life is not violated by a death ‘that could have been prevented by expensive medical treatment that the

patient was unable and the state unwilling to pay for'.[16] This means that it is more sense to talk about 'non-fulfilment' or 'underfulfilment' of human rights rather than a violation of them, which suggests a more absolute definition of a right. The centrality of institutions in Pogge's conception of human rights means that it escapes the criticism of being individualist legally based rights. Instead the focus is on institution building; 'human rights are not supposed to regulate what government officials must do or refrain from doing, but are to govern how all of us together ought to design the basic rules of our common life.'[17]

> the pre-eminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation of food, drink, clothing, shelter, education, and health care. Achieving the formulation, global acceptance and realisation of this requirement is the pre-eminent moral task of our age.[18]

Pogge argues that this conception of rights is supported by Article 28 of the Universal Declaration on Human Rights; 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' So far from the more traditional understanding which reads the rights agenda as imposing duties not to violate rights, Pogge sees a 'responsibility [on governments and individuals] to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights.'[19] Part of that institutional order must be a design of companies which are no longer structured to encourage them to seek for 'profit maximation', a design which pushes them towards exploitation of workers and environmental vandalism. A first step is to properly understand what is meant by 'property rights' so that it is possible to examine critically the claim that shareholders have 'property rights' in the company and that owning these property rights makes them of paramount importance, driving the management to profit maximise. Michael Freeman has shown that the human rights discourse is uncomfortable with property rights issues because of a common conceptual foundation. Any attempt to build companies as human rights maximising institutions must grapple with this difficulty.

DIFFERENT PERSPECTIVES ON PROPERTY RIGHTS

Hutton has analysed very different attitudes which may be discerned in the USA and Europe.[20] His thesis is that the attitude to the ownership of property in the US has been informed by a number of factors. One of these is the existence of the experience of the settlers who arrived at 'a wilderness preg-

nant with riches', had 'risked all crossing the Atlantic and who, as fervent Protestants, believed they had a direct relationship with God.' They believed that they were serving God's purpose by taking possession of the land and using it for their own individual purpose.[21] Hutton shows how the writings of John Locke encouraged the view that property both claimed by and created from the land belonged 'exclusively and completely' to the settler and, moreover that the 'purpose of society and Government' was to 'further the enjoyment of property, and political power was only legitimate if it served this end.'[22] Two passages cited by Hutton seem particularly apt:

> The only way whereby any one divests himself of his Natural Liberty and puts on the bonds of Civil Society is by agreeing with other Men to join and unite and into a Community, for their comfortable, safe and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it[23]

and

> Every man has a property in his own person. There is no body has any right to it but himself. The labour of his body, and the work of his hands we may say are properly his. Whatsoever then he removes out of the state that nature has provided, and left it in, he hath mixed his labour with and joined to it something that is his own, and thereby makes his property.[24]

The war of independence and the writing of the constitution did nothing to dispel this mindset, the justification for revolution being the interference by King George III with the settler's rights to enjoy their property freely.[25] 'Any notion that property rights were a concession granted by the state in the name of the common interest – the European tradition … had been dispelled by the revolution'.[26]

The understanding of the nature of property rights then is founded in nature and religion, giving at once a mystical and religious significance to ownership. If a settler prospered it was evidence of a healthy relationship with God. The availability of vast stretches of land made any egalitarian notions realisable without the concept of redistribution becoming a problem, so that redistribution of property became contrary both to nature and religion. The role of the central government was thus reduced to protection of individual property. The constitution prevented states from doing anything that might impair obligations embodied in contracts. Once the right to own property and to contract had been granted to corporations as well as individuals[27] and companies holding shares in other companies were equated with individual shareholders, the stage was set for the giant groups of companies that we see today. Furthermore, the resistance to redistribution enshrined in the Fifth Amendment is a fertile ground for those seeking to

resist regulation on the basis that it is a 'confiscation of property'. The Fifth Amendment prevents the government from depriving an individual of 'life, liberty and property without due process; nor shall property be taken for public use without just compensation'. Thus, although there was a long period between the 1930s and 1970 when property rights were regulated, the fundamental understanding of individual liberty as inextricably intertwined with ownership of property made it very much easier for the ultra conservatives to build their anti-regulatory policies and have them widely accepted:

> For the constitution remains explicit. Without powerful popular support and a clear sense of national crisis – as over slavery in the 1860s or unemployment in the 1930s – the American constitutional conception is that government at federal and state level is the custodian of private property rights; and the Supreme Court sees its task as policing that injunction[28]

The old settler cast of mind provided fertile ground for Nozick's arguments that taxation to finance any minimum income for the poor is a form of forced labour and all forms of redistributive justice are co-ercive.[29] It also provided fertile soil for the concept that corporations are nothing but a 'nexus of contracts'[30] with the obvious result that government should not interfere in that 'contract'.

All these influences can be seen at work in the anti-environmentalist movements chronicled by Rowell[31] with the use of dominion theology (God gave man 'dominion' over the earth[32]) to justify exploitation of natural resources; 'you can't really hurt the planet because God wouldn't allow that. God wouldn't have given man chain saws if he didn't think they were benign'[33] coupled with allegations that environmental regulation destroys jobs and interferes with private property rights. One of the aims of Alliance for America is 'To restore and protect constitutional private property rights'. Part of the 'Wise Use' movement, Alliance for America assisted in constructing Gingrich's now notorious 'contract with America' which the National Resources Defence Council explained 'threatens to undermine virtually every federal environmental law on the books, meaning dirtier air, dirtier water and more species pushed to the brink'[34]. No wonder, then that the Government, in international trade negotiations, regards itself as acting to protect private property, in this case the interests of corporate America:

> One USTR [Office of the US Trade Representative] was remarkably frank in saying that the US has no intellectual plan about the long-term national interest, no consistent commitment to any principle. Rather the 'client state' is the model of the USTR: 'It's too socialist to plan … the businessman is the man who knows. So you respond to him.'[35]

Given the underlying understanding of the moral value attached to property ownership coupled with the conceptualisation of corporations as individual property owners, there would seem no reason for the trade official not to be frank. He has every reason to be happy in his job of increasing the property ownership of US constituents and in particular the value of the 'property rights' of shareholders in US companies.

What, then, of the 'European' conception of property ownership. Of course, it is not possible to reflect subtle and complex differences between the understanding of property across Europe. However, it may be possible to detect a general difference of view. Hutton cites Article 14 of the post-war German constitution as capturing some of the flavour of the difference;

> property is not seen in Europe as an absolute right, as it is by US conservatives. Rather, it is a privilege that confers reciprocal obligations – a notion captured by article 14 of the post-war German constitution, which specifies that 'property imposes duties. Its use should also serve the public weal.' Those who own and hold property are members of society, and society has a public dimension to which necessarily they must contribute as the quid pro quo for the privilege of exercising property rights.[36]

This conception of property ownership is coupled with a 'profound commitment to the notion that all citizens should have an equal right to participate in economic and social life, and that the state is more than a safety net of last resort: it is the fundamental vehicle for the delivery of this equality.'[37] To some extent, this attitude was driven by the different experiences vis-à-vis land ownership when notions of equality became important. In Europe, any attempt at equality meant redistribution; in the US

> When John Adams argued in 1776 that the acquisition of land should be made easy for every member of society in order to achieve equality and liberty, he could disregard European concerns with how the state had to intervene to construct a just society: a continent lay before him waiting to be claimed[38]

The European state thus had a real and vital role to play in constructing a fair society, a far cry from a minimalist role in protecting individual property rights.

PROPERTY RIGHTS AND POWER OVER PEOPLE

The rhetoric used in discussing property rights often ignores two aspects of property rights; one is the importance of always keeping in mind the insight that property rights are, in essence, rights against other people. The other is that they confer power over people. This means that all property rights

govern power relations between people. If property rights are seen as a person having rights over a thing, this ignores the fact that the rights actually lie against other persons, a right to exclude and so on. This means that the role that property rights play in wealth distribution is ignored because the person-to-person relationship is clouded by the person-to-thing discussion. Thus

> A theorist who supposes that ownership interests in objects may be justified, say, by a natural-rights argument, but then ignores questions of wealth-distribution, tells only half the story. The same is true, in the opposite direction of one who advocates a certain distribution of 'resources' but who neglects the question whether person–thing ownership relations are to form part of a property-institutional design.[39]

It is because rights over things can never be absolute, but rather made up of a web of rights and responsibilities operating interpersonally that the debate resonates with issues of wealth distribution and power relations. If property ownership meant that I have absolute dominion over three beans and the right to use them as I wished and you have similar rights over five beans, the property distribution debates would exist but they would be a mere matter of counting. Do I deserve more beans than you? Because the reality of property relations is that I may exclude some (but not others) from use of an item and I may use that item only in non-harmful ways, the discussion of rights and duties becomes infinitely more complex and balanced. It is important, then, to understand what the bundle of rights called property rights actually consists of.

Harris argues that the Hofeldian 'bundle of rights' concept which emphasises rights against other persons, rather than rights over things, can best be expressed on an 'ownership' spectrum which enables an individual to have more or less exclusivity over the use of the property and more or less power to use it in designated ways. The concept of ownership is seen therefore as firmly rooted in social expectations which have come to be embedded in legal rules. This understanding means that attempts to infuse more weight into a particular side of the balance of interests by claiming it is a 'property' right is mere rhetoric designed to appeal to the conceptions underlying a particular society's view of the standing of 'property'. Of considerable interest in this context is the examination by Harris of 'Expansive' definitions of property.[40]

Most important, perhaps, is the insight that the use of 'property rights' is a rhetoric which will resonate with the reader according to the 'meaning' of property in a particular society:

> The plausibility of rhetorical expedients of this sort is difficult to assess. They depend on the way you suppose 'property' will ring in the ears of an addressee

and on his willingness to fall in line with the terminological shift. Imagine the following dialogue:

Egalitarian: 'For reasons of a, b and c, I maintain that everyone ought to have an enforceable right to work.'

Conservative: 'For reasons of X, Y and Z, I disagree with you.'

Egalitarian: 'But you believe that property ought to be protected, don't you?'

Conservative: 'I do.'

Egalitarian: 'Well the right to work is property.'

Conservative response 1: 'No it isn't.'

Conservative response 2: 'Why didn't you say that before? Of course, I now change my view to yours.'[41]

It can be seen that this discourse is intended to have the opposite effect from the attempts to understand companies by representing shareholder rights as property ownership rights. In the Harris dialogue the right to work is put forward as a 'property right' which can only be interfered with with care and probably with compensation following. This is likely to have the effect of a redistribution of wealth to poorer communities. In the case of shareholders-as-owners, making a property claim about shareholder rights is an attempt to make them the focus for the company's efforts and those of the directors, giving us the structure which insists that directors should act in the service of shareholders and presumes this service to be profit maximisation.[42] In this case the redistributive effect is likely to be reversed. In particular, strengthening the shareholders' rights excludes from consideration the interests of employees (and others on whom the company has an impact) and assumes that shareholders may profit at the expense of employees. This enhanced protection by representation of these rights as property rights is likely to have the effect of redistribution of wealth from employees to wealthy shareholders.

We need, therefore, to examine very closely the results which might be achieved by the use of any expanded property rhetoric. As Harris notes, 'The concept-expanding arguments … concede, at least arguendo, that property as conventionally understood really deserves prestige and that the rights contended for have an importance which is merely parallel to conventional proprietary interests … [the arguments] make too much of property.'[43]

COMPANIES: AN EXPANSIONARY USE OF 'PROPERTY RIGHTS'

In order to reach a proper understanding of what companies should be doing and of better governance it is extremely important to explode the 'shareholder-owner' myth, to see the company as a free standing structure and to create mechanisms to reflect the responsibilities which the company has towards those over whom it has power by reason of the exercise of its

property rights by its managers.[44] Paddy Ireland has made it clear that companies fit with difficulty into the property rights discourse.[45] This is because the traditional 'take' on companies is that they are 'the property of the shareholders' or 'in the "nexus of contracts" or "agency" theory of the company, in what amounts to the same thing, that the shareholders own not "the company" but "the capital", the company itself having been spirited out of existence'.[46] Ireland also shows that there is considerable convergence between the property rights of creditors and those of shareholders; each can be seen as essentially 'outsiders' having contractual rights against the company, rather than 'insiders' with membership rights. The remaining 'insider' rights of shareholders are relics of the time when joint-stock companies were run by members and of an even earlier time when lending for interest was banned but partnership for profit was not. An investment as a 'sleeping partner' was a convenient way to circumvent this rule. What are the relics? One is the rule that the residue of capital on a winding-up belongs to shareholders. The other is that they should have a significant role in the way the company is run.

There are two aspects to the debate within the 'property' rhetoric; one is the shareholder-as-owner-therefore-profit-maximisation debate, the second is the corollary of that; shareholder-as-owner-company-as-moral-deflection-device. Both claims envisage the company as the 'creature' of the shareholders and deny any decision-making platform to any other constituency who may be affected by the company's operations. Hence the concept of rules which seek to align the interests of the managers with the interests of the shareholders. The concept is essentially deregulatory, using the 'property' claim in the sense understood in the 'American' way described above.

However, the identification as a property right does not in any way, as Harris points out, identify its parameters; it merely appeals to the importance of 'property'. The 'property concept' tells us nothing about the limitations to be imposed. Any recognition of property rights involve (i) a bestowal of the right on one or more persons; (ii) a corresponding limitation of the rights of others; and (iii) limitations on the use of the right by its owner. Where the balance should be struck cannot be deduced from the 'nature' of the rights but needs to be considered as a distributional issue of social justice. If I make and patent a crossbow, and that gives me 'natural' rights in it, this does not mean I may use those rights to injure or bully others.

FOUR DIMENSIONS OF PROPERTY RIGHTS

New insights into the nature of property rights make further inroads into the perception of shareholders as owners. Laura Underkuffler argues persua-

sively that property rights have four dimensions; an understanding of *Theory*, a *Spatial* element, the degree of *Stringency* with which a right is protected and a *Time* element.[47]

For companies in US/UK jurisprudence, we clearly have an expansionary 'shareholder-as-owner theory'. What do the other dimensions of property rights identified by Underkuffler say about the limitations on the exercise of those rights?

The concept of the space to which the rights apply is a concept of particular importance to the understanding of the company as property. Underkuffler illustrates the concept by examining the case of *Lucas v South Carolina Coastal Council*.[48] In that case Lucas purchased land with the intention of developing it. After his purchase his land was included in an area regulated by the Coastal Zone Management Act.[49] As a result Lucas was unable to develop the land. The issue of the 'space' over which Lucas might be able to exercise his right to develop depends on whether the land over which he is claiming the right is seen as separate from its context in a threatened costal ecosystem.

The issue before the court was as follows: should the space over which the rights could be exercised be understood as belonging to the parcel of land bought by Lucas or should they be understood as applying to that parcel of land in the context of a delicate coastal ecosystem? Applying this logic to the operation of companies gives a clear lead into the possibility of formulating an enterprise theory which recognises that although technically each company in a group is a separate entity, the 'space' over which they operate together extends to wherever the group's trading has 'effects' equivalent to the effect of Lucas' proposed development on the fragile ecosystem. It is a 'contextual' space and the calculation of its dimensions could be developed by analogy to the way in which competition lawyers calculate the dimensions of a 'relevant market' by understanding the extent to which sale of one item might impact on sale of another. It is noticeable that in making this calculation, competition law does not take account of the legal technicalities which separate individual companies but considers the market effect of the whole commercial enterprise.

The third dimension identified by Underkuffler is that of stringency of protection.[50] She notes that different rights appear to be more or less carefully protected by the legal system; in the US, at least, the right to exclude and pass property to heirs is much more carefully protected than, for example, the right to use. That this cannot be wholly explained by the degree of deprivation suffered by the 'owner' is neatly illustrated by a number of cases, including *US v Pewee Coal Company*.[51] In that case the government seized and directed the operation of a coal mine. This was held to be a 'taking' by the government. However, where a gold mine was ordered to be closed, it

was not held to be a taking[52] despite the practical outcomes of the cases for the owners being exactly equivalent. This was because the first case involved 'physical possession' by the government, the second did not. Consequently the nature of the rights that had been infringed was different. Since, if shareholder rights are property rights at all, they can only be 'use' rights when seen in the context of using the capital invested in the operation of the company, it would seem that the stringency of protection should be at the low end of the scale and thus potentially subject to significant restrictions.

As well as different levels of protection for different rights, the variation in stringency also applies to the nature of the 'thing' to which the right is attached (kidneys deserve greater protection than cars) and also to the *different contexts* in which the rights appear.[53] The latter has been explored by Margaret Radin[54] who adds a 'redistributive' concept, that is that

> the stringency with which completely fungible and otherwise 'impersonal' property (such as money, stocks, bonds, and other kinds of general wealth) is protected often depends upon the size of the individual holdings involved. It is an intuitive and widely accepted principle that an individual's protective claims weaken as one moves from a limited core of personal wealth into the penumbra of larger and more widespread property claims. Because of this view, we accept as fair those laws that impose heavy taxes on luxury goods or that use graduated rates for income and estate taxation.[55]

Yet again shareholder rights seem to come at the lower end of the stringency of protection spectrum.

The time factor provides the final dimension; this was obviously crucial in the *Lucas* case, since the regulation came into force after the purchase of the land, but it will be seen to have wide-reaching implications for companies. It should be noted that some theories seek to provide explanations of corporations by studying their origins. The dominant US/UK theory of contractualism sees companies as the product of a contract between founding members. According to the contractual theory two or more parties come together[56] to make a pact to carry on commercial activity and it is from this pact that the company is born.[57]

This is a foundational theory. But when this is used to justify the pre-eminence of shareholders as 'owners' of the company, it purports to act as an operational theory. Some of the difficulties encountered by contractualism in seeking to explain the operation of companies have arisen because foundational theories have been applied to the operation of companies without an understanding of the difference between a foundation contract and the dynamics involved in the operation of a company. The key point in the difference is the way in which the company's constitution operates, not merely as a contract but as an arbiter of the rights and duties of those concerned with the ongoing

nature of the corporation. In the US/UK model the constitution remains 'frozen' at the moment of incorporation, recognising only a relationship between the company and the shareholders, refusing to recognise any other individual or group on whom the working company will have an impact. The logical outcome of the theoretical contractual base is to limit the social responsibility of the company and create an entity remote from regulatory interference because any denial of the right to use the free enterprise tool which is available tends to interfere with this concept of the company and the 'property rights' of its 'owners'.[58] The theory has the effect of putting the corporation into the sphere of private law, of viewing the legitimation of the power it wields as coming from the entrepreneurial activities of the members and lessening the state's justification for regulatory interference.[59]

Stokes argues that the contractual model legitimises the power of the board of directors because they are the appointees of the owners: 'Thus, by invoking the idea of the freedom of a property owner to make any contract with respect to his property the power accorded to corporate managers appears legitimate, being the outcome of ordinary principles of freedom of contract.'[60] This in turn leads to 'ends-orientated'[61] behaviour whereby: 'Provided that corporate actions and decisions comply with the terms of the contract they can be judged primarily in terms of whether they achieve some desired goal, rather than by reference to their impact on the rights or interests of the persons involved.'[62]

As explained above, a key reason for the strain experienced in applying the notion of legal contractualism to the operation of companies is the different considerations which apply to the balancing of rights and duties of the participants when the company is up and running. The foundational theory becomes wholly unconvincing at this point.

The Underkuffler insight which understands the element of 'time' relating to property rights is therefore devastating to the foundational contractual theory since the property rights change significantly once the company becomes operational, affecting other people. Now the property rights of shareholders, like Lucas' right to develop his land, need to be seen in a wider context, that of a company with employees, creditors, consumers, an environmental and social impact.

In fact there are two time dimensions; as Underkuffler points out, the content of property rights must be determined at a particular time and, secondly, a decision must be made

> whether the content that we have chosen will remain fixed thereafter or whether it will – in fact – vary in time. We could, for example, choose to protect-with-utmost-stringency an individual's right to use land, with the content of that right determined (on the basis of 'reasonable expectations', 'existing state law', or other understandings) at the moment of the individual's purchase. The question

> remains: what if expectations, 'reasonable' at the moment of purchase, become unreasonable thereafter? … Few would deny that regimes of private property, as generally conceived, include consideration of the public's interests. To the extent that individual property rights are collectively conceived and collectively enforced, they will (almost certainly) consider not only the interests of property owners but also the interests of others in the community. With the consideration of collective needs, however, comes the question of collective change. The dimension of time captures[63] that question.

We need to examine the way in which any property right in the company changes when a foundational model changes into an operational company.

A HUMAN-RIGHTS-CONSISTENT DESIGN FOR COMPANIES

As Teubner rightly says: 'Putting it quite bluntly, a corporate enterprise does not exist simply as a self serving and self-realizing institution for the unique benefits of its shareholders and workers, but rather exists, above all, to fulfil a broader role in society.'[64]

Indeed, large companies have a huge influence on our social, economic and political lives. In the words of Chayes, '[T]hey are repositories of power, the biggest centers of nongovernmental power in our society'.

Teubner argues for a proceduralization of fiduciary duties that enables non-shareholder interest groups to participate in the monitoring and decision-making functions. The role of the law, in Teubner's view, should be to control indirectly internal organizational structures, through external regulation. The role of the law is external mobilisation of internal control resources.[65] The organisational structures should allow for 'discursive unification processes as to allow the optimal balancing of company performance and company function by taking into account the requirements of the non-economic environment.' In short, Teubner advocates a constitutionalization of the private corporation to make the corporate conscience work 'if that meant to force the organization to internalise outside conflicts in the decision structure itself in order to take into account the non-economic interests of workers, consumers, and the general public.'[66] Teubner highlights the role of disclosure, audit, justification, consultation and negotiation and the duty to organise. He emphasises the need to proceduralise. Ultimately the point is to ensure that the decision-making processes allow participation by those affected by the decisions, whether in terms of profit, consumer choice, working conditions or environmental impact of corporate activities. If the decisions are made jointly with the directors, the monitoring role ought to reduce. Teubner's proceduralisation would mean a complete change in conceptualisation of the company and directors' duties.

Berle and Means identified the separation of ownership and control in the 1930s,[67] showing that, with dispersed ownership of shares, control of corporations lay less with shareholders and more with the professional managers of large companies. This led to corporate governance being discussed primarily as involving antidotes to such a separation, and, in particular with implementing mechanisms to align the managers' interests with those of shareholders. Today there is a second shift in the governance of companies, this time strengthening the degree of separation between ownership and control and also shifting the focus and perhaps the power centre of decision making to a lower level in the company. This second shift calls into question the reality of the vision of a company exclusively directed by the 'controlling minds' of managers. Limits on their decision making appear by way of providing them with information from throughout the organisation and insisting that the focus of their decision making should be an assessment of risks to the organisation. This new understanding would reject the idea of the company being composed solely of its organs but, in some ways embrace the 'organic' view of companies.[68] The organic analysis is borrowed from the analysis of states. Wolff[69] cites John Caspar Bluntschli who 'found something corresponding in the life of the State not only to every part of the human body but even to every human emotion, and designated e.g. the foreign relations of a State as its sexual impulses!' In fact the organic theory is remarkably wide in its vision; many current theories would omit the inclusion of the 'hands' at all, regarding employees as 'negative externalities' rather than as an integral part of the company's existence.

There are a multiplicity of regulations that companies must implement and within companies, systems are set up to implement them. A simple example (and the most obvious) is the systems which must be set up to ensure financial control. In the Barings collapse, one of the problems that was clearly identified was the lack of knowledge of the derivatives operation which was displayed by the directors. They were eventually disqualified as directors as being 'unfit' following their failure to put in place proper systems of financial control. However, in order to create effective systems they needed to fully familiarise themselves with the functioning of the derivatives operation. It is argued here that, because detailed knowledge of the operation of the systems which make up a functioning company are to be found elsewhere than at board level and that proper systems of control cannot be designed without this detailed knowledge, it is incumbent on the eventual decision makers to take account of the knowledge and experience of those most intimately involved in the systems necessary to control the risks which are the subject matter of the regulations.

This is not to say that the power to take the eventual decision has moved, but that proper decisions cannot be made without wide consultation. This, in

turn, gives the consultees standing to influence the decision-making process and, in particular, change the culture of the company from focusing on shareholder profit alone. This approach is analogous to the 'law as communication' approach, analogous in the sense that the outcome is a decision made by those acting on behalf of the company rather than a law defined in any technical sense.

> Analysing the legal phenomenon in terms of communication seems to have several advantages. It approaches the law as a means for human interaction and not as some autonomous end. The concept allows a broad, pluralist analysis as communication can be found at different levels and under many different forms. It does not lead to the elaboration of a closed system but remains open-ended, as the emphasis lies on communicative processes and not on fixed elements, e.g. 'norms'. The concept of communication as such refers to the taking into account of differing points of view and to some dialectical exchange of viewpoints. Such a dialectical approach should preserve us from one-sided analysis and conclusions.[70]

The 'dialectical' approach may also be too narrow to absorb the full range of input, assuming as it does an exchange between two points of view. A much wider openness to information flows would assume a multiplicity of points of view available at any one time.

These theories build on Habermas' denial of the concept of objective truth and his search for rationality through communication with others.[71] The concept of companies and of the shareholder–director–company relationship has become a closed *self-referential system*, falling into the trap of excluding relevant factors. Autopoietic theory shows how a legal system can be simultaneously autonomous and non-autonomous, that is to different degrees sensitive to 'social facts, values and norms'[72] (cognitively open) but select the 'relevant' data according to criteria which emerge as 'an internal logic of the legal system'[73]. If a system becomes too closed, self referential and autonomous it is no longer sensitive to the external data. The difficulty of selecting the relevant criteria is discussed by Michael Blecher in Chapter 4, but we saw in the discussion of property rights how the contextual understanding of property rights leads to concepts such as time and space having an impact on the legal determination of the outcome.

In calling for constant communication between systems, social spheres in a 'permanent temporary mode', Blecher points out the prevalence of mechanisms which *exclude* inclusive communication, especially in

> the continuous production of global knowledge through single and collective autonomies together with their new communicative media (mobile phones, inter- and intranets) [which] is merely considered from the point of view of exploitation and the creation of new scarcity guaranteed and protected by specific legal constructions (intellectual and industrial property, the limitations of a new 'cyber

> law').[74] The mechanisms of classical representative democracy still claim to have exclusive access to the definition of social problems and their solutions, be they realized in nation states or the present forms of international or supranational conglomerates in spite of their inability to resolve new global challenges.[75] Accordingly, free and spontaneous migration of global citizens is restricted by new discriminatory policies.'[76]

Blecher argues that in order to seek justice[77] it is necessary that 'The functionally organized autonomies (economy, politics, law, science, etc.) can exploit this "creativity" only if they open their "spontaneous spaces" in order to make continuous "attempts at global justice", reaching out for the participation of the actors of the global multitude and accepting "needle sharing" with their "other"'.[78] Exactly the same analysis applies to the legal structuring of corporations; it is necessary to provide systems of communication in order to permit the selection of relevant data. However, many of these theories are unclear on how to achieve the inclusive result they seek. The methodology suggested here (see below) is that of risk assessment.

FROM REGULATION TO SYSTEMS: BUILDING A COMPANY TO DELIVER HUMAN RIGHTS

In order to translate communicative theories into practice within companies, a starting point may be to examine the network of regulations which impinge on the way in which companies operate. Traditionally they would be seen as the preserve of a 'compliance officer' and be considered to be external and hostile. However, the best way to ensure that the regulations are complied with is to gather information from throughout the organisation as to what systems could best prevent a breach of the regulations. This exercise in communication is likely to have two effects; it will empower those who suggest the design of the systems, their input will have real effect on the eventual decisions taken at the highest level and it will internalise not only the regulation but the social motive which led to its imposition in the first place. A clear example of this effect is the way in which environmental concerns have been increasingly absorbed into company decision making over the last twenty years.[79]

The example of financial controls (given above) is just a single example of the regulations which impinge on decision making within companies. Many other regulatory structures impinge on corporate decision making so that it is no longer open to the shareholders to insist on profit at the expense of compliance with health and safety standards, environmental regulations[80] or consultation with employees. Nor can systems to ensure compliance with criminal law be neglected. The company must remain within the criminal law

and must have systems which ensure that this happens. This may extend to ensuring consistency between methods of working and achievable targets. For example if time targets for repairs to electric signals on a railway cannot be achieved without electricians working excessively long hours, the inconsistency may in future be identified as a reason for holding the company (and its directors) criminally responsible for an ensuing disaster. Similarly proper systems for implementation of health and safety and environmental regulations must rely on detailed knowledge of the 'way things actually work'.

In effect, the imposition of regulations which must be implemented, gives the company a greater degree of autonomy from the shareholders. As we have seen, the 'shareholder property rights' model led to a narrow definition of what is meant by 'Corporate Governance' with most commentators concerned only with the methods by which management action can be controlled in order to ensure management behaviour 'for the benefit of the company', meaning in the vast majority of situations, for the financial benefit of shareholders. This tendency has been reinforced by the 'legal boxes' which have been constructed, particularly in common law jurisdictions. 'Company law' is seen as a separate discipline from 'labour law', ignoring the fact of enormous proportions that the huge majority of employees work for companies and that companies cannot work without employees. This is one of many examples of 'closure' of a legal system which prevents relevant social data from playing its proper part.

In the recent US scandals, particularly those like Enron and WorldCom which involve manipulating accounts in order to maintain inflated share prices we see a conflict between the old-fashioned view of 'corporate governance' which sought to create mechanisms for aligning the governance of the company with shareholders' interest in profit maximisation and the vision described here which seeks, by regulation, to make sure that companies have proper systems in place to ensure their compliance with the requirements of society generally. Although it is true that directors of these companies stood to gain personally from inflated share prices, the primary motive for the 'creative accounting' was the pressure to do better than competitors so far as a continuously rising share price was concerned. The system of corporate governance which relies primarily on shareholder enforcement is shown not only to be inadequate, but counterproductive, imposing pressures which are destructive of both the company and the wider interests of society, both in loss of faith in markets and destruction of, for example, pension benefits.

The requirements of this web of regulation, imposed by society at large, means that the company gains a greater degree of autonomy from its 'owners' because it has discretion in responding to the imposition of control from a source other than the 'owner' shareholders. In this way the separation of ownership and control is enhanced.[81] At the same time, reliance on the

knowledge of the employees at the 'coalface' to properly implement the systems creates a culture of inclusion which moves away from a simple conception of a company as a contract-based institution created by shareholders for their own benefit. This applies not only to financial and employee protection systems but to all systems designed to implement regulations relevant to a particular company's operation. For example, a company making chemicals will be unable to implement environmental control systems unless the designers of the systems obtain detailed knowledge of the manufacturing process so that risk (for example of spillage) may be minimised. This requires extensive consultation if it is to be successful. In turn the consultees have the opportunity to influence decision making. Similarly, implementation of regulations designed to protect a 'wilderness area' may require extensive consultation with inhabitants and scientists if the aim of the regulations is to be properly achieved. The company becomes very much more complex than a shareholder-driven profit maximisation machine. The resultant company looks very different. What is clear is that, while this understanding of companies is nearer the 'real picture' than the stylised vision that we are given by theorists, company law and discussions of corporate governance have not changed to embrace the new reality and remain stuck in the 1930s, debating the consequences of the Berle and Means understanding of separation and control by 'aligning' managers' interests with shareholder interests rather than addressing the reality of the complex web of systems of control which make up company decision making. This, coupled by the legal 'box' mentality has inhibited the understanding of directors' duties. They remain principally a code of personal conduct designed to address the 'alignment of interests' issue and no remedy is available in company law for failure to design proper systems of control; no employee affected by the absence of health and safety controls, damaged by poor environmental controls or disadvantaged by failure of consultation has a remedy against directors for failing to implement regulations correctly.

The proper implementation of these regulations will and should entail a change in the corporate culture, from a narrow contractual concept to a more inclusive one, shifting decision-making powers in two separate ways. First, the regulations may prevent the shareholders and directors from taking certain decisions. More subtly, by requiring implementation of control over operations where they involve complex detail known only to those intimately involved, they require significant input from and give significant influence on the eventual decision to those operating networks at all levels of the organisation. The emphasis is on *proper* implementation of the regulations, if they are complied with in a 'box-ticking' or minimalist way it is unlikely that the regulations will function well, leaving the company at risk of violation. Essentially a process of internalisation will take place, with the decision-

making processes absorbing the underlying aims of the regulations as systems are designed to achieve those aims. Parker explains the mechanisms relating to employees well:

> For exactly the same reasons that external command-and-control regulation will fail, a legalistic, top-down approach to compliance management within the company will also be a weak guarantee of compliance. At the simplest level, this is because a corporate compliance management system that fails to enter employees' 'zone of meanings' will not be effective at teaching them or convincing them of what it actually means to comply … At a deeper level, a self-regulation program that fails to connect with people's values and identities will fail to connect with anything that offers a robust motivation to commit to compliance – it will be dependent on extrinsic sanctions and rewards for success only, not intrinsic ones … Also, a compliance management approach that does not seriously engage with employee opinions, concerns and experiences about compliance will mean that employees distrust management's approach to compliance. There will be no bond that convinces them that it is worthwhile to comply to help the company. Finally, engaging with employee concerns and values about self-regulation builds up the integrity of the whole organisation by building up personal integrity, individual by individual. This is a bottom-up resource of connection with and permeability to the broader culture and its values.[82]

Two factors are at work here; one is the way in which company culture can be 'grown' as a result of implementation, the second is the nature of 'good' regulation.

The formation of a corporate culture can be significantly influenced not only by formal regulation but also by the 'issues of the day', which frequently surface in 'soft law' such as Codes of Conduct. Drahos and Braithwaite have noted the way in which Codes and Principles have influenced business conduct.[83] Issues such as sexual harassment or age discrimination become embedded in corporate culture as discussion of them is prompted by regulation or discussion which originated outside the organisation concerned.[84] Proper implementation of regulatory controls of all sorts will involve an internalisation process which needs to be individual to each organisation so that it works well within the existing culture and operations of a particular organisation. In order to facilitate this notion of internalisation it is necessary to adapt the core notions of corporate governance to give proper prominence to the complex web of risk control systems. The danger is that, if this is not done, compliance with regulatory control will continue to be seen as a marginal, moving concerns other than profitability to the status of 'negative externalities' rather than an essential part of the nature of corporate existence.[85]

An institution absorbs and respects norms which are implemented within the organisation in response to outside regulation. The extent to which this occurs will depend to a large extent on the design of the regulations. Environ-

mental awareness within companies has been enormously increased over recent years as a result both of the imposition of requirements of environmental audit and the general awareness of environmental issues in the general population.

Those who seek to regulate companies have been moving away from the simple 'command and control' model of prescribing the behaviour of companies by external regulation.[86] Instead, regulations increasingly follow the innovation in regulatory design suggested by Ayres and Braithwaite of enforced self-regulation,[87] although with a slight shift in emphasis. Ayres and Braithwaite envisaged individual firms proposing their own standards of regulation. The rules designed would have a public enforcement mechanism.[88] What seems to be emerging is a slight variant on this theme which perhaps we may call 'directed self-regulation'. Instead of each company setting its own standards of regulation, the standards or aim of the regulation is defined.[89] However, the two systems share in common the way in which the implementation is achieved. Parker uses the term 'new regulatory state' to describe the way in which 'the state is attempting to withdraw as the direct agent of command and control and public management, in favour of being an indirect regulator of internal control systems in both public (or formerly public) and private agencies'.[90] Detailed implementation is left to individual companies so that the mechanisms which suit that company may be established. While directed self-regulation lacks the flexibility of avoiding over-strict rules for small enterprises, it shares with enforced regulation the benefits of individual design of rules so that companies are likely to be more committed to them; hostility to outside regulators is avoided and the confusion of two rulebooks is avoided.[91] In certain circumstances the full flexibility of enforced self-regulation may be established by regulators who are able to run a risk analysis over specific supervised sectors. The Financial Services Authority, for example, has established a sophisticated method of analysing financial risk which requires varying degrees of internal regulatory control, dependent on the assessment of the degree of risk posed by the operations of individual firms.[92]

DIRECTORS' RESPONSIBILITY TO ASSESS RISK AND ESTABLISH SYSTEMS

A key feature of such a legal framework is the imposition of a duty on directors to design and oversee systems which are capable of assessing and controlling the risks run by companies. Financial risks are the most obvious and the law already imposes duties to establish and maintain proper financial control systems. However, companies are at risk from a wide range of pressures imposed by society either directly (by regulation) or indirectly (by, for

example, bad publicity). If, as suggested, we consider the company as a series of interlocking systems, we can see that each system has a distinct role. One system will ensure that employees are paid correctly, another will establish the optimum method of ensuring a supply of raw materials, and another will establish controls over financial affairs generally. Some of the systems will be established in response to external regulatory or publicity pressures. These systems established to control risks of regulatory or public condemnation, if properly designed and implemented, will change the culture of a company from one which has a narrow conception of its purpose as profit maximisation to a wider understanding of its role within the society whose values have been internalised. In turn, this means that directors' duties should be seen not as imposing a code of conduct to ensure that the single stakeholders' interests are met, rather, they should be considered as responsible for establishing systems specifically designed for that company which adequately address the risks of regulatory condemnation and bad publicity, as well as the systems which make the process of production work. The importance of systems was analysed by Gladwell[93] in relation to the Enron failure, arguing that the collapse of the company was partially due to the culture of recruiting talented 'stars' and giving them unfettered discretion to operate, rather than establishing a settled network of operating systems.[94]

I have argued elsewhere that this new concept of risk management as a duty for directors is already becoming evident.[95] For the present, one example will suffice. *Re Barings plc and others (No 5)*[96] resulted in the disqualification as directors of three directors of Barings on the grounds that their conduct as directors made them 'unfit to be concerned in the management of a company'.[97] The Secretary of State's case was that each respondent was guilty of serious failures of management in respect of the supervision of the conduct of Nick Leeson, thereby demonstrating incompetence of such a high degree as to justify a disqualification order. The three specific illustrations of management failure all relate to the failure to establish and maintain proper systems of control; firstly over Leeson directly because he was both dealing and settling, that is dealing and auditing his own behaviour; secondly by failing to maintain any procedure for enquiring into the massive requests for funding made by Leeson or attempting to reconcile the amounts requested with the underlying position; thirdly the 'crass' and 'absolute' failure of any managerial controls over Leeson. The court held that each individual director owed duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. Where functions had been delegated, the board retained a residual duty of supervision and control. In his evidence to The Board of Banking Supervision Inquiry Mr Peter Baring described the internal control failings as 'crass' and 'absolute',[98] a description with which the court agreed. However, the purpose of Mr

Barings' description was to shift blame away from the board. His argument was that the board had properly delegated the establishment of supervision systems. Basing his decision on directors' duties of skill, care and judgment, Parker J. refused to follow that line of argument, dismissing the idea that a 'flat' management structure, necessary for quick decision-making, involved

> any lesser degree of vigilance or diligence on the part of senior management in the performance of their managerial duties. Similarly, in my judgment, the mere fact that functions had been delegated to trusted colleagues whose capabilities are known and respected – in other words, the mere fact that the delegation was a proper one – does not relieve the delegator of the duty to supervise and monitor the discharge of those functions.[99]

This judgment emphasises that the ultimate responsibility for creating and supervising systems for the control of risk lie with the board. This does not imply that they have sole responsibility; the systems should also identify responsibilities throughout the company for design and participation in the systems.[100] Requiring and overseeing this aspect of systems design should be the responsibility of the board.

Of course, in the Barings case, the risk was of financial losses. However, financial loss may be caused by less direct failures and in particular exposure to regulatory or public opinion condemnation. It seems evident that there is a direct responsibility on the board to assess these risks and respond to them by establishing adequate systems of control and that directors who do not do so are 'unfit' for that office. How may risks be assessed?

RISK ASSESSMENT

Assessment of risk is a complex business even if it be accepted that it can be achieved with any degree of objectivity. The technical perception of risk as objective and measurable is losing ground:

> the view that a separation can be maintained between 'objective' risk and 'subjective' and perceived risk has come under increasing attack, to the extent that it is no longer a mainstream position … Assessments of risk, whether they are based upon individual attitudes, the wider beliefs within a culture, or on the models of mathematical risk assessment, necessarily depend on human judgment.[101]

This points to the necessity for directors to exercise their skill and judgement in assessing the exposure of their particular concerns. Some lessons may be learned from the work done by the Financial Services Authority which is creating a 'Risk Assessment' approach to regulation.[102] The risk posed by a firm to the FSA's objectives[103] will be assessed by 'scoring' probability and

impact factors. Probability factors take account of the likelihood of the risk happening and impact factors assess the 'scale and significance' of the harm should the risk occur. The FSA expresses it as:

Priority = impact ¥ probability[104]

The FSA proposes a spectrum of supervision from maintaining a continuous relationship with firms that have a high-impact risk rating to 'remote monitoring' of low-impact firms. Firms in the latter category 'would not have a regular relationship with the FSA, but would be expected to submit periodic returns for automated analysis, and to inform the FSA of any major strategic developments.'[105]

This is a strategy that could clearly be adopted by the boards of companies towards their systems that implement regulation or that seek to prevent market or financial risks from materialising. Indeed such systems are required (although with unclear ambit) by the Combined Code which is the outcome of the Cadbury, Greenbury and Hampel Reports.[106] These exercises culminated in the Combined Code which requires amongst other things the maintenance of a 'sound system of internal control'.[107] The London Stock Exchange issued guidance on the implementation of this requirement[108] which stresses management of significant risks since 'a company's system of internal control has a key role in the management of risks that are significant to the fulfilment of the company's business objectives'. In order to ensure a proper system of internal control the board must consider

- The nature of the risks facing the company
- the likelihood of the risk materialising
- the company's ability to reduce the impact of such risks if they do materialise
- costs relative to benefits.

The DTI's OFR[109] is moving in the same direction. It would include

> where and to the extent material … An account of the company's and/or group's systems and structures for controlling and focusing the powers of management and securing an effective working relationship between members, directors and other senior management … , Dynamics of the business – i.e. known events, trends, uncertainties and other factors which may substantially affect future performance, including investment programmes. For example risks, opportunities and related responses in connection with competition and changes in market conditions, customer/supplier dependencies, technological change, financial risks, health and safety, environmental costs and liabilities.[110]

This new culture of risk assessment and required response by setting up implementation systems is clearly an important element in company culture. Proper implementation systems will involve dialogue with those most closely involved in whatever it is that is posing a risk to the company's operation. Thus, if the risk is to the health and safety of employees, the only way in which that risk can be minimised is to understand the risk by undertaking consultations with those most at risk. Only in this way can the risk be properly understood and relevant systems devised to minimise it. In turn, this will involve a change of culture, from regarding health and safety systems as a negative externality involving minimum compliance, to seeing them as an integrated part of the corporate objective. In this way, 'stakeholders' become part of the company, not by formal identification, but by taking part in the decision-making process. This avoids the insuperable difficulties of the formal insertion of stakeholders; no longer must a formal 'weighting of interests' take place, each system operates to minimise the risks to the company and it is those risks that are to be weighed, not the moral or social claims of interest groups.

A CORPORATE GOVERNANCE SOLUTION

However, one problem remains, and that is the difficulty of holding the directors to account. Clearly all risks undertaken by the company will, if they materialise, have costs. Regulations will have their own enforcement mechanisms, bad publicity will lead to drop in revenue and so on. However, if the internalisation of the new understanding of companies as affecting a wide range of people is to be completed, enforcement mechanisms internal to the company are necessary. No longer should the risks run by employees be seen as imposing an external cost, 'red tape', on companies; their risks should be managed by internal systems with an integral enforcement mechanism. The dangers of not pursuing this route may be illustrated by the ineffective s309 of the Companies Act 1985 which infamously requires directors to take account of the interests of employees and provides that the enforcement mechanisms are to be the same as for any other duty of directors, that is exclusively in the hands of shareholders with the result that it has been entirely ineffective.[111]

We have seen that directors' duties are being reformulated to cover devising and supervising systems of risk control, requiring them to assess the risk to the company of failing systems. Devising a proper internal enforcement mechanism that widens the interest groups with *locus standi* to enforce those duties requires an assessment of the risks run by the beneficiaries of those systems. Where the risk run by the protected beneficiary and the risk run to

the company of a system failure are both significant and coincide, the protected beneficiary should have *locus* to enforce the duty of directors to put in place proper systems or to claim compensation for the failure to do so. This would be the enforcement of a duty owed to the company, brought by a person or group who has a 'direct and individual concern'[112] (or some similar formula) in the failure of such systems. The risk run by the individual would give them the standing to correct the failure to protect the company from risk. It must be emphasised that the creation of such a cause of action would be without prejudice to claims external to company law such as compensation claims. The point is to create a company law right to force companies, via their managers, to take on board the responsibilities inherent in the power that a company's property right bestows on it. For an employee to be able to demand that proper systems of health and safety protection should be put in place might well be as valuable for her future as a compensation claim is for remedying past wrongs, and they should not be mutually exclusive. Of course, so far as individual employees or others who are affected by companies are concerned, it is not difficult to grant *locus standi*. What should happen about a company's wider responsibilities for ethical behaviour? Who should be the enforcers of human rights and corporate social responsibility, including environmental responsibilities? Here I would draw on the Ayres and Braithwaite concept of 'tripartism'.[113] This involves the empowerment of Public Interest Groups (PIGs). The strategy would be to identify a PIG that is directly concerned with the enforcement of the spirit behind a particular piece of legislation (environmental agencies for environmental law, employees for Health and Safety and so on). In order to prevent cosiness, competition between groups would be engendered. The role of these groups would then be to oversee the regulator/ regulated relationship and step in where there was undue evidence of capture and corruption. The empowerment of PIGs is argued also from the standpoint of democratic involvement. 'An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it'.[114] The authors' thesis is that a democracy limited simply to providing a vote for citizens will be undermined by the power accrued by the corporate sector. Selective empowerment of PIGs provides some element of counterbalance to that power. Further, empowerment of PIGs will of necessity cause the building of trusting relationships since there 'is no reason for us to trust those who have no influence over our lives; but once an actor is empowered in relation to us, we are well advised to build a relationship of trust with that actor.'[115] The competition could be presided over in the UK by DTI, FSA or the Stock Exchange and the NGOs who were appointed would be charged with making sure that proper systems of CSR and rights compliance exist within the company. This would be done by comparison between

claims made by the company and the reality as researched by the NGO. Disparities would require an explanation. Gross disparities would prima facie be a breach of directors' duties. Company responsibility for systems would extend to responsibility for supplies, subsidiaries, and all over whom the property right gives significant dominion, whether at home or abroad. This system might well have the welcome side-effect of increased transparency for NGOs so that it would become easier to assess their independence.

So far as a standard of care is concerned, the courts already have a power to determine when company affairs are being conducted in a way unfairly prejudicial to the members.[116] And the jurisprudence relating to this concept could perhaps be adapted to embrace other interest groups.[117] However, a better approach might well be to use the standards being developed for the purposes of the disqualification of directors on the 'unfit' ground.[118] As noted above, the court in the Barings case made it plain that it remained the ultimate responsibility of the board to ensure that proper systems of financial control were in place as the company was otherwise at extreme risk of collapse. Putting the company at risk from failure to create other systems protective of groups other than shareholders may equally be susceptible to a finding of 'unfitness', and such a finding could well be the basis for compensation or redress for groups other than shareholders.

In this way, it is suggested, the vision of companies can be changed and broadened. Of course, the assessment of risk carries with it difficulties and discretion and it is not suggested that such a remedy would arise frequently. However, the possibility of extending enforcement measures to groups other than shareholders would mean that the narrow objectives of service to shareholders would be changed, and a more inclusive culture would understand that the objectives of society and the objectives of companies must be made to work in some degree of harmony.

NOTES

1. This chapter is an expansion of material published in J. Dine, *Companies, International Trade and Human Rights*, Cambridge University Press, Cambridge, 2005, and I am grateful for permission to reproduce the overlapping text here.
2. T. Pogge, 'The first millennium development goal' www.etikk.ne/globaljustice/.
3. United Nations Development Programme *Report* United Nations: Geneva, 2003, p. 87.
4. Such as starvation, pneumonia, tuberculosis, measles, malaria, pregnancy-related causes, World Health Organisation *The World Health Report 2001* Geneva, WHO Publications, 2001, Annex, Table 2.
5. UNDP 2003, op. cit. p. 9, Wateraid *The Education Drain*, www.wateraid.org.uk.
6. Pogge, op. cit., p. 11.
7. US Department of Agriculture *US Plan on Food Security*, 1999, piii, www.fas.usda.gov/summit/pressdoc.hmtl.
8. UNDP 2003, op. cit., p. 9.

9. T. Pogge, *World Poverty and Human Rights*, Polity Press in association with Blackwell, Oxford, 2002, p. 5.
10. Ibid., p. 5.
11. Ibid., p. 77.
12. For an extensive discussion of this issue with a bibliography see J. Dines, Companies, International Trade and Human Rights, Cambridge University Press, Cambridge, 2005.
13. Ibid., p. 76.
14. Ibid., pp. 78–9.
15. Ibid., pp. 41–2.
16. Ibid., p. 47.
17. Ibid., p. 47.
18. Ibid., p. 50.
19. Ibid., p. 65.
20. W. Hutton *The World We're In*, London, Little Brown, 2002.
21. Ibid, pp. 52–3.
22. Ibid.
23. John Locke, *Two Treatises of Government*, ed. P. Laslett, Cambridge University Press, 1988, p. 331.
24. Ibid., p. 288.
25. Hutton, op. cit., p. 56.
26. Ibid., 58–9.
27. *Dartmouth College v Woodward* (1819) 17 US 518.
28. Hutton, op. cit., p. 60.
29. R. Nozic, *Anarchy, State and Utopia*, Harvard University Press, 1973; Hutton, op. cit., p. 68.
30. R. Posner, *Economic Analysis of Law*, (4th edn), Little Brown, Boston, 1992; F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge, Mass, 1991; B. Cheffins, *Company Law, Theory, Structure and Operation*, Clarendon, Oxford, 1997; J. Dine, *The Governance of Corporate Groups*, Cambridge University Press, 2000.
31. A. Rowell, *Green Backlash*, Routledge, London, 1996.
32. Genesis 2:27–28 'So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said to them, Be fruitful and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth'.
33. Rowell, op. cit., p. 9 citing speech by Chip Berlet.
34. National Resources Defence Council, *Breach of Faith* 1995, cited in Rowell, op. cit., p. 32.
35. P. Drahos and J. Braithwaite, Global Business Regulation, Cambridge University Press, 2000.
36. Hutton, op. cit., pp. 50–51.
37. Hutton, op. cit., p. 51.
38. Hutton, op. cit., p. 61.
39. J. Harris, *Property and Justice*, Clarendon: Oxford, 1996, p. 141.
40. Harris, op. cit., p. 146.
41. Harris, op. cit., p. 160.
42. Making a 'property claim' about intellectual property will have the same regressive effect.
43. Harris, op. cit., p. 161.
44. Although, as Paddy Ireland notes this will be a difficult process; P. Ireland, 'Property and contract in contemporary corporate theory' (2004) *Legal Studies*, 451.
45. P. Ireland 'Company law and the myth of shareholder ownership' (1999) *Modern Law Review* **62**, See also J. Hill 'Visions and revisions of the shareholder' (2000), *American Journal of Comparative Law* **39**.
46. P. Ireland, 'Company law and the myth of shareholder ownership' (1999), op. cit.

47. L. Underkuffler, *The Idea of Property*, Oxford University Press (2003).
48. 505 US 1003 (1992).
49. S.C. Code Ann 48-30-10 et seq 1987 US
50. Underkuffler, op. cit., p. 24 et seq.
51. 341 US 114 (1951).
52. Underkuffler, op. cit., p. 26.
53. Ibid., p. 27.
54. M. Radin, 'Property and personhood' (1982), 34 *Stanford Law Review* 957.
55. Underkuffler, op. cit., p. 27, heartening to hear this after years of President Bush asserting otherwise.
56. It is unclear exactly how this theory adapts to one-person companies.
57. S. Bottomley, 'Taking corporations seriously: some considerations for corporate regulation' (1990), 19 *Federal Law Review* 203.
58. D. Sugarman and G. Rubin (eds) *Law, Economy and Society, 1750–1914*, (Professional Books, Abingdon, 1984) note (at 12–13): 'The ideology of freedom of contract was an important element in the liberalisation of English company law in the 19th century … However, as in other areas of private law, the power of freedom of contract, the rise of legal formalism and perhaps, on occasions, a sympathy for these agencies of economic growth, encouraged the courts frequently to adopt the mantle of legal abstentionism rather than the watchdog.'
59. Ibid., p. 209.
60. M. Stokes 'Company Law and Legal Theory' in W. Twining (ed.) *Legal Theory and Common Law* (1986, Blackwell, Oxford), pp. 155, 162.
61. S. Bottomley, 'From contractualism to constitutionalism: a framework for corporate governance' (1997), *Sydney Law Review* 281.
62. Ibid.
63. Underkuffler, op. cit., pp. 29–30.
64. Gunther Teubner, 'Corporate fiduciary duties and their beneficiaries: A functional approach to the legal institutionalization of corporate responsibility' in Hopt and Teubner (eds) *Corporate Governance and Directors' Liabilities* (1987, de Greuter, Berlin) 149, at p. 157.
65. Ibid., at p. 160.
66. Ibid., at p. 165.
67. A. Berle and G. Means, *Modern Corporation and Private Property* (New York, Macmillan 1962).
68. M. Wolff 'On the nature of legal persons' (1938) *Law Quarterly Review* 494.
69. Ibid., p. 499.
70. M. Van Hoeke, *Law as Communication*, Hart Publishing, Oxford, 2002, p. 8.
71. J. Habermas *The Theory of Communicative Action, Vol I: Reason and the Rationalization of Society, and Vol 2: Lifeworld and System; A Critique of Functionalist Reason*, translated by T. McCarthy, Polity Press, Cambridge, 1987.
72. M. van Hoeke, *Law as Communication*, Hart Publishing, Oxford, 2002, p. 39.
73. Ibid.
74. M. Blecher, 'Law in Movement Paradoxontology, Law and Social Movements' Chapter 4, this volume, citing G. Teubner, *Digitalverfassung*, (manuscript 2001) with respect to attempts to cope with such 'limitations' through the establishment of 'civil constitutions'.
75. M. Blecher, citing Ulrich Beck, *Gegenmacht im globalen Zeitalter*, Frankfurt: Suhrkamp, 2002; D. Zolo, *Globalizzazione*, Roma-Bari: Laterza, 2004; J. Habermas, *Ist eine Konstitutionalisierung des Völkerrechts möglich?*, in: *Die Spaltung des Westens*, Frankfurt: Suhrkamp, 2004.
76. M. Blecher, citing the contributions of S. Mezzadra, E. Rigo (*L'Europa dei migranti*), E. Balibar (*L'Europa, una frontiera 'impensata' della democrazia?*), A. De Giorgi (*L'Europa fra stato penale e nuova cittadinanza*) and M. Palma (*L'Europa e l'ossessione della sicurezza*), in: G. Bronzini, H. Friese, A. Negri, P. Wagner (eds), *Europa, Costituzione e Movimenti Sociali*, Roma: Manifesto Libri 2003.

77. It is is accepted that it can never be totally achieved due to the inevitable selectivity of decision-making, but must always be pursued to realize as much as possible the unlimited potentials by temporalizing the standards of selectivity and increasing the participation of interests involved).
78. M. Blecher, citing, as an example for such an approach in the field of legal reform in so-called 'transition countries' and a respective concept of comparative law, G. Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law', in: *Utah Law Report* No. 2 1997, pp. 259–74.
79. D. Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) *European Journal of International Law* 685.
80. See on this point M. Blecher 'Environmental officer: management in an ecological quality organisation' in G. Teubner (ed.) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organisation*, John Wiley, London, 1994.
81. I am grateful to Bob Watt for this point.
82. C. Parker, *The Open Corporation*, Cambridge University Press, Cambridge 2002, p. 203.
83. P. Drahos and J. Braithwaite, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000; see also J. Dine and B. Watt 'Sexual Harassment: Hardening the Soft Law' (1994) European Law Review 104.
84. C. Parker, *The Open Corporation*, Cambridge University Press 2002, p. 16 and chapter 2.
85. Cooter has analysed a reverse of this process: arguing that in a large organisation the self-interest of employees is imperfectly aligned with the interest of the organisation 'Internalising an occupational role involves accepting the norms of an occupation so intimately that they enter the individual's self-conception', R. Cooter 'Law and Unified Social Theory' (1995) 22 *Journal of Law and Society* 50.
86. Which a number of studies have shown to be ineffective and leading to deception and avoidance; see I. Ayres and J Braithwaite, *Responsive Regulation*, Oxford University Press, Oxford, 1992; R. Chambers, *Whose Reality Counts*, Intermediate Technology Publications, London 1997; J. Dine, *Criminal Law in the Company Context*, Dartmouth, Aldershot, 1995; J. Dine, *The Governance of Corporate Groups*, Cambridge University Press, Cambridge, 2000.
87. Ayres and Braithwaiteop. cit., p. 101.
88. Ibid., p. 102.
89. A procedure not dissimilar to the original design for EEC Directives.
90. C. Parker, *The Open Corporation*, Cambridge University Press, Cambridge, 2002, p. 15.
91. Ibid., p. 116.
92. See detailed discussion of risk assessment, below.
93. M. Gladwell, 'The talent myth', Times, 20 August, 2002.
94. See also B. Mclean and P. Elkind, *The Smartest Guys in the Room*, Viking, London, 2003; B. Cruver, *Anatomy of Greed*, Arrow, 2003.
95. J. Dine, 'Risks and Systems: A New Approach to Corporate Governance and the European Employee Consultation Stuctures?' 2001 *International and Comparative Corporate Law Journal*, **3** (2), p. 299.
96. [1999] 1 BCLC 433.
97. Under s6 (1)(b) Company Directors Disqualification Act 1986.
98. *Re Barings*, judgment of Jonathan Parker, p. 481.
99. *Barings* op. cit., p. 499.
100. I am grateful for my colleagues at the Canberra conference of Corporate Law Teachers Association of Australia and New Zealand 2004 for raising this issue. In the Australian HIH collapse a different division of responsibilities between managers and directors was suggested by the investigating Commission. See *Collapse*, CCH Australia, 2001.
101. See Royal Society, *Risk: Analysis, Perception and Management*, Royal Society, 1992, p. 90. See also Julia Black, 'Perspectives on derivatives regulation' in *Modern Financial Techniques, Derivatives and Law*, A. Hudson (ed.), Kluwer, London 2000; R. Baldwin,

'Introduction – risk: The legal contribution' in *Law and Uncertainty: Risks and the Legal Processes* (R. Baldwin (ed.), Kluwer, Berlin, 1997.

102. Drawing (*inter alia*) on the work of the Basle Committee on Banking Supervision. See, for example *Risk Management Guidelines for Derivatives*, Bank for International Settlements, Basle, July 1994.
103. Sections 2–6 of the FSMA set out four objectives; to maintain confidence in the financial system, to promote public understanding of that system, to secure the appropriate degree of protection for consumers and to reduce the extent to which it is possible for a financial services business to be used for a purpose connected with financial crime.
104. *Building the New Regulator* (Financial Services Authority, 2000).
105. Ibid., para 25.
106. See now the combined Code, para 12.43A Listing Rules, in force 11 January 199 (Stock Exchange, London).
107. Code Principle D.2.
108. *Internal Control: Guidance for Directors on the Combined Code*, Stock Exchange, 27 September 1999.
109. *Modern Company Law: Developing the Framework*, para 5.88 and the Companies and Government Departments (Reporting) Bill 2004.
110. Ibid.
111. Not only for lack of enforcement powers in the hands of employees qua employees but also because the wording of the section is vague and any enforcement action would probably have to show total disregard for employees' interests (the weight to be given to each interest group is introduced by this formal identification of stakeholders).
112. EC Treaty, Article 230.
113. I. Ayres and J. Braithwaite, *Responsive Regulation*, New York, Oxford University Press, (1992), Ch. 3.
114. Ibid., p. 82.
115. Ayres and Braithwaite, *Responsive Regulation*, p. 82.
116. S459 CA 1985.
117. See *O'Neill v Phillips* [1999] 2BCLC 1.
118. S6 Company Director Disqualification Act 1986.

4. Law in Movement: Paradoxontology, law and social movements

Michael Blecher*

'All is possible and nothing can I change' (N. Luhmann)
'Also impossibilities are limited' (R. Wiethölter)
'You don't have no chance, so utilize it" (H. Achternbusch, slogan of social movements in Germany in the early 1980s)

1. SUMMARY

Law is in paradox movement. It organizes a continuous battle about normative standards, permanently deconstructing the restrictions of the global social system on democracy, common welfare and justice. The latter is presented as the continuous development of the potentials of autonomous personal and social spheres structured by temporary legal definitions of reciprocity. Accelerating the change of legal standards for political and economic organization means also pushing for the change of law's own procedural and substantive parameters which were supposed to immunize the social system against uncontrolled transformations. While doing so, 'law in movement' acts 'politically' and in inevitable affinity to the social movements of today which struggle against social immunization beyond systemic borders and are in continuous self-transformation. The recognition of this affinity and the reconstruction of Ihering's 'battle for law' as 'battle of the movements' are presented as necessary requisites for the continuation of postmodern critical legal thought. The chapter presents the consequences of this approach for the (re-)organization of the legal system and for legal education.

2. LIMITED IMPOSSIBILITIES

In order to reproduce themselves, individuals and social entities ('psychic and social systems') use distinctions which define them as 'this-and-(not)-that'. The human mind uses thoughts to construct it-'self' with respect to an-'other'.

Social entities (including 'society' as such) use communicative acts which attribute social relevance to events. As regards specialized social entities like law, politics and economy, each of them has developed a core distinction (or 'code') during its historical evolution in order to carry out a particular social function. Law attributes the value of 'legal'/ 'illegal' or 'lawful/ unlawful' to a social event; politics distinguishes relations with respect to power or non-power aspects; economics runs alongside definitions of 'having/ not-having' or 'paying/not-paying'; science tries to separate true from false knowledge. As all these distinctions basically use binary logic, one can easily understand that, in a complex world, the same event can, for example, be defined as being 'legal' in one context and 'illegal' in another. How can a transnational enterprise act legally with respect to the law of its rich Western home country while one of its subsidiaries carries out labour law or human rights violations in a poor country of the world's South, and is not prosecuted there because the country has not developed adequate labour laws due to its dependence on direct investments such as the ones carried out by the subsidiary, or simply because of the subsidiary's powerful standing in that country? 'Easy', says classical company law jurisprudence, the action of the subsidiary cannot be attributed to the 'mother' abroad as the subsidiary is legally independent.[1] So it seems you have just to apply the right distinctions to make contradictions, collisions or conflicts between laws 'legally' disappear.

But, as we all know, the 'movements' of social development put pressure on such 'conceptual perversions' in order to create change. Movements attack the Babylonian tower of inadequate distinctions and descriptions and require new and different ways of treating social organization and its problems.[2] Generally speaking, for social entities, it is the incapacity to cope with social *conflicts* through existing parameters which brings about the crisis of their (self-)descriptions. For single humans, it is the breakdown (or 'cognitive dissonance') of their personal identifications/identities experienced ('in relation' to their body) as *suffering* which requires a change or re-combination of self-descriptions, sometimes requiring therapeutic vehicles. We call the fact that each (personal or social) distinction and description is inadequate with respect to (all) the other possibilities *contingency*: distinctions and descriptions are contingent or possible in a different way with respect to the exceeding possibilities or the 'potentia' (Negri, Deleuze, Spinoza) inherent in any distinction.[3]

Contingency has two aspects. One regards the re-combination or re-definition of the two 'values' of a distinction, for example, when a High Court changes its jurisprudence and stops defining sit-ins on railway tracks as 'violent' if this act of disobedience is proportional to the target it wants to achieve, say to kick off public debate on political decisions which endanger local and global public safety, like the introduction of nuclear technology.[4] Or when the

destruction of genetically modified crops is not defined as criminal damage if the force used is reasonable in defence of nearby organic crops.[5]

Secondly, in relation to the seriousness of the problem which caused the crisis and loss of plausibility, contingency may open another and stronger option, that is, to abandon a distinction and (self-)description as such and to choose another distinction to resolve the problem in question. This is, for example, the case when political pressure de-legitimizes the 'trips' of WTO intellectual property law to rule on low-cost-production of important medicine by countries of the global South. The protest refuses to accept that parameters of legality/illegality can resolve the problem and requires a globalized political decision (which, at a later stage, will certainly 're-enter' into legal forms).[6]

3. THE HERETICAL QUESTION

When looking at the inadequacy of a distinction as such, we have actually left the level of 'collisions' or 'contradictions'. We encounter 'paradoxes': in such situations, standing on one side of the distinction, say 'legal', we immediately feel ourselves catapulted to the other side, say illegal, and the effect is that the entire distinction is suspended. The 'heretical questions' which can create this situation are the following: is the distinction of legality/illegality itself legal or illegal? Is the distinction between good or bad itself good or bad? And so on. These questions make us discover contingency and the paradox access to the whole variety of possibilities which might be used to transform social and personal constructions. Paradoxes are not logical mistakes which have to be eradicated in order to proceed. They appear to be an unconditioned, ubiquitious and central moment of social dynamics: they replace the transcendental subject and any other 'foundation tale' and let us discover personal and social structures as contingent phenomena.[7]

Let us show this in the paradox-driven legal development of *human rights*.[8] The paradox circular relation between society and individual (society constitutes the human, which constitutes society) is the 'a priori' on which all historical variants of human rights solutions are based. In spite of all 'socializations', human beings of flesh and blood, which have been created by social communication as 'persons', raise their voice and insist on their 'rights' as individuals/bodies which have not been constituted by communication. This 'tension' between the individual and society is captured by functional social structures which are continuously de-constructed and re-constructed during historical development. Roughly, the development steps have been: 'human nature' in the old natural law; agreement of individuals through 'social contract' and 'civilization' of human beings equipped with

'natural rights' through the (self-)constitution of (state) sovereignty; validity of 'subjective rights' a priori; political transformation of individual rights into positive law where the exercise of these rights must always anticipate the 'needs' of social institutions. Today: scandalization of global society in front of human rights violations. Present collisions: human rights violating human rights wars; the human right of the poor to appropriate necessary goods and services, the 'scarcity' of which somebody else is exploiting based on human rights. Proposed solutions: global society 'to serve' human rights development: autonomous self-organization under conditions.[9]

If paradoxes, and not collisions, contradictions or antagonisms, appear to be the moving factor of social and legal development, it becomes clear that any attempt to definitively overwhelm them through de-paradoxing teleological constructions is doomed to fail. The totalitarianisms, world wars, and ecological disasters of the 'short' twentieth century are examples of such attempts. The more any 'telos' tries to eradicate the paradox and its de- and reconstructive force, the more disastrous and harmful the return of the excluded.[10]

4. THE ETHICAL 'POTENTIA'

However, these disastrous effects of attempts to totally negate the paradox and its 'potentia' not only lead to a 'functional' recognition of its 'logics' but also to the 'discovery' of its *normative* aspect.[11] The 'potentia' ('everything possible is indeed possible') appears to be the origin of all 'foundation symmetries' and the constituent resource for personal and social constructions, that is, among others,

- The realization of the democratic 'common' (good) in politics, which requires the permanent transformation of existing forms of ('unequal') political participation, representation and self-organization;[12]
- The realization of the 'common welfare' in economics, which requires the permanent correction of the access to 'scarce' goods and the redefinition of 'property';[13]
- The realization of 'justice' in law, which requires the permanent adaptation of standards, fora (decision-making bodies) and procedures to guarantee the development of autonomous social spheres and their reciprocity;[14]
- The realization of 'the truth' in science, which requires the permanent construction and adaptation of applicable knowledge;[15]
- The realization of human 'liberty', which requires the permanent development of single autonomy in relation to the 'common' and against social alignments.[16]

As regards the 'origin' of law in its meaning of 'justice', collective organization could only be 'just' as far as it provided for the realization of all (!) the possibilities of construction for all (!) participants of a social entity. It is the task of law to allow this unconditioned justice to emerge as much as possible in the concrete distinctions and constructions which define the parameters of social order. However, on the one hand, the complete emergence of this 'justice' (*all* possibilities for *all* participants) is out of reach because any concrete social entity can only be realized through 'asymmetric' selective creations from that space of unlimited possibilities. On the other hand, the permanent attempt to realize 'justice' is necessary because any restriction or exclusion produced by a social entity is only legitimate as far as it tries to realize the maximum of possibilities for the maximum of single and collective entities involved. This ethical claim of the law to realize itself in relation to the ever exceeding possibilities and therefore to provide for 'world justice' stands (and continues to stand) at its very 'origin'.

Law's origin is, therefore, the unconditioned undetermined 'potentia' which is the origin of any social construction. 'Justice' is the name for this potentia with respect to the social role that law is supposed to play. Law's origin is, therefore, definitely not 'violence' as Benjamin, and others after him, put it. Violence is a phenomenon which, so to speak, comes 'later' as it accompanies social distinctions and exclusions which the same law is supposed to define (as legal or illegal).

The claim to realize the maximum of possibilities is obviously leading the law to be 'critical' towards its own definitions: no concrete decision can ever lose its inadequacy or injustice with respect to the ever exceeding possibilities. This is why it is the task of law to continuously improve the parameters and procedures for its decisions aiming at an increase and co-ordination of possibilities which social entities may realize. One can say: 'Law emerges because it is never enough'. This task corresponds to an attitude of 'taking care of' or 'cultivating the paradox of law'.

The normative effects of the paradoxontology of law correspond to those of other social spheres mentioned above, like those of politics (the continuous realization of the common good) and economy (the continuous realization of the common welfare). We can now say that the disastrous effects described above do not just occur because of the irreducible selectivity of personal and social 'realizations', but also because of the neglect of the 'ethical-normative' aspect of continuously realizing the maximum of possibilities of all the individuals and social entities involved. It is this very neglect which leads the history of personal and social constructions to crisis and breakdowns – and 'back to the productive source' where the chance of relaunching the ethical-normative aspects for the new realizations of the 'potentia' reappears.

5. CULTIVATING THE PARADOX (OF LAW)

By assuming this normative task of cultivating the paradox we distinguish ourselves from other approaches to paradoxes, namely those of N. Luhmann and J. Derrida. Luhmann would deny that the logics of re-paradoxalizations and de-paradoxalizations which move the development of social and psychic systems contain any normative aspect. Derrida (relating to Levinas) understands the paradox as a transcendental source and turning point for his de-constructions in order to gain mystical 'alterity'.[17]

Derrida's

> main point seems to be to go beyond the mere disruptions of deconstruction and to bring a disquieting awareness of transcendence back into the highly rationalized worlds of the economy, science, politics and law. His astonishing theses have to do with the paradoxical effects of the 'pure gift' as against the profit-led economy, of 'friendship' as against professionalized politics, of 'forgiveness' as against secularized morality and of 'justice' as against highly technicized law.[18]

We can, on the one hand, accept such 'representations' of the 'potentia';[19] but, on the other hand, we insist on their 'immanence' with respect to the mentioned distinctions and the ethical requirement of their 'realization'. The distinction between transcendence and immanence, which is traditionally the leading distinction of religious systems, has revealed to be another distinction 'in crisis'. With G. Teubner, we can ask why the religious system should be able to monopolize the distinction of 'transcendence and immanence' if all the other specialized subsystems are not able to monopolize their functional roles with respect to society's need for change. The political *system* appears to be incapable of exclusively establishing adequate 'power relations'. The legal *system* appears to be incapable of exclusively establishing 'justice'. The economic *system* appears to be incapable of exclusively establishing 'global social welfare'. The scientific *system* appears to be incapable of establishing 'the truth'.

As regards the 'failures' of the scientific system,[20] the production of knowledge is, on the one hand, systemically concentrated in universities and research centres. On the other hand, parallel to this 'administered knowledge', knowledge production and reflection take place in other subsystems (legal theory, political theory, economic theory) and in the development of the 'general intellect' or 'collective intelligence' of interacting persons who create a global public opinion and, beyond the latter and more specifically, global social movements.[21]

Likewise, *all* kinds of systemic 'administration' of social (legal, economic, political, scientific, etc.) functions are 'overlapped' by the political (!) aspiration to enlarge and substitute them with (legal, economic, political, scientific,

etc.) alternatives. On the one hand, these core functions produce social structures while, on the other hand, their distinctions are continuously liquefied and appear to be treated 'elsewhere' and 'differently' in order to come to terms with their 'potentia'.[22] This scenario corresponds to Deleuze's and Guattari's 'mille plateaux',[23] or to a network of autonomous entities,[24] or to a continuous 'metamorphosis' of distinct spheres.[25] Luhmann's 'functional differentiation of systems' covers only certain aspects, while Derrida's paradox unification through a mystically 'generalized other' loosens the grip of its productive deconstructions through this quasi-religious interpretation of the potentia. We do not want to revitalize the distinction of immanence and transcendence. Nowadays, such attempts often lead back (in spite of calling themselves 'New Age') to an attitude which tries to discover the a priori given 'meaning' of personal, social and natural phenomena through a socially neutral and ahistoric interiority which is concentrated on the recognition and interpretation of 'signs'. We insist instead on setting those psycho-social energies of the potentia free as 'political' energies against false 'post-premodern pacifications'. This scenario implies permanent political confrontation and negotiation 'between autopoietic systems and poietic non-systems'.[26] The forms of autonomous *cooperation* (from enterprise organization to solidarity, friendship, gift giving, etc.) and the *conflictual negotiation* of contingent definitions create the social (dis)order. This is the process which the law has to 'cultivate'.[27]

We have reconstructed the paradox as the *unconditioned, undetermined and unlimited 'potentia'* inherent in any distinction, and this will allow us to establish normative parameters for the *reciprocity* of autonomous social spheres, the 'post-feudal project which was left unfinalized by both, bourgeois and anti-bourgeois theory'.[28] Law basically accepts the autonomous personal and social spheres as actual realizations of the unlimited space of possibilities. But it also reconstructs their 'relations' in a way that permits a possible maximum to be realized for all of them. This reconstruction of overall 'bonds' occurs in a permanent temporary mode in order to guarantee *'justice'* as the first immanent quality of law. The latter accompanies as a permanent critical parameter the second quality of law, its definitions of *(im)partiality*. The old dichotomies of subjects and institutions, private and public, contract and organization and so on have lost their capability to define the reality of a post-industrial and post-national society. At stake now is the relation of law to a whole variety of autonomous social spheres and their rationalities and normativities. The leading distinction for legal constructions becomes, therefore, *'partiality and impartiality'*. That means to *guarantee autonomous spheres and simultaneously reserve control mechanisms with respect to their continuous transformation towards the realization of unconditioned justice*: law provides that all autonomous spheres (including itself)

reciprocally respect each 'other' in the light of the ever exceeding possibilities, that is in a condition of permanent change of all their constructions and productions. In other words, their inevitable asymmetries are continuously put under the pressure of 'normative symmetry attempts' without making them lose their autonomy to a new 'unity'. The space of 'unity' has been occupied by the paradox! This is what Hardt and Negri call 'the postmodern production of the common based on the common potentia.'[29]

6. THE POLITICS OF THE 'MULTITUDE' AND THE MOVEMENT OF THE MOVEMENTS

In this sense, the 'multitude' (Hardt and Negri, Deleuze, Spinoza) of social movements reminds organized political power and state sovereignty that they are contestable from the point of view of the maximum realization of the (other) possibilities of political construction. The 'multitude' is the 'incarnation' of the potentia in terms of 'the living alternative that grows within the Empire.'[30] In other words, 'multitude' stands for the whole variety of autonomous single and social actors ('singularities') representing the 'breeding ground' for new forms of political action and organization.[31] The crisis which is automatically inherent in any concrete and selective government structure, concerns today the model of liberal democracy, political party representation, the nation state and international relations. The crisis visibilizes the political 'condition of being' according to which the legitimation of any government lies in the cultivation of the 'potentia' of all personal and social spheres involved.

This is what *democracy* has always stood for. As 'origin' of political self-organization, it remains a continuous challenge for the organized political system even if its realization cannot avoid the limitation of asymmetric selectivity compared to all (!) possible solutions. As 'justice' continuously corrects the social order and the normativity which it produces, 'democracy' as the political reciprocity program continuously confronts the existing forms of political organization and representation with their possible 'other' and forces them to open for 'alternatives'. A political system which responds to this concept of 'liquid democracy' will be based on cooperation and conflict without any 'teleological hierarchy' between them. Conflict will certainly occur once cooperative solutions have been found because of the inevitable inadequacy (asymmetry) of the latter with respect to the unlimited possibilities (the symmetry) of the potentia. It is the task of legal *constitutions* to, on the one hand, cultivate this continuous political transformation as a permanent '*acte constituant*', and to guarantee a 'conflict culture' which allows the creative political conflict to take place preserving the openness of this process

against any false uni- or multilateral 'pacifications' or 'synthesis'. On the other hand, the definition of reciprocities (the 'common') between the whole variety of autonomous spheres (functional systems, individuals, collective entities, institutions, organizations), is not just a political project where the law would have to obey legislative actions and, above all, omissions.[32] The compensation of asymmetric relations and the definition of the 'proportionality' of the forces on the field becomes law's own creation beyond the limits of institutional politics. This will have consequences for the way the legal institutions and doctrines are organized as we will see in a later section.

As law represents the 'non-location', the 'blind spot', or, in a positive version, the 'creative space' of exceeding possibilities which require the maximum of realization through 'more just' constructions and (self-)descriptions, law shows a special affinity to the 'multitude' and to the new forms of global social movements which have appeared in recent years. These new movements differ from their predecessors as they set out to enlarge the possibilities of global development without producing new mechanisms of inclusion/exclusion. However, the self-reflection of the 'movement of movements' could avoid such mechanisms only if it were able to maintain the continuous reference to those exceeding possible realizations, if its political 'power' continues to nurture itself from its inherent constituant 'potentia'. The new movement aims to do exactly this when it declares that power or 'empowerment' is not what it aspires to and when it refuses to occupy organized global political positions or to accept 'concessions' for certain forms of 'spontaneous' protest or scandalization.

On the one hand, the movement of movements can cultivate its 'potentia/posse' only as long as it reproduces itself as 'multitude' beyond any forms of 'incorporation' and as long as it 'plays' with the roles attributed to it escaping from such definitions through a continuous 'exodus' (Negri). This is why the movement, in spite of participating in the efforts of re-constitutionalizing the national and global political, economic and legal systems, has always refused to become a 'global people'.[33] It has good reasons to believe that a unifying organization such as 'people' is a decadent form of the same multitude which brings about the 'membership' ('citizen') question and all its well-known disastrous mechanisms of inclusion/exclusion. The history of the nation state, but certainly not only this history, can be re-read in this way.

On the other hand, it is obviously impossible for the multitude not to fall into the 'traps of paradoxontology'. If it wants to realize new possibilities, each movement is forced to pass from simply 'being against' existing forms of the social system to defining concrete alternatives for the solution of social problems. Pure deconstruction ('resistance') may seem the ultimate heresy against the existing system of power. However, if the action of the multitude is limited to pure deconstruction, systems theory would be right when stating

that social movements take part in the system and reproduce it also by just 'saying no'. In this case, the system could easily 'adapt' to these 'negative parts' of society and create organizational devices to cope with them (from explicitly ignoring them to their criminal prosecution).[34]

It may be true that

> There is never in the multitude…any obligation in principle to power. On the contrary, in the multitude the right to disobedience and the right to difference are fundamental. The constitution of the multitude is based on the constant legitimate possibility of disobedience. Obligation arises for the multitude only in the process of decision making, as the result of its active political will, and the obligation lasts as long as that political will continues.[35]

However, it is the same self-recognition and claim to be the 'living alternative that grows within the Empire' which inevitably binds the multitude and forces it to realize its 'will' through choices, both with regards to forms of political organization and to the definition of a type of program.[36] In spite of the 'exodus-principle', it seems, then, also inevitable that at least parts of the movement will be absorbed by the decisional and organizational structures of existing politics which, in a best-case-scenario, 'learn' and change their parameters by introducing those proposed by the movements. Consequently, choices made by (parts of) the movement may then result in an increasing detachment from the movement's starting point, and the realization of further possibilities may require new movements which represent the 'potentia' beyond the constructions which the previous movement had been able to propose and realize. The recent history of the German ecological movement gives a good example of this process. Last but not least with reference to this experience, the new movements refuse to get organized as a political party. Even if, due to the historical 'obsolescence' of democratic representation through political parties, this decision appears to be correct, it does not change the paradox mechanisms which we have described here and which are linked to any selective decision-making.

The latest variant of such an 'absorption of protest' is probably represented by the so-called 'non-governmental organizations' (NGOs). Their ambivalence derives from the fact that, on the one hand, they fill the vacuum left by the increasingly obsolete liberal-democratic forms of political representation and extend valuable assistance where the public sector does not assist (any more). On the other hand, NGOs often 'cushion' or impede real transformation of exisiting systems. No wonder that, in recent years, big bi- and multilateral 'donor organizations' like World Bank, UNDP and USAID have produced countless NGO projects in so-called transition and developing countries. (Potential) activists quickly become well-mannered employees, and, as NGOs are largely financed by and responsible to those West-bound agencies, one can

expect that 'everything remains in good order'. Protest which may still arise because people do not find their cause adequately represented, can easily be set aside as pure 'disturbance', or, more post-modern, as 'terrorism'.[37]

Systems theory further argues that movements interprete any successful 'co-determination' of 'the system' as 'defeat' because their very reproduction as 'movement' seems to come to an end. The fact that paradoxontology also requires mechanisms of variety, selection and (at least temporary) retention may indeed provoke frustration and depression. But their 'hidden' reason, which systems theory cannot see due to its invisibleization of the normative aspects of paradoxontology, is that the mentioned choice always develops 'less' with respect to the deconstructive 'totality' of possibilities which the potentia reserves. Paradoxically, it is, therefore, the very 'constraint of selectivity' which guarantees that the movement will never end as it prevents the totality of exceeding possibilities from being consumed. 'Defeat' can, therefore, only mark an 'episode' in a movement's constructive history.[38] The understanding of this paradoxical scenario will fuel the continuous development of constructive alternatives and have two positive side-effects. On the one hand, it increases the pressure on existing systemic structures. On the other hand, it guarantees movements the adequate amount of self-criticism and self-transformation in order to avoid the well-known (post-revolutionary) phenomenon that, after having re-established access to the moving potentia by deconstruction, the necessary re-construction of the 'political will' may bring about (fall back into) new monstrous socio-political constructions.[39]

It is true that movements cannot but desire the realization of the maximum of potentia. This is their reproductive (logical) motor, but also their normative task and self-understanding. Now, it may seem improbable that complex post-modern societies will encounter a shift of all or the great majority of their distinctions which would bring about a 'revolution' like that in France which marked the end of a complete – the 'ancien' – 'regime' with that famous sensation of a 'ripe fruit' which is going to be consumed. However, the revolution of the regimes of Eastern Europe after 1989 shows that at least the entry into post-modernity can occur even in the so-called developed world 'in a disruptive way'. The following transformation processes will probably become more complex, as post-modern societies have largely been recognized as being based on 'events' and have started to build their reproduction on the change of their distinctions and programs. Cultures of (class, gender, ethnic, etc.) 'prejudices' which do not have much desire to change, certainly continue to exist (and may even 'defend themselves' by organizing transformation elsewhere through 'permanent wars'); but the post-modern 'paradigm shift' lies in the fact that these prejudices are 'constructions', that is they are neither imposed by necessity nor by destiny; they are, as mentioned above, 'contingent', possible in different ways. The logical and

normative conditions simply remain invisiblized as long as concepts, cultures and programs and the self-described psycho-physical 'health' of the humans involved are able to 'resolve' collisions, contradictions, conflicts and suffering without losing their plausibility because of increasing normative social and psychological pressure.

Then, the movement's target must be to *exercise that pressure on the normative parameters for the limitation of transformation created by social 'immunity systems' which determine through the proceduralization and neutralization of conflicts what should still be part of the system and what should not.*[40] In order to do this, the inevitable paradoxical effects of deconstruction (= reconstruction of the potentia) and re-construction (= selective deconstruction of the potentia) must be 'exploited and canalized' through the introduction of mechanisms of continuous revision of the organizational and substantial choices, that is through their 'acceleration' (Deleuze) and the attempt to strike a balance between the necessity of limited (self-) construction and the nutrition with 'better' alternative possibilities. The acceleration of change is, therefore, not an objective in itself,[41] but is subordinated to a 'normative discovery context' of defining and adapting social reciprocities.

7. PROCEDURAL JUSTICE: LAW IN MOVEMENT

In the eyes of systems theory, law is society's main 'immunity system'.[42] If the target of social movements is to change the parameters of immunity systems, the battle for a different law becomes one of its main objectives. In this respect, it coincides with law's own self-critical responsibility to continuously 'increase justice' through the development of contingent forms of social reciprocity and to protect society against the risks of its established immunity mechanisms of inclusion and exclusion. The question arises, then, regarding what the procedural steps for the production of such legal structures look like.

1. First, the claim of 'justice' has to be transformed into normative contradictions and collisions which can be decided by decision-making bodies ('fora') using suitable standards. In this respect, it has to be taken into account that the form of contradiction or collision itself is contingent, that is possible in a different way, and changes with reference to changing social contexts. It cannot be decided a priori what will collide – norms, principles, social models, theories, rationalities. And, as we have seen above, it is definitely useless to establish first and second range contradictions and put all efforts into the (revolutionary) 'victory' of one of them. The oscillation between the 'underlying'

paradox and deparadoxing differences or distinctions cannot be avoided. The construction of dialectic contradictions remains without synthesis. *The 'revolution' takes the form of an acceleration of the continuous substitution of personal and social distinctions and (self-) descriptions.*

2. In order to produce these normative collisions and define the standards to decide on them, law must relate to the 'reasons' of other autonomous spheres in the 'network', that is the systemically organized spaces of economy, politics, science, religion, arts, and so on, their recombination in other autonomous contexts and the spheres of single humans. Law must understand these reasons in order to define its own. It must therefore refer to the whole variety of social theories and their competing claims for social construction. The theories in question today are, mainly: the systems theory of N. Luhmann and others; the neoliberal or institutional economics of F.A. Hayek and others; the critical philosophy of J. Habermas and others; the post-Marxist theory of M. Hardt, A. Negri and others. If undetermined justice, the maximum of possibilities for all social actors, has to be realized, law has to continuously reflect these theories in order to strike a precarious normative balance between 'interests' involved. This process is indispensable for the development of adequate, that is temporarily justified, standards. But it must also take into account that all social theories have their 'blind spot', their constructive selectivity, which cannot grasp the entirety of social and personal phenomena because there is no privileged point from which everything can be observed 'objectively'. The paradox itself becomes the substitute for this point of view.

   Against all odds, this does not mean falling into a relativist approach as regards the decision between these theories. Neither is there any claim for a 'super-theory'. There is simply, on the one hand, the recognition of an 'empty space' which law uses to continuously create a normative 'plus-value' deriving from a continuous mutual irritation and confrontation of social theories in reference to the relevant social context and the problems in question. By doing so, law creates another (its own) 'social theory' which reflects its normative social function of 'producing justice'.

   On the other hand, there is an intrinsic bias of this legal theory with respect to its normative affinity to those theories which implies the permanent transformation of power(s) previously established by standards, fora and procedures. We recall that the need for any concrete and contextual 'recombination' of theories derives from law's normative task to continuously produce standards for the compensation of the lack of possibilities of autonomies involved. 'Maybe the emancipation of such law from the law envisaged by the rival social theories brings about the chance of its realization. "Law" would then not obey the design of those

social theories but develop its own, in any case neither 'system', nor 'discourse' nor 'enterprise','[43] nor only, so we have to add for the fourth theory introduced here, 'cooperation' or 'collaboration'.[44]

3. This brings us to the third step of legal (de-)construction, that is the 'cultivation of the paradox' already mentioned above.[45] Once normative decisions for social construction have been taken through the creation of standards, fora and procedures, law itself has to provoke the political decision to establish the moment when existing social models and constructions need to be revised with respect to the realization of 'better possibilities', that is, 'more justice'. In other words, *it is the task of the law to increase social pressure on the plausibility of the way society and law itself is built.* The social treatment of paradoxes (the continuous de-paradoxing and re-paradoxing of social differences) therefore appears to be a *political* process which law is provoking. This is the reason one may call such a concept 'political legal theory':[46] law liquefies existing social structures beyond their embeddedness in systemic 'functional differentiations'. The important results of Luhmann's research into the development of functional social (sub-)systems and the fruitfulness of 'underlying' paradoxes are transformed by the political search for more adequate solutions for social organization which point to realizing the potentia of personal and social development at its best beyond the borders of systems. Law has to guarantee this process precisely and becomes '*Law in Movement*': 'The most exciting expectations and hopes would concern the 'Law' (…) which defines (…) the collisions standards for Law-Morality, Law-Politics, Law-Economy, etc., (…) Law as structural coupling of life-world-systems'. 'Protection of rights' and 'protection of institutions' adequately translated would nowadays become *production of legitimate legal protection of freedom functions.*'[47]

This procedural concept of 'Law in Movement' seems to be capable of coping with the above-mentioned logic and normative requirements for social construction under conditions of uncertainty: 'immunity' of autonomous social spheres and their normative standards is accepted as long as their contingent decision-making and organization reflect the 'living interests' of all (personal, social and natural) environments involved. The recognition of autonomies and the definition of their reciprocal bindings include a permanent risk assessment and prevention; not in order to strengthen immunity, which appears to be the natural reproductive trend of autonomies due to the drift towards autopoietic closure but also 'the highest risk of all'. Instead, risk assessment and prevention need to immunize the established social construction against its immunity through the 'obligation to always consider change' in order to realize as much as possible the full range of 'living interests'. This

would paradoxically mean to *increase* the risk to the autonomous sphere in question through the continuous challenge of its structures. In order to achieve this, these spheres are obliged to continuously elaborate all available interests and create new 'knowledge' based on the continuous inclusion of all persons and communities concerned and through the establishment of specific mechanisms of monitoring and control which allow for the constant adaptation of decisions and organizations. These would be the common parameters for the realization of potentia and justice through legal constructions and the establishment of responsibilities and liabilities.

8. LAW'S DEPENDENT INDEPENDENCE

This reconstruction of the affinity of potentia, justice and Law in Movement shows that law cannot be simply understood as an instrument of power and the powerful which the multitude would just need to 'use' strategically.[48] Obviously, law's 'immunity functions' have always created socio-economic, political asymmetries. But the permanent 'battle for law' (R. v. Ihering's 'Kampf ums Recht') has also always tried to de-legitimize and de-construct them with reference to potentia and justice and the realization of alternative possibilities for all singularities involved. During this process, 'law has radically emancipated itself towards self-determination and, nevertheless, depends on nothing as much as on externalities, normativities, structuring, should it not be stolen or get lost.'[49] That means that the struggle always comprises, both the definition of law's dependence and independence. It is bringing the various social theory projects to the forefront together with their political (!) positions on law's 'coupling' with its environments and translates these into 'frictions' between established legal concepts and (self-)critical 'Law in Movement'. This process takes place 'inside' the law, is a 'part' of law. The accusation that law is an 'instrument' for particular interests is itself part of the legal re-construction process.

It is, then, not by accident that the multiple actors of the multitude express their contingent claims for the realization of new possibilities in terms of 'new rights': rights regarding self-determination of autonomous spheres, participation in global decision making, unlimited global migration, citizens' basic salary, free access to socially created knowledge, guarantees for decent labour, and a general right to disobey any unjustified limitation of possibilities.

All these 'rights' are the expression of concrete reciprocities which translate potentia into justice and call for the actors of the multitude to represent them. Therefore, the first quality of 'Law in Movement', 'justice', is always looking for 'new alliances' in order to fulfil its task of increasing its own possibilities and those of other autonomous spaces. In other words, 'Law in

Movement' mobilizes other autnonomous spaces in order to reach its own '*effet utile*'.

9. BEYOND ADMINISTERED TRANSFORMATION

Therefore, if organized social spheres and the 'spontaneous space' they allow for do not try to realize their inherent ethics of reciprocity and change, 'Law in Movement' will react with *indignatio* (Spinoza) and take to the streets together with the present representatives of the multitude. The same distinction between 'organized space' and 'spontaneous space' recently introduced by G. Teubner,[50] remains still trapped in 'systemic logic' as it gives the (sub)systemic organization the right of '*granting spontaneousness*'.[51] If you argue, instead, that the foundation of social normativity lies in the potentia of the multitude and in the irreducible diversity of its realizations, the latter basically transcend any organized systemic definition of 'legitimacy'. However, for the programmed spontaneousness, the non-integrated 'others' are either utilizable for systemic reproduction,[52] or they appear as 'disturbing elements' which are supposed to be treated by the mechanisms which control deviance and change.[53] So in the end again only undesired 'environmental' effects, be they effects in natural environments or other singular or collective environments, press an autonomus sphere 'to react' and change its constructions. Teubner's distinction, therefore, modernizes, but does not change the mechanics of 'openness and closure' (and immunity) which Luhmann introduced for 'systems' and which Teubner now consequently enlarges to other 'autonomies in networks'.[54]

Moreover, the reality of 'organized spaces' has shown that the 'organizational side' usually controls and tends to overthrow its 'spontaneous side', instead of maintaining a relation of 'mutual control'.[55] It seems strange in this context that Teubner attributes the term 'spontaneous space' to 'the market' as against economic (enterprise) 'organization'. This point of view echoes *nolens volens* the neo-liberal ideology of 'free market forces' and does not sufficiently reflect the fact that the market itself is strongly structured and organized. Owing to its asymmetric focus on 'having', the 'open' market has the inherent (paradoxical) tendency to overthrow (corrupt) itself: the competitive pressure to gain an ever bigger share of the market and an ever more powerful position inevitably incites joint economic action, high concentration, monopolization, and the corresponding production(!) of 'spontaneous demand'. The creation of enterprises and their conglomerates is a product of the same (!) process which is hidden behind the myths of contractualism and property rights.[56] Owner and shareholder interests structure competition on the market asymmetrically in a very narrow sense towards

the continuous invention and increase of property and the rise of share prices. The interests of other 'value producers' (workers, creditors, consumers, pensioners, concerned communities, other representatives of common interests) are, in spite of compensative legal mechanisms (labour law, consumer protection law, and so on), subordinated to the former. The neo-liberal enterprise model and its variants which dominate all Anglo-American enterprise concepts focus on strengthening the role of shareholders as they are the 'owners' of the enterprise (or of its 'capital', which amounts to the same thing). Enterprises are rather not seen as entities 'in their own right' with 'social responsibilities' for that mentioned set of value producers or 'stakeholders'. Any action, including Enron-style 'creative accounting', is economically valid as long as it obeys the 'interest bias' which structures the market. It is, therefore, not enough to change the (legal) model of corporate governance towards 'more social responsibility'.[57] The economic model itself would need to be treated as 'contingent', together with its legal 'immunities', including the revision of the leading unlimited property rights concepts, if the economic potentia or the global 'common welfare' of the maximum of singularities are to be increased.[58]

The debate on this has today passed into the realm of 'human rights' with their ambiguous role of, on the one hand, 'conceding (!?!) voice' to the suppressions of common 'bare necessities' in great parts of the world (including the 'developed'!), while, on the other hand, limiting (immunizing) social transformation through an 'asymmetric vision' of these rights. The traditional focus on civil and political rights has been such a limitation for a long time. It is, therefore, an important step to include economic and social rights and to recognize the legal obligation (!) for (national or international) institutions to realize all these human rights.[59] 'The human rights idea has had important, though limited, success in eroding the concept of state sovereignty. Now it is taking on capitalism. The well-being of many millions depends on the success of this project.'[60] Proposals pointing in this direction are the establishment of a (constitutional) right for indebted countries to refuse rescheduling and paying back their debt,[61] or the reform of WTO trading rules as a 'reparation' for countries/regions, the population of which suffered from the centuries-long slave trade.[62] However, for the 'excluded', that is for the majority of the world population, their human rights still remain 'negative freedoms' (against the state). Also the mentioned debate on institutional obligations has not brought about 'positive freedom' for them, that is, the possibility to request material change: they continue to suffer from lack of bare necessities while we talk. Therefore, in order to sustain the mentioned 'institutional measures', it would likewise be necessary to accompany these measures with a 'spontaneous' right (!) for the 'excluded' to take action by 'appropriating their own rights' against the

existing system of scarcity and property, if institutional justice fails to take off and continues to leave them without access to common 'bare necessities' like water, food, shelter, health care, pensions, education, transport, energy and communication. Can the distribution of food from a supermarket-chain to the poor by members of the movement in Rome or elsewhere be declared 'criminal offence', theft, robbery, trespassing, or violence?

The dominant market structure, but also the totalizing tendencies of other 'organized spaces', can provide many other examples for the subordination of 'spontaneous spaces': lack of (legal) recognition of local autonomies brings about a subordination of local markets (of 'the South') to the politics of transnational enterprises (of 'the North').[63] The global crisis which is produced by the 'discovery context' (Hayek) of the neo-liberal market fundamentalism (main effect: 'spontaneous' increase of poverty and exhaustion of the production of demand) brings about a neo-Keynesian warfare economy.[64] The organization of economy and science has enormous problems in recognizing basic remuneration of the 'productive force' called 'general intellect' which is the key (of the flexible and precarious labour) of the 'new economy' as the latter deploys and absorbs the very general functions of human competences to communicate, learn, abstract, memorize, cooperate and (self-)reflect.[65] Instead, the continuous production of global knowledge through single and collective autonomies together with their new communicative media (mobile phones, inter- and intranets) is merely considered from the point of view of exploitation and the *creation of new scarcity* guaranteed and protected by specific legal constructions (intellectual and industrial property, the limitations of a new 'cyber law').[66] The mechanisms of classical representative democracy still claim to have exclusive access to the definition of social problems and their solutions, be they realized in nation states or the present forms of international or supranational conglomerates in spite of their incapability to resolve new global challenges.[67] They invent, for example, new discriminatory policies which restrict free and spontaneous migration and the right to participate in political decision making wherever the 'citizens of the world' are, temporarily or permanently, located.[68]

Against such absorbtion of spontaneity and change, the actual 'incorporations' of the multitude claim the realization of 'utopias' in every location of the global society – 'poietically and unsystemically' and with reference to the reciprocity formula 'justice'. The functionally organized autonomies (economy, politics, law, science, etc.) or their new network combinations could exploit this creativity if they opened their administered 'spontaneous spaces' in order to make continuous 'attempts at global justice'. They would need to convince the actors of the global multitude to participate in their standard-setting and decision-making fora and procedures. That means that organized law and political institutions would need to recognize the

movements' necessary normative social function as a resource for the reduction of global social and environmental risks. Institutional deconstruction and reconstruction would need to be seen as a chance and not as a threat. The inevitable reproduction of the multitude's exodus would need to be accepted as a beneficial part of this process. Activists' manifest or latent criminalization would need to be stopped. Finally, a famous 'popular suspect' regarding law would require a positive re-interpretation: the often bemourned lack of eternal stability, security and reliability is not a deviation from law's 'normality', but law's 'natural state'; only stable adaptations of legal parameters and doctrines to the 'ethics of reciprocity' would be able to promise acceptable social constructions.[69]

Is there presently any chance for such an 'enlightened governance' or is this just wishful thinking? On a global scale, the time may be right, as Hardt and Negri argue,[70] for all economic and political forces 'suffering' from the unilateral (or selective multilateral) order re-imposed by the present Government of the 'only super-power' to enter into a kind of post-modern 'Magna Carta'. The majority of the various 'global aristocracies'[71] seem to be interested in security, the activation of new global productive forces and the integration of the global population into exchange circuits which can only be established under peaceful conditions and cannot but aim at the end of 'preventive' warfare. New alliances, like for example the anti-protectionist movement of the 'Group 20' countries at the Cancun WTO conference, seem to point into this direction. Some of the reforms requested by global social movements appear to be necessary for the renewal of global richness and security. Movements doubt, on the one hand, that those 'aristocracies' point at democracy and expect just another form of 'imperial control'.[72] On the other hand, important parts of global aristocracies see unilateralism (and with it the 'classical' multilateralism based on national sovereignty) as the reason for global disorder and tend to accept the role of social movements in their fight against it. The same unilateralism seems, therefore, to create strategic opportunities for global democratic development and a different global constitution. This would show that, in times of the 'post-national constellation' (Habermas), any attempt at unilateral command over the multiple levels and networks of global governance is deemed to fail as it finds itself caught up in the complexity of the global 'life-world-system'.[73]

Signs of flexible alliances between autonomous social spheres and various levels of global governance bring about the chance to tackle the functional limitations of justice mentioned at the beginning of this section. And paradoxontology has also taught us that the choice of participating in such alliances creates commitments which in the end will again need to be liquefied in order to abolish restrictions of justice and to re-open its further development. The continuous critical re-construction of the role and rule of

law and of existing parameters of national and post-national legal set-ups and 'juridifications' will have a key function in this process. The two final sections, therefore, try to show how 'critical law' must organize itself in order to promote the continuous development of, both, local and global justice and how the 'legal staff' must be trained in order to be able to run it.

10. NETWORKS OR MILLE PLATEAUX: THE RE-ORGANIZATION OF LAW

'Law in Movement' will bring about a whole variety of decision-making bodies where the 'negotiations' between representatives of old and new forms of (state) sovereignty, (transnational) economic actors and the incorporations of the multitude will take place.

It can certainly be expected that R. Wiethölter's political legal theory, but also the 'Law in Movement' which incorporates that theory, will lead to a revaluation of case law and the role of the judge.[74] The 'partial' recognition of autonomous social spheres and their own rules and their 'impartial' control from the point of view of social reciprocity leads to a reduction of the role of legislation and to an increase of jurisdiction which becomes more and more a 'sensor for social normativities.' This means, however, that we are not just looking for a balance of interest in a single case. *Case law becomes explicitly an 'experiment with social institutions',*[75] *i.e. it will be explicitly and transparently politicized.*

One can easily imagine that members of social movements, who became victims of 'political justice' in the past, may at first sight disdain such a vision. Having had an experience of this kind, it appears to be difficult to recognize that law may have its own autonomous role and that the judiciary should have a leading position in the battle for 'Law in Movement'. Such a vision seems to promote an illegitimate take-over of political decision-making and social engineering by courts, or the continuation of 'political justice' in different terms.

In this respect, the argument often becomes paradoxical as, on the one hand, the definite failure of classical concepts of the division of power is criticized, while, on the other hand, 'judicial self-restraint' is requested, which again implies the possibility of reducing the role of the judge to a purely 'formal' role of independently executing the legislator's will without entering into a review of its 'material reasons' (of justice). Such a point of view does not take into account that it may precisely allow the production of what it wants to avoid. Classical 'political justice' has always used the 'formal' instruments of legal doctrine and argumentation to sell an ideological political decision as based on the 'objective means of juridical interpretation', that

is as a purely legal decision composed 'lege artis', while it contemporarily either deviated from the underlying 'material reasons' (of justice) or substituted them by (emergency) rules of a 'higher order'. Both 'anomalies' unveil, however, the crucial problem of any judiciary, that is the failure to recognize its own 'material foundation' in the promotion of the potentials of social justice. Recognizing this 'foundation' would lead to a refusal to apply any legal rule which was not produced by the legislator in the same spirit. This(!) is the origin of courts' and judges' 'independence'. Taking it seriously may result in a truly political fight between the judicial system and Government structures which have a different view of a given situation.[76]

It is, then, the very role of the judiciary in the (non-)system of 'Law in Movement' to create the practical standards of legal application for each case in order to concretely realize the potentials of justice. This realization may require the 'materialization' of formal legal positions. For example, formal 'freedom of contract' laid down in Civil Codes asserts that equal economic power of contractual partners is the quality of the underlying socio-economic order. However, the asymmetric reality pushed courts (and later legislators) to compensate the real power relations through 'special private laws', such as labour laws or consumer protection laws, but also legal interventions into the power structure of enterprises.[77] The strategy of such 'materializations' was to pierce the formal legal veil and to try to adapt the legal reality to the underlying symmetric conditions, and that is to 'more justice'.

'Law in Movement' takes the heritage of the materialization debate of the 1970s and 1980s, overcoming traditional relations between form and substance: 'proceduralization' is the declared (material) production of temporarily 'just(ified)' standards for social reciprocity or the 'common' in each special case, taking the 'proportionality'of the forces on the field beyond systemic limitations into account. A question of such 'proceduralization on material grounds' would, for example, be a critical revision of the (legislated) neoliberal privatization policies, in case they were brought to (constitutional) justice. Such a revision would be necessary, where the dismantling of public sectors had the effect of a quantitative and qualitative reduction of social justice functions for large parts of the population which have to be counted starting with the 'less affluent'. This would be the case if affordable access to certain basic functions (water, food, housing, health care, pensions, communication, energy, transportation, education) was impaired.

Consequently, 'Law in Movement' would also require a decisive change of certain procedural rights; for example, the enlargement of collective rights to claim, the introduction of public rights of participation and consultation, more sophisticated evidence procedures, the transparent inclusion of predicted consequences and risks into legal decisions and a new ('learning')

approach towards the force of final legal sentences ('stare decisis') with respect to changes of their underlying context.[78]

Alternative dispute settlement bodies and other decision-making bodies chosen by single autonomies to balance their 'interests' are accepted by 'Law in Movement' as long as their procedures are based on the parameters discussed here for the realization of the common potentials of justice.

No formal or substantial legal concept is excluded from this critical way of law-making. Let us come back to the example of enterprise law.[79] On formation of a business enterprise, an autonomous legal order is formed which has rights and duties independent from the rights and duties of partners, members or shareholders. After foundation the enterprise 'gains legitimation not only from the founders but from the whole of the community interested in the commercial adventure. Its powers are therefore a concession not from the owners alone but from the wider group involved in attaining its goals.'[80] A post-modern treatment of the problems of enterprise organization and conduct therefore abandons the classical distinction between private and public law. Business organizations are increasingly scrutinized with respect to their social function and responsibility, last but not least because many of them have become extremely powerful in the national and international economic and political context. Law develops new regulatory strategies which take public image-shaping by the corporation, like Microsoft's slogan 'your potential our passion', seriously. It then analyses the self-regulated corporate organizational and decision-making structures in order to understand if the enterprise reflects the 'interests' of other autonomies and interests of the common social context as part of its 'good governance'. The standards for the latter are set and continually updated in negotiations between the enterprise and the representatives of local, regional, national or transnational 'agencies of the common' who are supposed to continually supervise the implementation of the (self-)regulatory process.[81] The term 'enterprise' as compared to 'company' refers precisely to this broader functional context of business organizations. While 'company law' traditionally refers to the establishment and conduct of organizations as programmed by their partners, members or shareholders, modern 'enterprise law' recognizes that the twin privileges of legal personality and limited liability must be balanced by an increasing access to enterprise decision-making by those other interested 'stakeholders' mentioned in the previous section (creditors, employees, local communities, environmental groups, other representatives of common interest). This request can be realized through an obligation for the enterprise to create its own 'constitution' which flexibly assigns procedural responsibilities for the inclusion of such interests.[82]

The treatment of criminal cases would; beyond the mentioned general 'justice-test' of the criminal norm; have to take into account the psycho-

physical and social 'biography' of a defendant, the complex socio-political environment of the supposed criminal offence, the proportionality of a penal sentence including its expected individual and social effects, and the personal development of the detainee which may also lead to a revision of the punishment. This treatment would be, 'against all odds',[83] the continuation of the debate on the reason for punishment and the legitimation of criminal law, which has accompanied this legal 'branch' from the very start and had its 'peak' during the 1970s.

The procedural production of social autonomy, reciprocity and change through law is obviously also supposed to become a general 'attitude' in the field of legislation, last but not least because access to courts always depends on getting somebody to claim or on getting collective claimants organized. Legislation has lost its function of generalizing normative standards as its underlying 'unity' has disappeared. Therefore, regulating single cases has become as 'normal' as the permanent revision of enacted legislation. It has always been curious to see Western legal advisors pop up in so-called transistion countries of Eastern Europe or elsewhere and sell their traditional package of legislative 'theory' and 'legal reasoning and legal writing' based on ideas of stability and continuity of law making and ignoring the permanent transition that the legislation of their home countries has been continuously subjected to because of increasing 'complexity' of their societies and corresponding claims for social justice. Therefore, this transition has today led to the mentioned 'network' or an interconnected, not necessarily hierarchical 'multi-layer system' of political and legal constitutions and decision-making. These include, not only on the level of the European Union, legislation and jurisdiction, but also standard-setting by other 'fora', such as expert groups and conventions assisting governing bodies, or the self-regulation of autonomous organizations.[84] It seems that Deleuze's and Guattari's 'mille plateaux' have found another expression in the production of 'Law in Movement'.[85]

11. LEGAL EDUCATION: FROM FLEA CIRCUS TO JURISTS IN MOVEMENT

We have argued here that 'Law in Movement' must

- guarantee the permanence of the political and legal transition process in order to increase justice for the maximum of singularities;
- create a 'conflict culture' for confrontation and negotiation between competing concepts for the production of the common;
- provide the procedures and locations or 'competent fora' for the realization of this program.

Only in doing so, do all possible approaches for the promotion of just social construction and of reciprocity have a chance to be negotiated and realized. If this is the post-modern expression of 'justice', how can 'the message be passed' and integrated into legal education? In times where full employment has definitely given way to 'flexibility' (also at universities) and social movements are, beyond their satisfaction about the decline of traditional labour concepts,[86] fighting for the re-adjustment of labour law parameters in order to reach 'flexsecurity', there may be more chance that legal scholars will teach and law students learn the lessons of 'Law in Movement' we have tried to explain here. No wonder that the political question of public legal education reform is (constantly) at stake in many European member states. The reality of liquefied legal standards (and knowledge production) requiring permanent learning and the expectation that even permanent learning is no guarantee of winning the competition against others, is likely to provoke the request for more justice, the re-discovery of the single and collective 'potentia' and the comprehension of 'Law in Movement'. Then, it may be understood that legal education has always been one of the main scenarios of 'the battle for law' and it cannot but be a part of the battle of social movements today. Obviously, this battle takes place with respect to the entire educational system where the false (neo-liberal) alternatives between 'minimal school' for the masses and particular 'drawing rights' for the (economically) 'prodigious' must be attacked.

It is important to avoid above all in legal education, which traditionally has always been strongly formalized, the post-modern re-appearance of a legal 'flea circus'.[87] The ubiquitious reference to continuous learning and liquefied standards may today lead to students' minds being filled with and consumed by mountains of legal (case) knowledge, without their being taught the reference to 'justice' as the hidden reason for legal construction.

Legal training in so-called transition countries has marked a 'low point' in this sense. The question regarding the standards based on which jurists should do their 'reasoning and writing' in a common democratic legal culture seemed pure luxury as the local legal experts rushed to produce baskets of laws in order to come to terms with the expectations of their Governments and the tight schedule of international financing organizations. This resulted in creating legal set-ups 'without heart and brain'. It is not by accident, that at the end of the first pre-accession process of Eastern Candidate Countries, that is more or less in 1998, the EU Commission's progress reports highlighted the lack of understanding among the local legal staff of what had been created. Lack of knowledge in certain new legal fields appeared to be only one side of the problem. The other and greater one was a lack of understanding of the 'reasons' behind all those new regulations which were copying the 'mille plateaux' of structures in Western legal systems. So it came to the surface that

only this understanding would allow so-called 'sustainability' in the area, that is the capacity of local legal experts to manage 'the system' alone and to determine its future with respect to the local societies' needs of 'justice'. No wonder that the EU put up layers on layers of legal education and judicial training projects for the second pre-accession phase; no wonder, also, that the new type of association agreements with new candidate countries in the Western Balcans, the so-called Stabilization and Association Agreements, which were signed by Macedonia and Croatia in 2001, are insisting on 'human resources development'[88] in the legal sector from the very beginning.

However, in order to come to terms with the needs of 'Law in Movement' beyond a purely functional approach, global (!) legal education would, first of all, need to be recognized as a 'paradoxical affair', the classical 'squaring of the circle'.[89] On the one hand, students have to learn abstract doctrinal concepts and methods which have defined and resolved 'collisions and contradictions'. On the other hand, they have to learn a method of continuous 'second-order observation'[90] which suspends the given standards to treat norms and facts and allows for an analysis of the regulatory context in question using the various social theories we mentioned in order to develop for each context an autonomous just(ified) definition of reciprocity or of the common.[91] Legal 'feasibility studies' must be set up which define the 'modalities of freedom' for the parties involved and organize the observation of the consequences of the decision which may lead to a revision of the case due to context changes convincingly claimed by (one of) the parties. Training in such theory-led research of the relevant social context and in the corresponding legal and political judgements is precisely what traditional authoritarian legal thought has always tried to avoid: 'Jurists must have their methods but these methods may not be at their disposition' (E. Forsthoff). This means that the decision of how society is organized has to be taken elsewhere and jurists have just to learn and implement those programs without autonomously using their 'methods' for interference.

Here we have given a different view on jurists' work 'between norms and facts': their need to develop their own approches to social phenomena and to translate them into normative standards through specific forms of professional argumentation. These special needs and methods guarantee that law is not simply functioning as politics, economics or anything else; but they also guarantee that law creates its own programs of defining social reciprocity and declaring social behaviour and organization as lawful or unlawful in the sense of temporary realizations of personal and social potentia and justice.

Social movements recognize ever more that the battle for such a 'Law in Movement' is part of the battles that need to be fought. The awareness that decisions taken during the creative battles for the realization of potentia and justice remain, in any case, basically inadequate and undecidable, inevitably

brings about a continuous (self-) reconstruction. Such a paradox attitude may at moments create difficulties; but it remains a precious element of the movements, because it is precisely this continuous awareness of basic inadequacy and undecidability which keeps (other/better) world(s) possible.[92]

NOTES

* PhD European University Institute, Florence; Senior Legal Counsel and Team Leader for legal reform projects in 'transition' and 'development' countries. E-mail: micblecher@yahoo.com. The chapter is dedicated to the 75th birthday of Rudolf Wiethölter (University of Frankfurt). I would like to thank Janet Dine (University of London) for her valuable comments on the draft version of this chapter and for supporting its publication.

1. Cf. for this debate, J. Dine, *The Governance of Corporate Groups*, Cambridge: Cambridge University Press, 2000.
2. A 'classical' political strategy of doing this is to show that the system's 'actual' distinctions do not (want to) correspond to those ('true ones') which in the meantime have emerged to substitute them, and which therefore make the continued use of the former appear as purely 'ideological'. Cf. on this, 'thesis no.3' in chapter 4 of P. Virno's, *Grammatica della Moltitudine*, Catanzaro: Rubettini, 2001.
3. This definition deviates from Luhmann's definition of contingency. For Luhmann 'contingency' refers to distinctions as 'neither necessary nor impossible', opening for other possibilities which are 'in reach'(!) for a system. This definition does not envisage contingency with respect to the unlimited creative 'potentia' and its normative meaning. Cf. N. Luhmann, *Die Religion der Gesellschaft*, Frankfurt: Suhrkamp, 2000.
4. Cf. for such legal treatment of 'civil disobedience', G. Frankenberg, *Unordnung muss sein*!, in A. Honneth, T. McCarthy, C. Offe, A. Wellmer, *Zwischenbetrachtungen im Prozess der Aufklärung; Jürgen Habermas zum 60. Geburtstag*, Frankfurt: Suhrkamp, 1989, p. 690 et seq.
5. Cf. *R* (On the Application of Abbott) *v Colchester Magistrates Court* (2001) CrimLR 564, and *R v Melchett and others* (2001 unreported).
6. Cf. for the alternatives to treat the 'normative vacuum' created by economic 'globalization', D. Zolo, *Globalizzazione*, Roma-Bari: Laterza, 2004; generally on globalization as problem of legal theory, K. Günther, *Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem*, in K. Günther, L. Wingert (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit, Festschrift für Jürgen Habermas*, Frankfurt: Suhrkamp, 2001, p. 539–67.
7. Cf. Luhmann, op. cit., p. 132, and G. Teubner, *Der Umgang mit Rechtsparadoxien: Derrida, Luhmann, Wiethölter*, in: C. Joerges, G. Teubner (eds), *Rechtsverfassungsrecht*, Baden Baden: Nomos, 2003, pp. 25–47. (English version: *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*, Storrs Lectures 2003/04 Yale Law School, available under http://www.jura.uni-frankfurt.de/teubner/pdf-dateien/Dealing.pdf. The text was also published in: O. Perez und G. Teubner (eds), *Paradoxes and Inconsistencies in the Law*, London: Hart, 2005. Quotations refer to the German publication.
8. Cf. N. Luhmann, *Das Paradox der Menschenrechte und drei Formen seiner Entfaltung*, in N. Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Mensch*, Opladen: Westdeutscher Verlag, 1995, 229–36; quoted by Teubner (op. cit.).
9. Cf. on the 'duty' of social institutions to serve and adapt to the realization of human rights and on the 'double standards' applied in societies of the global North to invisiblize their participation in avoiding human rights realization in countries of the South ('moral deflection'), J. Dine, *Companies, International Trade and Human Rights*, Cambridge: Cambridge University Press, 2005; T. Pogge, *World Poverty and Human Rights*, Oxford: Polity Press in association with Blackwell, 2002.

10. Cf. J. Clam, *Die Grundparadoxie des Rechts und ihre Ausfaltung: Beitrag zu einer Analytik des Paradoxen*, in: G. Teubner (ed.), *Die Rückgabe des zwölften Kamels: Niklas Luhmann in der Diskussion über Gerechtigkeit*, Stuttgart 2000, pp. 109–43, 129.
11. Cf. M. Blecher, *Zu einer Ethik der Selbstreferenz*, Berlin: Duncker & Humblot, 1991.
12. See, in this respect, M. Hardt, A. Negri, *Empire*, Cambridge: Harvard University Press, 2000, and now, *Multitude – War and Peace in the Age of Empire*, New York: Penguin Press, 2004.
13. See, in this respect, J. Dine, op. cit.
14. See, in this respect, R. Wiethölter, *Recht-Fertigungen eines Gesellschafts-Rechts*, in: C. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht*, Baden Baden: Nomos, 2003, p. 13 et seq.
15. See, in this respect, G. Teubner op. cit., p. 36 et seq.
16. See, in this respect, note 12 and Blecher 1991, op. cit., pp. 199–210. The 'individual differences' indicate the underlying paradox of the term 'individual'. The freedom of a single human being lies in its development as 'dividual' or as a 'non-unitary self' characterized by specific, often conflicting differences.
17. Cf. G. Teubner, *Ökonomie der Gabe – Positivität der Gerechtigkeit: Gegenseitige Heimsuchungen von System und différance*, in: A. Koschorke, C. Vismann (eds) *System – Macht – Kultur: Probleme der Systemtheorie*, Berlin: Akademie, 1999, pp. 199–212. (English version: *Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann*, in: Theory, Culture and Society **18**, 2001, 29–47).
18. Cf. G. Teubner (op. cit., in note 7), p. 37.
19. Cf. with respect to the new or revitalized forms of cooperation from the point of view of the social movements, F. Berardi (Bifo), *Il Sapiente, il Mercante, il Guerriero. Dal Rifiuto del Lavoro all'emergere del Cognitariato*, Roma: Derive-Approdi, 2004, p. 194. For a feminist view on alternative economy see now: Genevieve Vaughan, *Gift Giving as a Basis for Alternative Economic Models*, in: *Greenpepper Magazine*, 'Life beyond the market', Amsterdam 2004: Knust Extrapool, p. 34.
20. Cf. Teubner (op. cit. in note 7), p. 36 et seq.
21. Cf. on 'mystifications' and 'control' of 'public opinion' convincingly Hardt and Negri, *Multitude*, op cit. in note 12, p. 245 et seq.
22. This also includes the interactive structure of 'the couple'; cf. Zygmunt Bauman, *Liquid Love, On the Frailty of Human Bonds*, Oxford: Polity Press, Cambridge and Blackwell Publishing, 2003.
23. Which may certainly not be understood as hierarchical constructions, but like M.C. Escher's paradox architecture; cf. G. Deleuze, F. Guattari, *Mille Plateaux. Capitalisme e Schizophrénie*, Paris: Les Editions de Minuit, 1980.
24. Cf. K.H. Ladeur, 'Towards a legal theory of supranationality: the viability of the network concept', *European Law Journal*, 1997, pp. 33–54.
25. Cf. to this radicalization of Deleuze's and Guattari's thought by feminist theory, R. Braidotti, *Metamorphoses, Towards a Material Theory of Becoming*, Polity Press in association with Blackwell: Cambridge, UK, 2002.
26. Cf. Wiethölter, op. cit., p. 21.
27. Habermas' discourse ethics may have their point here. But his 'normative universalism' is risking being trapped by invisibleizing its own contingency. Cf. now, with respect to the debate on the reform of international public law in continuation of Kant's project of a 'law for the citizens of the world', J. Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in J. Habermas, *Der gespaltene Westen*, Frankfurt: Suhrkamp, 2004, pp. 113–94. Habermas states here that the 'solidarity of the citizens of the world' may be limited to protection of peace and human rights instead of requiring 'the "strong" ethical values and practices of a common political culture and form of living' (p. 141). Such a position (and alternative) is adequately criticized by S. Zizek, *The Ticklish Subject*, 2000; pp. 279–89 ('For a Left-Wing Suspension of the Law – Per una Sospensione di Sinistra della Legge') of the Italian version (*Il Soggetto Scabroso*, Milano: Raffaello Cortina Editore, 2003). Zizek refuses any 'neutral universal content' and displays his 'left universalism', where 'siding with the excluded' represents the dimension of universalism:

'The universalism we are talking about is, therefore, not a concrete universalism with a determined content, but a void universalism without an explicit concept which would specify its circumstances, and which exists only in the form of an injustice suffered by a particular subject which politicizes the situation in which it finds itself.' (ibid. footnote 54). This attitude is certainly also part of the paradox 'realization of justice' displayed in this chapter.

28. Wiethölter, op. cit., p. 18.
29. See *Multitude*, op. cit., above all, subsection 2.3 ('Traces of the Multitude', pp. 196–208), and subsection 3.3 ('Democracy of the Multitude', pp. 348–59). Cf. p. 348: 'Paradoxically, the common appears at both ends of biopolitical production: it is both the final product and also the preliminary condition of production.' For Hardt and Negri, the concrete production of the (undetermined underlying) common is realized by the 'performative acts' of communication. In spite of similarities, these cannot be mixed up with Habermas' 'discourse conditions', last but not least because the latter would not reflect the novelty of labour relations today as being embraced by the communicative production of the common beyond 'instrumental reason' creating one common 'life-world-system' (Wiethölter): 'Post-Fordism and the immaterial paradigm of production adopt performativity, communication, and collaboration as central characteristics.' (p. 200). The common is the result of the 'passage from the Res Publica to the Res Comunis' and diverges 'from the private and the public'. The common is 'nor a preconstituted entity nor an organic substance bio-produced by the national community, but it is the productive activity of the singularities within the multitude. (….) Everything that is general or public must be riappropriated in order to be administered by the multitude and therefore become common.' (p. 206).
30. Cf. Hardt and Negri, *Multitude*, op. cit., Preface, p. xiii.
31. It seems Hardt and Negri subsume under the term 'singularities' (introduced by G. Simondon) both 'individuals' and social groupings or organizations which are aiming at 'alternatives'.
32. See Teubner op. cit. at note 7, p. 44.
33. Cf. now Hardt and Negri, *Multitude*, op. cit., Preface, p. xiv.
34. This would confirm Foucault's view on power and biopolitics as reported by R. Esposito in *Bios, Biopolitics and Philosophy*, Turin: Einaudi, 2004, p. 32: 'Power needs a point of contrast to measure itself within a dialectics without definitive result. It is as if power, in order to strengthen itself, must continuously divide and fight against itself.'
35. Hardt and Negri, *Multitude*, op. cit., p. 340.
36. Or one would expect these 'forms' to always coincide with their execution. But this would deprive the alternative discourse of any continuity. Hardt and Negri confirm therefore, that 'the political project of the multitude (…) must find a way to confront the conditions of our contemporary reality.' (Ibid., p. 352). The two authors accept that, ever since M. Weber, these 'conditions' have always meant the present state of 'rationalization' (p. 251). For Hardt and Negri, an alternative political combination of deconstruction and reconstruction must nowadays coordinate Lenin's project of destroying state sovereignty through the power of the (reconstructed) common with Madison's project of a (federal) democratic society. The new form of 'rationalization' consists in 'communicative and collaborative networks that constantly produce and reproduce social life.' (p. 355).
37. Cf. sharp criticism as against NGOs in A. Roy, *Public Power in the Age of Empire*, speech held at the 99th annual meeting of the American Sociological Association in San Francisco on 16 August 2004. The speech is available on the Internet.
38. This paradox context was reflected by the old European concept of the '*subject*' with its oscillation between, simultaneously, being the underlying psycho-social 'sub-strate' and the 'sub-jected'. (Cf. on this ambiguity now R. Esposito, ibid., p. 29). The concept of the subject was de-constructed by the recognition of the multitude's changing 'singularities' and their network variations. The search of a new logical and historical 'subject' seems therefore vain. However, the paradoxical causes and effects of de- and re-construction also affect those multiple 'singularities' and their 'will' which sounds very much like the heritage of the 'will' of the traditional 'subject'. This 'heritage' is also suggested by the

attribute of the multitude to be 'the *living alternative* that grows within the Empire'. It seems, then, that the actual (bio-) political power structures make 'singularities', who sustain it, 'lose their lives' to (the system of) the 'Empire'. Instead, it is precisely the paradoxical mechanism of (social and personal) 'life' which makes singularities selectively restrict ('alienate') themselves (and their bodies) and eventually subordinate to powerful socio-political constructions which others before them built and which they now reproduce. This may last until the deconstructive 'breakdown' of their self-descriptions leads them to re-discover their potential with the chance to re-construct their 'naked' life increasingly with respect to personal liberty and common justice and to 'play' with their self-induced limits, like a 'bungee jumper' who bounces back each time 'to the point of departure'! (The metaphor was introduced by R. Braidotti, op. cit., fn. 24, p. 19 of the Italian version.) In other words, *like the subject before, the multitude lets the Empire grow in itself and is contemporarily the alternative which grows inside the Empire!* 'Life' is inevitably an oscillation between these two tendencies of 'harm and healing'. The descriptions of 'alienation' and the 'distortions of will' which have accompanied the history of the (legal) subject need to be re-constructed in this context. See, in this respect, S. Zizek's description of new psycho-social 'monsters' created in the aftermath of the traditional subject's decline (op. cit., pp. 429–37 'Das Unbehagen of the Risk Society', L'Unbehagen della Società del Rischio') taking, however, into account that the subject defended by Zizek seems to have prevalently male connotations and seems to suffer from an 'anti-feminist regression' when 'resisting' the unlimited metamorphosis between(!) multiple distinctions (see Braidotti, op. cit., pp. 69–75 of the Italian version). Moreover, see the descriptions of the 'cognitive dissonances' and depressions of the multiple singularities in F. Berardi (Bifo), op. cit. The problem also recalls Habermas' distinction between 'life-world and system' which claimed that there was a set of 'presumingly guaranteed common convictions' not subsumed by the system, cf. *Theorie Kommunikativen Handelns II* (Theory of Communicative Action), Suhrkamp: Frankfurt, 1981, p. 91. While Hardt and Negri correctly recognize that the 'living alternative' always grows 'inside' the Empire, the paradoxical connection between them (or between life-worlds and systems) remains a continuous challenge for the multitude's construction of the common. See also p. 183: 'The fact that the performative acts of immaterial production tend to be characterized by the life in common does naturally not mean that we have already realized a free and democratic society.' See also R. Esposito, op. cit., pp. 171–215.

39. See on this phenomenon, M. Benasayag and D. Scavino, *Pour une Nouvelle Radicalité, Puissance et Pouvoir dans la Politique*, Paris: La Découverte, 1997, and H. Arendt, 'Sulla violenza' (On violence), Ugo Guanda Editore : Parma, 1996.
40. See, on the concept of 'immunity systems', N. Luhmann, *Soziale Systeme*, Frankfurt: Suhrkamp, 1984, p. 488 et seq, (English version: *Social Systems*, Stanford 1995), and *Das Recht der Gesellschaft*, Frankfurt: Suhrkamp 1993, pp. 465–8 (English version about to be published by Oxford University Press). Immunity systems are supposed to preserve (personal and social) self-reproduction under conditions of permanent change of the self and its environment. In order to do so, contradictions or ('cognitive') dissonances in self-descriptions are assessed and monitored and lead either to maintenance or to change of these concepts with respect to their capacity to continue to guarantee the reproduction of the system. In this sense, law becomes society's main 'risk manager'. Luhmann obviously does not recognize the 'normative' side of this immunity system. Disturbances of systemic reproduction are treated 'without cognition, without knowing the environment, without analysis of the disturbing factors based on the pure definition of them as not being a part' (*Soziale Systeme*, op. cit. p. 505). In other words, Luhmann does not recognize that self-reproduction is based on the joint 'potentia' which 'connects' autonomous personal and social spheres to each other with respect to their exceeding horizon of possibilities to be realized 'jointly and severally'. If this 'reciprocity' is not continuously (re-)produced and reflected by social structures, the (autopoietic) self-reproduction of living systems, persons and societies tends to be endangered by the very creation of 'immunity' (resulting, for example, in environmental disasters or permanent wars). The lack of understanding regarding the normative side of the autopietic construction logic becomes, therefore, the

main social 'risk'. See now, for a profound analyis of the 'paradigm of immunity' and the possibilities of avoiding the 'tanatopolitics' or self-destructive tendencies of modern immunity functions, R. Esposito, op. cit. in note 34.

41. Like in the scenario which Z. Baumann, op. cit., describes for the tendency today to submit our world to the totality of a pure market rationale: it leads people to an accelerated consumption of all kinds of social bonds and boundaries.
42. Cf. Luhmann, *Soziale Systeme*, op. cit., p. 541.
43. R. Wiethölter, op. cit. at note 14, p. 20.
44. Hardt and Negri's 'prejudice' seems to lie in their asymmetric focus on '*Co-operation*' which the communicative production of the common (and of politics and economy) is supposed to be based on. The 'conflict' between singularities seems to be subordinated to that cooperation in spite of the 'origin' of their theory in the works of Macchiavelli and Spinoza (cf. F. d. Lucchese, *Tumulti e Indignato, Conflitto, Diritto e Moltitudine in Macchiavelli e Spinoza*, Edizioni Ghibli, Milan 2004, p. 141. For the opinion presented here (see section 5 at the end), cooperation and conflict are the two sides of the same coin and the definition of their relation remains always contingent. That means that law cannot just limit itself to the recognition of autonomously produced normativities and of their relations. Reciprocity or the common must always be 'produced' through cooperation and conflict and with support from law. On the one hand, Hardt and Negri rely on this production of the common (see note 29); but it remains vague as to how and according to which standards it is carried out beyond factual performative communication. Therefore, the problem of a non-transcendental, non-sovereign production of reciprocity, already present in Spinoza, continues to persist.

    As concerns the reproduction of the concept of *labour*, Hardt and Negri rightly claim that, with the generalization of interaction-based forms of production, 'life as such' has finally become the main means of production. By doing so, they take on the heritage of the concept of 'real subsumption' which had been introduced by Marx and was further developed by Adorno and Horkheimer. However, having learned from Foucault, they correctly recognize the paradoxical foundation of this concept in the sense that the 'biopolitical production of the common' always exceeds its selective appropriation through capitalist economy and reproduces itself as 'the living alternative' together with each act of appropriation. One can certainly still call this 'labour' (see *Multitude*, op. cit. in note 12 S. 125). But, if 'everything' is labour, 'nothing' is labour and more, which means to say that the distinction between labour and capital has lost its function as the leading critical distinction. What is left, is a (capitalist) economy, which, through the construction of 'scarcities' and of corresponding property positions, sustains that some economic actors may selectively absorb the values of wealth which has been produced 'in common' with other autonomous spheres. This does not mean that, in the struggle between capital and labour, capital has won the final battle, but that *autonomy/non-autonomy* now becomes the leading critical distinction, and that the problem of a capitalist economy of appropriation (re-)appears as a problem of *abusing autonomy* and *corrupting* the common or the reciprocity which has been produced together with (all) other single autonomies.
45. Cf. section 5.
46. Cf. Wiethölter, op. cit., p. 18, and Teubner (op. cit. in note 7), p. 35.
47. R. Wiethölter, *Zur Argumentation im Recht: Entscheidugnsfolgen als Rechtsgründe?*, in: G. Teubner (ed.), *Entscheidungsfolgen als Rechtsgründe: Folgenorientiertes Argumentieren in rechtsver-gleichender Sicht*, Baden Baden: Nomos, 1994, pp. 89–120, 119. Wiethölter, *Recht-Fertigungen…*, op. cit., p. 21, now uses the term 'critical law' to define his approach. We preferred to use 'law in movement' to underline the dynamic, system-transcending aspect of such a law and its affinity with the social movements. This 'prejudice' will probably not be shared by R. Wiethölter's 'critical law'. The only existing 'critical' social theory he is taking into account, is Habermas' 'discourse theory' which has its own ('universalist') prejudices, last but not least against other critical approaches (cf., for example, Habermas' over-simplifying opinion on Hardt and Negri's theory in *Hat die Konstitutionalisierung…*, op. cit. in note 27, p. 185). Wiethölter's approach goes far beyond Habermas' theory in spite of certain 'sympathies'. However,

he does not explicitly mention any other 'major' (post-Marxist, post-colonialist, etc.) approach on social transformation and the important new role of social movements in the postmodern global (dis)order besides old and new forms of (state) sovereignty and transnational economic players (see Hardt and Negri, op. cit. in note 12, and G.C. Spivak, *A Critique of Postcolonial Reason*, Cambridge: Harvard University Press, 1999). Wiethölter recognizes that the 'basic communicative experience' brings about 'movements, changes and healings' (p. 19). But this broad reference on his concept's affinity with social movements remains unspecified. Wiethölter probably does not really trust in the movements' self-transforming capacities which are the main protective device against new constructive 'monsters'. However, if this were the case, 'Western reformism' would become the 'prejudice' of 'critical law' and this would de facto deny to the vast majority of the global population the opportunity to change their situation. 'Law in movement' does not have any prejudice with respect to the forms of social transformation. Today social transformation will probably take much less the form of 'revolutions', but occur through a whole variety of forms of protest and constructive 'alternative interventions', which obviously also include 'reforms'.

48. So Hardt and Negri, *Empire*, op. cit. in note 12, p. 8 seq. In *Multitude*, op. cit. in note 12, p. 204, Hardt and Negri's attitude towards law has changed as they now recognize the 'post-systemic' legal approaches of Teubner and Wiethölter (see p. 205, footnote 125) as 'the best example of contemporary legal theory based on singularity and commonality', aiming at the communicative production of common norms through 'a constant, free, and open interaction among singularities.' Now, 'legal questions tend no longer to be linked only to the exercise of power' as law in the actual phase 'appears not as a consolidated normative result but as a process' during which law 'can construct social relationships in line with the networks organized by the many singularities' and 'regains a constituant element' (p. 207 et seq).
49. Wiethölter, *Recht-Fertigungen*, op. cit. at note 14, p. 17.
50. Cf. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* **63**, 2003, pp. 1–28 (p. 26), (English version: 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' ('Storrs Lectures 2003/04' Yale Law School), in: C. Joerges, I.-J. Sand and G. Teubner (eds), *Constitutionalism and Transnational Governance*, London : Hart, 2004, pp. 3–28.
51. For Teubner, the political system would have to introduce the distinction between a formally organized sector of political parties and state administration, and a 'spontaneous' sector composed by the electorate, interest groups, and public opinion; cf. ibid.
52. Like the so-called illegal migrants for the economies of rich(er) countries.
53. A method which also progressive political parties like to apply when groups of the 'spontaneous' multitude no longer serve their political calculations.
54. Certainly, it seems that, in '*Dealing with Paradoxes* …' of 2003, op. cit. at note 7, Teubner has abandoned the distinction between organized and spontaneous spaces and recognizes a 'double regime' of systemic treatment of social functions – law, economy, politics, science, etc. – and a transversal treatment of these subjects by a network of autonomous spheres, the 'new privacy' of which would need to be interlocked through law. This would be at least a partial take-over of Wiethölter's 'poietic and unsystemic' concept. See p. 43 et seq. In fact, Hardt and Negri (*Multitude*, op. cit. in note 12, p. 204) now call Teubner's recent legal theory shift 'post-systemic'. Instead, N. Luhmann would probably have said that systems 'learn' and use internal differentiation to adapt their organizations and programs to new and more complex situations. From the point of view of systems theory, the famous *networks* of autonomous spheres, which the majority of social theories praise as the latest form of (Weberian) 'rationalization' or the 'new paradigma of social morphology' (M. Castells, *The Rise of the Network Society*, Oxford: Blackwell, 1996), appear to be such a systemic(!) differentiation. This new paradigm is supposed to adapt the integrative functions of existing institutions to a more complex global scenario which fails to be governed by precedent mechanisms, last but not least due to the pressure for change exercised by social movements. As Teubner's important works on the forms and problems

of the social 'unitas multiplex' have applied systems theory for almost 20 years, his network approach rather appears as the most developed form of a *neo*-systemic theory, and not as a post-systemic theory. Social movements and 'Law in Movement' go for the transformation of any fixed morphological structure. Their morphological principle is 'metamorphosis' (R. Braidotti, op. cit. at note 25) in spite of the fact that they 'play' today with the network-concept attacking any dominion exercised by single 'knots', confronting any integrative function of 'the net' with 'more just' links, and insisting on keeping the net open.

55. Which G. Teubner would expect; cf. op. cit. at note 50.
56. Cf. on both myths, J. Dine Chapter 3, this volume.
57. See on 'constitutionalization' of enterprises the works of G. Teubner in the field; for example, *Hybrid Laws: Constitutionalizing Private Governance Networks*, in: R. Kagan and K. Winston (ed.), *Legality and Community: On the Intellectual Legacy of Philip Selznick*, Berkeley: Berkeley Public Policy Press, 2002, pp. 311–31.
58. See with respect to the 'conflict of interests' which traverses market society as a whole, G. Rossi, *Il Conflitto Epidemico*, Milano: Adelphi 2003; with respect to the change of property rights concepts, J. Dine, op. cit. at note 56.
59. Cf. T. Pogge, op. cit. at note 9.
60. Cf. M. Freeman, Chapter 1 this volume, pp. 68–9.
61. See S. Michalowski, *Argentina's External Debt – Some Legal Considerations*, Chapter 12, this volume.
62. See F. Brennan, *Time for a Change: Reforming WTO Trading Rules to Take Account of Reparations*, Chapter 10, this volume.
63. Cf. J. Dine, op. cit. at note 9, and *Multinational Companies and the Allocation of Risk in International Investment Treaties*, manuscript, London, 2005.
64. Cf. C. Marazzi, *Capitale & Linguaggio: dalla New Economy all'economia di Guerra (Capital & Language: From new economy to war economy)*, Milan: Derive & Approdi, 2002. An early recognition of authoritarian or even totalitarian institutional guarantees that neo-liberal policies depend on can be found in Carl Schmitt, *Gesunde Wirtschaft im starken Staat*, Schriften des Langnam-Vereins 1932.
65. Cf. P. Virno, op. cit. in note 2.
66. G. Teubner (op. cit in note 50), develops attempts to cope with such 'limitations' through the establishment of 'civil constitutions'.
67. Cf. U. Beck, *Gegenmacht im globalen Zeitalter*, Frankfurt: Suhrkamp, 2002; D. Zolo, op. cit. in note 6; J. Habermas, op. cit. in note 27.
68. Cf. the contributions of S. Mezzadra and E. Rigo (*L'Europa dei migranti*), E. Balibar (*L'Europa, una frontiera 'impensata' della democrazia?*), A. De Giorgi (*L'Europa fra stato penale e nuova cittadinanza*) and M. Palma (*L'Europa e l'ossessione della sicurezza*), in: G. Bronzini, H. Friese, A. Negri and P. Wagner (eds), *Europa, Costituzione e Movimenti Sociali*, Roma: Manifesto Libri 2003.
69. 'Law cannot guarantee security, if society itself understands its future as risk depending on decisions', Luhmann, *Das Recht..*, op. cit. in note 40, p. 561. Obviously, Luhmann would not have accepted that the 'ethics of reciprocity' we mention here is inevitable to reduce social and environmental risks. See for his approach to the risk subject, *Risk: A Sociological Theory*, Berlin: Walter de Gruyter, 1993.
70. Cf. *Multitude*, op. cit. in note, p. 320 et seq.
71. 'that is the multinational corporations, the supranational institutions, the other dominant nation-states, and powerful nonstate actors', Hardt and Negri, ibid., p. 320.
72. This will hopefully satisfy, above all, the critical British reader, to whom any reference to the pre-modern 'Magna Carta' may seem quite odd. In order to ensure these readers that no naive take-over is intended, I cannot but fully quote 'What the original Magna Carta said' as reported by W.C. Sellars and R.J. Yeatman in their 1930 alternative history book *1066 and All That – A Memorable History of England comprising all the parts you can remember, including 103 Good Things, 5 Bad Kings and 2 Genuine Dates*, Harmondsworth: Penguin (1930) 1969, p. 33 et seq.: '1. That no one was to be put to death, save for some reason – (except the Common People). 2. That everyone should be free – (except the

Common People). 3. That everything should be of the same weight and measure throughout the Realm – (except the Common People). 4. That the Courts should be stationary, instead of following a very tiresome medieval official known as the *King's Person* all over the country. 5. That 'no person should be fined to his utter ruin' – (except the King's Person). 6. That the Barons should not be tried except by a special jury of other Barons who would understand. Magna Carta was therefore the chief cause of Democracy in England, and thus a *Good Thing* for everyone (except for the Common People).'

73. 'In order to maintain itself Empire must create a network form of power that does not isolate a centre of control and excludes no outside lands or productive forces.' Hardt and Negri, *Multitude*, op. cit. in note 12, p. 324.
74. Be they judges employed by the state or those selected by parties, cf. G. Teubner, op. cit. in note 7, p. 42 et seq.
75. Ibid.
76. See, in this respect, Italian Prime Minister Berlusconi's recent attacks on the 'biased' judicial system with respect to criminal cases where he or his followers are involved or where the constitutionality of laws which his government enacted is questioned by courts. In the aftermath of this debate, the Berlusconi Government has launched the most incisive 'reforms' to be faced by the judiciary in post-war Italy. See, on these 'reforms' and their political background, S. Stuth, 'Macht gegen Recht – Berlusconi gegen die italienische Justiz', in: *Kritische Justiz* 2003, pp. 256–73. See also the British House of Lords decision on the Belmarsh detainees who were held without trial just because they were suspected of being terrorists (UKHL56, 2004). L.J. Hoffman said here that it was the special home security law which posed a danger to society rather than a terror threat. Nota bene: judicial systems *must* certainly be reformed as far as they do not comply (any longer) with the 'material' parameters mentioned in the text.
77. Cf. Wiethölter, *Materialization and Proceduralization in Modern Law*, and *Proceduralization of the Category of Law*, in Joerges and Trubek (eds), *Critical Legal Thought: An American-German Debate*, Baden-Baden 1989, p. 516.
78. See Teubner (op. cit. in note 7), p. 43.
79. Maintaining the awareness that enterprise law reform would require reform of the dominating legal market structures in order to be successful; see the previous section.
80. So the 'dual concession theory' as opposed to the classical 'contractualist theory' which privileges the role of founders and shareholders at every stage of the enterprise life cycle; cf. J. Dine, op. cit. in note 1, p. 27.
81. See on such mechanisms of 'enforced or directed self-regulation', J. Dine, op. cit. in note 9, p. 21. See also the EU 'corporate social responsibility' debate covering, among other things, the responsibility for the creation of technical safety standards, environmentally sustainable management, respect of human rights, and so on. However, the EU does not 'force' the enterprises to organize devices for its realization. Cf. EU Commission Green Paper 'Promoting a European Framework for Corporate Social Responsibility', COM 2001, 366 final, Brussels, 18.07.2001.
82. See for the legal treatment of modern forms of enterprise groups, G. Teubner (op. cit. in note 57). The translation of the summary of the German version says: 'The increasing appearance of enterprise networks (virtual enterprises, intranets and extranets, franchising nets, just-in-time contracts, outsourcing) confronts private law with the question if and how it should react with a development of contract law or the law on groups. This contribution opts for a distinction between network elements and hybrid combinations of contractual and organizational law forms and reflects on their legal consequences. Hybrid networks must be constituted by private law beyond contract and organization: contract law applies through an increase of legal obligations for cooperation inside the network, tort law applies through double attribution and shared liabilities between network and knots, organizational law applies with legal guarantees for the reflexive autonomy of the decentralized units.' See now J. Dine, Chapter 3, this volume, adopting an approach of legal risk management which tries to integrate Teubner's distinctions in terms of responsibilities/ liabilities for communication, organization and control.
83. The 'odds' mean that public paranoia in times of preventive war has, in the meantime, led

to an increase of preventive criminal justice, another fact that is worthy of being attacked by social movements; cf. the contributions mentioned in note 68.

84. Cf. for the European debate, C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart Publishing, 1999; G. Frankenberg 'Die rückkehr des vertrages: überlegnngen zur verfassung der Europäischen Union', in K. Günther and L. Wintert (eds), *Die Öffentlichkeit der Vernunft und die vernunft der Öffentlichkeit, Gestschrift für Jürgen Habermas*, Frankfurt: Suhrkamp, 2001, pp. 507–38; N. Bernard, *Multilevel Governance in the European Union*, The Hague 2002: Kluwer.
85. See with respect to the multi-layer regulatory problems and the involvement of social movements, N. Montagna (ed.), *Controimpero*, Roma: Manifesto Libri 2002; H. Friese, A. Negri, P. Wagner (eds), *Europa Politica*, Roma: Manifesto Libri 2002; G. Bronzini, H. Friese, A. Negri, P. Wagner (eds), *Europa, Costituzione e Movimenti Sociali*, Roma: Manifesto Libri 2003.
86. Cf. F. Berardi (Bifo), op. cit. in note 19.
87. The original flea-circus metaphor derives from a description of legal education during the Weimar Republic. The picture referred to the fact that fleas can be trained to perform certain activities. In order to do this, one must first make them stay in a small space without jumping away. The process of flea education starts with a tall box consisting of some elements which can be taken away to make it lower and lower. The top of the box must be covered by a pane of glass. Once the fleas have got used to the height of the glass pane and no longer hit against it, one can take it away. The procedure must be repeated until the desired measure of the space is reached. The fleas will be perfectly adapted to their new environment and will not try to leave it any more. The picture was used to denounce a form of legal education in the process of which young jurists' views of their social environment and their ways of communication were by and by transformed. This was in order to totally align them with the authoritarian views and needs of state administration representing an ancient structure of society which they were supposed to sustain in ministries and court rooms against any intrusion of democratic reconstruction of society as represented, above all, by parliamentary legislation. The original metaphor therefore wanted to express, on the one hand, that the best legislation is not good enough if implementing institutions and their legal staff do not adequately put it into action. On the other hand, the little story warned against pure 'technocracy' in law-making, implementing law and teaching law. The main reproach against the leading cast of jurists in the Republic of Weimar was, in fact, that they had not defended democracy against its own procedural demontage because they had not adapted the use of their methods to the function of law in the new parliamentary democracy, that is, to provide justice for the entire (!) population.
88. The term 'human resources', invented by post-modern 'project-management', nicely reflects the dominance of systems theory in the field (as does its 'counter-term collateral') which presumes that 'humans' (the system of 'consciousness/mind' coupled to the living system of the body) are, on the one hand, basically 'outside' of (relevant) social communication while constituting, on the other hand, a necessary 'coupling device' for social systems in order to obtain 'extracts' from their lives (Luhmann). The naive idea of a 'transfer of systems' at the beginning of the 'transition process' had obviously not even taken this basic presumption of its own concept into account. However, the recognition of its necessary 'resources' has also not gone very far as it does not take into account that the latter's wish to increase their 'potentia' goes far beyond the takeover of new collision-rules from outside without being able to kick off the 'battle for law' (and democracy) within their own social environments due to the pressure of foreign 'donor agencies' involved. (Here the ancient reference to 'Trojan horses' applies: 'Timeo danaos et dona ferentes – Beware of Greeks bearing gifts'). Therefore, with respect to donor 'conditionalities', the 'resources' oscillate between being 'neo-liberal Americans' today and 'neo-social Europeans' tomorrow, while often neo-despotic heirs of the old authoritarian systems hamper their development. It will be interesting to see how the 'unsystemic poiesis' of the human resources involved in the fragile social reconstructions will continue to develop in 'transition countries' where neo-liberal economic policies have already demonstrated their intrinsic

capacity to impoverish great parts of those 'resources'. Ukraine has been the most recent show case as large parts of its 'resources' (probably another 'strategic alliance' of the kind mentioned in section 9) took to the streets for an autonomous application of the law against the continuous nepotism which has marked the aftermath of regime change in many of the CIS countries. It still remains to be seen, if the attempt to get rid of one biopolitical burden will bring about another society capable of increasing socio-economic justice among the 'resources' avoiding simply following the ridiculous slogan 'let the market decide'. Under circumstances of such complexity, the plausibility of mainly neo-liberal development policies is under pressure of being de-legitimized in spite of the fact that donor agencies continue their business as usual and reduce or close many of their 'think tanks' due to financial exhaustion imposed by the effects of the same economic model which they flag around the world. An adequate development policy which increases the potentia of the autonomous social spheres and their 'resources' has still to be written. See now, in this respect, N. Karagiannis, *Avoiding Responsibility – The Politics and Discourse of European Development Policy*, London and Ann Arbor: Pluto Press 2004.

89. Or, in old European terms, as 'education to freedom'.
90. Cf. on self-referential observation levels of 'cognition' which provide orientation to systemic reproduction ('second order cybernetics'), H. v. Förster, *Sicht und Einsicht, Versuche zu einer operativen Erkenntnistheorie,* Braunschweig, 1985.
91. The Frankfurt and Bremen 'model' of the German legal education reform of the 1970s, opted for law-students' 'initiation' through teachings on the so-called 'social science foundations of law'. Indeed, once the 'flea-circus' is on, it is very difficult to get different access to students' minds. The problem was, then, that the reform stopped halfway in many universities and reduced those subjects definitely to 'introductions' while the 'model' obviously envisaged a permanent interlocking of both aspects in every legal field.
92. G. Teubner (op. cit. in note 8, p. 42) sustains that continuous deconstruction of all distinctions leads in the end to an uncritical 'sacrificium intellectus' because a new distinction could only be introduced and temporarily maintained by avoiding immediate criticism. This thesis underestimates the effects of taking the paradox construction of distinctions explicitly into account. The new distinction is taken for granted to be inadequate even if it is the most adequate solution which can be found at the moment the mentioned 'feasibility study' was put up. It can be taught to students 'without lies' as the maximum possible in a certain historic moment, and it will, in fact, usually develop a kind of social 'gravity force' which makes it automatically stay for some time. Moreover, newly recognized distinctions usually produce single and collective 'identitarian craving' and their 'suspension' depends on how the social forces of de-construction act and react. Manipulation of public opinion and legal treatment of post-modern media policies play a decisive role here. Under these circumstances, you cannot simply 'wait' for the (impossible) 'verification' of a new distinction. As we have tried to show above, the 'organized' forces which claim that a concept must be (temporarily) verified before being abolished are usually trying to bring the 'spontaneous' deconstruction forces to a standstill. In other words, 'verification' is always part of the political and legal struggle. This is why social movements are right in suspecting that those verification attempts cannot simply be trusted. And it is precisely this suspicion which is necessary to guarantee their function as a social justice barometer. To end with another slogan which German social movements including Joschka Fischer, used in the early 1980s: 'They only want our best, but they won't have it!' ('Sie wollen nur unser Bestes, aber sie bekommen es nicht'). It is up to the reader to judge if Mr Fischer has fallen into the traps of paradoxontology and changed his mind.

5. Buying right: Consuming ethically and human rights

Andrew Fagan

INTRODUCTION

Can shopping positively contribute to the promotion and protection of human rights? The discourse of human rights has long been dominated by a concern for the dichotomous relationship between states and individuals. The relative simplicity of this picture has been complicated in recent years in a variety of ways. For example, the emergence and influence of international and national non-governmental movements which, in effect, occupy an intermediate position between states and individuals have, through their work, altered the nature of the relationship between states and individuals. One consequence of the emergence of international non-governmental organisations has been the creation of relationships between collections of individuals which both cross national and even continental boundaries and, in so doing, bypass national governments. The bulk of the efforts of these organisations has consisted of such things as raising awareness of human rights abuses, mobilising campaigns against those responsible for these abuses, exerting pressure on governmental and inter-governmental institutions to take direct action against the abusers, and raising funds to maintain these campaigns. Until relatively recently few within this field considered the possibility of promoting and protecting social and economic rights by means of going shopping. However, the emergence of what I shall henceforth refer to as the phenomenon of 'ethical shopping' offers precisely this promise. Through shopping ethically, we consumers residing in the affluent countries of the world are presented with the opportunity of enhancing human rights through spending our money not simply on media campaigns and pamphlet writing but on the everyday goods and services we consume. Ethical shopping offers the promise of transforming consumption, an essential feature of late-capitalist societies, into a means for enhancing, rather than restricting, human rights.

The ethical shopping phenomenon represents a small, but growing section of the market for consumer goods and services in the affluent economies of the world. As I write, the Fairtrade organisation in the United Kingdom has

announced sales for 2004 of £140 million. While this represents only a fraction of the overall consumer market in the UK, it is an increase of 51 per cent over the previous year. The forecast is for continuing increases in sales in the years to come.[1] So, can ethical shopping realise the ambition of promoting human rights through introducing morality into consumer choice? I shall argue that the potential does exist for enhancing human rights through 'buying right'. It would be naive to assume that global poverty can be eradicated merely through consumer action. As other contributions to this volume indicate, deeper structural obstacles stand in the way of achieving genuine global economic justice. However, ethical shopping does represent an opportunity for individuals to contribute to the pursuit of this end. The consumer choices we make can and do affect the lives and hence the human rights of those who labour to satisfy our wants and needs.

THE EXTENT OF THE PROBLEM OF GLOBAL POVERTY

An essential element of a human rights based perspective on global poverty can be found in Article 25 of the Universal Declaration of Human Rights (UDHR) which declares that 'Everyone has the right to a standard of living adequate for … health and well-being … Every human being has a right to a decent life, including adequate food, clothing, housing, medical care and social services.' Article 25 of the UDHR, like other such articles of this august document, betrays a certain philosophical naivety. References to a standard of living *adequate* for health and well-being and to a universally shared individual right to a *decent* life assumes a degree of consensus on the criteria for determining what these might be which has, it is fair to say, yet to be achieved amongst philosophers, economists and political scientists. Fundamental disagreements remain on such issues as, for example, whether it is possible to stipulate universally valid criteria for what constitutes a *decent* life. Economists' attempts to answer this question by stipulating a minimum monetary figure for possessing the means for leading a decent life are thwarted by gross differentials in the cost of living across the globe. The minimum conditions for leading a decent life in the United States or the United Kingdom far exceed those for one's counterparts living in southern hemisphere countries, such as, for example, Brazil or Kenya. This prevents the establishment of a single monetary quantification of the cost of leading a decent life. This issue is further complicated by philosophers' general failure to satisfactorily determine a set of universally valid criteria for or attributes of a 'decent' life. While some philosophers have been prepared to propose distinct and purportedly objective accounts of human well-being and the necessary constituents for leading a decent life, others have condemned the whole exercise

as incapable of proceeding from sound and genuinely objective rational foundations. Evaluations of well-being and, even more so, a *decent* life are dismissed as manifestations of personal prejudice or ethnocentric bias. Given the circumstances of its formulation, it is little wonder that the UDHR suffers from a degree of philosophical naivety. Attempts to provide an ultimate philosophical validation of the Declaration may, therefore, be utterly futile not because philosophy no longer possesses the 'tools' for any such exercise but because the object in question does not allow for it.

When the focus is narrowed to a consideration of the 'attainment' of Article 25 of the UDHR, relatively abstruse philosophical concerns over the coherence of the Declaration are immediately swept to one side by a relentless tidal wave of human misery and suffering and the state of moral urgency this entails. Article 25, deliberated over in the aftermath of the Second World War, is concerned with the material conditions of individuals' lives and, in particular, the extent to which absolutely essential needs such as an adequate diet and access to clean drinking water have been secured. Unlike some other articles of the UDHR a systematic failure to secure the conditions for individuals' secure possession and exercise of this right will result in prolonged suffering and premature death. While one may deliberate over the precise conditions required for securing individuals' rights to freedom of opinion and expression (under Article 19) or for rights to take part in the government of one's country (under Article 21), correctly identifying the consequences of a widespread denial of Article 25 requires little theoretical reflection. The individual human right to an adequate standard of living enshrined under Article 25 is, arguably, the most systematically and thoroughly violated right within the human rights corpus. Morbidity and mortality statistics provide an unequivocal confirmation of this claim. An estimated 2800 million people (46 per cent of the world's population) live below the World Bank's $2 a day poverty line;[2] 1200 million of these live on less than half that figure, 'surviving' on an income of less than $1 dollar a day. The consequences of this degree of absolute poverty are horrendous. Every year 18 million people die prematurely from poverty-related causes. That is 50 000 people each and every day. Of these, 34 000 are children under five years of age. When examined from a global perspective these 18 million poverty-related premature deaths a year cannot merely be blamed upon inadequate resources. Absolute levels of global wealth are more than adequate for eradicating all absolute poverty. The immediate obstacle to pursuing this goal lies in the distribution of global wealth. Thus, in contrast to their absolutely poor counterparts who, for the most part, populate the southern hemisphere of the globe, the average income of citizens of the affluent countries of the 'north' has a market exchange rate value 200 times greater than that of their poor counterparts. While 2800 million people share approximately 1.2 per cent of

total global income, 903 million people living in affluent countries share 79.7 per cent of total global income. The combined assets and wealth of the world's three wealthiest billionaires is greater than that of 600 million people living in the least developed countries of the world. Finally, the income gap between one-fifth of the world's population living in the richest countries and one-fifth of the world's population living in the poorest countries is 74–1. This last figure has actually increased from the 1990 differential of 60–1, which confirms wider evidence pointing to an ever-increasing wealth gap between the globally affluent and the globally poor. Statistics like these present a profoundly disturbing picture of the suffering and misery endured by almost half of the world's population whose principal misfortune was to have been born in the wrong place and, some might wish to add, the wrong time. At the very least, one must conclude that millions, if not billions, of human beings' fundamental right to the necessary goods outlined under Article 25 is being systematically denied with devastating consequences for them. While statistics provide a measure of the extent of the violation of the right they cannot, by themselves, adequately identify who is ultimately responsible for its violation, nor how it might be remedied or ameliorated.

GLOBALIZATION AND ATTRIBUTIONS OF MORAL RESPONSIBILITY

Contemporary levels of global inequality have been condemned from a number of differing normative perspectives and commitments. Thus, the utilitarian philosopher Peter Singer has argued that the distribution of global wealth and resources is morally indefensible because of its adverse effects upon global levels of utility and well-being.[3] The sheer quantity of people living under conditions of absolute poverty is a morally bad phenomenon because of the misery this inflicts upon the poor and its effects upon their fundamental interests. Those of us who live under conditions of absolute affluence are in a position to significantly reduce global human suffering by forgoing some of our own, relatively trivial, pleasures and donating the money thereby saved to those organisations which aim to alleviate global poverty. Singer calls for a redistribution of wealth and resources from the absolutely affluent to the absolutely poor on the grounds that the trivially adverse effects upon our utility will be massively offset by the fundamental benefits thereby conferred upon the poor. Singer's argument does not explicitly suggest that the absolutely affluent directly cause the conditions to which our absolutely poor counterparts are exposed. He argues, in effect, that we are not doing enough to help alleviate unnecessary suffering. Thus, in a resort to a well-worn philosophical analogy, one's moral duty to save a drowning child is not

dependent upon whether one somehow caused the child to be in the water in the first place. The benefits to the child far outweigh the costs to oneself and, so long as this is the case, are sufficient to impose a moral duty to assist. However, there are good reasons for doubting the applicability of this analogy (and any philosophical arguments that resort to it) to the phenomenon of global poverty and the violation of individuals' basic human right to, for example, an adequate daily diet.

Some have argued that the relationship between the absolutely affluent and the absolutely poor is not akin to that of the victim and the innocent bystander. Indeed, some theorists have argued, in effect, that levels of absolute affluence and absolute poverty are directly and interdependently related. Our level of material affluence is forged on the backs of the extreme material deprivations endured by our absolutely poor counterparts. This analysis radically alters one's evaluation of the character of the moral relationship that exists between the affluent and the poor. On this view, it is not simply the case that affluent peoples are failing to do enough to help alleviate the suffering caused by poverty but that we are actively, if unintentionally, creating this poverty in the first place. To return to the analogy above, we are represented not so much as the innocent bystander as the person who threw the child into the water in the first place. We are held accountable, not just for failing to alleviate the suffering of the poor, but for causing their poverty. Thomas Pogge, an advocate of this position, has recently stated 'extensive, severe poverty can continue because we do not find its eradication morally compelling.' (2002: 3).

The empirical basis to this attribution of moral responsibility is provided by the perception of increasingly interdependent and global economic relations; a phenomenon typically referred to as globalisation, combined with a claim that the principal regulative institutions of the global economy are dominated by, and promote the interests of, the affluent countries at the expense of their poor counterparts. The reality of economic globalisation cannot be disputed. Relations of trade and economic exchange are no longer principally restricted by regional, national, or even continental boundaries. Corporations and companies operate on an increasingly transnational basis and, in some cases, have greater assets and wealth than many of the countries they do business within. Those of us who reside in affluent countries are directly related to our counterparts in poor countries through, amongst other things, our consumption of the goods and, increasingly, services the poor produce: goods and services typically mediated by transnational corporations. By themselves, individual governments cannot create or abolish economic markets. The role of national governments in the global economy is characteristically restricted to that of regulator. However, both at the national and international levels, the governments of affluent countries have

been consistently criticised for imposing regulative regimes which are unfair and perpetuate historically unequal terms of trade between the affluent and the poor regions of the globe. Thus Thomas Pogge adds a condemnation of the World Trade Organisation (WTO) to his critique of global inequality. Pogge describes the WTO as being dominated by the representatives of the world's affluent countries. This imbalance of power is best seen, he argues, in the consistently protectionist policies pursued by the WTO in, for example, the establishment and maintenance of economic tariffs imposed upon goods imported from poor countries. The immediate beneficiaries of these tariffs are the affluent countries' producers of identical goods or produce who, in the absence of these tariffs, would have to compete, ironically in a 'free-er', market on price with their counterparts in poor countries. Pogge insists that the cost to the poor of these protectionist measures is often catastrophic and directly contributes to their misery and premature death. Given our representatives' self-imposed mandate to protect our economic interests, Pogge writes, 'our negotiators must know that the better they succeed, the more people will die of poverty. Our foreign and trade ministers and our presidents and prime ministers know this and so do many journalists and academics as well as experts at the World Bank.' (2002: 20). Pogge insists that our economic and trade representatives actively seek to secure and maintain a global economy which allows us to continue to lead materially affluent lives characterised by our consuming high quantities of natural and manufactured resources which emanate from poor countries and for which we do not pay a 'fair' price but one protected and distorted by the imposition of tariffs and financial surcharges. Affluent countries' dominance of organisations such as the WTO provides for our appropriation of the natural resources and wealth of poor countries. The poor are, in effect, subsidising our affluence with, in many cases, their lives.

Pogge shares Singer's sense of moral outrage at the plight of the poor. However, he refrains from appeals to utility calculations in outlining his moral criteria. Pogge acknowledges a distinct Lockean character to his critique and explicitly draws upon the account of individual property rights that originates within the tradition of natural rights in defending a claim that individuals possess certain inalienable rights to the fruits of their labour and the possession of requisite natural resources. Global trade constitutes a violation of these rights not by its very existence but by the terms upon which it proceeds. Pogge is certainly not ideologically opposed to free markets nor is he opposed to globalisation. Indeed, he explicitly rejects the view that global poverty is directly caused by the liberalisation of markets. The WTO is condemned, therefore, for its refusal to 'open up' markets, as witnessed in the continuing use of economic tariffs. Pogge's argument also differs from Singer's in respect of the normative importance he attaches to human rights in his

condemnation of global poverty. As a utilitarian, Singer does not attach principal importance to rights as a potential foundation for his account of moral universalism. Pogge is not similarly constrained. While his acknowledgement of the political philosophy of John Locke might suggest a characteristically 'negative' account of rights, Pogge argues that a commitment to human rights entails the eradication of crippling levels of poverty. Global poverty must be condemned and overcome, not just because it is founded upon the misappropriation of others' wealth but also because it violates a fundamental human right to an adequate standard of living. Exercising this right should not be dependent upon the geographical location of one's birth.

Recourse to the language of human rights raises certain issues for identifying who has a responsibility for securing the right in question. Pogge claims that affluent citizens directly benefit from the economic disadvantages imposed upon the poor by present regulative trade and exchange institutions such as the WTO. While he claims that knowledge of the consequences of WTO negotiations is widely available he does not argue that through maintaining my affluent lifestyle I directly intend the suffering of those who subsidise it. Initial responsibility lies with those state representatives who negotiate these unfair terms of trade and exchange. However, he insists that within democratic societies we cannot be absolved from taking responsibility for the actions of our representatives. This situation persists, in part, because we, or at least many of us, do not care enough for the suffering our lifestyles impose upon others as witnessed by our continuing electoral support for parties committed to upholding global inequalities. Pogge insists that, as affluent citizens, we must bear some moral responsibility for the extent and depth of global poverty. His argument therefore seeks to extend a general duty to protect human rights to private individuals. This does have a well-established precedent within recent human rights discourse. However, it runs counter to the primarily legal conventions which have long dominated understandings of human rights. From the dominant legal perspective the principal, and in many cases sole, duty bearer for securing an individual's possession and exercise of a human right is the state. In the first instance, individual nation states bear the principal duty to secure the rights that they have recognised through the ratification of an international human rights instrument. Thus, one might argue that the principal duty-bearers for securing individuals' right to an adequate diet are those states which have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the foremost internationally legal source of authority on this issue. On this view individual nation states can be held accountable for their failure to protect their own citizens from the effects of poverty. Indeed, if one restricts one's account of human rights to its legal instantiation, holding private citi-

zens' of other countries to moral account would be legally invalid and morally dubious. Yet, this is precisely what Pogge recommends.

Underpinning Pogge's position is a different understanding of human rights to that which seeks to restrict evaluative criteria to the realm of law alone. He argues that a commitment to human rights entails a commitment to the notion of human rights as moral rights, rather than merely legal rights. Contained within this understanding of moral rights is a commitment to a concern for human beings as human beings and not as citizens of a particular state. He writes, 'human rights are not supposed to regulate what government officials must do or refrain from doing, but are to govern how all of us together ought to design the basic rules of our common life.' (2002: 47). A commitment to human rights posits the existence of a single moral community. In a single global economy characterised by gross and systematic inequalities of income and wealth, the affluent bear a moral duty to secure the rights of the poor to an adequate standard of living. He also avers that an exclusive reliance upon the legal mechanism amounts to blaming the victim. The poor are not responsible for their plight. It is certainly true that the already meagre assets of many poor countries are further undermined by such phenomena as government corruption and incurring crippling foreign debt but, in most cases, these governments have not been legitimately and democratically elected and, in some, have been positively supported by the governments of affluent countries. Placing the onus for remedying poverty upon the poor and their governments will do little, if anything, to reduce global poverty.

States have ratified various treaties and conventions which aim to reduce global poverty. As a consequence of the World Food Summit, held in Rome 1996, for example, the UN made a pledge to reduce the number of undernourished people living in the world to half the present level by no later than 2015. If achieved, this would represent a highly significant development in the protection of the absolutely poor. However, this goal is not legally binding and failure to realise it (which many predict) will have no legal consequences upon individual states. As Pogge points out, current trends are not promising. If the trend since 1996 continues until 2015 there will be more, not fewer, undernourished people in the world (2002: 10). While states may appear to be best placed to address the systemic and structural causes of global poverty, there would appear to be a lack of political will among those states most capable of effecting such changes. State machinations clearly aim to circumscribe and limit the extent of a legal duty to secure the conditions for satisfactorily realising Article 25. The affluent states' domination of the principal international bodies ensures that truly effective action is rarely undertaken. Against this background, and in keeping with Pogge's (and Singer's) identification of the importance of the efforts of individuals in combating global poverty, one may examine the phenomenon of ethical shopping. Can

ethical shopping positively contribute to combating global poverty? What obstacles does ethical shopping confront in this regard? Should one aim to shop ethically if one is concerned to alleviate global poverty and its effects upon human rights?

ETHICAL SHOPPING: THE VERY IDEA

Neither Pogge nor Singer in their respective analyses of global poverty has considered the contribution ethical shopping might make to its eradication. Indeed, academics have largely ignored the phenomenon. Thus, an academic defence of ethical shopping requires a thorough analysis of its character and the basis for the claims made by advocates of ethical shopping.

The societies in which absolutely affluent people live have been typically described as mass consumer societies. Shopping is an essential feature of human life in such societies, whether we like it or not. Hence, while some of us may live in dread of expeditions to the supermarket or shopping mall, shopping has, for many, become a principal 'leisure' activity. Even a cursory survey of the ubiquitous culture of shopping will serve to confirm the status it occupies within contemporary society. Although it is still a developing phenomenon, a market for so-called 'ethical' goods and services has emerged in recent years. Ethical shopping aims to promote the consumption of distinctly moral goods and services through directing individual consumer choices towards them. Ethical shopping subjects shopping to a form of moral evaluation. It aims to promote and identify opportunities for consumers to act morally through buying in this way. Against those who either reject or ignore the possibility, the very existence of 'ethical' goods and services appears to offer the promise of each consumer securing a degree of moral goodness through buying 'right'. Self-declared ethical commercial enterprises such as the Fairtrade organisation have become prominent members of the 'ethical' market-place.[4] Organisations such as Friends of the Earth, the Soil Association, the Council for Ethics in Economics, and the Ethical Marketing Group aim to raise consumer awareness and influence policy across a broad range of consumer issues in the United Kingdom, Australia and the United States. The Ethical Consumer Research Association regularly publishes a magazine, entitled *Ethical Consumer,* which aims to inform its readers how to buy ethically through scrutinising the social and environmental records of those companies who dominate the high street, the shopping mall, and increasingly even cyberspace. An analysis of the philosophical character of the phenomenon of ethical shopping clearly needs to encompass the broad range of organisations and enterprises which fall within this compass but needs to start somewhere. A good, initial reference point is provided by an annual publication entitled

The Good Shopping Guide, published by the Ethical Marketing Group and widely recognised within the United Kingdom and the United States as the most comprehensive and informative guide to ethical shopping currently available. It is, arguably, the closest thing we have to an authoritative compendium on the subject of ethical shopping.[5] The *Guide* provides a single, initial source for discerning the scope of ethical shopping, the content and basis of its principles, and a set of guidelines upon how consumers can actually go about shopping ethically.

The *Guide* defines ethical shopping as 'buying things that are made ethically and by companies that act ethically – or in other words without causing harm to or exploiting humans, animals or the environment.' (Clark 2003: 11). I shall examine this understanding of the term 'ethical' in greater detail shortly. Suffice it to say that the term is applied to cover a broad 'community' of moral agents and objects, from coffee pickers in Costa Rica and factory farmed chickens in the United Kingdom to maize crops in the American midwest. The *Guide* seeks to empower ethically minded consumers to positively promote ethical commercial enterprises through buying their products and frustrating unethical enterprises through boycotting their products. To this end, it provides 'ethicality scores' for companies and products across a broad range of consumer goods and services, ranging from groceries and domestic appliances to building materials, health and beauty products and financial services (Clark 2003: 13). The ethicality scores are based upon companies' environmental reporting, pollution, animal testing, factory farming, workers' rights, and involvement in armaments and genetic engineering. The specific score each company attains is based upon the extent to which the manufacture and retailing of its products demonstrably cause harm to the environment, animals and people. As a further aid to successful ethical shopping, the *Guide* identifies 15 'good shopping principles' (Clark 2003: 26–27). These include only buying brands positively endorsed by the *Guide*, to only investing money and banking with ethical financial enterprises, through to opting for fair trade products to practising recycling. The final principle places an injunction against unethical brands, and states 'avoid the brands that do not score well in *The Good Shopping Guide* analysis – together we have the power to make companies change.' (Clark 2003: 27).

Adhering to the *Guide* offers the prospect of shopping ethically. But why should ethically-minded consumers adhere to this (or any other) 'how-to' manual of ethical shopping? More importantly, why should anyone be 'minded' to shop ethically, in the first place? It must be said that the 'ethical' status of the *Guide* and the products and enterprises it promotes is entirely assertoric and has received little independent scrutiny or examination. Ethical shopping tends to assume the validity of the moral assertions upon which it is founded. Are these assertions justifiable and what do they rest upon?

ETHICAL SHOPPING, AVOIDING HARM AND PROMOTING WELL-BEING

The scope of ethical shopping includes, but ultimately extends beyond, commercial practices that directly and indirectly affect the conditions of the absolutely poor. Advocates of ethical shopping are often similarly concerned to directly protect non-human animals and the environment, independently from how this may impact on human beings. The inclusion of non-human animals and the environment raises a number of interesting philosophical questions.[6] Given the object of this chapter, and the overall theme of this book, I shall restrict my analysis to those aspects of ethical shopping that aim to alleviate poverty through ethical commercial exchange.

Contemporary moral theory has been dogged by the spectre of subjectivism. Moral philosophers such as Alasdair MacIntyre and Bernard Williams have, in their respective ways, argued that moral reasoning and moral beliefs do not possess an objective, authoritative status for us any longer.[7] Contemporary, complex societies are often portrayed as riven by interminable moral diversity and conflict. Against this background, morality is typically conceived of as a largely private affair, a feature of individuals' personal beliefs and preferences. While shopping per se is seen by many as the epitome of the very individualist 'ethic' deemed to be responsible for eroding the authority of public morality, ethical shopping manifestly claims an objective basis to its understanding of the term 'ethical'. Echoing the terms of the *Guide*, the website of the Ethical Consumer Research Association acknowledges that 'ethical can be a subjective term both for companies and consumers, but in its truest sense means without harm to or exploitation of humans, animals, or the environment.' Ethical shopping stakes it position clearly. It deems itself to be based upon morally objective grounds and thus cannot be swept aside as a mere manifestation of some individuals' subjective moral sentiments.

Definitions of ethical shopping repeatedly stress the avoidance of harm to humans, animals and the environment as the moral aim and basis of the phenomenon. The focus upon harm is unequivocal and central to its understanding of the term 'ethical'. The focus upon the avoidance of harm possesses a broad intuitive appeal likely to resonate with people who are not, as yet, inclined to shop ethically. The importance of the concept of 'harm' to ethical shopping entails a philosophical analysis of the phenomenon as a harm-based account of morality. This is a well-established tradition within moral theory and has a strong intuitive appeal for many. However, attempted justifications of harm-based approaches are typically confronted by the problem of defining and quantifying 'harm'. This problem goes deeper than the standard concern over whether and to what extent individuals should be free to harm themselves, in so far as it involves objectively identifying instances of 'harm'

in the first instance.[8] What is perceived as harmful and how this is morally evaluated are deeply complicated by the diversity of normative and moral ideals and value systems individuals adhere to. Thus, a professional boxer and a Buddhist monk are likely to have very different understandings of what constitutes 'harmful' actions. Attempts at resolving this problem typically entail identifying some category of vital interests or slightly more extensive accounts of human well-being as a means for providing the necessary criteria for objectively identifying and quantifying harm.[9] Applying such criteria to the example of the absolutely poor should be relatively unproblematic.

Philosophers such as Henry Shue, for example, have argued that human beings' claim to the possession of certain 'basic rights' is grounded within our possession of certain fundamental physiological and social interests in such things as an adequately nutritional diet, clean drinking water, adequate shelter, and sufficient opportunities for recreation and exercise, adequate recognition and respect, education, access to the means for self-expression, and the like.[10] As socially constituted, physiological animals' access to 'goods' such as these may be thought of as essential prerequisites for leading minimally good lives, or even for being human at all. Extending upon this perspective one might argue that the conditions under which many 'unethical' goods are produced and processed are manifestly harmful to those involved in this process in so far as they adversely impact upon one's basic rights. For example, inadequate safety provision in clothing factories in southern China exposes the workers to the fear and prospect of suffering potentially debilitating injuries. Similarly, the employment of child labour in textile factories across the Indian subcontinent effectively denies these children's access to an adequate education and thereby frustrates one of their vital interests. Finally, the terms of exchange and rates of remuneration Costa Rican coffee pickers are forced to accept may be seen as violating their self-respect and dignity, as well as exposing them to the threat of destitution.[11]

Examples such as these are commonplace. Many who choose to shop 'ethically' do so in the hope that their actions will contribute to, at the very least, minimising the harm suffered by those so much less fortunate than themselves. The motivation to alleviate suffering is, in instances such as these, not limited by national or continental borders. Ethical shopping holds that an increasingly global market-place establishes moral relationships between consumers and producers, irrespective of distance or cultural difference. Thus, ethical shopping appears to be based upon the claims that human beings share certain basic and objective vital interests, that the interests of many human beings are adversely affected by their exposure to the global market-place and the consumer choices we make, and, finally, by means of ethical shopping, we are able to minimise the harm suffered by those of our fellow human beings who are directly and indirectly affected by the con-

sumer choices we make. Indeed, the benefits to the producers of 'ethical' products would, in many cases, appear to go beyond merely minimising the harm caused to the producer to positively contributing to his or her well-being. For example, so-called 'fair trade' coffee is typically produced by small-scale co-operatives working for themselves. Selling their coffee direct to 'fair trade' retailers ensures a higher return on their produce which, in turn, may positively benefit the wider community from within which the co-operative operates. Choosing to shop ethically is thereby presented as capable of both minimising harm and promoting well-being. This provides the principal ethical basis for the claims of ethical shopping. But, is this basis philosophically justifiable?

ON BEING MORALLY GOOD AND SHOPPING ETHICALLY

For many ethical commercial enterprises the progressive amelioration of global inequality is a principal, if long-term, motivation for providing 'ethical' goods and services. Ethical shopping aims to make the world a 'better' place and the principal agent identified as capable of achieving this is the individual consumer. In the words of the *Good Shopping Guide*, 'everybody can make a contribution to a better world by the simple choices we make while out shopping.' (The Ethical Marketing Group 2003: 9). Set against the context of an increasingly global market-place, individual consumers within affluent, industrialised nations are viewed as capable of significantly reducing the suffering caused to others (in the radical sense) by ethical shopping. The absolutely poor suffer as a consequence of our consumer choices, and ethical shopping provides an opportunity for effecting significant social, economic, and environmental change. By focusing upon the individual consumer, ethical shopping effectively circumvents more traditional, political affiliations and modes of action. Ethical shopping does not require regular attendance at rallies and meetings. It does not require an ideological aversion to capitalism. On the contrary, it encourages individuals to exercise their conscience through a change in their spending habits. While the potentially beneficial consequences of such action are presented as huge, the action itself is, when all is said and done, rather banal. The focus upon the individual consumer, while wholly consistent with the 'spirit' of the age, raises a particularly interesting philosophical issue for ethical shopping. Ethical shopping cannot be accused of moral equivocation. The message is very clear: to shop ethically is to act morally. This clearly implies a vision of moral goodness and of the morally good agent. Shopping ethically may not be sufficient but it is certainly presented as being necessary for a claim to moral goodness. Advocates of ethical

shopping suggest that those who shop ethically have a stronger claim to being considered morally good people. In the words of one prominent ethical shopping website, 'given the choice how many people would choose not to buy products that are more ethical?'[12] Ethically-minded individuals must, given the option, prefer ethical over unethical goods and services. Being good requires buying right.

In order to support this claim, advocates of ethical shopping have to argue that choosing to adhere to ethical shopping principles amounts to more than a morally valuable option, something one does if one happens to desire to be seen as a 'morally good person'. Were it the case, individuals who did not share this desire would be under no such moral obligation. Advocates of ethical shopping consistently argue that the phenomenon is more than a particular lifestyle choice, in accordance with which some individuals choose to impose upon themselves the moral obligations this entails. The defence of shopping ethically typically implies the existence of some external, independently valid grounds for recognising the moral force and authority of the claims made for it.[13] The implication of the previous cited words, 'given the choice how many people would choose not to buy products that are more ethical?' (getethical.com) is clear: to choose not to do so is to reject the claims of morality. People choose to do this every day, but that does not make it morally valid. Through the relatively banal consumer choices we make, we are in a position to harm or promote the well-being of others. Given the option, choosing to do the former appears intuitively wrong; at least, that is the view the advocate of ethical shopping as a morally objective good must hold to.

The terms in which ethical shopping is typically defended suggest that the basis of its moral goodness is not considered to be ultimately reducible to the subjective preferences of only those who value and choose to shop ethically. The distinctly 'moral' character of ethical shopping derives from the alleviation of avoidable harm it offers to others. This provides the independent or 'external' ground for its claim to moral validity. As such, its force applies equally to those who do not choose to shop ethically as well as to those who do. Ethical shopping is defended not as a subjective lifestyle choice, but as an objectively valid moral good. Further to this, like death and taxes, shopping is a fundamental and absolutely unavoidable aspect of most people's lives. Given this (and the relatively comprehensive range of goods and services it covers), if ethical shopping is to be considered a moral good it is better considered a general, rather than a particular, moral good. This is important in determining the extent to which ethical shopping may be considered a necessary attribute of moral goodness per se. Many practices are generally thought of as morally valuable in our society; donating one's time or money to charity, providing support or assistance to one's friends in their time of

need, and perhaps even helping little old ladies to cross a busy road. However, none of these is as extensive and pervasive as shopping and none has the impact that shopping does. The financial value of shopping dramatically exceeds that of charitable donations. We may not have any friends and we may not live near any busy roads without this adversely affecting our claims to moral goodness. We cannot avoid shopping, however. The sheer pervasiveness of shopping appears to justify the need to consider its ethical character and highlights the moral gravity of distinctly ethical shopping. To this extent, the question of the arguably ethical imperative of shopping ethically has more in common with deliberations upon the ethics of taxation, for example. As a fundamental feature of contemporary life, shopping demands moral examination, and ethical shopping, the response to this demand, ought to figure prominently in our conceptions of, and deliberations upon, moral goodness.[14]

This view is further reinforced by the nature of the ends apparently served by shopping ethically. Advocates argue that the nature and extent of the suffering caused by unethical shopping is fundamentally compelling. Effective use is made, for example, of numerous surveys of the working and living conditions of textile factory workers or crop pickers in the developing world. A significant portion of the ethical shopping market aims at the promotion of fundamental, rather than trivial, interests. The nature and extent of these interests, as the object of ethical shopping, add weight to the claim that ethical shopping rests upon objectively valid moral principles. Given the means and opportunity, morally good people will choose those courses of action which will, at the very least, cause the least amount of suffering to others. Ethical shopping is clearly consistent with this position. The very pervasiveness of shopping in consumer societies ultimately exposes almost all of us to the charge of failing to do what we reasonably can by continuing to consume unethical products, rather than their ethical counterparts. We may continue to choose the former over the latter but, in so doing, some aspect of our moral character is diminished in contrast to our ethical consumer counterparts. In mass consumer societies, shopping ethically presents itself as a necessary attribute of moral goodness.

The moral basis of the appeal of ethical shopping rests heavily upon an almost entirely intuitive notion that harming others is morally wrong. Unethical shopping systematically and necessarily contributes to the perpetuation of suffering and is, hence, morally wrong. Ethical shopping is presented as the means for countering this wrong, for transforming the moral character of shopping. Through making ‘ethical’ consumer choices we aim to, at the very least, minimise the harm caused to those at the other end of the commercial enterprise. In so doing, there is an expectation that we will also be contributing to restoring these people’s opportunities to lead their lives free from the

fear of destitution. On the face of it, these benefits appear to require little more than a mere change in our shopping habits and choice of goods and services. When one presents the situation in these terms, it may appear positively unreasonable for people to continue to prefer 'unethical' to 'ethical' goods and services. However, this conclusion is somewhat premature. The philosophical basis of ethical shopping can be subjected to a critical analysis and indeed must be if its claims are to achieve a degree of authority.

CRITICAL VIEWS

I have been analysing ethical shopping and its potential contribution to alleviating levels of global poverty. As I suggested earlier, as a general phenomenon ethical shopping encompasses, but goes beyond a concern for people's human right to an adequate standard of living. As a moral discourse ethical shopping draws upon philosophical resources which are not ultimately reducible to the humanist-derived principles upon which a commitment to human rights is based. Thus, for example, some advocates of ethical shopping are more concerned with the suffering of non-human animals or the effects of technology and industry upon the environment than they are with that endured by human beings. Philosophically substantiating these kinds of moral commitments raises deep issues about the nature of moral agency and relationships between rights and duties, for example. Restricting one's focus to those forms of ethical shopping which seek to address the effects of commerce upon people necessarily limits the grounds upon which the approach may be philosophically criticised. However, this does not entirely absolve ethical shopping from philosophically critical forms of analysis.

The principal objection to the philosophical basis of ethical shopping takes issue with the purported objectivity of ethical shopping's vision of moral goodness. Advocates of ethical shopping insist that the practice is morally valuable even for those who do not value it. The moral value of ethical shopping cannot be reduced to the conscious states of individual consumers. This is the basis of its purported moral authority. Ethical shopping is not just another lifestyle choice for relatively affluent people, but a morally compelling 'good'. Those who opt for unethical products over their ethical counterparts fail to recognise, or may even be rejecting, the valid demands placed upon them by morality, rooted in the suffering of those exposed to our consumer choices. This view of morality has, of course, been the object of consistent criticism. For example, Bernard Williams has consistently challenged the epistemological basis of moral objectivity. For Williams there exist no legitimately 'external reasons' for our moral beliefs. There is no ultimate court of moral appeal which might adjudicate between a potential

dispute between 'ethical' and 'unethical' consumers.[15] Others, such as Charles Larmore, have argued that the diverse and complex constituents of contemporary societies simply do not allow for the establishment of a single, morally objective regulative vision for governing relations between individuals. We each have an equal interest in securing our own moral commitments against external interference but this explicitly forbids demanding of others that they adhere to our vision.[16] Justifications for any moral commitments must therefore not exceed the conscious states of those who share them.

Thus, one cannot demand of others that they share one's own moral vision as a necessary condition of their claim to moral goodness. On this view, being 'good', in an objective sense, does not require shopping ethically. Finally, some might argue that ethical shopping unduly extends the bounds of individual consumers' normative responsibility.[17] Ethical shopping attributes, in effect, a moral responsibility to all consumers both to avoid buying products that have caused significant harm to others in their production and distribution and to positively opt for products that promote others' interests. One might, for the sake of argument, accept that one incurs responsibilities towards those one's actions directly affect, wherever these people be. However, this does not provide for a determination of the extent of one's responsibilities. Put simply, how much ethical shopping is sufficient to satisfy one's obligations? Is it sufficient to restrict one's ethical 'shopping basket' to one's weekly groceries? Or must one aim to consume only ethical products *and* services? Is a little better than nothing, or does this serve only to expose oneself to the charge of moral hypocrisy? These criticisms impact upon the philosophical basis of ethical shopping. They do not, by themselves, necessarily undermine this basis. They raise questions for developing an account of ethical shopping as a necessary attribute of moral goodness and entail the continuation of a 'dialogue' between ethical shopping and moral philosophy.

A second philosophical criticism which can be levelled at ethical shopping concerns an apparent lack of clarity or precision in determining an allegedly positive relationship between ethical shopping and human rights. On the face of it, one can argue that ethical shopping cannot be reduced to a set of deontological ethical foundations, such as those which have figured prominently in the philosophy of human rights. Ethical shopping goes beyond the deontological imperative to avoid doing wrong to others through the violation of what Charles Fried refers to as the 'categorical norms' (1978: 11).[18] Nor does ethical shopping identify morally adverse effects with intentional human action. Ethical shopping necessarily requires that we positively act to alleviate suffering both through refusing to buy 'unethical' products and through the positive promotion of their ethical counterparts. In contrast, a deontological approach to the ethics of shopping appears to necessitate a largely ascetic lifestyle as the means for avoiding inflicting harm upon others.

In addition, the centrality of the concept of 'harm' within ethical shopping appears to exclude lack of intention as an excuse or justification for unethical shopping. The vast majority of us who continue to consume unethically do not do so with the intention of harming others: shopping is not the preserve of psychopaths. However, our failure to exercise the correct moral choices, in accordance with the lights of ethical shopping, directly contributes to the perpetuation of suffering. This leads us to the final observation.

Ethical shopping cannot be thought of as being based upon primarily self-regarding ethical principles.[19] The so-called 'other' is absolutely central to the principle of ethical shopping. Ethical shopping aims to reduce the suffering our consumer choices ultimately inflict upon others. The principal motivation is thus fundamentally other-regarding. We may indirectly benefit as a consequence of shopping ethically, but this is not a necessary or even sufficient end for such action. It is a side-benefit, at best. Through shopping ethically we are thought to lessen the suffering of people we are likely never to meet, people who have no realistic opportunity of similarly directly promoting our interests through their actions. This does not contradict all aspects of the human rights corpus. However, it certainly runs counter to some philosophical elements which have had deep and enduring effects upon the development of our understandings of human rights.

In addition to the philosophical criticisms which may be levelled at ethical shopping, one must also consider those views which, so to speak, might take ideological issue with the phenomenon and the claims that are made on its behalf. Some might argue that the very phrase 'ethical consumerism' is oxymoronic. That is to say, that ethical shopping suggests the possibility of acting ethically within a setting which is thoroughly unethical. Within Marxism there has obviously been a long-standing and well-established view that consumerism is a manifestation of capitalist relations and, whilst these relations may not ostensibly violate the 'deformed' moral values which capitalism induces, they are, nevertheless, ultimately immoral. The claims underlying the previous sentence raise some extremely complicated and controversial epistemological and political issues which are beyond the remit of this current work. However, the criticism itself, as applied to the possibility of shopping ethically, is important and requires further analysis in one particular respect. In pursuing this analysis I shall focus not upon the relationship between consumer and producer, but opt instead for a discussion of the relations between consumers within affluent societies.

By its very nature, ethical shopping costs. More to the point, 'ethical' products are characteristically more expensive than their 'unethical' counterparts. In contrast to many forms of more traditional political action, advocates and adherents of ethical shopping are confronted by a financial surcharge; an *ethical* surcharge. 'Ethical' shoppers are, to coin a phrase, asked to put their

money where their mouths are. This is an important factor in evaluating attributions of moral goodness. On this view acting morally necessarily requires the expenditure of money and thus the possession of sufficient financial resources. This introduces a potential material constraint upon the very possibility of shopping ethically. For ethical shopping to be successfully defended as a necessary element of moral goodness, it must overcome a perceived association with a minority of relatively affluent individuals, motivated by the desire to make themselves feel more morally worthy. Ethical shopping is, however, contingent upon the possession of sufficient financial capital. Contemporary, consumer societies are manifestly characterised by large disparities of individual personal wealth and income. Thus, we cannot be said to have an equal opportunity for shopping ethically. In purely financial terms, the wealthier one is, the more the relative costs of ethical shopping diminish. It is simply easier for the wealthy to be moral on this basis. This observation clearly testifies to the persistence of relative poverty within otherwise affluent societies. Ethical shopping, it is fair to say, principally focuses upon relations between consumers living in affluent societies and producers living in poor countries. These two 'communities' tend to be treated as relatively homogeneous blocs and thus significant differences in income amongst the 'target' consumer market are obscured and not paid the attention they, perhaps, warrant. If the relative poor living in affluent societies feel that they simply cannot afford to shop ethically, cannot afford the 'ethical surcharge' upon their grocery bills, is it reasonable to include them within the broader community of unethical consumers? After all, very many 'wealthy' people also fail to shop ethically. Ethical shopping appears to put a price upon acting morally. Inequality of income and opportunities is undeniably most protracted between affluent and poor countries but this should not serve to ignore the existence of inequalities within affluent societies.[20]

Another 'ideologically' motivated criticism of ethical shopping can be gleaned from the literature which holds that globalisation has generally had adverse effects upon the enjoyment of many people's human rights. Given their globalising concerns, both ethical shopping and human rights must be considered manifestations of globalisation. This simply cannot be denied. The globalisation of economic forces and markets is singled out by many as posing particularly acute threats to the human rights of many people living in poor countries. Economic globalisation serves to undermine and diminish the capacity of individual states to protect and promote the rights of their citizens where these are exposed to the demands of global capital. The ongoing establishment of a single global economic space has resulted in the marginalisation of entire sections of many poor societies who are, in effect, condemned as being economically non-productive. This does not mean that they do not produce anything per se, but, rather, that what they produce

cannot compete within an increasingly globalised market. Further, it has been consistently argued that economic globalisation has adversely affected many people who have successfully secured employment but whose labour rights have been systematically violated by subsidiaries of multinational corporations who are not, effectively, answerable to state authorities or who are located within the growing number of unregulated economic zones to be found in developing world countries. Thus, in their analysis of the effects of globalisation upon human rights, Schwab and Pollis write 'globalisation has had a deleterious effect on the entire complex of human rights, resulting in significant transformations in the behaviour and values of masses of humanity across the globe (2000: 217).[21] On this view of globalisation, ethical shopping might be criticised for being 'contaminated', so to speak, by the broader economic processes and relations of which it is an unavoidable part.

I have, then, considered the character and basis of ethical shopping. I have also considered some of the more pertinent criticisms which may be levelled at the claims that ethical shopping is genuinely 'ethical' and that, as such, it is something consumers ought to practise, whenever they can. The next section aims to identify ways in which these criticisms might be overcome so that one may justifiably argue that shopping can contribute to the promotion and protection of human rights.

TOWARDS A (QUALIFIED) DEFENCE OF ETHICAL SHOPPING

The issue of the ultimate objectivity of ethical reasoning and moral beliefs continues to exercise many moral philosophers. Given the claims made on its behalf, ethical shopping cannot be excluded from these kinds of consideration. Advocates of ethical shopping will have to, at some stage, adequately engage with meta-ethical concerns if they wish to secure philosophical authority and justification. Whilst I cannot adequately engage with that task here, some observations may, nevertheless, be usefully made at this point. As I argued earlier, many moral and political philosophers have withheld the attribution of objectively true from substantive moral conceptions or perspectives in an attempt to secure a degree of harmony and stability within societies that are increasingly diverse and multicultural. The 'fact of pluralism', as John Rawls refers to this condition, is seen as militating against attempts to base legally and politically regulative principles upon disputed moral foundations. Reasonable people adhere to radically diverse and even potentially conflicting moral conceptions of the good. When confronted with this, Rawls holds, the morally legitimate thing to do is to seek to formulate and uphold principles capable of enjoying a satisfactory degree of consensus. This entails

the state's avoidance of promoting potentially controversial principles. This position enjoys widespread support and appeal amongst contemporary moral and political philosophers. Rawls himself argues that this position is compatible with the defence of human rights,[22] but the account of those rights which may form the bedrock of a legitimate political ethics is more limited in scope and content than many human rights advocates would wish. One may surmise that this philosophical position would not extend to include provision for ethical shopping, nor would it seek to justify ethical shopping's claim to moral title, so to speak.

A response is available to defenders of ethical shopping, though it does not, by itself, settle the issue of objectivity. In the kinds of complex and culturally diverse societies to which Rawls and the like have applied their arguments, shopping is a pervasive, not to say, ubiquitous, phenomenon. One can confidently assume that shopping is an activity engaged in by people with otherwise potentially incommensurate moral perspectives and beliefs. Shopping provides, if you will, a common object of human activity in complex, mass consumer societies and one which Rawls's analysis ignores.[23] Individual shoppers' attitudes towards the 'moral' character of shopping no doubt differ, and these differences are, no doubt in some cases, related to the more general moral commitments and beliefs they adhere to. However, the alleged moral imperatives of ethical shopping ultimately appeal not to the subjective dispositions of shoppers but to the demonstrable effects of shopping upon those who produce the goods consumed. Ethical shopping is, as stated earlier, a primarily 'other-regarding' ethic. Ethical shopping confronts all shoppers with a common question: do your consumer choices ultimately serve to inflict significant harm upon other people? If the answer to this question is yes, then continuing to consume such products amounts to a disregard for the effects of one's actions upon others. It seems somewhat counter-intuitive to claim that acting in this way can be described as either ethically acceptable or ethically neutral, even within morally diverse societies. After all, some limits must be imposed upon this diversity. There is a long-standing tradition within liberal philosophy which draws that line precisely at the point at which individuals' actions are likely to significantly harm others. The harm principle is predicated upon a conception of human communities in which the individual members are in a position to affect one another's interests. Typically it has simply been assumed that this necessarily corresponds with national communities. However, especially in these increasingly globalised times, this assumption cannot be sustained. Consumer choices made in, for example, the urban conurbations of Europe and North America have a direct effect upon the lives and working conditions of people exposed to the farms and factories in the developing world. Thus, one may hold beliefs about the morality of abortion, or capital punishment, or even the

role of the church in regulating public authorities that differ radically from those of one's neighbour. Despite these differences, both of you may consistently consume goods, the production and exchange of which may demonstrably harm others. The fact that those exposed to the effects of one's consumer choices do not live in the same neighbourhood, or even the same continent, should not diminish or undermine our recognition of the fact that our actions have caused them harm. Given the 'fact of harm', to paraphrase Rawls, it would appear reasonable for advocates of ethical shopping to place the burden of proof upon those who continue to argue that individual consumer choices cannot be subjected to moral evaluation. Seen in this light, continuing to shop unethically seems, quite frankly, morally wrong.

Adequately substantiating this last claim requires, at the very least, engaging with the criticisms levelled at the view that it is possible to act 'ethically' whilst engaging in global, capitalistic relations. Two aspects of this form of criticism are particularly pertinent. First, the claim that global capitalism is antithetical to the protection of human rights. Second, that inequalities of income among consumers within affluent societies significantly limit actual opportunities to shop ethically. On this last view, ethical shopping is liable to being considered a preserve of the affluent.

Like human rights, ethical shopping is simultaneously both a consequence of and a response to economic globalisation. Its legitimacy, like that of human rights, requires identifying its potential for constraining and remedying some of the profoundly adverse effects of economic globalisation. One might wish to argue that the alleged antidote is damned by its affinity with the illness. That is to say, that the pathology of economic globalisation is all-consuming and allows no space for the establishment of genuinely effective remedies or alternative modes of commercial practice. One might imagine a relatively orthodox Marxist presenting such a view. This view of the economic determinants of normativity has been widely and extensively criticised, not least of all by Marxists. Whilst refraining from a lengthy engagement with Hegelian Marxism, it might nevertheless be contended that real substantive differences do exist between ethical and unethical shopping. A blanket condemnation of the possibility of any such differences obscures from view those who benefit, albeit marginally, from the former. It would also, if generally accepted, presumably reduce the numbers of people prepared to shop ethically, since the exercise would be, at best, futile. Having said that, ethical shopping appears condemned to maintain a problematic relationship with economic globalisation and capitalism in so far as it points to both their harmful effects and the potential for remedying these through commercial exchange. However, once again, it appears incumbent upon those opposed to ethical shopping to demonstrate the legitimacy of continuing to act in ways which unnecessarily harm others. This brings us to the issue of the degree of

genuine choice even 'affluent' people can be said to possess over what we consume.

Ethical shopping, as stated earlier, typically costs more than its unethical counterpart. Ethical shopping entails an ethical surcharge to the consumer. On the face of it this would appear to limit the extent to which even affluent consumers can choose to shop ethically. If ethical shopping is a preserve of the wealthier sections of affluent communities can one genuinely claim that we have an equal (or at least similar) moral obligation to shop ethically? This is an important question. It quite simply is the case that not all of us are similarly financially placed to make ethical consumer choices. Needless to say, possessing the financial means provides no guarantee that people will make such choices. The issue is the extent to which inequalities of wealth among 'affluent' consumers limits the size and scope of ethical consumption. Thus, picture a potential community of ethical consumers. One must assume that a necessary condition of membership of this community is the possession of sufficient wealth or income. This is not, however, a sufficient condition, since many people who satisfy this condition continue not to shop ethically. One must therefore attach an additional proviso: that membership of this community requires both recognising the moral value of consuming goods and services which do not cause harm to others, and possessing the requisite material means. Advocates of ethical shopping still have much work to do to persuade many who fall into the latter category that it would be morally right for them to espouse the cause of ethical shopping. However, this still requires a determination of the extent to which consumers living in affluent societies do possess sufficient income to shop ethically. How much is sufficient? Given the relative modesty of the size of the market of ethical consumers one is tempted to suggest that many more consumers than is typically recognised can afford to shop ethically and are failing to do so. Determining the financial threshold for shopping ethically will require, most likely, more than the expertise of a philosopher. Having said that, philosophical resources do exist which may prove very effective in addressing this concern.

Given the sheer extent of wealth and income in mass consumer societies one is tempted to claim that many consumers fail to adequately appreciate the extent to which they possess sufficient financial means for shopping ethically. What is required is a shift in perception and priorities. A more detailed analysis of the argument presented by Peter Singer, which I considered earlier, provides a means for outlining some benchmark criteria for identifying people's abilities to make financial contributions to the alleviation of global poverty.

Singer has argued that people living in affluent countries have a moral duty to alleviate the poverty-induced suffering of people in poor countries.[24] His argument crucially contains the claim that each one of us possesses the

financial means for alleviating this suffering and that, given this, it would be morally wrong not to do so. He specifically proposes that we all devote 10 per cent of our annual net salaries to appropriate charities and aid organisations. Setting aside questions over the practical effectiveness of his proposal, for present purposes the important element of his argument consists of an economic concept he deploys in support of his position. Singer recognises the existence of gross disparities of wealth within affluent countries but insists that this is no obstacle to his proposal. He describes adult members of affluent societies as living in a state of 'absolute affluence' so that 'they have more income than they need to provide themselves adequately with all the basic necessities of life.' (1979: 161). Even the relatively poor are described as absolutely affluent, in contrast to their absolutely poor counterparts of the underdeveloped world who are unable to satisfy the basic necessities of life. If correct, the distinction drawn between absolute affluence and absolute poverty appears to offer significant support to the cause of ethical shopping. It appears to establish the necessary condition of moral urgency whilst indicating the capacity of absolutely affluent people to incur the marginally higher costs of opting for ethical over unethical products. Singer's proposal of a direct financial contribution may thereby be refashioned in the form of the 'ethical surcharge' currently entailed by shopping ethically. On this view, the vast majority of adults residing in absolutely affluent countries should be able to afford to shop ethically. For the relatively poorer members of these societies, doing so will probably entail altering one's spending habits in some areas, but the opportunity appears to exist. When confronted by the fact of absolute poverty, being relatively poor but absolutely affluent is no justification for not shopping ethically. Thus, drawing upon Singer's argument, most of us can help to reduce suffering through shopping ethically and therefore ought to do so. One is certainly justified in arguing that there is far greater 'capacity' for ethical shopping within affluent societies and that nowhere near enough is being done by individual consumers, let alone national governments, to alleviate the suffering and severe economic hardships of the global poor.

Some of us are better placed to consume ethically than others: inequalities of income and socio-economic capital are an endemic feature of the capitalist societies out of which ethical shopping emerges. Ethical shopping is, perhaps, an attempt to moralise and humanise global capitalism. It aims, in part, at reconciling respect for human rights with an activity that none of us who live in affluent consumer societies can ultimately avoid. Part of the success of the ethical shopping 'movement' has been to publicise the effects of our consumer choices upon those who labour to satisfy our desires and wants. Consumers are increasingly conscious of the conditions under which most goods and services are produced. In contrast to those views of capitalism

which hold that nothing can effectively be done to make the world a better place so long as capitalist relations prevail, ethical shopping offers an ever-widening opportunity to alleviate some suffering and even improve the lives of those so much less fortunate than ourselves. Given this, and despite enduring philosophical concerns surrounding the objectivity of moral reasoning, the onus lies, I believe, with those who choose not to consume ethically, given the means and the opportunity. This, by far largest, constituency of consumers needs to justify its refusal or neglect to alter its human rights abusing practices. Combined with this need the preceding analysis enables one to draw the following conclusion: if one has sufficient means and opportunity to consume ethical products and services then one ought to do so. One might refer to this as an axiom of ethical shopping.

CONCLUSION

Ethical shopping is an established and growing phenomenon. My argument above suggests that we should welcome and encourage this development, primarily through the products and services we consume. Ethical shopping can be subjected to philosophical and political criticism. Its claims to moral objectivity, as well as the implication that it is possible to act morally whilst engaging in commercial exchanges is bound to receive critical scrutiny. Everything turns, however, on whether by shopping ethically we can positively contribute to the alleviation of poverty and the protection of the right of the globally poor to an adequate standard of living. Certainly, a moral commitment to human rights would compel a commitment to ethical shopping if this positive effect can be securely demonstrated. Economic globalisation has brought in its wake misery and destitution to many. It thereby demonstrates the fact of our capacity to affect the interests of people to whom we are related through our commercial relationships. Though it may appear so at times, economic globalisation is not a monolith and its effects are not, necessarily and always, inherently harmful to the globally poor. Through exposing shopping to moral evaluation, ethical shopping has affected many of our perceptions of this banal but ubiquitous feature of our lives. Through shopping ethically we have an opportunity to make positive contributions to the lives of others. Having said that, one must be temperate in one's estimation of the potential scope of ethical shopping's contribution to the cause of human rights. It would be, I believe, naive to assume that global poverty can be eradicated by shopping alone. Clearly governments and international authorities have essential, structural roles to play in this endeavour. At present, their failure is palpable. Holding them to account is an urgent political task and one which will require concerted action by many constituencies of people.

Achieving the conditions for every individual's right to an adequate standard of living remains a distant expectation. Despair, however, is a luxury for those who do not go to sleep every night hungry. As individual consumers we are in a position to help. How can one choose not to?

NOTES

1. See www.fairtrade.org.uk/pr270205.htm for the press release.
2. The statistics in this paragraph can be found in the introduction to Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).
3. Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979) Chap. 8.
4. There exists an organisation which loosely regulates and endorses 'genuine' fair-trade products. The Fair Trade Labelling Organisation (FLO) is an umbrella organisation for all of the major fair-trade labels and has members in 17 countries.
5. The Ethical Marketing Group, *The Good Shopping Guide* (London: Ethical Marketing Group, 2003). The reader is also advised to consult Duncan Clark, *The Rough Guide to Ethical Shopping: The Issues, the Products, the Companies* (London: Penguin, 2004).
6. I consider these questions in a yet to be published article, 'The ethics of shopping ethically'.
7. Alasdair MacIntyre, *After Virtue: a Study in Moral Theory* (2nd edn), (Notre Dame, Ind.: University of Notre Dame Press, 1984). Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985).
8. The *locus classicus* of philosophical discussions of whether individuals should be free to harm themselves is John Stuart Mill, *On Liberty and Other Essays*, edited by John Gray (Oxford: Oxford University Press, 1991). For insightful analyses of Mill's 'harm principle' see John Gray, *Mill on Liberty: a Defence* (London: Routledge & Kegan Paul, 1983) and C.L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980).
9. One of the best examples of this approach is provided by James Griffin, *Well-Being: its Meaning, Measurement and Moral Importance* (Oxford: Clarendon Press, 1986). See also, Len Doyal and Ian Gough, *A Theory of Human Need* (London: Macmillan, 1991).
10. Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1996).
11. For a discussion of these kinds of examples see Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).
12. www.getethical.com/about.asp
13. This is, of course, a deeply controversial position to adopt in contemporary moral philosophy. For examples of two advocates of this position see Iris Murdoch, *The Sovereignty of the Good* (London: Routledge, 1991). Philippa Foot, *Natural Goodness* (Oxford: Clarendon Press, 2003).
14. In effect, I am arguing that advocates of ethical shopping do not consider it to be of merely supererogatory value. Ethical shoppers should not, therefore, be thought of as 'moral saints'. For a discussion of this last concept see Susan Wolf, 'Moral saints', *Journal of Philosophy*, **79** (1982), pp. 419–30.
15. See Williams (1985). See also his *Moral Luck: Philosophical Papers, 1973–1980* (Cambridge: Cambridge University Press, 1981).
16. See Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987).
17. This criticism has typically been levelled at act-utilitarianism and seems to apply here equally. See Bernard Williams, 'A Critique of Utilitarianism', in J.J.C. Smart and B. Williams (eds), *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), pp. 77–150.
18. Charles Fried, *Right and Wrong* (Cambridge, MA.: Harvard University Press, 1978). For a

further discussion of deontological norms see Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press, 1986), Chs. IX & X.

19. For examples of insightful discussions of the implications of adhering to self-regarding principles see Derek Parfit, 'Prudence, morality and the Prisoner's Dilemma', in *Proceedings of the British Academy*, 65 (1979) and J. Harsanyi, 'Morality and the Theory of Rational Behaviour' in *Utilitarianism and Beyond*, A. Sen and B. Williams, (eds) (Cambridge: Cambridge University Press, 1982).
20. I shall address this concern in the next section.
21. P. Schwab and A. Pollis, 'Globalization's Impact on Human Rights' in A. Pollis and P. Schwab (eds), Human Rights: New Perspectives, New Realities (Boulder, CO: Lynne Reiner, 2000), pp. 209–23.
22. See his *The Law of Peoples* (Cambridge, MA: Cambridge University Press, 1999).
23. Indeed, one might argue that Rawls's 'political liberalism' tends to obscure social structures and institutions to which we are, albeit differentially, exposed.
24. Singer 1979, Chapter 8.

PART II

Specific issues

6. Managing globalisation: UK initiatives and a Nigerian perspective†

'Gbenga Bamodu*

I. INTRODUCTION

'Globalisation' has been one of the issues at the forefront of international economic and political debate in recent years and is, arguably, the major buzzword of the late twentieth and the early twenty-first century. Essentially the term, particularly in its economics context, is used to refer to the notable and relatively recent evolution in the nature of the global economy reflected in the rapid increase in the level and speed of economic transactions, primarily, across geographical divides and national borders. This evolution has been brought about by a range of factors among which include, chiefly, advances in technology and trade liberalisation. Various definitions have been proffered as to the meaning of globalisation. According to one broad definition, 'globalisation is a process of rapid economic integration driven by the liberalisation of trade, investment and capital flows, as well as by rapid technological change and the "Information Revolution"'.[1] In a more simplistic definition, a World Bank paper observes that 'the most common or core sense of economic globalization … refers to the observation that in recent years a quickly rising share of economic activity in the world seems to be taking place between people who live in different countries (rather than in the same country).'[2]

Trading across national borders is of course not a new activity but one that is centuries old. There are, however, some factors that mark out globalisation as a distinct phase in the history of international trading activity. One of this is the speed at which cross-border transactions can now be conducted due to advances in transport and communications technology. Another distinguishing mark of globalisation is the increase in and diversity of global actors economically and in other respects. Unlike in the era of the mediaeval law merchant in Europe and even the traditional view of international trade prior to globalisation, international activity or indeed activism is no longer the preserve of a unique class but something that encompasses diverse actors from economic protesters, to transnational corporations and indeed even to

anyone with access to a computer, a modem and a functional telephone line. Implicit in the foregoing is also the fact that globalisation is not confined solely to trading activity. For example, one of the claimed consequences of the information revolution, among other things, is the globalisation of ideas, of culture and, to some extent, convergence of ideology.

In spite of all that has been said in the immediately preceding paragraph, globalisation has been, as is well known, a rather contentious matter, less so in terms of earlier debates about its existence,[3] but more in terms of its effects. In particular, globalisation has negative connotations among those concerned about its effects on the developing world. Indeed the question of how to 'manage globalisation', itself an indication of a consideration that globalisation is something to be managed or contained or curtailed or moulded somehow, continues to be a topic of importance and considerable heat in international discourse. Whilst a temperate consideration of the subject will necessarily acknowledge the benefits that flow from globalisation, such consideration will also realistically need to involve an acceptance that there are genuine bases for some of the concerns expressed about its effect, particularly the rapidity of change for which some countries, especially developing countries, are hardly prepared, if at all. What is proposed in the next few pages is an exploration of some of the issues surrounding globalisation and its management, taking the recent Report of The Commission for Africa established by the British Prime Minister and the preceding United Kingdom's White Paper on Globalisation[4] as the principal bases of the discussion.

II. A WELCOME CATALYST FOR GLOBAL PROSPERITY OR AN EVIL TO BE RESISTED?

At the extremes, views about globalisation can be polarised into those that consider it an unadulterated positive force and those that perceive it as nothing short of evil. Proponents who generally adopt a neo-liberal perspective maintain that globalisation and trade liberalisation bring about increased trade which in turn brings about economic growth, and which in turn brings about alleviation of poverty and increased prosperity. For example, an economist at the World Bank has been quoted as commenting as follows:

> In sum – Globalization is good for growth; growth is good for the poor; globalization has no effect on inequality; hence globalization is good for the poor. This is a simple and yet forceful fact-based conclusion, and cannot be disproved by specific examples to the contrary; any such example could be countered by more examples where globalization works for the benefit of the poor …[5]

Opponents argue that the claimed or anticipated growth or, at least, the alleviation of poverty and increase in prosperity simply has not happened for the great majority of the world's population. At any rate, most developing countries in particular have simply not experienced these claimed benefits or any real benefits from the onset of globalisation. It is further argued by some of these opponents that, to the contrary, globalisation has had a negative effect on the poor and vulnerable, in that as the rich get richer as a result of globalisation so the poor get poorer as an attending consequence.[6] It is even contended by some that globalisation is simply another manifestation of Western imperialism and is the contemporary equivalent of the scramble for Africa of the 1880s.[7]

Amidst this impassioned polarity it is still possible, however, to plot a somewhat middle course through a careful and balanced analysis. Indeed, it seems that the preponderance of considered contemporary opinion particularly among policy makers in developing countries acknowledges that, whilst there are some serious dangers attendant to globalisation, there are also some positive benefits to be reaped from it. Hence the amount of intellectual and diplomatic effort directed towards the topic of managing globalisation. Managing globalisation is thus about identifying, establishing and adopting policies and initiatives intended to limit the negative effects of globalisation whilst at the same time harnessing its positive effects. In any event, focus on managing globalisation also evinces another realisation which is that, whatever view one holds of it, globalisation is indeed an undeniable and present reality, even if it is still unfolding, hence the necessity of developing effective strategies for addressing its consequences.

It is particularly essential for developing countries to strike the right balance with regard to managing globalisation, considering their aspirations towards economic, technological and social development and the extent to which those aspirations can either be enhanced or jeopardised by globalisation. One of the major current preoccupations of developing countries, especially in Africa, is of course how to attract desirable foreign investment into the local economy. It is evident that the reality of prevailing negative economic circumstances has led, in the last two decades especially, to a shift of policy and attitude in Nigeria and other African countries away from protectionism or indigenisation to greater openness and acceptability of foreign participation in the domestic economy. Accordingly, major steps have been taken in these countries to re-orientate and improve their investment regulatory frameworks to create or at least give the impression of an investment- and investor-friendly climate. It thus follows that policy and initiatives aimed at managing globalisation will of necessity have to be measured and tailored in such a way as not to jeopardise the earnest desire to attract foreign investment. However, even as regards attracting foreign investment, there are and

have always been some concerns, and some of these are actually related to aspects of managing globalisation. These concerns include, for instance, the impact of foreign investment on local enterprise, labour standards and wages, protection of the environment, cultural preservation and social cohesion. Other related matters, either as potential incentives or prerequisites to foreign investment or as potentially consequential to or affected by it, include political and economic stability, infrastructural development, social development and human rights (including gender equality) issues. These are all matters that of necessity have to be addressed in the consideration of managing globalisation.

III. MANAGING GLOBALISATION: SPECIFIC ASPECTS

The Commission for Africa Report puts forward some practical suggestions for managing globalisation for the benefit of Africa. Some of the recommendations echo previous UK initiatives, especially the White Paper *Eliminating World Poverty: Making Globalisation Work for the Poor*[8] which was launched on 11 December 2000. The introduction to the Report calls for a partnership between Africa and the developed world to counter African poverty and stagnation. There is a clear perception that 'the developed world has a moral duty – as well as a powerful motive of self-interest – to assist Africa. This echoes the British Prime Minister's foreword to the White Paper, where he observed that eliminating world poverty is the greatest moral challenge facing our generation. Both documents received an overall welcome, but the welcome is not without qualifications or reservations.[9] To use a somewhat humorous yet serious English expression, the devil is in the detail. It is in terms of specific commitments and the proposed policy initiatives for achieving the objectives of the Report and its preceding initiatives that its ultimate usefulness and success will be measured. The commitments and proposals for managing globalisation contained in the Commission Report and White Paper touch upon most of the aspects in respect of which the debate on managing globalisation has been focused. Thus they present a useful framework for pursuing this present discussion. However, from the perspective of developing economies, that is, excluding emerging markets/middle income countries, the most crucial of the commitments and initiatives will be those that tackle avoiding marginalisation, which is seen by many as one of the greatest challenges that globalisation poses to developing countries.

The areas in respect of which the UK government makes specific commitments according to the terms of the White Paper include the following: promoting effective governments and efficient markets; investing in people, sharing skills and knowledge; harnessing private finance; capturing gains

from trade; tackling global environmental problems; using development assistance more effectively; and, strengthening the international system. Not surprisingly the Commission for Africa Report covers much the same ground but claims to have arrived at 'a coherent package for Africa' including the abolition of trade-distorting subsidies by rich nations and improving both the quality and quantity of aid. It is not possible to explore each of the issues covered in the two documents individually in full within present constraints, but some of the most salient matters will be considered under the following themes.

(a) Getting Systems Right: Governance and Capacity-Building[10]

One of the claims associated with globalisation, particularly among its proponents, is that globalisation of ideas has enhanced the spread of democracy and democratic ideals. It has also been pointed out that democratic institutions 'may well be critical to managing globalisation in order to ensure that it benefits the people.'[11] It should indeed be stressed that good governance and democratic accountability are extremely crucial, for African countries particularly and developing countries generally, not only with regard to managing globalisation, but also with regard to positive objectives of achieving economic growth, social development and alleviation of poverty. The history of sub-Saharan Africa particularly is littered with mismanagement, *coups d'état* and gross forms of corruption. These undoubtedly contribute enormously to the stagnation and poverty that these countries currently face. Another effect is the vicious circle that results from these terrible vices. Misrule, mismanagement and corruption create poverty and unemployment which in turn lead to crime, social unrest, political and economic instability, which in their turn are disincentives to foreign investment, economic growth and development.

The acknowledgement of these problems in the Report and White Paper and the commitment of the UK government to promoting effective systems of government, political reform and tackling corruption are very much commendable. This requires a clear agenda of a multi-layered approach encompassing doctrinal principles, internationally applicable norms as well as practical initiatives, to support democracy and make it yield dividends particularly for the poorest and most vulnerable.

On the doctrinal and normative level there should be support for the creation of international norms under a doctrine recognising the right of the people of the world to democratic governance. Indeed Thomas M. Franck has claimed the evolution of a doctrine recognising the right to democratic governance.[12] He argues that the radical vision of two notions underscored in the US Declaration of Independence is rapidly becoming a normative rule of the

international system.[13] These are firstly, that governments derive their just powers from the consent of the governed ('the democratic entitlement') and, secondly, that a nation earns a separate and equal station in the community of states by demonstrating a decent respect to the opinions of mankind.

A basic model for entrenching a doctrine of international law recognising the right to democratic governance already exists in the form of relatively recent instruments – especially the Harare Declaration and the Millbrook Action Programme[14] – and practice of the Commonwealth. With the suspension of Nigeria in 1995 following gross human rights abuses including gruesome execution of political activists and, a short while later, of Pakistan following the *coup d'état* of October 1999,[15] the Commonwealth has clearly established a practice in favour of the limitation of relations with or indeed isolation of a member state that does not comply with democratic principles. This is more so where an unlawful seizure of government has occurred.[16] The Commonwealth's commitment to the promotion of democratic governance has again been set in writing more recently in the form of the document *Commonwealth Declaration on Development and Democracy: Partnership for Peace and Prosperity* made in Aso Rock, Abuja, Nigeria in December 2003.

In the Aso Rock Declaration, the heads of government of the Commonwealth, in declaring their resolve to strengthen development and democracy, expressed their commitment to 'democracy, good governance, human rights, gender equality and a more equitable sharing of the benefits of globalisation' (Para 1). There is a further expression of commitment 'to make democracy work better for pro-poor development by implementing sustainable development programmes and enhancing democratic institutions and processes in all human endeavours' through the promotion of such objectives as participatory democracy, an independent judiciary and a machinery to protect human rights among other things (Para 7). As welcome as these expressions of commitment to democracy are and as helpful as they are on the doctrinal–normative level, if they are not backed by state practice and actual practical initiatives, they could easily be relegated to the status of empty fine words on paper which are meaningless to the lives of real people – the very vulnerable people who require the protection that is supposed to attend adherence to democratic ideals. In particular, the ideals expressed in the document may be jeopardised when political expediency is allowed to override matters of principle. In this regard, the championing by the UK government of the re-admission of Pakistan (despite the perceived continued autocracy, effectively, of General Musharraf) into the fold of the Commonwealth[17] generated distaste in many quarters, including within Pakistan itself,[18] being seen more as a reward for Pakistan's support for the 'war on terror' declared by the US and UK governments since the terrible

terror attacks in the United States on 11 September 2001 rather than for any genuine democratic reforms.[19] Interestingly, while Pakistan was readmitted to the Commonwealth in 2004 it failed to secure admission to a Commonwealth summit the previous year, but in the face of anecdotal claims that some of the member states of the Commonwealth would have been ready to do a deal to allow Pakistan to participate if Zimbabwe, another and continuing pariah state, was also allowed to attend. These types of machination tend to undermine confidence, naturally, in any exhortatory expressions on paper no matter how lofty the ideals being expressed and, unfortunately, raise questions as to the good faith and the genuineness of the commitment to democratic ideals that are expressed in grandiloquent documents.

As the United Kingdom is a major operator not only in the Commonwealth, but also in the wider international community, it is rather desirable that its government confirms not only by words but also clearly by action that in line with the collective practice of the Commonwealth, its individual state practice is in resonance with the recognition of an international law right to democratic governance. In addition, given that it can be expected that the United Kingdom government would prefer to maintain the considerable influence that the country traditionally enjoys vis-à-vis the poorer member states of the Commonwealth, particularly in this regard those from sub-Saharan Africa, a consistent principled stance, rather than one of haphazard opportunistic expediency, is what is likely to find greater welcome among the cross-section of stakeholders, and not just officialdom, in such countries.[20] Moreover, the history of association between sub-Saharan African member states of the Commonwealth and the United Kingdom means that quite often there are close economic ties between these countries and the United Kingdom. Within the framework of these economic ties are opportunities for practical initiatives that can contribute to strengthening democratic ideals, principles and practices. Two interrelated examples of areas where the United Kingdom's economic influence could be channelled positively for the benefit of some of the sub-Saharan member states of the Commonwealth are in terms of (a) the repatriation of funds illegally siphoned from those countries and ultimately ending up in the United Kingdom and (b) using economic leverage positively to insist on the eradication of official corruption, particularly the kleptocratic looting of government coffers which results in the depletion of funds that could be used for economic and social development.

There is not much doubt that endemic corruption, particularly grand corruption as opposed to petty corruption, has been a significant contributing factor to the under-development and continuing poverty of the poorer sub-Saharan African countries.[21] While corruption exists to different degrees and in different shades across the world, the affliction that has perhaps

most negatively affected development in many sub-Saharan African countries has been a particularly insidious form in terms of wanton and sometimes brazen looting of government revenue. Often the funds thus looted end up in banks and financial institutions in developed countries. For example, according to news reports recently, the United Kingdom's Minister for Africa, Mr Chris Mullin on a visit to Nigeria, admitted that over £1.5 billion of Nigeria's stolen funds 'are frozen in various British Banks'.[22] In fairness, the United Kingdom and some other developed countries have in recent times begun to acknowledge the need to assist countries such as Nigeria, whose funds have been looted and stashed abroad, to recover some of these funds which it is hoped will be used positively for the benefit of the people of the countries concerned. For instance, in acknowledging that some of Nigeria's stolen funds are stashed in British banks, Mr Mullin also stated that the British government is in the process of returning £30 million traced to the family of one of Nigeria's recent dictators, the late General Sani Abacha, to Nigeria.[23]

In the specific context of the funds believed to have been looted by the Abacha family, the £30 million that the British government has promised to help Nigeria to recover represents only a small fraction of what Nigeria could hope to recover, considering that estimates of the amount believed to have been looted by that family alone have reached as high as US$2.2[24] and 5.2[25] *billion*! This demonstrates starkly the need, firstly, for a genuine commitment by the United Kingdom to help in its own right to ascertain to the fullest extent possible the funds that have ended up in the United Kingdom after being looted from poor countries in dire need of such funds. Secondly, it also demonstrates the need for the United Kingdom, in its stated commitment to making globalisation work for poor countries, to help in exerting pressure on other developed countries where such looted funds are believed to be stashed, to assist similarly in identifying as much of such funds as possible. Thirdly, with normal reasonable caveats and measures that will prevent recovered funds from once again finding their way to private coffers and foreign bank accounts, there is need for a genuine commitment to returning as much of the stolen funds as are identified to their countries of legitimate entitlement. Finally, in the same manner that anti-money laundering legislation is being used to tackle the matter of funds believed to be used to fund terrorism, similar legislation needs to be employed effectively to address continuing and future stashing of looted funds in financial institutions in the developed countries.

The Report tackles this issue in Chapter 4, putting the principal onus on African states to eliminate corruption but, in a welcome development, identifying actions which can be taken by outsiders 'to support and to avoid undermining good governance'. The recommendations include transparency

in procurement policies and by export credit agencies, and the recommendation that

> Countries and territories with significant financial centres should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets. We call on G8 countries to make specific commitments in 2005 and to report back on progress, including sums repatriated, in 2006.

It is in the implementation, in good faith, of practical measures such as these that the quest for making globalisation beneficial for developing economies can find productive realisation.

The list of measures that can help in establishing and sustaining democratic ideals is obviously one that is not closed or confined to the matters discussed so far. There is need for constant review and inventiveness in terms of such measures. One additional emphasis in The Report is welcome, that is, the focus on education. The Report calls for proper funding of the right to education for all, including the right to free primary school education. This is a specific recognition of the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) as interpreted by the Committee established under that Treaty. This is likely to strengthen good governance, as one of the reasons that autocrats in African countries have been able to get away with abuse of power, even granted their repressive tactics, is that too great a percentage of the population in the concerned countries have been silent in the face of this abuse or too readily accepting of misrule owing, among other things, to a failure to recognise their real democratic entitlement and the power of the will of the people. In the context of globalisation, a notable portion of development assistance and the work of non-governmental organisations should be targeted at education and information of the broader population towards awakening them against unquestioning submission.

(b) Development Assistance and Debt Relief

One of the most welcomed commitments which appears both in the UK globalisation White Paper and the Report is the commitment 'to the multilateral untying of aid'[26] and more generally in the Report to the commitment to improve 'the quality of aid'. This is to address the practice whereby the granting of aid or assistance is tied to the purchase of goods and services, by the recipient, from the donor country. The recognised negative effects of the practice include that it has the effect of reducing the value of the aid by about 25 per cent; it is grossly inefficient in that it leads to the recipient country being supplied with incompatible (or unsuitable) equipment; and that it encourages a donor-driven approach to development. The Executive Secretary of the United Nations Economic Commission for Africa (UNECA) pointed

out recently that though less aid is explicitly tied than before, donors are still trying to claw back aid through special purchase requirements and that too much aid is based on projects according to the donor's priorities rather than the priorities of the recipient.[27]

Development assistance continues to be essential for developing economies especially the very low-income countries. It is essential, not only for temporary relief in terms of natural disasters and emergencies, but for more long term purposes such as developing institutional and infrastructural facilities that enhance trade, investment and development. Sadly, this is one area where help from international financial institutions has traditionally been poor but where it has been urgently needed for African countries especially. Development assistance, wisely managed and used constructively can go some way to plugging the gap in this respect. Untying aid gives national governments greater autonomy with regard to its management. However, it must be accepted that some obligations of responsible behaviour can be expected from recipient countries. As has been observed, it would be necessary 'to make judgments about the commitment and the capacity of governments to implement sound macroeconomic policies, saving and investment policies that promote growth and measures that open employment and social services to the poor.'[28] Other aspects of responsible behaviour of recipient countries will include consultations with its civil society on development strategies, as both White Paper and the Report acknowledge,[29] as well as democratic accountability, policies on human rights and environmental protection.

Probably of even greater importance than development assistance, if developing countries are not to be continually marginalised in the wake of globalisation, is debt relief and indeed debt cancellation. Debt repayments and servicing undoubtedly have a crippling effect on the ability of heavily indebted developing countries to provide social services, especially as regards health and education, let alone on their ability to make trade investments – a matter starkly demonstrated recently by the Nigerian Minister of Finance.[30] Yet it seems somehow apparent that their creditors have far less to lose from cancellation or reduction of debt than these countries stand to gain from reduction/cancellation or for that matter than they stand to lose from continued indebtedness. This is especially so considering that in some cases the amount that has already been repaid by some of the developing countries is claimed to have equalled or exceeded the equivalent of the amount borrowed originally, whereas the loan conditions and attending interest rates have the consequence that those countries are still in the position of owing sums vastly in excess of the original loans.[31]

Sadly, as is now acknowledged, the pace and volume of debt reduction has been disappointing so far.[32] Thus while the cancellation of official debt for

the poorest countries by the UK government is to be applauded, it is considered that support is due for the call that it must be followed by similar measures from other OECD countries. Similarly, support is also needed for the call that the highly indebted poor countries (HIPC) initiative of the World Bank and IMF 'must be accelerated to provide far-reaching debt relief in the shortest possible time.'[33] Outside the HIPC initiative, there is also a case to be made for at least some debt relief for some of the countries that do not qualify for that initiative. As the Nigerian Finance Minister has pointed out, fully servicing its debts for even a relatively better off poor country like Nigeria would result effectively in having nothing left for the country's capital budget for up to a decade into the future.[34] It may be considered that these indebted countries cannot be totally absolved of responsibility for their indebtedness. While that consideration contains some truth, it needs to be placed in the context that these were loans that were, in most cases, recommended by international financial institutions as facilitators of economic and infrastructural development and were often attended by recommended conditionalities and structural adjustment programmes, some of which were later discredited as rather contributory factors to the continuing poverty in Africa. The arguable 'contributory negligence' and operational culpability of the international lending community to the poverty-sustaining indebtedness of the poorer countries lends some amount of credence to the equity of debt relief in the present prevailing circumstances.

The Report's conclusions on debt relief are somewhat muted. It calls for 100 per cent relief for 'Poor countries in sub-Saharan Africa which need it',[35] while noting that the total public debt service paid by sub-Saharan Africa in 2003 was US $8.6 billion, Nigeria paying US $1.6 billion. It is somewhat disappointing therefore that the call for debt relief seems equivocal.

(c) Trade Liberalisation, Growth and Development

The view is widely held that international trade is the primary instrument for economic development.[36] Beyond economic development of individual states, international trade is also regarded as the engine for global economic growth and prosperity. These among other factors inform the international efforts that have been devoted over the years towards the facilitation of international trade. The current principal embodiment of the efforts to facilitate trade is obviously the World Trade Organisation. The centrepiece of the trade facilitation efforts over the years has been trade liberalisation encompassing greater openness of domestic markets through the elimination of barriers such as tariffs and subsidies. This is essentially the *raison d'être* of the WTO.

There is no question that greater participation in international trade, particularly through exports, is essential for developing countries. As has been

observed, 'International trade is far more important to developing countries than aid, not least because it can provide the foundations for more self-reliant development.'[37] Developing countries have participated over the years in the trade liberalisation regarded as necessary for trade facilitation through the WTO and the preceding GATT framework. The problem is that despite all their participation in the GATT and the WTO and all they have done to liberalise trade, and despite claims that some amount of economic growth has followed these, there is still widespread poverty, underdevelopment, balance of exchange and balance of payment difficulties.

In fact the level of tangible benefits that developing countries, African countries especially, have reaped from decades of liberalisation can hardly be described as having matched legitimate expectations, whereas there has been a decidedly negative impact on their economy as a result of trade liberalisation on their part.[38] One such negative impact, especially in the earlier days of trade liberalisation, was the collapse of some domestic industries that were unable to compete with competitors from the more industrialised countries. It is easy enough to attribute this to clever theories of market forces and comparative advantage[39] but the fact of the matter is that real jobs and livelihoods were lost and real people impoverished. The situation is worsened by the realisation that part of the reasons for the inability to compete and the attendant impoverishment is that while being asked to liberalise their own markets and economies, developing countries continue to face difficulties in penetrating markets in developed countries as a result of the continued existence of trade barriers and defensive measures (for example anti-dumping and countervailing duties) in developed countries in respect of some of the sectors that are most crucial to developed countries – especially textiles and agriculture.[40]

Oxfam expresses the situation succinctly and aptly when it observes that

> protectionist barriers maintained by northern governments cost developing countries an estimated $700bn a year – fourteen times the amount they receive in aid. … While northern governments preach free trade, they practice protectionism. The double standards are reflected in WTO rules. These allow northern governments to subsidise farmers on an epic scale, while demanding that poor countries liberalise their markets. This helps to explain why two decades of liberalisation by poor countries has produced disappointing results, with average trade deficits increasing by 3 per cent of GDP.[41]

The White Paper and Report highlight a range of factors that inhibit many developing countries from benefiting fully from trade liberalisation including internal factors within individual countries.[42] Most crucially, they acknowledge what many advocates of the plight of developing countries have long argued, which is that there is a need to create a fairer international trading

system. The White Paper acknowledges 'substantial inequities in the international trading system'[43] and both documents admit that practice of developed countries lags behind their rhetoric on openness and liberalisation. A 50 per cent cut in tariffs would be in the region of $150 billion dollars, which is about three times the amount of aid flows.[44]

With these admissions it is not surprising that the White Paper supports some of the measures that have been advocated by those seeking to correct the marginalisation of developing countries. The UK government commits to supporting 'substantial cuts in high tariffs and in trade distorting subsidies, particularly for those sectors most important to developing economies.'[45] The Report calls for 'the successful completion of an ambitious Doha Round, with specific and timebound goals for ending appalling levels of developed country protectionism and subsidies' and also calls for a relaxation of regulatory barriers such as rules of origin.[46] While this is welcome, there is the argument that there is a need to go much further than this. One proposal that has been made is the elimination of tariffs on all imports from at least the world's (50 or so) least developed countries. It has been observed that this would not be a costly step for developed countries or even for middle income developing countries.[47] In fairness, the UK government also commits to supporting a similar position but in respect only of goods imported into the EU from LDCs.[48] It would probably be even more productive if the UK uses its relative strength in the international system to press for a global application of this initiative.

There are other dimensions to the issue of trade liberalisation as an aspect of managing globalisation, but two additional matters will be mentioned briefly. First, is the requirement of more assistance for some developing countries to be able to participate effectively in trade negotiations – a matter which the White Paper, the Report and the WTO acknowledge. The second is the welcomed increasing recognition of the need for promoting a pro-development aspect to trade policy. It is not sufficient that improvements in the international trading positions of developing countries bring about economic growth. The real advance will be if the growth is translated to real and sustainable development, alleviation of poverty and improvement in the economic and social position of the people of these countries.

(d) Foreign Investment

African and other developing countries have taken major steps to improve their foreign investment regulatory frameworks. It might seem anachronistic, in the light of the current prevalence of schemes to attract foreign investment, that at one stage in history Nigeria and some other African countries actually implemented policies that were designed to or at least had the effect of

discouraging foreign investment. As has been pointed out, however, the protectionist indigenisation approach was the product of its time[49] and its time was primarily the period immediately or shortly after the attainment of independence and statehood.

In spite of the shift of attitude towards liberalisation and greater openness to foreign participation that has since taken place (from about the mid-1980s onwards), it is generally acknowledged that Africa still suffers marginalisation in the global economy. According to an UNCTAD Report of 1999,[50] Africa as a whole has not experienced the expected surge of foreign direct investment partly because investors discount the continent as a location for investment due to a negative image which 'conceals the complex diversity of economic performance and the existence of opportunities in individual countries.' On the other hand, the diversity of economic performance and existence of opportunities is reflected in the fact that some African countries have traditionally been more successful in attracting foreign investment than others while some have achieved relative greater success, if marginal, in more recent times. Importantly, a message that is gradually coming across finally is that the continent offers attractive opportunities particularly in terms of rate of return or profitability of investments. According to UNCTAD:[51]

> The least known fact about FDI in Africa is that the profitability of foreign affiliates of TNCs in Africa has been high, and that in recent years it has been consistently higher than in most other host regions of the world.
>
> - In the case of United States FDI …, it is noteworthy that between 1983 and 1997 there was only one year (1986) in which the rate of return in Africa was below 10 per cent;
> - Since 1990, the rate of return in Africa has averaged 29 per cent; since 1991, it has been higher that in any other region, including developed countries as a group, in many years by a factor of two or more;
> - Net income from British direct investment in sub-Saharan Africa (not including Nigeria) was reported to have increased by 60 per cent between 1989 and 1995 (Bennell, 1997a, p. 132);
> - In 1995, Japanese affiliates in Africa were more profitable (after taxes) than in the early 1990s, and were even more profitable than Japanese affiliates in any other region except for Latin America and the Caribbean and West Asia ….
>
> Earlier studies (UNCTAD, 1995) confirm the high rate of return of foreign affiliates of TNCs in Africa.

Considering the profitability of investment in Africa and the abundance of natural and other resources it is unfortunate that the continent still lags behind in terms of ability to attract foreign investment. It may be that in the course of time the improved efforts of African countries since about the mid-

1980s to attract greater investment will germinate and yield positive fruit. There is a need, however, to review those efforts constantly and to ensure that the right policy and approaches are being followed at any particular point in time and to respond positively and speedily to global economic developments. Thus while African countries have improved the regulatory framework for foreign investment in the course of the last twenty odd years through the provision of what are traditionally seen as investment incentives, it may be that the time has come to regard some of these 'incentives' rather as investment prerequisites. In addition, there is perhaps a need to consider developing innovative tools for attracting investment which will then be the true incentives or at least added incentives while at the same time taking care to avoid what is sometimes described as a 'race to the bottom'.

In connection with the suggested continued examination of policy and approach towards attracting foreign investment, perhaps one radical direction worthy of consideration for African countries is that of cooperation rather than competition. By this is meant that it is worth examining potential areas where a concerted effort in defined areas and on particular matters will be more beneficial in attracting and dissipating foreign investment into and throughout the continent as a whole instead of more expensive and sometimes fruitless competition.[52] One initiative that can be mentioned briefly here is the harmonisation of business laws being undertaken principally in Francophone African countries under the framework of the OHADA Treaty. The OHADA Treaty is revolutionary in the context of integration in Africa because it marks a radical departure from traditional schemes that had focused principally on economic integration.[53] This is because central to this treaty is the harmonisation, among member countries, of laws affecting the conduct of business and the resolution of business disputes.

The objectives of the OHADA Treaty include to 'harmonize commercial law within the member states, by the elaboration and adoption of common, simple and modern rules, which are adapted to the economic situation by putting in place appropriate judicial procedures, and by encouraging recourse to arbitration to resolve contractual disputes.' The chief technique for achieving the objectives of the OHADA Treaty is the adoption of Uniform Acts in respect of specific aspects of law relating to business activity. Uniform Acts, once adopted,[54] are mandatory and directly applicable in member states reminiscent of a *Regulation* in the context of European Community law. No less than four Uniform Acts have already entered into force following adoption by the Council of Ministers set up under the Treaty. The four Uniform Acts already in force are: the Uniform Act on General Commercial Law; the Uniform Act on the Law of Commercial Companies and Economic Interest Groups; the Uniform Act on the Organisation of Security; the Uniform Act on Debt Recovery and Execution of Judgements.

Generally speaking, the OHADA Treaty itself has had a positive reception so far as reflected in the following sentiments by one commentator:

> The OHADA Treaty is having, and will continue to have, far-reaching effects on the modernization and harmonization of business law within the OHADA member states. This will create a more stable legal environment for companies doing business in Central and West Africa, enhanced by the certainty created by the direct application of the Uniform Acts …[55]

(e) Private Capital Flows and Regulation of Financial Markets

A positive spin on the situation regarding private capital flows will highlight that since the 1990s there has been a remarkable increase in the amount of private capital flows to developing countries as a whole. However, this would be to disguise the fact that these flows have been concentrated primarily in the direction of a handful of countries mainly in East Asia while developing countries in Africa and South Asia struggle to attract private finance. According to one observer, '[t]he marginalization of these regions in the global debate on the international financial architecture is as much a reflection of their marginalization in the real world of global trade and finance as it is of the complacency to which the seeming triumph of "market forces" has given rise.'[56] Perhaps what is an even greater tragedy is that, as further observed, 'although they are largely marginalized in global trade and finance, these countries are not spared the effects of an international financial crisis. They pay for it in reduced growth, in terms of trade losses and in reduced capital flows.'[57]

There are two principal issues for developing countries, particularly in Africa, in terms of capital flows and regulation of financial markets. The first is how to increase access to private capital to boost economic growth and development objectives. The second is to ensure insulation from or protection against shocks and instability to the international financial system. The first is related to other issues concerned with avoiding marginalisation and increasing foreign investment generally. There is a need to reverse the negative image of developing countries, especially in Africa, as places beset by political and economic instability. There is also a need to highlight the high profitability of investments in some of these places, the great improvements to investment regulatory frameworks and growth-enhancing investment-friendly initiatives including freedom for repatriation of capital. The second principal issue is a matter of concern beyond developing countries primarily and indeed, arguably, a matter of greater concern to those countries that are successful in attracting foreign investment, as the Asian crisis of 1997/1998 demonstrated. The resolution of this issue is being debated in terms of better regulation of international financial markets through such measures as better

surveillance, demand for increased transparency and more equitable distribution of the losses resulting from bad capital investment decisions.

The Report and White Paper also address some of these and other issues. They highlight a range of factors that can enhance the attraction of developing countries for foreign private capital. An interesting, if not shameful and damning, statistic mentioned in the UNCTAD Report which is particularly relevant considering recent history in Nigeria and some other African countries is that an estimated 40 per cent of African private wealth is held overseas compared with only 4 per cent in Asia.[58] These are issues that need to be addressed within African countries themselves and are interrelated to previously discussed issues of good governance and democratic accountability. Both Report and White Paper advocate internal reforms such as financial sector reform and improved taxation policy. While the White Paper underemphasised 'responsible behaviour by investors'[59] the Report paints a generally positive picture of the role of business.

> There are already numerous good examples of effective action. The International Business Leaders Forum has developed a useful framework for co-ordinating business actions in support of the Millenium Development Goals and is in the process of rolling this out across Africa. The Global Business Coalition on HIV and AIDS brings together 180 international companies to promote best practice company anti-AIDs programmes in the workplace and communities, and to influence public policy. Many others, including the Business for Social Responsibility movement and the World Business Council for Sustainable Development, are leading the way in business engagement in development issues. And individual companies, including the Commission for Africa Business Contact Group, are pioneering innovative ways of working in Africa.[60]

The Report partly contradicts this view by its following recommendation for 'a sea change in the way the business community, both domestic and international, engages in the development process in Africa.'[61] If private capital flow to Africa and developing countries in a similar position is to be increased, the attitude of those in control of the capital will need to shift from a short-sighted and short-termist position to a longer-term and development-friendly stance.

(f) Regulation of Transnational Corporations and Reform of WTO, IMF and IBRD

Recent experiences of conflict between oil companies and indigenous communities in oil producing areas of Nigeria[62] demonstrate the potential negative consequences of real or perceived corporate irresponsibility of transnational corporations. It is believed that on an objective consideration the case for a more responsible attitude from TNCs has been convincingly

made out. In the long run, focus solely on share value, performance and profit at the expense of legitimate concerns in terms of increased poverty and environmental degradation is unsustainable. It is also fair to say that a coalescence of the interests of governments in developed countries and TNCs or at least a sympathetic stance by governments of developed countries to the desires of TNCs[63] have contributed to the conclusion of agreements and the generation of rules under the WTO framework that seem to focus principally on advancing the interests of TNCs. Speaking of the Agreement on Trade-Related Aspects of Intellectual Property Rights and the General Agreement on Trade in Services concluded under the Uruguay Round WTO Agreements, it was observed recently that 'it is hard to escape the conclusion that the direct primary beneficiaries of these agreements are international business enterprises.'[64]

Regrettably, on the other side of the coin, efforts to establish or implement a code of conduct for transnational corporations since the mid-1980s (for example the UNCTC) have traditionally not been particularly fruitful. More recently, however, growing recognition of what has been described in terms as 'the rise of unaccountable global corporate power as a consequence of lowering national barriers to trade and investment and giving "rights" to the private sector that are not mirrored by obligations nor by equivalent "rights" for national governments or individuals'[65] has generated a renewed interest in developing instruments intended to foster some amount of transnational corporate responsibility. The recent instruments include an OECD instrument, *Guidelines for Multinational Enterprises*[66] and the *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*.[67] The latter instrument, the *UN Norms*, follows the pattern of what is really needed in that it is couched in mandatory terms, rather than the exhortatory terms of the *OECD Guidelines* and other instruments, though, as has been observed, there is still a need for such an instrument to overcome the fact that because of their economic strength among other things, multinational enterprises tend to rise above 'the regulatory control of nation states'.[68]

Finally, the role of and attitude within the principal multinational institutions driving globalisation need to be reformed with some amount of urgency. A re-orientation of attitude away from focus on liberalisation as an end, and ability to service debts towards a more holistic approach encouraging development and not just growth is necessary. As a former Chief Economist at the World Bank has been quoted as commenting, the received wisdom 'took privatisation and trade liberalisation as ends in themselves, rather than means to more sustainable, equitable and democratic growth.'[69] Similarly, the directions of current focus of the WTO such as intellectual property as well as the substantive rules within those directions need to be re-examined. They need

to reflect the fact that the most urgent need of the world as a whole is not so much the advancement of corporate interests but the alleviation of poverty and development.

IV. CONCLUDING OBSERVATIONS

It is important to restate that the most crucial issues with regard to managing globalisation from the perspectives of developing economies are the avoidance of marginalisation and the eradication of poverty. In the first place, it must be re-emphasised that governments in developing countries, especially African countries, bear a considerable share of responsibility, especially with regard to good governance and democratic accountability, to be successful in harnessing the benefits of the prevailing reality of current global economic circumstances and the onset of globalisation. To this extent, a recent positive development is that African countries are now beginning, somewhat belatedly, to take measures to address some of their traditional shortcomings with regard to good governance and democratic accountability in the quest for economic development and arresting marginalisation occasioned by globalisation. An important recent initiative in this regard is the *New Partnership for African Development* (NEPAD)[70] developed by African leaders in 2001 which has as its goals growth and sustainable development, the eradication of poverty and halting marginalisation resulting from globalisation. A key aspect of the NEPAD initiative is the peer-review mechanism which, unfortunately however, seems to be being steered by African leaders more towards economic and corporate review rather than more towards, the arguably more important, political review in terms of good governance and democratic accountability.[71] Accordingly, NEPAD is not without criticism[72] but at least it is a first step in the acceptance by African leaders of their own share of responsibility for addressing Africa's present plight which can be built upon with continuing pressure both internally and externally.

The Report calls for a commitment to double infrastructure spending and the doubling of aid to Africa to about $50 billion, setting a 100 per cent objective of debt cancellation for poor sub-Saharan African countries and making trade fairer by addressing the vexed and controversial issue of trade barriers at future WTO negotiation rounds. Importantly, the Report seeks to challenge and involve other developed countries, particularly the member states of the Group of Eight Nations, to commit to the recommendations for addressing the identified problems inhibiting Africa's economic development and contributing to the poverty of its peoples.

It is to be hoped that with pursuit and implementation in good faith of the objectives of both the African initiatives and initiatives of developed coun-

tries such as the UK's Globalisation White Paper and the Africa Commission Report, African countries and the international community will begin, genuinely, to take the necessary steps to help Africa and other developing countries achieve their economic potential and avoid the marginalising effects of globalisation. It is also to be hoped that the alleviation of poverty[73] in these countries will genuinely receive the importance that it deserves. As the current Secretary-General of the United Nations has said: 'How can we say that the half of the human race which has yet to make or receive a telephone call, let alone use a computer, is taking part in globalisation? We cannot without insulting their poverty.'[74]

NOTES

† This work is based on a paper titled 'Managing globalisation for developing economies' presented by the author at the British–Nigerian Law Week Conference held at Abuja, Nigeria 23–27 April 2001.

* Lecturer in Law at the University of Essex, Colchester (United Kingdom).

1. *Oxfam Policy Papers*, Oxfam GB Policy Paper 5/00; 'Globalisation: Submission to the UK Government's White Paper on Globalisation'.
2. 'What is Globalization?' paper prepared by the Poverty Reduction and Economic Management (PREM) Economic Policy Group and Development Economics Group of The World Bank Group; text available at http://www1.worldbank.org/economicpolicy/globalization/ag01.html. Cf. the definition provided by David Held *et al*. that globalisation means 'a process (or set of processes) which embodies a transformation in the spatial organizations of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power.' See D. Held, A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture* (Cambridge, England: Polity Press, 1999) 16; see also F. Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) *European Law Journal* **5**(4) pp. 334, 335 and W. Twining *Globalisation & Legal Theory* (Butterworths, 2000) at p. 4.
3. See, for example, F. Snyder, 'Economic Globalisation and the Law in the 21st Century' in A. Sarat (ed.) *The Blackwell Companion to Law and Society* (New York and Oxford: Blackwell Publishers, 2004).
4. See further section III below.
5. Comments attributed to Sandeep Mahajan, World Bank Economist in World Bank Development Forum, Globalisation and Poverty Online Debate at www.panos.org.uk/environment/globalisation_and_poverty_online.htm.
6. S.T. Akindele, T.O. Gidado and O.R. Olaopo, 'Globalisation, Its Implications and Consequences for Africa' (2002) 2(1) *Globalization* text available at http://globalization.icaap.org/content/v2.1/01_akindele_etal.html.
7. See for example Andrew Mogoy, 'Is Africa Chasing the Globalisation Mirage? (Commentary)' in *The Nation* (Nairobi) January 27, 2001 text available at www.allafrica.com/stories/printable/200101270075.html.
8. The White Paper (CM 5006), follows an earlier White Paper of 1997 on a similar theme *Eliminating World Poverty: A Challenge for the 21st Century*, text available at http://www.dfid.gov.uk/Pubs/files/whitepaper1997.pdf.
9. See for example, *Oxfam Policy Papers*, op. cit. in note 1 and *Memorandum Submitted by the Trades Union Congress and the International Confederation of Free Trade Unions on*

the White Paper 'Eliminating World Poverty: Making Globalisation Work for the Poor issued 27 January 2001.

10. This appeared in the White Paper as 'Promoting effective governments: globalisation and democratic accountability'.
11. Sarah Cliffe (Head of World Bank in East Timor), 'Democracy, Development and Globalisation' Remarks to the CNRT National Congress Dili, 24 August 2000.
12. Thomas M. Franck, 'The emerging right to democratic governance' (1992) *American Journal of International Law* 46; see also Thomas M. Frank, *Fairness in International Law and Institutions* (New York: OUP, 1995).
13. Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) *American Journal of International Law* 46. Unsurprisingly this claim has the support of some African scholars; see N.J. Udombana, 'Articulating the Right to Democratic Governance in Africa' (2003) *Michigan Journal of International Law* **24**(4) p. 1209.
14. *The Harare Commonwealth Declaration* (1991) and *The Millbrook Commonwealth Action Programme on the Harare Declaration* (1995).
15. Both Nigeria and Pakistan have now been restored to some amount of respectability in the international community – Nigeria following a return to a democratic form of government and Pakistan following cooperation in the 'war on terror' pursued by the United States and a few allies since the attack on the World Trade Center of 11 September 2001.
16. See Chief Emeka Anyaoku, 'The Commonwealth and Democracy' Address to the English-Speaking Union of Nigeria, 14 December 1999; see also Derek Ingram, 'Tools Sharpened to Deepen Democracy' text available at http://www.thecommonwealth.org/htm/info/info/features/9922.htm.
17. See for example 'Britain supports Pak's readmission to Commonwealth …' in the *Pak Tribune* of 4 March, 2004; text available at www.paktribune.com/news/index.php?id=56971.
18. See for example The United Kingdom Parliament, House of Commons Foreign Affairs Select Committee Seventh Report 2004 especially Paras 270–27; text available at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/44102.htm.
19. See for example Paul I Adujie, 'Fundamental principles versus political expediencies: the bad examples of the Commonwealth' originally published at www.gamji.com/NEWS3567.htm, cached copy still available online as of 8 February 2005.
20. It may be suggested for example that the United Kingdom Government's stance with regard to the violation of democratic and human rights principle by the Mugabe regime in Zimbabwe is undermined and less authoritative as a result of perceived inconsistency, for example in the attitude to Pakistan as well as some amount of cooperation with non-democratic governments in Africa in the fairly recent past.
21. On the effect of endemic corruption and development generally, see for example E. Jane Ellis, 'Globalisation, corruption and poverty reduction' *Transparency International Australia Papers* at www.transparency.org.au/documents/globalisation.html; also in *Australia National Development Bulletin*, ANU (2001).
22. 'N315bn Looted Funds in British Banks' in *Daily Champion* (Nigeria) 3 February 2005; text available at http://allafrica.com/stories/200502030150.html.
23. Mr Mullin is also quoted as saying that 'about US$500 million traced to Switzerland would soon be returned to Nigeria. And another $110 million said to be in another country will soon be released to the Nigerian government …' See 'Britain to return £30m looted funds' at http://news.biafranigeriaworld.com/archive/punch/2005/02/03/britain_to_return_a30m_looted_funds.php; 'UK helps Nigeria recover funds' at www.finance24.com/Finance/Economy/0,,1518-25_1657110,00.html.
24. See United Nations Office on Drugs and Crime, *Country Projects: Nigeria* especially the section on 'Asset recovery project in Nigeria'. Text of document available at http://www.unodc.org/unodc/en/corruption_projects_nigeria.html.
25. See 'Britain to help Nigeria recover looted funds' at www.businessinafrica.net/news/410722.htm.
26. Para.320, White Paper, chapter 9 Report.
27. K.Y. Amoako, 'Making aid work better for Africa', Statement to the United Kingdom Houses of Parliament, 23 February 2005; text available at http://www.uneca.org/.

28. Peter Sutherland, 'Managing the international economy in an age of globalisation', The 1998 Per Jacobson Lecture, 4 October 1998, text available at http://www.perjacobsson.org/lectures/1998-sutherland.htm.
29. Para 285 White Paper, chapter 4 Report.
30. Ngozi Okonjo-Iweala, 'Understanding Nigeria's debt situation' in *This Day* (Nigerian Newspaper) of 27 February 2005; text available at http://allafrica.com/stories/200502280598.html; See also 'One in five Africans live in Nigeria – and need aid' in *The Guardian* (UK) of 31 January 2005, text available at http://society.guardian.co.uk/aid/comment/0,14178,1402346,00.html
31. A stark reflection of this is the statement made by the Nigerian president after a G8 summit in 2000: 'All that we [Nigeria] had borrowed up to 1985 or 1986 was around $5 billion and we have paid about $16 billion yet we are still being told that we owe about $28 billion. That $28 billion came about because of the injustice in the foreign creditors' interest rates. If you ask me what is the worst thing in the world, I will say it is compound interest.' Quote cited in, among other places, Wanda Fish, 'The terrorism of debt' text available at http://www.sustecweb.co.uk/past/sustec11-5/terrorism_of_debt.htm. The point is broadened elsewhere to note that sub-Saharan countries having paid, by 2000, four times the original loans that were taken out circa 1980 still owed four times that original loan afterwards; see Demba Moussa Dembele, 'The IMF and the World Bank in Africa: a disastrous record', text available at http://www.worldhunger.org/articles/04/africa/dembele.htm
32. See, for example, Sutherland, op. cit. in note 28.
33. TUC and ICFTU Memo mentioned in note 9 above. See also UNCTAD, *The Least Developed Countries 2000 Report Overview*: 'There is a need for deeper, faster and broader debt relief which is based on lower thresholds for judging debt sustainability, more realistic forecasts of economic growth, exports and imports, and more upfront extinction of the debt stocks and the front-loading of debt service relief.'
34. Okonjo-Iweala, 'Understanding Nigeria's debt situation', op. cit. in note 30.
35. Para 9.4.
36. See, for example UN G.A. Res. 1707 (XVI), 1961.
37. Oxfam Submission op. cit. in note 1, Report Chapter 8.
38. See for example Y. Tsikata, 'Globalisation, poverty and inequality in Sub-Saharan Africa: a political economy appraisal' OECD Development Centre Working paper no 183 (2001) text available at http://www.oecd.org/dataoecd/10/15/2731341.pdf; see also S. Kayizzi-Mugerwa, 'Globalisation, growth and income inequality: the African experience' OECD Development Centre Working paper no 186 (2001) text available at http://www.oecd.org/dataoecd/9/58/2731373.pdf.
39. Some of the problems with the applicability of the doctrine of comparative advantage, in light of recent economic developments, have been pointed out recently noting that the efficiency and welfare advantages anticipated under the doctrine are based upon the movement of commodities and manufactured goods across borders whereas what happened in the twentieth century was an increase in the movement of the means of production across borders. See F. MacMillan, 'If not this World Trade Organisation, then what' (2004) *International Company and Commercial Law Review* **15**(3), p. 75.
40. Some of the initiatives suggested by some developing countries to address the concerns in such sectors tend to achieve no progress due to opposition from some developed countries especially the United States and the European Union. See for example *Poverty Reduction: Sectoral Initiative in Favour of Cotton – Joint Proposal by Benin, Burkina Faso, Chad and Mali*, text available at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/Min03/W2.doc, which did not make much headway at the Cancun Ministerial Conference of 2003. See MacMillan, op. cit. in note 39. It is to be pointed out that the WTO has now set up a sub-committee, on 19 November 2004, to focus on cotton as a specific issue in agriculture talks under WTO negotiations. See WTO News at http://www.wto.org/english/news_e/news04_e/sub_committee_19nov04_e.htm.
41. Oxfam Submission, op. cit. in note 1.

42. See especially Paragraphs 219–225 alluding, among other things, to research into modernisation of agriculture and diversification of primary exports.
43. Para 230
44. White Paper, para 231.
45. White Paper, Para 234.
46. Report, chapter 8.
47. Sutherland, op. cit. in note 28.
48. White Paper, Para 244.
49. See T. Ogowewo, 'The shift to the classical theory of foreign investment: opening up the Nigerian market', (1995) *International and Comparative Law Quarterly* **44** p. 915.
50. UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (1999).
51. Ibid.
52. See, for example, UNCTAD ibid.: 'African countries should consider joint efforts to attract FDI. This would include joint activities to promote the entire region as an investment location. The agencies of all SADC countries have recently started to move in this direction ….'
53. Indeed it would seem that the OHADA Treaty is meant to be complementary to the economic integration schemes operative among some of the member states of the Treaty. See Roland Amoussou-Guenou, 'The organisation for harmonisation of business law in Africa (OHADA)' (1998) *Oil and Gas Law and Taxation Review* 167.
54. On the process leading to the adoption of a Uniform Act, see R. Major, 'West African states aim for legal harmonization' (1998) *International Financial Law Review* 59.
55. Ibid. at 60.
56. Kwesi Botchwey, 'Financing for development: current trends and issues for the future'. Paper delivered at the UNCTAD X conference on 25 January 2000, text available at http://www.globalpolicy.org/socecon/ffd/botchwey.htm.
57. Ibid.
58. Para 153.
59. Para. 156.
60. Para 134.
61. Para 138.
62. See for example Owens Wiwa, 'The paradox of poverty and globalisation'. Paper presented at an international conference on Globalisation in 2001, text available at http://www.globalisationdebate.be/2001/conferencetracks/speeches/wiwaspeech.pdf.
63. See for example M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* (1996, Sweet & Maxwell) Chapter 1; F. MacMillan, 'Making corporate power global' (1999) 5 *International Trade Law & Regulation* 3.
64. See MacMillan, op. cit. in note 39, at 77.
65. MacMillan, op. cit. in note 39 above at 78.
66. OECD, *Guidelines for Multinational Enterprises*, DAFFE/IME/WPG (2000) 15/FINAL of 31 October 2001, text available at http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final.
67. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), text available at http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument. In addition, the United Nations has also sponsored a *Global Compact* which, in their own words, 'is a voluntary international corporate citizenship network initiated to support the participation of both the private sector and other social actors to advance responsible corporate citizenship and universal social and environmental principles to meet the challenges of globalization.' See http://www.un.org/Depts/ptd/global.htm.
68. See MacMillan, op. cit. in note 39, at 79.
69. Joseph Stiglitz, *Globalisation and Its Discontents* (Penguin Group, 2002) quoted in Oxfam Submission, op. cit. in note 1.
70. See www.nepad.org, www.nepad.org.ng.
71. See Jakkie Cilliers, 'NEPAD's peer-review mechanism', Institute for Security Studies (South Africa) Occasional Papers No. 64, November 2002, text available at http://www.iss.co.za/Pubs/Papers/64/Paper64.html.

72. See, for example John Stremlau, 'NEPAD peer-review: still work in progress' in *The Mail and Guardian* (South Africa) 10 May 2002, text available at http://www.web.net/~iccaf/debtsap/nepadpeerreview.htm.
73. It was noted recently by a notable British politician that: 'Poverty has become intolerable, too, because we know that we have the means to overcome it. That is why it excites so much passion and anger.' See Chris Patten, 'Globalisation and the Law' (2004) 1 *European Human Rights Law Review* 6, 8.
74. Speech to the Millennium Assembly, New York, 3 April 2000, text available at http://www.un.org/millennium/sg/report/state.htm.

7. TRIPS and bilateralism: Technology transfer in a development perspective

Steve Anderman and Rohan Kariyawasam

1. INTRODUCTION

The global expansion of legal protection for intellectual property rights in the Agreement on Trade Related Intellectual Property Rights (TRIPS) within the framework of the World Trade Organisation (WTO) has been fuelled by a desire of the larger privately owned corporations in the wealthier countries of the world to ensure a profitable return for their Intellectual Property (IP) protected assets particularly in developing countries without IP legislation.[1] This process has been described as one, 'whereby the wish lists of various intellectual property lobby groups [have been] inscribed into public international law.'[2] There are undoubted conflicts 'between the implementation of the TRIPS Agreement and the realisation of economic, social and cultural rights' particularly in relation to impediments to transfer of technology to developing countries.[3] While it is true that Intellectual Property Rights (IPRs) are also viewed as human rights under the Universal Declaration of Human Rights,[4] there is a crucial difference between recognising human rights as a foundational principle for the creation of IPRs by the state and the exercise of IPRs by private parties which has detrimental effects on LDCs.[5] The multilateral extension of IPR protection regimes as minimum standards with its negative effects upon the developing world is only part of the story of inhibited technology transfer. The TRIPs Agreement has been accompanied by a series of bilateral agreements including TRIPS-plus agreements,[6] Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) which have cumulatively resulted in the imposition of IP laws on developing countries with little account taken of development needs and human rights.

What is striking about this exercise in globalisation of the coverage of IPRs is its unbalanced nature. While the proponents of the TRIPS Agreement may offer theoretical prospects for benefits to developing countries as well as developed countries, the reality is that such benefits are restricted to certain strongly developing countries such as India, China, Korea, Taiwan, Brazil and Singapore. As Jagdish Bhagwati has commented:

> TRIPS does not involve mutual gain; rather it positions the WTO primarily as a collector of intellectual property-related rents on behalf of multinational corporations (MNCs). This is a bad image for the WTO and in the view of many, especially the non-governmental organisations, reflects the 'capture' of the WTO by the MNCs.[7]

For the LDCs, the IPR protection in TRIPS has been promoted essentially at the expense of development policy. Little thought has been given to the appropriateness of the application of Western legal concepts to developing countries. The huge widening of the coverage of IPRs worldwide, not surprisingly, has helped significantly to increase the income for EU, US and Japanese companies largely at the expense of developing countries. Nor have there been any demonstrable improvements in direct investment or trade within the LDCs.[8]

The purpose of this chapter is to explore the extent to which and how the combination of TRIPS and bilateralism has produced an unbalanced framework for developing countries – both developing countries (DCs) and less-developed countries (LDCs). Part I will look at the TRIPS Agreement and technology transfer to developing countries from a multilateral perspective, making the point that the lack of a competition law can be a handicap in obtaining the type of technology transfer envisaged by the TRIPS Agreement. Part II will look at the issues from a bilateral perspective, giving particulars on the way in which bilateral agreements are reducing the scope for DCs and LDCs to ensure a transfer of technology that will allow them to develop home-based industries and services.

PART I

The TRIPS imposed expansion of IPRs has had at least three types of adverse effects on the development policy of DCs and LDCs. In the first place, the timing of the imposition of the task of enforcing an expanded platform of IP protection upon developing countries has been inappropriate from a development perspective. The TRIPS agreement with its package of minimum protective standards has placed many DCs and LDCs under pressure to invest their limited resources in legislation and enforcement machinery to implement the standards of protection in order to avoid a reference to the WTO Dispute Panel.[9] The net result has been to deprive many DCs and LDCs of access to a more gradual IP development policy used by many developed countries such as the USA, the UK, Japan, Switzerland and Holland, which, each in their own way, consciously restricted IPR protection to foreign IPR owners during earlier stages of their development. Many of the recently developed East Asian countries such as Taiwan and Korea also used a policy

of restrictive IPR protection as a spur to their development. Now with TRIPS providing a 'one size fits all' set of IPR standards worldwide, developing countries have lost their autonomy to devise their own development policy (CIPR 2002).[10] The concession in TRIPS to allow developing countries extra time to adjust to the TRIPS regime only partly meets the need.[11]

Secondly, many LDCs cannot make full use of the system of internal checks and balances established within the TRIPS agreement itself, such as compulsory licenses and exceptions to certain types of patents. This is partly because bilateral treaties, both TRIPS-plus agreements and FTAs, have restricted the scope of compulsory licensing and exceptions. Many do not have the legislative, judicial or administrative procedures to put compulsory licensing laws into effect and do not themselves have the manufacturing capacity to ensure that the compulsorily licensed products can be made. The most immediate consequence of this has been felt in the health sector where compliance with the TRIPS agreement and bilateral TRIPs-plus agreements left such countries with inadequate resources to use domestic legislation to ensure pharmaceutical products to their population to maintain minimum public health standards. While the Doha Declaration provided a compromise to deal with that emergency created by restrictions of access to patented pharmaceuticals, other features of TRIPs-induced IP imbalance between the developed countries and LDCs remain unresolved. 'Prominent amongst these are the effects on the right to food of plant variety rights, patenting of genetically modified organisms, bio-piracy and the reduction of communities' (especially indigenous communities') control over their genetic and natural resources and cultural values…'[12].

The third feature of the unbalanced expansion of IPR protection worldwide, one that has hitherto been less extensively examined, is the fact that the IP protection imposed under the TRIPS Agreement has not been accompanied by a requirement for a complementary competition law. This is not to say that competition policy by itself offers a solution to the imbalance of power between the North and the South or even saves development policy from the imbalance of TRIPs. Nor does it presuppose that an LDC has the resources to institute a competition policy as well as a TRIPs-compliant framework of IP laws. However, what has been learnt from the experience of the developed world is that strong IP legislation also requires a competition policy as a 'second tier' of regulation of the exercise of IPRs in the interests of ensuring that markets for IPR-protected goods are not monopolised and that technology transfer is not distorted by the licensor's misuse of power over the licensee.

For LDCs, the control of monopoly power and the regulation of technology transfer by competition policy is often beyond their reach at an early stage in their development. A national competition law seems to be available

as an option for developing countries only at a more advanced stage of development. In recent years, for example, India, Singapore, Malaysia, Thailand and China have joined the other members of the international competition network. In the Doha Ministerial Conference, the African Group of developing countries were deeply suspicious of an international treaty *requiring* competition legislation as a complement to the TRIPS Agreement and bringing competition law issues to the WTO dispute settlement system. Their reaction was prompted partly because of the trade-related dimension of competition law and the Singapore issues, in particular the way the general principle of non-discrimination within the WTO could be viewed as a wedge for the benefit of multinational corporations (MNCs) to gain access to public procurement and general services in the developing world. Moreover, many developing countries were all too aware that they lacked the capacity to install their own competition regime which could apply national competition policies in the context of a development policy. For developing countries, for example, it may be vital to a development policy to exempt certain sectors or services from the competition rules until those sectors and services reach a certain stage of development.

The participants in the Doha Ministerial Conference may have proved unreceptive to proposals for a Multilateral Framework Agreement on Competition Policy within the WTO largely for those reasons, but that does not mean that the case for complementary competition policies is extinguished. There are two important points that remain to be considered. In the first place, there is a need to set out on how competition law operates as a form of control of the market power of large private undertakings who enjoy IP protection, whether that power is wielded by its owners acting unilaterally or bilaterally in technology transfer licensing agreements. In the period between the Singapore and the Seattle Ministerial Conferences, the WTO Working group on the Interaction between Trade and Competition policy produced a report on the interface between IP protection and competition policy in which it made it clear that the exercise of IPRs should be regulated by competition law and spelt out some of the problems for the developed world as well as developing countries. It is important to spell out how competition policy has the capacity to regulate the conduct of powerful, foreign-owned, private undertakings and the process of technology transfer without 'discriminating' in the sense of the WTO principles.

Secondly, the purpose of this closer examination of the way competition policy can regulate the abusive exercise of IPRs is not to provide a foundation for a renewal of efforts to establish a parallel treaty establishing national competition laws in all countries within the WTO subject to the WTO dispute settlement mechanism. Nor is it to suggest a progressive harmonisation of such policies. It is premature to expect the LDCs to embark on such a course

of action. The purpose of this part of the chapter is to indicate how the problem of this imbalance is so severe that it may require some form of international response rather than a simple model of establishing competition authorities in all WTO members. For example, to what extent can international competition law provide a mechanism for enforcement assistance to LDCs without their own national competition authorities, rather than merely confining itself to technical assistance to and capacity building for LDCs? To some extent, LDCs may already benefit from the side-effects of international cooperation in the enforcement of anti-cartel enforcement. To what extent is there room to build upon that experience in other areas of competition policy concerns such as monopoly control and technology transfer which are more directly related to the process of achieving a balanced interface between IP rights and competition law? As we shall see, bilateralism has steadily reduced the capacity of member states to use the available internal balancing measures in IP laws such as compulsory licensing. This development may make the need for competition law measures even greater in DCs and LDCs.

2. IPRS, TRIPS and Competition Policy

The first step is to better understand the way competition law applies to IP owners with extensive market power. Competition law has long operated as a virtual 'second tier' of regulation of IPRs in the interests of ensuring that markets for IPR-protected goods are not monopolised and IP licensing agreements are not restrictive of competition.[13] In the EU, Japan and USA, competition laws and IPRs are generally seen as complementary legal regimes attempting to achieve the same end of contributing to consumer benefit and the development of an economy through balanced growth and innovation.[14] However, the two legal regimes use rather different means. The major IPRs, such as patents and copyright, confer an exclusive right to exploit an invention or creation commercially for a limited period as an incentive to creation and innovation. Competition law accepts that IPRs are essentially *negative rights* against copying, and IPR owners only rarely enjoy the real market power of a monopoly. Yet it also recognises that some products protected by exclusive IP rights do coincide with a position of market dominance or monopoly and indeed achieve the status of technical standards for an industry that have all the features of 'essential facilities, i.e., a facility that is both a monopoly, for which there is no substitute, and an indispensable input or infrastructure to an activity engaged in by firms on separate but related markets'.[15]

Where an IP-protected product enjoys a position of real overwhelming market power, competition law will place certain legal responsibilities upon its owners to exercise their exclusive rights with certain restraints: they must

not price unfairly or discriminatorily; they must not refuse access to third parties in 'after markets' on reasonable terms despite the protection conferred by IPR legislation. It does so in part because of its public interest concern to preserve access to markets to ensure that they remain un-monopolised, leaving open alternative sources of innovation. This type of regulatory measure would apply in a developing country to its own domestic monopolies as well as the monopolies established by MNCs. However, if abuses are committed by foreign-owned firms with market power, it would not be discriminatory to prohibit their conduct under competition rules applying across the board on equal terms to all undertakings.

Competition law also regulates the terms of technology transfer agreements by restricting the power of IPR owners to improperly extend the scope of their IPR by inserting clauses acquiring all rights in the improvements of technology by the licensee and limiting the independent R&D efforts of the licensee. In other words it incorporates a concept of patent licensing misuse in its regulation of licensing agreements. Competition law introduces these restrictions on freedom of contract to protect the public interest in developing 'follow on' development. It remains to be seen when such a protection can be useful in the technology transfer process of developing countries to their owners.

This inherent complementarity between competition law and IPR protection in the developed world is actually acknowledged in the TRIPs Treaty in a number of ways. Article 8 (2) TRIPS starts with the general proposition that 'Appropriate measures, provided they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders…'. Article 8 also makes it clear that in principle member states may enact legislation to prevent practices by the right-holder that adversely affect the international transfer of technology. This Article thus envisages competition law complementing IPR legislation by setting limits both to the unilateral exercise of IPRs by owners of products with market power and to the exploitation of IPRs via the mechanism of licensing.

Under TRIPS Article 31 a compulsory licence may be authorised by national patent legislation for an array of reasons relating to the refusal of a patent owner to permit the exploitation of a patent by an inventor who is working on an important technical advance.

This authorization of patent legislation with provisions for compulsory licenses is complemented by a second specific authorization, Article 31(k), which is given explicitly for legislation to provide for a compulsory license 'to remedy a practice determined after judicial and administrative process to be anti-competitive.' In such cases, certain preconditions are waived and termination of the compulsory license can be refused if the authorities consider that 'the conditions which led to' the compulsory license 'are likely to

recur.' This is a specific acknowledgement in the TRIPS Agreement that competition law in certain circumstances may step in to provide a remedy where the exercise of the IPR by its owner comes into conflict with the competition rules.

Finally, and most importantly, Article 40 of TRIPS on the Control of Anti-Competitive Practices in Contractual Licences sets out at Article 40.2 that licensing practices or conditions that may constitute an abuse of IPRs having a detrimental effect on competition in the relevant market may be prevented by national legislation. The examples it gives are exclusive grant-back conditions, conditions preventing challenges to the validity of the IPR, and coercive licensing packages. The TRIPS agreement does not require the legislation of competition rules; it merely acknowledges that such national legislation would be an appropriate complement to an intellectual property legal regime based on TRIPS. Moreover, its suggested procedure under Article 40.3 for requesting consultations with another member whose multinational corporation (MNC) is practising an abuse, presupposes a legislative regime in the DC making such a request.

Although these provisions may appear marginal to the TRIPS Agreement as a whole, they are in fact an indication of the way competition rules can function as a default mechanism to ensure that in extreme cases the exercise of economic power by IPR owners does not go unregulated. This is made plain in the well established interrelationship between IPR ownership and competition law constraints in EU and US law. In the EU, the European Court of Justice (ECJ) has confirmed that the exercise of IPRs is subject to the limits of Articles 81 and 82. Moreover, the case law of the Court of First Instance (CFI) and ECJ, as well as the decisions of the European commission have provided a detailed framework of rules regulating refusals to license, refusals to supply interface codes, tie-ins, exclusive dealing and even unfair pricing, all in addition to the compulsory licensing provisions of the patent and allied rights legislation. Similarly, the EU Technology Transfer Block Exemption Regulation 2004 provides a comprehensive set of rules regulating the contents of IPR licensing agreements which restricts the commercial and contractual possibilities of exploitation by IPR owners. In the US, the Guidelines to Intellectual Property Licensing 1996 apply the competition law framework to those who licence IPRs.

3. An Excursus: The 'Internal Balance' of IPRs and Development Policy

One complicating factor in the role of competition laws as a default regulator of the exercise of IPRs by their owners, is that IP legislative measures often contain exceptions and limitations to ensure that the use of the IP protection

contributes to the creativity and innovativeness of participants in a market economy *other than the IPR owner*. Under the TRIPS treaty, for example, there are important provisions creating categories of exceptions to patent protection. Member states are authorised to refuse to grant a patent in the following exceptional cases:

- Where necessary to protect public order, morality, including to protect human, animal or plant health or to protect the environment (Art 27.2),
- diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Art. 27.3(a))
- certain plants and animals other than micro-organisms (Art. 27.3(b))
- essentially biological processes for the production of plants and animals other than non-biological processes and microbiological processes and plant varieties(Art. 27.3(b))

Article 30 of the TRIPS treaty contains conditions that reflect the delicate balance that must be struck between private ownership rights and public interests in drafting and implementing the exception provisions. These exceptions must not *unreasonably* conflict with the *normal* exploitation of the patent or *unreasonably* prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

On the surface, TRIPS embodies a view of property rights that combines rights with responsibilities including responsibilities to the public health and environmental concerns of developing countries. It appears to offer help to developing countries in the areas of pharmaceuticals, education, traditional knowledge and the patenting of living organisms. Yet, there is a huge gap between the rights allowed in the language of the Treaty and the experience in practice in developing countries, particularly since the TRIPS-plus bilateral agreements have tended to reduce the scope for developing countries to exercise the full powers of compulsory licence under the TRIPS Agreement.[16]

Copyright and its exceptions

A second major area of IP protection under TRIPS, copyright law, also contains some ‘exceptions’ that help to balance legal protection against overt copying with use by third parties of the inventive or creative idea. First and most fundamentally, even during the copyright terms, most systems of copyright tend to endorse the idea/expression dichotomy, that is, they do not protect the idea underlying a work but only the original mode or form of expression of that underlying idea, leaving open to other innovators and creators free access to and use of the underlying idea.[17] Secondly, copyright law contains a doctrine of ‘fair use’, or ‘fair dealing’, that permits some use

for reporting for news, educational and research purposes, criticism or review as well as some personal use.[18] These measures are needed as the copyright term has been extended recently from a period of 50 years plus life to 70 years plus life, a term more suited to literary than informational copyright protection.

In the field of information technology, there are specific adaptations of the general copyright rules to computer software and databases that strike their own type of balance between idea and expression.[19] The EU Computer Software Directive endorses the general principle that 'ideas and principles which underlie any element of a computer program, including those which underlie its interfaces are not protected' (Art 1(2)).[20] The US Copyright Act 1976 s 102(b) recognises a similar dichotomy: 'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.'[21]

The balance struck in copyright law between protection against overt copying and use by third parties of the inventive or creative idea differs in nature from patent law. First and most fundamentally, even during the copyright terms, most systems of copyright tend to endorse the idea/expression dichotomy, that is they do not protect the idea underlying a work but only the original mode or form of expression of that underlying idea, leaving open to other innovators and creators free access to and use of the underlying idea.[22] Secondly, copyright law contains a doctrine of 'fair use', or 'fair dealing', which permits some use for reporting for news, educational and research purposes, criticism or review as well as some personal use.[23] On the other hand, the copyright term extends to 70 years plus life duration.

While it is true that there is an 'internal balance' struck by IP legislation between 'initial' and 'follow on' innovation, it is less true that these features of IPRs offer much reassurance to LDCs. The more likely scenario for LDCs is that they will be forced to implement a stronger version of the IPRs, particularly patents, than may be suitable for a developing country. Strong IPR regimes restrict imitation, which in the early stages of development in Korea and Taiwan for example, was crucial to the growth of the economies of these countries. In any case, what is quite clear from experience in developed countries is that there are occasions when the internal balance struck within IP law between 'initial' and 'follow on' innovation fails to limit an IP owner with sufficient market power from effectively preventing follow on innovation and 'spill-over'of technological knowledge. This creates a role for competition law to deal with the excesses of IP misuse, particularly where that misuse might be by a foreign MNC through some form of Foreign Direct Investment (FDI) or IPR licensing agreement.

4. IPR Licensing Agreements, Competition Policy and Developing Countries

Technology transfer between countries often occurs in the form of licensing agreements between the technology owners in one country and their licensees in a second country. The regulation of the terms of IP licensing agreements by competition rules will be of relevance mainly to developing countries which have reached the stage where undertakings within their own countries are able to draw in technology transfer in the form of an agreement between two independent undertakings. If the technology transfer takes the form of FDI,[24] then the actual contractual or licensing transaction will probably take place internally within the overall corporate structure of the investing company itself (for example, parent and subsidiary) and hence fall outside the scope of the competition law provisions which regulate restrictive agreements.[25] It is still possible for the competition law provision regulating monopolies or abuse of a dominant position to apply. However, where an undertaking in a developing country, whether state-linked or private, is able to obtain a technology transfer in the form of an IP licensing agreement, the competition rules of the restrictive agreements provisions of a basic competition law system will apply to the agreement. For example, both Article 81 of the European Treaty and Section 1 of the US Sherman Act contain provisions which prohibit 'restrictive' agreements. Thus, Article 81 prohibits agreements which 'prevent restrict or distort competition'. Section 1 of the Sherman Act proscribes agreements which constitute an unreasonable 'restraint of trade'. Both general competition laws have given rise to detailed forms of regulation of the contents of IP licensing agreements.[26]

Today certain terms of IP licensing agreements are more systematically regulated in the EU by the Technology Transfer Block Exemption Regulation[27] and in the USA by the Antitrust Guidelines to the Licensing of Intellectual Property issued by the Justice Department and the Federal Trade Commission. The terms of such contracts which are closely monitored by competition authorities and relevant to the development strategies of developing countries are those where the licensor attempts to control the licensee's 'grant-back' of improvements, or attempts to impose 'tie-ins' of non-IP protected products as a condition of the IP license. Competition law also regulates licensor attempts to place limits on the licensee's freedom to work in competition and its freedom to challenge the validity of the original intellectual property right.

These actions by the licensor are viewed by competition authorities as an excessive use of market power vertically, a form of downstream 'leveraging' of that power, by the IP owning licensor and they are regulated along with the more traditional competition concerns with cooperation between competitors

such as market sharing agreements and price fixing. The concern of competition law with 'vertical' means of leverage is largely inspired by a concern to protect 'follow on' innovation in the EU, USA and Japan but its methods can be adapted to a developing country's strategy to ensure a 'spill-over' of technological information where the MNC licensor's bargaining power would otherwise restrict such a transfer by contract. Competition law attempts to preserve the freedom of action of licensees to engage in independent R&D and exploitation of the results of such efforts and to ensure that licensing, itself a diffusion of the original invention, is not used as a means of restricting further diffusion by licensees. Good examples of this policy are the limits placed by competition law on 'grant-backs', the obligation imposed on the licensee to license back to the licensor the right to use the licensee's improvements to the licensed technology. In the USA, non-exclusive grant-backs are perfectly acceptable but exclusive grant-backs are subject to a 'rule of reason' balancing test.[28] Hence if the licensor inserts an exclusive grant-back in the agreement, the US antitrust agencies will 'consider the extent to which the grant-back provision has offsetting pro-competitive effects.'[29]

In the EU, the competition rules are more detailed in pursuit of the objective of curbing the licensor's control over the licensee's improvements of the licensed technology and preserving the licensee's autonomy. In the first place, the block exemption regulation makes a license void if it includes a provision in which the licensee is required to assign to the licensor any improvements or new applications of the patented technology.[30] Secondly, in the case of 'severable' improvements, that is those which can be IP protected and be worked independently of the licensed technology, an obligation to grant-back is limited to a non-exclusive license. Even during the term of the contract the licensee must be kept free to develop and license this type of improvement. The licensor's entitlement to disclosure of improvements and a non-exclusive license is conditional upon providing reciprocal rights to licensees.[31] Non-severable improvements can be required to be exclusively licensed to the licensor during the term of the contract but this is subject to a reciprocal obligation upon the licensor to grant a license, albeit non-exclusive, of all its improvements back to the licensee.[32] Once the license expires, the licensor must negotiate for any continued grant-back terms, possibly by offering a further license of the underlying technology.

The competition policy aim is not to allow the licensor to use the terms of the original licensing agreement as a lever to obtain exclusive rights to licensee improvements or new applications of the licensed technology in the period after that agreement is terminated. These limits on excessive use of market power or leverage are created by EU competition law to ensure that licensees, as well as licensors, have the incentive and the capacity to contribute to a wider diffusion of the technology.[33] This 'hands on' legal regime

therefore controls vertical use of IPRs through the mechanism of licensing in the interests of innovation.

5. Competition Law and LDCs

Whatever benefits competition law may have as a default mechanism against the exploitation of market power by IP owners can only be achieved if the competition rules exist and are accompanied by an effective enforcement mechanism. DCs and LDCs without the resources to establish a competition authority face a vacuum in regulatory authority if nothing else is done. To what extent can and should the international community offer assistance to such LDCs by creating a mechanism for a form of international enforcement assistance rather than merely technical assistance or long-term capacity building?

One possible answer to this is to locate the responsibility of developed countries within the WTO framework to assist other member states to prevent impediments to internal trade by analogy to their obligations under Doha in respect of IPRs. Joseph Drexl has suggested that since the WTO is meant to create an evolving framework for the liberalisation of goods and services, and IPRs contain the mechanisms to replace state initiated barriers to international competition with the erection of such barriers by private undertakings, there is a case for international assistance to member states who cannot protect its markets by a domestic competition law system or rule of exhaustion.[34] It cannot be assumed that the existing pattern of robust enforcement of competition laws by developed countries within their borders will prevent MNCs from simply taking their restrictive practices and monopoly practices to countries where no effect enforcement is available.[35]

The core feature of the Drexl formula is to create in a new agreement on competition law an obligation for all WTO members not to discriminate between the protection of national and international markets. WTO members will have to apply their national competition rules to restraints of competition in foreign markets and domestic markets alike. The principle amounts to an obligation on WTO members to combat export cartels and other restraints of competition that have their origin in the territory of one WTO member, but generate their harmful effects only on foreign markets. The rationale for this action is that the restraints are in fact trade-related restraints.[36] Such a new multilateral agreement would be designed to protect competition and not the undertakings that restrain competition.

One attraction of such a formula is that it can move from anti-cartel regulatory activity to the regulation of specific 'anti-competitive' contractual clauses in technology transfer licensing agreements. Drexl argues that where a member prohibits licensing clauses in licensing agreements with domestic

licensees, for example, they should also prohibit such clauses in outward bound licensing agreements. The Drexl formula offers a 'road map' out of the impasse and has the virtue of building on the spirit of Article 65 of the TRIPS Agreement. However, it relies on the impetus for reform to be welcomed by the EU, USA and other Quad countries. Yet they are the very countries, as we shall see in the next section, that have been instrumental in creating the current situation by assiduous resort to bilateralism and they show little inclination to travel the prescribed road for reform.

PART II: BILATERALISM AND INTELLECTUAL PROPERTY RIGHTS

Alongside the TRIPS, there has been a rapid increase in the number of bilateral trade and investment agreements in the last few years. For example, the number of bilateral investment treaties (BITs) covering Foreign Direct Investment (FDI) in services reached 2265 by the end of 2003, and involved 175 countries.[37] The latest report on investment from UNCTAD lists the move of FDI into the services market.[38] The reasons why such agreements are negotiated, include for the LDCs and DCs, increased options for attracting foreign investment for development on the one hand, and on the other, increased certainty for foreign investors that their investments will be secure as well as increasing market access and obtaining better conditions for national treatment for MNCs (than perhaps provided by LDCs' or DCs' special commitments under the GATS).

However, such agreements come at a price. For example, a number of BITs contain prohibitions on certain *performance requirements* with regard to technology transfer, where restrictions are imposed at the expense of LDCs and DCs. This is particularly the case with NAFTA, which in its performance requirements sections, prohibits the imposition or enforcement by a Party of requirements 'to transfer technology, a production process or other proprietary knowledge to a person in its territory' in connection with the admission or treatment of an investment of an investor of any Party or non-Party (unless required to do so by a competition authority).[39] Similar technology transfer performance requirements can be found in other FTAs.[40] The bilateral investment treaties of the United States also often include a prohibition of mandatory requirements 'to carry out a particular type, level or percentage of research and development' in the territory of a party.[41] Although performance requirements restricted only to control the competitive conditions of a market may be good for the general economic development of the host LDC or DC, more extensive requirements as to the generation, transfer and diffusion of technology, which go beyond competition-related issues, could also be prohibited

under performance requirement restrictions.[42] Therefore, the conclusion that must be drawn is that LDCs and DCs interested in including development-oriented clauses in the International Investment Agreement (IIA)/BIT/bilateral trade agreement or FTA which touch on local personnel training requirements or the regulation of royalty payments by the developing country licensee would be restricted from doing so by potential restrictions on performance in the respective agreement.[43]

As UNCTAD's World Investment Report 2004 points out,

> IIAs covering services FDI are proliferating at the bilateral, regional, and multilateral levels. The resulting network of international rules on FDI in services is multifaceted, multilayered and constantly evolving, with obligations differing in geographical scope and substantive coverage. These rules are increasingly setting the parameters for national policies in the services sector.[44]

In fact, it would seem that much of the impetus for the negotiation of Free Trade Agreements (FTAs) by the United States for example lies outside of merchandise trade: rules on liberalising services, IPRs, the environment, labour standards and provisions for capital transfers are now standard components of US FTAs.[45]

The United States in particular has been using bilateral and regional FTAs to impose TRIPS-plus intellectual property standards on LDCs and DCs that exceed WTO rules. Recent FTAs negotiated by the USA include US–Chile (2003), US–Jordan (2000), US–Morocco (2004), US–Singapore (2003), US–Central America Free Trade Agreement (CAFTA-2004), US–Morocco (2004), and US-Australia (2004).[46] Other FTAs are currently in the pipeline including the Free Trade Area of the Americas, Andean Countries, Thailand, Panama, Bahrain and Southern African countries.[47]

The failure of the negotiations at Cancun to achieve any overall consensus in September 2003 led eventually in July 2004 in Geneva to some movement on the part of the Quad countries (USA, European Communities, Canada and Japan) in recognising developing country concerns on failure to reach agreement or honour existing developed country obligations on core trade issues, such as agricultural subsidies, cotton, primary commodities, TRIPS and health, and non-agricultural market access, and without further progress in favour of developing countries on these issues, resulted in three out of the four Singapore Issues wanted by developed countries as part of the Doha agenda – Investment, Competition and Transparency in Government Procurement, being dropped from the Doha Round agenda.[48] Although this could be seen as some evidence of LDCs and DCs being able to influence the Doha negotiating agenda, in reality the Quad countries, and in particular the United States, has circumvented the difficulties of negotiating in a multilateral forum by pursuing exactly the same issues of

investment, transparency and competition in bilateral trade agreements and FTAs. Also included are provisions on the protection of intellectual property rights, which go beyond the protections offered by the TRIPS agreement, so called TRIPS-plus provisions. For example, in the area of compulsory licensing provided for by Article 31 TRIPS, which allows members to temporarily override a patent in the public interest, members can determine for themselves the circumstances under which they can use this provision when confronted with a public health problem, such as a national emergency or epidemic.[49] Article 31 does, however, set restrictions as to how the clause should apply. For example, before issuing a compulsory license, members must first attempt to obtain a license from the patent holder within a reasonable time and on reasonable terms[50] (unless a national emergency applies in which case the requirement can be waived). Suppliers of the product under the compulsory license can include government entities or parties authorised by the government to sell on the commercial market, but exports outside the domestic market are restricted[51] (although this position has now been modified with the adoption of the August 2003 Agreement to lift TRIPS restrictions on compulsory licensing for export of medicines – mandated under Paragraph 6 of the Doha Declaration on TRIPS and Public Health).[52] However, even with the TRIPS provisions in place, measures included by the US in various FTAs dilute the operation of Article 31 TRIPS on compulsory licensing. In Section 1711 (Articles 5, 6, and 7) of the NAFTA agreement, compulsory licensing is not permitted for the first five years following product registration due to provisions protecting data exclusivity (provisions protecting test data). Similarly in the FTAA agreement, the provisions on compulsory licensing are restricted only to remedy anticompetitive behaviour, to national emergencies and to public non-commercial use.[53] Furthermore, the same provisions prevent the export of generic medicines produced under a compulsory license and specifically allowed for under the August 2003 'paragraph 6' solution mentioned above. Clearly such provisions are TRIPS-plus. Other measures used in bilateral and FTAs that are TRIPS-plus include requirements to extend patent protection beyond the 20-year period required under the TRIPS, which in effect would delay the production of generic medicines. Also included are provisions giving patent holders the right to block *parallel importation*, which again in the health sector, will limit the ability of governments to obtain patented medicines placed on foreign markets at cheaper prices.[54] This move flies in the face of paragraph 5c of the Doha Declaration, specifically allowing for members to establish their own regimes for exhaustion of rights without challenge and subject only to MFN and national treatment provisions under Articles 3 and 4 TRIPS.[55] In the technology sector, under the US–Jordan FTA, each party must give effect to selected provisions of the WIPO Internet

Treaties,[56] neither of which are currently part of TRIPS, and are therefore TRIPS-plus provisions.

Some agreements, such as the US–Nicaraguan bilateral investment treaty, do not specifically mention intellectual property rights, but refer within the wording of the agreement to treaties that do cover IP rights, such as the TRIPS Agreement. Often, activities involving the use of IPRs (such as licensing technology transfer to a producer in an LDC or DC) will be covered by the investment treaty, as such activities will be classed as a 'covered investment activity'. If the target LDC or DC then puts in place a measure that might restrict the protection of an investor's IPR, for example by issuing a compulsory license covering that technology, the US might argue that such a measure will have the effect of 'impairing by unreasonable and discriminatory measures the management, conduct, operation … of covered investments'.[57] In other words could a DC or LDC issuing a compulsory license constitute an investment expropriation under the investment treaty?[58] The issue on whether or not an IPR can constitute an 'investment' is an important issue, as generally investment agreements provide for direct investor-to-state dispute settlement, whereas trade agreements in general only provide for state-to-state dispute settlement.[59] Investor-to-state dispute settlements provide for arbitration awards for uncompensated expropriation, whereas state-to-state settlements generally only provide for the imposition of punitive trade sanctions.[60]

Furthermore such provisions could seriously impact an LDC or DC to freely determine its domestic agenda on IPRs, given the Most Favoured Nation (MFN) provision set out at Article 4 TRIPS. MFN requires that a member, which grants any advantage, favour, privilege or immunity to the national of any other country (not necessarily a member of TRIPS), must accord the same to the nationals of other TRIPS members. Note that although the provision does not apply to bilateral agreements agreed *prior* to the coming into force of the WTO Agreement, but for any agreement signed thereafter, the effect of Article 4 is to oblige any LDC or DC that has signed a bilateral trade agreement or FTA with the USA, for example, and containing some of the provisions set out above, to grant similar rights to all other WTO members. In effect, the MFN principle when coupled with bilateral agreements or FTAs will benefit any country that is a primary exporter of intellectual property rights, generally the Quad countries. Therefore as a consequence of the operation of Article 4 TRIPS, when the US negotiates such restrictions on the use of IP, the European Communities, Japan and Canada will benefit and vice versa. Peter Drahos has described this process as the 'Global IP Ratchet': when the US and the EU between them have negotiated enough bilateral agreements containing TRIPS-plus standards, those standards will in effect become the *minimum standards* required in

any future WTO trade round.[61] From the perspective of developing countries, therefore, the WTO then becomes the agent not so much for facilitating trade and increasing market access for both developed and developing nations, but specifically for the developed world in extracting concessions on IPRs that had never been agreed at the multilateral level by the G90 (coalition of developing countries).

As a recent Oxfam paper makes very clear: 'Countries should not have to expend huge amounts of time and political capital to gain consensus at the WTO, and then have these efforts undermined by a US strategy that depends on unequal negotiating power to pick off developing countries one by one.'[62]

In effect, LDCs and DCs may well find themselves trapped in a pincer movement. On the one hand they are negotiating bilateral trade agreements or FTAs with powerful actors such as the US to attract FDI, and on the other, entering into bilateral trade agreements as a consequence of a provision in the US Trade Act 1974 (s.301), which allows the United States Trade Representative (USTR) to deal with foreign unfair trading practices, including practices involving intellectual property rights. Section 301 specifically allows the USTR to take all 'appropriate and feasible action' to remove foreign trade barriers that hinder US exports to third country markets.[63] A Section 301 investigation may result in a bilateral agreement between the US and the target state, or failing that, the imposition of trade sanctions, although this is rare. More countries are now subject to s.301 investigations than before, possibly as a consequence of the number of reviews (out-of-cycle reviews) being increased over time.[64]

Other provisions in US domestic law effectively lock the United States into a very tightly defined negotiating position when negotiating IPRs protection in the international forum, which will at times put the US at odds with its agreed position at the WTO (see below). For example, the US Trade Act 2002 (fast-track authority) states:[65]

> The principal negotiating objectives of the United States regarding trade-related intellectual property rights are:
>
> (A) to further promote adequate and effective protection of intellectual property rights, including through
>
> (i) (I) ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)), particularly with respect to meeting enforcement obligations under that agreement; and
>
> (II) ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law;

(ii) providing strong protection for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property;
(iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use and enforcement of intellectual property rights;
(iv) ensuring that standards of protection and enforcement keep pace with technological development, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; and
(v) providing strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil administrative, and criminal enforcement mechanisms;

(B) to secure fair, equitable, and non-discriminatory market access opportunities for United States persons that rely upon intellectual property protection; and

(C) to respect the Declaration of the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.[66]

From the above section of the US Trade Act 2002, three points become immediately obvious: (i) that under subsection A(i)(II) above, US domestic law requires US trade negotiators to seek international IPR protection *commensurate* with US domestic law, which when considering the US DMCA 1998, is one of the most advanced legislative frameworks for the protection and enforcement of IPRs in the world providing provisions most certainly in excess of the standards required by TRIPS; (ii) that under subsection A(iv) above, negotiators must seek provisions that will protect digital rights management technology (and indirectly anti-circumvention technology) not currently reflected in the TRIPS (but in the WIPO Internet treaties for example); and (iii) under (C) above, to respect the Doha Declaration on TRIPS and public health. As mentioned above, the difficulty is that US domestic law requires US trade negotiators to negotiate provisions within bilateral trade agreements that either exceed current WTO law (TRIPS) or place the US at odds with agreed WTO understandings (Doha Declaration on TRIPS and public health).[67] Therefore, unless and until the US Trade Act 2002 is amended by the US Senate and Congress to reflect the position agreed by the US government at the multilateral level, any further discussion of the policy objectives of USAID being in line with US policy on international trade will likely be considered rhetoric. For example, the development arm of the US government (USAID) refers to a recent report outlined on its website that: 'At least for the next generation, US strategy for reducing poverty in developing countries must focus on promoting growth in poor countries. Growth in such

countries is good for the poor. New data eliminates any doubt that rapid economic growth reduces poverty'.[68] Given US trade interests as reflected in the Trade Act 2002 as discussed above, could such provisions on trade in intellectual property help promote the kind of economic growth that USAID is referring to? Most DCs and LDCs as a collective are net *importers* of intellectual property, and mainly sourced from the developed countries. In a recent report by the Commission on Intellectual Property Rights (CIPR), the Commission cites an estimate from the World Bank suggesting that most developed countries would be the major beneficiaries of the TRIPS, with the US alone benefiting from patents by an annual $19 billion.[69] Developing countries and a few developed ones would be the net losers. The Commission states that in 1999, figures from the World Bank indicate a deficit for developing countries for which figures are available of $7.5 billion on royalties and license fees.[70] Clearly growth for DCs and LDCs will come more directly from increased access to markets in the developed world that attract preferential tariffs with greater chance of export than from importing costly IP from the developed countries. As the CIPR states: 'If IPRs are to benefit developing countries, that benefit will need to come through promoting invention and technological innovation, and thereby enhancing growth.'[71] The CIPR concludes its report on IPR and Development by stating that:

> The main conclusion seems to be that for those developing countries that have acquired significant technological and innovative capabilities, there has generally been an association with 'weak' rather than 'strong' forms of IP protection in the formative period of their economic development. We conclude therefore that in most low income countries, with a weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth.[72]

Clearly then the TRIPS-plus provisions as required by the US Trade Act 2002 would be even less beneficial to the kind of economic growth referred to by USAID above. Perhaps what is required is an amendment to the US Trade Act 2002 that will allow the USTR and its negotiators the power to exercise a discretion and which would give LDCs and DCs exemptions or exceptions to some of the provisions required by HR3009.

The US is not alone in extracting TRIPS-plus provisions through bilateral trade agreements or FTAs. The EC–Mexico FTA also contains a provision at Article 12 that commits both parties to providing adequate and effective protection to the 'highest international standards', which could well cover standards that are yet to emerge in the future or be agreed at a multilateral level, such as for example the WIPO Internet treaties covering copyright in digital works and the protection of performance rights. The WIPO treaties require a number of ratifications from member countries before they come

into force, but through the signing of bilateral agreements/FTAs requiring WIPO Internet treaty compliance with more and more countries by the US and the EC, it is not difficult to envisage a point in time (potentially) when all WTO members have ratified, the end result being that the Internet treaties will be folded into the TRIPS.[73] This would be a remarkable development considering that the Internet treaties set very high standards for the protection of copyright in digital works as found in the US Digital Millennium Copyright Act or the European Copyright Directive, for example, the US and the EU being two of the leading exporters of IPR in the world. It is difficult to envisage how some LDCs or DCs, if faced with this prospect, would be able to enact and enforce such provisions given that basic human rights such as access to food, housing and education as set out in the International Covenant on Economic, Social and Cultural Rights[74] still need to be financed and enforced at the LDC/DC national level.[75] We should bear in mind that low-income countries, with over 40 per cent of the world's population, account for less than 3 per cent of world trade, with developed countries exporting around $6000 per capita and developing countries around $330 per capita, with the lowest income countries exporting less than $100.[76]

It gets worse. Only two arms of the pincer movement have been described above, but there is a third arm more directly linked with the way trade rules on tariffs currently operate at the WTO. These rules apply as a consequence of the *General System of Preferences* or GSP regimes that certain developed countries apply. Under these schemes, applied tariff rates may be lower than MFN rates owing to the non-reciprocal preferences granted to selected developing countries under the GSP and supplementary preferences for LDCs.[77] The aim of the GSP regime is to grant special and differential treatment to DCs and LDCs and to increase the export opportunities of these countries by discriminating in favour of qualifying DCs and LDCs through granting non-reciprocal tariff reductions below the MFN rates for particular products. However, Acharya and Daly argue that GSP schemes 'have at best yielded only "modest" increase in imports from beneficiary countries, with some of those gains due merely to trade diversion rather than trade creation.'[78] Nevertheless the GSP schemes remain highly popular to DCs and LDCs as they at least provide some inroad into the highly prized markets of the United States and the EU. However, preferential tariffs under a GSP scheme can be unilaterally revoked or modified at any time by the member according such concessions, leading to uncertainty and generating a culture of dependency. This in turn facilitates developed countries being able to extract various concessions from developing countries, which may well be in non-trade areas. For example Acharya and Daly cite the EU explicitly linking its granting of preferences in addition to those provided by the GSP to beneficiary countries' adherence to labour and environmental standards, and under US

trade law to allow the President to use GSP to promote intellectual property rights for example as found under the *African Growth Opportunities Act 2000*, which allows for 38 African countries to qualify for preferential treatment so long as they already qualify for GSP treatment. GSP is to be extended to eligible African countries until 2008.[79] Also, rules of origin may often require beneficiary DCs or LDCs to use inputs from the US or EC granting the preference, which could have adverse effects on the DCs or LDCs exporters' competitiveness, as the sourcing may not be the cheapest available, raising the production costs of DC or LDC exporters.[80] Such arrangements are particularly disadvantageous for DC or LDC exporters in the cotton and textiles industry for example, to which potential concessions on tariffs promised by developed countries was one of the primary reasons for many DCs and LDCs agreeing to sign up to the minimum IPR standards required by the TRIPS agreement in the first place.[81]

Implications for Development

As Drahos argues, 'Developing countries are being led into a highly complex multilateral/bilateral web of intellectual property standards that are progressively eroding, not just their ability to set domestic standards, but also their ability to interpret their application through domestic and administrative and judicial mechanisms.'[82]

The significance of maintaining flexibility for determining national policy has been adopted as a policy objective at the recent UNCTAD XI Conference in Sao Paulo (June 2004) (the *Sao Paulo Consensus*) which states at paragraph 8 that:

> The increasing interdependence of national economies in a globalizing word and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, i.e. the scope for domestic polices, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.[83]

Clearly LDCs and DCs, entering into bilateral/FTA agreements to attract FDI are going to increasingly face the difficult challenge of striking a balance between using BITs, IIAs, and FTAs to attract FDI on the one hand, and maintaining sufficient flexibility to pursue national development plans in the services sector on the other. In a recent IMF paper by Hilaire and Yang, the

authors (working for the IMF) generated two simulations based on trade data looking specifically at the implications for a number of developing countries' FTAs with the United States. They argue that initial improvement in market access enjoyed by the participants to the FTAs could be eroded progressively as global liberalisation proceeds, and that this preference erosion might act as a disincentive to participate in multilateral liberalisation.[84]

In addition, developed countries have a responsibility to consider the implications of the IP protection standards they use in bilateral investment agreements or FTAs in terms of the costs involved for developing countries to implement such standards (particularly the TRIPS-plus provisions mentioned above), and also in terms of evaluating whether the protection required is appropriate to the state of economic development of the target DC or LDC. Furthermore, developed countries need to ensure that their objectives for the protection of IP in the target DC or LDC are consistent with their own publicly stated objectives as set out in the development policy and poverty reduction agendas of their overseas aid and development departments.

Regional and bilateral arrangements are much less preferable to the setting of multilateral standards, where the negotiating capabilities of developed and developing countries, although remaining asymmetrical, are counterbalanced by numerical advantage and the ability to build alliances.[85] There are further risks that regional/bilateral agreements could undermine the multilateral system by limiting more generally the use by developing countries of the flexibilities and exceptions allowed for in TRIPS, such as making use of provisions within the TRIPS for the exclusion of plant and animals from patent protection, provisions for the international exhaustion of patent rights, and the 'Bolar' exception[86] to patent rights.[87] The implications of bilateralism and the danger it poses to negotiations at the multilateral level have been argued by leading WTO jurists, such as John Jackson.[88] The proliferation of bilateral and regional agreements has gradually eroded the scope and application of MFN tariffs,[89] the cornerstone of WTO policy since the WTO was first established in 1995. As Acharya and Daly argue: 'The outcome is that MFN tariffs tend to be the exception rather than the rule, especially as far as the EU and Canada are concerned.'[90] There are also other trade distorting aspects of bilateral/FTA arrangements that have been well summarised in the IMF paper by Hilaire and Yang mentioned above[91]: (i) as trade barriers are lowered between partners to preferential trade agreements, trade may be diverted from lower-cost suppliers that are not members of the arrangement, because the higher tariffs on their goods now make them more expensive than imports from members, generating welfare costs as a consequence of resources being shifted to less efficient producers; (ii) concentration on building bilateral and regional alliances may distract and dilute the momentum towards multilateral trade liberalisation; (iii) as more countries get into regional trade arrange-

ments, the cost of non-participation mounts[92]; (iv) a plethora of, sometimes overlapping, trade agreements could add considerable administrative cost and confusion due to the need to negotiate separate agreements, establishing and policing various rules of origin and preference margins; (v) as mentioned earlier, reliance on preferences could be modified or withdrawn leading to instability and dependency; and finally (vi) the current genre of US FTAs include relatively new elements such as requirements on labour standards, IPRs and capital transfers where non-performance could lead to trade sanctions, and which could undermine a country's ability to operate in emergency situations.

In the specific area of IPRs, it is perhaps naive to think that developed countries, such as the US and those in the EU, will discontinue racheting-up IP protection in bilateral/FTA arrangements. Drahos suggests a solution to the global ratcheting-up of IP rights:

> Developing Countries should consider forming a veto coalition against further ratcheting up of intellectual property standards. The alliance between NGOs and developing countries on the access to medicines issue and the fact that this alliance has managed to obtain Special Sessions of the TRIPS Council on this issue suggests that this coalition is a realistic possibility. The position of such a veto coalition should be converting the Council on TRIPS from a body that secures a platform to one that polices a ceiling. This bold new agenda for the Council on TRIPS would be a standstill and rollback of intellectual property standards in the interests of reducing distortions and increasing competition in the world economy. If developing countries cannot forge a unified veto coalition against further ratcheting up of intellectual property standards, they can be assured that they will be picked off one by one by the growing wave of US bilaterals on both intellectual property and investment more broadly.[93]

The CIPR also suggests changes. The Commission refers specifically to the extension granted to LDCs for the patent protection to pharmaceuticals to 2016, and argues that the extension should be broadened to cover the implementation of the TRIPS as a whole. Furthermore, the Commission suggests that the TRIPS Council should also consider introducing *criteria* to decide the basis on which LDCs should enforce the TRIPS obligations after 2016. Such criteria could include indicators of economic development and scientific and technological capability as reflected in Article 66.1 TRIPS Agreement of the need for flexibility to create a viable technological base.[94] Extending the argument made by the CIPR, we go further and suggest that any criteria developed by the TRIPS Council (as suggested by the CIPR) could then be used as the basis for providing *exceptions* or *exemptions* to developed country national law on the negotiation of intellectual property rights and trade, for example in the US Trade Act 2002 discussed above. In the case of the United States, the criteria could be set out in a schedule or annexe to the Act which

would allow the USTR to provide exceptions or exemptions to any DC or LDC that meets those criteria. Such a provision could then become a template model for any developed country with similar trade-related intellectual property rights legislation in force.

The one thing that is abundantly clear from this examination of the effects of the TRIPS Agreement and subsequent bilateralism is that LDCs have effectively lost control over their power and discretion to determine the path and stages of their own development. They must embark on a development policy constrained by trade rules and bilateral agreements which are not designed to promote their autonomous determination of their own route to development. Currently, the international law framework casts doubt on the capacity of LDCs to make any serious inroad in delivering the key economic and social rights to their citizens. Is there any chance that the wealthier countries in the world will recognise this and modify their current trade policies?

NOTES

1. With the failure of the Stockholm WIPO treaty negotiations in the 1970s, owing largely to the reluctance of the developing countries to invest their limited resources in IP laws and IP enforcement agencies, the decision was taken by the US Government with the support of the EU and Japan to link IP protection with trade sanctions. These highly developed countries accepted the economic arguments that the return to such investments by the larger corporations helped to maintain the growth and development of US, European and Japanese economies in the face of world competition. J. Braithwaite and P. Drahos, *Global Business Regulation*, (2000) Cambridge University Press pp. 61–3. The US Government first adopted a policy of bringing IP protection within the GATT in the 1980s and by 1993, the USA, supported by the EU and Japan, was able to secure a TRIPS agreement that became part of the WTO Treaty of 1994. The coverage of the TRIPS agreement extends to all forms of IPRs based on the Berne and Paris Conventions as well as the recent WIPO Treaties.
2. P. Gerhart, 'Why lawmaking for global intellectual property is unbalanced', (2000) EIPR 309.
3. UN Sub-Commission for the Protection and Promotion of Human Rights. In particular, the Right To Development, discussed in more detail in Chapter 8 in this volume.
4. See Article 27(2).
5. See, for example, M. Blakeney, 'International Intellectual Property Jurisprudence' in D.Vaver and L.Bently, *Intellectual Property in the New Millennium* (Cambridge University Press 2004) p. 9 [pp. 1–19].
6. See, for example, J. Braithwaite and P. Drahos, *Global Business Regulation*, (2000) Cambridge University Press pp. 61–3. Discussed in more detail in Part II of this chapter.
7. Cited in Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 8, 'The international architecture', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter8htmf, accessed February 2005, p. 5.
8. See, for example, CIPR p. 23.
9. The TRIPS agreement offers a unique method of enforcement of an IP treaty. If a country fails to implement the standards of the TRIPS agreement, another member may make a complaint to the WTO and thereby initiate the WTO dispute resolution procedure which

can result in trade sanctions until that country amends its legislation to conform to TRIPS. This procedure has been brought against both developed and developing countries but the TRIPS agreement operates most forcibly upon developing countries. (See India Pharmaceuticals).

10. Alongside TRIPS, the USA, again using the threat of trade and lending sanctions, has engaged in a series of bilateral TRIPS-plus agreements with developing countries to limit their scope for compulsory licensing and exceptions in their domestic legislation. See, for example, CIPR p. 162.
11. TRIPS Art. 65.
12. See statement of the UN Sub-Commission for the Protection and Promotion of Human Rights 17 August 2000. See also CIPR 2002 and World Bank Report 2002.
13. S. Anderman, *EC Competition Law and Intellectual Property Rights*, Oxford University Press, 1998.
14. *Atari Games Corp. v Nintendo of America Inc.*, 897 F. 2nd 1572, 1576 (Fed. Cir. 1990) A.
15. *Oscar Bronner v Mediapoint* [1998] ECR I-7817.
16. See, for example, CIPR p. 162.
17. See Article 2 Berne Convention incorporated in the TRIPS treaty by Article 9.
18. See, for example, Article 9 of the Berne Convention; Articles 2bis, Article 10 (educational utilization) and Article 10bis (press, broadcasting and wire services to the public) Chapter III ss 29–30 of the Copyright, Designs and Patents Act 1988 (CDPA).
19. Cf. TRIPS treaty Article 10.
20. The EU Computer Software Directive (91/250/EEC) also requires member states to recognise four exceptions to the scope of exclusive copyright protection: first, acts by a lawful acquirer which are necessitated by use of the program for its intended purposes; secondly, to allow the making of backup copies by lawful users; third to permit the studying and testing of a program; and fourth, the decompilation of programs. These exceptions are viewed as being so significant that the Directive does not permit the parties to contract out of any of them. Cf. CDPA 1988, s.296A(1)(c). The Directive introduces a decompilation right to assist interoperability of software programs where the program maker neither publishes information about access codes or licenses it. (See Articles 5 and 6 91/250/EEC.)
21. See, for example, *Whelan v Jaslow* [1987] F.S.R. 1 (C.A. 3rd Cir.); (dental lab program) *Computer Associates v Altai* [1992] 982 f. 2d 693 (C.A. 2d Cir.) (computer job scheduling) . However 'business processes' can be patented under US law.
22. See Article 2 Berne Convention incorporated in the TRIPS Treaty by Article 9.
23. See, for example, Article 9 of the Berne Convention; Articles 2bis, Article 10 (educational utilization) and Article 10bis (press, broadcasting and wire services to the public) Chapter III ss 29–30 of the Copyright, Designs and Patents Act 1988 (CDPA).
24. See, for example, R. Kariyawasam, 'Technology Transfer to Developing Countries' in S. Anderman (ed.), *The Interface between Intellectual Property Rights and Competition Law: A Comparative Survey* (Cambridge University Press, forthcoming).
25. If the FDI takes the form of a joint venture then there is greater possibility for technology transfer and a wider reach for competition laws to monitor the contents of the agreement. Otherwise the domestic competition law framework in the target state can only catch internal corporate agreements under the abuse of dominant position rules. It cannot regulate the contents of 'internal' licensing agreements as restrictions of competition.
26. Historically, the excesses of IP licensing in the USA were regulated by a judicial doctrine of 'patent misuse' to limit the extent of the patentee's freedom of action over licensees. (See for example *Motion Picture Patents Company v. Universal Film Company Manufacturing Company* 243 U.S. 502 (1917).) More latterly the courts have developed a doctrine of copyright misuse. (See for example *DSC, Inc v DGI, Inc.*, 81 F.3rd 597 (5th Cir. 1999); *Lasercomb America Inc. v Reynolds*, 911 F.2d 970(4th Cir. 1990).) These doctrines were applied by the courts themselves without the explicit authority of a competition law. Presumably, even without a separate competition law, it is open to the judiciaries of developing countries to avail themselves of similar doctrines but it is difficult to see how the courts of an LDC will take on the task of creating such a doctrine.

27. Reg. No. 772/2004.
28. See, for example, *Transparent-Wrap Machine Corp v Stokes & Smith Co.*, 329 U.S. 637, 645–48 (1947).
29. See US Antitrust Guidelines for the Licensing of Intellectual Property, section 5.6. Such effects include (1) promoting dissemination of the licensee's improvements, (2) increasing the licensor's incentives to disseminate the licensed technology and (3) otherwise increasing competition and output in the relevant technology.
30. Commission Regulation 240/96, Article 3(6).
31. Commission Regulation 240/96 Art 2(1)(4).
32. Ibid.
33. See S. Anderman, op. cit. in note 13 pp.109–18.
34. J. Drexl, International Competition Law – A Missing Link between TRIPS and Transfer of Technology
35. Ibid. p. 8.
36. See WTO Working Group Report of 1998 Communication of 21 September 2000 from European Community and its Member States.
37. UNCTAD *World Investment Report* 2004, p. 221.
38. Ibid.
39. Article 1106(1)(f) NAFTA. See also WT/WGTI/W/136, para 28.
40. 'See e.g. Art. G-06 of the Free Trade Agreement between Canada and Chile (1996); Art.15-05 of the Free Trade Agreement between Bolivia and Mexico (1994); Art. 9-07 of the Free Trade Agreement between Chile and Mexico (1998); and Art. 14-07 of the Free Trade Agreement between Mexico, El Salvador, Guatemala and Honduras (2000). These free-trade agreements also include a prohibition of requirements imposed on investments to act as exclusive suppliers of goods or services to a specific region or to the world market' (cited from WT/WGTI/W/136 at footnote 85).
41. WT/WGTI/W/136, para 34, which cites Art. VI(f) of the bilateral investment treaty between the US and Bolivia (1998) as an example.
42. UNCTAD, *Transfer of Technology*, UNCTAD/ITE/IIT/28, 2001, p. 96.
43. There may be scope however to include performance requirements in the IIA, if the investor is to receive an 'advantage' under the agreement, provided that the contracting state providing the technology has not prohibited performance requirements in any other IIA. Id, p. 97. See also the *OECD's Guidelines for Multinational Enterprises* that look to set requirements on MNCs to cooperate in the technology and science policy of the host country and prevent abusive practices (Sections VIII and IX respectively) at: http://www.oecd.org/dataoecd/56/36/1922428.pdf, date accessed October 2004.
44. UNCTAD *World Investment Report* 2004, p. 235.
45. A. Hilaire and Y. Yang, 'The United States and the New Regionalism/Bilateralism', IMF Working Paper WP/03/206, October 2003, p. 5.
46. See also US–Bahrain (2001),
47. See Oxfam Briefing Report, 'Undermining Access to Medicines', Oxfam International, June 2004.
48. However, the issue of trade facilitation still remains on the Doha agenda.
49. Article 31(a) TRIPS.
50. Article 31(b).
51. Article 31(f).
52. Decision of the General Council August 2003, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health* (WT/L/540).
53. Section B.2e, Article 6 FTAA.
54. See Article 16.7(2) US–Singapore FTA.
55. Clearly one way of dealing with the problem of patent rights attaching to imported medicines is for LDCs to take advantage of the extended deadlines for LDCs agreed at Doha which allows LDCs to exclude pharmaceutical products from patenting under TRIPS until at least 2016 in order to gain access to cheaper generic versions of new medicines.
56. WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

57. Drahos cites this example by referring to Article II.3(b) of the US–Nicaraguan Bilateral Investment Agreement.
58. Expropriation clauses generally protect against loss of the insured investment as a result of acts by the host government that may reduce or eliminate ownership of, control over, or rights to the insured investment. In addition to outright nationalisation and confiscation, 'creeping' expropriation – a series of acts that, over time, have an expropriatory effect – is also generally covered under an 'expropriation clause'. See the World Bank Group's Multilateral Investment Guarantee Agency at: http://www.miga.org/screens/pubs/guides/invest.htm, date accessed, February 2005.
59. C. Fink and P. Reichenmiller, 'Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements', Trade Note 20, World Bank, February 2005, p. 7.
60. Ibid.
61. P. Drahos, 'Bilateralism in Intellectual Property', Oxfam Report: 'Cut the Costs of Medicines Campaign', 2001, p. 13, at http://www.oxfam.org.uk/what_we_do/issues/trade/bilateralism_ip.htm.
62. *Undermining Access to medicines: Comparison of five US FTAs*, Oxfam briefing report, Oxfam International, June 2004, pp. 2–3.
63. Section 301 allows the USTR to respond to any act, policy or practice of a foreign country that is determined to be: (1) inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement; or (2) unjustifiable, unreasonable, or discriminatory and burdens or restricts US commerce. In the context of the US and a specific foreign country, national treatment focuses on whether US firms operating in that country are treated as favourably as firms of the foreign country are treated in the US, and MFN refers to best treatment accorded to firms from any other country operating in a specific country. For a more complete analysis, see C. Coughlin, '*U.S. Trade-Remedy Laws: Do they Facilitate or Hinder Free Trade*', July/August 1991, at http://research.stionisfed.org/publications/review/91/07/Trade_Jnl_Aug1991.pdf.
64. P. Drahos, op. cit. in n. 61, p. 4.
65. Section 2102(4), Trade Act 2002 (fast-track authority), 19 USC 3801, 6 August 2002, HR3009.
66. Source: http://waysandmeans.house.gov/, last accessed February 2005.
67. For example by restricting parallel importation in trade partner countries. It is important to note that in certain agreements, such as the US–Morocco and US–Bahrain agreements, the USTR has clarified in *side-letters* to the agreements that if circumstances were to arise and that a drug was required by way of a compulsory license to protect public health, then certain restrictions in the FTAs (such as on data protection) would not apply; that is, that the FTAs would not interfere with the protection of public health. In the same side letters however, the USTR also makes clear that the side letters do not create any kind of exemption that would allow parties to the FTAs to ignore obligations in the agreements. See C. Fink and P. Reichenmiller, 'Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements', Trade Note 20, World Bank, February 2005, p. 3.
68. '*Foreign Aid in the National Interest: Promoting Freedom, Security, and Opportunity*', USAID website at http://www.usaid.gov/fani/, date accessed February 2005. Note that USAID states that this report is not a policy document, but will nevertheless aim to inform on how US foreign assistance can adapt to meet future challenges.
69. Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 1, 'Intellectual Property and Development', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter1htmf, accessed February 2005, p.11.
70. Ibid.
71. Ibid.
72. Ibid, p. 12.
73. Under the provisions of Article 71.2 TRIPS which states that: 'Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those

agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.'

74. GAR Resolution 2200A, adopted 16/12/1966, entering into force 03/01/1976.
75. Discussed by Kariyawasam in more detail in Chapter 8, this volume.
76. 'Finding a way forward in the Doha Development Round: key issues for LDC trade', LDC Ministerial Meeting Dakar, 4–5 May 2004, Oxfam International, p.1.
77. R. Acharya and M. Daly, 'Selected Issues Concerning the Multilateral Trading System', WTO discussion paper No. 7, 2004, p. 9.
78. Ibid, p. 10.
79. Ibid, p. 10.
80. Ibid, p. 11.
81. 'Review of the progress and obstacles in the promotion, implementation, operationalization, and enjoyment of the right to development', Economic and Social Council, E/CN.4/2004/WG.18/2, 17 February 2004, p. 13.
82. P. Drahos, op. cit. in note 61, p. 14.
83. UNCTAD, TDL/L. 30 June 2004.
84. A. Hilaire and Y. Yang, 'The United States and the New Regionalism/Bilateralism', IMF Working Paper WP/03/206, October 2003, p. 1. At page 21, they conclude that three important implications emerge from their simulation studies: (i) initial improvements in market access enjoyed by FTA participants could be gradually eroded because many of the FTAs are coming together over a short period with major global quota reductions in textiles and garments scheduled over the next couple of years; (ii) countries will have less incentive to join in multilateral liberalisation; and (iii) welfare benefits to FTA participants could be substantially reduced if sensitive sectors, such as agriculture, are excluded from bilateral negotiations and liberalisation. Furthermore, if there is insufficient complementarity in trade structure between FTA partners, such exclusions could result in welfare losses.
85. Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 8, The International Architecture, 2002 at http://www.iprcommission.org/papers/text/final_report/chapter8htmf, accessed February 2005, p. 8.
86. The Bolar exception arises from the US case of *Roche Products, Inc. v. Bolar Pharmaceutical Co (1984)*, and allows a generic producer of pharmaceutical products for example to legally import, produce or experiment on a patented product before the patent term has expired. The Bolar exception came to be incorporated into US law through 35 USC 271(e)(1), and was sanctioned at the multilateral level in a WTO DSB case between the EU and Canada '*Canada — Patent Protection for Pharmaceutical Products (EU against Canada)*' April 2000. The Bolar provision is now incorporated into the TRIPs (Article 30) with similar language. Developing countries can take advantage of this exception by including this clause in national IPR laws, allowing domestic producers to manufacture generic medicines before the patent term has expired.
87. Commission on Intellectual Property Rights (CIPR) report on Intellectual Property and Development, Chapter 8, 'The International Architecture', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter8htmf, accessed February 2005, p.6. The CIPR completed a survey of 70 developing countries and found that approximately a quarter of these specifically excluded plant and animals from patent protection, less than half provided for international exhaustion of patent rights and less than a fifth provided for a Bolar exception.
88. J. Jackson, *The World Trading System*, The MIT Press, London, 1997, p.158.
89. 'As of August 2004, 298 RTAs have been notified to the GATT/WTO of which 174 were notified since January 1995, 206 notified agreements are currently in force and 60 or more are estimated to be operational although not yet notified. By the end of 2007, if RTAs reportedly planned or already under negotiation are concluded, the total number of RTAs in force might well surpass 300.' R. Acharya and M. Daly, 'Selected Issues Concerning the Multilateral Trading System', WTO discussion paper No. 7, 2004, footnote 45.
90. Ibid, p.12.

91. A. Hilaire and Y. Yang, 'The United States and the New Regionalism/Bilateralism', IMF Working Paper WP/03/206, October 2003, p. 7.
92. Hilaire and Yang argue that US activity in the Western hemisphere is also having repercussions in the Pacific, and that the US approach could catalyse other regions to establish competing and possibly protectionist FTAs. For example Japan, China and Korea have all recently signed FTAs with trading partners in Asia or are in the process of negotiating FTAs.
93. P. Drahos, op. cit. in note 61, p. 16.
94. Commission on Intellectual Property Rights (CIPR): report on Intellectual Property and Development, Chapter 8, 'The International Architecture', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter8htmf, accessed February 2005, p.8. The CIPR refers to a study completed by Lall and Albaladejo 'Indicators of the relative importance of iprs in developing countries', UNCTAD/ICTSD, Geneva 2001 at: http://www.ictsd.org/unctad-icstd/docs/Lall2001.pdf, which sets out various measures of scientific and technical capability in developing countries.

8. Jekyll and Hyde and Equation 5: Enforcing the Right to Development through economic law

Rohan Kariyawasam[1]

We are writing a bill of rights for the world … one of the most important rights is the opportunity for development (Eleanor Roosevelt)

1. INTRODUCTION

The Declaration on the Right to Development (the 'Declaration'), which states that the right to development is a human right,[2] was adopted by the UN General Assembly, resolution 4/128 on the 4 December 1986. Despite being in force for just under 20 years, the Declaration, not being a legally binding instrument, has suffered from a lack of implementation and the political will required for international cooperation. The Declaration's evolution can be traced back to the transposition of *civil and political rights* (Articles 1 to 21 Universal Declaration of Human Rights)[3] and *economic, social, and cultural rights* (Articles 22 to 28 Universal Declaration of Human Rights) into two separate legally binding treaties (i) International Covenant on Civil and Political Rights (ICCPR);[4] and (ii) International Covenant on Economic, Social, and Cultural Rights (ICESCR).[5] As the Independent Expert on the Right to Development, Arjun Sengupta, argues, 'it took many years of international deliberations and negotiations for the world community to get back to the original conception of integrated and indivisible human rights. The Declaration on the Right to Development was the result.'[6] The Right to Development ('RTD') as a human right has been reaffirmed in the Vienna Declaration adopted at the Second UN World Conference on Human Rights in Vienna, 1993.[7]

The aim of this chapter is not to discuss the history and evolution of the RTD, nor to discuss the relative differing schools of thought as to whether a rights-based approach to development or the RTD is the best way forward for integrating human rights and development. In this chapter, the author is

concerned as to how the RTD could be effectively enforced through domestic and international economic law. In doing so, he puts forward an *Economic Right to Development Theory* (the 'Theory') which aims to show the ultimate relationship between the RTD as a composite of human rights on the one hand[8] and Foreign Direct Investment (FDI) on the other. The author argues that putting in place an effective regulatory domestic framework for FDI that will help realise the RTD by way of technology transfer *processes* will in turn facilitate the delivery of fundamental human rights, such as the right to education, health, access to food, and freedom of information that form part of the composite RTD in the target state, more likely than not, a developing country (DC) or Least Developed Country (LDC).

The author argues that generating the real technology *spillover*,[9] which will help to realise the RTD in the target state, will require balancing foreign investor intellectual property rights (IPR) protection with the use of competition law and potential WTO surveillance to check on misuse of MNC market power on the one hand, with incentivising the international business community to invest in technology transfer to the target state on the other.[10] In achieving the latter, the author puts forward a recommendation for introducing a *Right to Development Tax Relief* ('RTD Tax Relief') which will operate in investor states and be administered jointly through the investor state's department for international development and tax revenue departments, and which will apply to any nationally registered MNC under relevant Company Act legislation in the investor state.[11]

In proposing the Theory, the author hopes to link the *human-centred* RTD with target and investor state obligations under domestic economic law and investor state obligations under international economic law, giving for the first time a potential legal mechanism for the implementation of the RTD that will be founded both in equity and justice, and which will have justiciability. Besides demonstrating the link between the RTD and economic law by way of discussing the law, the author also demonstrates the link through simple economic theory, using a series of (symbolic) equations culminating in *Equation 5* discussed below. The value in Equation 5 is to indicate the economic variables that the RTD could depend on, and therefore, provide the basis for further research, both legal and econometric, that could test the link between RTD and FDI. In addition, more work is needed to understand the process of FDI and any technology spillover that may result in the target state (if any), in particular, to examine the processes of spillover that may have a direct bearing on the RTD where, for example, there is a large technology gap between domestic and FDI firms.[12]

2. DEVELOPING THE THEORY

In a recent report by the open-ended working group on the RTD of the Human Rights Commission (Economic and Social Council), the working group states that:

> The right to development has been defined as the particular process of development in which all human rights and fundamental freedoms can be fully realized. It is a process of step-by-step progressive realization of all the rights, the implementation of a development policy to realize these rights, and the relaxation of resource constraints on these rights through economic growth. The right to this process has to be viewed as a composite right wherein all the rights are realized together in an interdependent and integrated manner. The integrity of these rights implies that if any one of them is violated, the composite right to development is also violated.[13]

In a separate report by the working group in reviewing the progress and the obstacles in the implementation of the RTD, the working group states that:

> The Independent Expert has defined the RTD, following Article 1 and the preamble to the Declaration, as a right to a particular process of development in which 'all human rights and fundamental freedoms can be fully realized'. Development is regarded as a process of economic growth, with expanding output and employment, institutional transformation and technological progress of a country that steadily improves the well-being of the people.[14]

It is this concept of linking the RTD with a *process* of development and as a process of economic growth, which depends to some extent on technological progress, that this chapter is concerned with. In this chapter, the author argues that technological processes for the delivery of food (for example technology transfer for cooling systems in refrigeration trucks), access to health (electronic medical records, machinery for blood sampling and treatment), education (on-line educational resources, technology for educational materials in CD-ROM or machine readable format), freedom of expression (access to the Internet and communications infrastructure), can all be delivered by way of effective technology transfer, and that technology transfer depends to some extent on international and national frameworks for the regulation of IPRs and competition. The working group on the RTD has made explicit reference to technology transfer and the RTD. For example in its report reviewing the progress of the RTD, the working group states that:

> 19. Availability of resources – material and human – and access to technology have always been recognized as the forces that drive and sustain the development process. Indeed, access to appropriate technology has often been the more critical input in undertaking development. It has not only been a substitute for other inputs, but has also provided the quantum jumps in attaining outcomes perceived,

> at some point in time, as being unattainable. It has been the means by which the developing countries have tried to catch up with those that had a head start, and it has been the tool that the developed world has used in attaining and sustaining their well-being and living standards. The issue of access to and transfer of technology is, however, an issue between the developed and the developing world.[15]

2.1 The RTD and Collective Rights

We will come back to the issue of access to and transfer of technology slightly later in this chapter. In developing the Theory however, an important question to ask is whether the RTD can apply to a *collective* of people or whether it is specifically tied to an *individual* living person? The question is important to answer as if the RTD can only be recognised as an individual right, then it would be much more difficult to link (directly) enforcement of the RTD with the regulation of intellectual property or competition at the domestic level, than if the RTD can be linked directly to a collective of people. The reason for this is that the regulation of intellectual property and/or competition is *economic* law, and from the perspective of English law for example, economic law comprises the regulation of *State* interference with the affairs of commerce, industry and finance.[16] The eminent legal scholar and jurist, Clive Schmitthoff, once argued that

> English economic law shows two characteristics. First, it has evolved the central concept of public interest and, secondly, its fabric is very different from that of other branches of law … The new concept of public interest is used to indicate the wide – and growing – area in which Parliament has regulated certain activities of private persons in the social and economic sphere because it considers such regulation to be desirable for the common weal. The concept of public interest is thus a socio-political concept.[17]

In a similar vein, the noted international trade lawyer and legal jurist John H. Jackson once defined international economic law as embracing 'trade, investment, services when they are involved in transactions that cross national borders, and those subjects that involve the establishment on national territory of economic activity of persons or firms originating from outside that territory.'[18] We can see therefore that from such guidance, a link between economic law and 'people', as a collective, can be easily established, but not as easily linked perhaps to an individual, although more recent legislative frameworks for competition law are increasingly recognising the interests of individuals, such as the 'consumer' in policymaking, for example in the regulation of communications services.[19] The question therefore is to determine whether the RTD applies only to individuals or also gives rise to collective rights: if the latter, then it becomes easier to link the RTD with a system of economic law, and therefore the transfer of technology (and hence

IP and competition frameworks). The importance of making this link is to then realise the RTD through effective enforcement of domestic economic law in the target state, and also to look for economic solutions which can be equally enforced in investor states.

In reading the Declaration, Article 2(1) sets out the RTD as a *human-centred* right: 'The human person is central subject of development and should be the active participant and beneficiary of the right to development.'

However, at the same time, the Independent Expert also refers to the *collective* rights that arise as a consequence of the Declaration.[20] He argues that the right to development was promoted both by the Third World protagonists and First World critics as a 'collective right of states and of peoples for development'.[21] Article 1 Declaration recognises the collective rights of peoples by stating that 'all peoples are entitled to the human right to development.'

In discussing collective rights, the Independent Expert cites Georges Abi-Saab, who suggests a possible definition of collective rights as a sum-total of double aggregation of the rights and of the individuals. (If there are *n* different rights, r_i, $i = 1, \ldots n$, and if there are *m* different individuals $j = 1, \ldots m$, having these rights, the collective rights will be $R = \Sigma i \, \Sigma j r_{ij}$).[22] In effect, this equation links individual rights and the rights of the collective. The Independent Expert goes onto argue that

> In the case of a collective right, such as that to self determination, the right-holder may be a collective such as nation, but the beneficiary of the exercise of the right has to be an individual … Indeed, in many cases individual rights can be satisfied only in a collective context, and the right of a state or nation to develop is a necessary condition for the fulfilment of the rights and the realization of the development of individuals.[23]

In one of its reports, the open-ended working group on the RTD (the ESC Commission on Human Rights) has argued that 'the realization of the right to development is seen as the fulfilment of a set of claims by people, principally on their State but also on the society at large, including the international community, to a process that enables them to realize the rights and freedoms set forth in the International Bill of Human Rights.'[24]

The Independent Expert also argues that in understanding the concept of collective rights and its link to the process of development, three fundamental criteria need to be met in realising the RTD:

(a) effective participation of all individuals in the decision-making and the execution of the process of development, which would necessarily require transparency and accountability of all activities; and
(b) equality of access to resources; and
(c) equity in the sharing of benefits.[25]

In applying these criteria to the development of the Theory and the establishment of a RTD Tax Relief, it can be argued that: (a) will be satisfied in the target state if a fully transparent legislative procedure involving the executive, judiciary and the legislature of the target state is able to pass economic law (competition and IP laws) that will realise effective technology transfer in the target state; and (b) will be satisfied if technology transfer can lead to technology being used in a fair and equitable way for the benefit of all members of the community of the target state; and (c) will be satisfied if the benefits of the technological processes delivered through technology transfer actually lead to improved access to food, education, health and freedom of expression for all members of the community of the target state. As the Independent Expert argues, the three criteria (a)–(c) are 'the essential elements of the process of development which make the right to that process a human right and which are the foundation of a right to development – development with equity and justice.'[26]

2.2 The RTD and Economic Law

Having linked the RTD to collective rights, it now becomes necessary to examine more closely how the RTD can be linked with economic law. To begin this process, it would be first helpful to look at the *Vienna Declaration* 1993,[27] which established the consensus of the RTD as a human right. Paragraph 10 of the Vienna Declaration states that: 'Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable *economic relations* and a favourable *economic environment* at the international level.'[28] The Vienna Declaration clearly states that the RTD requires a favourable economic environment at the international level, which, using economic terminology, can be restated as 'the RTD is a *function* of an equitable economic environment at the international level'. An equitable economic environment at the international level can in turn be described as a function of the effective regulation of international economic law. The regulation of international economic law will depend on international treaties dealing with economic issues such as trade, competition, intellectual property rights, and technology transfer, primarily the WTO's TRIPS Agreement.

The TRIPS places a number of obligations on the international community for technology transfer, particularly as regards DCs and LDCs. For example, Article 66.2 TRIPS Agreement, which calls for developed country members to 'provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.' Furthermore, Paragraph 11.2 of the *Doha Decision on*

Implementation-Related Issues and Concerns (the 'Implementing Decision') reaffirms that the provisions of Article 66.2 are mandatory, and that the TRIPS Council 'puts in place a mechanism for ensuring the monitoring and full implementation of the obligations in question'.[29] On 19 February 2003, the TRIPS Council made a decision on implementing Article 66.2 in compliance with paragraph 11.2 Implementing Decision, requiring developed country members to submit annual reports on actions taken or planned in pursuance of their commitments under Article 66.2.[30]

With the failure of the discussions at Doha, there should perhaps be further movement here. For example, in a Decision (*General Cancun Decision*) adopted by the WTO's General Council in August 2004, the Council has instructed the Committee on Trade and Development to 'expeditiously complete the review of all the outstanding Agreement-specific proposals on special and differential treatment and report to the General Council, with clear recommendations for a decision, by July 2005.'[31] Provisions on special and differential treatment affect DCs and LDCs in that they grant such countries certain preferences at the WTO. We will, however, have to wait and see to determine whether the review will have any meaningful outcome for DCs and LDCs.[32]

In an ideal world, an effective IPR regime should not block innovation or effective competition in the target state. Article 7 TRIPS Agreement sets out the objective that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology. Furthermore, the TRIPS Agreement also contains a number of provisions that deal with anti-competitive conduct, including Articles 8 and 40. Article 8.2 allows for members to adopt 'appropriate measures' to prevent the abuse of intellectual property rights by right-holders or the resort to practices which 'unreasonably restrain trade or adversely affect the international transfer of technology'. For example, in the WTO *Working Group on the Interaction of Trade and Competition Policy*, the view was expressed that 'one of the effects of international cartels could be to restrict the transfer of technology, particularly to developing countries.'[33] Again under Article 40.2 TRIPS, members may adopt appropriate measures to prevent or control anti-competitive practices, which may include for example 'exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing.' Finally, in terms of gaining access to technology, LDCs and DCs could make use of the *compulsory licensing* provisions of the TRIPS Agreement. Article 31 TRIPS sets out the *conditions* for compulsory licensing.[34] Correa (2000), argues that 'the conditions that govern the granting of compulsory licenses will determine the extent of the system's effectiveness in promoting local innovation and the transfer of technology', and that 'the existence of a statutory provision itself may persuade

rights-holders of the need to act reasonably in cases of requests for voluntary licenses, while strengthening the bargaining position of potential licensees.'[35] However, in order to implement such measures, LDCs and DCs are left with the task of putting in place effective IPR legislation, which requires both trained personnel and resources.[36] A more detailed discussion of the TRIPS, intellectual property and competition law and the implications for developing countries are outside the scope of this chapter, but are discussed more fully in Chapter 7 of this volume. For now, we can see briefly that investor states have a clear obligation in international law to provide effective technology transfer, and that technology transfer in turn is dependent on effective competition and IP laws, both at the international and domestic (target state) levels. In the area of human rights, we can also find obligations on the international community in finding solutions to international economic problems, so for example under Articles 1, 55[37] and 56 of the United Nations Charter which specifically make reference to international cooperation in solving international problems of an economic nature. Both the TRIPS and the UN Charter are legally binding treaties, the TRIPS in particular, given the availability of sanctions under the WTO's Annex on Dispute Settlement.[38] Furthermore, the Declaration itself contains specific provisions on cooperation at the international level to promote an equitable economic environment. Article 3(3) Declaration states that:

> 3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

As mentioned earlier, however, the Declaration is not a legally binding instrument, although the Independent Expert has argued that the RTD could in time become customary law, and that in addition, the RTD deals with rights recognised in international conventions, that are legally binding.[39]

Finally, there are two other international instruments that, although they may not be legally binding, nevertheless have relevance, particularly in influencing the role of MNCs in helping to enforce (indirectly) the RTD. The first instrument is the UN *Global Compact*,[40] which seeks to regulate the business practices of transnational corporations as well as to promote principles that could be incorporated into company policy in human rights, labour, the environment and anti-corruption. The Global Compact is not a regulatory instrument, but instead relies on public accountability, transparency, labour and civil society. The second instrument is the UN Norms on Corporate Responsibility developed by the working group of the UN Sub-commission

on the promotion and protection of human rights, and adopted by the sub-commission in August 2003.[41] The Norms recognise that although States are primarily responsible for protecting human rights, MNCs are also responsible for promoting the principles as set out in the Universal Declaration on Human Rights, and several other treaties dealing with civil and political, economic cultural and social rights.[42] The Norms are not legally binding, but many of the substantive provisions on human rights contained in the Norms do make use of existing provisions in international law, the Norms now applying these provisions to private enterprises.[43]

2.3 Obligations at the domestic (target state) level

As obligations in economic law can be imposed on States at the international level to comply with certain treaties, such as the TRIPS, so too can similar obligations be imposed at the domestic level, and specifically the target state. For example, the TRIPS sets out specific requirements for domestic legislation in the protection of IPRs and such obligations when coupled with IPR provisions in certain bilateral or Free Trade Agreements (FTAs) can create TRIPS-plus provisions that will also apply at the domestic level.[44] As a consequence of signing such agreements, the target state, usually a DC or LDC, will then find its hands tied in terms of having effective control over its own domestic regulatory agenda on, say, foreign investment, competition, IPRS and labour standards. As such, the target state will need to balance any local measures introduced to generate increased spillover through technology transfer (for example through the imposition of performance requirements),[45] IPR legislation, and competition law to check possible MNC IPR exploitation with its obligations under bilateral/investment/FTA agreements. Generating spillover in the local target market is crucial for DC and LDC innovation and growth. The actual diffusion of technology into the local market (spillover) is as important as the technology transfer itself.

There is also the related issue of *absorption*. It is one thing to create policy incentives to encourage MNCs in generating spillover, but quite another for developing country producers to use bare, documented technological information, which is dependent on the absorption capacity of the producers. DCs and LDCs with limited absorption ability are much more likely to place greater reliance on unpatented know-how to assure effective transfer. Welch, in citing studies by F. Contractor, indicates that: 'less developed countries place greater emphasis on organisational and production management assistance in licensing arrangements than do advanced countries'.[46] Some commentators argue that spillover effects are far more important for diffusion than the formal transfer of the technology itself.[47] Spillover has been defined in various ways by economists and lawyers alike,[48] but in the context of the WTO, generally spillovers

occur 'when the entry or presence of MNC affiliates leads to productivity or efficiency benefits for the host country's local firms, and the MNCs are able to internalise the full value of these benefits'.[49]

As mentioned earlier, development is regarded as 'a process of economic growth, with expanding output and employment, institutional transformation and technological progress of a country that steadily improves the well-being of the people.'[50] It is this concept of linking the RTD with a *process* of development and as a process of economic growth, which depends to an increasing extent on technological processes that will help deliver access to adequate food, health, education, cultural life and scientific progress. The ICESCR (International Covenant on Economic, Social and Cultural Rights), a legally binding international treaty, sets out specific rights in this regard with a right to an adequate standard of living including adequate food,[51] the right to the enjoyment of the highest attainable standard of physical and mental health,[52] the right to education,[53] and the right to take part in cultural life and to enjoy the benefits of scientific progress,[54] all of which can be delivered through technological processes. The author does not argue that access to effective technology is the only way to achieve such rights, but it is becoming an increasingly significant way given the costs involved. For example, and as mentioned earlier in this chapter and cited again here, the Human Rights Commission working group on the RTD has specifically stated that:

> Availability of resources – material and human – and access to technology have always been recognized as the forces that drive and sustain the development process. Indeed, access to appropriate technology has often been the more critical input in undertaking development. It has not only been a substitute for other inputs, but has also provided the quantum jumps in attaining outcomes perceived, at some point in time, as being unattainable.[55]

To what extent then is the target state under an obligation to implement the economic and social rights mentioned above, and can any legal relationship be found with economic and technological solutions? This question is addressed in the next section.

2.3.1 The legal obligation

Article 2(1) ICESCR sets out the legal obligation:

> 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 achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Commentators have questioned whether Article 2(1) gives rise to obligations that are *immediately* justiciable, and although there has been controversy on the subject, it does appear that the Article does give rise to obligations on states with immediate legal effect.[56] And so under Principle 21 of the Limburg Principles (which provide guidelines on the implementation of the ICESCR Covenant):

> The obligation 'to achieve progressively the full realisation of the rights' requires State parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary all State parties have the obligation to begin immediately to take steps to fulfil their obligations under the [ICESCR][57] Covenant.[58]

Similarly Principle 17 of the Limburg Principles states that:

> At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant.

Note however that although the obligations under Article 2(1) have immediate effect, both the Article and the Limburg Principles also specify that the state can 'take steps' in realising the rights set out in the ICESCR. Notwithstanding this however, clear obligations arise. Furthermore Article 8(1) Declaration also sets out obligations on the state:

> States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

We can see here as well the reference to an *economic* solution for implementation of measures at the national level to realise the RTD. The author suggests that one possible interpretation of an 'economic solution' would be to put in place an effective domestic legislative framework in DCs and LDCs for intellectual property and competition law that would facilitate technology transfer and specifically the technological processes required to help deliver adequate access to food, health, education, the right to enjoy a cultural life, share in scientific progress, and provide the means of freedom of expression, all of which form part of the composite RTD.

However, there are considerable hurdles to jump. As the Commission on Intellectual Property states:

> Since many technologies of interest to developing countries are produced by organisations from developed countries, the acquisition of technology requires the ability to negotiate effectively based on an understanding of the particular area of technology. This process requires a determined approach on the part of the recipient of technology to acquire the necessary human capital and the appropriate institutions.[59]

Clearly there are considerable costs in doing this and we should bear in mind that low-income countries, with over 40 per cent of the world's population, account for less than 3 per cent of world trade, with developed countries exporting around $6000 per capita and developing countries around $330 per capita, with the lowest income countries exporting less than $100.[60] In helping to tackle this problem, the Independent Expert has proposed an idea for an *RTD-Development Compact*, which would form the basis of financial aid from the international community, but would also recognise the reciprocal obligations of both developed and developing countries. The RTD-Development Compact is discussed in more detail in section 2.6 below.

Obligations at the domestic level, however, should not just apply to DCs and LDCs in attempting to attract technology transfer. The author also argues that generating real technology *spillover* will require incentivising the international business community to invest in technology transfer to the target state. How this can be achieved is discussed in the next section.

2.3.2 Right to development tax relief

To incentivise the international business (MNC) community, the author puts forward a suggestion for introducing a *Right to Development Tax Relief* ('RTD Tax Relief') that will operate in investor states and be administered jointly through the investor state's international development department and/or tax revenue department, and that will apply to any nationally registered MNC under relevant Company Act legislation in the investor state. The author argues that to qualify for the RTD Tax Relief, the MNC will need to satisfy a minimum set of *Technology Transfer Criteria* (the 'Criteria'), which the author suggests could be established by the WTO's Working Group on Technology Transfer (WGTT), such Criteria to be annexed to the investor state's implementing legislation for the RTD Tax Relief. Under this proposed scheme, MNCs will notify their technology transfer agreements to the relevant investor state's development department and/or tax revenue department.[61] The author also suggests a *sliding scale* of tax relief: greater relief provided for MNCs licensing into LDCs with less relief available for licensing into DCs.[62] The appropriate scale for tax relief, the author suggests, could be set by the WGTT following a separate set of *Indicators*.[63]

2.4 Linking the RTD with Economic Growth (GDP) and FDI

Earlier, the explicit link between technology transfer and the RTD was made by reviewing the obligations on states at both an international and domestic level, and looking at possible *technological processes* of development. In this section, the relationship between technology transfer and FDI is made, which would then provide the foundation for linking FDI with the RTD. Linking FDI with the RTD is significant as both, to some extent, are also linked with economic growth as defined by Gross Domestic Product (GDP). The presumption is that by increasing FDI into a country, that would have a corresponding effect on GDP, which in turn would impact the RTD. We can start then by asking the question: What is the relationship between FDI and technology transfer?

Business partnerships are a major source of technology transfer including, FDI, Build Operate Transfer (BOT) agreements, subcontracting, licensing and franchising. There has been much discussion of FDI in recent years. For example, UNCTAD's *World Investment Report* (2004) focuses on the shift to services in world trade and the role that FDI will play in that shift. According to the 2004 report, although global inflows of FDI declined in 2003 for the third year in a row, the prospects for FDI look to improve, particularly in Asia, and to developing countries, which experienced a growth of 9 per cent in 2003 rising to $172 billion overall.[64] In terms of law, there were 244 changes in laws and regulations affecting FDI in 2003, 220 of which further liberalisation.[65]

FDI can be defined as the act of establishing or acquiring a foreign subsidiary (foreign affiliate) over which the investing firm (parent) has substantial management control.[66] This is a narrow definition for FDI. In a report for the Asian Development Bank surveying the technology spillovers from FDI,[67] Fan, an ADB economist suggests a broader approach:

> FDI can potentially benefit domestic firms. The benefits arise from foreign firms demonstrating new technologies, providing technological assistance to their local suppliers and customers, and training workers who may subsequently move to local firms. Local firms can also learn by watching. Moreover, the very presence of foreign-owned firms in an economy increases competition in the domestic market. The competitive pressure may spur local firms to operate more efficiently and introduce new technologies earlier than would otherwise have been the case. Because foreign firms are not able to extract the full value of these gains, this effect is commonly referred to as the spillover effect.[68]

There are of course many negative effects of FDI including for example the crowding out of local businesses as a result of foreign entry. Dine also discusses a number of negative consequences including citing a study by

Borenszstein, De Gregorio and Lee showing that FDI only benefits countries that have average male schooling above one year of secondary education. Below that, FDI has a negative effect.[69] Furthermore, that in many low-income countries, FDI is not sought for technology transfer but for the employment of low-skilled workers (mostly in low-technology manufacturing activities) and for foreign exchange.[70] In some cases, the need to attract FDI may result in the lowering of regulations relating to health and employment in the target state, particularly in dedicated 'Export Zones', where in the manufacturing sector materials may be imported by FDI firms, assembled and then exported with little or no use being made of local inputs other than labour. As Dine argues, 'If this is coupled with the tax concessions given to the companies to locate their plants in the country it can be seen that the development benefits from this strategy are negligible.'[71]

Firms that engage in FDI and operate in more than one country can be classed as MNCs. MNCs can transfer technology in a number of ways as described above, but two main ways are either through FDI through a foreign subsidiary or through external licensing with a third party in the target state. MNC can achieve tighter control over the technology transfer process by using FDI, particularly when the target state's legislative framework for the protection of IPRs is weak. Although UNCTAD's 2004 report paints a favourable picture as regards FDI in-flow into developing countries, only a select group of DCs are actually receiving this investment: the majority lose out. In the last ten years, although global FDI figures have increased by almost a factor of five, only 0.5 per cent of global FDI flows have been invested in 49 LDCs.[72] Furthermore, it is anticipated that the decentralization of R&D activity by MNCs will likely continue to be focused on a small number of DCs. For example in 2003, the top ten recipients for FDI in Asia were headed by China, Hong Kong (China), Singapore, India and the Republic of Korea, in that order.[73] However, as mentioned above, it is not entirely clear to what extent FDI also contributes to actual technology spillover and absorption into local target markets. Fan suggests a more cautionary approach:

> Until now, policy frameworks in most developing countries have tended to focus predominantly on attracting FDI, particularly in high-technology areas. Policy initiatives have largely bypassed measures to specifically enhance the spillover benefits from FDI. There are now a large number of empirical studies that suggest it is difficult for domestic firms to extract the potential benefits of spillovers when a large technology gap exists between domestic and FDI firms. FDI policy should thus be placed in a broader economic policy context in order for the host economies to maximize the benefit they derive from FDI inflow. Government policy can play a role by investing in growth theory. More rigorous theoretical work is needed to explore the relationship between FDI and spillovers, FDI and domestic firms, and the role of FDI in promoting growth.[74]

Fan makes a reference to growth theory. The relationship between FDI and GDP described above illustrates a certain kind of thinking in economics known as 'New Growth Theory' (NGT), which takes as its central focus the growth of technological knowledge and its diffusion and absorption. NGT views innovation and imitation efforts that respond to economic incentives as major engines of growth (Fan 2002). Generally, growth theory falls into three broad categories: (1) *post-Keynesian* growth models which emphasise the role of savings and investment in promoting growth; (2) *neo-classical* models which emphasise technical progress; and (3) *new growth* models which emphasise the role of R&D, human capital accumulation and externalities.[75] Under the NGT model, the social rate of return to investment must exceed the private rate of return (Balasubramanyam et al. 1996). In addition, under NGT, knowledge spillover contributes to growth in the aggregate. In his paper linking FDI with growth, Balasubramanyam argues that FDI has long been recognised as a major source of technology and know-how to developing countries, but that technical progress accounts for a low proportion of the growth experienced by most developing countries because of the lack of human capital.[76] He also argues that although NGT provides 'powerful support for the thesis that FDI could be a potent factor in promoting growth', the absence of a favourable economic climate could result in FDI becoming counter-productive, in that FDI can actually 'thwart rather than promote growth' and may 'enhance the private rate of return to investment by foreign firms while exerting little impact on social rates of return in the recipient economy.'[77]

Clearly the jury is still out on FDI and its significance to local spillover. Notwithstanding Fan's and Balasubramanyam's cautionary comments on FDI, it is perhaps at this stage that we should ask: what exactly is the economic relationship between the RTD and GDP, and between GDP and FDI? And therefore is it possible to establish a relationship between FDI and the RTD? If the latter is possible, then could we find a way of achieving/enforcing the RTD through FDI, and as a component of FDI, technology transfer?

2.5 The Link between FDI, GDP and the RTD

The Independent Expert has suggested a symbolic (economic) approach that links the RTD with GDP.[78] As background he explains that the realisation of many of the interdependent human rights depends on the sufficient availability of goods and services, and that such availability is constrained by a country's resources, represented to some extent by GDP. Furthermore he argues that

> access to the relevant goods and services would depend on public policies, including public expenditure which cannot expand indefinitely without an increase in

> public revenue; this in turn, would be related to the country's GDP. A process of development in which all rights are realised together would, therefore, include growth of GDP as an element that would relax the country's resource constraints.[79]

How then can we link the now well understood and documented ways of *growing* GDP by way of investment (both domestic and foreign) with the RTD?

Marks, in reviewing the Independent Expert's *symbolic* theory linking the RTD with GDP,[80] where the Independent Expert describes the RTD as a *vector*, shows it symbolically as:

$$R_D = (g, R_1, R_2, \ldots R_n) \tag{1}$$

Where R_D is the right to development, which consists in an undefined relationship between growth in domestic product (g) and the realisation of n number of human rights.

In their paper analysing the relationship between trade strategy, FDI and growth in developing countries in the context of New Growth Theory,[81] economists Balasubramanyam, Salisu and Sapsford[82] tested a hypothesis put forward by the economist Jagdish Bhagwati that the volume and efficacy of incoming FDI will vary according to whether a country is following the export-promoting (EP) or the import-substituting strategy (IS).[83] Balasubramanyam et al. tested Bhagwati's hypothesis, using the formula:

$$Y = g(L, K, F, X, t), \tag{2}$$

where: Y = gross domestic product (GDP),
L = Labour input,
K = domestic capital stock,
F = stock of foreign capital,
X = exports,
t = a time trend, capturing the technical progress. The term g expresses that Y (GDP) is a function (more precisely, a production function) of the variables on the right-hand side of the equation.

They then difference equation (2) above (measure the rate of change of the variables with respect to time t) giving:[84]

$$y = \alpha + \beta l + \gamma k + \psi f + \theta x, \tag{3}$$[85]

Where the lower case letters denote the *rate of growth* (in terms of time t) of the individual variables set out in equation (2) (so for example l shows the

growth rate of labour input and *x* is the growth rate of exports). The parameters β, γ, δ, ϕ are output elasticities of labour, domestic capital, foreign capital and exports respectively, and *y* is the rate of growth of GDP with time *t*. They argue that because of the well-known difficulties of accurately measuring capital stock (domestic and foreign capital), they approximate instead the rate of growth of the capital stock by the share of the respective domestic and foreign capital stock in GDP. Balasubramanyam et al. do this by replacing the rates of change in domestic and foreign capital inputs by the share of domestic investment and foreign direct investment in GDP (so $k = I/Y$ and $f =$ FDI/Y), where *I* is domestic investment, FDI is foreign direct investment and *Y* is GDP. This then yields the following equation:

$$y = \alpha + \beta l + \gamma(I/Y) + \delta(\text{FDI}/Y) + \varphi x, \tag{4}$$

Balasubramanyam et al. therefore arrive at equation (4) linking the rate of change of growth (GDP) and FDI. The author now makes use of equation (4) by substituting the term for *y* in equation (4) for *g*[86] in equation (1) (which links the RTD with the rate of growth of GDP), giving:

$$R_D = ([\alpha + \beta l + \gamma(I/Y) + \delta(\text{FDI}/Y) + \varphi x], R_1, R_2, \ldots R_n) \tag{5}$$

Equation (5) now shows in a purely *symbolic* way the potential relationship between the RTD expressed by the symbol R_D with foreign direct investment (FDI).[87] It also shows the potential relationship between the RTD on the one hand, and domestic investment, domestic labour productivity, and the growth rate of exports on the other.[88]

The significance of the symbolic equation (5) is in linking the RTD with economic factors promoting growth (GDP), such as FDI, labour and the growth in exports. All of these factors can be measured and enforced through domestic economic law in the target state. However, as mentioned above, examining FDI, specifically technology transfer *processes* and their relationship to spillover in the target market requires further analysis. Assuming that such research, for example in large magnets for FDI like China and India will be forthcoming, the question then remains as to how DCs and LDCs can be assisted in achieving equation (5), in growing GDP, and how the developed countries can help. This in part, can be through the RTD-Development Compact, proposed by the Independent Expert, and discussed in the next section.

2.6 The RTD-Development Compact

The RTD-Development Compact (RTD-DC) is a mechanism for implementing the RTD. It is the mechanism, as put forward by the Independent Expert,

by which DCs and LDCs enter into a 'development compact' with the international community to seek assistance and cooperation in meeting its development goals. As the Commission on Human Rights working group on the RTD made clear in 2004,[89]

> the logic of a development compact rests on the acceptance by and a legal commitment of the international community to pursue, individually and collectively, the universal realization of all human rights and, on their part, for the developing countries to follow explicitly a development strategy geared towards the universal realization of human rights.[90]

The RTD-DC is based on a framework of *mutual commitment* or *reciprocal obligations* between the target state and the (investing) international community to 'recognise, promote and protect the universal realisation of all human rights.'[91]

As the HR Working Group on the RTD makes clear, three essential elements are required to bring an RTD-DC to life: (1) a programme of development on which target state civil society, donor institutions, and other countries are consulted, and which specifies policies and sequential measures to be adopted in order to realise the RTD; (2) a policy specifying the responsibilities of donors and multilateral agencies, detailing their Official Development Assistance (ODA) budget; and (3) an effective monitoring system. The Independent Expert argues that to finance the RTD-DC, the international community will need to honour existing ODA commitments of 0.7 per cent of their GNP to go into a 'callable fund',[92] which would be serviced by a support group, and which would review DC and LDC proposals for funding.[93]

What are the reciprocal obligations that could form the basis for any RTD-DC? The author argues that as regards the developed countries, the obligations could be in putting in place an RTD Tax Relief as discussed above, honouring current commitments on ODA, and in the long term, honouring existing commitments under WTO law, such as Article 66.2 TRIPS on technology transfer and technical assistance, and already agreed provisions on Special & Differential Treatment for DCs and LDCs.[94]

As regards the DCs and LDCs, obligations would be in developing national development policies that have the RTD as their very foundation; putting in place effective IPR regimes to facilitate technology transfer and FDI, and competition frameworks to check any imbalance of IPRs;[95] and conducting more research at a national level, with the help of the international community, to examine the relationship between FDI, technology transfer, local spillover, and its implications for development.

3. CONCLUSION

There is little doubt that competition for the world's resources is constantly increasing with the growth in the world's population. Furthermore the implications for the world of global warming and global dimming are also becoming well understood with available land mass for the poorest people potentially shrinking, and the consequent implications for mass migration. Effective development policy as applied to DC/LDCs will need to become a priority for the developed world, but simple aid is not going to work; business processes are required. We need to find a way to enforce the RTD both at the domestic (target state) level and at the international (investor state) level. As argued in this chapter, the use of technology is just one solution to help DCs and LDCs achieve the RTD. This is particularly the case given that the policy options for DCs and LDCs to control their microeconomic policies are becoming increasingly limited, partly as a result of signing FTAs and bilateral agreements with developed countries,[96] but also as a consequence of WTO covered agreements. For example, in the past, many developed countries have used, during their various phases of development, a combination of tariffs, quotas and sector-specific subsidies, to develop their domestic industries. Some developing countries that are now newly industrialised nations 'protected the home markets to raise profits, implemented generous subsidies, encouraged their firms to reverse engineer foreign patented products, and improved performance requirements such as export–import balance requirements and domestic content requirements on foreign investors (when foreign companies were allowed in).'[97] All of these strategies are now severely restricted under current WTO agreements.

In showing the relationship between economic variables and the RTD in equation (5), the author is suggesting that for DCs and LDCs to truly cause their GDP to *grow*, and hence provide a strong foundation for the RTD to take off, these countries will need to put in place effective IPR and competition regimes that will facilitate FDI. Certainly there is a fear of introducing competition frameworks as many DC and LDC governments fear their national monopolies coming under attack. For this reason alone, the author also argues that any new competition framework that is introduced at the national level should not only include adequate safeguards against excessive use of IPRs by MNCs, but also include a level of protection/exemption of state monopolies under the law, where for example, certain target state monopolies have duties given to them by the national government to provide *services of a general economic interest*.[98] The author also argues that by implementing effective IPR and competition regimes we can also help to *enforce* the RTD,[99] by making effective use of FDI and technology transfer. However, the author also advises caution in that DCs and LDCs will also need to measure the

costs of implementing more rigorous IPR regimes as it is by no means certain that increased IPR protection yields greater benefits in terms of FDI. In a recent study by Fink and Marcus (2004), the authors review a number of studies undertaken to gauge the link between the strength of IPR protection and the attraction of FDI inflows. They conclude that countries that strengthen their IPR regimes do not necessarily benefit from increased FDI.[100] As discussed above,[101] target state commitments under bilateral trade/investment agreements and FTAs will also need to be considered. DCs and LDCs often grant increased IPR protection by way of such agreements to gain increased market access opportunities through preferential tariffs in specific markets, such as agricultural and manufactured goods for example in the United States or in the EU. However as a recent trade note from the World Bank makes clear, such preferential tariffs are *time-bound* in that they will be eroded once the US reduces remaining tariffs and quotas on a non-discriminatory basis in current Doha or future trade rounds.[102] In contrast, DC/LDC IPR commitments made in FTAs or bilateral agreements will *remain* in place, unless renegotiated by the parties concerned, which to some extent will depend on the bargaining positions of the parties concerned, which, given the current position of LDCs/DCs as evidenced by recent Doha round negotiations, does not prove very promising.

LDCs and DCs will need to invest in research with appropriate international technical assistance in measuring the effect of FDI on GDP in terms of local productivity, spillover, and growth in exports, the economic variables, which as set out by the author in Equation (5), constitute the RTD. Perhaps what is required is not necessarily increased FDI, but *targeted* FDI in compliance with a country-level technology transfer measure, that has as its primary function, the aim of generating increased spillover in the target market.

To this end, the international community, G90, and the multilateral institutions, such as the WTO's Working Group on Technology Transfer (WGTT), need to consult on appropriate technology transfer *Criteria* and *Indicators* as discussed above to achieve a workable RTD Tax Relief that could operate at the national level within developed countries. The rationale for the WGTT becoming involved in setting policy that helps to achieve the RTD (effectively mixing trade with human rights) will depend to some extent on whether we have a *functional* or *civic* view of the WTO's power to act in this area, and specifically in determining the objectives of the WGTT. The interface between trade and human rights is a very wide area and a full discussion is outside the scope of this chapter, however Leader (2004) captures the tension well. He looks to the interpretation of the WTO treaties and talks of either a *functional* approach or a *civic* approach to the use of the WTO's power. Leader describes the functionalist approach as one that relies on the special, and not the general objectives, of the institution (WTO) concerned as fixing

that institution's appropriate responsibilities. Thus according to the functionalist view, he argues that

> if it could be shown that opening markets to certain goods and services damages the prospects of certain local populations, the functionalist claims that this is not enough to attach the responsibility for those effects to the WTO. The proper concern of the organisation, from this perspective, is not to achieve comprehensive fairness, but only to achieve the limited sorts of fairness that its commitment to non-discrimination among goods and service providers involves.[103]

By contrast, the civic view does not tie the WTO to its special objectives but anchors those objectives within wider concerns: 'consider the WTO rules that affect access to education or health, or affect the full range of labour rights. Based on the civic approach, if those effects are significant then the organisation [WTO] is responsible.'[104]

The author argues that if we were to take the civic approach to the WTO's power as described by Leader above, then the WGTT, as an organ of the WTO, has a wider responsibility to act in helping to achieve the RTD through FDI/technology transfer. In looking at other multilateral actors that have become involved in the area of technology transfer, the OECD's guidelines for MNCs proposed in the last decade failed in this regard, and it is clear that the international community has since moved on, in that there are vastly different technologies and actors now on the international stage.[105] Clearly for an RTD-DC to work, it also requires the international business community (MNCs) to become actively involved in the development process. This will only happen if MNCs have an *incentive* to become involved: the author argues that the RTD Tax Relief is one such incentive. To what extent such a tax relief could form part of a developed country's existing ODA budget or as a new form of aid remains to be debated. In theory, the RTD Tax Relief could constitute one of the *obligations* on the international community referred to by the Independent Expert as part of the RTD-Development Compact discussed above.

Whatever form is taken, poverty remains a huge issue in developing countries.[106] As Marks cogently argues, the real task is 'overcoming obstacles in the way of transforming aspirations of the Declaration into reality for the hundreds of millions of people for whom development remains an empty promise.'[107]

NOTES

1. Lecturer in Law, University of Essex (UK). Kariyawasam has worked as a consultant for several global commercial law practices and as an external consultant to the UK's Department for International Development (DFID), Cable & Wireless, and the UK's

Office of Telecommunications (OFTEL, now OFCOM), and the World Bank. In the early 1990s, he was Asia-Pacific Product Manager for McGraw-Hill's strategic business ICT research consultancy, Northern Business Information. In 2001, he was awarded a Fulbright Research Scholarship to Harvard Law School. He is both a telecommunications engineer and qualified to practice law as a solicitor in the United Kingdom.

2. Article 1 Declaration on the Right To Development (referred to throughout this chapter as the 'Declaration').
3. Adopted by UN General Assembly Resolution 217 (A) II on 10/12/1948.
4. General Assembly Resolution 2200A, adopted 16/12/1966, entering into force 23/03/1976.
5. General Assembly Resolution 2200A, adopted 16/12/1966, entering into force 03/01/1976.
6. A. Sengupta, '*The Right to Development as a Human Right*', 2000, at: http://www.hsph.harvard.edu/fxbcenter/FXBC_WP7—Sengupta.pdf, p. 1.
7. Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 25 June 1993.
8. Notwithstanding that the RTD is a *composite* of the human rights to be found in the ICCPR and ICESR. See Section 2 below.
9. Discussed in section 2.3 below.
10. See the Conclusion section of this chapter. Also see Chapter 7 in this volume by S. Anderman and R. Kariyawasam, which discuses the competition/IP balance in much greater detail.
11. Discussed in section 2.3.1 below. The idea for a tax relief for companies that license technology to developing countries has already been suggested by the Commission on Intellectual Property (CIPR) in its report on intellectual property and development: Chapter 1, 'Intellectual Property and Development', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter1htmf, accessed February 2005, p.16.
12. In developing the Theory and Equation 5, the author was reminded of the popular fictional story of *Dr Jekyll and Mr Hyde* by Robert Louis Stevenson. 'It was on the moral side, and in my own person, that I learned to recognise the thorough and primitive duality of man.': a quotation from Chapter 10 of the book by Stevenson. In looking at Equation 5, we could liken the parameters dealing with human rights in a similar way to Stevenson's fictional character *Henry Jekyll* demonstrating man's tendency for goodness, his desire to alleviate the suffering of his fellow man and the respect of basic human rights, and *Edward Hyde*, with commercial interests, a potential desire for greed and a potential disregard for the rights of others; and yet they are one and the same man. We can see a similar balance/conflict in *Equation 5* with both commercial and human rights variables appearing in the same equation.
13. Preliminary study of the independent expert on the right to development, Mr Arjun Sengupta, on the impact of international economic and financial issues on the enjoyment of human rights, submitted in accordance with commission resolutions 2001/9 and 2002/69, E/CN.4/2003/WG.18/2, Geneva 2003, p.3
14. Consideration of the sixth report of the independent expert on the right to development, E/CN.4/2004/WG.18/2, February 2004, p.4.
15. Ibid., p. 10.
16. L.S. Sealy and R.J.A. Hooley, *Commercial Law, Text Cases and Materials*, Third Edition, LexisNexis Butterworths, p. 31.
17. C.M. Schmitthoff, 'The Concept of Economic Law in England' (1966) *Journal of Business Law* 309, pp. 315, 318–19 cited in Sealy and Hooley op. cit.
18. J. Jackson *The World Trading System* (1989) MIT Press, pp. 21–2.
19. See OFCOM's guidelines on handling competition complaints at: http://www.ofcom.org.uk/consult/condocs/resp/eu_directives/guidelines.pdf, date accessed February 2005.
20. Collective rights need to be distinguished from *group* rights. In the case of collective rights where the rights holders are individuals, the individuals are the direct beneficiaries. For group rights, the groups hold the rights and are the beneficiaries as regards specified criteria leading to the increase in the value or interests of the group. In the context of this

chapter, the RTD can be described as a collective right as opposed to a group right. More fully, it can be argued that the RTD is an individual right that can be exercised collectively by all the citizens of a country, where the rights holders are individuals, and the collective is recognised in order to realise the RTD through a collective development policy. It is possible for the RTD to also exist as a group right, when for example it is necessary to give certain rights to minorities and indigenous peoples, where special development policies need to be designed for such groups. A full discussion is outside the scope of this chapter. See 'Considering collective rights, group rights and peoples' rights' at http://www.minorityrights.org/Legal/development/rtd_pt1_considering.pdf, date accessed February 2005, p. 10.

21. A.Sengupta, op. cit. in note 6, p. 11.
22. Ibid, p. 12. The Independent Expert cites George Ali-Saab (The Hague Academy of International Law), *The Right to Development at the International Level* (The Hague, 1975).
23. Ibid.
24. 'Consideration of the 6th report of the Independent Expert to the right to development', UN Economic and Social Council, E/CN.4/2004/WG.18/2, Geneva, February 2004, paragraph 3. In this same report at page 20, the International Bill of Human Rights is defined as mainly comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.
25. Supra note 22.
26. Ibid., p. 13.
27. *Vienna Declaration and Programme of Action*, adopted by the UN World Conference on Human Rights, A/CONF.157/23, 25 June 1993.
28. My emphasis.
29. WT/MIN(01)/17, Article 11.2. Around 100 implementation issues were raised in the lead-up to the Doha Ministerial Conference. The implementation decision, combined with paragraph 12 of the main Doha Declaration, provided a two-track solution for agreeing some of implementation issues prior to the Doha Round. According to the WTO, more than 40 items under 12 headings were settled at or before the Doha conference. See the WTO website at: http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#implementation, date accessed October 2004.
30. IP/C/28.
31. Clause 1(d), WT/L/579.
32. In October 2004, the WTO Committee on Trade and Development did produce a report listing all the special and differential treatment provisions to be found in the WTO covered agreements for LDCs. See WT/COMTD/W/135, October 2004. The report simply lists the provisions, but makes no recommendations going forward.
33. WT/WGTTT/5, para 15.
34. Selected conditions include: authorization to be based on individual merits, requirements for the rights holder to be already approached with a reasonable offer of licensing (unless a national emergency applies), in the case of semi-conductor technology use restricted only for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive, non-exclusive, predominantly for the domestic market, provisions for economic remuneration, possibility of revocation of the license. Compulsory licenses are discussed in more detail in Chapter 7 of this volume.
35. Correa 2000, p. 244. See also recent developments in the area of compulsory licenses with regard to public health. Given the proliferation of HIV/AIDS in the developing world, international institutions such as the WTO have come under increased pressure to recognise the difficulties that WTO members with insufficient or no manufacturing capabilities in the pharmaceutical sector are facing with producing effective drugs for treatment and the need to obtain supplies quickly. As such the WTO has now granted a waiver of condition 31(f) TRIPS Agreement on manufacture for domestic markets only, allowing other WTO members to produce drugs cheaply for import by WTO members who are *eligible*. See the Decision of the General Council August 2003, 'Implementation

of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health' (WT/L/540).

36. In the *General Cancun Decision*, the WTO's General Council states at para 1(d) on development that the: 'Council affirms that such countries, and in particular least-developed countries, should be provided with enhanced TRTA [trade related technical assistance] and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages the improved coordination with other agencies, including under the Integrated Framework for TRTA for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP).'
37. Article 55(b): 'solutions of international economic, social, health, and related problems; and international cultural and educational cooperation;'
38. Annex II WTO Agreement, Understanding of rules and procedures governing the settlement of disputes.
39. 'Fifth report of the Independent Expert on the right to development', Economic and Social Council, E/CN.4/2002/WG.18/6/Add.1, 31 December 2002, paragraphs 13–14.
40. See http://www.unglobalcompact.org/Portal/Default.asp, date accessed March 2005.
41. The Norms deal with the right to equal opportunities and non-discriminatory treatment, right to personal security, respect for national sovereignty and human rights, rights of workers, consumer protection obligation, environmental protection obligations, and general provisions for the application of the Norms by transnational corporations.
42. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Session 55.D Workers Rights, 4 August 2003.
43. Ibid.
44. Both the specific domestic provisions of TRIPS, bilateral trade agreement/investment agreement, and FTAs are discussed more fully in Chapter 7 in this volume.
45. For example on local employee training, sharing of know-how etc.
46. S.L. Welch, 'The technology transfer process in foreign licensing arrangements', Chapter 17, *The Economics of Communication and Information*, 1996, p.159 citing F. Contractor, 'The composition of licensing fees and arrangements as a function of economic development of technology recipient nations', *Journal of International Business Studies*, 1980.
47. WT/WGTI/W/65, para 10.
48. See for example Conklin and Lecraw (1997), and Ramachandran (1993).
49. WT/WGTI/W/65 para 11.
50. Consideration of the sixth report of the independent expert on the right to development, E/CN.4/2004/WG.18/2, February 2004, p.4.
51. Article 11 ICESR.
52. Article 12 ICESR.
53. Article 13 ICESR.
54. Article 15 ICESR.
55. Ibid., p. 10.
56. J. Rehman, *International Human Rights Law a practical approach*, Longman 2003, p. 107.
57. [ICESCR] inserted for clarity.
58. Principle 21, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ECCOR. Res. Commission on Human Rights, 43rd Sess., Agenda Item 8, UN Doc. E/CN.4/1987/17Annex (1987).
59. CIPR report, Chapter 1, 'Intellectual Property and development', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter1htmf, accessed February 2005, p.15.
60. 'Finding a way forward in the Doha Development Round: key issues for LDC trade', LDC Ministerial Meeting Dakar, 4–5 May 2004, Oxfam International, p.1.
61. Both the development and tax revenue departments of the investor state could have *concurrent jurisdiction* (for example as compared to similar provisions on concurrency to be

found in national competition law frameworks, such as the United Kingdom's *Competition Act 1998*, allowing for both a sector-specific national regulatory authority and a separate competition authority to hear competition complaints) to call for and examine such agreements, and if found to be in breach, have the power to impose both civil and criminal penalties both on the MNC as a corporate entity or individually on the MNC's board of directors. The power to do so will be set out in the implementing legislation bringing the RTD Tax Relief into force in the relevant investor state's jurisdiction.

62. There may be issues of *State Aid* linked to the implementation of the RTD Tax Relief which will need to be examined, for example in Europe, under Community competition rules on State Aid found in Articles 87 and 88 EC Treaty and relevant case law specifically defining the meaning of aid in terms of its effect, for example preferential tax treatment (Case 173/73 *Commission v Italy* [1974] ECR 709) and the application of the 'market investor principle' as set out in Case C-39/94 *Syndicat Francais de l'Express International (SFEI) v La Poste* [1996] ECR I-2547; Cases C-278-280/92 *Spain v Commission* [1994] ECR I-4103. Furthermore, there may be issues of state subsidies at the multilateral level given that the WTO also has certain rules (Subsidy Rules under the WTO *Agreement on Subsidies and Countervailing Measures*) on states offering support to private industry. The analysis of state aid/WTO subsidy rules is outside the scope of this chapter.
63. Alternatively, the CIPR suggests that the TRIPS Council should consider introducing *criteria* (note, not the term 'Criteria' used in the text above to indicate terms in a technology transfer agreement) to decide the basis on which LDCs should enforce the TRIPS obligations after 2016. Such criteria could include indicators of economic development and scientific and technological capability as reflected in Article 66.1 TRIPS Agreement of the need for flexibility to create a viable technological base. See CIPR on *Intellectual Property and Development*, Chapter 8, 'The International Architecture', 2002 at http://www.iprcommission.org/papers/text/final_report/chapter8htmf, accessed February 2005, p.8. In making this recommendation, the CIPR refers to a study completed by Lall and Albaladejo '*Indicators of the Relative Importance of IPRs in Developing Countries*', UNCTAD/ICTSD, Geneva 2001 at: http://www.ictsd.org/unctad-icstd/docs/Lall2001.pdf, which sets out various measures of scientific and technical capability in developing countries. I can see no reason why a similar set of indicators of scientific and technical capability (the 'Indicators') could not be used to set a *sliding scale of tax relief* providing the greatest relief to those MNCs investing in developing countries with very low indicators, and gradually reducing the tax relief depending on rising Indicators. In Chapter 7, co-authored with Steve Anderman, I suggest that any Indicators developed by the TRIPS Council could also be used as the basis for providing *exceptions* or *exemptions* to developed country national law on the negotiation of intellectual property rights and trade, for example in the US *Trade Act 2002*. For example, in the case of the United States, the Indicators could be set out in a schedule or annexe to the Act which would allow the USTR to provide exceptions or exemptions to any DC or LDC in accordance with the Indicators. Such a provision could then become a template model for any developed country with similar trade-related intellectual property rights legislation in force. Please note that the Indicators suggested here are not the same as the Criteria suggested in the text above. The Criteria include a minimum set of legal terms on technology transfer, approved by the WTO's Working Group on Technology Transfer, that would form the basis as to whether a MNC that included such terms in its technology transfer agreements with developing country producers/states would qualify for tax relief or not. It is a *legal test*, which if satisfied would qualify the MNC for tax relief. The Indicators suggested above would then determine the *scale* of that tax relief: a higher Indicator leading to lower tax relief and vice versa. The Indicators therefore would form more of an economic *means-based* test.
64. *World Investment Report*, UNCTAD, 2004.
65. Ibid., overview section.
66. K. Maskus, 'The role of intellectual property rights in encouraging foreign direct invest-

ment and technology transfer', 9 Duke *Journal of Comparative and International Law* 109, 1998, p.7.

67. E.X. Fan, 'Technology Spillovers from Foreign Direct Investment – A Survey', Asian Development Bank, ERD Working Paper No.33, December 2002, p. 7. Fan cites the economist Kokko in A. Kokko, 'Technology, market characteristics, and spillovers', *Journal of Development Economics* **43**:279–93, 1994.
68. Ibid.
69. See J. Dine, *Companies, International Trade and Human Rights*, Cambridge University Press, 2005, p. 24.
70. Ibid.
71. Ibid.
72. IP/C/W/398 at page 4.
73. Ibid., p. 50.
74. Fan, op. cit., pp. 26–7.
75. V.N. Balasubramanyam, M. Salisu and D. Sapsford, 'Foreign Direct Investment and Growth in EP and IS Countries', *The Economic Journal* **106**(434) (January 1996), 92–105, see especially p. 94.
76. Ibid.
77. Ibid.
78. A. Sengupta, 'Fifth report of the independent expert on the right to development', Economic and Social Council, Commission on Human Rights, open-ended working group on the right to development, E/CN.4/2002/WG.18/6, Geneva, September 2002, p. 5.
79. Ibid., paragraph 7.
80. S. Marks, 'The human rights framework for development: five approaches', Harvard School of Public Health, 2001, p. 9.
81. Discussed above at section 2.5.
82. Balasubramanyam et al., op. cit., pp. 92–105.
83. Ibid. pp. 92–93. They define EP as a strategy which equates the average effective exchange rate on exports to the average effective exchange rate on imports, which results in trade being neutral and bias-free. In contrast, an IS strategy is one where the effective exchange rate on imports exceeds the effective exchange rate on exports and is biased in favour of import substitution activities.
84. They also make the assumption that the equation in (2) is linear in logs. In the context of economics, 'log' usually means 'natural log', that is $\log_e$, where e is the natural constant that is approximately 2.718281828. So $x = \log y <=> e^x = y$.
85. This formula has also been tested in another study entitled 'The impact of Foreign Direct Investment on labour productivity in the Chinese electronics industry' by X. Liu, D. Parker, K. Vaiyda and Y. Wei, Lancaster University Management School Working Paper 2000/002, where the authors were looking for the evidence that FDI in the Chinese electronics industry was associated with higher local productivity. The results confirmed this hypothesis.
86. Note that this is not the same term g used in equation (2) to represent the production function.
87. This equation in no way represents a statistical/mathematically defined relationship between the RTD and the variables on the right-hand side of the equation, but seeks to demonstrate symbolically, that such a relationship might exist. Equation (5) *extends* the Independent Expert's own symbolic vector representing the RTD set out in equation (1) (as described by Marks) by making the link with FDI, and indirectly with technology transfer as a component of FDI. Clearly more empirical research is required to test the equation and to find an appropriate statistically defined relationship. See the Conclusion section below.
88. Measurements, for which the author argues can be made, and variables which can be enforced in domestic frameworks of economic law.
89. E/CN.4/2004/WG.18/2, p. 19.
90. Ibid., paragraph 36.

91. Ibid.
92. The Commission on Human Rights open-ended Working Group on the RTD points out that in 1970 at the UN General Assembly, although the international community pledged 0.7 per cent of GNP for ODA to developing countries and 0.15 to 0.2 per cent of their GNP to the LDCs, 'only a handful of countries have come anywhere near to meeting this target.' In 2003, the ODA from industrial countries amounted to only $56 billion per year, about 0.2 per cent of their GNP. At the Millennium Summit, the Heads of State committed a further $40–60 billion in resources to meet the aims of the Millennium Development Goals, which taken together would only amount to 0.5 per cent of the GNP of OECD countries. See E/CN.4/2003/WG.18/2 at paragraph 22. The report stresses the need to address LDCs' and DCs' current levels of debt, which have severe domestic budgetary repercussions. For example, Africa cannot expand much-needed imports such as capital, intermediate, and consumer goods, due to budgetary constraints imposed by servicing high international debt, and African exports have been less than half of other developing countries. The report indicates that 'Africa's share of world exports declined from 3.9% in 1980 to 1.5% in 1997, owing largely to protectionism in the industrial countries against goods exported from Africa.' Ibid., Paragraph 25.
93. Ibid., paragraph 37.
94. Discussed in more detail in Chapter 7 in this volume.
95. Ibid.
96. Ibid.
97. E/CN.4/2003/WG.18/2 at paragraph 25, citing Dani Rodrik. 'The global governance of trade as if development really mattered', JFK School of Government, Harvard University, July 2001.
98. For example as found in the jurisprudence of the European Union under Article 86 of the EC Treaty. For many years, telecommunication monopolies in Europe enjoyed certain freedoms as a consequence of having to provide SGEI, such as universal service obligations. To some extent, the same argument can still be extended to public service broadcasters. A detailed discussion of state monopolies and Article 86(2) and 86(3) EC Treaty is outside the scope of this chapter.
99. In his seminal paper, 'The right to development as a human right', the Independent Expert discusses the difficulties of enforcing the RTD: 'The right to development when it is accepted as a human right through a legitimate process of consensus building, therefore, becomes a primary claim on resources of a country – when resources are taken in the broadest sense as being whatever instrument that is necessary to realize certain objectives – physical, financial, or institutional. It also entails a legitimate right of reprimanding the parties which have the obligation to deliver the counterpart to the holders of the rights. For a national government, this can be executed through a judicial process of compensation or reparation … Internationally such reprimand has taken the form of sanctions or international pressures.' p. 8
100. F. Carsten and K. Maskus, *Intellectual Property and Development: Lessons from Recent Economic Research*, World Bank and Oxford University Press 2004.
101. And in more detail in Chapter 7.
102. C. Fink and P. Reichenmiller, 'Tightening TRIPS: the intellectual property provisions of recent US Free Trade Agreements', Trade Note 20, World Bank, February 2005.
103. Leader, S. 'Human rights and international trade: mapping the terrain' in P. Macrory et al. (eds), *The World Trade Organisation: Legal, Economic and Political Analysis*, Springer: Kluwer, 2004.
104. Ibid., p. 2245.
105. *OECD's Guidelines for Multinational Enterprises* on requirements on MNCs to cooperate in the technology and science policy of the host country and prevent abusive practices (Sections VIII and IX respectively) at: http://www.oecd.org/dataoecd/56/36/1922428.pdf, date accessed October 2004.
106. 'An alternative route for assessing the impact of integration [into the world economy] on the right to development could be by relating integration to the *indicators* on poverty. Given that poverty is a violation of human right, indicators of poverty reduction may be

used as indicators of the level of realization of the right to development.' Supra note 86, paragraph 12, where the report makes clear, however, that the statistical evidence of any such impact is far from unequivocal.

107. S. Marks, '*Obstacles to the Right To Development*', Harvard University, 2003, at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP17—marks.pdf, p. 1

BIBLIOGRAPHY

Abi-Saab, G. (1975), 'The Hague Academy of International Law), *The Right to Development at the International Level*' The Hague Academy of International Law.

Anderman, S. and R. Kariyawasam R (2005), '*TRIPS and bilateralism: technology transfer in a development perspective*', *Human Rights and Capitalism*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.

Annex II WTO Agreement, 'Understanding of rules and procedures governing the settlement of disputes'.

Balasubramanyam, V.N., M. Salisu and D. Sapsford (1996), 'Foreign Direct Investment and Growth in EP and IS Countries', *The Economic Journal*, **106** (434), January, 92–105.

Carsten, F. and K. Maskus (2004), *Intellectual Property and Development: Lessons from Recent Economic Research*, World Bank and Oxford University Press.

Case 173/73 *Commission v. Italy* [1974] ECR 709.

Case C-39/94 *Syndicat Français de l'Express International (SFEI) v. La Poste* [1996] ECR I-2547.

Case C-278-280/92 *Spain v. Commission* [1994] ECR I-4103.

Commission on Intellectual Property (2002), Chapter 1, 'Intellectual Property and Development' at http://www.iprcommission.org/papers/text/final_report/chapter1htmf, accessed February 2005.

Considering collective rights, group rights and people's rights at http://www.minorityrights.org/Legal/development/rtd_pt1_considering.pdf, date accessed February 2005, p.10.

Consideration of the sixth report of the Independent Expert on the right to development, E/CN.4/2004/WG.18/2, February 2004.

Contractor, F. (1980), 'The composition of licensing fees and arrangements as a function of economic development of technology recipient nations', *Journal Of International Business Studies*.

Correa, C. (2000), *Intellectual Property Rights, the WTO and Developing Countries*, Zed Books.

E/CN.4/2003/WG.18/2, Geneva 2003.

E/CN.4/2004/WG.18/2, February 2004.

Fifth report of the Independent Expert on the right to development, Economic and Social Council, E/CN.4/2002/WG.18/6/Add.1, 31 December 2002.

Fink, C. and P. Reichenmiller (2005), 'Tightening TRIPS: the intellectual property provisions of recent US free trade agreements', Trade Note 20, World Bank, February.

Fan, E.X. (2002), *Technology spillovers from Foreign Direct Investment – A Survey*, Asian Development Bank, ERD Working Paper No.33, December.

Finding a way forward in the Doha Development Round: key issues for LDC trade, LDC Ministerial Meeting Dakar, 4–5 May 2004, Oxfam International.

Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health (WT/L/540).
IP/C/28.
IP/C/W/398.
Lall, S. and M. Albaladejo 'Indicators of the Relative Importance of IPRs in Developing Countries', UNCTAD/ICTSD, Geneva 2001 at: http://www.ictsd.org/unctad-ictsd/docs/Lall2001.pdf
Leader, S., '*Trade and Human Rights II*', forthcoming 2005.
Liu, X., D. Parker, K. Vaiyda and Y. Wei (2000), 'The impact of Foreign Direct Investment on labour productivity in the Chinese electronics industry', Lancaster University Management School Working Paper, 2000/002.
Jackson, J. (1989), *The World Trading System*, MIT Press, pp. 21–2.
Kokko, A. (1994), 'Technology, Market Characteristics, and Spillovers', *Journal of Development Economics*, **43**(2):279–93.
Marks, S. (2003), '*Obstacles to the Right To Development*', Harvard University, at: http://www.hsph.harvard.edu/fxbcenter/FXBC_WP17—Marks.pdf.
Marks, S. (2001), '*The Human Rights Framework for Development: Five Approaches*', Harvard School of Public Health, at: http://www.hsph.harvard.edu/fxbcenter/FXBC_WP18—Marks.pdf.
Maskus, K. (1998), 'The role of intellectual property rights in encouraging foreign direct investment and technology transfer', Duke Journal of Comparative and International Law, **9**(109).
OECD's Guidelines for Multinational Enterprises on requirements on MNCs to cooperate in the technology and science policy of the host country and prevent abusive practices (Sections VIII and IX respectively) at: http://www.oecd.org/dataoecd/56/36/1922428.pdf, date accessed October 2004.
OFCOM's guidelines on handling competition complaints at: http://www.ofcom.org.uk/consult/condocs/resp/eu_directives/guidelines.pdf, date accessed February 2005.
Ramachandran, V. (1993), 'Technology transfer, firm ownership, and investment in human capital', *Review of Economics and Statistics*, **75**(4), 664–70.
Rehman, J. (2003), *International Human Rights Law: A Practical Approach*, London: Longman, p. 107.
Rodrik, D. (2001), '*The global governance of* trade: *as if development really mattered*', JFK School of Government, Harvard University, July 2001.
Sealy, L.S. and R.J.A. Hooley (2003), *Commercial Law, Text Cases and Materials*, 3rd edn, LexisNexis Butterworths.
Schmitthoff C.M. (2003), 'The concept of economic law in England' in L.S. Sealy and R.J.A. Hooley (eds), *Commercial Law, Text Cases and Materials*, 3rd edn, London: LexisNexis Butterworths.
Sengupta, A. (2000), '*The Right to Development as a Human Right'*, at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP7—Sengupta.pdf, p. 1.
Sengupta, A. (2002), 'Fifth report of the independent expert on the right to development', Economic and Social Council, Commission on Human Rights, open-ended working group on the right to development, E/CN.4/2002/WG.18/6, Geneva, September.
The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN ECCOR. Res. Commission on Human Rights, 43rd Sess., Agenda Item 8, UN Doc. E/CN.4/1987/17Annex (1987)
Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, A/CONF.157/23, June 25, 1993

WT/MIN(01)/17
WT/L/579.
WT/COMTD/W/135, October 2004
WT/WGTTT/5
WT/WGTI/W/65
World Investment Report, UNCTAD, 2004.
WTO *Agreement on Subsidies and Countervailing Measures*.

9. WTO member states and the right to health

Paul Hunt and Simon Walker*†

This chapter focuses on a selection of WTO Agreements and trade issues that bear closely upon the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ('the right to health').[1] For two reasons, its primary focus is on the position of states in relation to selected trade issues and the right to health, rather than the responsibilities under international human rights law of the WTO and its secretariat. First, the WTO is principally driven by its member states and, second, international human rights law primarily places obligations on states. Thus, given the central role of states under both international human rights law and trade law, it is more fruitful to focus on the relationship between states, the right to health and trade.[2]

As a point of departure, it is important to identify the normative and practical bases for analysing this relationship. At the normative level, all member states of the United Nations – which includes all members of the WTO – have ratified at least one human rights treaty. Most WTO members have ratified the International Covenant on Economic, Social and Cultural Rights and all but one have ratified the Convention on the Rights of the Child, both of which recognize the right to health. Thus, there is a normative basis for considering the promotion and protection of human rights within the context of the negotiation and implementation of trade rules within the WTO. At the practical level, the Millennium Declaration and the Millennium Development Goals (MDGs) provide an operational link between states, the right to health and trade. The Millennium Declaration and the MDGs represent an established framework for development, agreed by the international community – including all WTO member states – the overarching national and international policy objective of which is the reduction of poverty (goal 1). At least four of the eight goals are health-related, and elements of a fifth – developing a global partnership for development (goal 8) – also bear closely upon the right to health as well as trade. Further, not only all states, but also all members of the 'United Nations family', including the Bretton Woods institutions and the WTO, are firmly committed to the realization of the

goals, underlining not only the significance that the MDGs have attained but also the pertinence of MDGs to trade.[3] These normative and practical links therefore provide the *raison d'être* for considering the relationship between states, the right to health and trade, as well as a framework for analysing this relationship.

Given this relationship, we argue that national and international human rights law, including the right to health, should be consistently and coherently applied across all relevant national and international policy-making processes, including those relating to trade. This highlights one of the greatest challenges confronting international human rights law: the problem of 'disconnected' government. Practice shows that one part of government does not necessarily grasp what another part of the same government has agreed to do. Increasingly, states recognize this is a problem and some of them are trying to address it by 'mainstreaming' human rights.[4]

At the level of international financial and trade institutions, the WTO, the World Bank and the International Monetary Fund (IMF) endeavour to ensure greater coherence between trade, development and finance. This powerful trend has far-reaching implications that are beyond this chapter. However, it is crucial that enhanced coherence is not confined to policies that only deal with trade, development and economics. What is needed is a coherent approach to the application of a state's various national and international obligations, including those relating to trade, development, economics and human rights. Not only should that coherence be achieved at the level of international institutions, but states should also work towards connected government at the national level. Analysing the relationship between trade and the right to health is one step in meeting this challenge.

As a cornerstone of our analysis, we have taken the position that international human right law does not necessarily take a position for or against any particular trade rule or policy.[5] Our focus is instead on the real and potential effects of particular trade rules on the right to health as well as the way in which WTO members formulate those rules. Thus, the rule or policy in question must, in practice, actually enhance enjoyment of human rights (or at least not diminish the enjoyment of human rights), including for the disadvantaged and marginalized. Further, the process by which the rule or policy is formulated, implemented and monitored must be consistent with all human rights and democratic principles.

For example, if reliable evidence confirms that a particular trade policy enhances enjoyment of the right to health, including for those living in poverty and other disadvantaged groups, and that policy is delivered in a way that is consistent with all human rights and democratic principles, then it is prima facie in conformity with international human rights law. However, if reliable evidence confirms that a particular trade policy has a negative impact

on the enjoyment of the right to health of those living in poverty or other disadvantaged groups, then the state has an obligation under international human rights law to revise the relevant policy. This does not necessarily mean that the particular policy has to be altogether abandoned – it might mean that it has to be revised in such a way that it begins to have a positive impact on the enjoyment of the right to health of those living in poverty and other disadvantaged groups.

This position has a number of important implications. Among the most significant is that international human rights law requires reliable evidence that a chosen rule or policy is delivering positive right to health outcomes, including for the disadvantaged. If a policy is at the planning stage, our analysis – indeed, international human rights law – encourages WTO member states to undertake reliable assessments to anticipate the likely impact of the policy on the enjoyment of the right to health of those living in poverty and other disadvantaged groups. In this way, reliable data – rather than any particular ideology or negotiation pressure – can provide the basis for rational and rigorous national and international policy-making. We address the question of human rights impact assessments later in this chapter.

The following section briefly introduces some of the normative characteristics of the right to health that are relevant to any human rights analysis of health-related trade rules. The second section illustrates the relationship between the right to health and two WTO Agreements – the TRIPS Agreement and the General Agreement on Trade in Services. The third section examines some cross-cutting issues in the relationship between human rights and trade, namely: gender and trade, and the difficulties faced by acceding countries and new WTO members, particularly small and poorer countries. The fourth section sets out some ways in which a right to health perspective could be introduced into the formulation and implementation of trade rules. In the final section, we make some concluding suggestions to promote continued dialogue between trade and human rights professionals.

I. THE RIGHT TO HEALTH: AN OVERVIEW IN THE CONTEXT OF TRADE

A. Sources of the Right to Health: International, Regional and National

The international right to health is a firmly established feature of binding international law.[6] Adopted in 1946, the Constitution of the World Health Organization (WHO) recognizes the fundamental human right to health.[7] Two years later, the Universal Declaration of Human Rights laid the founda-

tions for the international legal framework for the right to health. Since then, the right to health has been codified in numerous legally binding international and regional human rights treaties. The most extensive treaty elaboration of the right to health is in the Convention on the Rights of the Child, which has been ratified by all states, bar two. The right to health is also enshrined in numerous national constitutions: over 100 constitutional provisions include the right to health, the right to health care, or health-related rights such as the right to a healthy environment.

Importantly, binding treaties, constitutional provisions and national legislation on the right to health are beginning to generate significant case law and other jurisprudence that shed light on the content of the right to health.[8] These human rights cases – and numerous other laws and decisions at the international, regional and national levels – confirm the justiciability of the right to health. Several cases decided by the dispute settlement regime of WTO have considered health-related issues.[9] A crucial legal challenge is to maintain consistency between these two related and developing bodies of jurisprudence.[10]

B. The Scope of the Right to Health

The international right to health has normative depth that can make a constructive contribution to trade rules and policies. In brief, the content of the right to health, and resulting obligations, includes the following components.[11]

Health care and the underlying determinants of health; freedoms and entitlements

The right to health is an inclusive right, extending not only to timely and appropriate health care, including access to essential medicines, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation. The right to health contains both freedoms and entitlements. Freedoms include the right to be free from discrimination and non-consensual medical treatment. Entitlements include the right to a system of health protection, such as adequate health care and access to essential medicines, that provides equality of opportunity for people to enjoy the highest attainable standard of health. Increasingly, health facilities, goods and services are subject to trade rules and policies – thus, it is of growing importance to examine the numerous areas where trade and the right to health converge.

Progressive realization; immediate obligations

The full realization of the right to health is subject to the availability of resources. Since resource constraints cannot be eliminated overnight, inter-

national law expressly allows for the progressive realization of the right to health. However, progressive realization is subject to various conditions, otherwise pursuit of the right to health might be constantly postponed, emptying the right of any meaning. For example, progressive realization means that states have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of the right to health.

At the same time, the right to health imposes various obligations of immediate effect, notwithstanding resource constraints and progressive realization. These immediate obligations include the guarantees of non-discrimination and equal treatment, as well as the obligation to take deliberate, concrete and targeted steps towards the full realization of the right to health, such as the preparation of a national public health strategy and plan of action. The right to health also includes obligations to ensure the satisfaction of, at the very least, minimum essential levels of health care and the underlying determinants of health.

The progressive realization of the right to health, and trade rules and policies, relate to each other in several ways. First, trade has the potential to increase resources and thus to contribute to the progressive realization of the right to health. Second, if trade generates more resources, they have to be allocated in such a way that they do, in practice, contribute to the progressive realization of the right to health for all; a national health strategy and plan of action should be designed in a way that ensures that the necessary allocations occur. Third, the effect of trade on the progressive realization of the right to health depends upon the trade rules chosen: different forms, pacing and sequencing of trade liberalization have different effects on progressive realization. The right to health requires that the form, pacing and sequencing of trade liberalization be conducive to the progressive realization of the right to health. Fourth, it is axiomatic that a state establishes effective and transparent mechanisms to monitor whether or not the selected trade (and other) policies are progressively realizing the right to health.

In summary, progressive realization of the right to health, and the immediate obligations to which it is subject, place reasonable conditions on the trade rules and policies that may be chosen. These conditions are designed to ensure that the selected trade rules and policies actually deliver positive right to health outcomes for all.

Non-discrimination and equal treatment

Non-discrimination and equal treatment are among the most critical components of the right to health. International human rights law proscribes any discrimination in access to health care, and the underlying determinants of health, on the internationally prohibited grounds, such as sex, race and social origin, that has the intention or effect of impairing the equal enjoyment of the

right to health. The authors highlight the word 'effect': even an unintended discriminatory effect may be in breach of international human rights law. In the present context this is very important, because trade rules and policies can unintentionally have different impacts on different groups, including men and women, and these impacts can extend to differential access to health and health-related services. The right to health requires that the differential impact of trade rules and policies be monitored and, where necessary, appropriate policy adjustments made.

The principle of non-discrimination is also an important component of international trade law. While there are some similarities between the trade and human rights principles of non-discrimination, they are also different in scope and application. The human rights principle has been intimated above: it reflects a particular preoccupation with those who are disadvantaged, vulnerable and living in poverty. On the other hand, the trade principle of non-discrimination is primarily designed to reduce trade protectionism and to ensure that a government's policies to regulate international commercial transactions apply regardless of the origins of the goods, services or service supplier rather than to alleviating disadvantage or poverty as such.[12]

Participation

The human right to participate in the conduct of public affairs is inextricably linked to fundamental democratic principles and the enjoyment of other rights, including the right to health. Fulfilment of this right includes more than free and fair elections, and extends to the active and informed participation of individuals and communities in decision-making that affects them. Thus, the right to participate should inform the formulation of both trade and right to health policies.

International assistance and cooperation

States have an obligation to take steps, individually and through international assistance and cooperation, towards the full realization of the right to health. Importantly, international assistance and cooperation should not be understood as encompassing only financial and technical assistance: it also includes a responsibility to work actively towards equitable multilateral trading, investment and financial systems that are conducive to the elimination of poverty and the realization of the right to health. For example, states should respect the enjoyment of the right to health in other jurisdictions, and endeavour to ensure that no international trade agreement or policy adversely impacts upon the right to health in those other countries. They should also ensure that their representatives to international organizations, including the WTO, take due account of the right to health, as well as the obligation of international assistance and cooperation, in all policy-making matters.

The human rights concept of international assistance and cooperation reinforces WTO members' commitment to technical assistance and capacity-building which, especially since Doha, is a crucial feature of the responsibilities of WTO.[13]

Responsibilities of all actors

While states have primary responsibility for the realization of international human rights, all actors in society – individuals, local communities, intergovernmental and non-governmental organizations, health professionals, business enterprises and so on – have responsibilities regarding the realization of the right to health.

Accountability

Like any other human right, the right to health is almost meaningless if unaccompanied by mechanisms of accountability. From the right to health springs duties – and in relation to these duties there must be transparent, effective and accessible mechanisms of accountability. Accountability mechanisms come in many forms, perhaps the most well-known being judicial (for example judicial review of executive acts) and political (for example parliamentary processes). But there are other forms of accountability, such as quasi-judicial devices (for example health ombuds) and administrative arrangements (for example the preparation and publication of right to health impact assessments). The form and mix of right to health accountability mechanisms will vary from one state to another – but together they have to provide transparent, effective and accessible accountability. Given that non-state actors have responsibilities in relation to the realization of the right to health, accountability mechanisms are needed in relation to both states and other actors whose actions bear upon enjoyment of the right to health. Accountability depends upon sound monitoring. The primary purpose of monitoring and accountability mechanisms is to ensure that timely adjustments are made to national and international trade (and other) policies when reliable evidence shows that they are not delivering outcomes consistent with the international right to health.

It is because a right to health approach to trade requires transparent, effective and accessible mechanisms of monitoring and accountability that this report considers impact assessments and the Trade Policy Review Mechanism (TPRM). Of course, these monitoring and accountability mechanisms are not alone sufficient. Nonetheless, they may constitute two modest but practical ways to enhance monitoring and accountability in relation to trade and the right to health.

C. The Right to Health: Two Analytical Frameworks

In recent years, the human rights community has developed analytical frameworks or tools that are designed to deepen our understanding of human rights, including the right to health. In the context of trade, this section outlines two of these complementary frameworks; the first outlines the content of the right to health and is especially relevant to policy analysis; the second sets out the obligations on states in relation to the right to health, and is particularly relevant to a legal analysis.

Availability, accessibility and good quality

The right to health requires that health facilities, goods and services shall be *available, accessible* and of *good quality*.[14] By way of illustration, in the following paragraphs, this framework is briefly applied to an issue that is both an element of the right to health and a feature of contemporary trade: access to essential medicines.

1. *Available*: the state has to do all it reasonably can to make an essential medicine available in its jurisdiction, for example by using, where appropriate, the TRIPS flexibilities, such as compulsory licences and parallel imports.
2. *Accessible*: however, making the essential medicine available in the jurisdiction is not enough. The medicine might be available in a state, but only in the urban centres, not the rural areas; or only to some ethnic groups, not others; or only to the rich, not those living in poverty; or only to people without disabilities; and so on. Thus, the state has to do all it reasonably can to ensure that the essential drug is not only available in the jurisdiction, but accessible to all.

   Access has at least four dimensions:

   (a) *Non-discrimination.* The essential medicine must be accessible to all, in law and fact, without discrimination on any of the internationally prohibited grounds, such as sex, race and social origin. For example, delivery mechanisms will be needed to reach disadvantaged groups, such as women, minorities, indigenous peoples, slum-dwellers and labour migrants;

   (b) *Physical access.* The essential medicine must be accessible in all parts of the country, including rural areas. For example, mobile clinics might be needed;

   (c) *Economic accessibility*. Whether publicly or privately provided, the essential medicine must be affordable to all, not just the well-off. Clearly, the affordability of essential medicines raises crucial issues, such as drug pricing, compulsory licences, parallel importing, and the reduction of import duties;

(d) *Information*. Accurate public health-related information must be accessible to all, including information regarding the essential medicine.

3. *Quality*: making the essential medicine available and accessible is not enough. It could be available and accessible in a jurisdiction, but of poor quality, for example counterfeit, contaminated or sub-standard. Sometimes drugs, rejected in the North because they have passed their expiry date, are sold in the South. Thus, states need to have in place a basic system for monitoring essential drug quality.

Respect, protect and fulfil

While the analytical framework outlined above is especially relevant to understanding the content of the right to health and to policy analysis, the framework of respect, protect and fulfil identifies the broad legal obligations on states in relation to the right to health and, as such, is particularly relevant to a legal analysis. Those obligations can be understood as follows:

a) The duty *to respect* requires states to refrain from interfering, directly or indirectly, with the enjoyment of the right to health. Thus, a state should not market unsafe drugs or unlawfully pollute the environment from state-owned facilities.
b) The duty *to protect* requires states to take measures that prevent third parties from interfering with the right to health. Thus, a state is obliged to regulate health service provision with a view to eliminating the marketing of unsafe drugs and reducing professional malpractice. It is also obliged to ensure that a privatized health sector enhances the realization of the right to health of all, including those living in poverty.
c) The obligation *to fulfil* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health. This includes the residual obligation to provide the various elements of the right, such as access to an essential medicine, when an individual or group, for reasons beyond its control, is unable to enjoy that element itself by the means at its disposal.

II. TWO WTO AGREEMENTS AND THE RIGHT TO HEALTH

A. The TRIPS Agreement, Intellectual Property and Access to Medicines

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) is the most comprehensive multilateral agreement that sets detailed minimum standards for the protection and enforcement of intellectual property rights. The forms of intellectual property protection covered by the TRIPS Agreement most relevant to the enjoyment of the right to health include patent protection (over new medical processes and products such as pharmaceuticals), trademarks (covering signs distinguishing medical goods and services as coming from a particular trader), and the protection of undisclosed data (in particular test data). For example, patent protection of a pharmaceutical allows the intellectual property right holder to exclude competitors from certain acts, including reproducing and selling the drug for a minimum period of 20 years. This period of exclusion theoretically allows the right holder to recoup some of the costs involved in medical research. Apart from establishing minimum standards for various forms of intellectual property protection, the Agreement also allows WTO member states to adopt measures to protect public health and nutrition, and to protect against the abuse of intellectual property rights in certain cases. The Agreement makes disputes between WTO members concerning respect for the minimum standards subject to the WTO dispute settlement procedures.

Intellectual property protection can affect the enjoyment of the right to health, and related human rights, in a number of ways. First intellectual property protection can affect medical research and this can bear upon access to medicines. For example, patent protection can promote medical research by helping the pharmaceutical industry shoulder the costs of testing, developing and approving drugs. However, the commercial motivation of intellectual property rights encourages research, first and foremost, towards 'profitable' diseases, while diseases that predominantly affect people in poor countries – 'neglected diseases' – remain under-researched.

Neglected diseases and very neglected diseases – those diseases overwhelmingly or exclusively occurring in developing countries, such as river blindness and sleeping sickness – have multiple human rights implications, including: discrimination, the availability and accessibility of essential medicines, the right to enjoy the benefits of scientific progress, and international assistance and cooperation.[15] The possibility of recouping research and development costs by excluding competition from the market through the use of intellectual property rights assumes that there is a market for new medicines

in the first place. The fact that very neglected diseases are suffered overwhelmingly by poor people in poor countries underlines that there is no or little market potential for medicines fighting these diseases, simply because the sufferers are unable to pay. Intellectual property protection does not therefore appear to provide an incentive to invest in research and development in relation to very neglected diseases. A more serious side-effect of intellectual property protection could be that the existence of the market mechanism of intellectual property protection encourages the diversion of money into profitable research and away from research into neglected diseases. Substantiating such a claim would nonetheless be difficult and beyond the focus of this chapter.

Second, the exclusion of competitors as a result of the grant of a patent can also be used by patent holders as a tool to increase the price of pharmaceuticals unreasonably. High prices can exclude some sections of the population, particularly poor people, from accessing medicines. Given that the right to health includes an obligation on states to provide affordable essential medicines according to the WHO essential drugs list,[16] intellectual property protection can lead to negative effects on the enjoyment of the right to health. In other words, in some cases intellectual property protection can reduce the economic accessibility of essential medicines.

One of the means of protecting against abusive use of intellectual property rights envisaged in the TRIPS Agreement is compulsory licensing (article 31). A compulsory license is a non-exclusive licence to produce or use patented products or processes which is granted to a third party by authorization of a government authority, irrespective of the will of the patent owner. The patent owner should receive a reasonable remuneration in return, at a rate set by the authority. Compulsory licences are generally awarded to promote the public interest or in cases of national emergency. For example, if a patent holder sets the price of drugs at a level that excludes significant portions of the population, a government may consider issuing a compulsory licence in favour of a local manufacturer who could make and sell the drugs at an affordable price.

While the compulsory licence option is attractive for countries with a pharmaceutical manufacturing capacity, it does not necessarily help other countries, in particular the most poor, which do not have such a capacity. Significantly, article 31(f) of the TRIPS Agreement establishes that a compulsory licence must be granted for supply ‘predominantly for the domestic market of the member authorizing such use’. Thus, a country without sufficient capacity to manufacture pharmaceuticals can neither benefit from the compulsory licensing provisions nor import sufficient quantities of generic drugs from countries that have issued a compulsory licence over patented treatments.

In the Declaration on the TRIPS Agreement and Public Health, WTO members stated that the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all. Further, the Declaration recognized 'the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement' and specified that each member has 'the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted'.

Given the difficulties – referred to above – of countries without a pharmaceutical manufacturing capacity to benefit from the compulsory licensing provisions of the TRIPS Agreement, WTO ministers directed the TRIPS Council to 'find an expeditious solution to this problem and to report to the General Council before the end of 2002'.[17] In August 2003, WTO members reached a decision that allows for WTO members producing generic copies of patented drugs under compulsory licence to export drugs to countries with no or little drug manufacturing capacity. From a human rights perspective, this can be seen as a positive move as it could allow for the production and export of cheaper essential drugs (for example for HIV) to poor countries desperately in need of medicines. Nonetheless, the effectiveness of this decision will depend on the extent to which it actually does lead to increased access to medicines for the poor. Already, there are signs that some countries, in reforming their intellectual property legislation, might not be making the most of these flexibilities.[18]

Third, and finally, intellectual property rights may affect the use of traditional medicines, including by indigenous peoples. While indigenous communities have benefited from intellectual property protection in some cases,[19] in other situations traditional medicines – and also foodstuffs – have been appropriated, adapted and patented with little or no compensation to the original knowledge holders and without their prior consent, which raises questions for both the right to health and cultural rights. For example, patents have been granted over products derived from indigenous and local community knowledge such as: basmati rice (a product associated with South Asia); a process of extracting oil from the neem tree (used over generations in India); a process of healing a wound by administering turmeric (a culinary ingredient and traditional medicine used in India); and the highly nutritious drought-resistant food crop, Quinoa (grown by indigenous communities in Bolivia and Peru).[20] While existing intellectual property protection can promote the health innovations of indigenous and local communities, the particular nature of this knowledge and the knowledge holders might require significant amendment to be made to intellectual legislation for protection to be comprehensive.

B. Trade in Services and GATS

Trade in services can occur through a number of recognized 'modes' of supply. Each of these supply 'modes' are relevant to the delivery of health and health-related services, and thus to the right to health. For example:

(a) *Cross-border supply (mode 1)*: the supply of a service across a border where both the service providers and the consumer do not leave their respective countries; for example offering telemedicine services over the Internet;
(b) *Consumption abroad (mode 2)*: the consumption of a service in one country by a consumer from another country; for example a Thai patient travelling to Cuba to receive specialized treatment;
(c) *Commercial presence (mode 3)*: a service supplier offering a service in another country through, for example, a subsidiary; for example a Singapore corporation investing in hospital services in Malaysia through a subsidiary;
(d) *Presence of natural persons (mode 4)*: people temporarily entering another country in order to provide a service; for example a Filipino nurse offering nursing services in France for a limited period.

The liberalization of trade in services across each of these 'modes' of service supply opens the health sector to higher levels of international competition. The effect of the liberalization of these 'modes' of service supply on health and health-related services will depend on the specific nature of a country's national health system, the regulatory environment, the government's policies and the level of development and infrastructure of the country.

While accepting that increased trade in health services could increase available resources and improve the state of health care in some cases, it could also lead to regressions in enjoyment of the right to health. For example, increasing opportunities for telemedicine (mode 1), attracting wealthy overseas patients for specialized surgery (mode 2), or increasing foreign direct investment in health services (mode 3) might provide needed resources to improve health infrastructures – yet it might also lead to greater commercialization of health care and gear health provision towards wealthy local and foreign patients, leading to a two-tier health system that caters to the healthy and wealthy rather than the poor and sick. Of course, at times a public health system can also neglect the poor and people traditionally suffering from discrimination and social injustice; however, these issues are often also relevant in the case of higher levels of private participation in services provision. A two-tier system could lead to specialized surgery responding to profitable areas (for example, elective surgery); 'cream skimming', where services are

provided to those who can pay more but need less; the 'brain drain', with health-care professionals moving towards the higher paying private sector focused on patients who can pay, and possibly diverting resources from rural and primary health care towards specialized centres.[21] Thus, while increased trade in services might lead to an improvement in health services for some, it could also generate increased discrimination in the provision of health services – particularly discrimination on the basis of social status – and a withdrawal of resources from the poor towards the wealthy.

This is the situation that a human rights approach to trade in services can help to avoid.

A human rights approach focuses on protecting the rights of all, particularly the potential 'losers', and seeks to design policies accordingly. The right to health requires that health facilities, goods and services shall be accessible and of good quality. Some trade and development theorists accept that there will be some 'losers' in the process of trade liberalization and development which, they argue, can be justified through overall gains to welfare.[22] Yet such an approach cannot be accepted from a human rights perspective. If increased trade in services were to lead to a reduction in rural primary health care, or reduced access for the poor because of user-fees, prima facie this would be inconsistent with the right to health. Equally, if increased trade in services were to lead to sub-standard health facilities, goods and services, this too would prima facie be inconsistent with the right to health. A human rights approach to the liberalization of trade in services examines those effects, and designs appropriate flanking measures to avoid negative impacts on the right to health and to mediate effects that have arisen.

Within this context, the General Agreement on Trade in Services (GATS), as the first multilateral agreement governing all forms of international trade in services, is significant. GATS covers trade in all services, with a few exceptions, and it seeks to establish a multilateral framework of principles and rules for trade in services with a view to the progressive liberalization and expansion of this trade. GATS breaks down trade in services in the four different 'modes' of service supply outlined above.

General obligations under GATS – such as the most favoured nation principle,[23] promotion of transparency in relation to laws and regulations that affect trade in services, and assurances that regulations affecting trade in services are applied in a reasonable, objective and impartial manner – apply to all trade in services within the scope of the Agreement. However, WTO members also make specific commitments setting out the extent to which they grant market access and national treatment[24] in relation to trade in services with other WTO members.

Each country may make commitments – set out in a country-specific schedule – over 11 service sectors, including health. Commitments may be

made across the four modes of service supply outlined above. Thus, each WTO member may commit to the liberalization of trade in services according to the pace it deems appropriate and on the basis of negotiations with other WTO members. Those commitments are, however, subject to further rounds of negotiations to achieve higher levels of market access.[25] In practice, commitments and requests for further commitments in the area of health services remain relatively few at the moment.

Once a commitment is made, WTO members undertake to introduce no new market access and national treatment restrictions unless those restrictions fall within the general exceptions allowed under GATS.[26] A WTO member may only modify or withdraw a commitment after three years and the WTO member will have to enter into negotiations for compensatory adjustments with any country affected by the modification or withdrawal if requested to do so. This underlines the importance of ensuring states open markets only in ways that are likely to promote and protect the right to health. It also raises questions about the appropriateness of the requirement of compensatory adjustments if a decision to modify or withdraw a commitment is linked to the existence of a negative impact on the enjoyment of the right to health. If opening health services to international competition could have the effect of reducing access for the poor to health services, or creating a two-tier health system, it is critical that a WTO member undertakes a right to health impact assessment before making such a commitment. In this way, the WTO member can decide on the correct form, pace and sequence of trade liberalization according to national needs and consistent with the right to health.

III. CROSS-CUTTING ISSUES, TRADE AND THE RIGHT TO HEALTH

A. Gender and Trade

Gender mainstreaming in trade policy – both in making and applying trade rules – requires urgent attention.[27] For various reasons, trade policies and rules can have different implications for men and women. Women and men often have different access to ownership and control of capital, land and other productive resources; this may mean that an apparently neutral trade measure has a different impact on men and women, and this may affect the enjoyment of human rights, including the right to health. For example:

(a) Whether from HIV/AIDS or other ill-health, women often face a disproportionate burden caring for sick family members, reducing their participation in the paid labour force. Trade policies and rules promoting

greater access to affordable medicines could have particularly positive outcomes for women, notably with regard to preventing mother-to-child transmission of HIV;

(b) Market access opportunities provided under mode 4 in GATS (movement of natural persons) can affect women and men differently because women constitute a large proportion of health-care personnel. For example, mode 4 liberalization might have a disproportionately positive effect on women health workers in sending countries: more nurses may be able to find short-term employment in countries that have undertaken commitments in this area. However, this may mask structural inadequacies in the receiving country, such as low wages that fail to attract receiving country nationals – and the flow of health workers out of the sending country may have a negative impact on health services in that jurisdiction;

(c) In many states, women and girls have primary responsibility for fetching water. In these countries, if the liberalization of water services improves or hinders physical access to water, then women and girls will be affected disproportionately.

Gender mainstreaming in the context of trade policy has received some attention in recent years by trade-related inter-governmental organizations, as well as states. For example, Asia-Pacific Economic Cooperation established a Gender Focal Point Network in 2003 to encourage consideration of gender issues within the organization, and there is an Inter-Agency Task Force on Gender and Trade led by the United Nations Conference on Trade and Development (UNCTAD). In Cancún, Mexico, in September 2003, the Government of Canada sponsored a round table on gender equality, trade and development, while the WTO Director-General, delegates and staff participated in a session on women and trade in June 2003 – the first meeting of its kind in a WTO symposium.[28] In 2004, UNCTAD discussed trade and gender at UNCTAD XI in Brazil where the organization also launched a book outlining a framework, including human rights within its breadth, for considering the multilateral trade regime from a gender perspective.[29] However, more explicit formal recognition of the gender dimensions of trade rules will be important if significant advances are to be possible. On a practical level, states should consider undertaking human rights impact assessments – including a gender impact assessment – prior to the formulation of trade rules as well as post-implementation. The question of assessments is discussed in greater detail below.

B. Acceding Countries

The level of trade liberalization commitments undertaken by acceding countries to WTO is an issue of serious concern. As part of the process of accession, would-be WTO members enter into negotiations with existing WTO members to discuss their national trade policies and the level of commitments to trade liberalization they will undertake before they become members of the organization. Some commentators have concluded that 'the process of accession to the WTO is fundamentally flawed'.[30]

First, acceding countries have sometimes accepted demands that are not required under WTO Agreements – known as 'WTO plus' – or have forgone benefits or rights included in WTO Agreements – known as 'WTO minus'. WHO regards 'TRIPS-plus' as 'a non-technical term which refers to efforts to extend patent life beyond the 20-year TRIPS minimum; limit compulsory licensing in ways not required by TRIPS; and limit exceptions which facilitate prompt introduction of generics'.[31] The term 'TRIPS plus' is also used to refer to situations where countries implement TRIPS-consistent legislation before they are obliged to do so. The use of trade pressure to impose 'TRIPS-plus'-style intellectual property legislation could lead member states to implement intellectual property standards that do not take into account the safeguards and flexibilities included under the TRIPS Agreement, which in turn could constrain states from implementing intellectual property systems that provide adequate policy space for the promotion of the right to health.

Second, the process of accession negotiations sometimes leads to demands from stronger WTO members for acceding countries to undertake greater commitments than those made by WTO members of a similar developmental status. A Commonwealth Secretariat study compared commitments to the liberalization of trade in services under GATS made by acceding countries as opposed to those of existing WTO members, and concluded that 'at each level of services sectoral classification, the commitments made by acceding countries were far larger than those made by WTO Members'.[32] Third, a further area of concern is the situation of recently acceding countries that are under pressure to undertake further commitments to trade liberalization in the current round of trade negotiations launched at Doha while they are still implementing and adjusting to the commitments they undertook during the accession process.

While international human rights law is neither for nor against any particular trade rule as such,[33] pressure in trade negotiations, particularly when exercised by stronger trading partners over smaller acceding countries, might lead to unsustainable commitments to trade liberalization that, in practice, diminish states' capacity to realize the right to health. Powerful states have a human rights responsibility of international assistance and cooperation in

relation to the right to health which means, *inter alia*, that they should respect the obligation of an acceding state to realize the right to health of individuals in its jurisdiction. In other words, during accession negotiations, the various human rights responsibilities of all parties should be kept in mind. At root, human rights remain a check against the possible misuse of power.

IV. PROMOTING THE RIGHT TO HEALTH IN THE CONTEXT OF THE FORMULATION AND IMPLEMENTATION OF TRADE RULES

A. Impact Assessments

While a detailed methodology for a right to health impact assessment of trade-related policies is still under discussion,[34] broadly speaking such an assessment involves a transparent consideration of the likely or real impact of trade rules and policies on the enjoyment of the right to health and related human rights, undertaken through a participatory process with concerned individuals and groups.

Such assessments should have a gender perspective and consider the real and potential effects of the proposed policy on disadvantaged and vulnerable groups. The right to health analytical frameworks outlined in section I might provide a useful way of approaching right to health assessments. Thus, the assessment might consider the likely impact of the policy on the availability, accessibility (in its various forms) and quality of health goods, facilities and services. In some instances, assessments will be needed at three different stages: before, during and after the introduction of the policy or rule. It should be noted that article XIX of GATS mandates the Council for Trade in Services to carry out an assessment of trade in services.

On the question of who should carry out assessments, clearly national governments could play a central role. However, some countries may be faced by a lack of national resources to undertake such studies, which raises the question of both technical assistance and capacity-building (in the WTO context) and international assistance and cooperation (in the human rights context). One possibility is for United Nations country teams to give assistance to national governments in undertaking human rights impact assessments of trade-related policies.

While right to health assessments at the national level are important, there is also a need to prepare international assessments that provide the global context, or ‘big picture’. An assessment at the international level could help identify in which health aspects (essential drugs, the movement of health professionals, water services, and so on), and in which geographical subregions,

the international trading regime is leading to improvements and where there are challenges. Read together, national and international assessments could help to identify where international cooperation and assistance is most needed to ensure that the international trading system promotes respect for the right to health in all parts of the world on an equitable basis.

Any modern policy maker, unless purely driven by ideology, will wish to consider, in a balanced, objective and rational manner, the likely impact of a proposed new policy, especially on those living in poverty. Too often, ill-considered policies have had disastrous consequences, especially for the poor, who are often left out of policy-making processes even when they are among those most affected. Right to health impact assessments are an aid to equitable, inclusive, robust and sustainable policy-making.

B. Technical Assistance

The WTO secretariat undertakes technical cooperation and capacity-building activities to assist developing countries in their efforts to implement WTO rules and procedures. At Doha in 2001, ministers decided that technical assistance and capacity-building were core elements of the development dimension of the multilateral trading system – in particular to promote more effective participation in trade negotiations, implementation of WTO Agreements and the formulation of trade-related policy – and they made various commitments that members revised in December 2002. Since then, WTO has significantly increased its focus on – and funds available for – technical assistance and capacity-building. For example, the WTO secretariat works closely with officials from UNCTAD and the International Trade Centre (ITC) through the Joint Integrated Technical Assistance Programme to help African country partners benefit from the multilateral trading system. WTO, together with the World Bank, IMF, UNDP, UNCTAD and ITC, participates in the Integrated Framework for Trade-Related Technical Assistance (IF) which is designed to assist the least developed countries (LDCs) in developing the necessary analytical and policy framework for mainstreaming trade into national development strategies.

A state's human rights commitment to international assistance and cooperation resonates with a WTO member's commitment to technical assistance and capacity-building in the context of trade. These are two mutually reinforcing international commitments.

Technical assistance in the area of trade is a possible vehicle for ensuring that progressive liberalization of trade is conducive to the progressive realization of the right to health. This is not to say that international organizations providing assistance in the area of trade should give technical assistance on human rights. The United Nations has its own technical assistance pro-

gramme in this regard. However, it is important that technical assistance in one area take into account states' obligations in other areas, including the right to health.

States may specifically request technical assistance to enable them to use those flexibilities that are legitimately available to them. Also, since impact assessments have a crucial role to play in the formulation and implementation of equitable trade and health policies, states may request joint UN–WTO technical assistance so that they have the capacity to prepare right to health impact assessments. Further, technical assistance could be requested to help a state ensure consistency between its trade and right to health law. Finally, technical assistance could be requested to help a state identify and establish devices that enhance its policy coherence in relation to trade, health and human rights.

In recent years, concerns have been raised by civil society, and others, that WIPO had been giving 'TRIPS-plus' technical assistance to developing countries, for example assisting states in drafting patent laws that do not fully take into account the flexibilities in the TRIPS Agreement.[35] WIPO, on the other hand, has denied this claim and maintained that it does provide advice on flexibilities in the TRIPS Agreement, although it does not have a mandate to interpret that Agreement. Claims that international organizations are promoting stronger trade rules than might be appropriate to the national context, if substantiated, are of legitimate concern given the significance that flexibilities in WTO Agreements have as a potential means of promoting the right to health, while at the same time implementing trade rules.

C. Trade Policy Review

WTO members undertake periodic peer reviews of individual members' trade policies through the Trade Policy Review Mechanism (TPRM). Members established TPRM to facilitate the smooth functioning of the multilateral trading system by, *inter alia*, improving the quality of public and intergovernmental debate on WTO obligations and the general impact of trade policies. All WTO members are subject to review under TPRM, although the frequency of review depends on the share of world trade of the member under review. The review, while undertaken by WTO members in the Trade Policy Review Body, is conducted on the basis of a report provided by the member under review and a report prepared by the WTO secretariat, which is usually prepared after a country mission. The reports generally contain information on the trade policies and practices of the member. Importantly, the mandate of TPRM specifies that the review should take place against the background of the wider economic and developmental needs, policies and objectives of the member concerned.[36] Such a reference suggests that health considerations

could be raised as part of the wider economic and developmental needs, policies and objectives of a WTO member. There is little evidence that health considerations have been systematically included within the review.

In the introduction to the present chapter, the authors emphasize the problem of 'disconnected' government and the challenge of policy coherence. Policy coherence is difficult to achieve: it demands high-level political commitment and the introduction of a variety of processes and arrangements. The authors suggest that further consideration be given to using TPRM as one of the devices to enhance policy coherence in relation to trade and health.

V. CONCLUSIONS

Dialogue between the human rights, health and trade communities must be not only deepened, but extended to include all the Agreements and issues that arise in the context of the World Trade Organization. The quality of the dialogue would be enhanced by a number of specific initiatives that should be undertaken by a range of actors.

The Commission on Human Rights, for example, should address the development of a methodology for right to health impact assessments in the context of trade. It should also request reports on: the human rights implications of the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures; how the technical assistance provided by the Office of the High Commissioner for Human Rights, WTO, WHO and WIPO could ensure that the progressive liberalization of trade is most conducive to the progressive realization of the right to health; and the relationship between contemporary poverty reduction strategies, trade liberalization and the enjoyment of human rights, including the right to health. The Commission should also request the preparation of guidelines to help human rights treaty monitoring bodies – the Committees established to review the implementation of human rights treaties by states' parties – raise pertinent trade issues in the United Nations human rights periodic reporting process.

For their part, United Nations human rights treaty bodies should give due attention to trade policies and rules in the discharge of their responsibilities, including their examination of state party reports and the preparation of general comments and recommendations to states' parties. Special rapporteurs – independent experts appointed by the Commission on Human Rights to monitor the implementation of particular rights or country situations – and other Charter-based independent human rights experts, when carrying out their responsibilities such as country missions, should consider the impact of trade policies and rules on human rights, including the right to health.

WTO member states should establish effective mechanisms within government that enhance policy coherence between health, human rights and trade. When formulating their trade policies, all states must take into account their national and international human rights obligations, including those relating to the right to health. Developed states must take into account their human rights responsibility of international assistance and cooperation.

If a state chooses to engage in trade liberalization in those areas that impact upon the right to health, then it should select the form, pacing and sequencing of liberalization that is most conducive to the progressive realization of the right to health for all, including those living in poverty and other disadvantaged groups. The form, pacing and sequencing of liberalization should be selected on the basis of right to health impact assessments.

Several provisions in the TRIPS Agreement, such as article 31 (compulsory licensing), have significant potential for the protection of the public interest in areas bearing upon the right to health. WTO member states should place these provisions in national legislation as a way of safeguarding aspects of the right to health. States should be cautious about enacting 'TRIPS-plus' legislation without first understanding the impact of such legislation on the protection of human rights, including the right to health. Equally, wealthy countries should not pressure a developing country to implement 'TRIPS-plus' legislation, unless reliable evidence confirms that such legislation will enhance enjoyment of the right to health in the developing country.

When a member state is under consideration by the Trade Policy Review Mechanism, its Ministry of Health should prepare a paper, if necessary with appropriate technical support from WHO, on the key trade and health issues in that country. This paper should be fed into the TPRM process, as well as providing the basis for a discussion between the Ministries of Health and Trade. Generally, WTO and WHO should deepen their discussions and cooperation on these issues. For example, WHO should be invited to join the country mission that is undertaken as part of the TPRM process.

In the context of the Integrated Framework, a member's Ministry of Health should prepare a paper, with appropriate support from WHO, on the country's technical assistance and capacity-building requirements in relation to trade and health. For example, the paper could consider whether the member requires advice and draft legislation on the TRIPS flexibilities. In appropriate cases, this paper might be a revised version of the TPRM paper signalled in the preceding paragraph.

Consistent with the human rights concept of international assistance and cooperation, acceding states should not be placed under undue pressure from more powerful states to enter into commitments that are 'TRIPS plus' or 'WTO plus'. Also, an acceding country, with technical assistance where

appropriate, should make use of right to health impact assessments before identifying the most appropriate commitments for its particular context.

International organizations also have a key role to play. They must be respectful of members' national and international human rights obligations. The organizations' various policy initiatives – commissions, research projects, and so on – should take into account the relevant human rights obligations of their members. Organizations should take steps to ensure that their secretariats understand the main features of human rights law.

In making or applying trade policies or rules at the national or international level, it is vital to include women in, and ensure a gender perspective on, these processes. There should be training on the gender analysis of trade rules and flows, and in methods of collecting sex-disaggregated trade and trade-related data. Further, the UNCTAD-led Inter-Agency Task Force on Gender and Trade (or one of its member organizations) should convene a conference to examine the actual and potential gender-differentiated impact of trade liberalization. The conference might also consider the most useful role that WTO, and other organizations, could play in gender and trade issues.

WTO, WIPO and WHO should, where this is not already the case, include advice on TRIPS flexibilities in their technical assistance programmes. All parties, especially states and intergovernmental organizations, should urgently endeavour to identify effective and sustainable measures to address the serious human rights problem of neglected diseases.

Finally, civil society, while campaigning for the integration of the right to health into all national and international policy-making processes that relate to trade, should give particular attention to the development of participatory mechanisms (especially for the poor), right to health impact assessments, and effective accountability arrangements.

NOTES

* Paul Hunt is Professor of Law and Member of the Human Rights Centre, University of Essex, UK, and Adjunct-Professor of Law, University of Waikato, New Zealand. In 2002, he was appointed UN Special Rapporteur on the right to health. Simon Walker is a Human Rights Officer at the Office of the High Commissioner for Human Rights. He works on a range of human rights issues, with a particular focus on the protection of human rights in economic processes such as trade liberalization. The opinions expressed by Simon Walker in this article are his own and do not necessarily represent the views of the United Nations or the Office of the High Commissioner for Human Rights. The co-authors are very grateful to Judith Bueno de Mesquita, Lisa Oldring, Helena Nygren-Krug, Nick Drager, Caroline Dommen, Lisi Tuerk, David Fidler, Janet Dine and Meg Jones for their contributions to this chapter. Any errors are the responsibility of the co-authors.

† The contents of this article are closely based on the report of the Special Rapporteur on the right to the highest attainable standard of physical and mental health upon his mission to the World Trade Organization in July and August 2003 (E/CN.4/2004/49/Add.1). The methodology adopted during the mission is outlined in paragraphs 1–5 of the Special

Rapporteur's report. The report can be found on the website of the Office of the High Commissioner for Human Rights – http://www.ohchr.org.

1. Among the Agreements and issues that are omitted in this particular study are the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, and the WTO dispute settlement. The authors recommend the High Commissioner's reports on: TRIPS (E/CN.4/Sub.2/2001/13), agriculture (E/CN.4/2002/54), GATS (E/CN.4/Sub.2/2002/9), investment (E/CN.4/Sub.2/2003/9), and non-discrimination (E/CN.4/2004/40). The reports are available on the website of the Office of the High Commissioner for Human Rights, http://www.ohchr.org.
2. It is accepted, however, that the legal argument that WTO, and its secretariat, themselves have international human rights responsibilities deserves urgent consideration.
3. For his part, the Director-General of WTO has also affirmed the vital importance of the goals. See, for example, 'Trade policies cannot work on their own, Supachai tells development seminar' Second Integrated Framework Mainstreaming Seminar, 1 November 2002, at http://www.wto.org (accessed 21 March 2005).
4. Some NGOs are also encouraging states to integrate human rights into their trade, economics and development policies, for example, 3D-Trade, Human Rights, Equitable Economy. See www.3dthree.org.
5. This position has also been adopted by the Committee on Economic, Social and Cultural Rights in General, Comment No. 3, paragraph 8, and in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paragraph 6.
6. The preliminary report of the Special Rapporteur on the right to health outlines the international, regional and domestic sources of the right to health. It also identifies the numerous recent resolutions of the UN Commission on Human Rights that affirm, or bear closely upon, the right to health, as well as international conference outcomes, such as the Millennium Declaration, that relate to the right to health (E/CN.4/2003/58, paras. 10–21).
7. See the WHO website, http://www.who.int (accessed March 2005).
8. See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 14 on the right to health (E/C.12/2000/4); *Centre for Economic and Social Rights and Social and Economic Rights Action Center v Nigeria*, African Commission on Human and Peoples' Rights, Case No. 155/96; *Jorge Odir Miranda Cortez et al v El Salvador*, Inter-American Commission on Human and Peoples' Rights, Case No. 12.249; *International Commission of Jurists v Portugal*, European Committee of Social Rights, Complaint No. 1/1998. At the national level, see, for example, the recent decision of the Constitutional Court of South Africa in *Minister for Health v. Treatment Action Campaign*, Constitutional Court of South Africa, case CCT 8/02, paragraph 135 (2) (a).
9. See, for example, Appellate Body Report, EC – Measures Affecting Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R; Appellate Body Report, EC – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R.
10. There is a growing literature on the relationship between human rights and trade law, recent additions including Marceau, 'WTO dispute settlement and human rights', *European Journal of International Law* (2002), **13**(4), pp. 753–814, and Howse and Mutua, 'Protecting Human Rights in the Global Economy', International Centre for Human Rights and Democratic Development, Canada, 2002. Also see S. Leader, 'Human rights, international trade, and competing values: mapping the terrain', in Macrory and Appleton (eds), *Understanding the WTO: Perspectives from Law, Politics, and Economics*, Kluwer, 2004, and Caroline Dommen, 'Raising human rights concerns in the World Trade Organization', *Human Rights Quarterly* (2002), **24**.
11. See the preliminary report of the Special Rapporteur on the right to health (E/CN.4/2003/58, paras. 22–36).
12. For a helpful discussion on the differences – and similarities – between the two principles, see E/CN.4/2004/40.
13. J. Dine, *Companies, International Trade and Human Rights*, Cambridge University Press, 2005, chapter 6.
14. CESCR general comment No. 14, paragraph 12. It should be noted that CESCR has a

fourth very important component – *acceptability*. For present purposes, the co-authors read this component into the first dimension (non-discrimination) of the second component (*accessibility*).

15. See the preliminary report of the Special Rapporteur on the right to health (E/CN.4/2003/58, paras. 73–81).
16. See General Comment of the Committee on Economic, Social and Cultural Rights No14, 'The right to the highest attainable standard of physical and mental health', (E/C.12/2000/4: para 43(d)).
17. The TRIPS Council consists of representatives of all WTO members and oversees the operation of the TRIPS Agreement.
18. There has been concern, for example, that the Indian Patents Amendments Bill introduced in 2003 was unclear in ways that could ultimately inhibit the export of medicines produced in India under compulsory licence to countries with insufficient or no manufacturing capacities in the pharmaceutical sector. See also 'Intellectual property protection dogs regional trade deals' in *Bridges*, International Centre for Trade and Sustainable Development , Year 9, No. 1 January 2005, p.14.
19. For example, Australian indigenous peoples have used copyright to protect artistic works, indigenous communities in Panama have used industrial design protection to protect textile designs, Andean indigenous communities have used trademark protection and appellations of origin to distinguish their products or services from others on the market, while communities in the Venezuelan Amazonian Region have used trade secrets to protect a database containing genetic resource information. Similarly, some forms of intellectual property protection not included in the TRIPS Agreement can be helpful to protect the innovations of indigenous and local communities. For example, utility model protection can be a low cost and effective way to protect innovations and improvements to existing devices and objects. See, for example, D. Vivas Eugui and Manuel Ruiz Muller, 'Handbook on mechanisms to protect the traditional knowledge of the Andean region indigenous communities', Prepared for the UNCTAD Biotrade Initiative, UNCTAD, Geneva, November 2001, pp. 11–20; WIPO, 'Final report on national experience with the legal protection of expressions of folklore', Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, third session, World Intellectual Property Organization, Geneva, 13–21 June 2002 (WIPO/GRTKF/IC/3/10).
20. A. Gonzales and C. Monagle, 'Biodiversity & intellectual property rights: reviewing intellectual property rights in light of the objectives of the convention on biological diversity', Joint Discussion Paper, World Wildlife Fund, November, 2000, section I; G. Dutfield, 'Intellectual property rights, trade and biodiversity', International Union for Conservation of Nature and Natural Resources, Earthscan Publications Ltd, UK, 2000, p. 67.
21. R. Chanda, 'Trade in health services', *Bulletin of the World Health Organization*, **80**(2), 2002, pp. 158–63.
22. See, for example, D. Ben-David, H. Nordstrom and L.A. Winters, *Trade, Income Disparity and Poverty*, WTO Special Study No. 5, Geneva, 2000.
23. GATS, article II (1) provides that 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'
24. GATS, article XVII (1) provides that 'In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.' National treatment and most-favoured nation treatment are the two elements of the trade principle of non-discrimination.
25. GATS, article XIX (1).
26. GATS, article XIV.
27. See, for example, M. Williams, *Gender Mainstreaming in the Multilateral Trading System*, Commonwealth Secretariat, London, 2003.

28. Report: http://www.wto.org/english/tratop_e/dda_e/symp03_cida_e.doc.
29. United Nations, *Trade and Gender: Opportunities and Challenges for Developing Countries*, United Nations Conference on Trade and Development, Geneva and New York, 2004.
30. R. Grynberg, V. Ognivtsev and M.A. Razzaque, *Paying the Price for Joining the WTO*, Commonwealth Secretariat, London, 2002, p. 39.
31. WHO, 'Globalization, TRIPS and access to pharmaceuticals', *WHO Policy Perspectives on Medicines*, No. 3, March 2001, p. 4.
32. Ibid., p. 39.
33. See p. 229.
34. The United Nations Open-Ended Working Group on the Right to Development has recently discussed impact assessments of trade and development policies in the context of the discussion on the right to development. See, for example, United Nations, *Report of the High-Level Task Force on the implementation of the right to development*, Working Group on the Right to Development, January 2005, (E/CN.4/2005/WG.18/2). See also S. Walker, 'Human rights impact assessments of trade-related policies', in *Sustainable Development and Trade*, Kluwer Publishing (forthcoming).
35. See, for example, C. Correa, *Intellectual Property Rights, the WTO and Developing Countries*, Third World Network, London, 2000.
36. The Final Agreement Establishing the World Trade Agreement (1994), Annex 3, A(ii).

10. Time for a change: Reforming WTO trading rules to take account of reparations*

Fernne Brennan

INTRODUCTION

The vision of a world of equals outlined in the policy documents of the World Conference against Racism and Xenophobia, where racism is to be combated by effective reparations,[1] will not materialise without a fundamental change in the application of the international trading rules of the World Trade Organisation which impact on the lives of people in developing countries such as Guyana as they struggle to trade in the international markets for sugar, rice and bananas. It is argued that the rules and the management of them currently operate to the disadvantage of the poor in developing countries.[2] The poor of these economies represent one of the targets of concern for the World Conference Against Racism (2001) (WCAR),[3] and goals for action of the Durban Declaration and Programme of Action.[4] The latter recommended that Africans and people of African descent as victims of this slave trade[5] and the subsequent periods of colonialism and post-colonialism currently suffer from contemporary forms of racism and racial discrimination[6] and should be proper subjects for reparations from the West.[7] The conference acknowledged that the Transatlantic Slave Trade was a human tragedy, a crime against humanity and a major source of current racism,[8] racial discrimination, xenophobia[9] and intolerance.[10] Advocates of reparations such as the representative of Trinidad and Tobago contend that the World Conference 'should call upon those States that have practised, benefited or enriched themselves from slavery, the Transatlantic Slave Trade and indenture ships to provide reparations to countries and peoples affected, and to adopt appropriate remedial and other measures in order to repair these consequences.'[11] This paper argues for this injustice to be remedied through reparations[12] in the form of compensation to the communities harmed, rather than to individuals, by way of change to the operation of trading rules of which the World Trade Organisation (WTO) is guardian. This change must come through the prioritisation of preferential trading

agreements in the teeth of liberalised equal treatment trading rules that benefit the North.

CONTEXT

The historical context to the reparations can be briefly understood as the following. Western states have profited from the slave trade by the imposition of 'inhuman and degrading treatment'[13] on upwards of 20 million African human beings.[14] This inhuman and degrading treatment has persisted through the imposition of colonialism. These eras together with imperialism have been responsible for the racial victimisation of the 'native' rather than the 'slave'.[15] Now, in the time of global capital the West continues to perpetuate racial discrimination. This occurs through the way in which these post-colonial economies are forced to engage in rules that are rigged against them and where it is contended that the imposition of double standards lock the Black poor out of the benefits of trade, which are designed, or in effect, substantially benefit the West.[16] These double standards amount to racial discrimination because they form a continuous web of racial exploitation. How can a claim to change those trading rules be made using the reparations argument as the justification for such change? It is important to address this question now particularly given the fact that the meetings have taken place to address the reparations question. A meeting held by a Working Group of Experts on People of African Descent[17] aimed to address this problem without proper consideration of the inequality inherent in institutional rules such as the WTO trading rules. The issue of reparations for slavery took on global significance at the recent World Conference WCAR. Racism and racial discrimination have been identified as faced by people of African descent requiring measures to ensure full and effective access to justice.[18] It is argued that this racism is sourced in the Transatlantic Slave Trade – described by 18th century commentators as 'the mainspring of the machine which sets every wheel in motion.'[19] This inhuman trade furnished the industrial revolution, comprised of slaves imported from Africa, exports and ships from the West and raw materials of the colonial plantations.[20] This period was an appalling tragedy in the history of humanity. An economically determined slave trade – ideologically justified and rationalised by reference to ascribed racial differences – subjugated people of African descent as inferior beings and resulted in major sources of racism faced by people of African descent today.[21] The imperialism and colonialism – which evolved from the Transatlantic Slave Trade – was also a source of racism suffered by people of African descent. The systems of imperialism and colonialism, described as a 'form of conduct and social organisation'[22] accepted and practised by the major powers, are

now proscribed as one of the 'paradigms of injustice'.[23] These periods constituted forms of institutional racism consisting of the separation and subjection of African and Caribbean economies and their inhabitants for the political benefit and economic well-being of the Motherlands of England, France, Italy, Germany and so on.[24] Fanon discusses the notion of 'being for others of which Hegel speaks'[25] as the essence of these periods of experienced exploitation. Post-colonial Africa and the Caribbean did not evolve free of such institutionally racist practices and ideologies which developed during those periods. Notions of inferior peoples and the exploitation of the economies they were forced to inhabit in the Caribbean did not disappear; rather they are seen as essential to the maintenance of white power structures keen to protect political and economic interests and maintain indirect rule albeit through Western dominance in international trade relations. The trading rules in fundamental areas such as the banana, sugar and rice industries injure former slave colonies and the mainly poor that inhabit them today. Guyana, a former British colony, has agribusiness that includes rice, sugar and bananas. It has been suggested that 'The World Trade Organisation and its Agreement on Agriculture [puts] Guyanese small scale farmers in unfair competition with the agribusiness of the United States.'[26] This constitutes modern day racism in the form of institutional racism. Institutional racism has its roots in these past factors that have bled the economies of developing countries. There is a need to tackle this form of global economic discrimination through an understanding of how institutionally racist practices of the past have become the pattern of processes and practices of the trading rules of the World Trade Organisation (WTO).

INSTITUTIONAL RACISM AND THE WTO

The Geneva-based WTO,[27] the successor of the General Agreement on Tariffs and Trade (GATT),[28] describes itself as 'the only international organisation dealing with global rules of trade between nations.'[29] The WTO was set up in 1994 under the Marrakesh Agreement.[30] Its prime function is the free flow of trade, the aim of which is to benefit both consumers and producers and the underlying result is to have in place 'a more prosperous, peaceful and accountable economic world.'[31] The overarching goal is to 'improve the welfare of the peoples of the member countries,'[32] over three-quarters of which are developing countries. This goal is pursued through Agreements that relate to a 50-year-old multilateral trading system which is administered by the WTO.

It is argued that institutional racism is the cement that holds together past abuse of African and Caribbean economies with current exploitation of the same through the operation of international trade rules of which the WTO is

custodian. Institutional racism is a form of racism that consists of overt and covert acts by the total White community against the Black community.[33] It is the White community that controls those institutions and modus operandi that impact on the economies of the communities of Black people. It is the White community that benefits from this relationship with the Black community, a relationship that is not borne out of negotiation and a treatment of Black people as equals. This relationship can be seen in the way in which international trade practices based on the notion of formal equality effectively lock the poor of these economies out of the possibility of sustained development. It is argued that this relationship can be more fruitfully understood in the context of the refined definition of institutional racism as:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin which can be seen or detected in processes; attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people.[34]

'Discriminatory … Processes …'

Institutional racism consists of processes that result in discrimination against people on the basis of factors such as colour. An examination of the rules shows that this discrimination is manifested in the operation of international trading rules rather than any explicit or implicit rule. Thus it is stated that 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'[35] Here the WTO appears as a neutral body whose function is to ensure that the institutional paradigm operates effectively for all members. Furthermore, the international legal instrument through which the WTO ensures that trade is fair and free is through a system of negotiated rules by which members of the WTO are legally bound.[36] These rules are referred to as Multilateral Trade Agreements[37] which form 'integral parts of the Marrakesh Agreement, binding on all Members,'[38] and Plurilateral Trade Agreements[39] which 'are binding on those Members'[40] who have agreed to them.[41]

These legal rules are termed WTO agreements, of which there are about 60 (along with several separate commitments entitled 'schedules'). The agreements relate to matters such as the trade in goods ('GATT' is the main rule book for the goods trade) and services, intellectual property, subsidies and anti-dumping. As a result of these agreements WTO members are said to work within rules that '… spell out principles of liberalization … [with] commitments to lower custom tariffs and other trade barriers …'[42] WTO agreements relating to goods are contained in the General Agreement on Tariffs and Trade

(GATT).[43] This provision has provided the opportunity for the liberalisation of the goods trade for member states. This has come about through legally binding arrangements between members that are said by the WTO to enable barriers to trade to be less onerous in areas such as customs duties. Similar agreements exist in the service sector for matters such as banking, insurance, telecommunications and the like.[44] The agreements relating to these are contained in the General Agreement on Trade in Services (GATS). Once again, there does not appear to be anything on the face of these rules that would bear evidence to institutional racism. Indeed from a developing countries' point of view the importance of the WTO is its guarantee concerning non-discriminatory access to trade markets. The Marrakesh Agreement purports to enshrine notions of fairness, non-discrimination and prosperity. These are demonstrated in the preamble to the Marrakesh Agreement respectively as follows:

> Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development
>
> Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations
>
> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Explicit reference to the needs of developing countries in the pursuit of international trade echoes the views of thinkers such as John Stuart Mill, who have long since argued that, 'The superiority of one country over another in a branch of production often arises only from having begun it sooner. … a protecting duty, continued for a reasonable time'[45] is necessary in order for the infant industry to 'catch up' and compete on an equal footing with the major players. There is some recognition therefore that, given past exploitative relations against the developing economies of Africa and the Caribbean and the West, some accommodation should be made to enable them to compete in world markets.

This recognition is borne out by the fact that the WTO has taken some account of the very special position that developing countries and the least

developed countries (LCDs) have found themselves in as members of this institution – preferential treatment. The preferential treatment system evolved through the 1986–1994 Uruguay Round, signed at Marrakesh in 1994.[46]

The operation of preferential treatment has been questioned as one that does not enable 'effective participation of LCD's in world trade'[47] so that they might 'cement' this 'integration of developing country economies into the global trading system.'[48] The importance of taking account of the 'special needs' of developing countries was enshrined in provisions such as Article XVIII, Part IV allowing for 'flexibility in the use of trade measures to protect infant industries',[49] and the support by encouraging countries in terms of access to their markets.[50] Thus it is said that encouraging the special treatment of developing countries includes directing provisions towards them as 'beneficiaries of many special treatment clauses.'[51] In the Agreement on Agriculture, for instance, the preamble acknowledges that there should be put in place 'special and differential treatment of developing country members' as an 'integral part of this agreement.' Furthermore, there is an expectation that 'developed country members will provide greater market access for agricultural products of particular interest to developing countries, including the fullest liberalisation of trade in tropical agricultural products'[52] Yet the workings of the Marrakesh Agreement show that in practice recent WTO rulings which have impacted negatively on poor economies 'clearly show the ruthlessness of world trade.'[53]

The Guyanese economy is quite clearly affected by changes in its trade relations concerning sugar.[54] For instance, it is estimated that of its 750 000 population, 600 000 of them live in areas where the sugar industry employs people. About 20 000 of this number are employed in the industry and another 10 000 are employed in connecting areas. Thus it has been suggested that 'an average of four people depend on one employed person, (therefore) no less than 150 000 people rely on the sugar industry for their livelihood.'[55] It is through the slave trade and plantation system, that has been 'inherited' by free labour, that many find themselves locked in to this position of vulnerability. The relationship between the sugar trade, the Guyanese economy and its vulnerability can be traced back to the slave plantation systems developed by Western Europeans. The Dutch East India Company was the one to introduce the plantation system where products such as sugar were grown using West Africans as slaves when attempts to enslave the native Arawaks and Caribs generally failed.[56] Later the French and British took parts of Guiana for their own purposes and Britain took three of the Dutch colonies which it renamed British Guiana.[57] The plantation system was developed to serve the needs of the markets of the plantation owners and their trade with the rest of the world. For instance by 1762, Demarara in Guyana had 93 plantations.[58] Evidence suggests that 'the social life of Western Europe in the 18th century

depended on the products of slave labour. In homes and coffee houses, people met over coffee, chocolate or tea sweetened with Caribbean sugar.'[59] The clear aim of the development of the plantation system was to make quick profits. Many profited from the trade in slavery amongst whom were John Gladstone (1764–1851), a large estate owner in British Guyana.[60] According to Williams,[61] Gladstone was a slave owner in the West Indies who argued that the slave trade was necessary. He was able to obtain several large plantations in what was British Guiana (Guyana) which he used to grow sugar, and subsequently sold on the Liverpool Exchange.[62] The wealth generated from this trade activity helped to fuel trade with Russia, India and China.[63] Despite its appalling impact on the lives of those subject to the plantation system,[64] Gladstone and his family defended the system of slavery on the family estates in Guiana.[65] This system of exploitation was justified as essential to the progression of trade in areas such as sugar. As Williams put it, 'sugar meant labor – at times the labor has been slaves, at other times nominally free'[66] Williams further observed that 'Ultimately, like other colonial territories, [Guyana] was essentially an area of exploitation, in which the European engaged in a narrow range of activities exclusively for the benefit of the master class.'[67] This system of exploitation of the land, the people used to work it and the racist ideology that unquestioningly exploited the skin of Black men, women and children, continued after the emancipation of the African slaves in 1834 when slavery was abolished. However it was the skin of Indian indentured labour according to Williams, that filled the hole created by the 'emancipation of the Negro and the inadequacy of the white worker.'[68] '[D]eprived of his Negro'[69] the sugar plantation owners looked to the 'the Indian from the East. India replaced Africa; between 1833 and 1917'[70] importing 238 000 Indians into the region.[71] This was done to benefit the West. It was Indian indentured labour that is said to have been 'enticed by promises of land'[72] in Guyana to work the rice fields. Fried describes rice as the 'bloodline for Guyana'[73] because fluctuation in global price impacts on the 150 000 people who are directly or indirectly employed in the industry. When prices are good, the people and the economy benefit. The reverse is also true. Big and small farmers have been 'punished' for toeing the line in the world market for rice, whilst these rules which, it is argued, are based on a 'false presumption that markets can be free and equal',[74] allow 'wealthy nations to play fast and loose when it suits them'.[75] In relation to the rice industry, Guyana sought to improve her position in the world market for rice by taking advantage in the 1990s of the EU's preferential trading agreement which was offered to ACP countries[76] under the Lomé I Convention. This entailed the use of 'non-reciprocal preferences for most exports from ACP countries to EEC'.[77] This understanding enabled Guyana to export 90 per cent of her rice duty-free. The profits made from rice exports enabled farmers and others to

borrow money in order to invest in the infrastructural elements that would make them more productive. However, in the mid to late 1990s the EU imposed restrictions on the rice imports from Guyana. This restriction was imposed to meet with requirements placed on the EU by WTO rules.[78] These rules had a negative impact on the preferential arrangements enjoyed by Guyanese rice exports. In 1996 the new quotas imposed reduced her rice exports to the EU from 90 per cent to 19 per cent of the total. Earnings also dropped[79] with a ripple effect that was to impact on the lives of the Guyanese people. Not to be defeated, Guyana increased her rice exports to the CARICOM countries in the Caribbean.[80] Here Guyana was once again offered preferential treatment on her rice exports. The biggest importer of Guyanese rice was Jamaica, which absorbed 79 000 to 100 000 tonnes a year.[81] Guyana's market share rose in 1997 from 1 per cent to 44 per cent.[82] However, Guyana's competitor was the USA, traditionally the main supplier of this product. During this period the price for rice was deliberately driven downwards by rice brokers. Whilst the US Government was able to subsidise its participants in the production and export of rice to Jamaica, the same could not be said for Guyana. An already heavily indebted government had no leverage to support its rice farmers. In terms of equal treatment, two related things should be noted at this juncture. One, is that the rules of the WTO in relation to the use of preferential treatment of developing countries appears to be subject to the more general rule of equality of treatment between the membership. However, this notion of equality is limited and its application quite damaging in situations where it is quite clear that developing countries such as Guyana do not start off equally. A further, unequal starting point is one imposed through the historical relationship that created a plantation-mono-crop system in Guyana. The West (USA) has clearly had the advantage of using the slave trade and subsequent periods in ways that have allowed diversification and dominance in world trade markets. Preferential trading rules are built on the understanding that historically, developing countries have poor economies compared with the stronger economies of the West and the USA. This impoverished position is one that can be traced back to an international trading regime that 'has encouraged Guyana to develop a mono-crop export sector oriented towards preferential markets in the industrialised countries.'[83] The recognition of this problem whilst apparently catered for within the idea of preferential treatment withers away when it comes to putting this idea into practice. Thus the relatively few gains made by the poorer countries are trumped by the way in which the richer countries are able to play the WTO rules (along with the shelter of state subsidies when market prices drop),[84] to their advantage.

Like rice, the markets in sugar have been used to fuel the wealth of the industrialised nations. Like rice, the interest in sugar and its profitability for

the West has come at the expense of people and the lands they were forced onto or coerced into cultivating. No regard was paid to the slaves who were deliberately stolen from Africa to work the Guyanese plantations when attempts to enslave the local population of Caribs and Arawaks failed.[85] Nash points out that 'Sugar and tobacco production … developed hand-in hand with co-erced and degraded labor: grasping for wealth, profit-maximising English planters relentlessly sought overseas markets, ruthlessly exploited fellow humans, accumulated narrowly concentrated power, and resonated very little to liberal ideas and higher values.'[86]

Despite the abolition of slavery in Guyana in 1834 and her eventual political independence in 1966 she remains a 'pawn' in the hands of the free trade market, like many similarly placed Caribbean countries. It is in this sense one sees institutional racism flourishing and this is why the call for the incorporation of a reparative framework in the operation of these trading rules is so important. Evidence suggests that when economies like Guyana try to take advantage of preferential terms in trade agreements in relation to rice and sugar, there is a 'sting in the tail'. The complexities in the world trade arena which are buttressed by WTO rules tend to favour those economies where the resources of their governments are able to 'soften' the blow of the consequences of sticking to the rules. Thus the strict letter of WTO that required the EU to comply with non-discrimination requirements, that is 'mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'[87] in relation to the rice and sugar markets, disadvantages Guyana. Her source for exports on preferential terms virtually dried up. Moreover, whilst the rice market was depressed by the brokers, her potential for export earnings also reduces significantly. At the same time the American agri-business was able to rely on government subsidies to tide them over during this problematic era. In 1999 this was to the tune of US$446 million under the US Department of Agriculture's Production Flexibility Contract and further payments of US$470 million and loans of US$395 million.[88] Clearly the market is not dealing with economies of equals. The Guyanese government had no reserves to provide a cushion for its farmers and related workers. It has not been in a position to acquire the reserves from export earnings that would enable it to do so. According to Bhagwab Lall (the Chairperson of Leguan district 3), 'Whether you be a big farmer or a small farmer, you are punished for being a rice farmer.'[89] Furthermore, despite her willingness to enter the trading rules of the WTO on its terms – with the promise of 'the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic devel-

opment',[90] this promise has not materialised. Like many Caribbean economies, she is still deprived of the income that would enable her to maintain a viable economy. The rules that give lip service to the recognition of the need for ex-colonies to have a fair share of the market – preferential agreements – are just that. This is clearly an unacceptable position to be in, and one that needs to be given urgent attention because we are not only talking of a loss of profits but the way in which the present global economic order supported by the WTO agreement contributes to the maintenance of huge debt in the developing countries and the 'persistence of poverty.'[91]

'… Unwitting Prejudice, Unwitting Racism'

It is argued that the dispute resolution mechanism of the WTO set up to deal with international trade disputes operates against the interests of developing countries in a way that shows unwitting racism at work in the impact of decisions. Article III(3) of the Marrakesh Agreement provides that 'The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.' The DSU is thus the forum where disputes may be heard and issues resolved. At least 300 cases have been heard in this way. The DSU machinery plays a vital role in the enforcement of rules relating to the free flow of trade. However, this free flow operates against the interests of the Black people of the Caribbean and Africa, demonstrating that 'racism … can influence … service delivery not solely through the deliberate actions of a small number of bigoted individuals, but through a more systematic tendency that could unconsciously influence … performance generally.' It is argued that this system is an example of a collective failure to provide an adequate service to African and Caribbean economies, the vast majority of whose inhabitants are Black. This racism occurs when WTO dispute resolution machinery hears disagreements between parties and decides in favour of a framework that prioritises the formal notion of equality above that of the preferential trading system.[92] This treatment of developing countries by the WTO amounts to an invitation of 'the might to the decision-making table while shunning the powerless … ' because the WTO 'facilitates the gouging of super-profits from women, workers and the poor, and threatens the environment with its one-size-fits-all policies.'[93] The workings of the DSU throw up dynamics that allow institutional racism to flourish through the impact of its decisions. The rulings take no account of the special position of developing countries which

> Durban recognized that colonialism led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and

> people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences.
>
> The effects and persistence of slavery and colonialism – its structures and practices – have been among the factors contributing to lasting social and economic inequalities in many parts of the world today.[94]

The recent example of the EC sugar case will suffice to demonstrate the point of the argument. This concerned subsidies for sugar. The allegations made by Australia, Brazil and Thailand were that the European Union's exports of sugar were subsidised in a way that conflicted with the rules of the WTO Agreement. Two grounds of challenge were made by the complainants. The first was that 'the export of so-called "C sugar" [benefited] from export subsidies with revenues from production under A and B quotas.'[95] With the second complaint the allegation was that there were 'export refunds on 1.6 million tonnes of sugar … equivalent to preferential EU imports from ACP[96] countries and India.'[97] On the basis of these two points the complaints claimed that the EU went beyond subsidies allowed under the WTO Agreement. The EU countered that by refuting both claims. The EU made further arguments that its behaviour in relation to the 'exports of ACP/India sugar [were] in full conformity with EU's schedule of commitments and WTO provisions regarding agricultural export subsidies.'[98] In ruling against the EU (15 October 2004) on this issue the World Trade Organisation Panel decided that the EU had exported 'more sugar with export subsidies than it is permitted to do under the WTO Agreement'.[99] The decision of the WTO panel (which can be appealed against)[100] has been criticised as causing, amongst other things, concern in relation to the 'preferential access enjoyed by developing countries into the EU.'[101] The ACP countries have expressed concern that the ruling of the WTO will affect the preferential agreement that they have with the EU.[102] Since it is difficult for these countries to compete in the world sugar market it has been suggested that these preferential arrangements give ACP countries a chance to trade on a more equal footing than would otherwise be the case. It is reported that under the agreement between the EU and the African, Caribbean and Pacific (ACP) countries concerning sugar, the EU would buy sugar from the ACP countries at more than three times the world price and then re-export it.[103] The ACP worry that the WTO ruling will not only endanger exports to the EU but also bring dire changes to the whole of the sugar industry for this region which has for some time had a relationship under the ACP/EU Sugar Protocol with the EU. There is some disagreement as to the extent of the impact of the ruling. However, it is clear that the new EU sugar regime will lock out many of the poor since it amounts to 'export dumping' that inhibits access for poor countries.[104] This 'export dumping' leads to a depression in the world market for sugar and consequently a reduction in foreign exchange.[105] The ACP argue that the challenge from

Australia, Brazil and Thailand regarding the EU sugar regime will affect ACP states because of their vulnerability, the fact that many are landlocked and small island states that are single commodity producers.[106] This single commodity is one developed through the inheritance of plantation land, subsequently geared to the goods of value to the West. Furthermore, the type of ruling from the WTO tends to conflict with agreements such as the Lomé Convention which provides that

> Under the sugar protocol, the Community agrees to buy a fixed quantity annually of sugar from ACP producers at attractively high guaranteed prices aligned to EU's own internal sugar price and establishes annual quotas for sugar producers, a preference which has been valuable to the economic development of certain ACP states – Mauritius, Fiji, Guyana and Barbados[107]

Thus a system that is aimed at widening access for some of the most vulnerable economies in the world is itself under threat as a consequence of WTO rules that are based on liberal notions of equality. The banana trade of developing countries has received a similar fate. The WTO dispute panel ruled in favour of the US concerning preferential trade entry to Europe for Caribbean bananas. The history of this dispute involved a decision by the European Union in 1993 to improve the banana market in imports. This involved the granting of preferential treatment to the EU's overseas territories and former colonies[108] and a correlative restriction on imports in bananas from a number of countries, amongst which was Latin America. This move by the EU enabled former African colonies, former colonies in the Caribbean and the Pacific to export bananas to the EU at lower costs and in higher quantities while[109] other countries had elevated duties to pay and limitations placed on the number of bananas they could export to the European market. Furthermore, the EU obliged entities involved in the business of the export of bananas to the European market to acquire a licence for the importation of the produce – this system was more favourable to the African and Caribbean countries. The EU's regime was challenged by the US companies of Del Monte, Chiquita and Dole that were operating out of Latin America at the WTO dispute settlement panel. The allegation was that the EU's trade restrictions in bananas breached the GATT and a number of trade agreements that were the responsibility of the WTO. In addition they argued that there was an infringement of Article XIII of the WTO.[110] In its defence the EU argued that the regime it had set up was covered by the Lomé Convention of 1975. Of the four conventions the first Lomé Convention was signed in 1975. The aim of this Convention was to encourage trade relations with the Commonwealth upon Britain's accession to the European Community. In terms of the subject matter under discussion the relevant term of this agreement was 'the non-reciprocal preferences for most exports from ACP countries to EEC'.[111] As an

international aid and trade agreement dealing with relations between ACP and the EU this convention was 'aimed at supporting the "ACP states'"[112] efforts to achieve comprehensive, self reliant and self-sustained development,'[113] through a mechanism of 'non-reciprocal preferences for most exports from ACP [African, Caribbean and Pacific] countries to EEC.'[114] A further argument made by the EU was that the Uruguay Round Agreements also safeguarded the banana trade arrangements.[115] Despite the arguments mounted by the EU in defence of its preferential trade entry to Europe for Caribbean bananas, the WTO Appellate Panel found against the arrangement in 1997 on the basis that the import licence scheme breached the rules of non-discrimination in relation to the banana market participants in the non-ACP countries.[116] According to the panel, 'the tariff quotas enjoyed by ACP countries must be eliminated or provided to all'.[117] This ruling tends to reflect a traditional notion of equal treatment influenced by the Aristotelian perspective that equality is where a man is 'assumed to have no more than his share, if he is just (for he does not assign to himself more of what is good in itself unless such a share is proportional to his merits …)';[118] the imperative is thus based on the notion of equality of opportunity found in discrimination law, meaning that like should be treated alike. The idea of equality appears to be premised on the paradigm of 'equality of starting points' and not 'equality of outcomes'. Thus a situation can arise where if everyone is treated equally badly then that would satisfy the idea of equal treatment, as occurred in *Palmer v Thompson,*[119] since there is no unequal treatment. There is a principle of non-discrimination contained in the preamble to the WTO Agreement which reads: 'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.[120]

This principle, read in its narrow sense, would presuppose equality of treatment in terms of allowing all participants an equal chance to participate in the market for the trade in bananas. Thus on the face of it the European Union's system of favourable tariffs for ACP countries and the licensing requirements would seem unfair. However, scholars in the field of discrimination law have argued that such liberal notions of equality equated with equality of opportunity are limited in terms of providing effective change in situations where there has been historical discrimination such as that between the 'developed' economies and the 'developing' ones.[121] This is a factor explicitly recognised in the WTO Agreement: 'Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.'

Fredman argues that one of the problems with this notion of equality is that it does not have any substantive[122] underpinning. Such an underpinning should recognise that equality of treatment in its narrow liberal sense may in practice reinforce discrimination. Thus the impact of this ruling is said to have caused 'enormous social and economic problems in the windward islands where bananas represent as much as 60 percent of their economies.'[123] However, it is highly unlikely that the maintenance of the system of preferential treatment would have had a similar impact on wealthy American-owned businesses in Latin America. Furthermore, the ruling tends to ignore the important role of social institutions, such as the WTO, in playing a central, rather than a 'neutral' position in the distribution of justice.[124] Rather, there is a predominant institutional response that fails to address the root causes of racism against racial and ethnic minority groups even when there is the opportunity to do so through the device of preferential trading agreements. This blinkered attitude is more than the 'prejudiced or racist acts of people running institutions such as banks, corporations, government agencies, and so forth.'[125] It is a failure to make the link between the Transatlantic Slave Trade, colonialism and the unfavourable treatment of post-colonial economies by Western regimes. Preferential trading rules are recognised by the WTO but often side-stepped when challenged in the arena of the desire to enforce the rules regarding non-discrimination. Those that challenge such preferences correctly predict that the WTO will take the minimalist option, which means determining disputes through the narrow legal paradigm of liberal equality. The impact of such a paradigm for developing countries is to devastate an economy and starve its people. The liberalisation of the commodity exchange rules that at first blush appear built on notions of 'free' trade serve to benefit strong Western economies, the EU and the USA, whilst the returns in terms of economic and social goods for developing economies in Africa and the West Indies come with onerous conditions attached that operate unfairly, unequally and serve to spiral the cycle of poverty experienced by the economies of these countries, caused by or compounded through the rules such as that of the World Trade Organisation (WTO). It is contended that such rules need to be restructured to halt the potentially destructive force of current globalisation in relation to the economies of these developing countries and to address the historical injustices of the past that continue to be perpetuated through these trading rules. For developing countries, the idea that there is a free market is nothing more than a myth.[126]

REPARATIONS

It is argued that former slave colonies such as Guyana cannot make economic progress in the agribusiness of sugar, rice and banana because their dealings with international trade rules are engineered in favour of the richer countries. Moreover, these trading rules benefit White people at the expense of non-White people in the developing countries. This amounts to institutional racism because it amounts to acts of the total White community against the total Black community. Until this situation is addressed, racism will remain and the issue of reparations for victims of the Transatlantic slave trade that was raised[127] at the Third World Conference against Racism (2001)[128] will wither away. The reparative framework consists of the basic idea that the wrongdoer tries to repair the harm done to the injured party or compensates the injured party where repair is either not appropriate or possible.[129] Reparations may be understood as a package of remedial measures that aim to address violations of human rights.[130] They are based on principles that are accepted by the international community with an expectation that the violators 'pay'. These principles have been termed the 'Van Boven Principles',[131] which require in relation to international law, that the violation of human rights including genocide, systemic discrimination and the forcible transfer or removal of populations, should obligate states to make reparations and, where necessary, to adopt 'special measures' to permit fully effective reparations. This package of measures may include the right to restitution, compensation, rehabilitation, re-establishment and the guarantee of non-repetition.[132]

This chapter argues for reparations to be made to the non-white of Africa and the Caribbean in order to alleviate the ongoing economic and social disenfranchisement of the poor in these countries through changes to international trading rules, so that they no longer disentitle such people and the fruits of their labour in terms of their economies.[133] The justification for excluding reparations as a means to achieve this end relies on the following arguments: no survivors either on the side of potential claimants or respondents; the principle against founding a claim on ancient wrongs; the failure to establish causation between ancient wrongs and current racial discrimination and the prohibitive magnitude of possible financial damages. [134]

The Survivorship Argument

At the World Conference Against Racism (WCAR) victims were defined by the Working Group on the Draft Declaration as: 'The victims of racism, racial discrimination, xenophobia, and related intolerance are individuals or groups of individuals who are or who have been affected by or subjected to or targets of those scourges.'[135] It has been argued that a claim for reparations

for the Transatlantic Slave Trade could not mount survivorship hurdles.[136] Unlike contemporary reparations claims such as reparations for the victims of the Holocaust,[137] Japanese–American internees,[138] Australian Aborigines (Stolen Generations),[139] or the US litigation,[140] there are no survivors. Slaves were killed, sold, or moved around in such a way[141] that it would be difficult to establish that there was a relationship that was recognizable in law for the purposes of pursuing a claim for reparations.[142] Where the claim raised is that the Transatlantic Slave Trade was a crime against humanity,[143] the existence of survivors or 'successors in title' may also raise difficulties. Who are they? How can their claims be construed as claims by victims when there is little to connect them with the violation directly?[144] Some scholars would also argue that there is no direct relationship either because any links that may have existed were extinguished long ago. That being so, there is no way in which people of African descent can argue that they are 'victims' who have suffered trauma, or need legal 'space' in which to express their feelings and seek apology.[145] Perpetrators also lie out of reach. Individuals would be long since dead, entities folded or merged and states changed hands. It is clear that states may accept some form of legal responsibility for their conduct related to the Slave Trade.[146] However, it is not a foregone conclusion that states will accept there are claims linked to the Transatlantic Slave Trade that would warrant their attention. The real question is, who should be the parties? The answer is clear. Remedies for institutional racism require us to address community issues, rather than those based on individual complaint.[147] It is Black communities that were stolen, lost ties, language, culture and their own future for the sole purpose of White communities of the West.[148] These communities[149] continue to suffer from economic exploitation which has not been removed with the abolition of slavery. It is even simpler to answer the question – who is the respondent? In this case it would be the West as represented through the WTO. The West profited through the exploitation of Black people and continues to do so through dominance in the working of the international trade rules of the WTO.

The Ancient Wrongs Argument

The WCAR acknowledged that the Transatlantic Slave Trade was a crime against humanity. Crimes against humanity have been defined in the Principles of the Nuremburg Tribunal, 1950 as:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.[150]

This area has also been the mainspring for current racism and racial discrimination,[151] yet victims have never been able to obtain reparations. Clearly there are differences between a 'one-off' military event such as the Iraq/Kuwait affair and a slave-trade based claim spanning centuries. Similarly, it may be reasonable to argue that the reparations claims for the Holocaust and Aboriginal Australians are different from slave-trade based claims because they relate to fairly recent periods in history which lend themselves more easily to the tracing of written and oral evidence in a way that the Transatlantic Slave Trade might not. However, there is not too much difference between taking people from the land and using them for economic gain (as in the Transatlantic Slave Trade) on the one hand, and taking land from the people and using it for economic gain (as in the case of the Aboriginal people of Australia or native Americans) on the other.[152] Furthermore, the ideology that underpinned this exploitation was racially contrived.[153] Moreover, despite legislative moves to dismantle the misuse of peoples and land, institutional racism stubbornly remains.

Contemporary claims portray other similar characteristics that tend to be required for a successful resolution such as the assertion of a right at common law for instance and/or breach of an obligation imposed by statute. In what way can those who might seek to make a legal claim for reparations related to the Transatlantic Slave Trade, assert rights at common law or that a right has been breached due to a statutory duty? In relation to the latter scholars argue[154] that when agreement was reached amongst states to abolish the slave trade,[155] any subsequent trading in slaves might be identified in law as a form of piracy.[156] This could be construed as a breach of international obligations. The question of what rights to assert is one that is hotly contested. For instance legal representatives of corporations in the US who have been accused of 'unjust enrichment', violation of human rights and conspiracy, because of their company's past involvement in the Trade on American soil argue that what was 'horrible, was perfectly legal for about 250 years'[157] implying that it would be unjustified to judge past practices through the modern legal paradigm. Furthermore, the question of the causal link between the damage suffered by the complainant and the conduct of the respondent tends to occupy much of the legal argument surrounding reparations. In some instances it has been argued that where conduct is carried out in compliance with the law, that conduct cannot be impugned by reference to other rights including human rights.[158] Other scholars have argued that there cannot be a chain of causation by slave trade reparation claimants because it was not to them that the injustice was done.[159]

'All law, whether national or international, civil or criminal, has its roots in precepts of behavior which, if violated, invoke a sanction from the community that has been offended.'[160] From this statement it may be argued that in

order for a reparations claim to succeed, the claimants must be able to establish that there is conduct that violated that community.[161] That conduct may be based on the breach of an international agreement,[162] the violation of property rights (based on the notion of unjust enrichment) and/or the violation of human rights and fundamental freedoms that constitute Torts. Tort derives from the Latin word *tortus* which means wrong; furthermore, Tort refers to the body of law which will allow an injured person to obtain compensation from the person who has committed the injury.[163]

What is the Tort or Torts committed against people in developing countries as regards the Transatlantic Slave Trade? It is argued that the Transatlantic Slave Trade constituted a Tort committed against African peoples because of the harm caused by its consequences. Those consequences are experienced today by people of African descent and others caught up in developing countries such as Guyana. The Tortfeasor[164] chose to intervene in the African world in pursuit of self-interest with the result that Africans, and their society and economy, were all but destroyed. The destruction of community and society through murders, rapes,[165] kidnappings and the wholesale removal of people to foreign lands had a detrimental impact on subsequent populations spawned for the plantations.[166] The institution of slavery was able to exist economically because it could use skin colour racism[167] to hold off effective criticism from opponents[168] for a considerable length of time. More importantly, it was able to exact from its victims 'the mechanical obedience of a plough-ox or a cart-horse to demand that resignation and that complete moral and intellectual subjection which alone makes slave labour possible.'[169] This relationship of subordination between master and slave impacted on almost every aspect of the life of African slaves, including how they perceived self and self worth.

> When you control a man's thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his 'proper place' and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit. His education makes it necessary.[170]

The idea of the racial superiority of Whites versus racial inferiority of Black Africans has persisted down the ages and continues today. This is evidenced by the fact that legislative initiatives in many of the former European Slave trading economies, aimed at prohibiting racial discrimination today have still not made significant inroads.[171] Many such people continue to be victims of labour exploitation. It is argued that these consequences are the result of the policies and practices of slave trading nations, who have long since stopped trading in slaves, but have not stopped 'trading' practices that result in racial discrimination. This discrimination

constitutes a Tort against people of African descent, but it is one which has not been properly acknowledged by states because of its institutionalized form.[172] Institutional racism has been defined as 'acts of the total white community against the black community.'[173] Examples of such acts include Torts suffered by such people in terms of the 'continuing economic and social deprivation that they experience as a consequence of past wrongs.'[174] The reparations claim has often been shunned because of the argument that it tends solely to rely on ancient or historical wrongs.[175] However, the argument maintained in this chapter is that far from relying entirely on past wrongs, the reparations claim is a way of highlighting how the racism has become institutionalized in a way that does not make its historical link to the Transatlantic Slave Trade apparent. It is a racism defined as the 'predication of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over that group.'[176] Racism may also be based on a polarisation of opposites such as 'We' and 'They'; 'White' and 'Black'; 'Self' and 'Other': the 'Other' is often undifferentiated as a homogenous group with a fixed essence and stereotyped in a derogatory way.[177] One way in which racism manifests itself is through racial discrimination, which in turn has been defined in international law as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[178]

The contention is that the racial distinctions, exclusions, restrictions and preferences that characterise modern institutional racism, and to which people of African descent are victims, constitute gross violations of human rights and fundamental freedoms, one example of which is systemic discrimination.[179] These distinctions manifest themselves in the trading rules in indirectly discriminatory ways because they rely on the principle of equal treatment to continue to take advantage of global trade at the expense of Black people who are some of the poorest of developing countries. The WTO, in its pursuit of such liberal notions of equal treatment, fails to deal with the question of how these rules are rigged against the poor in institutionally racist ways. A decision-making paradigm that imposes a duty on the WTO to balance the interests of those who pursue liberal equality rules against those requiring preferential treatment, might go some way towards satisfying the demand for reparations.

Causation

Intertwined with questions concerning the form of legal action are those relating to causation. It has often been said that there is no causal link between the Transatlantic Slave Trade and contemporary forms of racism.[180] This puts the reparations claim in jeopardy. It is argued that a causal relation can be established if it is understood that the injustice and injuries of the Transatlantic Slave Trade bear a direct relationship to racial discrimination faced by today's African and Caribbean economies.[181] Those economies served the demands of the slave trade through the plantation system. The plantation system continued during colonial and post-colonial times, for example in sugar, cotton and rice. Political independence of ex-colonies did not amount to economic independence. Rather, ravaged economies already tied into the world trading system were inherited by the inhabitants of these economies. Causation arguments rely on the construction of a legal claim along straight lines or that the process of developing a reasoned legal argument demands the progression from one stage to another in a series of steps.[182] Whilst this is not the only way to understand causation it is argued that, nevertheless, the test is satisfied by the argument that there has not been a break from institutional racism. Rather its manifestation can be found in the guise of WTO trading rules. Moreover, causation can be understood in a number of ways including what justice demands such as acquiring valued social goods[183] of economic sustainability, sufficient food, medicines and education. We are at liberty to ask 'what the law calls cause?'[184] This raises questions as to the object of causation. It is argued that the purpose of causation in this context is to be embraced by arguing that the 'cause' of contemporary institutional racism suffered by people of African descent and the poor in developing countries such as Guyana are rooted in the Transatlantic Slave Trade.

The Prohibitive Financial Damages Argument

The Declaration and Programme of Action of the World Conference[185] acknowledged that the Transatlantic Slave Trade was not only a major source of racism and devastation contributing to the underdevelopment of Africa, but that the effects of it are manifest in lasting social and economic inequalities for Africans today. This chapter argues that those lasting social consequences are evidenced in the impact of the WTO trading rules which are institutionally racist because they discriminate against the Black poor of developing countries. The World Conference has asked States to 'take appropriate and effective measures to halt and reverse lasting consequences of those practices'[186] including market access.[187] A major hurdle in the reparations claim is the sheer enormity of a financial claim. However, the argument of this chap-

ter is that monetary compensation is not the solution.[188] The unjust enrichment[189] that characterised the slave trade, colonialism and current trade rule exploitation could be dealt with through ensuring that the WTO trading rules are fair to developing countries. This future-orientated claim would look to dismantle contemporary forms of institutional racism such as that implicit in the way that the rules of the WTO operate in favour of the West through legal techniques such as estoppel, legal presumptions and the burden of proof. Unravelling the complexities of racism would begin with the WTO providing a forum where those groups in the socio-political power structure that develop policies, make influential decisions and control the modes of execution[190] would bear the burden of rebutting a presumption that preferential trading agreements were in the interest of the developing countries.

CONCLUSION

Undeniably[191] the current ravages experienced by African and Caribbean economies can be traced back to the Transatlantic Slave Trade. In the 16th century, according to C.L.R. James,[192] the peasantry system of many parts of Africa was broken up, women, children and men enslaved and treated like property and packed in dens of putrefaction, bound for the Americas and West Indies, all in the name of the West and America's quest for wealth. According to Basil Davidson some 12 million slaves landed in the Americas, 2 million perished on the journey and 7 million died before embarkation, victims of disease and brutality.[193] Although the slave trade and slavery was abolished,[194] the question of reparations remains a live one. Abolition reaped millions of pounds for British plantation owners for the loss of their slaves but nothing was given to the slaves for the loss of their lives or for Black people for the loss of their communities.[195] The racial discrimination that was brought on by slavery – colonialism, neo-colonialism, the underdevelopment of Africa and the racial discrimination that continues to accompany this form of exploitation, can be addressed through reparations in the form of better management of the international trading rules of the WTO and prominence given to preferential trading rules for the benefit of these developing countries. A relatively minor change would contribute to the much-needed help of economies in the Caribbean. That would be to ensure that the positive measures that are started in the WTO Agreement should be manifested in terms of guarantees of quotas and the removal of duties for these countries. Such a measure need not be infinite. It should be used for a period of time until such time as these economies are allowed to 'catch up' with the rest of the world. This would be a sensible and cost-effective move forward that would maximise the benefit of WTO rules to the greatest number and for the greatest good,

whilst retaining respect. This chapter hopes that this will be the beginning of putting the question of reparations to rest.

NOTES

* This chapter is dedicated to my dear father, a Guyanese man and descendant of Africa, African slaves, and Indian and European ancestry, who fell asleep in his mother country, Britain, in August 2004. Special appreciation must go to Professor Janet Dine for her faith and comments. Any mistakes belong at the foot of my door.

1. Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August–8 September 2001, GE.02-10005(E) 100102 A/CONF.189/12.
2. See Oxfam, *Rigged Rules and Double Standards. Trade, globalisation, and the fight against poverty* at www.maketradefair.com.
3. The first (1978) and second (1983) World Conferences on combating Racism and Racial Discrimination were problematic because of the controversy surrounding Apartheid South Africa and the Israeli–Arab conflict; see K. Boyle and A. Baldaccini, 'International human rights approaches to racism', in S. Fredman (ed.) *Discrimination and Human Rights* (Oxford, Oxford University Press, 2001).
4. Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, (WCAR) Durban, 31 August–8 September 2001, GE.02-10005 (E) 100102 , 02-21543 (E) 160 102 at 6, paragraph 13. WCAR.
5. WCAR also made reference to the people of Asian descent.
6. Ibid. at 7 para. 14.
7. The concept of reparations in the context under discussion was discussed at some length in the Report of the Working Group of Experts on People of African Descent, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, on its First and Second Sessions at paragraphs 62–69. The general view was that this concept covered monetary and moral reparations. See UN Economic and Social Council, Commission on Human Rights 59th Session, Distr. General E/CN.4/2003/21, 25 February 2003.
8. Defined as 'the predication of decisions and policies on considerations of race for the purpose of subordinating a racial group and maintaining control over that group.' See S. Carmichael and C. V. Hamilton, *Black Power. The Politics of Liberation in America* (New York, Vintage Books, 1967). Contemporary definitions of racism include the idea of a 'fixing' of 'human groups in terms of *natural* properties'; constructing people as racialised subjects for the purpose of distinguishing them from others by imposing upon them social and cultural characteristics', see J. Solomos and L. Back (eds) *Theories of Race and Racism. A Reader* (London, Routledge, 2000) at 23. Racism may also be based on a polarisation of opposites such as 'We' and 'They'; 'White' and 'Black'; 'Self' and 'Other'. The 'Other' is often undifferentiated as a homogenous group with a fixed essence and stereotyped in a derogatory way, see S. Fredman, *Discrimination Law* (Oxford University Press, Oxford, 2002).
9. A strong dislike or fear of people from other countries, see Oxford English Dictionary, (Oxford University Press, Oxford, 2002).
10. Unwilling to tolerate ideas or behaviour different from one's own, Oxford English Dictionary, (Oxford University Press, Oxford, 2002).
11. Report of the WCAR, op. cit., at 116, para. 3(c).
12. Several scholars support the case for legal reparations; see Lord Anthony Gifford, 'Slavery: Legacy', the Official Record from Hansard Debate, House of Lords, U.K. 14 March 1996, column 1042 and Professor G. Van Bueren, 'Slavery and Piracy. The Case for Reparations for Slavery', Discussion Paper, World Conference Against Racism, London, Consultative Council of Jewish Organisations, 2001.
13. The UN Committee on the Elimination of Racial Discrimination (CERD) state that racial

discrimination constitutes 'degrading treatment' within the meaning of Article 3 of the European Convention on Human Rights, see D. Petrova, 'Racial Discrimination and the Rights of Minority Cultures', in S. Fredman, *Discrimination and Human Rights. The Case of Racism* (Oxford, Oxford University Press, 2001).

14. Hugh Thomas, *The Slave Trade. The History of the Atlantic Slave Trade 1440–1870* (London, Papermac, 1997).
15. Working Group of Experts on People of African Descent, 2nd Session, 3–7 February 2003, at 4, see S. Paneerselvam, intern, International Movement Against All Forms of Discrimination and Racism – UN Office.
16. See Oxfam, *Rigged Rules and Double Standards. Trade, globalisation, and the fight against poverty* at www.maketradefair.com.
17. Working Group of Experts on People of African Descent, 2nd Session, 3–7 February 2003, see S. Paneerselvam, intern, International Movement Against All Forms of Discrimination and Racism – UN Office.
18. Report of the WCAR, op. cit., at para. (b) (ii).
19. J.F. Rees, 'The phases of British Commercial Policy in the eighteenth century', *Economica* June 1925, 143.
20. Eric Williams, *Capitalism and Slavery* (USA, University of North Carolina Press, 1944) at 51.
21. WCAR, op. cit., at para. 13. More generally see Eric Williams, *Capitalism and Slavery* (USA, University of North Carolina Press, 1944, 1994) at 19.
22. T. Pogge, *World Poverty and Human Rights* (Polity Press, 2002, Cambridge) at 2.
23. Ibid.
24. S. Carmichael and C.V. Hamilton, op. cit., at 6.
25. See F. Fanon, 'The Fact of Blackness', in L. Back and J. Solomos, *Theories of Race and Racism* (Routledge, London, 2000) at 257.
26. See M. Fried (ed.) *Guyanese Rice Farmers and the Myth of the Free Market,* Trade Report Research, Oxfam Canada, 2001.
27. WTO came into effect in 1995.
28. GATT was the entity that had overall responsibility for the multilateral trading system.
29. WTO April 2003, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm..
30. Marrakesh Agreement 15 April 1994.
31. WTO April 2003, op. cit.
32. Ibid.
33. S. Carmichael and C.V. Hamilton op. cit. at 4.
34. Macpherson, Lord 1999. *The Stephen Lawrence Inquiry*. Cm 4262-I. London: The Stationery Office.
35. Article II(1) Marrakesh Agreement.
36. WTO on-line document at http://www.wto.org/english/thewto_e/whatis_e/tif_echap1_e.pdf.
37. These consist of agreements and associated legal instruments which are referred to in Annexes 1, 2 and 3 of the Marrakesh Agreement 1994, see Article II(2).
38. Article II (2) Marrakesh Agreement 1994.
39. These consist of agreements and associated legal instruments included in Annex 4 of the Marrakesh Agreement 1994 see Article II(3).
40. Article II (3) Marrakesh Agreement 1994.
41. Ibid.
42. WTO on-line document at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agm1_e.htm.
43. General Agreement on Tariffs and Trade (GATT) 1994 as modified by the Uruguay Round and consists of the 1947 Original GATT Agreement.
44. WTO on-line document at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.
45. See Oxfam, *Rigged Rules and Double Standards. Trade, globalisation, and the fight against poverty,* at www.maketradefair.com.
46. WTO see http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top.

47. See WTO, Part Five, Developing Countries in the WTO System, Special and Differential Treatment in the Legal Texts at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top.
48. Ibid.
49. Ibid.
50. Ibid.
51. Ibid.
52. Ibid.
53. See *trade-newswire*, Guyana: WTO rulings against sugar subsidies, 5 August 2004, www.trade-newswire@sidsnet.org.
54. Rhoee suggested that the whole of the economy would be disrupted by a WTO decision against the EU's preferential agreement regarding sugar; see *Stabroek News*, 8 April 2004, 'Sugar Protocol Challenge Case, Rhoee makes plea for differential treatment'.
55. See *Stabroek News*, 8 April 2004, 'Sugar Protocol Challenge Case, Rhoee makes plea for differential treatment'.
56. See Guyana – A Look at the Past, www.settlement.org/cp/english/guyana/alook.html.
57. Ibid.
58. See M. Ifill, 'Guyana under seige, legacies of the early colonial era: the plantation system and the export economy in British Guyana', www.guyanaunderseige.com, 2001.
59. Merseyside Maritime Museum, *European Profits*, http://www.liverpoolmuseums.org.uk/maritime/slavery/eprofits.asp.
60. Ibid.
61. E. Williams, *Capitalism and Slavery*, with a new introduction by C.A. Palmer, (1944, 1994, The University of North Carolina Press, Chapel Hill, USA).
62. Ibid. at 89–90.
63. Ibid. at 89.
64. Williams writes that not all those who were brought into slavery remained so: 'the Bush Negroes of British Guiana were runaway slaves who had extracted treaties from the British Government and lived independently in their mountain fastness or jungle retreats.' See E. Williams, op. cit., at 202.
65. Ibid. at 93.
66. Williams also points out that this labour was sometimes 'black, white or brown or yellow' see E. Williams, op. cit., at 29.
67. M. Ifill, op. cit.
68. E. Williams, op. cit., at 28.
69. E. Williams, op. cit., at 28–29.
70. Ibid.
71. Ibid.
72. M. Fried, *Guyana's Rice Farmers and the Myth of the Free Market* (Trade Report Research, Oxfam, Canada, 2001).
73. Ibid.
74. Ibid.
75. Ibid.
76. The Caribbean Community and Common Market (CARICOM) states are concerned. This body was set up under statute by the Treaty Establishing the Caribbean Community in 1974, this consists of Antigua, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Trinidad and Tobago.
77. See http://europa.eu.int/comm/development/body/cotonou/lome_history_en.htm.
78. M. Fried, op. cit.
79. M. Fried, op. cit.
80. M. Fried, op. cit., states that 'Guyana's market share rose from 1% to 44% in 1997.
81. M. Fried, op. cit.
82. Ibid., at 2.
83. M. Fried, op. cit. at 4.
84. According to Fried, US farmers received millions in government aid and guarantees to help them during the 1999 crisis in the price for rice on the world market, whilst the

Guyanese farmers received nothing from their impoverished government, see M. Fried, op. cit. at 2–3.

85. See www.settlement.org/cp/english/guyana/alook.html.
86. G. Nash 'Forward' in R. Dunn *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624–1713*, University of North Carolina Press, 1972 and 2000.
87. This sentence is from one of the recitals of the Agreement Establishing the World Trade Organization, an overall agreement which forms part of legal documents called the 'Final Act', signed in Marrakesh in 1994.
88. See M. Fried, op. cit., at 2.
89. Ibid., at 3.
90. WTO Agreement, preamble.
91. T. Pogge, op. cit. at 115–16.
92. Article III (3) Marrakesh Agreement 1994.
93. J. Dow, 'A clash of global forces', Women's Environment and Development Organisation, March 2000.
94. Black Information Link, 23 January 2004.
95. EUROPA, Press Release, 'Commission Appeals Against WTO Sugar Ruling', Reference IP/04/1237, 15/10/2004, Brussels.
96. The Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States, 1975, the ACP.
97. EUROPA, Press Release, op. cit..
98. EUROPA, Press Release, op. cit.
99. EUROPA, Press Release, op. cit.
100. In April 2005 the WTO confirmed its initial decision that the EU sugar subsidies were illegal. It is reported that this decision is likely to cause problems for developing countries, although Oxfam maintain that judgment should not cause a problem for countries with preferential access agreements, see *Financial Times*, 29 April 2005, p. 8.
101. EUROPA, Press Release, op. cit. It is reported that the EU intends to appeal against this decision, see European Union in the US, News Releases, no 142/04, 15 October 2004, 'EU Commission Appeals WTO Sugar Ruling'.
102. See BBCCaribbean.com, 16 October 2004.
103. Ibid.
104. WWF, European Policy Office, 4 August 2004.
105. Ibid.
106. ACP Sugar. www.acpsugar.org/.
107. This was part of the Treaty of European Union in 1993. The object of which was to advance economic, social and cultural developments in Africa, the Carribean and the Pacific States, http://europa.en.int/comm/development/body/cotonou/lome_history_en.htm.
108. State of the Union Initiative, *Trade in Bananas*. See P.J. Shah, 'Disputes and the WTO', *Economic Times*, June 2001, Centre for Civil Society, 'Banana III: European Communities regime for importation, sale and distribution of bananas', at http://www.ejil.org/journal/Vol9/No1/sr1e-04.html, C.E. Hanrahan, RS20130: *The US-European Banana Dispute*, December 1999, CRS Report to Congress at www.ncseonline.org/nle/crsreports/.
109. State of the Union Initiative, *Trade in Bananas*.
110. Relating to the non-application of Multilateral Trade Agreements Between Particular Members, see Agreement Establishing the WTO, *Article XIII Non-Application of Multilateral Trade Agreements*.
111. The European Commission, Development, *The Lomé Convention.* 'Membership of the United Kingdom to the then EEC in 1973 led to the signing of the wider reaching Lomé I agreement between 46 ACP and the then 9 EEC member states (1975–80).'
112. See the Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States, 1975, the ACP. By Article 1 of this agreement Members of the ACP are signatories to the Lomé Convention.
113. 'Four such Conventions have been signed to date. The first Convention (Lomé I) was signed on February 28, 1975. (from http://homepages.uel.ac.uk/mye0278s/ACP1.htm)'.
114. European Commission, Development, the Cotonou Agreement, The Lomé Convention.

115. State of the Union Initiative, *Trade in Bananas*. See note 108.
116. State of the Union Initiative, *Trade in Bananas.* Also see WTO Ruling and note 108.
117. M. Dolan, Field Director, Public Citizen's Global Trade Watch.
118. See L.P. Pojman and R. Westmoreland (eds), *Equality, Selected Readings* (Oxford, 1997, Oxford University Press) at 24; Aristotle, *The Nichomachean Ethics*, trans., W. D. Roass (1925), Oxford University Press.
119. *Palmer v Thompson* (1971) 403 US 217, 91 S Ct 1940. The city ran a 'whites only' policy in its swimming pools. When required to desegregate the city closed the service down. The court decided that since '…identical treatment had been applied to both whites and blacks …. there was no breach of the equality guarantee.' See S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2003) at 8.
120. This is from one of the recitals of the Agreement Establishing the World Trade Organization, an overall agreement which forms parts of legal documents called the 'Final Act', signed in Marrakesh in 1994..
121. See S. Fredman, *Discrimination Law*, op. cit.
122. The idea of substantive equality is based on the work of S. Fredman, *Discrimination Law*, op. cit., at 128–9.
123. J. Dow, 'A clash of global forces', Women's Environment and Development Organisation, March 2000.
124. S. Fredman, *Discrimination Law*, op. cit., refers to the substantive approach as one that rejects State neutrality, at 129. I have transposed that idea to entities such as the WTO.
125. L.G. Carr, *'Colour-Blind' Racism* (London, Sage, 1997) at 167, footnote 3.
126. M. Fried, op. cit.
127. Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August – 8 September 2001, GE.02-10005(E) 100102 A/CONF.189/12.
128. In preparation for the World Conference, the UN High Commissioner for Human Rights highlighted the need to 'ensure effective protection and remedies and the right to seek just and adequate reparation or satisfaction…' as one of the issues to be considered at the conference, see T. Van Boven, 'Discrimination and human rights law', 111–33, at 130 in S. Fredman (ed.) *Discrimination and Human Rights. The Case of Racism* (Oxford, Oxford University Press, 2001).
129. G. Johnstone, *Restorative Justice. Ideas, Values, Debates* (Devon, Willan, 2002) at 26.
130. A. Cornwall, *Restoring Identity: Final Report of the Moving Forward Consultation Project*, Public Interest Advocacy Centre, Ltd, 2002, NSW Australia at 11.
131. T. Van Boven, Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by T. Van Boven, Special Rapporteur, UN DOC: E/CN.4/Sub. 2/1993/8.
132. In 1989 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, entrusted Van Boven with the study of the right to restitution, compensation and rehabilitation of victims of gross violation of human rights and fundamental freedoms under international law.
133. K. Boyle and A. Baldaccini, 'International human rights approaches to racism', at 187 in S. Fredman (ed.), *Discrimination and Human Rights. The Case of Racism*, op. cit.
134. T. Kok-Chor, *Colonialism, Reparations and Global Justice*, paper presented at a conference held at Queen's University, Canada, 'Reparations: An Interdisciplinary Examination of some Philosophical Issues', 23 January 2004.
135. See 'Working Group on Draft Declaration adopts generic text on victims of racism', RD/D/42, 6 September 2001, http://www.un.org/WCAR/pressreleases/rd-d42.htm.
136. J. Thompson, 'Historical injustice and reparations: justifying claims for descendants', *Ethics* 112, October 2001, 114–35.
137. In September 1952 the German Chancellor Konrad Adenauer agreed that the Federal Republic of Germany would provide $715 million in goods and services to the State of Israel as compensation for taking in survivors; $110 million to the Claims Conference for programs to finance the relief, rehabilitation, and resettlement of Jewish Holocaust

survivors; and direct reparations to selected individuals over a 12-year period. Germany was once compensating 275 000 survivors. Today, the number is approximately 120 000; see American Jewish Historical Society, *American Jewish Desk Reference* (The Philip Leff Group, Inc., 1999) at 30.

138. US Civil Liabilities Act 1988 awarded monetary compensation to Japanese Americans for their internment in camps during the Second World War.
139. See A. Cornwall in relation to Aboriginal Australians, Public Interest Advocacy Centre Ltd, 2002, NSW Australia, op. cit.
140. *Carolina Morning News on the Web*, 27 March 2002. The claimant had filed a lawsuit on behalf of 'all African–American slave descendants'. There are those who can claim slaves as forebears. For instance, Deadria Farmer-Paellmann the great-great granddaughter of a South Carolina slave who has brought action in a US Federal Court against Aetna Inc. of Hartford (the nation's largest insurance company), FleetBoston Financial Corporation (a financial services company) and CSX Corp, a leading railroad company.
141. John Hawkins was the first English trader who, in 1562, captured 300 Africans from Sierra Leone which he sold in Hispaniola. By the 18th century, though snatchings continued this was rare. There was a lucrative and complex trade in slaves from Africa; see J. Walvin, *Black Ivory: A History of British Slavery* (Washington DC, Howard University, 1994) at 25.
142. On this point see J. Thompson, op. cit. at 116.
143. Lord Gifford, Slavery Legacy, *The official record from Hansard of the debate initiated by Lord Gifford QC in the House of Lords of the British Parliament* on 14 March 1996, Column 1045. Human Rights Watch, *An Approach to Reparations*, July 19, 2001, who argue that if the violations under slavery were 'committed today these would be crimes against humanity' at 1.
144. For instance there are claims made by Aboriginal Australians who were victims of abductions sanctioned by the state, see A. Goodstone and A. Cornwall, Public Interest Advocacy Centre, *Submission to the Senate Inquiry into the Stolen Generations*, April 2000, NSW, Sydney.
145. See B. Hamber, 'Repairing the irreparable: dealing with the double-binds of making reparations for crimes of the past', Paper presented at the African Studies Association of the UK Biennial Conference, *Comparisons and Transitions*, SOAS, University of London, London, 14–16 September 1998.
146. M. Wharton, 'Promises unfulfilled: 40 acres and a mule, and other tales of reparations', NorthStar Network, 1 November 2002. Wharton suggests that whilst the mule was not mentioned in the order there was an expectation that such was required in order to till the land. 'The devise of land was a reparation, a payment made for wrongs done to loyal refugees and freedmen, and overseen by the short-term congressionally authorized Freedman's Bureau. According to the Sherman's Order, tracts in South Carolina Sea Islands, and near St. John's River in Florida, were specifically reserved for Black occupation. By June 1865, 40,000 freedmen had claimed 400,000 acres of land. Nevertheless, by September of the same year, claims by former owners of the land began to erode freedmen's rights of access, and the larger promise made by Sherman and Congress.' The Order was rescinded by 1869. Thus on the 16 January 1865, there was a Special Field Order No. 15 issued in Atlanta by General William Tecumseh Sherman.
147. A. Legesse 'Human rights in African political culture', in K.W. Thompson (ed.) *The Moral Imperatives of Human Rights: A World Survey* (Washington DC, University of America Press, 1980) at 124 and 128.
148. A. Cornwall in relation to Aboriginal Australians, Public Interest Advocacy Centre Ltd, 2002, NSW Australia at 59, op. cit.
149. See J. Donnelly, *The Concept of Human Rights* (Kent, Croom Helm Ltd, 1995) at 82–85.
150. Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle vi, c.
151. WCAR at 6, para. 13.
152. The author is particularly grateful to Peter Luther (Legal Historian) for his contribution to this point.

153. Although Williams argues that racism was a by-product of the slave trade and not its source, which he maintains was economically driven.
154. See G. Van Bueren, 'Slavery and piracy. The case for reparations for slavery', Discussion Paper, World Conference Against Racism, London, Consultative Council of Jewish Organisations, 2001.
155. There were a number of bilateral agreements concluded during the 19th century condemning the slave trade. In 1885 at the Berlin Conference, the General Act of February 26 1885 (also known as the Berlin Act 1885) was entered into by 15 signatories including Berlin, Great Britain, Austria-Hungary, France, Germany, Russia, USA, Portugal, Denmark, Spain, Italy, the Netherlands, Sweden, Belgium and Turkey. The agreement was an attempt to provide for a 'European conference to resolve contending claims and provide for a more orderly "carving up" of the continent.' As a consequence of the conference the Berlin Act made express reference to the suppression of the slave trade. (http://web.jjay.cuny.edu/~jobrien/reference/ob45.html). Chapter I, VI stated that: 'All the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being and to help in suppressing slavery, and especially the Slave Trade.' Chapter II, IX provided that the 'Powers which do or shall exercise sovereign rights or influence in the territories forming the … basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.'
156. Piracy *jure gentium* According to Article 15 of the Geneva Convention on the High Seas, 'piracy *jure gentium*' is defined as 'An illegal act of violence, detention or any act of depredation, committed for private ends, by those aboard a private ship or private aircraft, and directed, either on the high seas against any ship or persons or property thereon or in territory or waters of the nature of terra nullius against a ship or person or property thereon.' Piracy *jure gentium* for numerous centuries has been considered as a scourge and pirates may be tried, according to International Law, by any State provided the act was committed on the high seas and for private ends. Piracy was defined by the League of Nations in 1927 as 'sailing the seas for private ends without authorisation from the government of any state with the object of committing depredations upon property or acts of violence against persons.'
157. See http://www.enquirer.com/editions/2002/05/26/loc_smith_amos_slavery.html, at 2.
158. *Kruger and others v Commonwealth of Australia* [1997] 71 ALJR 991.
159. J. Thompson, op. cit., at 116.
160. B. B. Ferencz, *International Crimes Against the Peace*, http://www.benferencz.org/artis.htm.
161. For the purpose of this paper that community was defined by the Working Group on the Draft Declaration as: 'The victims of racism, racial discrimination, xenophobia, and related intolerance are individuals or groups of individuals who are or who have been affected by or subjected to or targets of those scourges.' See Working Group on Draft Declaration Adopts Generic Text on Victims of Racism, RD/D/42, 6 September 2001, http://www.un.org/WCAR/pressreleases/rd-d42.htm.
162. See G. Van Bueren, 'Slavery and piracy. The case for reparations for slavery', Discussion Paper, World Conference Against Racism, London, Consultative Council of Jewish Organisations, 2001.
163. See Duhaime's Legal Dictionary at http://www.duhaime.org/dictionary.dict-t.htm.
164. Defined as a legal person who chooses to intervene in the world, and whilst what he or she is doing may display neither indifference nor defiance to the interests of others, it may, in pursuit of self-interest, put others at risk, see T. Honore, *Responsibility and Fault* (Oxford, Hart, 1999) at 85–6.
165. For instance recent genetically based evidence suggests that one in four British African Caribbean men have a 'Y' chromosome that traces back to European, rather than African ancestors. This means that through rape, consent or affection many white slave owners

impregnated their African slaves, see http://www.bbc.co.uk/science/genes/dna_detectives/african_roots/results.shtml.

166. It has been suggested that the impact of slavery has had a detrimental impact on the mental, physical and socio-economic levels for people of African descent. African life was based on the clan, tribe, village, system of economic and social organisation. Through the language and custom much information regarding family was handed down by the oral tradition. Family lineage could be traced orally. An interesting example is that of Emperor Haile Selassie who could trace his roots back 2000 years to the Queen of Sheba.
167. 'That is the use of the colour of a person's skin as grounds for discriminatory or offensive behaviour.' The fallacy of this distinction lies in ignorance. Scientific evidence suggests that appearance can be deceptive since those that look like white North Americans may have genetic links to Africa. See http://www.bbc.co.uk/science/genes/dna_detectives/african_roots/results.shtml. Also see F. Brennan, 'The race directive: recycling racial inequality' *Cambridge Year Book of European Legal Studies* (Oxford, Hart Publishing, 2004) 311–32. Also see NICEM, Submission to the OFMDFM in Response to the Draft Race Regulations in Implementing EU Equality Obligations in Northern Ireland, 31 March 2003, Belfast.
168. Eric Williams, *Capitalism and Slavery* (USA, University of North Carolina Press, 1944) chapter 11.
169. Ibid. at 19.
170. C.G. Woodson, *The Mis-education of the Negro* (Washington: Associated Publishers, 1933. Repr. AMS Press, 1972. LC2801.W6 1977).
171. See generally F. Brennan, 'The race directive: recycling racial inequality' in J. Bell, A. Dashwood, J. Spencer and A. Ward (eds), *Cambridge Yearbook of European Legal Studies*, 2002–3, vol. 5 (Oxford, Hart Publishing, 2004) pp. 311–32.
172. See for instance K. Boyle and A. Baldaccini, op. cit. at 157.
173. S. Carmichael and C.V. Hamilton, *Black Power. The Politics of Liberation* (New York, Vintage Books, 1967) at 4.
174. See Human Rights Watch, An Approach to Reparations, July 19, 2001, at 1.
175. J. Thompson, op. cit.; also see D. Horowitz 'The latest civil rights disaster' in Salon.com, 2003, http://dir.salon.com/news/col/horo/2000/05/30/reparations/index.html?pn=2 where he contests the idea of reaching back in time in order for reparations claimants to make a claim against the United States. Also see A.J. Sebok, 'The Horowitz slavery and controversy, and the problem with conceptualising human rights violations as property-based', 26 March 2001, at http://writ.news.findlaw.com/sebok/20010326.html.
176. S. Carmichael and C.V. Hamilton, *Black Power. The Politics of Liberation in America* (New York, Vintage Books, 1967) at 3.
177. S. Fredman, *Discrimination Law* op. cit.
178. Defined in the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 into force 4 January 1969, in accordance with Article 19, Article 1(1).
179. See T. van Boven (1993) Study concerning the Right to Restitution, compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, op. cit.
180. J. Thompson, op cit. at 117.
181. J. Thompson, op. cit. at 117.
182. See Oxford English Dictionary (Oxford, Oxford University Press, 2002) at 487.
183. Ibid. at 8–9.
184. A. Peczenick, *Causes and Damages* (Sweden, Jurisdiska Foreningen, Lund, 1979) at 368.
185. Report of the WCAR, op. cit. at 91–93.
186. Ibid. para. 119 at 92.
187. Ibid. para. 125 at 93.
188. J. Lamont and N. D. Innocent, 'Annan calls corporations to account', *Financial Times*, 31 August, 2001.

189. 'Slavery reparations case heads to Court', *Financial Times*, 1 September, 2001. Thus in South Africa victims of Apartheid have filed law suites against the top government officials, three German banks and US computer corporation IBM, arguing that the racist apartheid regime was supported by these organisations, and that the victims of the regime should be 'compensated' for their loss.
190. T. Van Dijk, 'Elite discourse and the reproduction of racism', in R.K. Whillock and D. Slayden (eds), *Hate Speech* (London, Sage, 1995). Also see Eddie Bernice, Head of the congressional black caucus in the US Congress, *FT.com*, 31 August, 2001.
191. Report of the WCAR, op. cit. at 116, para. 3(c).
192. C.L.R. James, *The Black Jacobins* (New York, Vintage Books, 1989).
193. See *The Financial Times*, 'Reparations for Slavery quest finds spotlight' , J. Lomont, R. Wolffe and M. Holman (21 August, http://newsft.com/ft/gx.cgi/ftc 2001).
194. Britain outlawed the slave trade in 1807 and prohibited slavery in 1833. Slavery has been illegal in America since 1865.
195. See Baroness Howells of St Davids, House of Lords. 'No Equality Without Rememberance of Oppression', EUMC 5th Roundtable Discussion paper 2001.

11. The UN Norms

Tom Sorell

In what ways, if any, should transnational corporations take account of international human rights law? Since they are not parties to the treaties on which some of this law is based, it might be thought that they need not be directly concerned with it at all. And though transnationals are bound by domestic law in the countries in which they operate, domestic law rarely connects their operations with human rights standards. Are such standards inapplicable to transnationals, then? The only comprehensive and up-to-date answer to this question from a source close to the treaty bodies is the 'UN Norms on the Responsibilities of Transnational Corporations', adopted in August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights.[1]

The UN Norms lay out responsibilities for transnational corporations in employment, security, development, environmental and consumer policy, dealings with governments, and other activities, and they outline ways in which transnational corporations can be held to their obligations. 'Transnational' in the Norms covers any business operating in more than one country, and this brings within the scope of the Norms many organizations that do not fit the popular stereotype of the transnational, that is, businesses that are not huge, particularly rich, or headquartered in the developed countries. Though they are covered by the Norms, such businesses are not their main preoccupation. The Norms have been inspired by what are taken to be the bad and good practices of the biggest transnationals, and except where the context makes clear that 'transnational' is being used to refer to the much wider group of companies, I shall mainly be considering, as I think the Norms do, well known commercial organizations from the developed world that operate globally.

The response from international business to the Norms has not been entirely uniform, but it has mostly been negative. Hostility has come from at least one large international group, the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE).[2] The reaction of leading human rights NGOs, on the other hand, has been supportive. Amnesty International and Oxfam, as well as the International Business Leaders Forum, have welcomed the Norms. In what follows I ask whether there is anything more than predicable reluctance to submit to regulation in

the ICC/IOE response. I argue that there is, though not enough to make their case against the Norms compelling. I shall argue that the IOE and ICC exaggerate the danger to their interests of legal regulation, just as some of the NGOs who welcome the Norms overstate the difference that they can make to accountability. There is no more reason to think that the Norms will force any transnational corporation to do anything than there is to think that the ICCPR and ICESCR force any state to do anything. Although the two main Covenants have enforcement mechanisms, these are difficult to bring into operation and do not always act on problems effectively. The value of the twin covenants is not the stick they carry, but their elaboration of rising standards that all states can be expected to comply with.

In the same way, it is not the enforcement mechanisms gestured at by the Norms that give the Norms value. It is their attempt to set international standards of business practice that mesh with human rights standards. The Norms set out a number of things that transnationals globally ought to do to promote goals that traditional human rights law promotes. They draw the things that transnationals ought to do from things that some multinationals already *are* doing, and that other multinationals with similar resources are in a position to do. They equip NGOs and states around the world with the same general measuring stick for success or failure in the practice of transnationals.

After running through the sorts of requirements stated by the Norms, I shall examine the IOE/ICC objections to them, and some of the considerations stressed by supporters. I shall suggest that neither side has an uncontroversial interpretation of the Norms, and that the IOE/ICC's reading, though at times alarmist, has more to it than some critics have allowed, and than some human rights activists are likely to allow.

I

The UN Norms consist of a long preamble, a statement of general and particular obligations (§§ 1–14), a set of prescribed steps for implementation, monitoring and enforcement (§§ 15–19), and some definitions (§§ 20–23). The preamble gives a list of many human rights instruments with a bearing on the activity of transnationals, notes the growing global economic power and influence of transnationals, as well as some international standard-setting mechanisms, and asserts that those involved in running transnationals have human rights obligations. The Norms then spell out those obligations, which are conceded to vary according to the scope and influence of a given transnational in a given country. There are general obligations to respect and to see respected human rights that might be violated within the sphere of influence and activity of particular transnationals. Then there are particular

obligations drawn from the known operations of transnationals in different commercial sectors. Transnationals are said to have obligations not to discriminate; to protect the security of those affected by their operations; to respect workers' rights; to abide by domestic law; respect the rights of indigenous people and general economic, social and cultural rights; as well as refraining from bribes and other forms of corruption; finally, transnationals are obliged to engage in consumer and environmental protection.

The Norms are schematic in what they prescribe for implementation and monitoring. After calling on companies to integrate the Norms into their internal procedures, the Norms speak of bringing the activities of transnationals under UN monitoring and reporting bodies. Then states are asked to make legal arrangements to give the Norms force. Finally (§ 18) companies are directed by the Norms to compensate those who have been adversely affected by failure to comply with them. A 'saving' clause stipulates that states cannot reduce their human rights responsibilities by assuming or behaving as if some of them are shared with transnationals (§ 19).

The paragraph of the Norms that comes closest to summarizing all of the rest, in my view, is the first:

> 1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. 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.

The Norms are an attempt to get transnationals to support or prompt action by states to fulfil human rights obligations. They are also an attempt to get transnationals to do things in their own right that promote some of the goals that human rights law promotes. The Universal Declaration of Human Rights already urges the recognition and protection of human rights on all organs of society: the Norms spell out what transnationals can do, considered as organs of societies, in view of their considerable capacity for aiding those who have primary responsibility for human rights.

Now it is disputable that transnational corporations are organs of society in any substantial sense. It is disputable that 'all organs of society' have human rights obligations. It is disputable that having the capacity to do a thing that is worthwhile confers any duty or obligation to do it. But these are not quite the points disputed by those in the business community who resist the Norms. If the IOE/ICC response to the Norms is anything to go by, the main objection is that businesses are not the right sort of corporate bodies to have human

rights obligations, and that the Norms are an attempt to conjure up new and onerous legal obligations for businesses out of thin air:

> The Sub-Commission's draft *Norms* has done a great disservice by confusing people on this fundamental point. The preamble incorrectly says that private business persons (natural and legal) have 'human rights obligations', and this legal error is expanded throughout the operative provisions. For instance, Article 1 says that private business persons 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights,' and other articles go on to say that these duties *shall* be enforced by courts (art. 18), that so-called violators *shall* pay reparations (art. 18), and that they shall be subjected to other political enforcement actions (arts. 15 to 18).
>
> The draft *Norms* not only misrepresents the fundamental legal point, it has ignored the *nature* of the UN human rights treaties, and the *practical steps* that need to be taken to ensure realisation of human rights. The essential problem with the draft Norms is that it privatises human rights by making private persons (natural and legal) the duty-bearers. Privatisation leaves the real duty-bearer – the State – out of the picture. This will have profoundly negative consequences, legal and practical.[3]

The claim that the Norms 'leave the real duty-bearer – the State – out of the picture' seems to be flatly mistaken. The preamble, the opening paragraph of the Norms, and the 'saving clause' at the end say that states have primary responsibility for human rights and that Norms cannot be construed as reducing those obligations. As for the claim of a legal error, the IOE/ICC position is both right and wrong. It is right in that even supporters of the Norms credit them with no more than the force of 'soft law',[4] which is to concede that human rights obligations of transnationals are not human rights obligations in the same sense, or in as strict a sense, as the human rights obligations of states.

In order to become hard law, or law comparable to the ICCPR or ICESCR, the Norms would have to be made the subject of an international treaty. There *is* no such treaty. It does not follow, however, that transnationals have no obligations corresponding to those that the UN Norms call human rights obligations. For example, torture is one of the morally worst types of actions, and so it is wrong for those who can try to intervene to stop torture, and who can do so at little risk to themselves, to stand by and do nothing. Similarly, it is wrong to stand by and do nothing at the scene of an accident if one is competent to help, at no risk to oneself, and there is not enough help already being brought to bear. It is wrong to stand by and do nothing in both cases even if one is not professionally involved in preventing or curtailing torture, and even if one does not work for the ambulance service or act as a lifeguard. It is wrong to stand by and do nothing even if the people being tortured were not promised help by you. The reason it is wrong to stand by and do nothing in the case of torture is that inflicting unbearable pain on people is one of the

worst things anyone can do or have done to them, and therefore the threshhold for its morally having to be stopped is extremely low. Or, in other words, if *anything* can be said to be morally necessary and urgent, it is morally necessary and urgent to do something about torture. It is true that if one tries to persuade the torturers to stop, or if one protests in public at what the torturers are doing, one is not necessarily carrying out a strict human rights obligation, but one *is* carrying out a moral obligation, and a pretty strict one at that. This applies to transnationals in particular. Even if there is no treaty-based legal obligation for transnationals to protest against torture in countries where they operate, or to refuse to invest in the first place in countries in which torture is inflicted with the approval of governments, that does not mean that a transnational is not strongly obliged morally. It could not be *more* strongly obliged morally, given the kind of wrong torture is.

Even if a transnational is obliged morally, what prevents it from ignoring the obligation? Does it face any unpleasantness if it fails to act? Many critics of transnationals think that companies can turn a blind eye with impunity. But the evidence of successful campaigns against transnationals shows that this is a mistake. The action or inaction of transnationals can come to the attention of aggressive NGOs who can orchestrate unwelcome press and internet publicity, penetrate and disrupt shareholders' meetings, and affect the capacity of transnationals to recruit talented staff with scruples about where they work. Many transnationals, from Shell and Nike, to Rio Tinto and Premier Oil, have suffered these extra-legal kinds of pressure when their alleged omissions have been much less serious than keeping silent over known torture.

A feature of this extra-legal pressure is that it is often exerted by people who do not have all the facts, and who do not feel constrained to make sure their negative publicity is accurate, or fair to transnationals. Transnationals may be powerless to limit the damage to their reputation once a campaign against them has begun, and the publicity can engage the attention of those in government and the international human rights community who have a regulatory agenda.[5] Although businesses sometimes suppose that the Norms encourage these excesses, there is reason to think that their effect will in fact be the opposite. The Norms are a way of stating what is expected of transnationals, but they are also, indirectly, a way of setting standards for reasonable criticism of transnationals by NGOs. If a transnational that is trying to satisfy the Norms is attacked by an NGO for supposed contempt for the Norms, that NGO deserves criticism from other NGOs who acknowledge that the transnational is making those efforts, and that it supports the Norms. The same NGO deserves criticism from the UN sub-commission and other bodies supporting the Norms. If this criticism is not forthcoming, the good faith of those supporting the Norms can be impugned in publicity against the NGOs.

It is true and important that not all transnationals are equally exposed to NGO pressure for their omissions. Transnationals based in countries with poor human rights records and with the corresponding lack of NGOs capable of campaigning against business have less to lose by ignoring the Norms than transnationals headquartered or active in countries where these campaigns have long been conducted. For these transnationals the direct risk of reputational damage from condoning torture may be slight. But there are reasons for thinking that even these transnationals cannot operate with total impunity indefinitely. First, many of them do business with companies that *are* exposed to NGO pressure, and that do not want to suffer that pressure for making partnerships with less scrupulous transnationals; second, the Norms themselves act as a template for campaigning by any NGO from the developed world that wants to campaign against the offending transnationals, or for fledgling NGOs local to the offending transnationals. Again, the states in which some of the unexposed transnationals are headquartered are not impervious to pressure from other states that support the Norms. And it is legitimate for transnationals headquartered in an exacting jurisdiction to bring pressure on that jurisdiction and others for a more level playing field internationally.

It might be thought that all of this extra-legal pressure is somehow second-rate when compared to the force of law. Indeed, on this point both opponents of the Norms and supporters seem to be agreed. We have already seen the IOE/ICC statements of alarm at having their legal obligations increased; but they seem to be unaware of the damage that can be done by NGO campaigning. On the pro-Norms side, there is the clear message that though 'soft law' is a poor second best when compared to hard law, the obstacles to getting a treaty make soft law infinitely preferable to what NGOs would probably get if they settled for nothing less than a treaty: namely, nothing. But the assumption that hard law is best is questionable in the present context because 'hard international law' is notoriously *not* hard. Indeed, the strictness of legal as opposed to moral obligation *in general* is often exaggerated. It is true that one is not normally forced to carry out one's strict moral obligations, and so in that sense the obligation is not strict. But then not everyone who has common or garden legal obligations is in practice forced to carry *them* out either. The richer and more powerful an agent is, the more he can use legal devices to evade his responsibilities, delay carrying them out, or negotiate for some lesser obligation. Giving legal force to an obligation, then, does not necessarily make compliance automatic or quick. This conclusion has particular plausibility where the obstacles in the way of enforcement are as large and as subject to political negotiation as those encountered in international law.

II

When I considered an example of a strict moral obligation on the part of a transnational, I took the case of protesting at, or trying to intervene to stop, torture that one knows about. What about transnationals that have no official knowledge of torture? Are they absolved of any responsibilities to do anything about the torture? Not if the reason they lack knowledge is that they do not want to know and take steps to stay in ignorance. In many cases, in fact, it is hard to stay in ignorance. The practice of torture in a jurisdiction is often documented by NGOs and UN bodies, and is the subject of public protests by those organizations. A transnational that operates in this jurisdiction can often not help learning of torture, then. What can it do without turning itself into an honorary NGO or UN body? It can add its name to UN protests and make public and private representations to the local government. It can add its protests to those made by the government of its headquarters jurisdiction, or get advice from this government or UN bodies about what it might do. All of these steps seem to me to be sufficient for compliance with the Norms, and so long as they are taken forthrightly, and seriously, they need not even be done with full publicity. Although it seems to be in the spirit of the Norms for transnationals to make representations to offending governments with the knowledge of relevant UN bodies and NGOs, this falls short of making representations with all the media attention that the UN and NGOs typically receive or seek. Low-profile activity is still activity, and still public activity.

I am describing what I think a transnational could reasonably do about torture on the assumption that the torture starts to be carried out after a transnational arrives in a jurisdiction. Matters stand differently where a transnational is deciding whether to *start* operations in a country whose government is known to practise torture. For in that case, the decision to enter the country can itself look like, and will certainly be represented by hostile NGOs as, condoning or endorsing the actions of a government that practises torture. It will be represented that way with some justification. After all, a transnational that goes in, submits to the authority of a government that misuses its authority as grossly as a government can – by torturing people. Such a government needs to be challenged in the most robust way, because of the location of torture on the scale of severity of wrongs done by governments to their people. A transnational that forgoes a commercial opportunity in such a jurisdiction acts reasonably and in the sprit of the Norms by not going in, and though it loses a commercial opportunity, this will partly be counterbalanced by forgoing a reputational cost.

Trying to prevent torture is at the extreme end of actions that correspond to human rights obligations, and is not central to the human rights obligations that the Norms emphasize. The Norms emphasize development, and espe-

cially economic and social rights, as well as civil and political rights other than the right to be spared torture. Paragraph 12, which has more to say about human rights than any other part of the Norms, reads as follows:

> 12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

Now all of these rights, but especially the ones toward the beginning of the list, correspond to weaker moral obligations than the obligation to intervene in, or at least protest at, torture. Torture is an extremely serious wrong because there is arguably nothing worse than having intolerable pain and distress deliberately inflicted upon one. Torture is unusual as a wrong in being *so* serious that everyone has both a strong obligation not to inflict it themselves, *and* a strong obligation to stop others inflicting it if they can. Everyone has the obligation to refrain from it and to try to prevent it, whether it is their official role or not. And so business people and organizations of business people have these obligations.

Other obligations are not like obligations with respect to torture. For example, it is wrong to lie, and so it is morally obligatory to refrain from lying, but it is not obligatory and may sometimes be wrong to prevent others from lying. Similarly for breaking promises, failing to pay one's debts and many other matters of moral obligation. One reason it is not obligatory and may sometimes be wrong to prevent others from lying, is that the autonomy of other people matters and requires respect. It is part of respecting that autonomy that we think other people have the latitude to act on their own choices, even morally wrong ones, so long as the harm done to others is relatively contained. Autonomy requires latitude from others, but it also involves, on the part of autonomous agents, a willingness to take responsibility for their own actions and life. Certain kinds of intervention – both preventive and supportive – can deny autonomy to agents.

Autonomy is not the only thing that relaxes one person's moral obligations to others; there is also the difference between what others need, which does make claims on others, and what other people merely want, which doesn't make claims on people outside the sphere of loved ones. Another relevant consideration is that between established obligations and new ones. Except for very urgent and serious claims on one's actions, like the claims of those who are being tortured or whose lives are in danger, it makes a difference whether someone who needs my help is competing with others I have already

committed myself to and have my hands full helping, or whether taking on a new obligation will reduce my ability to help someone who hasn't yet exercised their rights to my help.

All of these sources of relaxed obligations are in play in the case of transnationals. For example, transnationals usually operate under obligations to shareholders, employees, creditors and others in a home or headquarters jurisdiction. These may interfere with doing much under paragraph 12 of the Norms. Again, if a transnational is being asked to fill a vacuum that the local government has resources to fill, but that it misdirects, a transnational has reason to refuse to act. A transnational also has scope for inaction if what it is asked for is aid for something unconnected with its operations and something that fills no urgent need, like a contribution to the construction of a world-class opera house that the local ruler has his heart set on.

Genuine reasons for refusing to recognize or carry out obligations under paragraph 12 are one thing; pretexts for evading obligations a transnational cannot be bothered to carry out are something else. Where does the burden of proof for inaction under paragraph 12 lie? Should transnationals be assumed to be incapable of acting under it unless it can be shown they are capable; or should they be assumed to be capable unless they can show that they are not? Campaigners against multinationals are wont to assume that these companies have limitless riches, and that it is only greed that keeps them from parting with some of their money for the sake of the poor. Even the well-publicized bankruptcies and repeated losses of very well known companies have failed to dispel the impression that big businesses cannot suffer real financial hardship. This encourages people to think that it is for companies to show themselves incapable of aiding in education, poverty-reduction and so on, rather than for outsiders to show them capable.

Even if all of this is an unsatisfactory basis for putting the burden of proof on transnationals, there are other, perfectly good, reasons why the burden of proof *should* be placed there. Let us confine ourselves to the central case of a transnational from a developed country deciding to operate in one of the less developed or even least well developed countries. For a company to decide responsibly to go into such a country is for it to decide on the fullest information about the country. Information about the respect of the relevant government for international legal standards will be relevant to whether the company can operate there commercially at all – whether its equipment and cash reserves are secure, and will be relevant, too, to whether employees it is bringing in and for which it is responsible will be safe. But a fully informed decision to go in will also take into account information – about the educational standards of the potential work force, local rates of pay, facilities for education and health – from which a range of *vulnerabilities* of local people can readily be inferred. In a standard developing country, it can

be inferred that people will have a poor life-expectancy, poor access to medical treatment, schooling, good housing and most of the other necessities of a decent life. Probably they will be reliant for a living on inefficient agricultural techniques. The entrance of transnationals may take away agricultural land, may confine economic opportunities to the existing educated elite, may drive up land prices and the prices of construction materials. The efforts of the government to attract transnationals may involve waiving obligations that are commonplace in the developed world, like payments to locals for disruption and expropriation. Perhaps the government will guarantee the transnational the protection of the military, who are not above taking liberties with the local people. It is the fact that information about these vulnerabilities is an inevitable by-product of a reasonable *commercial* decision to go in, that establishes a presumption that transnationals will operate so as not to turn vulnerabilities into actual harms.

Although I have argued that the burden of proof is on the transnational to show that it is not in a position to do anything under paragraph 12 of the Norms, the argument does not show that this burden of proof cannot be discharged. A company that is in demonstrably grave commercial trouble can justifiably turn its attention inward, for example. A company can also excuse itself from efforts under paragraph 12 where there is significant evidence that the local government has resources that it could commit to economic, social and cultural rights or civil and political rights, but wants to redirect them at some questionable prestige project or some spending that benefits a local ruling elite and no one else.

In general, a transnational will have more trouble convincingly excusing itself from the demands of paragraph 12, the poorer or less developed the country in which it operates, the less expensive the thing it is asked to do, and the more the thing it is asked to do is easy for the company to do, given the resources it has in place, its expertise or something else. For example, a company that has a relatively little-used medical service in its centre of operations may find it easy to open a clinic for local people and promote the goals associated with the right to health. A food retailer may be able to advise a local government on food storage and distribution, and perhaps even share some of its own facilities or build some facilities for the government alongside its own. And any multinational will probably be able at very little expense to offer vehicles and communications equipment to NGOs or international bodies helping with humanitarian or other treaty commitments. In the same way, a multinational may subsidize the transportation and payment of experts able to advise in medical, educational and water provision. Again, it may offer to subsidize a health or education campaign.

The IOE/ICC response to paragraph 12 is not to try to define what reasonable compliance might be, but to dig its heels in and insist that paragraph 12

responsibilities belong to governments. The IOE/ICC prescription for development is for governments in developing countries to improve the commercial climate.[6] According to the IOE/ICC, this will attract outside investment and encourage entrepreneurship, with after-effects in increased tax revenue, and more capacity to develop the services required to meet human rights commitments. The IOE/ICC approach is reminiscent of the Friedmanite response to the movement for corporate social responsibility of an earlier era in the developed countries. The Friedmanite response is roughly that corporate social responsibility begins and ends with providing increased value for share-holdings and obeying local laws or local rules of the game. So understood, corporate social responsibility is very different from the responsibility of governments, with which, Friedman used to say, it must not be confused.

Just as the Friedmanite line, despite having some defenders even now, has been left behind in the USA and other parts of the developed world by extremely familiar kinds of corporate giving, community and environmental initiatives, so it is likely that the new corporate responsibility, which acknowledges the international character of big business and the possibility of internationalizing good practice, will probably leave behind the position espoused by the IOE/ICC. It is a sign of the IOE/ICC position already being outmoded in its minimalism about corporate obligations that some figures resisting the UN Norms as ICC spokesmen come from companies whose practice is probably already in line with the Norms, or quickly getting to that point. Robin Aran, Shell Vice President of External Relations and Policy Development, has been one of the leaders of the ICC attack on the Norms even though Shell has undertakings with the Amnesty International UK Business Group to abide by human rights standards in its business practice. Shell belongs to the small minority of companies whose corporate social responsibility policy explicitly makes reference to human rights. So, with his ICC hat on, Aran has in effect been protesting against already accepted practice in his own company.[7]

III

In the last section I concentrated on obligations under paragraph 12, which I have been claiming are weaker than obligations to intervene or protest at torture. My line of argument agrees in part with that of the IOE/ICC, for it implies that some obligations under paragraph 12 are less than strict, that they are binding only when certain significant conditions are fulfilled. My position agrees with the IOE/ICC position in further ways, for even when the obligations are real they are, according to me, duties to do things locally, in a company's area of operations, rather than duties to promote or protect human

rights wherever they are under threat in a jurisdiction. Again, I think there is merit in the point that the obligations are not human rights obligations, and the correlative point that when the obligations are broken, companies are not strictly guilty of human rights violations.

On the other hand, companies do have strong obligations, even if not always human rights obligations, to adopt many practices that have inspired the Norms and that the Norms are trying to encourage. Companies do something wrong by trying to evade or deny these obligations. Furthermore, the morally binding obligations on companies *correspond* to human rights obligations: they call for the same actions and promote the same goals as human rights obligations, and failure to carry out those obligations merits heavy criticism. If that heavy criticism amounts to, or verges on, the vilification of the errant companies, then I also part company with the IOE/ICC in holding that the vilification is justified,[8] and in denying that to hold companies to even the vague provisions of the Norms risks human rights violations of 'private persons' viz. businesses.[9]

So much for paragraph 12 of the Norms, and its human rights obligations. I have been arguing that some of these obligations are weaker than others, though they are genuine obligations. Occasionally, however, the Norms stray into requirements that it is hard to see as obligatory at all, either because most transnationals are not equipped to comply, or because they make transnationals responsible for others whose actions are not, and perhaps should not be, within their control. For example, the Commentary on transnational obligations in respect of security of persons requires suppliers and distributors and parties to contracts with the transnational to be compliant with human rights standards, and it is far from clear how the actions of this potential multitude of agents could possibly be kept track of by even a large company.

When it comes to other obligations asserted by the Norms, it is much harder to see what is objectionable about them from the point of view of business, since many are observed already. For example, no fewer than five paragraphs of the Norms (§§5–9) detail employment rights that are routinely adhered to by transnationals, at any rate transnationals from developed countries. Similarly for the respect for local and international law (§10), non-discrimination (§2) and security (§3) on some less demanding interpretation than the one objected to a moment ago. The paragraphs on consumer and environmental protection (§§13, 14) contain much that is widely accepted, becoming controversial only where they commit companies to observe principles that may go far beyond what is required by international or typical domestic law. For example, observance of the precautionary principle can be unreasonable when risks are small or when benefits seem significantly to outweigh risks. Similarly, it is unreasonable to ask companies to subscribe to a long list of unspecified principles for environmental protection and sustain-

able development. But these are details. Much standard business practice already goes in the direction that the Norms set out. Even the provision for reparations to people for violations of the Norms (§18) would probably be anticipated in many jurisdictions by labour, environmental and consumer protection legislation.

IV

The implementation and monitoring provisions of the Norms are important to its supporters and detractors alike. It is these provisions which take the Norms beyond purely voluntary codes, according to supporters. And it is these same provisions which, for the opponents of the Norms, mimic the enforcement mechanisms of laws, and thus sustain the fiction that the Norms have the force of hard law. As supporters emphasize,[10] the Norms are supposed to go beyond voluntary codes of practice for businesses; so it is as well to be clear about the reasons why going beyond such codes is supposed to be necessary.

To begin with, there is a great variety of codes. When companies write them up themselves they are free to make them narrow or vague, or to word them in such a way that all they call for is business as usual. Even when provisions in the code are definite enough to be violated, there may be no adverse consequences of violation for a company. Since codes can amount at times to little more than hot air, the fact that a company has adopted one or publishes one can mean little morally. This is part of what motivates opposition to merely voluntary codes.

In relation to the Norms, the opposition to voluntarism has a further dimension, for it is possible for multinational companies not only not to abide by their own codes, but to evade even strict law. Transnationals can easily move to lenient jurisdictions or, at more expense, employ legal tactics to postpone or evade legal punishment for bad behaviour in stricter jurisdictions. In developed countries this is bad enough, but in developing countries, where the vulnerabilities of people are greater and the restrictions on what companies can do legally are fewer, the consequences of total freedom of action are likely to be even worse. What is more, the dangers the vulnerable people of developing countries face are not just from companies: governments, warlords and criminals are threats. Human rights law recognizes this variety of threats and the international community has created some institutions to counter them. These institutions are relatively weak without the backing of governments and other powerful international actors. Here is where transnational companies with policies or corporate responsibility come in. They can add their weight to that of governments to help the most vulner-

able people in the world. A few, including some with extremely high profiles, such as Shell or BP, already have policies in keeping with the UN Norms, and so supporting the Norms, *pace* Robin Aran, costs *them* nothing or not much.

Other transnational companies are on the other side. They have no corporate social responsibility policy, or one that calls for business as usual. Some of these transnationals are headquartered in human rights-abusing jurisdictions and are run by people who are friends or relations of the human rights-abusing elite in these jurisdictions. Some may even be owned or partly owned by human rights-abusing governments themselves. They are disinclined to think about the relation of their business activities to human rights and may be expected to avoid business environments in which expectations of corporate social responsibility are very elevated. They may be in commercial competition with more scrupulous companies and have fewer costs than those companies. What kind of influence can be brought to bear on them? Even the demanding parts of the UN Norms seem too undemanding for them.

The UN Norms offer no solution on their own to the problem of regulating these rogue multinationals. But they do stand a chance of affecting the behaviour of the many other companies who stand in between the rogues and the avant-garde of the corporate social responsibility movement. The companies in the middle, as they may be called, are open to the influence both of human rights-respecting governments, unmilitant NGOs, and the business avant-garde and their followers. The UN Norms give them an idea of what is counted by the activist NGOs as best practice, and what is expected by the avant-garde of the business community itself. In giving them an idea, the UN Norms take away one part of the discretion available in the era of voluntary codes: namely, the discretion to pick and choose which requirements one will be subject to. The UN Norms give a template for the sort of requirements the companies in the middle might be expected to adopt. The UN Norms do not, however, take away voluntariness in the sense of being a code that is strictly or legally compulsory once adopted. A company that adopts the Norms and then fails to live up to them is open to public criticism for failing to do so, and invites the attentions of aggressive NGOs, but it would face these things even if it did not adopt the Norms but publicly violated many of its requirements. So the sense in which the Norms go beyond a voluntary code is limited. That, however, does not mean that only compulsory standards have a point.

I said that the Norms offer a model that the business avant-garde already conform to, and that well-intentioned companies can conform to. The distance between companies in the middle and the business avant-garde must not be minimized, however. The Norms are not being introduced at a time when, even in the developed word, there is a very elaborate or widely shared view of the connection between business and human rights. If fewer than 50 companies with codes of practice mention human rights in those codes at

all,[11] then consciousess of human rights is slight, even in the corporate social responsibility movement in the developed world, and it must be infinitesimal in the business community at large in the developed world, let alone the whole world. It may be that the Norms, particularly when read in the light of the very exacting commentary of their authors, are too much in tune with the business avant-garde and not enough with the business mainstream.

Now it is important to my interpretation of the background to the Norms and the way that they go beyond voluntary codes that there are a number of major transnationals that already act in keeping with the Norms (the business avant-garde) and that they act this way voluntarily. The fact that some transnationals, admittedly only a few, do abide by the Norms shows that many similar transnationals can in the long term. To that extent the Norms are not open to a charge of utopianism. Again, the fact that some transnationals are leading the way is a reason for supposing that they are on the side of the Norms and on the side of human rights in the struggle against transnationals who are indifferent to human rights. It is not, as NGOs sometimes make it seem, as if UN bodies, NGOs and human rights-respecting states are on one side and business is on the other. Rather, the human rights-respecting parties and the activist parties include some of the parties whose behaviour would be regulated by the Norms. It is a weakness of the statement of the Norms we are considering that the role of the business avant-garde is virtually unacknowledged in its preamble, and that voluntary adoption of the standards stated by the Norms is not praised.

Returning now to implementation and monitoring mechanisms, must these be interpreted as being the playthings of non-commercial bodies who are hostile to business? Not at all. The Norms acknowledge that monitoring and implementation has to start within companies, and therefore that some of the procedures required to show that the Norms are being complied with will be put in place voluntarily. But even where external bodies do play a role, they are as unlikely to display hostility to companies reporting to them as committees overseeing the Covenants are to display hostility to states. The concluding observations of the relevant bodies always say something positive about the reports of states, even those of states whose human rights record is appalling. The counterparts of these reports will be all the more likely to say something positive about companies whose range of responsibilities is much narrower, and so much more dependent on voluntariness.

Business people who fear the Norms seem to me to misread the practice of international human rights regimes. Anti-business opponents of the Norms misidentify the enemy as *all* transnationals. Those who minimise the distance between the business avant-garde and other transnationals are guilty of naivety. The most reasonable position in the debate I have been reviewing is occupied by supporters of the Norms who are clear-headed about business,

and clear on the difference between mainstream and avant-garde business practice. For them, the Norms are a more effective way of *stating* global standards than other mechanisms that have been tried, but not necessarily a way of helping to see those standards implemented on a large scale. It remains to be seen whether the standards remain mere ideals for everyone outside the avant-garde, or whether they can be observed in mainstream international business.[12]

NOTES

1. For the text, see http://www1.umn.edu/humanrts/links/norms-Aug2003.html. This version leaves out the Commentary, which is reproduced in the Amnesty publication referred to below, in note 4.
2. Joint views of the IOE and ICC on the draft Norms 40pp. http://209.238.219.111/IOE-ICC-views-UN-norms.
3. Joint views of IOE and ICC, op. cit. p. 4.
4. *The UN Human Rights Norms for Business:Towards Legal Accountability* (London: Amnesty International U.K., 2004), p. 6. See also Sir Geoffrey Chandler's response to the IOE/ICC: http://209.238.219.111/Chandler-response-to-IOE-ICC-April04.htm. After adoption by the sub-Commission, the Norms are due to be available to the Commission on Human Rights, which may be able to get governments to use it as a guide to the strength of domestic company law.
5. For these people the Norms can serve as a draft treaty that states are obliged to bring in domestic legislation to implement, once they have ratified it.
6. Joint views of IOE and ICC, p. 33.
7. Yet, as critics of Robin Aran have pointedly asked, how serious can Shell be about these standards if one of its senior executives is in the forefront of the attack on the UN Norms for spreading human rights responsibilities beyond states to companies. For details, see the report from the NGO, Corporate Europe Observatory http://www.corporateeurope.org/norms.html. Shell's reply to this article says in part, 'The article is wrong, in our view, to imply that because we express our concerns about the draft norms that in some way undermines or puts into question our commitment to support human rights. We have been working hard over several years, within the company and with others, to ensure human rights issues are taken properly into account in carrying out our day-to-day business operations and have been progressively building these considerations into our processes and management systems for what we call social performance i.e. all the ways in which we impact on or contribute to the communities that surround our operations and the societies in which we work. We report our progress in the Shell Report. We also continue to support and work actively with others in initiatives such as the Voluntary Principles on Security and Human Rights, the Global Compact which, unlike the draft norms, has the support of a wide range of companies as well as governments, NGOs, unions and UN agencies and with the Danish Centre for Human Rights on a human rights compliance tool for companies.' But this ignores the fact that the initiatives listed by Shell are precisely what the Norms call for. If Shell thinks its initiatives are worth imitating, how can this be reconciled with the wholesale opposition to the Norms in the IOE/ICC document?
8. For the IOE/ICC protests against the vilification of business, see Joint Views of IOE and ICC, pp. 26ff.
9. Ibid., pp. 21ff.
10. See *The UN Human Rights Norms for Business*, op.cit., pp. 11ff.
11. *The UN Human Rights Norms for Business*, op. cit. p. 5
12. Richard Jones and Prof. David Kinley made valuable comments on this chapter.

PART III

Focus on South America

12. Repayment of sovereign debts from a legal perspective: The example of Argentina[1]

Sabine Michalowski

INTRODUCTION

In present day Argentina, not a day passes in which one is not, on the one hand, reminded of the extreme poverty in which large parts of the country's population live, and of the ongoing negotiation of debt repayment between the Argentinean Government and its foreign creditors, on the other. Without wanting to minimise other factors that have a negative effect on Argentina's economic recovery and on the possibility of the Argentinean state to protect the economic and social rights of its citizens, debt repayment plays a predominant role because instead of being able to use its financial resources in order to revive its economy and provide social assistance to citizens in need, the country needs to dedicate an important percentage of its resources to debt repayment. In fact, even during the last few years of acute economic crisis, Argentina repaid more of its debts than it received from International Financial Institutions (IFIs) in the context of debt refinancing.[2] More importantly still, the IMF, the World Bank, and the governments of the G7 states use Argentina's dependency on debt-restructuring etc. in order to influence Argentinean economic policies. Applying the logic of capitalism, they require that the fulfilment of the country's obligations towards its creditors be regarded as a matter of prime concern, prioritising it even over poverty reduction measures and other social policies that might help to improve the economic and social situation of Argentina's poor. The President of the World Bank, James Wolfensohn, explained this quite graphically in his reply to the question of whether Argentina should increase its budgetary surplus in order to be able to dedicate more money to debt repayment:

> And at some point, as an individual, you can't just go on not paying your credit cards, and not paying your bank, and not paying your mortgage and saying well, what I really want to do is to educate my kids. … Well, of course you want to educate your kids, but at a certain moment the rules are that if you want to keep

> playing the game you do have some other obligations and that is the issue with countries.[3]

Beyond insisting on debt repayment, the IMF makes debt renegotiations and restructuring subject to conditions, such as a reduction of public spending;[4] or the adoption of policies that favour foreign investors in Argentina, for example the owners of privatised public service providers.[5] Accordingly, the problem of debt repayment is one of the most crucial issues for consideration when reflecting on the relationship between capitalism and human rights within the Argentinean context.

However, as is to be expected, the link between debt repayment, capitalism and human rights is not uncontroversial. In the context of Argentina, the only undisputed fact rather seems to be that Argentina suffered an extreme economic crisis, as the consequence of which the protection of social rights has deteriorated, unemployment figures have rocketed,[6] savings and pensions have been devalued, poverty rates have reached an unprecedented level, and the social protection of large sectors of the Argentinean society has dropped worryingly.[7] The reasons for this, on the other hand, are debatable and debated. Many voices can be heard contending that Argentina's crisis and the resulting deterioration of the social situation of large parts of the population were mainly caused by internal factors, such as corruption, ungovernability, the lack of will to implement fully the adjustment programmes suggested by the IMF, and so on.[8] It would then not be the logic of capitalism that adversely affects the human and social rights situation of the people. To the contrary, given that the IMF is presented as the mother of sound capitalist policies, the suggestion rather seems to be that Argentina would not face its economic problems, and the population would not have to put up with the erosion of its social rights, if only capitalist policies had been, or would now be, implemented properly.[9] However, it is submitted that the capitalist policies that were pursued in Argentina did, in fact, have an adverse impact on the dire social rights situation the country finds itself in.[10] While there can be no doubt that factors inherent in the political culture of Argentina have significantly contributed to the desolate situation of the country,[11] it is equally clear that the current crisis in Argentina cannot be isolated from the phenomena of neoliberalist capitalism and financial globalisation.[12] Indeed, many of the acute problems that led to the breakdown of the Argentinean economy are the results of Argentina's neo-liberal policies, backed and partly required by the IMF, the World Bank and the G7 governments.[13]

The problem of debt repayment touches on many fundamental issues such as concepts of justice; the tension between human rights protection and financial interests; and the relationship between the Third World and the industrialised North. It is therefore hardly surprising that debt repayment has

sparked a highly emotive political and moral debate.[14] From a moral perspective, it could be asked whether it can be justified that a country dedicates resources to the repayment of foreign debts while large parts of the population live below the poverty line and have even the fulfilment of their basic needs, such as food, shelter, health care and so on frustrated. The moral arguments against debt repayment become even more compelling when taking into account the claim that the international creditors are partly responsible for the debt crisis. In recent years, a moral claim for debt relief or even debt forgiveness because of the dramatic adverse impact of debt repayment on the social and economic situation in poor countries has become more and more popular.[15] From a more political perspective, it is often argued that the debt is unfair, odious, that but for the usurious interest rates it would already have been repaid several times, and that, instead of the Third World being indebted to the North, it is the other way round, as the North owes the Third World an ecological debt.[16]

Reference to legal principles and concepts is often made in order to support these moral and political claims. From a legal perspective, the Third World debt is challenged based on principles of international law, as well as on principles of the domestic law of debtor nations. In this respect, it has been argued that many of the loan agreements are not valid, as they were often entered into by undemocratic regimes and were not used for the benefit of the people of the debtor nations; that the interest rates charged are usurious; and that the creditors are at least partly responsible for the debt crisis. With regard to the debt owed to IFIs, it is further suggested that conditionalities imposed on debtor nations as a prerequisite of receiving loans that are needed to avoid defaulting on debt repayment, in particular structural adjustment programmes (SAPs), have worsened the debt crisis and the protection of social rights in those countries, and also undermine state sovereignty. However, this reference to the law is frequently no more than an expression of moral and political convictions of what the law should be, without providing the analysis that would be necessary in order to justify the claim that legal principles do, in fact, support the conclusion that the foreign debt does not need to be repaid, either partially or in full. Indeed, it often seems as if the law is primarily regarded as a tool that might help achieve, and give more credence to, political and moral claims. The international creditors, on the other hand, present the problem primarily from a formalistic legal perspective, when arguing, based on traditional legal concepts such as the fulfilment of contractual obligations, that debts need to be repaid. Indeed, Argentina's creditors, without having any regard to the reasons for Argentina's grave economic and social crisis, and the question of whether Argentina is solely to blame for this, or whether they share some of the responsibility for this situation, adopt a seemingly objective legalistic attitude when demanding that

these debts are contractual obligations that need to be honoured, no matter what the country's social situation. In the words of James Wolfensohn: 'everyone wants to put money into social purposes and no one more than the (World) Bank, but there needs to be a balance in terms of some responsibilities and obligations which have been undertaken'.[17]

It thus seems as if the legal debate of the problem of debt repayment in Argentina is characterised, on the one hand, by the allegedly value-neutral legalistic approach adopted by Argentina's creditors, and on the other hand, by a moralistic and political approach to the interpretation and application of legal principles. It is submitted that both approaches are problematic. The political/moralistic approach is problematic because while a debate of what the law should be in the context of the restructuring and repayment of sovereign debt is useful and necessary, this is a political and moral discussion and not a legal analysis. If, however, the law is to be used in order to add another dimension to the debate, and to rebut the legal claims of the creditors on legal grounds, a consistent legal argumentation that favours the arguments against debt repayment over those advanced by the creditors of sovereign debts needs to be developed. Only this way can the creditors' reference to clear-cut legal rights be reassessed in the light of the legal objections raised by the opponents of debt repayment. And only this way can a conclusion be drawn as to whether the law really supports the creditors' claims as unconditionally as they want to make believe,[18] or whether the legal validity of their claims can rather successfully be challenged from the perspective of domestic Argentinean law, mainly constitutional law, and from the point of view of international law. Thus, it is submitted that it is essential to pay due respect to the legal issues surrounding debt repayment.[19] However, the significance of political and moral considerations in the context of debt repayment should not be downplayed, and it is not suggested that the legal issues can be examined from a politically neutral perspective. Indeed, Noam Chomsky rightly claims that while it is clear that the Third World debt exists, it is an ideological question who is responsible for this debt and who owes it.[20]

This chapter will analyse some of the problems that arise when assessing the legal objections to debt repayment and evaluating whether and to what extent a debtor nation is in fact legally obliged to pay its foreign debt. Argentina will be used as an example, as it is not only a country in which debt repayment is at the forefront of the political and economic agenda, but it is more importantly the only country in which the courts have been involved in questions surrounding the validity and constitutionality of a country's foreign debt.

1. ARGENTINA'S DEBT IN ITS HISTORICAL AND POLITICAL CONTEXT

In the context of a short piece which mainly aims at providing an analysis of some legal issues around debt repayment, a full historical and political account of the development of Argentina's public foreign debt cannot even be attempted.[21] Instead, an introduction to some of the features of Argentina's debt that are of particular importance for the subsequent discussion must suffice. Although the history of Argentina's foreign debt goes back to the 19th century, the most important period for the purposes of a legal analysis of debt repayment starts with the beginning of the latest military regime in 1976 and continues into present times. The process of excessive lending and borrowing that took place between 1976 and 1979 needs to be seen in the context of the world financial situation.[22] Between 1974 and 1980, the oil crisis led to an extreme liquidity of Western banks where the OPEC countries deposited the dollars they gained from petrol exports, a financial situation in which loans to Third World governments seemed attractive.[23] Argentina's military regime was happy to accept loans which international banks were as happy to offer, even though large parts of the loans were not used for the purposes of investment into infrastructural, industrial or other developmental projects, the carrying out and success of which could have guaranteed the repayment of said loans.[24] Instead, the incoming money was widely used for the purpose of increasing the federal reserves of the country,[25] by depositing the money with the very banks that made the loans, obtaining lower interest rates than those paid for the loans![26] The multiplication of Argentina's foreign debt by four and a half during the latest dictatorship was accompanied by, and some argue intended to facilitate,[27] the opening of the capital market and the financial system to foreign capital; a capital flight; the indebting of prosperous nationalised enterprises;[28] and the country's dependence on IFIs. As Justice Ballestero concluded in the case of Olmos, a criminal case brought against Martínez de Hoz, Secretary of the Economy under the latest military regime, and others, for their involvement in indebting the country between 1976 and 1983, a decision that provides a very detailed analysis of the ways in which Argentina's foreign debt developed under the military regime, based on the reports of numerous expert witnesses: prosperous public companies had been obliged to take up loans they did not need to enable the country to obtain foreign currency that stayed with the Central Bank and with the help of which the financial and economic policies of the military regime, that is the opening of the capital market, could be achieved.[29] Private Argentinean companies also accrued foreign debt of substantial proportion, for which the state issued guarantees. This debt of the private sector was turned into public debt in 1982, as the military government, when the private companies did not repay

their debts, assumed this debt by issuing new state bonds.[30] This further increased the already large public foreign debt of the Argentinean state.[31]

Having liberally received loans, with the change of the world financial situation and US fiscal policies in 1979, Argentina, like many other countries, found itself in the situation described forcefully by Fantu Cheru, who submitted that:

> what turned the debt into a crisis was not the absolute level of the debt, but the changing terms of the debt. When the second oil price rise of 1979 occurred, the US Federal Reserve Bank adopted a tight monetary policy which pushed up real interest rates to historically high levels. For debtor countries, this not only made new borrowing more expensive, but also unexpectedly increased the amount of interest they had to pay on their old loans, since much of this commercial borrowing was originally contracted with floating interest rates.[32]

With the return to democracy under the Government of Alfonsín at the end of 1983, the new government at first took the view that the debt it inherited from the military regime would not be repaid without a thorough investigation into how it had come about in order to establish to what extent the debt was, in fact, legitimate. To that effect, Congress enacted statute 23.062, stating that all administrative acts and provisions of the de facto regime lacked legal validity, and, more importantly in the present context, rejected the investment accounts referring to the years 1976 to 1983 in statute 23.854.[33] In June 1984, the then Secretary of the Economy, Bernardo Grinspun, submitted a Letter of Intent to the IMF, stating that the debt Argentina was asked to repay had been contracted by the means of arbitrary and authoritarian policies in which the creditors had actively participated and which did not bring any benefits to the Argentinean people. However, giving in to the enormous pressures from Argentina's creditors,[34] he added that Argentina would honour its tradition of meeting all its obligations.[35] The same line has been taken by all Argentinean governments ever since, and instead of deciding whether or not all or part of the debt was, for various reasons, illegitimately contracted and therefore did not have to be repaid by the Argentinean people, new loans were constantly taken up in order to repay and restructure the debt that originated from the military regime of 1976 to 1983. Furthermore, those state owned companies that had formerly been profitable, but forced under the military regime to take up foreign debt, were privatised and sold rather cheaply to foreign companies.[36]

In December 2001 Argentina defaulted on all debt servicing other than with regard to debts with IFIs, and for a short period, even defaulted on its foreign debt with the World Bank. Given the financial impossibility of repaying all of its foreign debt, in September 2003 the Argentinean Government submitted to the Annual Meeting of the IMF and the World Bank in Dubai a proposal that consists of reducing the foreign public debt with other than IFIs

by 75 per cent, a proposal which was at the time accepted by the IMF on the basis that the IMF itself, as well as the other IFIs, received preferential creditor status, meaning that the Argentinean debt with the IFIs will be repaid in full, including interests. However, since then, the IMF as well as the G7 governments and the creditors concerned put a lot of pressure on the Argentinean Government to improve this offer.[37] These negotiations between the Argentinean Government and Argentina's private creditors resulted in a large-scale debt-restructuring. Parallel to the Government's offer of new bonds to replace the bonds that are in default, many bondholders, particularly those who are not happy with the offers the Argentinean Government has made so far, are pursuing their claims in the courts, mainly in New York.[38]

While, unfortunately, this very brief overview can only give a very sketchy introduction to the issue, it should not be left unmentioned that apart from the economic and social consequences of the foreign debt, Argentina's status as a debtor state means, in practice, that the IMF, and the G7 governments, through the IMF, as well as in their own voice, exercise a lot of pressure on Argentina regarding its economic and fiscal policies. In fact, one often gets the impression that in Argentina, political decisions, as well as laws implementing them, are often made in negotiations with, if not according to the dictate of, the IMF and the most powerful states in the world.

2. FOREIGN DEBT AND THE ARGENTINEAN CONSTITUTION

In Argentina, the main legal objections against debt repayment are based on constitutional arguments, and the most popular of the arguments advanced in this context is that of the unconstitutionality of the foreign debt on the ground that it has not been incurred, restructured and accepted by the constitutionally competent state organ, which would be Congress. The constitutionality of debt and debt repayment can also be challenged from a different angle, as according to the Argentinean Constitution, all acts, legislative or executive, that violate constitutional rights and principles, including social and other human rights, are unconstitutional. Thus, an argument could be made that every act facilitating debt repayment is unconstitutional, if a link between debt repayment and social rights violations can be shown.

2.1 Unconstitutionality because the Debt was not Contracted or Settled by Congress

The Argentinean Constitution regulates the distribution of powers between the different state organs. Article 75, which establishes the areas in which

Congress has exclusive competence, contains two different sections dealing with questions of public debt. First of all, in s.4, Article 75 empowers Congress to borrow money on the credit of the nation, thus clarifying that it is Congress, not the Executive, that has the power to indebt the country by taking out loans. S.7 of Article 75 empowers Congress to settle the payment of the domestic and foreign debt of the nation. This section found its way into the Constitution of 1853 in order to ensure that in the case of debt that was incurred, prior to the coming into force of the Constitution, by an organ other than Congress, Congress would at least retrospectively be involved in settling the payment of such debt. The importance of Congress' involvement in the issue of public debt can be explained by the consideration that the people can only be expected to pay debt taken up in the name of the country if Congress, as the representative of the people, at least retrospectively accepts it as binding.[39] If this is the underlying idea, and given that s.7 survived the constitutional reform of 1994, even though it is not very likely that there are any more payments of public debts in need of settlement that refer to the pre-constitutional period, it seems convincing also to apply s.7 to cases in which a public debt was not incurred in accordance with s. 4 of Article 75 by the constitutionally determined regime, that is Congress, but instead, for example, by an undemocratic regime that governed the country and indebted it without constitutional authority.[40] This is of great importance in the Argentinean context, given that since the coming into force of the Constitution, the country suffered many years of de facto regimes.

Thus, only Congress can validly indebt the country, and if public debt was taken up in the name of the country by another organ, only Congress has the power to settle the payment of such debt. In the context of Argentina's foreign debt, these constitutional provisions raise some important issues. The first question that needs to be asked is that of whether or not the country's public foreign debt has been contracted in the constitutionally foreseen way, and what legal consequences attach if it can be established that that was not, in fact, the case. In order to answer the factual question, it needs to be determined when the debt was contracted, for what amount, and, most importantly, for which purposes, by whom, and by the means of which acts.[41] None of these facts are, however, easy to establish, as the history of Argentina's foreign debt is long and complicated. Even if the analysis is limited to the period starting with the beginning of the latest military regime in 1976, when the country's foreign debt reached quantitatively new proportions, to determine with any degree of exactitude any of the aforementioned factors is extremely difficult, not the least because the Central Bank of Argentina, the main institution involved in all matters surrounding foreign debt, did not keep a record of the transactions related to the country's foreign debt![42] Some knowledge can, however, be gained from the factual findings in the case of

Olmos,[43] where it was determined that during the government of the latest military regime, Argentina's foreign debt was not contracted through Parliamentary legislation, that is the procedure envisaged in Article 75(4) of the Constitution, but instead by the means of governmental decrees and decisions of Central Bank executives.[44] This raises the question of the constitutional validity of acts by de facto regimes that do not respect formal constitutional requirements, or that change them. In this respect, in Argentinean constitutional law it is a well-established principle that once a de facto regime has come to an end, measures taken in violation of constitutional principles need to be confirmed by a subsequent democratic government in order to be constitutional and thus valid.[45]

Thus, the debt was originally contracted in an unconstitutional way, and in 1984, Congress adopted Act 23.854 which rejected all investment accounts referring to the period of the military regime, that is 1976 to 1983. Various arguments might nevertheless be brought forward in favour of the view that Congress later settled the debt pursuant to Article 75(7), thereby healing the original unconstitutionality. The main controversy in this context focuses on the interpretation of the word 'settle'.[46] Many seem to be of the opinion that either by approving the annual Budget Act which determines the budget of the Argentinean State, and which routinely includes a provision assigning a certain amount of money to the payment of the country's foreign debt,[47] or through the approval of measures restructuring the original debt, Congress settled the payment of the public debt.[48] This view seems to find some support in the Supreme Court's decision in Brunicardi.[49] In that case, a bondholder challenged the constitutionality of regulation 772/86 and of ministerial resolutions and communications of the Central Bank based on regulation 772/86, which modified, in 1986, the conditions of the bonds he was holding. The last military regime had issued these bonds through regulation 1334/82, thereby assuming the debt of private Argentinean companies. At the same time, the conditions of the original loan were altered. The Supreme Court first of all made it clear that the rejection of the investment accounts through statute 23.854 did not, in itself, affect the validity of any legal acts or relationships that date back to the military regime. According to the Court, the modification of the terms of the obligations assumed in 1982 through regulation 772/86 must be regarded as an implicit ratification and a recognition of the validity of the original obligations that were thereby altered.[50] Given that the Parliamentary debate of the budget made it possible to know Congress' opinion with regard to the servicing of the country's debt, it did not trouble the Court that these alterations had been made in the form of executive regulations. From the fact that Congress did not adopt the suggestion of a minority in Parliament which wanted to include into the text of the Budget Acts explicit references to a direct involvement of Congress in the

context of settling the public debt, the Court rather concluded that Congress accepted the practice whereby the executive exercised all faculties concerning the foreign debt and Congress' involvement was reduced to the annual debate of the budget dedicated to the payment of the foreign debt.[51]

The Court's analysis which led to the conclusion that the discrepancy between the constitutional text and the practice adopted with regard to all acts concerning the country's foreign debt is not problematic, is surprisingly superficial, given that within the system of a written constitution that expressly allocates different tasks to different constitutional organs, the question of whether or not constitutional requirements have been complied with cannot depend on the attitude of the different organs, but instead depends on whether or not the constitution regards such practices as acceptable. Thus, Congress and the Executive cannot, even by mutual agreement, circumvent the constitutionally determined distribution of powers and vest powers in the Executive that the Constitution assigned to Congress, unless the Constitution itself allows for such a delegation of powers. It then seems as if two constitutional questions need to be addressed in this context: whether Congress' enactment of the annual Budget Act can constitute the settling of old, or the contracting of new debt, acts for which Congress has the exclusive competence pursuant to Articles 75(7) and 75(4), respectively; and whether or not the practice according to which Congress' involvement is reduced to approving the Budget Act constitutes a delegation of power that is in accordance with the Constitution.

With regard to the question of whether the mere approval of the budget constitutes a settling of the public debt by Congress as required by Article 75(7) of the Constitution, one of Argentina's most highly regarded constitutional law professors, Germán Bidart Campos, suggested that this cannot be the case, given that Article 75 of the Constitution makes a clear distinction between Congress' power to approve the budget, a power conferred by s.8 of Article 75, and the power to settle the public debt pursuant to s.7 of Article 75. According to his opinion, s.7 of Article 75 would be superfluous if it could be exercised simply by approving the budget, that is by the very same act with which Congress fulfils its task of fixing the budget under Article 75(8). Thus, settling the debt needs to be something qualitatively different from the mere approval of a budgetary item. Neither can Congress' involvement in the contracting or settling of public debt be reduced to approving the relevant international treaty in which the terms of the debt were agreed between the Argentinean Government and the creditor, as here again, two distinct constitutional faculties of Congress would otherwise merge into one.[52] He therefore concludes that the practice according to which it is the Executive that contracts the foreign debt and regulates the terms and conditions of its payment, whereas Congress does no more than approve the relevant trea-

ties and allocate the funds necessary for these purposes within the budget, is a mutation of the Constitution.[53]

This leaves the question of what, in addition to making available the relevant budget, is required in order for Congress to 'settle' the payment of the debt. It has been suggested that to settle the payment of the debt refers to putting it in order, and that the difference between such an activity and the mere approval of budgetary positions is that the latter only refers to setting aside a certain amount of money for a specific purpose. It does not include, as should the former, a thorough and detailed analysis of the origins of such loans, their destination, conditions and any other point that is important in order to perform the task of effectively auditing the foreign debt that was contracted by an organ other than Congress.[54] To settle the payment of the debt would then refer to all decisions about transactions in this context, including cuts, guarantees, securities, renewals, (re)financing of the debt, the period of payment, and interest rates.[55] Given that Article 75(7) of the Constitution is aimed at involving Congress retroactively in scrutinising those foreign debts that were not contracted by Congress itself in order to decide whether it is justified that the country assume the payment of such debt, Congress cannot fulfil this task by approving something as part of the budget, the exact circumstances of which it ignores and never debated.[56]

A settling of the debt in this sense, has, however, never taken place. In 1984, the Alfonsín Government convened an Investigative Committee of Senate whose task was to investigate the economic illegalities and irregularities that occurred between 1976 and 1983. This could have been a first step towards enabling Congress to perform its task of settling the payment of the country's foreign debt based on the findings of this Committee. However, the Committee's mandate was terminated in 1985 before it could fulfil its mission.[57] When Justice Ballestero decided in 2000 to send his findings in Olmos, including all expert witnesses' reports, to Senate and Congress to make available to both Houses of Parliament the outcome of the most thorough investigation into the development of the country's foreign debt under the last military regime,[58] a Parliamentary debate of the issue did not take place. From all this it follows that the payment of the debt has not been settled by Congress in the constitutionally required way.

Does this mean that all activities of the Executive that aim at paying, renegotiating or refinancing the unsettled debt are then necessarily unconstitutional? As these activities are based on empowering statutes in which Congress grants the Executive far-reaching powers in the context of the foreign debt, Executive acts based on those statutes can then only be unconstitutional if the empowering statutes on which such activities are based are themselves unconstitutional, or if the Executive's acts go beyond the powers awarded by those statutes. It then needs to be analysed whether this delega-

tion of powers from the legislative to the Executive is constitutional. In Article 76(1), the Argentinean Constitution prohibits that Congress delegate powers to the Executive 'save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.' According to Argentinean constitutional doctrine, it is unconstitutional that Congress authorises another organ to perform the functions the Constitution has vested in Congress.[59] What is, on the other hand, constitutional is that Congress exercises its constitutional powers in an area of its competence, but does so in a form that leaves room for the executive to become active in the same area, within the framework set by Congress.[60]

Thus, Congress cannot validly delegate to the Executive its powers to settle the country's foreign debt. On the other hand, Congress could, in principle, delegate the competence to negotiate the terms of repaying, refinancing or renegotiating the old debt, as these seem to be administrative tasks that normally belong to the Executive's responsibilities, as long as Congress sets the policy framework within which these activities are to take place. However, it is doubtful that such delegations can be constitutionally valid before Congress has exercised its task of settling the debt. This is because before Congress has audited and accepted as binding a debt that was incurred in an unconstitutional fashion, this debt itself, and then necessarily also its repayment, has not been legitimised. To delegate powers with regard to the payment of this debt would then mean that Congress gives the Executive the power to dedicate the nation's money to the fulfilment of an obligation the nation has not as yet assumed in the constitutionally prescribed way, and this can hardly be regarded as a legitimate and constitutionally valid expense. It follows that all activities that take place in the context of debt repayment and renegotiation before the debt has been settled are unconstitutional. These considerations not only apply to the renegotiation of the terms and to the repayment of the foreign debt, but also to the taking up of new loans in order to repay the old debt. Debt can only be contracted constitutionally for the purposes mentioned in Article 4 of the Argentinean Constitution, and that article limits Congress' power to authorise loans and credit transactions to cases of national emergencies or enterprises of national interest. Debt repayment does not fall under either of these categories, so that the taking up of new loans in order to repay or refinance the old debt cannot be justified this way and must instead be regarded as an activity in the context of settling the payment of the old debt.

The claim frequently made in the political discussion of Argentina's foreign debt that every payment, renegotiation or refinancing of the debt, as well as the taking up of new debts in order to repay the old debt, is unconstitutional until a settling of the payment of the debt by Congress has taken place, thus has its backing in the country's Constitution. However, judicial proceed-

ings intended to prevent government, by the means of a temporary injunction, from performing any such acts aimed at paying or renegotiating the country's foreign debt, or contracting new debt for this purpose, until Congress establishes the real amount of the debt and settles its payment with regard to the findings in Olmos,[61] were thrown out for procedural reasons.[62] However, given that in Argentina the acts of all organs of the state are subject to constitutional review by the courts,[63] the courts have the role and the power to control the compatibility of all decisions of the Executive and the legislative with constitutional principles.[64] This means that if proceedings for unconstitutionality were initiated, the courts could, and should, declare all acts aimed at debt repayment or renegotiation before the debt has been settled by Congress as unconstitutional. This includes the possibility that the current practice of assigning funds to debt repayment in the annual Budget Acts[65] could be struck down as unconstitutional by the courts.

In the light of the current practice with regard to debt renegotiations and payment, it seems nevertheless important to add that even if the debt had been settled, as many seem to think, so that its repayment in itself would then not be unconstitutional, the breadth of the legislative delegations gives rise to constitutional concerns. The Supreme Court argued in Brunicardi that the general authorisation of the Executive to intervene in all matters regarding the foreign debt that can be found in the Ministries Act and which was relevant for the specific question before the Court, amounted to a delegation of powers that was compatible with the Constitution.[66] However, it has been suggested that if the delegations of power to the Secretary of the Economy by the means of this statute were to be interpreted as conferring such wide-ranging powers as those to issue new bonds and to determine their terms and conditions, this would go beyond the powers envisaged by Article 76, as this means that instead of executing parliamentary policies, the Executive determines these policies, thereby assuming powers that are vested in Congress.[67] What would, instead, be necessary in the context of a constitutional delegation of powers is an intervention of Congress, prior to any executive activities with regard to the foreign debt, which sets the policy framework in which such activities are to take place.[68] Thus, Congress must be involved not just in setting aside the money needed for fulfilling obligations entered into by the Executive, but must rather provide, through the empowering provisions, a clear framework for the negotiating position of the Argentinean State.[69] If the empowering statute does not contain such clear guidelines, and the results of the negotiations between Government and Argentina's creditors are not debated and approved by Congress, either the delegation itself, or its exercise by the Executive, would be unconstitutional.

However, this is not how the delegation of powers works in practice. In Act 11.672, called Act Permanently Complementing the Budget, as amended by

Act 16.432, Congress gave the Executive the power to contract public debt with IFIs. In the context of the restructuring of Argentina's public debt under the Menem Government, Act 24.156 (Act of the Financial Administration and the Control Systems of the National Public Sector), which came into force in 1993, authorises the Executive in its Article 65 to perform operations to restructure the public debt, as long as this constitutes an improvement of the original amount, payment period and/or interest rates. While the Executive cannot make any operations with regard to the public debt unless they have been contemplated and specified in the Budget Act (s.60 of Act 24.156), operations with IFIs are expressly excluded from this requirement. Thus, Congress' role is largely reduced to rubberstamping whatever the results of Government's negotiations by making available the necessary funds in the Budget Act, and with regard to the debt with IFIs, the empowering statute does not even require that.[70] Furthermore, in the light of the latest financial crisis, Congress gave the Executive so-called super powers, allowing the Executive to change the assignment of the budget contained in the Budget Act from one item to another without any congressional involvement.[71] It is obvious that the delegation of powers, as well as the common practice adopted in Argentina in the context of debt negotiations, are not in line with constitutional principles. It has, indeed, been argued that the contracting of foreign debt by the Executive not only violates the constitutional provisions expressly regulating the distribution of powers and the competences of the respective constitutional organs, but also the spirit of the Constitution as set out in Articles 22 (the people deliberate and govern only through their representatives and authorities that were created by the Constitution) and 29 (Congress may not vest on the National Executive Power … extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honour, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void) of the Constitution.[72]

2.2 Can the Unconstitutionality be Healed?

If the main legal problem with regard to Argentina's foreign debt was the lack of constitutional legitimacy because the payment of the debt has never been settled by Congress in the constitutionally correct way, the possibility contained in Article 75(7) that Congress retrospectively accept the debt suggests that this procedural unconstitutionality can be healed. Thus, it seems as if Congress could redress the situation, if it so wished, and retrospectively legitimise the debt. However, it has been established above that settling the debt involves a qualitative aspect, as the origins, the amount and the purpose of the loans need to be thoroughly audited. While this does not mean that at

the end of this auditing procedure the debt cannot be approved and accepted as binding the nation, it is important to analyse whether Congress is entirely free in deciding whether or not to accept the debt and how to settle its payment, or whether the Constitution imposes restrictions in this respect. It is submitted that the latter is the case, as the Argentinean Constitution not only requires procedural constitutionality of all state acts, that is compliance with the procedure and competencies set out in the Constitution, but in addition demands substantive constitutionality, which means that the content of the decisions made by constitutional organs must be in accordance with constitutional principles. The Constitution prescribes in Article 4 that debt can only be taken up in cases of national emergencies or for the purposes of financing enterprises of national interest. It is submitted that the powers of Congress retrospectively to settle the payment of debt cannot go beyond its powers of contracting it to begin with. Thus, when settling the payment of the debt according to Article 75(7), Congress can only accept a debt as valid and binding if, but for the fact that it was not agreed by the competent state organ, it was contracted in accordance with constitutional standards.

In the context of the Argentinean Constitution it also needs to be borne in mind that all state acts must be compatible with constitutional human rights guarantees, including compliance with those international treaties which the Constitution has granted constitutional status,[73] such as the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights. Human rights considerations can thus not be ignored when government enters into international agreements, when parliament enacts legislation implementing the measures agreed therein, or when government formulates its economic and financial policy. This raises an interesting legal question, as it is then doubtful that the government could validly conclude the agreements that its creditors demand, at least if a negative impact of debt rescheduling and debt repayment on the protection of social and economic rights could be shown.[74] In that case, Congress could for the same reasons not validly settle the payment of the debt.[75] Thus, even if the auditing showed that parts of the debt taken up by the military regime were contracted for constitutionally valid objectives, the rescheduling and repayment of this debt would need to give due regard to human rights considerations, including social rights. In this context, it needs to be taken into account that the UN Commission on Human Rights 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, growth programmes and economic reforms arising from the debt.'[76] Furthermore, countries are under the obligation to assert and defend these rights in their negotiations with IFIs.[77] Given the constitutional status of these treaty obligations, social

rights compatibility of debt repayment can be controlled by Argentinean courts in the context of constitutional review of state acts.

2.3 Consequences of Unconstitutionality

If, then, Argentina's foreign debt has never been settled in the constitutionally prescribed way, and this affects the constitutionality of any delegation to renegotiate this debt and the contracting of new debt in order to repay it, the crucial – and unfortunately in the context of the Argentinean debate – largely neglected question arising is that of the consequences of this unconstitutionality. Several approaches are possible in this respect from an internal Argentinean perspective. First of all, it could be argued that the internal unconstitutionality has no effect on Argentina's relationship with its creditors, as no one can rely on the lack of internal competency in order to escape his/her obligations.[78] Alternatively, it could be said that the procedural unconstitutionality in itself affects the existence of the obligation towards the creditors, a result that seems to be in line with the approach taken by s.66 of Act 24.156 which provides that

> Operations with regard to public loans that are executed in contravention of the provisions of this statute are void and without effect, which does not affect the personal responsibility of those who executed them. The obligations following from these operations are not enforceable against the central administration or any other contracting entity of the federal public sector.[79]

Another possibility would be to make the effect of the unconstitutionality, or the unlawfulness, of the contracting of the debt, dependent on the bad faith of the creditor.[80]

At this point, an international dimension needs to be brought into the discussion, given that the country's foreign debt involves foreign creditors. Thus, it needs to be examined what effect, if any, the domestic unconstitutionality of the debt and of debt repayment has on the claim of the country's foreign creditors. In this context, it needs to be noted that Argentina has accepted foreign jurisdiction in these matters,[81] although the constitutionality of this has been questioned.[82] Looking at litigation which is currently taking place in New York before Justice Griesa, it seems as if the constitutionality of the Argentinean debt is not at all an issue before the court, which might be explained by the fact that the Argentinean Government is not raising the issue, so that there is then no need for the court to analyse it. While it is not likely that this situation is going to change, in the context of analysing how objections to debt repayment might influence the legal position it is nevertheless interesting to examine what effect, if any, the unconstitutionality argument could have in the context of such litigation.

The argument that the fact that debt was not incurred in the constitutionally prescribed way should void the loan agreements finds support in some international arbitration cases discussing the validity of obligations that were incurred by state organs acting *ultra vires*.[83] In one case, for example, the President of Venezuela had authorised the Venezuelan consul in New York to enter into certain contracts. The consul exceeded his authority, but the authorisation issued by the President contained an 'anticipatory all powers clause', approving all future acts of the consul with regard to those contracts. It was held that the validity of the contracts depended on whether the President himself had the power to enter into such contracts. Given that under the Venezuelan Constitution the legislature had the exclusive competence to conclude contracts in the particular subject matter, the contract was found to be *ultra vires* and the claim against Venezuela was rejected.[84] Similarly, in the so-called *Tinoco* case,[85] a cabinet member of the Tinoco Government of Costa Rica had entered into a concessionary contract with a foreign corporation. The contract was then authorised by the President and approved by the Chamber of Deputies. Taft, the US Chief Justice who was the arbitrator in that case, argued that the validity of the contract had to be determined according to the law of Costa Rica in existence at the time of its making. The contract contained provisions concerning taxes, so that, according to the Costa Rican Constitution, the approval of both Houses of Congress, not just that of the Lower Chamber, was required. As Senate had not approved (or disapproved) the contract, it was invalid, and Taft took it for granted that the nullity of the contract based on domestic constitutional law had the effect of invalidating the contractual claim of the international concessionary.[86] If these principles were to be applied to the case of Argentina's foreign debt, it seems as if Argentina could be justified in repudiating debt repayment on the basis of the preceding analysis of Argentinean domestic constitutional law, that is on the grounds that Congress did not settle the payment of the debt and that therefore all acts with respect to the negotiation and repayment of the foreign debt were and still are unconstitutional, thereby voiding any obligations the Argentinean state might otherwise have incurred towards its creditors. However, other cases make the prospect of successfully invoking the unconstitutionality of the obligations in international judicial or arbitration proceedings extremely unlikely. In some cases, international tribunals have, for example, held that the conduct of a state subsequent to the conclusion of the contract must be taken into account when deciding whether or not contracts are valid, even though they were entered into *ultra vires*. In a case involving Mexico,[87] a contract for legal services was concluded between a US lawyer and an official acting for the Provisional Mexican Government. After having made several payments under the contract, the incoming Mexican Government refused to pay the remaining sum on the basis that the

contract was *ultra vires* and thus void under Mexican law. The Commission held that it was unwarranted to pronounce the nullity of the contract in the light of the fact that the new Mexican Government had recognised the validity of the contract by making several payments under it.[88] In a comparable case in which a US Consul in India had appointed a lawyer to render legal services to the US, and in which the US Government refused to pay the fees on the grounds that the Consul had not been authorised to employ the lawyer on behalf of the Government, the tribunal decided that:

> Whatever at the outset was the authority of the United States Consul to employ an attorney at the expense of the United States Government, it is plain from the correspondence referred to above that that Government was perfectly aware … of Hemming's employment in a prosecution initiated solely for its benefit, that it did not object in any way whatever during the progress of the case to the steps taken by its Consul but appeared implicitly at all events to approve of those steps and of Hemming's employment. This Tribunal is, therefore, of the opinion that the United States is bound by the contract entered into, rightly or wrongly, by its Consul for its benefit and ratified by it.[89]

In the case of Argentina, it could then easily be argued that the consistent acts of all subsequent democratic governments to repay and restructure the country's foreign debt constitute a subsequent ratification of the originally void loan agreements concluded by the military regime. It is submitted that whether and how originally unconstitutional contracts can be ratified is, just as the issue of the original unconstitutionality of such contracts, a matter to be decided according to domestic constitutional law. Only if the organ that ratifies the situation has the authority to do so, and if the ratification complies with constitutional principles, will this ratification be any more valid than the act thereby ratified.[90] However, the foregoing analysis demonstrated that in the Argentinean context the acts that might be regarded as a ratification are not constitutional, so that they cannot have the effect of ratifying the originally unconstitutional contracts. If there is then no valid ratification, it is only possible to base an estoppel on a pure good faith argument,[91] on the grounds that the partial fulfilment of the obligation by the debtor state creates the appearance of the validity of the obligation on which the creditor can rely, or a legitimate expectation that the country will not turn round and repudiate the contract at some later point.

In another case in which the Venezuelan Government declared a contract void on the grounds that it had not been submitted by the Executive for legislative approval as required by the country's Constitution, it was held that this omission should not be ascribed to the other party to the contract, but rather to the Venezuelan Executive to whom the compliance with said formality corresponded.[92] In *Aboilard*,[93] again a case in which a concessionary

contract entered into between a French company and several Haitian Secretaries of State in the name of the Haitian Government, was later repudiated by the Haitian government on the grounds that it had not been submitted to the legislature and was therefore void under domestic law, the tribunal accepted the invalidity of the contract under domestic Haitian law. However, it was held that while the contract could therefore not produce the effects of a valid contract, Haiti was internationally liable for the repudiation of the contract, because the government was responsible for the legitimate expectations created by government officials in the validity of the contract. The government was accordingly liable for the damage suffered by the concessionary. These decisions equally seem to be based on the concept of good faith with regard to the fact that the state organ that originally entered into the obligation acted within its authorities. Thus based on cases such as Aboilard, it could be argued that the reasons for the invalidity of the obligations lie with the Argentinean Government, not with the foreign creditors, and that the Argentinean State through its acts has created legitimate expectations in its creditors and can accordingly not escape liability, even if the loan agreements were to be found invalid.

In both types of cases, in order to be able to rely on good faith, the other party must have relied either on the appearance of original authority or on the appearance of ratification, and must have applied reasonable care in order to ascertain the authority of the state official, the amount of care required varying depending on the expertise of the creditor and the importance and the subject matter of the contract.[94] The outcome of Argentinean challenges regarding the validity of the loan agreements based on unconstitutionality would then depend on the good faith of the creditors. While with regard to the original debt contracted by the military regime, an argument can be made that the unconstitutionality should have been obvious to foreign lenders,[95] it is more difficult to sustain a similar argument with regard to the acts of subsequent democratic governments. Even if these acts are unconstitutional under the Argentinean Constitution, it could be argued that the Argentinean state has, though not validly at the domestic level, nevertheless through the continuous practice of debt repayment, renegotiation and restructuring, created a legitimate expectation in the honouring of its obligations at the international level and is therefore barred from relying on the domestic invalidity of the contract.

This approach at first sight seems to strike a fair balance between the interests of international creditors and those of debtor nations.[96] However, several considerations shed doubt on the appropriateness of such an approach in this particular context. First of all, it needs to be taken into account that, known to the other party, one of the parties to the contract is a state, and that states are bound by their constitutional and international law obligations, and

furthermore have to take public interests into account when entering into contracts or later deciding whether or not to honour them. Indeed, states might be in violation of constitutional requirements or international norms if they were to give their contractual obligations precedence over other principles, for example their social rights obligations.[97] If the approach favouring the interests of creditors in the validity of contracts that are invalid under the domestic constitutional law of the debtor country is really derived from generally accepted principles of international law, it nevertheless needs to be borne in mind that at least with regard to agreements that might violate a state's obligations under international treaties, such as the ICESCR, the conflict can then not be reduced to one between domestic law and international law, but turns into a conflict between conflicting principles of international law.

The context of debt repayment in Argentina demonstrates clearly the problems of an approach that separates the domestic constitutionality of a contract from its international validity.[98] If acts related to debt repayment either by the Argentinean Executive, or by Congress before settling the payment of the debt, were to be regarded as valid with regard to the country's creditors without any regard to procedural or substantive domestic constitutional principles, this would have extremely far-reaching consequences. Indeed, it would mean no less than that the repayment of a debt taken up by a military regime and accepted de facto by democratic governments under pressure, develops its own dynamics and that this cycle can never be broken, no matter what the audit required by the Argentinean Constitution were to find with regard to the legitimacy of this debt and the compatibility of its servicing with human rights protection. If constitutional principles could thus be disregarded in the context of the contractual relationship between Argentina and its creditors, the Argentinean Government would be more accountable to its 'external creditors (the IMF and the World Bank in particular) than to [its] own citizens.'[99]

As the example of Argentina shows, the existence of a detailed constitution and of constitutional review of all state acts, to the contrary, seems to be the only legal tool a country that is dependent on its creditors has in order to keep at least some sovereignty and retain some independent decision-making power.[100] If domestic constitutionality can be disregarded in the international context, this means that a country's constitution, which is supposed to be the supreme expression of a nation's governing principles, as well as superior to the acts of the government of the day, loses this very characteristic, as governments or government officials can bind nations even if their acts violate constitutional principles, so that the constitution becomes largely worthless. If representative democracy is still a valid principle, it is difficult to sustain that the people can be held responsible for *ultra vires* acts of state organs that

did not have the authority to represent the people. Indeed, if constitutional principles had been complied with, large parts of Argentina's debt could not have been incurred, and the debt crisis would accordingly have been avoided.[101]

CONCLUSION

It is obvious that in a chapter, it is not possible to do justice to the complexities of the issues surrounding debt repayment, even when concentrating only on the example of one country. Many important issues therefore had to be neglected, even though they are important in themselves and could to some extent be related to the issues analysed above, such as the debate surrounding international bankruptcy procedures following the example of US domestic law.[102] In the context of the legal debate taking place in Argentina, it is submitted that the analysis of the procedural unconstitutionality of the country's foreign debt, while important in order to make clear the importance of Congress' involvement in resolving the problem, can be no more than a first step on the way to questioning the legitimacy of debt repayment. As was demonstrated, procedural unconstitutionality can be healed, unless this is prevented by substantive reasons, such as social rights considerations. A deeper analysis of these issues needs to take place in order to assess how these arguments could most effectively be used in the context of debt renegotiation and in the context of international judicial and arbitration proceedings for defaulting on debt repayment.

Furthermore, even if an audit of the Argentinean debt were to take place and were to show that much of the debt was, in fact, contracted in an unconstitutional way,[103] or that social rights considerations make a different approach to debt repayment necessary, this would open up new questions. An important problem that needs to be resolved in this context is that of the consequences of the invalidity of any loan agreements. In the context of swap interest transactions contracted *ultra vires* by local authorities, the House of Lords hinted, for example, that

> It may not follow that, as between the council and the banks, payments made by the council before or after the period of interim strategy can be recovered by the council. Nor does it follow that payments received by the council before or after that period cannot be recovered by the banks. The consequences of any ultra vires transaction may depend on the facts of each case.[104]

Thus, more work needs to be done to examine what the consequences of an *ultra vires* transaction should be, to what extent the principles of unjust enrichment might be relied on, and how social rights arguments fit into the restitution and compensation debate.

The preceding analysis has shown that a legal analysis of Argentina's foreign debt points clearly towards the conclusion that in the context of the settling of the country's foreign debt, formal and substantive requirements of the Argentinean Constitution have been, and still are, widely disregarded. While the Constitution demands that the debt is settled by Congress as the democratically legitimate representative of the people, one look at the ongoing debt negotiations between the Argentinean Government and the country's creditors shows a substantial gap between constitutional demands and reality. The terms of debt repayment with regard to debts with IFIs are worked out between the Argentinean Government and the IMF, and with regard to the restructuring of the debt with other than IFIs, they depend in addition on the approval of the US Security and Exchange Commission, or its equivalent in other countries in which the new bonds are to be put on the market.

Several explanations come to mind when reflecting on the discrepancy between constitutional mandates and reality. First of all, it could be possible that the requirements of the Constitution are simply impractical, and that in the context of debt repayment which requires constant negotiations with a wide variety of creditors, a concentration of powers in the Executive is inevitable. The Argentinean Constitution provides a framework, based on what was perceived to be in the interests of the Argentinean nation, which, if strictly adhered to, could stand in the way of capitalist interests and policies. Indeed, in the globalised world of neo-liberalist capitalism, it seems as if national sovereignty, but also the idea of a strong role of Congress, and of an independent judiciary that can control the constitutionality of all state acts, are no longer popular. Statements of foreign government officials and executives of IFIs make it clear that they regard the Argentinean constitutional system as threatening their vision of the rule of law and of legal security, which is a vision entirely focused on international and transnational business and financial interests.[105] More importantly, constitutional values such as the protection of economic and social rights do not come into the equation at all.

In the domestic arena, based on the realities of the negotiations with its creditors, a distribution of powers can be observed away from the, in many cases, constitutionally empowered and democratically legitimated organ, Congress, to the Executive, and has equally been justified on grounds of the realities, necessities and exigencies of debt negotiations. This shows that it is essential to bear in mind that the debt is used as a political tool, that gives IFIs, and in fact the whole international financial world, the possibility to exercise political pressure on debtor countries, but furthermore as a means to achieve internal obedience.[106] Indeed, it can be observed in Argentina that governments use debt repayment as an argument to justify unpopular measures,[107] and, even more importantly, in order to silence any debate on national policies.[108]

As a final point, it should be noted that the debate in Argentina, apart from that taking place in militant political circles, is largely characterised by resignation, if not fear, in that while there seems to be a large consensus that the debt is unconstitutional and, more importantly, unpayable and unsustainable and that debt repayment is detrimental to the interests of the country, the reality of the international power structure needs to be accepted and the debt to be repaid in order to avoid the consequences of international isolation, the loss of international investments and so on. From a legal perspective, this raises interesting issues of sovereignty and undue pressure which need to be resolved at the international level if the law is not to degenerate into the law of the strongest.

NOTES

1. I would like to thank Dr Carlos Juliá for helping me with my research into Argentinean law, and Prof. Sheldon Leader for discussions of the international dimensions of some of the issues addressed in this chapter.
2. *Clarín*, 9 March 2004.
3. 23 April 2004, www.businessday.co.za.
4. *Clarín*, 12 January 2005.
5. For example when insisting on legislation allowing for an increase of the charges for their services, see Eduardo Amadeo, *La Salida del Abismo*, Planeta Buenos Aires 2003, at p. 151.
6. See Augusto M. Morello, 'Suspensión del pago de la deuda pública. Fundamentos jurídicos', *El Derecho* 196 (2002), 839–46, at pp. 839–40.
7. The public health system, for example, has almost collapsed; see 'Estado de los hospitales públicos del país' (Situation of the public hospitals in the country), an Annexe to the Report on Health in Argentina, presented by the NGO Centre of Legal and Social Studies (CELS) to the Interamerican Commission on Human Rights. This gives an impressive overview of the disastrous situation of many hospitals in which even the most basic equipment, such as needles, anaesthetics etc., are missing, at www.cels.org.ar. For statistics on health; social security; unemployment; poverty rates etc. see the web page of the National Instute of Statistics and Censuses, www.indec.gov.ar.
8. See, for example, David Asp, 'Argentina's mystery of capital: why the International Monetary Fund needs Hernando de Soto', (2003) 12 *Minnesota Journal of Global Trade* 383, at p. 384. The IMF's Independent Evaluation Office's Report, while admitting some faults committed by the IMF, nevertheless mainly blames Argentina's policy choices, for example on p. 31.
9. See Michael Mussa, *Argentina y el FMI: del triunfo a la tragedia* (Buenos Aires, Grupo Editorial Planeta, 2002), at pp. 112–13.
10. The UN Committee on Economic, Social and Cultural Rights remarked in its Report on Argentina that 'the implementation of the structural adjustment programs has hampered the enjoyment of economic, social and cultural rights, in particular by the disadvantaged groups in society', at para.258, and recommended that 'the State party, when negotiating with international financial institutions, take into account its Covenant obligations to respect, protect and fulfil all the rights enshrined in the Covenant', at para.276, E/C.12/1999/11. See also Bernard Mudho, Report on 'Effects of structural adjustment policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights, E/CN.4/2003/10.
11. See, for example, Aldo Ferrer, *La Argentina y el Orden Mundial* (Buenos Aires, Fondo

de Cultura Económica, 2003), at pp. 141–47; and Michael Mussa, *Argentina y el FMI: del triunfo a la tragedia* op. cit., at pp. 13–26.

12. See, for example, Joseph Stiglitz, *Globalisation and its Discontents* (London, Allen Lane, The Penguin Press, 2002) at p. 69; and Mario Rapaport, *Tiempos de crisis, vientos de cambio* (Buenos Aires, Grupo Editorial Norma, 2002); Ann Pettifor, Liana Cisneros, Alejandro Olmos Gaona, 'It takes two to tango', Jubilee Plus Report, September 2001, at p. 6, www. .jubilee2000uk.org/analysis/reports/tangolowres.pdf.
13. See, for example, Ricardo Sidicaro, *La Crisis del Estado* (Buenos Aires, Libros del Roja, 2002); and John V. Paddock, 'IMF policy and the Argentine Crisis,' (2002) *University of Miami Inter-American Law Review*, 155–187; Miguel G. Peirano, *Pagina 12*, 19 September 2004. See also, very forcefully, Fantu Cheru, in his independent expert report to the Economic and Social Council 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50, who demonstrates the connection between neo-liberal policies and the social rights situation more globally. Also Patricia Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy*, Earthscan 1991, at p. 90.
14. Javier Iguíñiz Echeverría, 'La deuda social de los acreedores: aproximaciones a su responsabilidad social', in: Chris Jochnik and Patricio Pazmiño Freire (eds), *Otras Caras de la Deuda*, (Nueva Sociedad Caracas 2001), at pp. 191–215.
15. See, for example, Susanna Mitchell, 'The charade of unaffordable debt cancellation', www.jubilee2000uk.org (last accessed on 2 December 2004). This is, however, often rejected, either because it is argued that the Third World does not owe any debt, see, for example, Adams, op. cit. at p. 194, and/or because the current debt relief plans shift the burden away from the lenders themselves onto the tax payers in the creditor countries; see Adams, op. cit., at p. 193; Eric Toussaint, 'Impagable, incobrable, injusta: quebrar el círculo infernal de la deuda', in: Jochnik op. cit., 217–25, at pp. 220–24. See also UN-ESC Human Rights Commission, Report of Special Rapporteur Ronaldo Figueredo, E/CN.4/2000/51.
16. Carios Julía, *La Memoria de la Deuda* (Buenos Aires: Biblios 2002), at pp. 215 and 236. See also Heinz-Dietrich Steffan, 'Perspectivas de desendeudamiento externo desde el derecho internacional', in: Chris Jochnik and Patricio Pazmiño Freire (eds), op. cit., 117–30, at pp. 125–28; and Joan Martínez-Alier, 'Deuda ecologica vs deuda externa: una perspectiva latinoamericana', in Jochnik, op. cit. 163–80.
17. 23 April 2004, www.businessday.co.za.
18. This is also the approach suggested by Günter Frankenberg and Rolf Knieper, 'Legal problems of the overindebtedness of developing countries: the current relevance of the doctrine of odious debt', (1984) 12 *International Journal of the Sociology of Law*, 415–38, at pp. 418–19.
19. See also Chris Jochnik, 'Nuevos caminos legales para enfrentar la deuda: una petición a la Corte Mundial', in: Jochnik op. cit., 95–116, at p. 95.
20. *La Nación*, 24 April 2000.
21. For a fuller account see, for example, Norberto Galasso, *De la Banca Baring al FMI. Historia de la Deuda Externa Argentina*, (Editorial Colihue 2003).
22. For a more general and concise description of the problems created by lending policies in that era see Günter Frankenberg and Rolf Knieper, op cit.
23. For a description of loan policies during that period see, for example, Adams, at pp. 60–64, and 95–99; see also Jorge Schvarzer, *Argentina 1976–81: El endeudamiento externo como pivote de la especulación financiera*, Cuadernos del Bimestre, Buenos Aires 1983, pp. 7–10; Tom Congdon, *The Debt Threat*, Basil Blackwell Oxford 1988, at p. 112; Eric Toussaint, op. cit., at p. 218.
24. Hans-Rimbert Hemmer, 'The international debt crisis, its causes and possible solutions', in Manfred Brochert, Rolf Schinke (eds) *International Indebtedness*, Routledge London 1990, 76–85, at pp. 79–80.
25. Sue Bradford and Bernardo Kucinski, *The Debt Squads*, Zed Books London1988, at pp. 89–90.
26. See Alejandro Olmos, *Todo lo que usted quiso saber sobre la Deuda Externa y siempre*

se lo ocultaron, Ediciones Continente, 4th edn Buenos Aires 2004, at pp. 203–204; Eric Toussaint, *Your Money or Your life! The tyranny of global finance*, Pluto Press London 1999, at p. 201.

27. See, for example, Marcelo Diamond and Daniel Naszewski, 'Argentina's foreign debt: its origin and consequences', in: *Politics and Economics of External Debt Crisis. The Latin American Experience*, Miguel Wionczek (ed.), Westview Press, Boulder and London 1985, 231–76, at p. 249.
28. Schvarzer, op. cit., at pp. 24–30; Aldo Ferrer, *¿Puede Argentina pagar su Deuda Externa? El Cid* Editor Buenos Aires 1982, at pp. 54–60.
29. See also Toussaint (1999), op. cit., at p. 200–201.
30. See also Martín Kanenguiser, *La Maldita Herencia*, Editorial Sudamericana Buenos Aires 2003, op. cit., at p. 42.
31. See Schvarzer, at pp. 51–55.
32. Report to the Economic and Social Council 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50.
33. A power given to Congress by Art.75(8) of the Constitution.
34. See Kanenguiser, op. cit., pp. 49–62; Susan George, *A Fate Worse than Debt*, Penguin, London 1988, at p. 68; Olmos, op. cit., at p. 59; Jason Morgan-Foster, 'The relationship of IMF structural adjustment programs to economic, social and cultural rights, the Argentine case revisited', (2003) 24 *Michigan Journal of International Law* 577–646, at p. 621.
35. Olmos, op. cit., pp. 58–59. See also R.T. Naylor, *Hot Money and the Politics of Debt*, Black Rose Books, Montreal, London, New York 1994, pp. 345–6, who argues that the Alfonsín government had its own interests in striking a deal with the IMF and its other creditors.
36. Toussaint (1999), op. cit., at pp. 203–204.
37. See, for example, *Clarín*, 22 April 2004.
38. For example, one attempt by Argentina's creditors to use New York courts in their fight for debt repayment failed in November 2004 when Justice Griesa refused to declare Argentina's latest offer to its creditors to be unlawful, which would have had the effect of stopping the process of exchanging the old bonds for new ones that is currently under way, see *Clarín*, 19 November 2004.
39. Salvador María Lozada, *La Deuda Externa y el Desguace del Estado Nacional*, Ediciones Jurídicas Cuyo, Mendoza 2002, at pp. 249–52.
40. Juliá, op. cit. at p. 165; Lozada, op. cit., at p. 252; Carlos Mastrorilli, 'Atribuciones del Congreso en materia de deuda externa', La Ley 1984-C, 831–836, at p. 833.
41. Lozada, op. cit., at p. 243
42. See R.T. Naylor, *Hot Money and the Politics of Debt*, Black Rose Books Montreal, London, New York 1994, at pp. 144–8.
43. 'Olmos, Alejandro S/dcia', causa N°14.467, www.seprin.com/DEUDA_EXTERNA/Sentencia.htm.
44. See also Alberto García Lema, 'Bases constitucionales y legales del proceso de reestructuración de la deuda pública', La Ley 2004-A 956–971, at p. 959.
45. Germán Bidart Campos, *Tratado Elemental de Derecho Constitucional Argentino*, Vol. II, Ediar Buenos Aires 1992, at pp. 510–12, 519 and 522.
46. The Spanish original uses the word 'arreglar'.
47. García Lema, op. cit., at p. 961; With regard to the comparable situation of contracting debt pursuant to Article 75(4), see Marcelo Villegas, Eugenio Bruno and Lucas Piaggio, 'Los derechos de los inversores argentinos frente a la propuesta de reestructuración', La Ley 2004-A, 1025–1046, at p. 1025.
48. García Lema, op. cit., at p. 961.
49. 'Brunicardi, Adriano Caredio c/ Estado Nacional (BCRA) s/ cobro S.C. B.592.XXIV.', Corte Suprema de Justicia de la Nación, Decision of 24/02/1997.
50. Ibid., at para.9.
51. Ibid., at para 10.
52. Bidart Campos, *Tratado*, op. cit., at p. 126; see also Mastrorilli, op. cit., at p. 833; and

Marcelo Bazán Lazcano, '¿Es constitucional la gestión de la deuda pública externa?', *El Derecho* 117, 963–76, at 970–71.
53. Ibid., at p. 127.
54. Juliá, op. cit., at p. 166; see also Lozada, op. cit., at pp. 260–61: Bazán Lazcano, op. cit., at p. 971.
55. Mastrorilli, op. cit., at p. 832; see also Juliá, op. cit., at p. 165.
56. Lozada, op. cit., at p. 261–2.
57. Julia, op. cit., at pp. 174–80. Juliá questions whether the Investigative Committee was rightly one of Senate, rather than Congress, given that it is Congress who is responsible for the settling of the debt.
58. 'Olmos, Alejandro S/dcia', causa N°14.467.
59. Bidart Campos, *Tratado*, op. cit., at p. 28.
60. Ibid., at p. 31.
61. For an extract of the petition made to the court see: www.lanuevahuella.con.ar/temasnacionales/Acerbi_10.htm, last accessed on 17 November 2004
62. Julia op. cit., at p. 203.
63. Helio Juan Zarini, *Derecho Constitucional* (Buenos Aires, Editorial Astrea, 2nd edn 1999), at pp. 87–93.
64. For example the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights; see Art 75 (22) of the Constitution.
65. For a general discussion of the reviewability of the Budget Acts see Horacio Guillermo Corti, 'La ley de presupuesto ante la Constitución', in: Facultad de Derecho Universidad de Buenos Aires, Lecciones y Ensayos 2002–77, 35–84, at pp. 58 and 80.
66. 'Brunicardi, Adriano Caredio c/ Estado Nacional (BCRA) s/ cobro S.C. B.592.XXIV.', at para.13.
67. Mastrorilli, op. cit., at pp. 833–4.
68. Mastrorilli, op. cit., at pp. 835–6; see also García Lema, op. cit., at p. 960.
69. Mastrorilli, op. cit., at pp. 835–6.
70. It is then impossible to understand the opinion that this provides a constitutional delegation of powers, but see García Lema at p. 962.
71. *Clarín* 24 November 2004.
72. Juliá, op. cit., at pp. 189–90.
73. See Art 75 (22) of the Constitution.
74. In the case of Argentina, this adverse impact was, for example, expressly mentioned by Bernard Mudho, Report on 'Effects of structural adjustment policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights', E/CN.4/2003/10.
75. For a discussion of the relevance of economic and social rights in this context see Rolando E Gialdino, 'Derechos humanos y deuda externa', LL 2003-E, 1468–1481.
76. Resolution 2002/29, 'Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights', at para.9.
77. See the observations made by Sadi in the 33rd meeting of the Committee for Economic, Social and Cultural Rights on 25 November 1999, E/C.12/1999/SR.33, at para.13.
78. Bazán Lazcano, op. cit., at p. 971.
79. For a critique of this waiver of state responsibility see Oscar Aguilar Valdez, 'Responsabilidad del estado por su actividad financiera', La Ley 2004-A 972-992, at pp. 988–90.
80. Ibid., at p. 990.
81. See, for example, Article 8 of Decree 319/2004 regarding the most recent debt restructuring.
82. With regard to the unconstitutionality of jurisdiction granted to the ICSID see Alfredo Eric Calcagno, Eric Calcagno 'El CIADI resulta inconstitucional' *Clarín*, 22 March 2005.
83. For a discussion of these cases see Theodor Meron, 'Repudiation of ultra vires state contracts and the international responsibility of states', (1957) 6 ICLQ 273–289, at pp. 274–75.

84. *Beales, Nobles and Garrison (US v Venezuela)*, summarised in Meron, op. cit., at pp. 279–80.
85. *Great Britain v Costa Rica* (1923), Reports of International Arbitral Awards, Vol. 1, 371.
86. Ibid., at 397–98.
87. *Davies (USA) v Mexico* (1927), Reports of International Arbitral Awards, Vol. 4, 139.
88. Ibid., at 141. For a related argument, though in a case that was based on a different factual situation, see *Z v ABC* (1983) 8 YCA 94, at 104.
89. *Hemming (GB) v US* (1920), Reports of International Arbitral Awards, Vol. 6, 51, at 53. See also *Shufeldt (US v Guatemala)*, Annual Digest and Reports of Public International Law Cases, 1929–1930, Case No.110, p. 180.
90. In the UK, a comparable point was made by Lord Templeman in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL), at 39, though in a rather different context.
91. Meron, op. cit., at p. 286.
92. *Rudloff (US v Venezuela)* (1903), as summarised by Meron, op. cit., p. 285.
93. *Aboilard (France v Haiti)* (1905), 1 Revue de Droit International Privé et de Droit Pénal International, 893.
94. Meron, op. cit., at pp. 288–9.
95. See also the arguments advanced by Taft in the *Tinoco* case, *Great Britain v Costa Rica* (1923), Reports of International Arbitral Awards, Vol. 1, 371, at 394.
96. Theodor Meron, 'Repudiation of ultra vires state contracts and the international responsibility of states', (1957) 6 ICLQ 273–289, at pp. 274–75.
97. See, for example, Resolution 2002/29, 'Effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights', at para.9.
98. For a detailed argument against the internationalisation of such contracts see, for example, M Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, The Hague 2000, at pp. 85–104 and 223–78.
99. Fantu Cheru, 'Effects of structural adjustment policies on the full enjoyment of human rights', E/CN.4/1999/50.
100. The need for strong national constitutionalism in order to improve a debtor country's position towards its creditors, was also stressed by Joseph Oloka-Onyango, 'Beyond the rhetoric: reinvigorating the struggle for economic and social rights in Africa', (1995) 26 Cal W Int'l LJ 1, at pp. 64–65.
101. Eduardo Conesa, 'Argentina: como convivir con el default', La Ley 2004-A 993-1012, at p. 1007.
102. See, for example, Kunibert Raffer, 'Solving sovereign debt overhang by internationalising Chapter 9 Procedures', (2002) 36 Studien von Zeitfragen (Internet Ausgabe), www.jahrbuch2002.studien-von-zeitfragen.net/Weltfinanz/RAFFER_1/raffer_1.HTM.
103. Or that the interest rates are usurious and that the debt has been repaid if normal interest rates were applied, an interesting argument which can unfortunately not be developed in the context of this chapter, but see Miguel Angel Espeche Gil, 'Ilicitud del alza unilateral de los intereses de la deuda externa', presentation to the XV Congress of IHLADI in April 1989, comunidad.derecho.org/deudaexterna/espechee.htm.
104. See *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL), post 36D-E, *per curiam*.
105. For a description of how the IMF demanded 'legal certainty', by which was meant that the courts could not interfere with governmental policies(!), see Eduardo Amadeo, (2003) op. cit.
106. Juliá, op. cit., at p. 99.
107. Juliá, op. cit., at p. 162.
108. Lozada, op. cit., at p. 25.

13. Development, democracy and human rights in Latin America, 1976–2000

Todd Landman

I. INTRODUCTION

The final decades of the 20th century in Latin America saw a large number of economic, political and legal changes. Countries in the region saw a general economic transformation from a Keynesian state-led model of development to a more neo-liberal model, which has been largely driven by external forces related to the region's extraction from the debt crisis through the imposition of structural adjustment programmes (SAPs) by the World Bank and the International Monetary Fund (Brohman 1996). Complementing this shift from state-led to market-led economic development, many countries in the region experienced transitions from authoritarian rule. Starting with the Peruvian transition in 1978 and ending with the Mexican transition in 2000, a wave of democratisation has spread across the region such that Latin America has joined the 'democratic universe' even though the experience has been punctuated by democratic setbacks in Fujimoro's Peru, Chavez's Venezuela, and to a lesser extent Menem's Argentina and Cardoso's Brazil (Foweraker, Landman and Harvey 2003). Alongside these economic and political changes, the region has also emerged as a key terrain for the human rights movement. Through the promulgation of new constitutions (or the resurrection of old ones) and through ratification of international and regional human rights instruments, countries in the region have made new and extensive commitments to the *de jure* protection of human rights. On the ground, however, civil society organisations and human rights NGOs have monitored the *de facto* protection of human rights throughout the periods of authoritarian rule and democratic transition. Persistent patterns of human rights abuse despite the advance of democratic political institutions and state commitment to the international law of human rights have mobilised domestic and international civil society to struggle for improvement in the human rights situation through greater enforcement and implementation of human rights norms.

These developments have led to a raised set of expectations for the region about the inter-relationships between and among development, democracy

and human rights. Yet, there is still a paucity of empirical analysis supporting such claims at the regional level. Using comparative data from 17 Latin American countries for the period 1976–2000 (total $N = 425$), this chapter examines descriptively the cross-national and temporal patterns in development, democracy and human rights and then uses correlation and regression analysis to examine the empirical relationships between and among the various indicators. The descriptive analysis on development shows that while the region experienced a general increase in trade liberalisation, it also experienced a real decrease in per capita GDP during the 1980s, and has had residual problems with high concentrations of income, high levels of undernourishment, and middling levels of human development. The descriptive data on democracy and human rights shows that the region has made great strides in strengthening democratic institutions and that any real improvements in curbing human rights violations have not been made until the mid-1990s, where Brazil and Peru stand out as significant outliers in the region with respect to the prevalence of torture. Such persistent gaps between the development of democratic institutions and real protection of human rights supports the notion that Latin America suffers from the presence of 'illiberal democracy' (Zakaria 2003).

The bivariate and multivariate statistical analysis shows that there is a weak and in many cases insignificant relationship between income levels and democracy, which confirms similar findings on the 'exceptional' nature of the region with respect to the tenets of modernization theory (see also Landman 1999; Mainwaring and Pérez-Liñan 2003). But the statistical analysis does show that there are significant positive effects for democracy, wealth, interdependence, and membership in international and regional human rights regimes for the protection of different sets of human rights. These results are obtained even after controlling for past human rights practices, sub-regional variation, population size, and involvement in civil war. Taken together, the comparative and statistical analysis presented here shows the mixed fortunes of the region during the final two and a half decades of the 20th century, and the chapter concludes with a discussion of the implications of the findings for assessing the future prospects for development, democracy and human rights in Latin America.

II. DESCRIPTIVE PATTERNS

Using comparable quantitative indicators, this section of the chapter maps the temporal and spatial patterns of development, democracy and human rights across 17 Latin America countries for the period 1976–2000. The countries used throughout this section and the next include Argentina, Bolivia, Brazil,

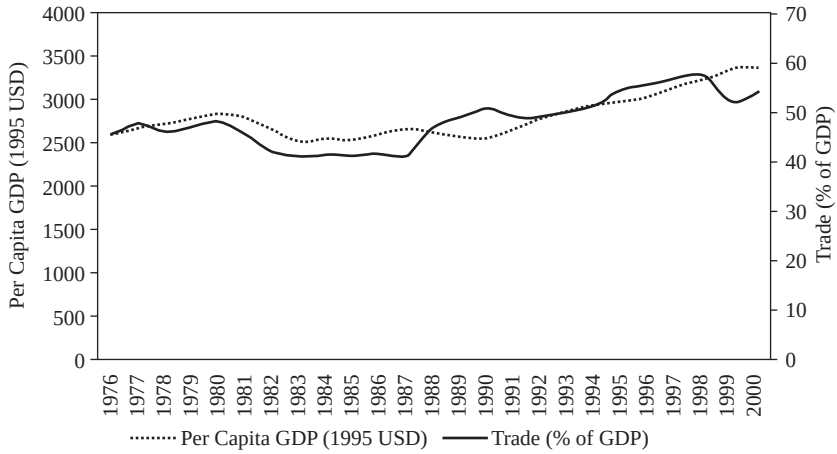
Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

II.1. Development

Broadly speaking, Latin American countries shifted from a state-led to a market-led model of economic development during the years examined in this chapter. Import substitution industrialization had given way to export-led growth, a shift that was largely brought on by the debt crisis in the 1980s and the imposition of structural adjustment programmes (SAPs) implemented by the World Bank and the International Monetary Fund. The basic elements of such programmes include trade liberalization (removal of tariffs, quotas and other barriers to trade), currency devaluation, removal of price and wage controls, and downsizing or elimination of state-owned enterprises (see Brohman 1996: 132–72; Todaro 1997: 458–532; Drazen 2000: 615–74). Based on a neo-classical counter-revolution or neo-liberal ideology, these programmes were meant to liberate countries in the region from bloated and inefficient state-dominated economies and promote rapid growth with (eventual) equity. The programmes were designed to provide immediate stabilization for hyperinflation and a long-term reallocation of resources to make the economy more efficient and productive. Using different indicators of development, it is possible to map the degree to which these policies were successful in delivering prosperity to the region. While this is far from presenting a fully specified econometric model of growth and development, the descriptive analysis gives some indication of the patterns in socio-economic change throughout the period.

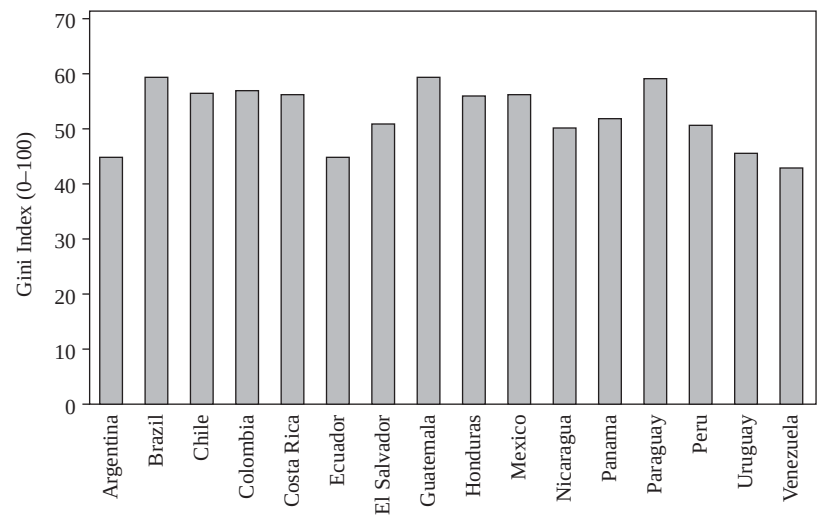
The development indicators include measures of income (per capita GDP), trade openness (trade as a percentage of GDP), income distribution (Gini coefficient), human development (UNDP human development index, HDI), and food security (percentage of the population facing undernourishment). Figure 13.1 plots the time-series trends in per capita GDP and trade as a percentage of GDP. The figure shows that the years immediately following the introduction of structural adjustment programmes in the region experienced a contraction in trade between 1979 and 1987, followed by an expansion until 1998 when it again contracted. Per capita GDP followed a similar trend in that it decreased for most of the 1980s and started to show monotonic growth in the 1990s to reach a regional average of just over $3000 (1995 US dollars). Despite the similarity in trends, trade and GDP are significantly *negatively* correlated,[1] suggesting that the promises of trade liberalisation have not had the expected relationship with changes in per capita GDP.

Figure 13.2 shows the cross-national averages for Gini co-efficient during the period. It is clear from the figure that despite the overall increase in



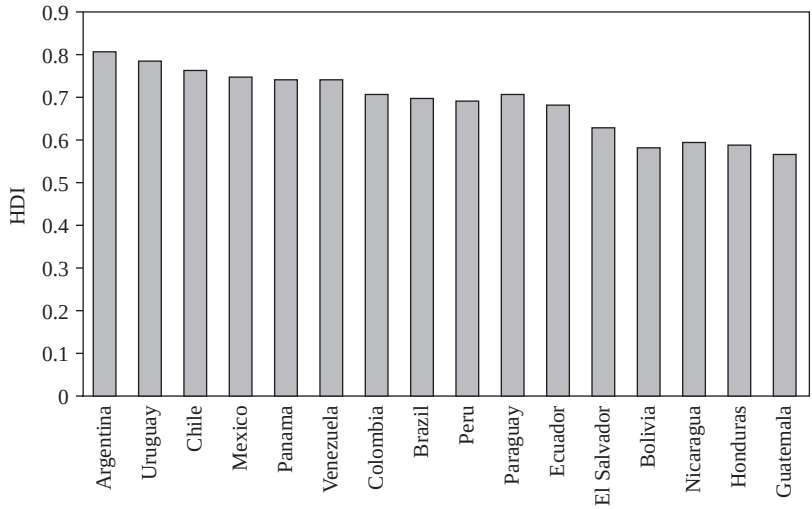
Source: World Development Indicators (www.worldbank.org).

Figure 13.1 Trade and income in Latin America, 1976–2000



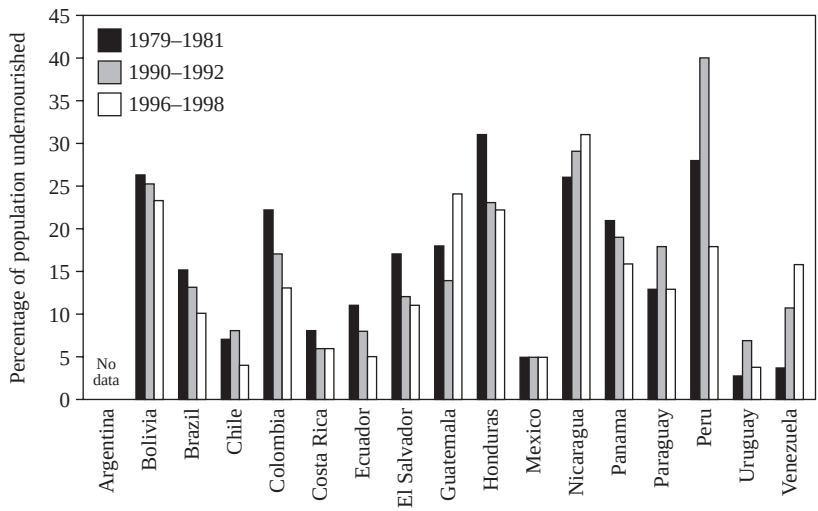
Source: World Development Indicators (www.worldbank.org)

Figure 13.2 Income distribution in Latin America, various years



Source: UNDP Human Development Report, 1990–2000

Figure 13.3 Human development in Latin America, 1975–1999



Source: FAO (2000: 27–30)

Figure 13.4 Prevalence of undernourishment in Latin America, various years

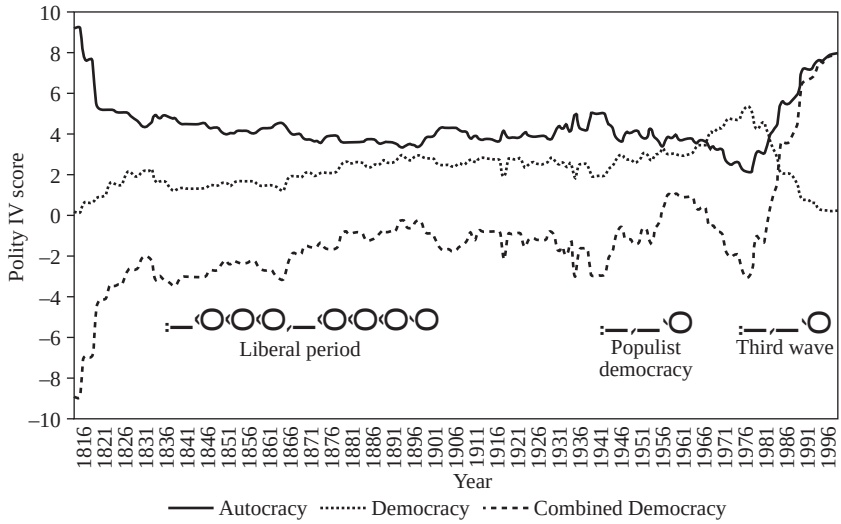
average per capita GDP for the whole period, there are many countries in the region where the gains from any developmental advance have not been distributed in the fairest fashion. Countries with the highest maldistribution of income include Brazil, Guatemala and Paraguay with an average Gini coefficient of approximately 59 per cent. Of these countries with the worst distribution of income, Brazil has the highest average per capita GDP at $4155 (1995 USD), making it the third richest country in the region behind Uruguay and Argentina. Figure 13.3 shows the average human development index scores, which depict the combined achievements across per capita GDP, adult literacy and enrolment in education, and life expectancy at birth (UNDP 2002: 252). The top economies in the region perform reasonably well on this measure, followed by the Andean and Central American countries. Over the period the average HDI grew from 0.64 to 0.74. Finally, Figure 13.4 shows the percentage of the population facing problems of undernourishment in which it is clear severe problems have afflicted Honduras in the late 1970s, Peru between 1990 and 1992, and Nicaragua throughout the period.

Taken together, the indicators on development demonstrate mixed results for the period, with economic stagnation in the 1980s, reasonable improvements in human development, the persistence of income maldistribution, and the continued prevalence of undernourishment.

II.2. Democracy

For the initial years under comparison in this study, many countries in the region were either under authoritarian rule (for example Argentina, Brazil, Bolivia, Chile, Ecuador, Peru, Paraguay and Uruguay), involved in violent civil conflicts (for example El Salvador, Guatemala, and Nicaragua), or in the case of Mexico, were under one-party dominant rule. The region had had past experiences of democracy in many of these countries during the so-called populist period of the 1940s and 1950s (Hartlyn and Valenzuela 1994: 135–43), but with the Peruvian transition to democracy in 1978, a general wave of democratisation spread throughout the region with democratic transitions in Ecuador (1979), Honduras (1980), Bolivia (1982), Argentina (1983), Uruguay (1984), El Salvador (1984), Brazil (1985), Guatemala (1985), Chile (1988), Panama (1989), Paraguay (1989), Nicaragua (1990), and Mexico (2000) (see Foweraker, Landman and Harvey 2003: 41).

Figure 13.5 shows the democracy, autocracy and combined democracy–autocracy scores from the Polity IV data set for the region from 1816 to 1998, while Figure 13.6 shows the same scores for the period 1976–1998. The longer time-series plot of these indicators shows a general rise in the democracy score between 1816 and 1900 during which the region gains its independence and promulgates a series of limited liberal constitutions largely



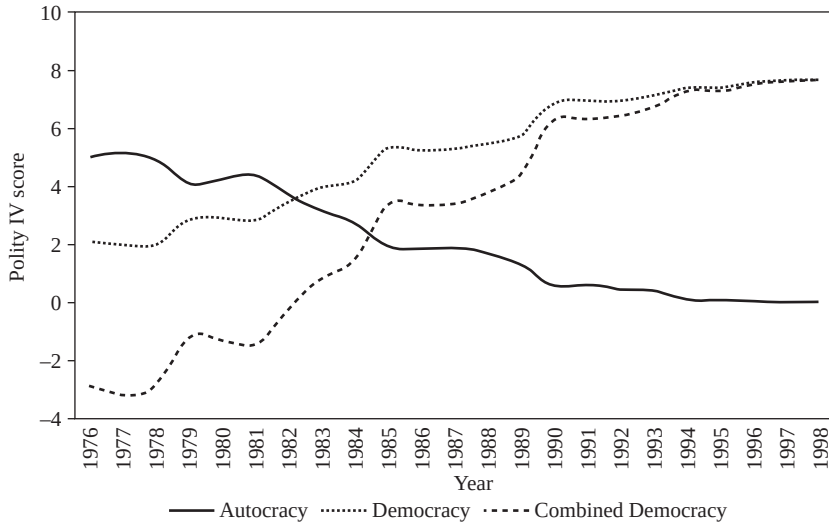
Source: http://www.cidcm.umd.edu/inscr/polity/

Figure 13.5 Democracy, autocracy and combined scores for Latin America, 1816–1998

modelled after the US constitution. The early tumultuous years of the 20th Century give way to a slightly greater democratic improvement through the 1940s and 1950s, a collapse of democracy and the rise of authoritarianism throughout the 1960s and early 1970s, and finally the return to democracy during the 'third wave' of democratisation (Huntington 1991). Figure 13.6 captures the contours of the third wave in Latin America, and with the Chilean and Brazilian democratic elections in 1989, all the countries in the region with the exception of Cuba had elected constitutional governments.

II.3. Human rights

This final sub-section of the chapter examines comparative indicators of *de jure* and *de facto* protection of certain human rights. The former kind of protection refers to those human rights that states formally commit themselves to protecting through ratification of international and regional human rights instruments. The latter kind of protection refers to the degree to which such rights are actually protected within the domestic jurisdiction of the state. Measures of the *de jure* protection of human rights reward countries for ratification of the main international and regional human rights instruments (see below). The indicators



Source: http://www.cidcm.umd.edu/inscr/polity/

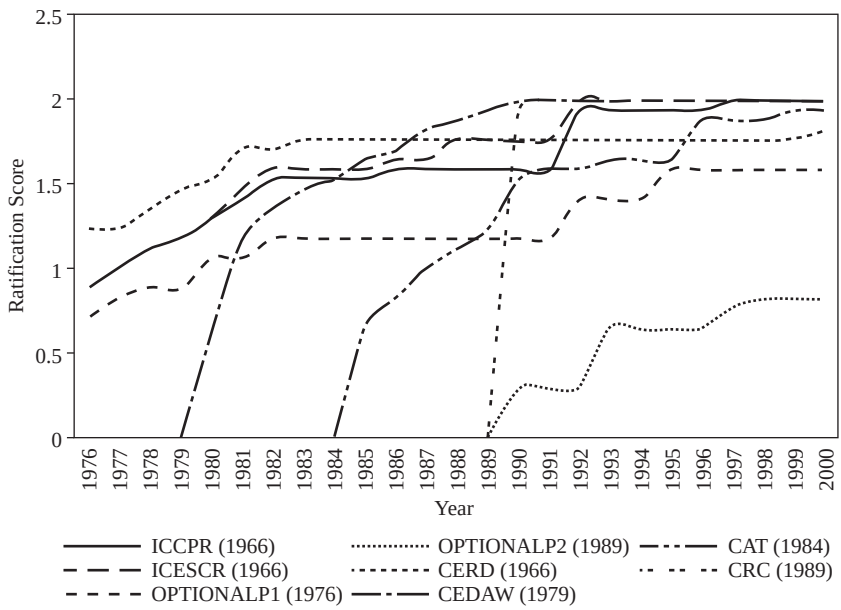
Figure 13.6 Democracy, autocracy and combined scores for Latin America, 1976–1998

used here give a country a 0 for no signature, a 1 for signature, and a 2 for ratification (see Landman 2005). Measures of *de facto* protection of human rights reward countries for the absence of systematic abuse of human rights as reported through local and international sources that monitor human rights practices of states. The measures used here focus on the protection of political and civil rights. They include the Amnesty International and US State Department version of the Political Terror Scale (see Poe and Tate 1994), the two separate scales of civil and political liberties produced by Freedom House (see www.freedomhouse.org), and a scale of torture, which relies on source material from the US State Department (see Hathaway 2002). All the scales give larger points to those countries with a more systematic pattern of human rights abuse. The Political Terror Scale and torture scale range from 1 to 5, while Freedom House ranges from 1 to 7. For ease of comparability used in the descriptive analysis, all the scales have been transformed to range from 0 to 1, while the statistical analysis uses the scales in their original form.

De jure protection

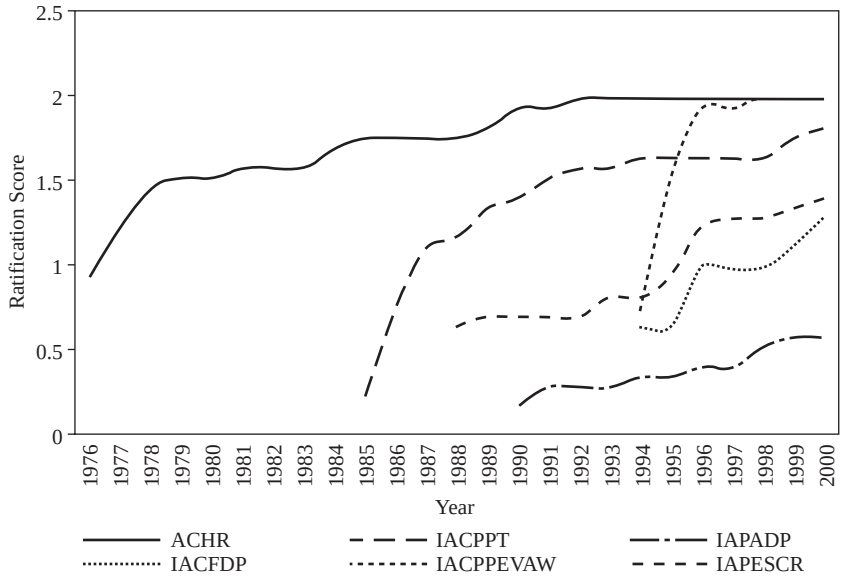
Since the Universal Declaration of Human Rights in 1948, there have been a series of international instruments established for the protection of human

rights, including most notably the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR), the 1966 International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), and the 1989 Convention on the Rights of the Child (CRC) (see Gandhi 2002: 55–132). Complementing the development of these human rights instruments at the international level, the inter-American system has also developed a series of regional human rights instruments for the protection of human rights, including the 1969 American Convention on Human Rights (ACHR), the 1985 Inter-American Convention to Prevent and Punish Torture (IACPPT), the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (IAPESCR), the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty (IAPADP), the 1994 Inter-American Convention on the Forced



Source: Landman (2005)

Figure 13.7 Latin American state ratification of international human rights instruments, 1976–2000



Source: Landman (2005) and Harris and Livingstone (1998: 562–75)

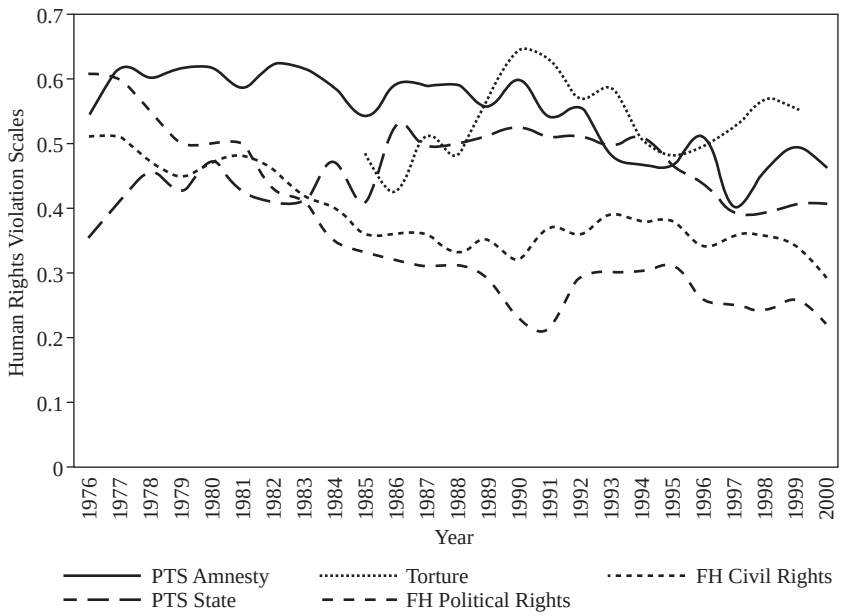
Figure 13.8 Latin American state ratification of inter-American human rights instruments, 1976–2000

Disappearances of Persons (IACFDP), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (IACPPEVAW) (see Gandhi 2002: 330–65).

Figures 13.7 and 13.8 show the time-series trends in state ratification of the international and regional instruments for the protection of human rights in Latin American countries for the 1976–2000 period. At the international level, Latin American countries have increasingly committed themselves to the growing body of human rights norms and in that sense participate actively in the international community in this issue area. After the European system, the inter-American system for the promotion and protection of human rights is the second most powerful region system and has a number of unique features such as the ability for the Inter-American Commission to carry out *in situ* visits. Comparing the two figures on ratification shows, however, that the countries in the region ratify more of the international instruments than the regional instruments. While participation in the American Convention is near unanimous, there is considerable lack of participation in the other instruments. There is thus significant scope for the expansion of state participation in the regional system.

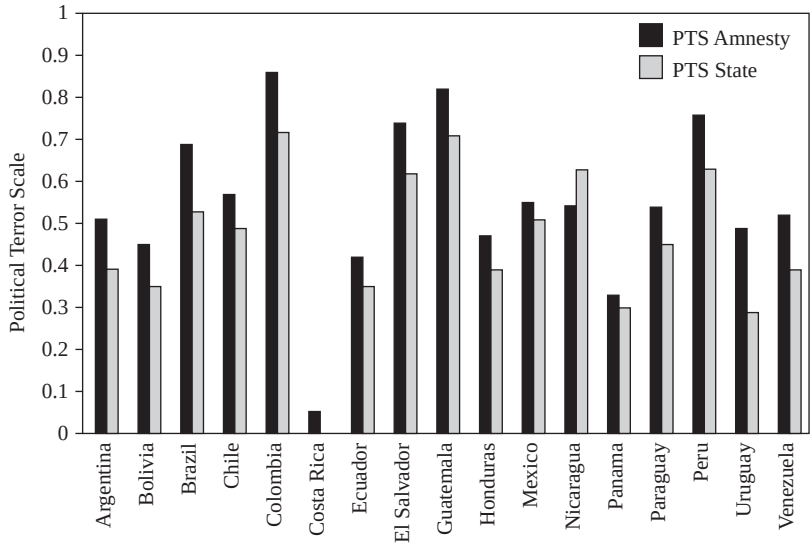
De facto protection

Despite the growth in the breadth and depth of the international and regional systems for the promotion and protection of human rights, the record of *de facto* human rights protection in the region has been notably negative during the period of authoritarian rule in the Southern Cone and during the period of prolonged civil conflicts in Central America. In addition, the prolonged and complex conflict in Colombia has led to persistent abuses of human rights, including violence against members of the judiciary and human rights defenders. Figure 13.9 shows the time-series trends in human rights violations for the different measures, where the Freedom House scores shows a general level of improvement over time, the Political Terror Scale shows a convergence between the two versions and a slight improvement, and the torture scale shows a peak in 1990 with an otherwise relatively high score throughout the period in which it is available (1985–1999). But Figure 13.9 masks the sub-regional variation in the scores by country. Thus, Figures 13.10, 13.11, and 13.12 show the country differences across these different measures, where the 'between group' differences in means are all statistically significant ($F > 2.0$, $p < 0.01$).



Source: Landman (2005)

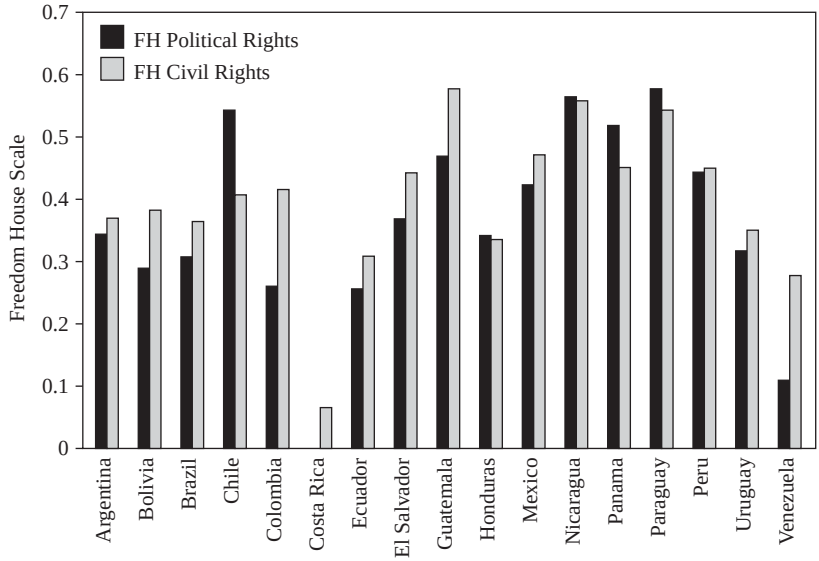
Figure 13.9 De facto human rights protection in Latin America, 1976–2000



Source: Landman (2005)

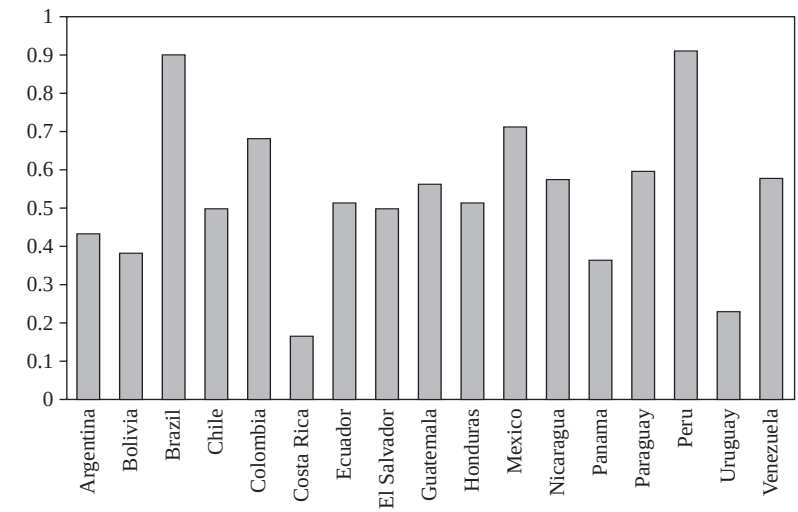
Figure 13.10 Political terror in Latin America, 1976–2000

The sub-regional comparison of political terror (Figure 13.10) shows unsurprisingly that Colombia, Guatemala and Peru have had the most persistent problem with violations of personal integrity rights, which include political imprisonment, arbitrary detention, extra-judicial killing and exile. The armed conflicts in all these cases have led to significant state-led terror against ordinary citizens. The Commission for Historical Clarification (CEH) in Guatemala estimated that 132 000 people had been killed in the conflict during the 1979s and 1980s (CEH 1999: 72), where the state was responsible for 95 per cent of the killings (Ball 2000: 278). The Truth and Reconciliation Commission (CVR) in Peru estimated that 70 000 people died in the 20-year conflict between the government and the *Sendero Luminoso* guerrilla movement (1980–2000), where the state was responsible for 30 per cent of the killings (Ball, Asher, Sulmont and Manrique 2003: 2). Full estimates of the total number of extra-judicial killings in Colombia vary, but Human Rights Watch (www.hrw.org) and the US State Department (www.state.gov) report that state responsibility for such killings has declined over the 1990s. The second highest-ranking cases in Figure 13.10 include Brazil, El Salvador and Nicaragua. In contrast, the Freedom House scores produce a different picture, where Chile, Nicaragua and Paraguay appear to have the worst records of political and civil rights protection, while Colombia has the largest gap



Source: www.freedomhouse.org

Figure 13.11 Civil and Political Rights in Latin America, 1976–2000



Source: Hathaway (2002)

Figure 13.12 Torture in Latin America, 1985–1999

between political rights and civil rights protection. These differences between the two figures are explained by the institutional dimensions included in the Freedom House scales that reward countries for holding elections and having democratic institutions in place (for example Colombia), as well as the presence of some ideological bias, which has led to a more unfavourable portrayal of certain regimes (for example Nicaragua) (see Munck 2002; Landman and Häusermann 2003). Finally, the comparison of torture shows that Brazil and Peru are significant outliers in the region with very high levels of persistent uses of torture. Thus, like the patterns of development outlined in Section II.1, the region has seen a mixed record for the promotion and protection of human rights.

III. STATISTICAL ANALYSIS

This section of the chapter pushes the analysis beyond mere description to examine the important first and second order relationships between and among the variables measuring development, democracy and human rights. The section proceeds by enumerating the variables that will be used for the analysis, showing the bivariate correlation coefficients between these variables, and exploring possible explanations for democratisation and the protection of human rights.

III.1. Variables

Extant research in comparative politics on modernization theory (for example, Lipset 1959; Helliwell 1994; Burkhart and Lewis-Beck 1994; Landman 1999; Przeworski, Alvarez, Cheibub, and Limongi 2000; Mainwaring and Pérez-Liñan 2003, Foweraker and Landman 2004) and in international relations on human rights and the democratic peace (for example Poe and Tate 1994; Poe, Tate and Keith, 1999; Keith 1999; Russett and O'Neal 2001; Hathaway 2002; Landman 2005) has identified important variables for exploring empirical relationships between and among development, democracy and human rights. In addition to variables on development, democracy and human rights outlined in the descriptive section of this chapter, this section uses a series of other important international and domestic variables, including state membership in international governmental organisations (IGOs), the number of registered international non-governmental organisations (INGOs), population size, and the Correlates of War (COW) measure of civil war. IGOs and INGOs are two variables drawn from neo-liberal-institutionalist research tradition in international relations (for example Russet and O'Neal 2001). Population size and civil war are standard variables used in global analysis of

Table 13.1 Variables used in the statistical analysis

	N	Min	Max	Mean	Std. Dev.
Development					
LNPCGDP (Natural log of per capita GDP)	398	6.01	9.04	7.72	0.70
LNTRADE (Natural log of trade as a % of GDP)	419	2.45	4.78	3.77	0.48
Democracy					
DEMOC4 (Polity IV democracy–autocracy)	380	–9.00	10.00	3.50	6.50
Human Rights					
ACHR (American Convention on Human Rights)	425	0.00	2.00	1.76	0.55
ICCPR (International Covenant on Civil and Political Rights)	425	0.00	2.00	1.61	0.74
PTSAI (Political Terror Scale – Amnesty)	414	1.00	5.00	3.21	1.11
PTSSD (Political Terror Scale – State Department)	425	1.00	5.00	2.82	1.02
FHCRIGHT (Freedom House Civil Rights)	419	1.00	6.00	3.38	1.18
FHPRIGHT (Freedom House Political Rights)	425	1.00	7.00	3.15	1.61
TORTURE (Torture Scale)	255	1.00	5.00	3.16	1.02
Other variables					
LNINGOS (Natural log of INGOs)	404	0.00	7.63	5.71	1.47
IGOMEM (Membership of IGOs)	425	9.83	94.00	55.38	17.67
LNPOP (Natural log of population)	425	14.39	18.95	16.16	1.18
CWARCOW (Correlates of War Civil War)	425	0.00	1.00	0.15	0.36
CADUM (Central America dummy)	425	0.00	1.00	–	–
SCDUM (Southern Cone Dummy)	425	0.00	1.00	–	–

human rights protection (for example Poe and Tate 1994). The analysis also uses dummy variables for Central America and the Southern Cone to control for sub-regional variation (see Landman 1999: 617–18). The analysis limits itself to consideration of the ICCPR and ACHR from international human rights law. Table 13.1 lists all the variables used in the subsequent analysis, a brief description of each, and basic summary statistics.

III.2. First-order Relationships

Table 13.2 is a bivariate correlation matrix, which explores possible relationships between and among the variables and represents a first step in the statistical analysis that moves beyond pure description. Sections of the table have been shaded and boxed for ease of the substantive discussion about some of the results that have been obtained.

The shaded region in the first row shows that there is an association between higher levels of per capita GDP and lower levels of human rights violations for four out of the five measures. The measures variously cover the period 1976–2000, while the torture measure has the least coverage from 1985 to 1999. Such an association lends some support to the expectations of modernization theory (for example Lipset 1959; Przeworski and Limongi 1997; Landman 1999) and confirms findings from global comparisons on human rights (Mitchell and McCormick 1988; Poe and Tate 1994); however, the absence of an association between wealth and the level of torture is driven by the fact that torture increased during the early 1990s (see Figure 13.9) and has been high among significant outliers such as Brazil and Peru (see Figure 13.12). It is also important to note the absence of a significant correlation between per capita GDP and democracy, a point that is explored further in section III.3.

The shaded region in the third row of Table 13.2 shows on the one hand, a positive and significant relationship between democracy and ratification of both the International Covenant on Civil and Political Rights and the American Convention on the Rights and Duties of Man, while on the other hand, it shows a negative and significant relationship between democracy and human rights violations. In other words, democracies have a greater tendency to ratify human rights treaties as well as a better record at protecting the various human rights represented by the different measures. Such a tendency among 'new' democracies to ratify human rights treaties is consistent with liberal republican theory in international relations, which argues that new democracies seek out international commitments to 'lock in' future generations of politicians in an effort to protect their nascent democratic institutions (see Moravcsik 1997, 2000; Landman 2005). This theory and its empirical confirmation were developed in relation to the European Convention for Human

Table 13.2 Bivariate correlation matrix for all variables

	Development		Democracy	Human Rights							Other			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
	LNPCGDP	LNTRADE	DEMOC4	ACHR	ICCPR	PTSAI	PTSSD	FHCR	FHPR	TORTURE	LNINGOS	IGOS	LNPOP	CWAR
1	–	–.48***	.033	–.21***	.15**	–.11**	–.25***	–.25***	–.19***	–.01	.21***	.05	.39***	–.25***
2		–	.14**	.28***	.22***	–.32***	–.23***	–.16**	–.04	–.31***	–.02	–.28***	–.70***	–.09*
3			–	.62***	.49***	–.33***	–.27***	–.71***	–.87***	–.28***	.24***	–.27***	.07	.01
4				–	.38***	–.26***	–.15**	–.37***	–.52***	–.17**	–.07	–.26***	–.11**	.17***
5					–	–.23***	–.12**	–.26***	–.30***	–.19**	.04	–.18***	–.07	.06
6						–	.76***	.57***	.39***	.61***	–.31***	.08*	.30***	.46***
7							–	.59***	.42***	.61***	–.31***	–.08*	.29***	.53***
8								–	.76***	.49***	–.33***	.01	.008	.29***
9									–	.39***	–.23***	.12**	–.10**	.13**
10										–	–.05	–.01	.55***	.31***
11											–	–.14**	–.05	–.36***
12												–	.12**	.07
13													–	.03
14														–

Notes: 237 £ *N* £ 425; Pearson's r, *p<.01, **p<.05, ***p< .001

Rights and it appears that such a finding receives additional support at the regional level of Latin America. The tendency for democracies to be better at protecting human rights is consistent with empirical democratic theory, which sees a certain affinity between democracy and human rights (see, for example, Beetham 1999), and empirical analysis that demonstrates democracy's ability to protect human rights (for example Poe and Tate 1994; Zanger 2000). Yet the association is not perfect unity, suggesting that there remains a gap between procedural democracy and liberal democracy (Diamond 1999; Foweraker and Krznaric 2000; Foweraker and Landman 2002, 2004).

The boxed area in rows four and five of Table 13.2 shows negative and significant relationships between ratification of the ICCPR and ACHR and the various measures of human rights, suggesting that those countries with a better ratification record also tend to be better at protecting human rights. This finding at the regional level of Latin America confirms a general global finding for the bivariate relationship between human rights treaty ratification and human rights protection (see Keith 1999; Hathaway 2002; Landman 2005). This relationship between the international law of human rights and human rights protection in Latin America is explored further through multivariate analysis in Section III.3.

The shaded region for rows six to nine in Table 13.2 shows that the various human rights measures are highly (but not perfectly) correlated with one another, a result that is evident in the time-series plot of the measures for the region (see Figure 13.9). The boxed region in the column for international non-governmental organisations (INGOs) shows that a greater presence of INGOs is associated with a lower violation of human rights across four out of the five measures. Again, the practice of torture is an exception. Finally, the shaded region in the column for civil war shows that human rights violations are higher in those countries that have experienced periods of civil war, and such countries have a smaller participation in international governmental organisations (IGOs).

Taken together, the first-order correlation analysis highlights a number of important empirical relationships between and among development, democracy and human rights. Relatively wealthy, democratic countries, with a greater presence of INGOs, participation in the ICCPR and ACHR, and no prolonged involvement in civil war have a greater tendency for lower levels of human rights violations. But these findings are achieved in isolation from one another and are merely statistical associations that require a more sophisticated multivariate model specification that takes into account the temporal and spatial characteristics of the data employed here.

III.3. Second-order Relationships

Development and democracy

The main tenets of modernization theory assert that democracy ought to be the natural product of economic development. This assertion has normally been tested through cross-national (for example Lipset 1959) and cross-national time-series global analysis (for example Helliwell 1994; Burkhart and Lewis-Beck 1994; Przeworski and Limongi 1997; Przeworski, Alvarez, Cheibub, and Limongi 2000), the results of which confirm that there is a positive and significant relationship between economic development and democracy (see Rueschemeyer, Stephens, and Stephens 1992; Landman 2003). Some scholars have used this empirical generalization to claim that economic development is *associated* with democracy (Lipset 1959) or *causes* democracy (for example Helliwell 1994; Burkhart and Lewis-Beck 1994), while others concede that the empirical results are obtained from the fact that rich democracies tend not to collapse (Przeworski and Limongi 1997; Przeworski, Alvarez, Cheibub and Limongi 2000). Replication of the analysis at the regional level has shown that these global findings cannot be upheld within Latin America, whether tested for the period 1972–1995 (see Landman 1999) or for the period 1945–1990 (Mainwaring and Pérez-Liñan 2003).

The absence of any relationship between economic development and democracy can be shown using the relevant variables from Table 13.1:

$$\underset{}{Democracy} = \underset{(0.019)***}{0.93(Democracy_{t-1})} + \underset{(0.20)}{0.01(Wealth)} - \underset{(0.29)}{0.09\,(Central\ America)} + \underset{(0.17)}{0.50\,(Southern\ Cone)}$$

Using cross-sectional time-series regression techniques, the equation above shows the parameter estimates for a simple modernization model that includes past values of democracy, economic development, and the two sub-regional dummy variables. The inclusion of a lagged version of the dependent variable (democracy) controls for time-serial autocorrelation, while the inclusion of the sub-regional dummy variables controls for significant variation in development and democracy in Central America and the Southern Cone during the period (see also Landman 1999). The reported parameter estimates include the unstandardised regression coefficients and standard errors in parentheses. The only significant variable is the past democracy variable, which is a typical result of such model specifications (see for example Burkhart and Lewis-Beck 1994; Helliwell 1994; Landman 1999). In substantive terms, it appears that the much-heralded association between development and democracy fails to be upheld in Latin America. To date, the region lacks an endogenous theory of democratisation (see

Boix 2003; Boix and Stokes 2003) and stands as an important example of 'regional exceptionalism' with regard to the modernization perspective (Mainwaring and Pérez-Liñan 2003).

Development, democracy and human rights

Drawing (somewhat unwittingly) on the insights of modernization theory, the international human rights community has continued to make a variety of assertions concerning not only the indivisibility of human rights but also the relationships between and among development, democracy and human rights. The best example of such an assertion comes from Paragraph 8 of the 1993 Vienna Declaration and Programme of Action, which states, 'Democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing' (see for example Ghandhi 2002: 418). The Vienna Declaration is not a legally binding human rights instrument, but the result of discussions among 171 states at a United Nations World Conference on human rights instruments, and as such represents a consensus agreement among the participating states (see Boyle 1995: 81) that is a *declaration* rather than an *empirical generalization*. Boyle (1995: 81) rightly contends that social scientists 'have difficulty in relating to the normative language of documents such as the Vienna Declaration', but in many ways, the declaration has been transformed into an empirical generalization through its frequent repetition in international policy circles, and has led to raised expectations within developing countries.

As outlined briefly above, global comparative analysis has shown strong empirical support for the relationship between economic development and democracy (for example Lipset 1959; Helliwell 1994; Burkhart and Lewis-Beck 1994), between economic development and democratic performance (Foweraker and Landman 2004), between economic development and the protection of human rights (Mitchell and McCormick 1988; Poe and Tate 1994; Poe, Tate and Keith 1999), between democracy and human rights (Poe and Tate 1994; Poe, Tate and Keith 1999; Zanger 2000; Landman 2005) and between international human rights law and human rights (Keith 1999; Hathaway 2002; Landman 2005). With the exception of Helliwell (1994: 5–6), Foweraker and Landman (2004), and Landman (2005), such global analyses do not include dummy variables to control for regional variation. For example, Helliwell (1994:5–6) shows that after controlling for different levels of per capita GDP, the level of democracy is higher in OECD countries, lower in six oil-dependent countries of the Middle East, lower in Africa, and higher in Latin America where the base of comparator countries are mostly in Eastern Europe and Asia. In their analysis of democratic performance, Foweraker and Landman (2004: 9–14) show that after controlling for levels of per capita GDP, Latin American countries perform worse on the performance dimen-

sions of executive constraint, legislative votes, competitiveness of participation, and the protection of civil rights. The apparent discrepancy between these two studies is explained by the fact that Foweraker and Landman (2004) use a disaggregated measure of democratic performance across eight different democratic values. But both studies are conscious of the need to control for regional variation and invite further analysis of global empirical generalizations at the regional level. Equally, Landman (2005) includes regional dummies in his analysis of the relationship between the international law of human rights and human rights protection.

Thus, the global expectations and generalizations produced either through consensual declarations such as the one issued in Vienna or through extant empirical analysis should be tested at the regional level, especially since policy advice and recommendations flow from such declarations and global analyses and then are applied to sets of developing countries or to specific geographic regions. To that end, this section of the chapter tests a series of models on human rights protection in Latin America using the development, democracy and other variables outlined above. The analysis specifies a general model of human rights protection that takes the following form:

$$\begin{aligned}\text{Human rights protection}_t = {} & \alpha_t + \beta_1 \text{Human rights protection}_{t-1} + \beta_2 \text{Human} \\ & \text{rights instrument ratification}_t + \beta_3 \text{Democracy}_t \\ & + \beta_4 \text{Economic development}_t + \beta_5 \text{ IGOs}_t + \\ & \beta_6 \text{INGOs}_t + \beta_7 \text{Trade}_t + \beta_8 \text{Civil war}_t + \\ & \beta_9 \text{Population size}_t + \beta_{10} \text{Central America} + \\ & \beta_{11} \text{Southern Cone} + \varepsilon_t\end{aligned}$$

Where human rights protection is represented by the five violations measures, human rights instrument ratification refers to the ICCPR and ACHR ratifications, democracy is the Polity IV democracy–autocracy variable, economic development is the natural log of per capita GDP, IGOs is the number of IGOs to which a country is a party, INGOs is the number of INGOs registered in the country, trade is the natural log of total trade as percentage of GDP, civil war is a dummy variable, population size is the natural log of the yearly population, and the Central America and the Southern Cone are dummy variables. In addition, α_t and β_1 to β_{11} are the parameters to be estimated and ε_t is the error term. Since there are five different human rights measures and two different treaty ratification variables, a total of ten regressions were carried out to estimate the parameters, the results of which are reported in Tables 13.3 (for the ICCPR) and 13.4 (for the ACHR).

The results reported in Tables 13.3 and 13.4 reveal a series of important findings regarding the empirical relationships among development, democracy and human rights. First, for both sets of equations, the lagged dependent

Table 13.3 Parameter estimates for human rights protection in Latin America, 1976–2000 (using the International Covenant on Civil and Political Rights)

Independent variables	Dependent variables				
	PTS (Amnesty)	PTS (State Dept.)	Freedom House CR†	Freedom House PR†	Torture
Constant	1.70	1.22	2.30*	1.39	–3.08*
	(1.47)	(1.23)	(1.24)	(1.47)	(1.86)
Lagged human rights	.61***	.53***	.80***	.84***	.34***
	(.04)	(.04)	(.03)	(.03)	(.07)
ICCPR	–.05	.07	–.07*	–.08	–.14
	(.06)	(.05)	(.05)	(.06)	(.09)
Democracy	–.02**	–.04***	–	–	–.05***
	(.01)	(.007)			(.01)
Development	–.10	–.24***	–.12*	–.07	–.12
	(.07)	(.07)	(.06)	(.07)	(.09)
IGOs	–.004*	–.01***	–.002	–.002	–.007**
	(.002)	(.002)	(.002)	(.002)	(.004)
INGOs	–.03	–.003	–.05**	–.04	.13**
	(.03)	(.02)	(.02)	(.03)	(.04)
Trade	–.15	–.12	–.09	–.05	.15
	(.13)	(.11)	(.87)	(.13)	(.15)
Civil war	.48***	.61***	.16*	.19*	.58***
	(.12)	(.10)	(1.72)	(.11)	(.16)
Population	.09	.18***	.007	.008	.35***
	(.06)	(.05)	(.05)	(.06)	(.08)
Central America	–.12	–.01	–.05	.001	–.08
	(.12)	(.11)	(.10)	(.13)	(.16)
Southern Cone	–.03	.02	.04	.15	–.21
	(.13)	(.11)	(.11)	(.14)	(.16)
N	324	334	364	375	208
R^2	.69	.73	.78	.81	.63
Wald Chi^2	696.32***	891.01***	1261.00***	1524.88***	334.07***

Notes:
Unstandardised coefficients are reported, standard errors in parentheses, *p<.10, **p<.01, ***p<.001

† Since the lagged values of the two Freedom House scores are highly correlated with the democracy measure (–.68 and –.80 respectively, p< .001), the Freedom House equations exclude democracy.

Table 13.4 Parameter estimates for human rights protection in Latin America, 1976–2000 (using the American Convention on the Rights and Duties of Man)

Independent variables	Dependent variables				
	PTS (Amnesty)	PTS (State Dept.)	Freedom House CR†	Freedom House PR†	Torture
Constant	2.75*	1.79	3.62**	2.81*	–3.29*
	(1.52)	(1.30)	(1.29)	(1.50)	(1.95)
Lagged human rights	.58***	.52***	.77***	.81***	.36***
	(.04)	(.04)	(.03)	(.03)	(.06)
ACHR	–.21**	–.15*	–.23***	–.31**	.09
	(.10)	(.08)	(.08)	(.10)	(.16)
Democracy	–.02**	–.03***	–	–	–.05***
	(.008)	(.007)			(.01)
Development	–.12*	–.22***	–.15**	–.10	–.05***
	(.07)	(.06)	(.06)	(.07)	(.01)
IGOs	–.005**	–.01***	–.01***	–.003	–.006
	(.002)	(.002)	(.002)	(.002)	(.004)
INGOs	–.04	–.02	–.02	–.05*	.14**
	(.03)	(.02)	(.02)	(.03)	(.04)
Trade	–.19	–.09	–.25**	–08	.10
	(.12)	(.11)	(.10)	(.12)	(.15)
Civil war	.52***	.66***	.30***	.22**	.50***
	(.12)	(.05)	(.09)	(.11)	(.15)
Population	.07	.16***	.006	–.02	.35***
	(.06)	(.05)	(.05)	(.06)	(.08)
Central America	–.14	–.05	–.08	–.003	–.03
	(.12)	(.10)	(.10)	(.12)	(.16)
Southern Cone	–.14	–.05	–.12	.02	–.16
	(.14)	(.12)	(.11)	(.14)	(.16)
N	324	334	329	375	208
R^2	.69	.74	.83	.81	.62
Wald Chi^2	708.33***	896.91***	1518.05***	1566.11***	328.15***

Notes:
Unstandardised coefficients are reported, standard errors in parentheses, *p<.10, **p<.01, ***p<.001

† Since the lagged values of the two Freedom House scores are highly correlated with the democracy measure (–.68 and –.80 respectively, p< .001), the Freedom House equations exclude democracy.

variables are all statistically significant, suggesting that human rights practices trend significantly over time, a finding that is consistent with global analyses. Second, there are significant effects for democracy on human rights protection across all the measures such that countries with higher levels of democracy tend to have lower levels of human rights violations. Again, such a finding is consistent with extant global analyses. Third, country participation in the American Convention rather than the ICCPR has a significant impact on human rights protection, even after controlling for democracy, economic development and other variables. Such a finding challenges in part global analyses on international human rights law and human rights protection (Keith 1999, Hathaway 2002), and demonstrates the importance of regional mechanisms for the protection of human rights. Fourth, the level of economic development has weak or non-existent effects on human rights protection, suggesting that the developmental experience in Latin America has not served to enhance the protection of human rights. Such a finding is inconsistent with the extant global studies and the modernization perspective, but is consistent with extant studies on development and democracy in the region (Landman 1999; Mainwaring and Pérez-Liñan 2003). Fifth, involvement in civil war has a significant and consistent effect on increased levels of human rights violations, a finding that is consistent with extant global studies. IGOs and INGOs have weak and mixed effects on human rights protection, while trade has no significant impact on rights protection, with the exception of the Freedom House civil rights measure. There are thus no real effects for international interdependence or trade liberalization. Finally, there does not appear to be significant sub-regional variation in human rights protection during the period for Central America and the Southern Cone.

Taken together, the results of the multivariate statistical analyses confirm many findings at the global level and challenge significantly other such findings. The analysis confirms the importance of conflict resolution, democratisation, and greater participation in regional human rights mechanisms for the protection of human rights. As in the global studies, involvement in civil war remains the largest predictor of human rights violations, while the tangible benefits of democratisation are apparent from the consistent positive relationship between democracy and human rights. The largest regional exception is the relative dearth of evidence for the impact of economic development on either the level of democracy or the protection of human rights. It is true that the 1980s represented a 'lost decade' for the region with negative growth rates, high levels of foreign debt, and high rates of inflation. Yet the region has experienced a wave of democratic transitions and the gradual (if not lagged) improvement in human rights protection.

IV. CONCLUSIONS

This chapter has used the Latin American region as a natural laboratory for comparative analysis that applies the theories and methods of mainstream political science to explore important empirical puzzles. In this way, the region can serve as a regional crucial case study that employs the 'most similar systems design' (MSSD) in an effort to test a series of empirical theories on development, democracy and human rights (see Landman 2003). The descriptive part of the chapter mapped the main contours of development, democracy and human rights in the region for the period under consideration. It showed that despite trade liberalization, there has been weak economic performance across the region, with persistent problems with food insecurity and income maldistribution. It showed that political transformations during the period have placed Latin America squarely in the 'third wave' of democratisation as it has indeed joined the 'democratic universe' (Foweraker, Landman and Harvey 2003: 34). It also showed that Latin America has been an active participant in the international and regional systems for the protection of human rights, and that the region itself has made some improvements in the areas of civil and political rights protection, although with persistent problems with torture, particularly in the cases of Brazil and Peru.

The statistical analysis showed that whatever economic development has taken place across the region has not been 'automatically' converted into either democratic or rights advance. Rather, advances in democratisation and rights protection are in need of a political explanation that moves beyond the identification of socio-economic and macro-structural variables. The democratic transitions in Latin America may rest on an endogenous explanation of political choice among elites combined with social mobilisation from below, which addressed its concerns through the increasing use of the language of rights. Comparative analysis of Brazil, Mexico and Spain on the relationship between the protection of citizenship rights and social mobilization shows the varying degree to which social mobilization can achieve greater rights protection and can contribute to democratic transitions (Foweraker and Landman 1997).

Case studies of Argentina (Brysk 1994), Chile (Ropp and Sikkink 1999; Hawkins 2002), and Guatemala (Ropp and Sikkink 1999) examine the degree to which the combined mobilization of domestic and international advocacy networks have been able to change state behaviour with respect to the protection of human rights. Domestic concerns over maintaining government legitimacy provide an opportunity for advocacy networks to put pressure on authoritarian governments to make 'tactical concessions' (Risse, Ropp and Sikkink 1999), which may eventually lead to fully institutionalised human

rights protection, which has arguably been achieved in the case of Chile (see Ropp and Sikkink 1999; Hawkins 2002).

The (somewhat false) expectations of the automatic association between and among development, democracy and human rights can undermine otherwise courageous attempts to bring about democratic transition and improvement in human rights protection. While it is certainly true that increased levels of economic development support democracy (for example Przeworski, Alvarez, Cheibub and Limongi 2000) and underpin the delivery of human rights protection, the raw pursuit of economic gain in the hope that it will necessarily deliver such political and legal improvements is based upon a false premise that ignores the truly political nature of democracy and human rights.

NOTE

1. For this correlation the natural log of both indicators are used to prevent skewness owing to sub-regional differences. Pearson's $r = -0.48$ ($p < 0.001$).

REFERENCES

Ball, P.B. (2000), 'The Guatemalan Commission for historical clarification: generating analytical reports, inter-sample analysis' in P.B. Ball, H.F. Spirer and L. Spirer (eds), *Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis*, Washington DC: American Association for the Advancement of Science, pp. 259–86.

Ball, P.B., J. Asher, D. Sulmont and D. Manrique (2003), *How many Peruvians have died?*, Washington, DC: American Association for the Advancement of Science (AAAS), http://shr.aaas.org/hrdag/peru/aaas_peru_5.pdf.

Beetham, D. (1999), *Democracy and Human Rights*, Cambridge: Polity.

Boix, C. (2003), *Democracy and Redistribution*, Cambridge: Cambridge University Press.

Boix, C. and S. Stokes (2003), 'Endogenous democratization', *World Politics*, **55** (July): 517–49.

Boyle, K. (1995), 'Stock-taking on human rights: the World Conference on Human Rights, Vienna 1993', *Political Studies*, **43**: 79–95.

Brohman, J. (1996), *Popular Development*, Oxford: Blackwells.

Brysk, A. (1994), *The Politics of Human Rights in Argentina: Protest, Change, and Democratization*, Stanford: Stanford University Press.

Burkhart, R.E. and M. Lewis-Beck (1994), 'Comparative democracy, the economic development thesis', *American Political Science Review*, **88** (4): 903–10.

Comisión para el Easclarecimiento Histórico (CEH) (1999), *Guatemala Memoria del Silencio: Informe de la Comisión para el Easclarecimiento Histórico*, Vol. I, New York: UNOPS.

Diamond, L. (1999), *Developing Democracy: Toward Consolidation*, Baltimore: Johns Hopkins University Press.

Drazen, A. (2000), *Political Economy in Macroeconomics*, Princeton: Princeton University Press.
Foweraker J. and R. Krznaric (2000), 'Measuring liberal democratic performance: a conceptual and empirical critique', *Political Studies*, **45** (3): 759–87.
Foweraker, J. and T. Landman (1997), *Citizenship Rights and Social Movements: A Comparative and Statistical Analysis*, Oxford: Oxford University Press.
Foweraker, J. and T. Landman (2002), 'Constitutional design and democratic performance', *Democratization*, **9** (2): 43–66.
Foweraker, J. and T. Landman (2004), 'Economic development and democracy revisited: why dependency theory is not yet dead', *Democratization*, **11** (1): 1–21.
Foweraker, J., T. Landman and N. Harvey (2003), *Governing Latin America*, Cambridge: Polity Press.
Ghandhi, P.R. (2002), *Blackstone's International Human Rights Documents*, 3rd edn, Oxford: Oxford University Press.
Harris D. and S. Livingstone (eds) (1998), *The Inter-American System of Human Rights*, Oxford: Oxford University Press.
Hartlyn, J. and A. Valenzuela (1994), 'Democracy in Latin America since 1930', in L. Bethell (ed.) *Cambridge History of Latin America, Volume VI: Part 2*, Cambridge: Cambridge University Press, pp. 99–162.
Hathaway, O. (2002), 'Do treaties make a difference? Human rights treaties and the problem of compliance', *Yale Law Journal*, **111**: 1932–2042.
Hawkins, D. (2002), *International Human Rights and Authoritarian Rule in Chile*, Lincoln: University of Nebraska Press.
Helliwell, J.F. (1994), 'Empirical linkages between democracy and economic growth', *British Journal of Political Science*, **24**: 225–48.
Huntington, S.P. (1991), *The Third Wave: Democratization in the Late Twentieth Century*, Norman, OK: University of Oklahoma Press.
Keith, L.C. (1999), 'The United Nations International Covenant on Civil and Political Rights: does it make a difference in human rights behavior?', *Journal of Peace Research*, **36** (1): 95–118.
Landman, T. (1999), 'Economic development and democracy: the view from Latin America', *Political Studies*, **47** (4): 607–26.
Landman, T. (2003), *Issues and Methods in Comparative Politics: An Introduction*, London: Routledge.
Landman, T. (2005), *Protecting Human Rights: A Comparative Study*, Washington, DC: Georgetown University Press.
Landman, T. and J. Häusermann (2003), *Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance*, Report to the European Commission.
Lipset, S.M. (1959), 'Some social requisites from democracy: economic development and political legitimacy', *The American Political Science Review*, **53**: 69–105.
Mainwaring, S. and A. Pérez-Liñán (2003), 'Level of development and democracy: Latin American exceptionalism, 1945–1996', *Comparative Political Studies*, **36** (9): 1031–67.
Mitchell, N.J. and J.M. McCormick (1988), 'Economic and political explanations of human rights violations', *World Politics*, **40**: 476–98.
Moravcsik, A. (1997), 'Taking preferences seriously: a liberal theory of international politics', *International Organization*, **51**(4): 513–53.
Moravcsik, A. (2000), 'The origins of human rights regimes: democratic delegation in Postwar Europe', *International Organization*, **54** (Spring): 217–52.

Munck, G. (2002), 'Conceptualizing and measuring democracy: evaluating alternative ideas', *Comparative Political Studies*, **35** (1): 5–34.
Poe, S. and C.N. Tate (1994), 'Repression of human rights to personal integrity in the 1980s: a global analysis', *American Political Science Review*, **88**: 853–72.
Poe, S.C., C.N. Tate and L.C. Keith (1999), 'Repression of the human right to personal integrity revisited: a global cross-national study covering the years 1976–1993', *International Studies Quarterly*, **43**: 291–313.
Przeworski, A. and F. Limongi (1997), 'Modernization: theories and facts', *World Politics*, **49** (January): 155–83.
Przeworski, A., M.E. Alvarez, J.A. Cheibub and F. Limongi (2000), *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*, Cambridge: Cambridge University Press.
Risse, T., S.C. Ropp and K. Sikkink (1999), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press.
Ropp, S.C. and K. Sikkink, (1999), 'International norms and domestic politics in Chile and Guatemala', in T. Risse, S.C. Ropp and K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, pp. 171–204.
Rueschemeyer, D., E.H. Stephens and J. Stephens (1992), *Capitalist Development and Democracy*, Cambridge: Polity Press.
Russett, B. and J. O'Neal (2001), *Triangulating Peace: Democracy, Interdependence and International Organizations*, New York: W. W. Norton.
Todaro, M. (1997), *Economic Development*, 6th edn, London and New York: Longman.
United Nations Development Programme (2002), *Human Development Report 2002*, New York: Oxford University Press.
Zakaria, F. (2003), *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York and London: W. W. Norton.
Zanger, S.C. (2000), 'A global analysis of the effect of regime changes on life integrity violations, 1977–1993', *Journal of Peace Research*, **33**.

Index