GLOBALIZATION, HUMAN RIGHTS AND SUB-SAHARAN AFRICA

Thesis Submitted for the Degree of Doctor of Philosophy

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ABSTRACT

This thesis attempts to address the originating question: Is globalization the cause of Africa's state of underdevelopment? Although framed in the language of economics, the question also has legal implications. Specifically, it seeks to establish why the region has been unable to realize any of the core elements of the International Covenant on Economic, Social and Cultural Rights, such as the rights to health, food, housing and education.

It examines the policies espoused particularly by the Bretton Woods institutions (namely, the International Monetary Fund, the World Bank, and the World Trade Organization), and acknowledges their detrimental impact on the economies of developing countries generally. The role played by transnational corporations in shaping this neo-liberal economic order is also examined, as are the human rights ramifications.

It concludes, however, that although the impediments posed by the dynamics of globalization to human rights have been almost universally acknowledged, these, without more, are not sufficient to explain why the situation within the region is more depressing than elsewhere in the world. It follows, it is argued, that the supposition that Africa is a casualty of globalization amounts to a dangerous extrapolation, not least because it creates unrealistic expectations on the part of an already indigent and helpless people by diverting their attention to exogenous factors.

The research acknowledges the inherent diversity of the political economy of the region, but identifies leadership as *the* obstacle to its development and argues that unless radical steps are taken at the international level, all efforts aimed at ameliorating the suffering of its people will continue to prove futile. Such steps, it is suggested, must necessarily include the indictment of rulers who continue to expose their citizens to unnecessary suffering through corruption, endless wars or sheer supercilious misrule. This, it is acknowledged, would not be unproblematic, given the traditional maintenance, within the human rights community, of a wholly artificial distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other. Nevertheless, the contention is that if the various UN Declarations proclaiming the indivisibility and interdependence of human rights mean anything other than empty rhetoric, these principles must be affirmed at the level of enforcement.

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CASE LIST

European Court of Human Rights

1. *Airey v Ireland*, Judgement of 9th October 1979, Publications of the European Court of Human Rights, Series A, No.32
2. *Deumland v Germany,* Judgement of 29 May 1986, Publication of the European Court of Human Rights, Series A, No.100
3. *Editions Periscope v. France*, 234 Eur. Ct. H.R. ser. A (1992)
4. *Feldbrugge v The Netherlands,* Judgement of 29 May 1986, Publications of the European Court of Human Rights, Series A, No.99
5. *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. ser. A 216;14 (1992) E.H.R.R.153
6. *Salesi v Italy,* Judgement of 26 February 1993, Publications of the European Court of Human Rights, Series A, No.257 E
7. *Schuler-Zgraggen v Switzerland,* Judgement of 24 June 1993, Publications of the European Court of Human Rights, Series A, No. 263
8. *Sunday Times v The United Kingdom No.2,* Eur. Ct. H.R. Series A.217; 14 (1992) E.H.R.R. 229

International Cases

9. *Case Concerning the Barcelona Traction, Light and Power Company Ltd (Second Phase),* ICJ, Judgment of 5 February 1970
10. *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997 (GATT/WTO Appellate Body Decision)
11. *Re Flick and Others* (United States Military Tribunal, Nuremberg, 22 December 1947) in *14 Intl L. Rep* 266 (1947)
12. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* 1980 ICJ Rep.73 (Advisory Opinion of December 20)
13. *Judgement of the Case of Nicaragua v United States* (Merits), ICJ Reports (1986)
14. *Re Karuch and Others (I G Fabern Trial)* (United States Military Tribunal, Nuremberg, 29 July 1948) *15 Intl L. Rep. 668* (1948)
15. *Re Krupp and Others* (United States Military Tribunal at Nuremberg. 30 June 1948) *15 Intl L. Rep 620* (1948)
16. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep. 174
17. *S W M Brooks v the Netherlands*, Communication No. 172/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 139 (1987). (UN Human Rights Committee)
18. *United States – Import Prohibition of Certain Shrimp Products*, Appellate Body Reports, WT/DS58/AB/R, 12 October 1998 (GATT/WTO Appellate Body Decision)
19. *F H Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987). (UN Human Rights Committee)
20. *The Zyklon B Case (British Military Tribunal),* reported in 42 Am J Int'l L. 299 (1948)

Sub-Saharan Africa

21. *Amnesty International v Zambia*, Communication 212/98, Twelfth Annual Activity of the African Commission on Human and Peoples' Rights (1998-99), AHG/215/(XXXV), Annex V (1999).
22. *Annette Pagnoule (on Behalf of Abdoulaye Mazou) v. Cameroon* (Merits), Communication No. 39/90 (adopted by the Commission at its 21st Ordinary Session, April 1997, [1996] 3 Int'l Hum. Rts. Rep. 123
23. *Attorney General v Unity Dow* [1991] C.A. Civ. App. No.4/91 (Botswana)
24. *Civil Liberties Organization v Nigeria*, Communication 151/96, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000), Annex V, 71 (2000)
25. *Free Legal Assistance Group et al v Zaire* (1996) (Merits), Communication No. 25/89, reprinted in [1997] 4 Int'l Hum. Rts. Rep. 89 (African Commission)

26. *Government of the Republic of South Africa v Grootboom and Others* [2000] 11 BCLR 1169 (South African Constitutional Court)
27. *John K Modise v Botswana*, Communication 93/97, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996–97, Thirty-third Ordinary Session, 2nd–4th June 1997, Doc. OS/(XXII), Annex X (1997), reprinted in 6 Int'l Hum. Rts. Rep. 828
28. *Krischna Achutan (on behalf of Aleke Banda) v. Malawi* (Merits), Communication No. 64/92, jointly heard with *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi* (Merits), Communication No. 68/92 and 78/92, reprinted in [1996] 3 Int'l Hum. Rts. Rep. 134 (African Commission).
29. *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter Africaine des Droits de l'Homme (RADDHO), Collectif des Veuves et Ayants-droits & Association Mauritanienne des Droits de l'Homme v Mauritania (Merits)*, Communications 54/91, 61/91, 98/93, 164/97, and 210/98, in Thirteenth Annual Activity of the African Commission on Human and Peoples' Rights (1999-2000), ACHPR/AHG/222 (XXXVI) Add. 136,158 (2000)
30. *New Patriotic Party v The Attorney General*, [1996-1997] Sup. Ct. of Ghana L. R. 728, at 745
31. *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* Communication 71/92, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996–97, Thirty-third Ordinary Session, 2–4 June 1997, Doc. OS/(XXII), Annex X (1997), reprinted in 6 Int'l Hum. Rts. Rep. 825
32. *Rex v Acres International Ltd*, CRI/T/2/2002, 13 September 2002 (Lesotho High Court)
33. *In Re Certification of the Constitution of the Republic of South Africa* [1996] 10 BCLR 1253 (South African Constitutional Court)
34. *Salvatori Abuki & Obuga v Attorney General* [1998] 3 Butterworths Hum. Rts. Cases 199 (Uganda)
35. *Soobramoney v Minister of Health (Kwa Zulu-Natal)*, 4 B.H.R.C 308 (1999) 50 B.M.L.R.224 (South African Constitutional Court)
36. *The Prosecutor Against Charles Ghankay Taylor (aka Charles Ghankay Macarthur Dakpana Taylor)*, Special Court for Sierral Leone, Case No. SCSL -03-1, dated 3 March 2003
37. *Union Inter Africaine des Droits de l'Homme et al v Angola* Communication 159/96, Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights (XXIII), Annex II, 30 (1998).
38. *Venia Magaya v Nakayi Shonhiwa Magaya*, Judgement No. S.C.210/98/Civil Appeal No.635/92 of the Supreme Court of Zimbabwe (unreported).
39. *World Organization Against Torture et al v Zaire*, Communications 25/89, 47/90, 56/91, 100/93, in Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995–96, Thirty-second Ordinary Session, 7th–10th July 1996
40. *Zamani Lekwot & Six Others v Nigeria* [1996] 3 Int'l Hum. Rts. Rep. 137 (African Commission)

United Kingdom

41. *Attorney-General's Reference (No 2 of 1999)* [2000] 2 Cr. App. R. 207
42. *Connelly (Respondent) v RTZ Corporation plc & Another* [1998] A.C. 854
43. *J H Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others* [1990] 2 AC 418
44. *Lubbe v Cape Plc (No.2), Afrika v Cape plc* [2000] 2 Lloyd's Rep. 383.
45. *Ngcobo & others v Thor Chemicals Holdings Ltd.* [1995] T.L.R. 579
46. *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.
47. *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72
48. *R v Kite and OLL Ltd* (Unreported, Winchester Crown Court, 8 December 1994)
49. *Salomon v Salomon & Co* [1897] AC 22, HL.
50. *Sithole & Others v Thor Chemicals Holdings Ltd & Anoth*, TLR 110, February 15 1999
51. *Smithkline Beecham Plc v Advertising Standards Authority*, No. CO/2291/2000 [2001] WL 14905
52. *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460
53. *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153

United States of America

54. *Akbar v New York Magazine Co.,* 490 F. Supp. 60 (D. D. C. 1980)
55. *Amlon Metals Inc v FMC Corp.*, 775 F Supp. 668 (S.D.N.Y. 1991)
56. *The Amoco Cadiz* [1984] 2 Lloyd's Law Reports 304
57. *In re Amoco Cadiz Oil Spill, 1984* A.M.C.2123 (N.D. Ill. 1984), affirmed, 954 F. 2d 1279 (7th Cir.1992)
58. *Beanal v Freeport-McMoran,* 969 F. Supp. 362 (E.D. La 1997)
59. *Beanal v Freeport-McMoran Inc.* 197 F. 3d 161 (5th Cir. 1999)
60. *Bodner v Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).
61. *Complaint, Government of India v Union Carbide Corp.*, No.85 Civ. 2696 (S.D.N.Y. 1985)
62. *Coppage v Kansas* [1915] 236 U.S. 1
63. *Doe v Karadzic*, 70 F.3d 232 (2nd. Cir, 995).
64. *Doe v UNOCAL Corp*, 963 F. Supp.880 (C.D. Cal 1997)
65. *Doe v UNOCAL Corp*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998).
66. *Doe v UNOCAL Corp*, 110 F. Supp 2d 1294 (C.D. CAL.2000)
67. *In re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v Marcos,* 978 F. 2d 493 (9th Cir. 1992)
68. *Filartiga v Pena-Irala* 630 F. 2d 876 (2d Cir. 1980)
69. *Filartiga v Pena-Irala*, 577 F. Supp. (E.D.N.Y. 1984)
70. *Guinto v Marcos*, 645 F. Supp 276 (S.D. Cal. 1986)
71. *Hilao et al v Estate of Ferdinand Mrcos*, 25 F. 3d 1467; 1994 U.S. App. LEXIS 14796
72. *Hilao v Marcos*, 103 F 3d 767 (1996).
73. *re Holocaust Victims Assets Litigation.*, 105 F. Supp. 2d 164 (S.D.N.Y. 2000).
74. *Jota v Texaco Inc.*, 157 F. 3d 153 (2d Cir.1998)
75. *National Coalition Government of the Union of Burma v UNOCAL Inc.*, 1997 U.S. Dist. Lexis 2097).
76. *Paul v Avril*, 812 F. Supp. 207 (S.D. Fla. 1993)
77. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India*, 809 F. 2d 195 (U.S.C.A. 2d Cir.)
78. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India*, 634 F. Supp. 842 (S.D.N.Y. 1986); affirmed in part 809 F 2d 195 (2d Cir. 1987) sub nom. *Exec. Comm. Members v Union of India,* 484 U.S. 871 (1987).
79. *In re Union Carbide Gas Plant Disaster at Bhopal India Opinion and Order 12 May 1986*, 634 F. Supp. 842 (S.D.N.Y.1986)
80. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).
81. *Xuncax et al v Gramajo*, 886 F. Supp. 162 (D. Mass. 1995)

LIST OF ACRONYMS AND COMMON TERMS

ACP	Africa, Caribbean and Pacific group of countries
AGOA	African Growth and Opportunity Act
AU	African Union
Bretton Woods Institutions	The IMF, World Bank, and the WTO
CAP	[EU's] Common Agricultural Policy
CESCR	[UN's] Committee on Economic, Social and Cultural Rights
Covenants (the)	The ICCPR and the ICESCR
CPRs	Civil and Political Rights
DFID	[UK's] Department for International Development
DSU	Dispute Settlement Understanding
EBA	[EU's] Everything But Arms initiative
ECOSOC	[United Nation's] Economic and Social Council
ECHR	European Convention on Human Rights
ESAF	Enhanced Structural Adjustment Facility (a variant of SAPs)
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
GSP	Generalized System of Preferences
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
G-7 (or G-8)	Group of seven most industrialized nations (now including Russia)
HIPC	Heavily-Indebted Poor Countries
HRC	[UN's] Human Rights Committee
IBHR	International Bill of Human Rights
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
IFIs	International Financial Institutions (The World Bank and the IMF)
ILO	International Labour Organization
IMF	International Monetary Fund
LDCs	Least Developed Countries
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured Nation
NEPAD	New Partnership for African Development
NTBs	Non-Tariff Barriers
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PRGF	Poverty Reduction and Growth Facility
PRSP	Poverty Reduction Strategy Paper(s)
Quad Countries	"Quadrilateral" group of trading nations made up of the EU, USA, Canada, and Japan
RTA	Regional Trading Agreements
SALs	Structural Adjustment Lending (or Loans)
SAPs	Structural Adjustment Programmes
S&D	Special and Differential Trading Regime (of the GATT)

SECAL	Sectoral Adjustment Lending (or Loans)
SPS	Sanitary and Phytosanitary Measures Agreement
SSA	Sub-Saharan Africa (used interchangeably with "Africa")
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational and Cultural Organization
WTO	World Trade Organization

INTRODUCTORY CHAPTER

A. The Research Problem

That sub-Saharan Africa has become synonymous with economic underdevelopment is perhaps too obvious to restate.[1] The research is necessitated by the fact that this state of affairs is not simply an economic disaster, but a very *human* tragedy – and one that appears destined to become much worse as time goes by. A snapshot of the nature of the tragedy is shockingly instructive: More than 300 million Africans – nearly half the region's population – still live in extreme poverty.[2] The infant mortality rate stands at 91 per 1000 births, while the adult literacy rates for males and females are 30 percent and 47 percent respectively.[3] As if these were not depressing enough, the HIV/AIDS pandemic is destroying lives on the continent at an alarming rate. A recent UN report highlights the problems thus:

> Approximately 3.5 million new infections occurred in 2001, bringing to 28.5 million the total number of people living with HIV/AIDS in sub-Saharan Africa. Fewer than 30 000 people were estimated to have been benefiting from antiretroviral drugs at the end of 2001. The estimated number of children orphaned by AIDS living in the region is 11 million. Even if exceptionally effective prevention, treatment and care programmes take hold immediately, the scale of the crisis means that the human and socioeconomic toll will remain significant for many generations. [4]

Neither is the situation regarding nutrition any less disturbing. According to a joint UN mission to southern Africa in 2002, 12.8 million people were on the brink of starvation.[5] The Deputy Executive

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[1] Throughout the thesis, the terms "sub-Saharan Africa" and "Africa" will be used interchangeably. Both refer only to the 47 countries that lie roughly south of the Sahara desert (including the Islands located in the nearby Atlantic and Indian oceans). These include: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central Africa, Chad, Comoros, Congo (Democratic Republic), Congo, Ivory Coast, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. The list is available via the World Bank's website: http://www.worldbank.org/afr/

[2] See World Bank Group, *World Bank Brief 2002*, at p.1, available at http://www.worldbank.org/afr/africabrief.pdf . And in discussing extreme poverty, it is important to note that "...Africa's poor are the poorest of the world's poor." (See World Bank, *Can Africa Reclaim the 21st Century?* (Washington DC: World Bank, 2000), at p.10

[3] See *World Bank Brief 2002*, ibid, at p.4

[4] See UNAIDS, *Report on the Global HIV/AIDS Epidemic 2002*, UNAIDS/02.26E (Geneva: Switzerland, 2002), at pp.22-23. See also *World Bank Brief*, ibid, at p.7

[5] Information available at the World Food Programme's website: http://www.wfp.org/newsroom/in_depth/Africa/sa_main_page020607.htm

Director of the UN World Food Programme is reported to have remarked: "We see this as a crisis of enormous proportions. The situation worsens with each day."[6] Little wonder therefore, that the life expectancy at birth in the region is only 47 years.[7]

As of 2000, over half of African countries were affected by war.[8] In his report to the UN Security Council, the Secretary-General stated:

> Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons.[9]

One year later, the Secretary-General also noted: "For many people in other parts of the world, the mention of Africa evokes images of civil unrest, war, poverty, disease, and mounting social problems. Unfortunately, these images are not just fiction..."[10] In 1984, Ethiopia treated the world to the ghoulish spectacle of what was almost certainly the worst post-Biblical famine it has ever witnessed, prompting the Live Aid appeal. Less than two decades later, the same tragedy has struck again, the only difference being that this time, it has managed to reach the people of southern Africa, whose lives, as already noted, are being destroyed by the HIV/AIDS pandemic.[11] Africa has thus become the only region in the world to miss the crucial economic benchmarks for meeting the UN's Millennium Development Goals (which include the reduction of poverty by half by 2015).[12]

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[6] ibid

[7] See World Bank Group, *African Development Indicators 2003* (Washington DC: World bank , 2003), at p.5

[8] See DFID, FCO, and MOD, *The Causes of Conflict in Sub-Saharan Africa: Framework Document* (October 2001), at p.5

[9] See UN Secretary-General's Report to the Security Council, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General," UN SCOR, 52 Sess., Agenda Item 10, UN Doc. A/52/871-S/1998/318 (1998), at para.4

[10] See K Annan, "Foreword" in UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (New York and Geneva: United Nations, 1999).

[11] See P Harris, "Africa Starves as Rains Fail and Rulers Reap Profits" *The Observer*, 19 January 2003, at http://www.observer.co.uk/)

[12] See Department for International Development, Departmental Report 2002: The Government's Expenditure Plans 2002/2003 to 2003/2004, presented to Parliament by the Secretary of State for International Development and the Chief Secretary to the Treasury, April 2002, at p.58. See also, United Nations Economic and Social Council, The role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development Report of the Secretary-General, UN Doc. E/2001/83, of 12 June 2001, at paras.13 and 41.

These, then, constitute the backdrop against which this research has become necessary – an avoidable tragedy that flows from the region's state of cyclic underdevelopment. At first sight, this may appear not to be a legal problem, since questions relating to economic development are essentially economic. However, this common assumption ignores the fact that the International Bill of Human Rights (IBHR)[13] has an economic dimension, at the core of which are: the rights to health, basic education, and adequate standard of living (including adequate nutrition, clothing and housing) as spelled out under the International Covenant on Economic, Social and Cultural Rights 1966.

To be sure, the validity of the above category of rights has been challenged, not just from a philosophical perspective, but also from a legal standpoint. However, the research has deliberately avoided (as much as possible) the philosophical debate for the simple reason that the IBHR (the core components of which have been ratified by at least 146 countries representing all the geographical areas, cultures, religions, races, and peoples of the world) offers an adequate basis for what is, after all, primarily a piece of legal research. Moreover, because its core elements are products of two international treaties, their status in international law cannot be questioned. Nevertheless, it is important to acknowledge that even seasoned international lawyers have argued that the exhortatory language employed in drafting the ICESCR raises important questions about the nature of the rights it proclaims. For example, it is contended that this non-binding language makes economic, social and cultural rights (ESCRs) non-justiciable; and that in any event, they depend very much on the availability of economic resources. These being the case, it is further contended, they cannot be as valid as, for example, the rights to life or to due process.

However, as argued in chapter 2, an attempt to draw such a distinction poses a danger to the victims of serious human rights violations. This is because it is based on two erroneous presuppositions. First, it assumes that *only* ESCRs depend on the availability of economic resources, or that the realization of civil and political rights (CPRs) does not *also* depend on it; ignoring the fact that the cost of legal aid, for

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[13] The IBHR is made up of three instruments: the Universal Declaration of Human Rights 1948; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights

example, could be just as high as a country's educational budget. Indeed, the question of political will aside, it is the case that the very basic right to free legal representation is simply unrealizable in much of the developing world for reasons of cost.

The second erroneous assumption is that there is any material difference between, for example, death through starvation on the one hand, and death from police torture. Both, it is submitted, describe an equal degree of suffering that seriously undermines the dignity of the human person, which, after all, lies at the heart of the notion of human rights. Moreover, the distinction ignores the simple fact that the right to vote is utterly meaningless to a person who is too uneducated to make an informed choice, too hungry to care, or too ill to travel to the polling booth – considerations which must have influenced the international community in its universal acceptance of the principles of interdependence and indivisibility of *all* human rights, as acknowledged under various United Nations Declarations, such as the Proclamation of Teheran (1968) and the Vienna Declaration (1993).[14] It is for these reasons that the two rights categories are given equal recognition throughout the thesis.

B. The Research Question

In chapter 1, the phenomenon of globalization is defined in its economic context. Its threats to the realization of ESCRs are also briefly examined. In addition to these, it is necessary to mention that even its most passionate advocates (namely, the Bretton Woods institutions) have acknowledged its impacts on the poor, particularly in developing countries, hence, the "charade of countless initiatives" highlighted in chapter 10 – all supposedly aimed at ameliorating them. In fact, it could be argued that the (relatively) generous welfare provisions which are guaranteed by law in Western countries are also an acknowledgement of its potential impacts. For these reasons therefore, various commentators have concluded that SSA's state of underdevelopment is a direct consequence of the neo-liberal economic policies that define the phenomenon of globalization, particularly for developing countries. *The research question is therefore a simple one: Is globalization the cause of Africa's state of underdevelopment?* In

[14] Both are also discussed in chapter 1

other words, it aims to test the common assumption that Africa, like any other region of the developing world, is a casualty of the global economic regime.

At first sight, this might seem a fruitless enterprise, given that Africa exists within the same global economy as any other region of the world. If globalization poses a threat to ESCRs in the richest countries, it might be argued, its impact on SSA should be a foregone conclusion. However, the research seeks to highlight the fact that although the impact of globalization on ESCRs has been so widely-acknowledged, the assumption that it is the *main* cause of Africa's intractable problems is not only grossly misleading, but also dangerous. It is misleading because it ignores the fact that post-independence African rulers have inflicted upon their citizens, a degree of suffering that would have horrified even some of the colonialists they replaced. Indeed, it ignores the fact that even the UN Secretary-General (a man who, having spent his entire working life within the corridors of international diplomacy is not given to unguarded comments) was so frustrated that he once asserted, "...[t]he quality of the leaders, the misery they have brought to their people and my inability to work with them to turn the situation around are very depressing."[15] It also ignores that fact that because of their manifest preoccupation with tyrannical and *kleptocratic* misrule and senseless wars, the region has remained, at best, on the periphery of the global economy, and otherwise, completely outside of it, its only engagement with it being in the context of its monumental debt and foreign aid.

The supposition that Africa is a casualty of globalization is also dangerous because it is a function of a casual extrapolation, which gives false hopes to an already helpless and indigent people, by suggesting that the solution to their misery lies in a global economic regime, the unassailability of which should be self-evident in light of the very nature of the powers behind it;[16] as opposed to focusing critical attention on the patently abysmal state of leadership on the continent.

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[15] See W Shawcross, "Africa: The Black Man's Burden," *Sunday Times*, London, 9 April 2000, obtained via Lexis-Nexis LNEPROF/1125BQ

[16] Its non-transient nature has been acknowledged thus by the Special Rapporteurs to the UN's Sub-commission the Promotion and Protection of Human Rights, "...it is clear that globalization is no passing or ephemeral cloud." (See United Nations Economic and Social Council, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, preliminary report submitted by J.

C. An Overview of the Main Sub-Themes

The issues raised within the thesis are discussed in thirteen chapters. The **first** offers an overview of the phenomenon of globalization, as well as a contextual definition of it. It however notes that contrary to common assumptions, the neo-liberal connotations of the phenomenon are not universally embraced, at least insofar as protectionism remains a major element of international trade, particularly in the richest economies of the world. It notes also that Africa's engagement with the global economic regime is mediated almost entirely by debt and aid. It further examines the uneasy relationship between globalization and human rights and concludes that its benefits can only be objectively assessed after taking into account its human rights impacts.

Chapter 2 is presented in three broad sections: The first begins by challenging the unequal treatment traditionally given to the two categories of human rights. In an attempt to expose the myths often circulated regarding the realizability of ESCRs, it goes on to examine their very nature as proclaimed under the ICESCR in the second section. Issues relating to the "core minimum obligations" are also discussed, as are the various suggested approaches to realization. It notes that contrary to common assumptions, their realizability *does not always* depend on the availability of resources – and certainly not to any greater extent than many aspects of CPRs.

The third section examines the main regional human rights instrument in SSA – the African Charter – as well as the attitude of the African Commission and the municipal courts in the region towards the realization of ESCRs. In the context of the Charter, however, it is noted, firstly, that in spite of its enthusiastic preambular commitment to their realization, its substantive provisions have made no reference to some of their core elements, focusing instead, on the escapist notions of "duties" and "the virtues...and the values of African civilization." Moreover, this section highlights several factors which constitute a definite impediment to the ability of the African Commission to fulfil its mandates under the

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Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8, E/CN.4/Sub.2/2000/13, 15 June 2000, at para.4.

Charter and argues that the realization of human rights in the region depends as much on the on the political will of the region's rulers than on anything else. It notes, however, that by incorporating the UN Declaration on the Right to Development into the Charter, African rulers have unwittingly imposed upon themselves a duty that they have so far consciously evaded.

Chapter 3 focuses on the question of economic development, relying, specifically on the above UN Declaration. It begins by addressing some of the doubts often expressed regarding the validity of the Declaration by examining its core contents, and goes on to assess the role of the UN General Assembly as source of law. It concludes that the right to development is indeed an inalienable human right under international law. It notes also that as well as imposing certain negative duties on international actors, it explicitly places *primary* responsibilities on governments to take steps to ensure the realization of human rights. This, it is argued, has changed the nature of human rights advocacy in a fundamental way, by introducing a new balance of emphases, particularly in SSA where leadership constitutes an impediment to economic development.

Chapter 4 examines the reality of globalization in SSA as evidenced by the debt crisis, and the roles played by the IFIs through the imposition of their much-criticized structural adjustment policies. It notes that these policies, based as they were, on neo-liberal fundamentalism of a kind that even the most robust economies have always consciously shielded themselves from, constituted a deliberate disregard for the lessons of history, as well as the rules of economics, and were also a direct violation of international law in a broad sense, and international human rights law in particular.

Chapter 5 is a sequel to chapter 4, its main aim being to determine whether the IFIs do in fact have human rights responsibilities *as a matter of law*. It briefly traces the evolutionary change in the attitudes of the IFIs, as evidenced, particularly by the HIPC initiative, and notes that this represents a direct acknowledgement of the inappropriateness of their previous, neo-liberal, approach to economic development. An assessment of the initiative, however, reveals that it is comparable to the proverbial

curate's egg: partly good and partly rotten. Nevertheless, the conclusion is that it represents the very best that African rulers can expect, given that total debt relief has been jointly ruled out by both institutions.

Chapter 6 marks the beginning of an examination of Africa's relationship with the multilateral trading regime. It provides a theoretical framework for a discussion of many of the themes in chapters 7, and to a limited extent 8 (both of which examine Africa's place within the global trading regime); as well as 9 and 10 (which focus on the powers and pervasiveness of TNCs within the global economy). It offers a critical overview of the dominant theories of international trade, and notes that contrary to the explicit endorsement (or promotion) of the notion of comparative advantage (and thus of free trade) by the WTO, the reality of international economic relations is that "strategic trade" has long replaced comparative advantage (and its variants) as the dominant theory, and is in fact the only preferred approach to international trade and investment for the industrialized nations. The conclusion is therefore that free trade is a myth.

Chapter 7 goes on to examine the multilateral trading regime, and how its rules affect SSA, and developing countries generally. It begins with an overview of the relevant provisions of the GATT, and notes that contrary to common beliefs, the GATT does in fact contain certain derogations aimed at assisting developing countries generally, and specific provisions to support the developmental goals of the LDCs. This, it is argued, means that insofar as SSA engages in any meaningful trading at all, this is done effectively outside of the multilateral trading regime. It however notes that the ability of the major trading nations (and trading blocs) to maintain protectionist policies constitutes a negative counterbalance to the highlighted derogations for developing countries.

Chapter 8 is a direct sequel to chapter 7, and explores the notion of preferential trade in some depth. Specifically, it examines the two most important preferential trading regimes: the United States' GSP regime (and its African Growth and Opportunity scheme); as well as the EU's ACP/Lome schemes (and its Everything But Arms initiative). It notes, however, that even within these preferential regimes, SSA

remains largely unable to trade. The conclusion is therefore that although these regimes are not as obstacle-free as is sometimes suggested, they represent the best that Africa can expect, given that international economic relations is based primarily upon self-interest, and not on altruism.

Chapter 9 goes on to look at the powers and pervasiveness of TNCs within the global economy, and the human rights implications. It examines the dominant theories governing TNCs and human rights, and concludes that the "TNCs as Engines of Development" thesis is not supported by empirical evidence. It notes, however, that as in the overall context of trade, SSA has only managed to attract a negligible amount of FDI. Nevertheless, it argues that this should not preclude the region from the TNCs/human rights debate, for the reason that some of the most flagrant and most serious human rights violations by corporate enterprises have occurred within it. It further examines the specific areas of human rights responsibilities by TNCs, and concludes although the conditions necessary to attract FDI are usually an impediment to the exercise of State responsibilities, their existence must not be allowed to become another excuse for Africa's state of underdevelopment, given that the countries of Asia, some of which share a common history with the region, have been successful at exploiting their existence to their advantage.

Chapter 10 continues with the theme developed in chapter 9, but focuses on the need for mandatory regulation at the international level. It begins by acknowledging that there are already a number of regulatory mechanisms both at the municipal and international levels governing corporate conduct. It however notes that the measures at the international level are largely non-binding, and are therefore of no practical use to victims of corporate human rights violations. At the municipal level, it draws on the body of case law decided within the US and UK jurisdictions and concludes that although these represent a fairly adequate means of remedial justice for victims of human rights violations within both jurisdictions (and indeed, for *some* foreign victims, as illustrated by the cases examined), they are not appropriate, particularly for the most likely victims living in developing countries, such as the impecunious and the uneducated. It thus argues for the establishment of a mandatory regulatory regime at the international level, with the same powers as other UN tribunals.

Chapter 11 marks a departure from exogenous considerations in relation to African development and begins to look at the region's political economy, its main theme being the problem of aid-dependency. It proceeds by acknowledging that in the light of the region's history of colonial exploitation, foreign aid, post independence, was, at the very least, as economically essential as the Marshall Plan was to Europe. It however notes that that economic necessity has now become a major impediment to African development, due, in no small measure, to the virtual abandonment, by some of the region's rulers, of their basic governmental responsibilities towards their people, in favour of escapist antics, aided by a burgeoning "initiatives industry" at the international level. Aid-dependency, it is noted, is therefore a problem that has not only distorted the basic political economy of the region, but has turned Africa into the most aid-dependent region in the world – an unsustainable situation if the region is ever to begin to alleviate the suffering of its people.

Chapter 12 examines the related problem of Africa's monumental debt. It begins by drawing briefly on one of the sub-themes explored in chapter 4, acknowledging the role played by African rulers in exposing their citizens to this crisis. The aim, however, is to examine the crisis within the framework of international law, particularly relying on the doctrine of "odious debts." It argues that as a matter of legal analysis, the indigent people of Africa cannot be expected honour "contractual obligations" entered into for the purpose of perpetuating their misery (through corruption and/or tyrannical misrule), and at any rate, by those who certainly did not have their democratic mandate at the time the "contracts" were concluded. It acknowledges, however, that a legal solution, like unilateral repudiation, would have serious economic consequences. Thus, it concludes by proposing collective repudiation as the only solution to the crisis, given that the debt may in fact never be fully repaid.

Chapter 13 examines on the problem of leadership in SSA – in essence, the very core of the thesis. It highlights the conduct of African rulers in terms of a "betrayal," given the promise of independence from years of colonial exploitation and notes the tragic irony that many of these rulers have inflicted a degree of suffering on their fellow citizens that would certainly have horrified many of the colonialists. It also notes a cult-like determination on their part to perpetuate the status quo, and argues that contrary to

what might be supposed, poverty (i.e., the violation of ESCRs) is just as effective in perpetuating despotism as the denial of the right to vote (or indeed, the denial of other CPRs). The chapter goes on to offer a human rights solution to this insidious impediment to the region's emancipation: It argues that contrary to prevailing legal opinion, there is no conceptual or practical obstacle to indicting rulers who violate ESCRs, as is currently the case with violations of CPRs. The argument here is that if the various UN Declarations proclaiming the indivisibility and interdependence of human rights mean more than empty rhetoric, these principles must be evident at the levels of enforcement.

D. Methodological Problems

The research raised a number of difficult methodological problems. Even at the outset, it had become clear that some of the emerging sub-themes would have to be examined primarily in non-law contexts. An appreciation of the concept of economic development, for example, would have been impossible without some understanding of the basic concepts usually articulated under the broad rubric of International Political Economy, just as it would have been impossible to examine the rules of multilateral trade without some knowledge of Trade Theory and Policy, as well as International (Economic) Relations. Yet, many of these sub-themes also had to be discussed in the language of law. Thus, an interdisciplinary approach was a matter of inevitability. Indeed, even within the context of law itself, tensions did sometimes emerge between the broad specialism of International Law (with its traditional emphasis on the preservation of the notion of national sovereignty), and International Human Rights Law (which seeks to eliminate that obstacle). Together, these created the challenge of synthesizing the disparate concepts and sub-themes into the single, coherent thesis that this, hopefully, has become.

An even more difficult problem emerged in chapter 3, in regard to the impact of structural adjustment policies on SSA. This, it will be noted, was the beginning of Africa's direct engagement with the global economic regime. There was, at the outset, an almost instinctive desire to adopt an empirical approach ("empirical" in this sense meaning the collection and evaluation of data from a set of countries). This,

however, would have entailed a degree of expenditure that would have been simply unaffordable. In any event, given that even the multilateral agencies have been unsuccessful in obtaining such information from many African countries (as noted in chapter 6), it becomes safe to argue that this would have been both fruitless and wasteful. The alternative was therefore to adopt an empirical approach of the anecdotal kind, or what might be called "anecdotal empiricism," which involved analyzing materials published by the multilateral agencies. The crucial advantage of this approach was its usefulness in testing the validity of many of the hypotheses within the thesis, including the one identified in the originating question itself.[17]

There was, however, the notoriously awkward problem of having to establish a *counterfactual*, i.e., the economic situation in the respective countries as it might have been had the IFIs not intervened as they did. This became even more problematic given that as pointed out by two of the most prominent experts on the region's political economy, although the prescribed policies have been broadly the same across the various countries concerned, they have been "implemented in different forms and different dosages – and in combination with different broader patterns of patient behaviour, including taking other medicines or throwing the adjustment medicine away after the first few doses."[18] In other words, there simply is no consistent or common (and therefore reliable) standard against which the performance of these countries could be judged. Moreover, and as has been noted in many of the chapters that follow, the conduct of some of Africa's rulers has made it impossible to determine whether these policies, detrimental as they inevitably are, are in fact responsible for so much suffering on the continent.

Nevertheless, an UNCTAD study suggests that the most widely used methodology is the "with and without" approach which involves comparisons between countries which did, and those which did not adopt adjustment programmes, based on the assumption that the non-adjusters provide an appropriate

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[17] See also J H Jackson, "International Economic Law: Reflections on the 'Boilerroom' of International Relations" (1995) *10 Am. U. J. Int'l L. & Pol'y 595*, at p.599

[18] See P Gibbon and A O Olukoshi, *Structural Adjustment and Socio-economic Change in Sub-Saharan Africa: Some Conceptual, Methodological and Research Issues*, Research Report No.102 (Uppsala, Sweden: Nordiska Afrikainstitutet, 1996), at p.10

counterfactual for those that did.[19] Using this approach, various IMF studies, perhaps not surprisingly, conclude that the prescribed reforms have been successful.[20] A slight variant of this is the "Modified Control-Group" or "General Evaluation Estimator" (GEE) approach, the distinguishing feature of which is "the estimation of a policy counterfactual – policies that would have been followed in the absence of IMF support against which to compare actual policies and resulting outcomes."[21] Yet as acknowledged by the same authors (who also are staff member of the IMF), "...a battery of diagnostic tests casts doubt on the applicability of the GEE framework at least to the ESAF-eligible countries..." [22]

There is also the "before and after" approach, which seeks to measure the performance of a group of countries in the period prior to adjustment, against their positions afterwards. Still, as acknowledged in a World Bank policy research working paper, this only gives a picture of what happened after adjustment, and does not necessarily address questions regarding the effectiveness of the programme.[23] Indeed, Gibbon and Olukoshi assert that its main defect stems from the fact that even if one could accurately determine the difference between the positions before and after adjustment, it would also be necessary to establish a comparison between one outcome and another.[24]

A further alternative might be to draw comparisons *amongst* adjusting countries, as well as *within* a specific country over time. However, as pointed out by UNCTAD, this is also problematic because it

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[19] See UNCTAD, *The Least Developed Countries Report 2000 – Aid, Private Capital Flows and External Debt: The Challenge of Financing Development in the LDCs* (New York and Geneva: United Nations, 2000), at p.110. See also P Gibbon and A O Olukoshi, ibid.

[20] See for example, IMF, "Status Report on the Follow-up to the Review of the Enhanced Structural Adjustment Facility," 30 August 1999, at http://www.imf.org/external/np/esaf/status/index.htm. Although there is no explicit reference to this approach, this is evident from the fact that the countries under review are divided into: "ESAF Program Countries" and "Non-ESAF Developing Countries" (See para.26). The study also notes: "It is too early to assess the effects of new programs put in place over the past 12 months. However, looking more broadly at recent performance under ESAF-supported programs, further evidence has accumulated indicating that the economies concerned are moving in a positive direction" (see para.2). See also, L Dicks- Mireaux et al, "Evaluating the Effect of IMF Lending to Low-Income Countries" (2000) *Journal of Development Economics*, vol.61, no.2, at p.521.

[21] Per Dicks- Mireaux et al, ibid, at p.495

[22] See ibid, at p.522

[23] See I E Elbadawi, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers*, Country Economics Department, October 1992, Washington DC: World Bank at p.44.

[24] See also P Gibbon and A O Olukoshi, above, note 19, at p.11

cannot address such questions as why there has been better outcomes in some countries than in others; or (where positive outcomes have been recorded) how sustainable.[1]

These notwithstanding, it was still considered appropriate to proceed on the basis of available anecdotal accounts of the impacts of these policies. This, of course, created certain doubts: the evidence, for example, might have been deduced from unreliable sources, or been simply misinterpreted. It may even have been tainted by the authors' ideological bias. To minimize these risks, the thesis drew, again, upon various anecdotal accounts comprising those offered by independent commentators, as well as reports emanating from the IFIs, including the much-cited publication by the independent experts appointed by the IMF to examine the impact of its policies in a number of countries.[2]

One further point needs to be made in this regard: As mentioned in chapter 1, generalizations can indeed be unhelpful as a basis for a project of this kind. This is because although SSA is largely homogenous in many respects, it is also quite diverse. There are, for example, countries such as Mauritius and Botswana, which are not only true democracies, but have combined economic growth with the progressive realization of their people's basic needs; while others such as the bizarrely named "Democratic Republic" of Congo, Zimbabwe and Somalia have simply ceased to exist as viable States. In between are countries such as Senegal, Mali, Burkina Faso, and of late, Mozambique and Uganda, which, although not paragons of democracy, and in spite of obstacles posed by an ideologically-driven global economic regime, have either remained or have become relatively stable and are making efforts in the right direction. Yet, even these broad categorizations do not fully capture the sheer diversity of the region.

Nevertheless, it is also the case that an outright rejection of "a generalized approach" is more often than not, the first step in attempt to deny the very existence of certain common and identifiable features that

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[1] See UNCTAD, *The Least Developed Countries Report 2000*, above, note 17, at p.110

[2] See K Botchwey et al, *Report of the Group of Independent Persons Appointed to Conduct an Evaluation of Certain Aspects of the Enhanced Structural Adjustment Facility* (Washington DC: IMF, 1998). The SSA countries examined were the Ivory Coast, Malawi, Uganda, Zambia, and Zimbabwe.

have come to define much of the region: Many of its countries, for example, have either experienced fratricidal armed conflict of some kind in their post-colonial history, or are still enmeshed in one. Almost without exception, they have, at some stage, been ruled by one-party or military dictatorships, or by what are, in essence, criminal gangs operating under the legitimacy of statehood, and in some cases, all of these combined. Even among the new "democracies," very few are truly representative or accountable to their citizens in a manner envisaged within the IBHR. Thus, provided the above exceptions are duly highlighted, generalizations represent a useful means of examining the African tragedy.

The research also naturally drew on the traditional legal methodology of case law deconstruction, as well as the analysis of other primary sources. A substantial body of literature was also examined. These, it is believed, represent the best ways of answering an originating question of the kind posed above.

Chapter 1

GLOBALIZATION, HUMAN RIGHTS, AND SUB-SAHARAN AFRICA: SOME PRELIMINARY REMARKS

1.1. Introduction

It has now become widely accepted that the collapse of communism has brought about a new order in international economic relations – an era of globalization – and one in which market-friendly economic reforms within the nation-State, and free trade amongst the nations of the world will generate prosperity for all, irrespective of geography. The establishment, in 1995, of the World Trade Organization was arguably the defining moment of this march towards economic liberalism. Whether these represent the reality of the global economic regime, however, is a different matter altogether. Indeed, as pointed out below, and as subsequent chapters will illustrate, the idea of a supposedly neo-liberal global economic order certainly deserves, at the very least, to be treated with caution. Nevertheless, before embarking on this critique, a number of points need to be clarified.

The first is that although the term "globalization" is itself new, commentators generally agree that the idea behind it is not. Indeed, as a UNDP study suggests, the world was more integrated a century ago than it currently is, and trade and investment as a proportion of GDP was comparable with current trends.[1] Interestingly, this view is shared by two authorities on the subject who note: "...the level of integration, interdependence, openness, or however one wishes to describe it, of national economies in the present era is not unprecedented.[2]" Indeed, both authors also argue: "In some respects, the current international economy is *less* open and integrated than the regime that prevailed from 1870 to 1914"

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[1] See UNDP, *Human Development Report 1999: Globalization With a Human Face* (New York: Oxford University Press, 1999), at p.30 (Box 1.1)

[2] See P Hirst and G Thompson, "Globalization and the History of the International Economy," in D Held and A McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalization Debate* (Cambridge, UK: Polity Press, 2001), at p.284.

[emphasis unchanged].[3] Whether it is the case that the world is now less integrated than it ever was is, at the very least, debatable,[4] given that technological advances (an integral part of modern-day globalization) has turned the world into a so-called "global village." Nevertheless, the point to note is that global economic interaction of one description or another has always been a feature of international economic relations.[5] To this extent, therefore, globalization is not new. According to the UN secretary-General, the main distinguishing features of the modern-day phenomenon are:

- advances in new technology (particularly information and communications technology);
- cheaper and quicker transport;
- trade liberalization;
- increased financial flows; and
- growth in the size and power of TNCs.[6]

The second distinguishing feature of the new phenomenon is that the collapse of communism has led policy-makers to the simplistic conclusion that State involvement in policy-making (particularly in the developing world) is inherently undesirable, while markets represent the way forward. Yet, as former White House adviser and World Bank Chief Economist points out, "the failure of the communist system was as much a failure of the political and social order on which it was based as of the economic system itself."[7] Thus, in addition to the noted technological aspects, the new phenomenon is driven by a resolutely ideological agenda which, as will be shown later, represents a definite threat to the aims proclaimed within the International Bill of Human Rights.

The third point to make is that although globalization is not a new phenomenon, for SSA, colonialism meant that it was effectively shielded from its direct impacts (whether positive or negative). Thus, it is safe to assert that but for the brief period after decolonization in the 1960s, the region's only

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[3] See P Hirst and G Thompson, "Globalization – A Necessary Myth?" in *The Global Transformations Reader*, ibid, at p.68.

[4] There is a more persuasive view which asserts: "In clear contrast with all other historical societies, the contemporary world society is global." It further contends: "...the nearest approximation to a worldwide political order was the Moslem world [at about 1000 AD]." (See G Modelski, "Globalization," in *The Global Transformations Reader*, ibid, at p.49)

[5] See G Modelski, ibid, at p.50, who highlights the roles played by the 19th century colonial powers in territorial conquest and trade.

[6] See United Nations General Assembly, Globalization and its Impact on the Full Enjoyment of All Human Rights, Preliminary Report of the Secretary-General, A/55/342, 31 August 2000, at para.5 [hereinafter, Preliminary Report of the Secretary-General]

[7] See J E Stiglitz, "Towards a New Paradigm for Development: Strategies, Policies and Processes," 9th Raul Prebisch Lecture delivered under the auspices of UNCTAD, Geneva, 19th October 1998, at p.8.

engagement with globalization began in the 1980s, soon after the international debt crisis, particularly with the introduction of structural adjustment policies by the IFIs. A World Bank study acknowledges this in these terms: "In Africa more than in any other region, engagement with the international community has come in the context of aid and debt."[8] For this reason, references to Africa and globalization in the chapters that follow must be understood mainly within these contexts, and in relation to its effective marginalization from the global economy. A further point to make in relation to SSA is that although generalizations might be useful in discussing its numerous economic (and thus, human rights) problems, they can also be quite misleading, given the diverse nature and character of many of the governments within it. Caution should therefore be a constant companion, if this thesis is to be understood in its proper context.

1.2. Globalization: A Definition

That globalization was the dominant terminology of the last decade of the 20th century (as well as of the early 21st) is almost certainly an understatement, its use spanning so many contexts and disciplines that the UN Secretary-General recently acknowledged that it is "a term often used without any formal definition."[9] Indeed, it is a testament to its protean nature that in his speech at the 10th Raul Prebisch Lecture, Gerald Helleiner noted that it "has become so slippery, so ambiguous, so subject to misunderstanding and political manipulation, that it should be banned from further use...at least until everyone is agreed as to its precise meaning and proper use."[10] There is therefore a need to acknowledge at the outset, that it has no agreed definition.[11] Whether there will ever be the kind of agreement envisaged by Helleiner, or whether such an agreement is necessary in the first place, is itself debatable, given that the various disciplines that make up the social sciences are products of their own particular perspectives. Hence, while some commentators define globalization in terms of spatial and

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[8] See World Bank, *Can Africa Claim the 21st Century?* (Washington DC: World Bank, 2000), at p.235.

[9] See Preliminary Report of the Secretary-General, n.6 above, at para.5.

[10] See G K Helleiner, "Markets, Politics and Globalization: Can the Global Economy be Civilized?" 10th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, at the Palais des Nations, Geneva, 11 December 2000, at p.4

[11] See R McCorquodale and R Fairbrother, "Globalization and Human Rights" (1999) *Hum Rts Q.*, vol.21, no.3, at p.736.

temporal developments within the global community,[12] others have focused on its sociological and cultural dimensions.[13] And these are by no means the only contexts in which this dynamic theme is being explored and developed. Susan Strange, for example, has adopted what might be called a political science approach, challenging what is widely seen as an erosion of the power of the nation-State in favour of supranational institutions.[14] On the legal front, Peter Muchlinski offers an insightful critique of how TNCs are contributing to the process of what he calls "a global business law," or what might be called the new *lex mercatoria*;[15] while David Held focuses on developments in international (human rights) law.[16] Indeed, the disparate responses often elicited by media reporters from the anti-globalization protesters who have become a permanent feature at almost every multilateral conference is clearly indicative of how multi-faceted this phenomenon has become.

The foregoing differences of emphases naturally prompt the question whether it is in fact possible to define the term "globalization," not least because the disparities in its very conceptualization require some degree of contextual clarity on the part of those who have come to embrace what is, without doubt, a very attractive concept. The differences notwithstanding, a common position is discernible from the vast literature that is emerging on this phenomenon, at least insofar as commentators appear to have accepted the idea of global interconnectedness (and even interdependence)[17] as a starting point. The World Bank, for example, defines it as "the continuing integration of the countries of the world,"[18] while Anthony Giddens alludes to "the intensification of worldwide social relations which link distant

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[12] See for example, V Cable, *Globalization and Global Governance* (London: Royal Institute of International Affairs, 1999), at p.3

[13] See for example, A Giddens, *The Third Way* (Cambridge: Polity Press, 1998)

[14] See S Strange, *The Retreat of the State: The Diffusion of Power in the World* Economy (Cambridge: Cambridge University Press, 1996). See also S Strange, "The Declining Authority of States" in D Held and A McGrew, *The Global Transformations Reader*, n. 4 above, at p.148 et seq.

[15] See P T Muchlinski, "Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community," in G Teubner (ed.), *Global Law Without a State* (Aldershot, UK: Ashgate Publishing, 1997), at p.86. See also V Gessner, "Globalization and Legal Certainty," in *The Global Transformations Reader*, ibid, at pp.173-180

[16] See D Held, "International Law," in D Held and A McGrew (eds.), *The Global Transformations Reader*, ibid, at pp.167-171.

[17] See J H Jackson "The Perils of Globalization and the World Trading System" (2000) *24 Fordham Int'l L.J.371*, at p.372. See also R O Keohane and J S Nye (Jnr), "Globalization: What's New? What's Not? (And So What?)," (Spring 2000) *Foreign Policy*, no.118, at p.104 et seq.

[18] See World Bank, *World Development Report 1999/2000:Entering the 21st Century* (New York: Oxford University Press, 2000), at p.31

localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."[19] Further, a report by a former UN Secretary-General to the Security Council also emphasizes the notion of an "ever more interdependent world."[20] This thesis will focus on the economic dimension of this trend,[21] as well as its human rights (i.e., legal) consequences, although this is not to suggest that these are necessarily distinct from the other perspectives.[22]

For many commentators, economic globalization is synonymous with the supposed liberalization of the global economy. Hence, Virginia Leary defines it as:

> the current transformation of the world economy: the reduction of national barriers to trade and investment, the expansion of telecommunications and information systems, the growth of off-shore financial markets, the increasing role of multinational enterprises, the explosion of mergers and acquisitions, global inter-firm networking arrangements and alliances, regional economic integration and the development of a single unified world market.[23]

While this definition encapsulates the very essence of the phenomenon, it is undermined by one basic flaw: the supposition that economic liberalization is a universal phenomenon. As will be explained in chapters 6 and 7, this assumption is based on an erroneous premise. In this thesis therefore, globalization will be defined simply as the one-sided imposition, through the agency of multilateral institutions, of neo-liberal economic policies on developing countries by the richest trading nations, which shield their domestic economies from the direct impacts of such policies with protectionist measures. Specifically, this refers to the policies espoused through the agency of the multilateral institutions that regulate the global economic regime, namely, the IMF, the World Bank, and the WTO,

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[19] See A Giddens, "The Globalizing of Modernity," in *The Global Transformations Reader*, n.16 above at p.92

[20] See Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda For Peace: Preventative Diplomacy, Peacemaking, and Peace-Keeping, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277-S/24111 (1992), at para.17 [hereinafter, Agenda for Peace]

[21] One commentator contends that globalization "is foremost an economic process." Whether this is in fact the case is debatable, and is, at any rate, beyond the scope of this exercise (See A Y Seita, "Globalization and the Convergence of Values" (1997) *30 Cornell Int'l L.J.429*, at p.429)

[22] The relocation of a textiles firm from a developed country to a developing one might have direct impacts on local youth culture (assuming that the product in question is affordable locally), as well as raising human rights (i.e. legal) questions in regard to wages and working conditions. Yet, this relocation would be primarily an economic decision.

[23] See V A Leary, "Globalization and Human Rights," in J Symonides (ed.), *Human Rights: New Dimensions and Challenges: Manual on Human Rights* (Aldershot UK: UNESCO Publishing, 1998), at p.265. See also, Preliminary Report of the Secretary-General, n.9 above, at para.5

as well as those of TNCs, whose interests they promote.[24] The aim of the thesis is therefore to examine the impact of these policies on the realization of the International Bill of Human Rights in sub-Saharan Africa – a question which subsequent chapters will attempt to answer.

1.3. Globalization and Human Rights: What Relationship?

The notion of human rights is examined in depth in chapter 2. For present purposes, it suffices to mention only that the focus will primarily be on the International Bill of Human Rights, which is made up of the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social and Cultural Rights 1966, the full contents of which are spelled out in the Appendix to this thesis. What, then, it might be asked, is the relationship between the phenomenon of globalization and the notion of human rights? The relationship between globalization and human rights rests on the fact that as noted in a UN report, "[v]irtually no area of human existence today is free from the varied consequences of globalization..."[25] Indeed, as noted in chapter 10, the increasing involvement of TNCs in this development reinforces this assertion.

1.3.1. The Benefits of Globalization

The foregoing notwithstanding, it has become axiomatic that globalization has brought benefits to many, particularly in the developed world. The advances made in communications technology, as well as reduced travel costs, are believed to have increased human mobility and created a degree of

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[24] The roles of these institutions in promoting this agenda are discussed at length, particularly in chapters 4, 5, 6, and 7. It suffices, for present purposes, to refer only to the following provisions: Article I(ii) of the IMF's Articles of Agreement which describes one its "purposes" as "[t]o facilitate the expansion and balanced growth of international trade..." At least two of the World Bank's constituent organizations make explicit reference to the promotion of foreign direct investment (See Article I(ii) of the IBRD, and Article I of the IFC. References to corporate interests within the GATT/WTO framework are implicit in the Most-Favoured-Nation and National Treatment clauses, as well as such specific ones as the TRIPS, GATS, and TRIMS provisions).

[25] See United Nations Economic and Social Council, Globalization and its Impact on the Full Enjoyment of Human Rights, Progress report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102, E/CN.4/Sub.2/2001/10, 2 August 2001, at para.4 [hereinafter, Globalization and its Impact (2001)]

understanding that has never existed before between the peoples of the world.[26] In direct human rights terms, the noted technological advances have brought what has been described as "a veritable explosion of ideas and their transmission, giving vent to the right to free expression and the attendant right of access to information."[27] Indeed, one may even point to the fact that the cause of human rights advocacy has been significantly enhanced by the so-called internet revolution and other aspects of communications technology: If nothing else, a human rights violation in one part of the world is now more likely than ever, to come to the notice of activists and advocates in a different continent, literally within a matter of minutes.

One commentator has even suggested that globalization has resulted in the spread of democratic governance around the world.[28] Whether this development has in fact resulted in fewer violations of human rights is of course debatable, given that as noted in chapter 13, this supposed new dawn of democratic governance has certainly not improved the human rights situation in much of sub-Saharan Africa. Nonetheless, the positive impact of globalization (or at least its potential) in this regard in the wider global context must be acknowledged. Commentators have also alluded to the potential benefits of advances in medical research in relation to the rights to food, health, and adequate standards of living.[29] Given that these are core elements of the IBHR, the positive impact of globalization (potential or real) is truly immense.

1.3.2. Its Threats to Human Rights

Proponents of globalization, however, also stand accused of overstating its benefits, and indeed, of sometimes overlooking its negative impacts. As noted in a UN publication, "...there is a new orthodoxy

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[26] See J Symonides (ed.), "New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks," in *Human Rights: New Dimensions and Challenges*, n.23 above, at pp.28-29. Whether this remains the case in light of recent confrontations between the so-called neo-Conservative Administration in the United States and the Islamic world is, of course, a matter for debate. The point to note, nevertheless, is that the promotion of understanding amongst the peoples of the world can only serve to promote the aim of global peace and security as envisaged in the Preamble to, and Article 1 of, the UN Charter.

[27] See Globalization and its Impact (2001), n. 25 above, at para.6 (footnote omitted).

[28] See A Y Seita, "Globalization and the Convergence of Values," n.21 above, particularly at pp.447 and 448

[29] See Globalization and its Impact (2001), n. 27 above, at para.6

or ethos about the economic dimensions of globalization that exalts it above all other human values or phenomena, indeed even above the basic condition of human beings themselves."[30] One aspect of human rights concern is freedom from discrimination, as proclaimed under Articles 3 and 7 of the ICESCR.[31] Although the authors acknowledge in emphatic terms that inequality and discrimination predate the phenomenon of globalization, they also note: "That globalization has caused global conditions of inequality and discrimination to worsen is clear..."[32] Attention is specifically drawn to the marginalizing impact of globalization on women, whom, it is noted, tend to work in labour-intensive sectors where wages tend to be low.[33]

Such discriminatory tendencies are by no means confined to the realms of gender. In one of its reports, the UNDP states: "The new rules of globalization – and the players writing them – focus on integrating the global markets, neglecting the needs of people that markets cannot meet..."[34] Indeed, other commentators Have identified this marginalizing trend both *within* and *between* the countries of the world. For example, the Special Rapporteurs to the UN's Sub-commission on the Promotion and Protection of Human Rights assert: "Globalization has not only reinforced the traditional inequality between North and South, it has also reinforced inequalities within the North."[35]

A further area of human rights concern lies in the impact of globalization on the State's ability to guarantee their realization. To begin with, and as noted in chapters 6 and 7, the very idea of "strategic trade" has resulted in the ironic situation in which those countries that are least able to liberalize their economies are being forced to do so, while those most able to liberalize have a virtual licence to

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[30] See United Nations Economic and Social Council, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, preliminary report submitted by J Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8, E/CN.4/Sub.2/2000/13, 15 June 2000, at para.7 [hereinafter Globalization and Its Impact (2000)]

[31] A similar provision under the ICCPR is Art.26.

[32] See Globalization and Its Impacts (2000), n.30 above, at para.26

[33] ibid, at para.31 et seq. And this, in spite of a cited UN study which highlights the pivotal role of women in the globalization process (See United Nations, *World Survey on the Role of Women in Development: Globalization, Gender and Work* (United Nations Publication, Sales No. E.99.IV.8, 1999), at p. 9.

[34] See UNDP, *Human Development Report 1999*, n.1 above, at p.30

[35] See Globalization and its Impact (2000), n.33 above, at para.29. See also, C Thomas, "International Financial Institutions and Social and Economic Human Rights: An Exploration," in T Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (Manchester and New York: Manchester University Press, 1998) at p.163. See further, UNDP, *Human Development Report 1999*, ibid, at p.36.

maintain protectionist policies in the same sectors in which the former have comparative advantage (agriculture being a prime example). The consequence of this has been that as noted therein, the idea of poor countries "trading their way out of poverty" remains, at best, a utopian expectation. Thus, even without the benefit of specific empirical evidence, it is possible to assert that globalization poses a definite threat to human rights in the sense that the myth it creates contributes to the perpetuation of underdevelopment generally.

Added to this is the fact that economic liberalization implies an erosion of the autonomy and policy-making capabilities of the nation-State.[36] Indeed, with the powers of TNCs on the increase vis-à-vis the ability of governments to regulate them, governments are increasingly regarding themselves merely as facilitators of the liberalization agenda, as opposed to being its regulators.[37] The right to self-determination (as proclaimed under Articles 1 of the two Covenants) thus becomes dangerously undermined.

These are by no means the only threats posed by globalization to human rights. The evident benefits of medical research to human health may be counterbalanced by the dangers posed by genetically-modified food or other dangerous food products. The patenting of plant materials may deny the use of traditional medicines to indigenous peoples. Transnational corporations may exploit their economies of scale and dump cheap food in a developing economy, thereby threatening the livelihoods of peasant farmers, with predictable knock-on effects on other rights, such as education, housing, healthcare, and standards of living. Macroeconomic reforms imposed by the IFIs on a developing economy often require cuts in public expenditure, again, threatening core provisions of the ICESCR. Indeed, according to former UN Secretary-General, "...progress also brings new risks for stability: ecological damage,

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[36] See UNDP, *Human Development Report 1999*, ibid, at p.29, which notes: "...multilateral agreements bind national governments in their domestic policy choices..."

[37] See J Symonides (ed.), "New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks," in *Human Rights: New Dimensions and Challenges*, n.26 above, at p.29

disruption of family and community life, greater intrusion into the lives and rights of individuals."[38] Thus, the picture is not as rosy as is often suggested.

What these mean for human rights advocacy is that globalization needs to be treated with the degree of circumspection that it deserves. Specifically, as well as acknowledging its evident benefits, human rights advocates must also be willing raise the awkward questions. For example, where it is believed to have brought about economic prosperity, the questions should relate to what sacrifices had been made, and by whom. Only by adopting this approach can its true impact on human rights be objectively determined.

1.4. Conclusion

Given that this is the opening chapter in a critique involving the use of a very fluid and protean concept, it was considered necessary to begin with some very basic clarifications. A number of observations were also made. Of these, the most important were, first, that the supposition that globalization has opened *all* the economies of the world to the dynamics of free trade, based on the concept of comparative advantage is a myth, at least insofar as the richest trading nations are able to trade on the basis undisguised protectionism. It was also noted that although globalization has brought immense benefits to some countries, particularly in the developed world, it also poses a definite threat to human rights in poor countries. It was further noted that for sub-Saharan Africa (which is the focus of the thesis), its engagement with the dynamics of globalization has largely been in the context of its crippling debt burden and aid-dependency. Much of these will be elucidated in the chapters that follow. At this stage, it is hoped that they constitute a useful contextual background to the thesis.

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[38] See Agenda for Peace, n.20 above, at para.12.

Chapter 2

ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HOW REALIZABLE IN THE AFRICAN CONTEXT?

2.1. Introduction

More than half a decade since the atrocities that characterized World War II shocked the international community into proclaiming the Universal Declaration of Human Rights (UDHR),[1] significant aspects (or to be more precise, one-half) of it still remain, at best, a matter of ritualistic rhetoric, and otherwise, a subject of derision amongst human rights advocates and policy-makers. In a statement to the Vienna World Conference in 1993, the UN Committee on Economic, Social and Cultural Rights (CESCR) noted:

> [t]he shocking reality...that States and the International Community as a whole continue to tolerate...breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights...[2]

This thus brings to light the fact that in spite of the near-universal acceptance of the norms proclaimed within the International Bill of Human Rights (IBHR), even the most cursory examination of the vast literature on human rights shows that whereas civil and political rights (CPRs) are regarded virtually as an article of faith (and rightly so), the treatment given to economic, social and cultural rights (ESCRs) ranges from cautious enthusiasm to outright derision, except for a handful of commentators who continue to highlight their equal importance.[3] From the highly publicized humanitarian interventions

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[1] See Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), UN Doc. A/810 (1948).

[2] See UN Committee on Economic, Social and Cultural Rights, Report on the Seventh Session (23 Nov.-11 Dec. 1992), Economic and Social Council, Official Records, 1993, Supplement No. 2, Annex III, Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1993/22 (1993), at para.5 [hereinafter, CESCR Statement to the Vienna Conference]

[3] interestingly, in a survey for the UN's Joint Inspection Unit of the achievements and shortcomings of the UN system, one commentator once asserted that its attitude towards economic, social and cultural rights "remains one of hypocrisy and longwindedness." (See M Bertrand, *Some Reflections on Reform of the United Nations,*

authorized by the UN Security Council in places such as Somalia and former Yugoslavia to the Pinochet trials in London, the international community has shown a commendable degree of determination to prevent or punish violations of CPRs in recent times. On the contrary, the very idea of invoking the full force of international law *primarily* to deter or punish the violation of ESCRs would almost certainly be greeted, at best, with deep scepticism. Yet, the consequences flowing from such violations continue to assault the human conscience each time the news media highlight the plight of starving and emaciated children in a refugee camp, or of victims of the HIV/AIDS pandemic in places such as southern Africa.[4] Nor can one ignore these simple facts: One-fifth of the developing world's population goes hungry every night, a quarter lacks access to even a basic necessity like safe drinking-water, and a third lives in a state of abject poverty.[5] Add to these the depressing statistics outlined in the introductory chapter relating to sub-Saharan Africa, and the consequences of this wholly artificial distinction between the two rights categories become even more glaring.

But what, it may be asked, are these aspects of ESCRs, the non-realization of which represent such a potent threat to the very foundations of the international human rights regime in the first place? What makes them so difficult to embrace in the manner envisaged? Indeed, are these norms of sufficient validity to be taken so seriously as a matter of law? These questions become all the more pertinent because as noted in the introductory chapter, the usual examination of the problem of economic underdevelopment within the realms of economic theory has led to a cul-de-sac, not least because of the ideological controversy that divides policy makers both at the international level and in a domestic context. There is therefore a need to adopt a new approach – one that articulates the same issues in a new language: the language of law, with its traditional emphases on the notions of (*enforceable*) rights, obligations, and possible remedies.

UN Joint Inspection Unit Report No.85/9, UN Doc. A/40/988 (1985), at para.119)).

[4] Indeed, as one commentator has pointed out, "...when people die of hunger or thirst, or when thousands of urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic or 'developmental' forces, or the simple inevitability of human deprivation, before placing liability at the doorstep of the state. Worse yet, societies increasingly blame victims of such violations for creating their own dismal fates, and in some countries, they are even characterized as criminals on this basis alone." (See S Leckie, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights," (1998) *Hum Rts Q.* vol.20, no.1, at p.82 (footnote omitted).

[5] Per UNDP, *Human Development Report 1994* (Oxford University Press, 1994), at p. 2

The aims of this chapter, therefore, are first, to examine the most common arguments against their validity as both human and legal rights. The second will be to outline them in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), examining in the process, their "minimum core" elements, as well as questions relating to their realizability.[6] Also, because of the controversy surrounding their very conceptualization as *human and legally enforceable rights*, an attempt will be made to articulate them in a manner that reinforces not just their status as such, but also their interconnectedness with CPRs. And because the geographical focus of this research is sub-Saharan Africa – evidently the most underdeveloped region of the world – efforts made towards their realization, particularly at the regional level, will also be examined. These, it is hoped, will address the crucial questions posed above.

2.2. Economic, Social and Cultural Rights in Context

The subject of human rights has generated much debate; and this is understandable given that as an academic discipline, it lends itself, almost uniquely, to a variety of interests: The human rights activist, the social scientist, the philosopher, not to mention the legal academic, are just some of those whose contributions have evidently enriched the subject, even if, for understandable reasons, this degree of interest has not translated itself into a coherent and unified body of opinion and has instead become a source of discord. Nor is it particularly helpful that even those commentators who share a common background do not always agree on an issue as elementary as whether certain human rights are of equal validity. The rights proclaimed under the ICESCR[7] have come to exemplify this controversy, even though as will be shown later, the Covenant is simply a reaffirmation, in legally binding form, of some of the core aspects of the UDHR.

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[6] Realizability in this context means the extent to which the State is able (or willing) to fulfil its responsibilities to its citizens in respect of a given right. It is broader that the issue of justiciability in the sense that only when the State has failed in its discharge of this duty that the victim (through the medium of a duly constituted tribunal) can raise the question of justiciability.

[7] See International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI) UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967) [hereinafter the ICESCR]. As of March 2003, there were 146 Parties to the Covenant (Information obtained from the UN Treaty Collection, available via the UN website).

Given that the ICESCR has the full force of international law behind it by virtue of it being a treaty, it is tempting to proceed upon the supposition that there can be no argument regarding the validity of the rights it proclaims. However, three factors, listed in order of importance, suggest a different approach. First, the very selective (and therefore misleading) articulation of its contents is capable of diverting the attention of the unwary from the binding nature of these rights, thereby reinforcing and perpetuating the scepticism surrounding them. Thus, there is a need to redirect critical attention to the actual content of the Covenant. Secondly, the calibre of some of the commentators, particularly those whose opinions are highly respected within the human rights community, poses the very real danger of undermining ESCRs in ways that are evidently not intended by those concerned. Thirdly, the language employed by the drafters of the Covenant appears to lend some credence to the view that they were not intended to be legally binding norms. Again, this creates a need to re-examine the relevant provisions, with the aim of determining whether such a literal approach to interpretation can ever be reconciled with the very notion of human dignity, without which all human rights become meaningless. But before these are examined in turn, it is considered necessary to offer a brief historical context to the ICESCR.

2.2.1. The Two Covenants and the UDHR

The history of the two Covenants can be traced back to the ideological wrangling that defined the Cold War,[8] the Covenants themselves being by-products of a determination by the international community to prevent a repeat of the atrocities committed by the Nazis immediately before, and during World War II.[9] It all began with proposals made under Article 68 of the UN Charter, which mandates the ECOSOC to "set up commissions in economic and social fields and for the promotion of human rights, and such

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[8] See: H J Steiner and P Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press, 2000), at p.238; J Donnelly, *International Human Rights: Dilemmas in World Politics* (Colorado & Oxford: Westview Press, 1993), at pp.7-10; C A Odinkalu, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights," (2001) *Hum. Rts. Q.* vol.23, 327-369, at p.335; and S B O Gutto, "Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa" (1998) *4 Buff. Hum. Rts. L. Rev.79*, at pp.86-87.

[9] See: H J Steiner and P Alston, *International Human Rights in Context*, ibid, at preface; I Brownlie, *Principles of Public International Law*, 5th ed (Oxford University Press, 1999), at p.568; and D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2000), at p.7.

other commissions as may be required for the performance of its functions."[10] Hence, in 1946, the Commission on Human Rights was established with the initial task of submitting proposals for an international bill of rights, an institution which has since evolved to become the world's single most important human rights organ.[11]

The task of formulating a set of universal human rights norms began with the drafting of the UDHR which received its approval by the General Assembly in 1948.[12] As the UDHR (on its own) does not constitute a source of law,[13] it was considered necessary to restate its various rights categories in treaty form; the idea being to incorporate them into a single document. However, the impact of superpower rivalry soon began to manifest itself, a situation described by the then Secretary-General as follows:

> On the one hand were those who argued that there should be a single document because it was not possible for the rights to be clearly divided into categories. Without [ESCRs], [CPRs] would be meaningless, just as [ESCRs] could not be enjoyed for very long without [CPRs]. On the opposing side were those who argued for their separation, arguing that [CPRs] were justiciable, while [ESCRs] were only to be progressively implemented. They even argued that because [CPRs] were 'legal' rights, they required different mechanisms for their protection, i.e., complaint procedures, whereas [ESCRs] were merely 'programme' rights requiring a system of periodic reports. Also were arguments that [CPRs] were rights of the individual against the State, while [ESCRs] required positive action by the State.[14]

The Commission was thus faced with faced with an awkward dilemma, the question being whether there should be one or two instruments. In a Resolution adopted in 1950, the General Assembly called

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[10] One commentator has traced the history of the ESCRs to the Treaty of Versailles in 1919 (and the establishment of the International Labour Organization), which was aimed at abolishing the "injustice, hardship and privation" of workers, as well as guaranteeing "fair and humane conditions of labour." (See V Leary, "Lessons from the International Labour Organization," in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), at p.582

[11] See H J Steiner and P Alston, *International Human Rights in Context*, n.9 above, at p.138

[12] See United Nations General Assembly, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948) of 10 December 1948

[13] See I Brownlie, *Principles of Public International Law*, above, note 9, at pp.574-575, who states: "The Declaration is not a legal instrument, and some of its provisions, for example the reference to a right of asylum, could hardly be said to represent legal rules. On the other hand, some of its provisions either constitute general principles of law or represent elementary considerations of humanity." [footnote omitted]

[14] See the Annotations Prepared by the UN Secretary-General on the Text of the Draft International Covenants on Human Rights, UN Doc.A/2929(1955), Chapter II, paras. 4-12. Indeed, the current Secretary-General observes that human rights were treated in the Cold War years as "strategic weapons in the confrontation between East and West or between North and South." (K Annan, "Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities," (1997) *10 Harv. Hum. Rts. J. 1*, at p.1))

on it to adopt a single Covenant, emphasising the interconnectedness of both categories of rights.[15] The following year, however, Western delegations, acting through the ECOSOC, succeeded in reversing this, with the result that both categories of rights are now contained in two separate Covenants.[16] What is worth noting, however, is that the General Assembly nevertheless decided that the same spirit should guide both instruments, and that they should contain as many identical provisions as possible.[17] Regrettably, the notion of interconnectedness has now evolved to become the subject of ritualistic rhetoric within UN system, as within the human rights community. Hence, in addition to it being reiterated at important forums such as: the International Conference on Human Rights in Teheran on 13 May 1968,[18] the General Assembly (which decided that all future rights-related work by the UN system should take into account the principles that all human rights are indivisible and interdependent, that equal attention and urgent consideration be given to the implementation, promotion and protection of both categories, and further, that the full realization of CPRs without the enjoyment of ESCRs is impossible),[19] the Vienna World Conference on Human Rights in 1993,[20] it has received an almost obligatory recognition in the vast human rights literature emanating from the UN system.

Ever since the reaffirmation of ESCRs within the framework of the ICESCR, however, these rights have come under sustained criticism from different perspectives, as commentators attempt to probe (or

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[15] See UN GA Res. 421 (V) of 4 December 1950. See also A Eide and A Rosas, "Economic, Social and Cultural Right: A Universal Challenge," in A Eide et al (eds.), *Economic, Social and Cultural Rights: A Textbook* (The Netherlands: Martinus Nijhoff Publishers, 1995), at p.15

[16] See UN GA Res. 543 (VI) of 5 February 1952. See also, I Szabo, "Historical Foundations of Human Rights," in K Vasak and P Alston (eds), *The International Dimensions of Human Rights*, vol.1, (Connecticut: Greenwood Press, 1982), at p.29.

[17] Per Res. 543 (ibid), which also states that "the enjoyment of civil and political freedoms and that of economic, social and cultural rights are interdependent," and further, that "in cases where the individual is deprived of his economic, social and cultural rights, he does not represent the human person who is considered in the Declaration to be the ideal of the free man."

[18] See The Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, UN Sales No.E.68.XIV.2, Art.13 of which states: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

[19] See United Nations General Assembly, UN GA Res. 32/130 of 1977

[20] See United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, reprinted in 32 ILM 1661 (1993), at para.5 [hereinafter Vienna Declaration], which states that both sets of rights are "universal, indivisible and interdependent and interrelated." It also asserts that "[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." The conference, which, in the words of the United Nations, "was marked by an unprecedented degree of participation" resulted in the adoption, by 171 countries of the world, of the Vienna Declaration. (See Office of the High Commissioner for Human Rights, World Conference on Human Rights,14-25 June 1993, Vienna, Austria, at www.unhchr.ch/html/menu5/wchr.htm)

indeed, challenge) their validity as justiciable (or even realizable) human rights. It is now considered necessary to examine some of these criticisms.

2.2.2. The Cranston Thesis

Maurice Cranston has become something of a standard-bearer, his much quoted, near-contemptuous rejection of ESCRs perhaps the most illustrative of prevailing views, particularly among neo-liberal commentators.[21] According to Cranston:

> One can justify the existence of ...universal human rights, provided one does not do what the UN did in 1948, and which fashionable opinion has continued to do; that is, to postulate as human rights universal claims to amenities like social security and holidays with pay. Such things are admirable as ideals, but...belong to a wholly different logical category from a right..."[22]

He thus begins by presenting an ingeniously selective picture of ESCRs, so much so that anyone not familiar with the provisions of the ICESCR might be forgiven for concluding that the rights it proclaims are no more than those relating to holidays with pay – a conclusion which will, hopefully, be dispelled later in this chapter when the substantive provisions of the Covenant are examined.

His evident levity aside, Cranston's rejection of ESCRs is based on a supposition that they do not satisfy three tests. For a claim to be a valid human right, he argues, it must be: (a) of paramount importance; (b) of a universal nature; and (c) there must be practical methods (political, economic, and legal) of guaranteeing it. In his view, only CPRs (which he contends are a Western construct) are endowed with these characteristics.[23] Without wishing to waste much effort on Cranston's thesis, it is difficult to ignore the fact that much, if not all, of it is beset by fundamental flaws. For example (taking his last point first), his "normative hegemony" thesis[24] cannot withstand even the most cursory scrutiny,

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[21] See M Cranston, "Are There Any Human Rights?"(1983) *Daedalus*, vol.112, no.4, at p.1-17.
[22] ibid, at p.1
[23] See M Cranston, *What Are Human Rights?* (New York: Taplinger, 1973), at pp. 65-67
[24] This is a term employed by William Meyer to describe Cranston's assertion regarding the origins of CPRs. (See W H Meyer, *Human Rights and International Political Economy in Third World Nations: Multinational*

given that if human rights flow from the fact of being *human*, it follows that they cannot be said to have emanated from mere historical instruments such as the Magna Carta, the French Declaration of the Rights of Man, or indeed, the IBHR itself; human existence, after all, predates any such proclamations.[25]

But even more serious is the fact that although his prescriptions seem reasonably persuasive as normative tests for the proclamation of *new* human rights standards (if these were ever needed), they do not appear to have been formulated with reference to any of the substantive provisions of the ICESCR itself. For example, the "supreme importance," test fails to appreciate that nothing can be of greater importance than the very basic essentials of life itself, namely, food, shelter, good health, and even education, without which the human person cannot realize his full potential – and all of which are at the very core of ESCRs, as will be discussed later. The same can be said about the "universality" test, given that these essentials of life are self-evidently indispensable to human existence, irrespective of geography, culture, or any other consideration. Indeed, the very fact that the two Covenants have been ratified by so many countries of the world[26] makes it unnecessary to contest this point any further.

Regarding the availability of practical mechanisms for their realization, it has to be noted that as pointed out by Michael Addo, these already exist, particularly in the rich industrialized countries in form of healthcare, social security, pensions, housing, and employment rights.[27] Thus, the question has never been about their inherent validity, but of their realizability (and by extension, of resources), which, to be sure, is also the case with the realization of CPRs: After all, the availability of legal aid,[28] (without which

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Corporations, Foreign Aid, and Repression (New York: Praeger, 1998), at p.16).

[25] Indeed, the UDHR itself acknowledges this fact by proclaiming in Article 1: "All human beings are born free and equal in dignity and rights."

[26] See n.7 above. The Vienna Declaration recognized this by proclaiming: "The universal nature of these rights and freedoms is beyond question." (See Vienna Declaration, n.20 above, at para.1)

[27] The blueprint for the modern Welfare State in the United Kingdom is the much-cited Beveridge Report (See W Beveridge, *Social Insurance and Allied Services* (The Stationery Office Books, 1942)). Its main recommendations were later to be translated into statutory guarantees for many of the rights enshrined in the ICESCR. Hence, for social security: the National Insurance Act 1965, and the Social Security Acts 1985 and 1986; for housing: the Housing Acts 1957 and 1988; for healthcare: the National Health Service Act 1977 and the Mental Health Act 1983; for education: the Education Acts 1944 and 1980. Needless to add that these, and their respective amendments, have generated a substantial body of case law over the years. For more on these, and on the justiciability of ESCRs, see M K Addo, "Justiciability Re-examined" in R Beddard and D M Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (UK: Macmillan, 1992),, at pp.93-117.

[28] See particularly Art.14(3)(d) of the International Covenant on Civil and Political Rights, adopted 16 December

the right to a fair trial may become meaningless to an impecunious defendant in a criminal trial) is almost unheard of in many developing countries. At any rate, even the question of realizability cannot be an excuse for the denial of the core rights proclaimed within the Covenants, as will be pointed out later. Thus, the best that can be said about Cranston's tests is that they represent an ill-conceived distraction from the human rights discourse.

2.2.3. Resistance from the Ideological Right

As already pointed out, the proclamation of the ICESCR was preceded by ideological wrangling within the UN system, and the situation has not changed to date. Indeed, the collapse of the Soviet command system in the early 1990s is seen by some as a triumph of the supposed virtues of market liberalism over interventionism, or as Conservative thinkers might wish to describe it, of good against evil.[29] Economic, social and cultural rights are therefore rejected at the ideological level because of the interventionist connotations that surround them. But even before these events, Conservative intellectuals had always resisted any attempt to equate them with CPRs. Prominent amongst these were Fredrick Hayek and Milton Friedman, for whom the market represented the only means of distributing wealth without impinging on individual liberties.[30]

Such narrow-minded views on human rights are sometimes articulated at the Executive levels of government, hence, the following statement by the Reagan/Bush administrations:

> While the urgency and moral seriousness of the need to eliminate starvation and poverty from the world are unquestionable...the idea of economic and social rights is easily abused by repressive governments which claim that they

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1966, entered into force 23 March 1976, G.A. Res.2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967) [hereinafter ICCPR]. As of March 2003, there were 149 Parties to the Covenant (Information obtained from the UN Treaty Collection, available via the UN website).

[29] See for example, The Honourable Richard B Cheney [US Vice President], "Meeting the Challenge of the War on Terrorism," Heritage Lectures no.802, delivered on the 10th of October 2003, particularly at p.6

[30] See F Hayek, *Law, Legislation and Liberty* (University of Chicago Press, 1978), at pp.55-56, and 112-115; and M Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962), at 34-36).

> promote human rights even though they deny their citizens the basic...civil and political rights.[31]

The above, however, must not be allowed to conceal the essentially ideological reasoning behind such pronouncements. As Philip Alston has pointed out, "many Americans...tend to think of [the ICESCR] less as an international treaty seeking to promote the satisfaction of basic material needs than as 'a Covenant on Uneconomic, Socialist and Collective Rights.'"[32] It therefore becomes easy to appreciate why the former US Secretary of State Abrams once argued that CPRs are public rights, while ESCRs should be "left in the private sphere."[33] Indeed, even the supposed ideological neutrality of the judiciary did not prevent an American judge in *Coppage v Kansas* from asserting the importance of "...the right to make contracts for the acquisition of property." "Chief among such contracts" the judge added, "is that of personal employment, by which labor and other services are exchanged for money and other forms of property." And he concluded: "If this right be struck down or arbitrarily interfered with, there is substantial impairment of liberty in the long-established sense."[34] Thus, it becomes safe to state that the ideological challenge to ESCRs is not to be taken lightly.

2.2.4. Vague Aspirational *Claims* or Enforceable Legal *Rights*?

Thus far, this critique has focused mainly on the non-legal challenges to ESCRs. What is more worrying from the perspective of human rights advocacy is that even some of the most distinguished international

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[31] See US Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices*, 1992, at p.5. For a more insightful account of the US position, see P Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy," (1990), *84 Am. J. Int'l L.365*, at pp.365-393.

[32] See P Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy," (1990), *84 Am. J. Int'l L.365*, at pp.366, and 372-393 for a detailed and insightful account of the rejectionist mindset in the United States. See also, A G Mower, *The United States, The United Nations, and Human Rights: The Eleanor Roosevelt and Jimmy Carter Eras* (Westport, Connecticut: Greenwood Press, 1979), at pp. 89-91; and D Forsythe, "Socioeconomic Human Rights: The United Nations, the United States and Beyond" (1982) *Hum. Rts. Q.*, vol.4 at p.435 et seq.

[33] See Review of State Department Country Reports on Human Rights Practices for 1981, Hearing before the Sub-Committee on Human Rights and International Organizations of the House Committee on Foreign Affairs, 97th Con., 2d Sess. 7 (1982). To be sure, the Roosevelt and Carter Administrations did not support the stated positions. In his 1944 State of the Union Address, Roosevelt made a long and explicit reference to all of the rights that were later to be proclaimed under the ICESCR, describing them in terms of "a second bill of rights"; while President Carter's attempts in 1978 to persuade Congress to ratify it came to naught. (See H J Steiner and P Alston, *International Human Rights in Context*, n.11 above, at p.243 and 250).

[34] [1915] 236 U.S. 1, at 14

lawyers (who, to be sure, are known proponents of these rights) have devoted much time to highlighting the shortcomings in the drafting of the ICESCR. For example, Alston asserts thus: "It is generally agreed that the major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the Covenant and the resulting lack in the clarity as to their normative implications."[35] He (and Henry Steiner) also highlights the fact that whereas the ICCPR contains mandatory terms such as: "everyone has the right to..." or "no one shall be..." the ICESCR adopts the more exhortatory term: "States Parties recognize the right of everyone to..."[36] This view is echoed by Ian Brownlie who regards the obligations under the ICESCR (with the exception of Article 8 – these being trade union rights) as merely "programmatic and promotional," while the ICCPR "is more specific in delineation of rights, stronger in statement of the obligation to respect the rights specified, and better provided with the means of review and supervision."[37] Another commentator once described CPRs as "absolute" and "immediate," and ESCRs "...not a matter of rights."[38]

It is pertinent to acknowledge that the drafting of the ICESCR represents a major difficulty for those seeking to equate the norms it proclaims with those guaranteed under the ICCPR. For example, under Article 2 of the ICESCR, each State Party merely "undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of [ESCRs]..." Indeed, developing countries may even withhold the proclaimed rights from non-nationals residing within their jurisdiction, by virtue of Article 2(3) of the Covenant. These can be contrasted with Article 2(1) of the ICCPR, under which each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction

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[35] P Alston, "No Right to Complain about Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant," in A Eide and J Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address*, Essays in Honour of Torkel Opsahl (Oslo: Norwegian University Press, 1991), at p.86, though he highlights Arts. 6-9 as notable exceptions. See also, P Alston, "Out of the Abyss: The Challenges Confronting the New United Nations Committee on Economic, Social and Cultural Rights," (1987) *Hum Rts Q.*, vol. 9, no.1, at p.351.

[36] See H J Steiner and P Alston, *International Human Rights in Context*, n.33 above, at p.246. See also A H Robertson, *Human Rights in the World* (Manchester University Press, 1972), at p.35

[37] See I Brownlie, *Principles of Public International Law*, 5th ed (Oxford, UK: Oxford university Press, 1999), at pp.576-577.

[38] Per E W Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) *Netherlands Journal of Int'l Law*, vol. 9, at p.103.

of any kind..." Thus, there is an apparent difference in the language employed in drafting the two Covenants. This contrast has not escaped the attention of the CESCR, although the Committee has explained that it must be understood in the context of the overall objective of moving as expeditiously as possible towards full realization.[39] Indeed, in an instructive explanation of what was meant by the phrase "to take steps," the Committee draws attention to some of the non-English versions of the text. For example, the French version contains the phrase *"s'engage à agir"* (meaning "to act"), while the Spanish version uses the words "*a adoptar medidas*" (meaning "to adopt measures"). Thus, it concludes that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force..." Such steps, it adds, "should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[40]

Such clarifications aside, the focus on the acknowledged differences in language ignores the fact that legal instruments have always posed problems of interpretation – problems which confront the municipal courts from time to time; hence, the development of well-established rules of interpretation which have become integral to standard introductory lessons in many law schools, at least in the common law world. Hence, for example, where a literal interpretation would result in an absurdity, judges have always been at liberty adopt the "golden rule," or its close variant, the "mischief rule" which gives an intended effect to the legislation[41] – the "mischief" here being the need to uphold the inherent dignity of the human person as proclaimed in the Preamble to the two Covenants). Indeed, this would be in accordance with the Vienna Convention on the Law of Treaties which provides that a treaty "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty

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[39] See UN Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States Parties Obligations (Art. 2, para. 1 of the Covenant) (Fifth Session, 1990) UN Doc.E/1991/23, at paras.2 and 9 [hereinafter General Comment 3].

[40] See para.2, ibid. Incidentally, this explanation is very much in consonance with that offered earlier in the Limburg Principles, para. 8 of which states: "Although the full realization of [ESCRs] is to be attained progressively, the application of some rights can be made justiciable immediately..." (See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17).

[41] See G Williams, *Learning the Law*, 8th ed (London: Stevens & Sons, 1969), at p.99 et seq

in *their context and in the light of its object and purpose*"[42] [emphasis added]. There is therefore a danger of overstating the significance of this apparent difference, thus accentuating a fictional distinction between a set of rights which have, after all, been universally recognized as interrelated, interdependent, and indivisible.[43] Indeed, as the CESCR has helpfully argued, "[t]he question is not whether these rights are basic human rights, but rather what entitlements they imply and the legal nature of the obligations of States to realize them."[44]

2.3. The Nature of ESCRs

As indicated earlier, the nature of the norms proclaimed within the ICESCR has been a source of controversy amongst commentators. But what, it might be asked, are the nature of these rights in the first place? An outline of the substantive provisions of the Covenant would be helpful as a prelude to a more detailed consideration of those that constitute the "minimum core" obligations under the Covenant.

It is necessary to acknowledge at the outset, the fact that some of the rights proclaimed under the ICESCR are qualitatively different from those under the ICCPR. The right to housing under Article 11, for example, can hardly be said to have any direct correlation with the "right to freedom of thought, conscience and religion" as proclaimed under Article 18 of the ICCPR. But this in no way detracts from their inherent interconnectedness: The deep sense of despair engendered by homelessness, if nothing else, can seriously impair the victim's freedom of thought. But critics of ESCRs often also fail to acknowledge that some of the provisions of the ICESCR are very similar to those under the ICCPR. For example, the ICESCR, like the ICCPR, begins by reaffirming the principles of the UN Charter, "[recognizing that] the inherent dignity and...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and more importantly, also "[recognizes] that in accordance with the [UDHR], the ideal of free human beings enjoying freedom from

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[42] See Art.31(1) of the Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, UN Doc A/Conf.39/26, reprinted in 8 ILM 629 (1969).

[43] See the Vienna Declaration (para.5), n.26 above; and the Proclamation of Teheran (Art.13), n.18 above.

[44] See Office of the UN High Commissioner for Human Rights, Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, available at: http://www.unhchr.ch/html/menu6/2/fs16.htm

fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."[45] Thus, the ICESCR, to begin with, successfully establishes an interconnectedness between the two categories of rights, relating them to the very idea of human dignity as proclaimed under the UN Charter.[46] Then follows the right to self-determination in Article 1, by virtue of which the peoples of the world are entitled to "...freely pursue their economic, social and cultural development..." The last sentence in subsection 2 adds: "In no case may a people be deprived of its own means of subsistence." The same provision, it is worth noting, exists under the ICCPR.[47]

The Covenant goes on to proclaim ten substantive provisions under Part III (Articles 6-15): Article 6, for example, obliges States Parties to take steps to guarantee the right to work, which includes an individual's right to freely choose the job in question.[48] It is to be noted that this also exists under the ICCPR prohibiting forced or compulsory labour.[49] It also provides that policies aimed at realizing this be pursued "under conditions safeguarding fundamental *political* and economic freedoms to the individual" [emphasis added].[50] Thus, as within the UN Charter, the correlation between the two rights categories becomes obvious.

Article 7 addresses conditions at the workplace, among which are the rights to fair remuneration and equal pay for work of equal value, safe working conditions, and to form and join trade unions, as well as

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[45] See the ICESCR, n.7 above, at Preamble.

[46] See Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A. Res. 1991 (XVIII) 17 December 1963, entered into force 31 August 1965 (557 UNTS 143); 2101 of 20 December 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 December 1971, entered into force 24 September 1973 (892 UNTS 119), at Preamble, and Art.55. Under the Preamble, the peoples of the world "reaffirm faith in fundamental human rights, in the dignity and worth of the human person..." and pledge themselves, *inter alia*, "to employ international machinery for the promotion of economic and social advancement of all peoples..." Article 55 states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms..."

[47] See Art.1 of the ICCPR, n.28 above.

[48] See Art.6(1) of the ICESCR, n.45 above.

[49] See Art.8(3) of the ICCPR, n.47 above.

[50] Per Art.6(2) of the ICESCR, n.48 above.

the equality of opportunities for all. The issue of holidays with pay – a central element of the Cranston thesis – is only mentioned under subsection (d) of this provision, and in the context of the rights to "rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays." Thus, apart from the fact that the right to holidays with pay is proclaimed only in the context of other rights, it becomes necessary to point out that without these guarantees (many of which have already become part of municipal law, particularly in the industrialized world),[51] the individual, who, presumably, is the main concern of the anti-ESCRs advocates, would still be working under medieval conditions – conditions evidently analogous to slavery - and which, in any event, are prohibited under both the ICCPR and the UDHR.[52]

Article 8 guarantees trades union rights which also exist under Article 22 of the ICCPR. Article 9 provides for the right to social security, the importance of which can only be appreciated by visualizing an unemployed individual living in a country with no such guarantees – a description that much of the population in many developing countries would not be unfamiliar with. This individual may also be in very poor health, and his children may have been expelled from school because he could not afford their fees. Indeed, the family may have been evicted by a landlord because they could not afford the rent. First, even the critics of ESCRs might be tempted to concede that such a life is irreconcilable with any interpretation of the notion of human dignity as proclaimed by the IBHR,[53] as well as the UN Charter.[54] Moreover, it would be interesting to know what comfort such a family (which may also be illiterate) would draw from being told that their country's Constitution, for example, guarantees their right

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[51] See, for example, European Union, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (*Official Journal L 307 , 13/12/1993 P. 0018 – 0024*), Art.8 of which states: "Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonized in accordance with national practices."

[52] See Art.4 of the UDHR which states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited *in all their forms*" [emphasis added]. Art.8 of the ICCPR is even more explicit. Apart from restating verbatim the UDHR, it goes on to state under subsection 3 (a): "No one shall be required to perform forced or compulsory labour."

[53] See the Preamble to the ICCPR, n.49, above, at para.1, in which States parties reaffirm the principles of the UN Charter, including its recognition that "the inherent dignity...of the human family is the foundation of freedom, justice and peace in the world." This is repeated verbatim in the same provision of the ICESCR.

[54] See the Preamble to the Charter of the United Nations, n.46 above, at para.2 in which the "peoples of the United Nations...reaffirm faith in fundamental human rights, in the dignity and worth of the human person..."

to free speech, or to due process, as important as these are. Joseph Oloka-Onyango highlights this problem in these terms:

> What is the meaning of 'the right to vote' when the voter may be too weak to effectively exercise his or her franchise? Conversely, unless the freedom of expression is guaranteed, the hungry voter is unable to articulate the cause of his or her malnourishment and deprivation...An inordinate focus on one category at the expense of another will obviously produce a truncated human reality.[55]

Article10 recognizes the rights of the family, including maternity rights for women, as well as children's rights against discrimination, social and economic exploitation, and child labour.[56] Other rights guaranteed under the Covenant (and these are by no means less important than the foregoing) include:

- Article 11: adequate standard of living for the individual and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- Article 12: health and related rights, including explicit obligations on States Parties to achieve reductions in stillbirth-rates and infant mortality, and to realize the healthy development of children. These obligations also include: the improvement of all aspects of environmental and industrial hygiene, the prevention and treatment of all forms of epidemics, as well as the provision of medical facilities for all.
- Article13: educational rights, including, *inter alia*, free compulsory primary education for all, the progressive introduction of free secondary and higher education for all. Article 14 obliges States Parties that have not done so at time of ratification, to "work out and adopt a detailed plan of action" for the realization of free primary education for all; and
- Article15 recognizes aspects of cultural rights such as access to the benefits of scientific progress and its applications, as well as the right to the protection of one's intellectual property.

These, then, are the nature of ESCRs – at worst, clearly reconcilable, and otherwise, evidently identical, with CPRs. Moreover, even if these were not the case, the very fact that ESCRs (or at the very least some of them) constitute the very basis of the sanctity of life itself, and for the fulfilment of the human potential makes them inalienable human rights in themselves. Thus, as with all established legal rights,

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[55] See J Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000) *6 Buff. Hum. Rts L. Rev 39*, at p.44. Another commentator puts it thus: "...[W]hy is it apparently more acceptable to die of hunger than to be shot?" (See L A Rehof, "Development Assistance from the Point of View of Human Rights," in L A Rehof and C Gulman (eds.), *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (The Netherlands: Kluwer Academic Publishers, 1989)), at p.12

[56] Family rights, it must be acknowledged, are only recognized (under Art.23 of the ICCPR) mainly in the sense of the family being "the natural and fundamental group unit of society..." thus requiring protection from the State. This provision also guarantees freedom of marriage, and reaffirms the equality of the spouses. It further recognizes the need to safeguard children's interests upon dissolution.

the question is no longer one of their inherent validity, but rather, what entitlements they confer and, by direct implication, what legal obligations they impose. Moreover, although their delineation within the Covenant leaves little doubt regarding their very nature, and although the Covenant identifies the State as their primary guarantor, these do not address the crucial question of how they are to be realized, particularly given that in poor countries (most of which are in sub-Saharan Africa). These questions will now be expounded in the context of their realizability.

2.4. The Question of Realizability

2.4.1. The Role of the CESCR

In discussing the question of realizability, it is considered a necessity to briefly examine the role played by the CESCR in this regard.[57] Created by a Resolution of the ECOSOC in 1986,[58] its remit is derived, though not directly, from Part IV (Articles 16-22) of the ICESCR, under which States Parties undertake to submit reports to the Secretary-General on the measures they have adopted, as well as the progress made, towards the realization of the ESCRs. The reports may include "factors and difficulties" affecting the extent to which their obligations have been fulfilled, while the Secretary-General is required to forward copies to the ECOSOC and other appropriate agencies. Its role is therefore not dissimilar to that of the Human Rights Committee (HRC), which is central to the monitoring of CPRs. Like the HRC, the CESCR also issues its own General Comments, one of which outlines the objectives of the exercise. These are:

- The submission of an initial report within two years of the Covenant's entry into force for the State party concerned, and to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant;

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[57] An excellent and first hand account of this has already been given by the Committee's chairman (See P Alston, "The Committee on Economic, Social and Cultural Rights," in P Alston and J Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), at p.473 et seq.

[58] See ECOSOC Res. 1985/17 of 28 May 1985, as cited in United Nations Economic and Social Council, Annual Sessions of the Committee on Economic, Social and Cultural Rights, Resolution 1995/39, 52nd plenary meeting, 25 July 1995

- to encourage the State Party to regularly monitor the actual situation with respect to each of the enumerated rights in order to assess the extent to which the various rights are being enjoyed by all individuals within the country;
- to provide a basis for government elaboration of clearly stated and carefully targeted policies to implement the Covenant;
- to facilitate public scrutiny of government policies with regard to the Covenant's implementation, while encouraging the involvement of a multiplicity of sectors of society in the formulation, implementation, and review of relevant policies;
- to offer a basis on which both the State Party and the Committee can effectively evaluate progress toward the realization of Covenant obligations;
- to enable the State Party to develop a better understanding of problems and shortcomings impeding the realization of economic, social, and cultural rights; and
- to facilitate the exchange of information among states parties and to develop a fuller appreciation of both common problems and possible solutions affecting the realization of each of the rights contained in the Covenant.[59]

2.4.2. The Nature of States Parties' Obligations

Because the ICESCR (like the ICCPR) is an international treaty, any attempt to examine the question of realizability of the rights it proclaims must necessarily focus on the State, except perhaps where, as in the context of the right to self-determination, there is an implied duty on international actors to refrain from impeding its ability to realize them as envisaged. A good starting point for the examination of States Parties obligations therefore would be Article 2(1) of the Covenant which, as already noted, obliges them "to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the [ESCRs] by all appropriate means, including particularly the adoption of legislative measures."

The nature of this obligation has been the subject of intense scrutiny both in academia and within the UN system – and in some cases both. An example of the latter was a conference which resulted in the formulation of the much-cited Limburg Principles[60] – supplemented a decade later by the Maastricht

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[59] See UN Committee on Economic, Social and Cultural Rights, General Comment 1, Reporting by States Parties (Third session, 1989), 24 February 1989, UN Doc E/1989/22, at paras. 2-9.

[60] The conference was convened by: the International Commission of Jurists, the Law Faculty of the University of Limburg (the Netherlands), and the Urban Morgan Institute for Human Rights, University of Cincinnati, USA in 1986 to deliberate, *inter aila*, on the nature and scope of the obligations of States Parties to the Covenant. The twenty-nine participants included "a group of distinguished experts in international law," representatives of several countries of both the developed and developing world, as well as such institutions as the UN Centre for Human Rights, the ILO, UNESCO, the WHO, the Commonwealth Secretariat, and the newly-established CESCR (See The Limburg Principles, n.40 above).

Guidelines.[61] Thus, although by no means the only such authority, the Limburg Principles represent an authoritative guide to the interpretation of the obligations assumed under the Covenant by its States Parties, as will soon become apparent.

In addition to the Limburg Principles, other commentators have also proffered useful interpretations of what these obligations entail. For example, Henry Shue suggests that they involve a duty to: *respect*, *protect*, and *fulfil* ESCRs.[62] Elaborating on these, another commentator explains that the obligation to *respect* consists primarily of duties of restraint akin to "negative" obligations, while obligations to *protect* entail a duty to prevent violations by third parties, including non-state actors. Thus, on the basis of this interpretation, it becomes possible to argue that the imposition of inappropriate policies, by the international financial institutions, of the nature described in chapters 4 and 5, as well as the conduct of transnational corporations (discussed in chapters 9 and 10), would constitute direct violations of the ESCRs. Obligations to *fulfil,* it is further explained, involve tertiary positive duties to take appropriate legislative, administrative, budgetary, judicial, and other measures leading to the most rapid enjoyment of the rights concerned.[63] For African rulers therefore, these imply a positive duty to adopt a more responsible approach (than that described in chapter 13) to the issue of governance – a fundamental sea change in their attitude towards their people's basic needs. This, after all, would be in consonance with the Vienna Convention on the Law of Treaties, at least insofar as it obliges States Parties to adopt the principle of "good faith and the *pacta sunt servanda* rule" in their interpretation of treaties.[64]

The obligations imposed upon States Parties, however, do not end with the adoption of legislative measures. Indeed, if "legislative measures" were all that was required for the realization of human rights, it would be safe to assert that many sub-Saharan African countries would rank among the most

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[61] See "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," (1998) *Hum. Rts. Q.*, vol. 20, no. 3, at pp.691-701

[62] See H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1980), at p.52. These were later reaffirmed under the Maastricht Guidelines (See The Maastricht Guidelines, n.61 above, at para.6)

[63] See A Eide, "Economic, Social and Cultural Rights as Human Rights," in A Eide et al (eds.), *Economic, Social and Cultural Rights*, n.15 above, at p.37

[64] See para.3 of the Preamble to, and Art.26 of, the Vienna Convention on the Law of Treaties, n.42 above.

rights-respecting countries in the world, given that as will be shown later, many countries in the region already have Constitutional provisions purportedly aimed at guaranteeing ESCRs; not to mention the regional human rights Charter – which is seen as the most progressive of the three main regional instruments. The reason why legislation is not a panacea on its own is almost self-evident: a rights-violating regime, almost by definition, is one that has little regard for legislation. Hence, although not referring specifically to such regimes, the CESCR has noted the tendency on the part States Parties to "conscientiously" recite details of legislative measures adopted at the domestic level in their reports; and thus "wishes to emphasize...that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive..." And it adds:

> While each State Party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most 'appropriate' under the circumstances.[65]

An example of a measure which would be a useful complement to legislation, as identified by the CESCR is the availability of judicial remedies in respect of a right which is considered justiciable. It notes, for example, that under the ICCPR, a victim of discrimination is entitled to "an effective remedy" under Articles 2 (paragraphs 1 and 3), 3 and 26 of that Covenant. By the same token, it argues, certain provisions under the ICESCR, including Articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) "would seem to be capable of immediate application by judicial and other organs in many national legal systems."[66] The list of measures considered "appropriate" under Article 2(1), it must be noted, is not exhaustive, but includes, according to the CESCR: administrative, financial, educational and social measures.[67] Thus, it could be safely stated that these would include a proactive political agenda aimed, for example, at vulnerable groups such as women, children, and/or other disadvantaged minorities,

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[65] See General Comment 3, n.39 above, at para.4.

[66] ibid, at para.5. The contents of the given provisions are as follows: Art.3 (equality of treatment between men and women); 7(a)(1) (equal pay for work of equal value between both sexes); 8 (trades union rights); 10(3) (special measures for the protection of children); 13(2)(a) (free and compulsory primary education); subsections (3) and (4) (the rights of parents and organizations to establish alternative educational facilities subject to approval by the State); and 15(3) (freedom of scientific research and creative activity).

[67] See General Comment 3, ibid, at para.7.

provided this is not merely a cynical public relations exercise by the governments concerned, designed to mollify international opinion and aid donors.

2.4.3. The Notion of "Progressive Realization"

As noted earlier, the idea of "progressive realization" is often interpreted as a major indication that ESCRs are merely programmatic, and therefore, not of the same degree of importance as CPRs.[68] Indeed, it has to be conceded that a literal interpretation of Article 2(1) inexorably leads to this conclusion. Moreover, it is self-evident that for poor countries – which, after all, are the main subjects of the ICESCR – progressive realization seems the only logical approach. The problem, however, is that in countries whose rulers do not take their peoples' basic needs seriously enough, this can become a most convenient excuse for inaction. Indeed, the CESCR alluded to this possibility by noting that this concept is often treated merely as a statement of intent, as opposed to being "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of [ESCRs]."[69]

But how, it might be wondered, are poor countries supposed to realize these rights in a more vigorous manner, given their resource constraints – not to mention such factors as the debt crisis and the impact of the structural adjustment policies imposed by the IFIs in the 1980s?[70] Of course, where, as discussed in chapters 4 and 5, the IFIs are responsible for violations through the policies they impose on poor countries, such violations would constitute an undermining of Articles 55 and 56 of the UN Charter, ironically by (specialized agencies of) the UN itself.[71] It would therefore be a matter for the UN Secretary-General to act upon, although given the nature of the relationship that exists between these institutions and the Washington policy-making network (highlighted in chapter 4), it is doubtful whether

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[68] See: H J Steiner and P Alston, *International Human Rights in Context*, n.36 above, at p.246; A H Robertson, *Human Rights in the World* (Manchester University Press, 1972), at p.35; and I Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, UK: Oxford university Press, 1999), at pp.576-577.

[69] See General Comment 3, n.67 above, at para.9

[70] These (and other constraints) have in fact been acknowledged in the final report submitted to the UN Commission on Human Rights. See UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fourth session Item 8 of the provisional agenda, The Realization of Economic, Social and Cultural Rights, Final Report Submitted by Mr Danilo Turk, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1992/16, 3 July 1992, at para.39 et seq

[71] See Art.55 of the UN Charter, n.54 above.

any such intervention would ever yield the expected results. Nevertheless, resource constraints must not become an excuse for inaction. According to the CESCR, Article 2(1) "imposes an obligation to move as expeditiously and effectively as possible towards that goal."[72] Interestingly, the Limburg Principles had previously proffered the following guidelines in this respect:

- Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States Parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.
- Some obligations under the Covenant require immediate implementation in full by all States Parties, such as the prohibition of discrimination in Article 2(2) of the Covenant.
- The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.
- Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.
- States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.
- `Its available resources' refers to both the resources within a State and those available from the international community through international co-operation and assistance.
- In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.
- In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.[73]

But suppose the above are mere well-intentioned statements of expectation, as opposed to one based on any intimate understanding of the political economy of underdevelopment? In its *Human Development Report* for 1990, the United Nations Development Programme stated: "Developing countries are not too poor to pay for human development...Most budgets can...accommodate additional spending on human development by reorienting national priorities..."[74] The report cites defence spending as one area where they tend to waste their scarce resources.[75] To this could be added the "white elephant" projects and blatant misuse of public funds on the part of African rulers, as highlighted in chapter 13.[76] Thus, while it is necessary to acknowledge the problem posed by resource constraints

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[72] See General Comment 3, n.69 above, at para.9

[73] See the Limburg Principles, n.60 above, at paras.21-28

[74] See UNDP, *Human Development Report 1990* (Oxford University Press, 1990), at para.7 (overview)

[75] ibid

[76] Indeed, according to the Maastricht Guidelines, a violation occurs "when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant..." Thus, the diversion of scarce resources into wasteful programmes would amount to a direct violation of the ICESCR. (See The Maastricht Guidelines, n.62, above, at para.11. See also, the Limburg Principles, n.73 above, at paras.70-72).

to the realization of ESCRs, this handicap can in fact be overstated, given that much also depends on policy priorities.

2.4.4. Approaches to Realization

Although there is broad consensus regarding the nature of State Parties' obligations in respect of the *process* of progressive realization, available literature reveals an absence of agreement as to what *approach* should be adopted in order to effectively monitor that process. To be sure, this cannot yet be described as an outright disagreement amongst commentators; indeed, as might soon become apparent, it is possible that some of the differing opinions are in fact reconcilable. Nevertheless, as pointed out by Steiner and Alston, the monitoring of ESCRs is "especially challenging" because of "the scope of the rights, the diversity of the means by which they might be made operational, and the inevitably complex relationship between rights and resources."[77] From a legal perspective, they assert, the challenge is how to reconcile, through the monitoring process, the notion of progressive realization with the practicalities of resource constraints, while acknowledging the dramatic disparities in financial and administrative capacities between countries.[78] With these in mind, the CESCR relies on the "minimum core content" approach (which ensures a universal standard for each right), and the need for each State Party to establish "benchmarks" against which both internal and external monitoring bodies can judge their performance.[79] But what do these concepts mean in practice? A good starting point is a consideration of what constitutes "minimum core obligations" in relation to ESCRs.

2.4.4.1. The Minimum Core Approach

It is difficult to determine, from the available literature, or with any degree of certainty, when the "minimum core" concept was first developed, or by whom. It is, however, possible to state that it was mooted as early as 1987 by Philip Alston, in response to a contribution made by the representative of

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[77] See H J Steiner and P Alston, *International Human Rights in Context*, n.68 above, at p.305
[78] ibid
[79] ibid

New Zealand during the drafting of the Covenant, to the effect that it should allow for "reasonable differences of opinion on the extent of [State] responsibilities." According to Alston, "[s]uch an interpretation would appear to be an accurate reflection of the drafters' intention that the [CESCR] should seek to identify some minimum core content of each right that cannot be diminished under the pretext of permitted 'reasonable differences.'"[80] Each right, he subsequently adds, "must therefore give rise to an absolute minimum entitlement, in the absence of which a State Party is to be considered to be in violation of its obligations."[81] Alston does not offer an elaboration of his suggestion, except to delineate a broad formula as to how it might be achieved.[82]

As already indicated, the CESCR has enthusiastically endorsed this approach. Indeed, it is of the view that "[if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."[83] Within this core are: *the rights to food, health, housing, and basic education.* In its view, a violation of these occurs where "a significant number of individuals" is deprived of them. Although this approach appears to preclude individual violations, it delineates a minimum set of rights below from which a State cannot derogate. Also, although it acknowledges the problem of resource constraints, it explains that for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of resources, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[84] The CESCR thus clearly envisages what might be called a "best endeavour" approach on the part of the State – and one which not only places definite obligations on it, but leaves no room for convenient excuses and escapism.[85]

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[80] P Alston, "Out of the Abyss," n.35 above, at p. 352

[81] ibid, at p. 353.

[82] See footnote no 138, ibid, where he states: "The scope of each right must be analysed in terms of an outer edge, a circumjacence and a core. The essential elements of the norm which are unrelinquishable and unchangeable for the guaranteed core must be determined. This would need exhaustive multi-disciplinary work. Once meaningful criteria for every right have been established which can be concretized for every right, it should be possible to formulate a lowest common denominator, and perhaps even the average, or ideally the highest, common denominator of all guaranteed cores."

[83] Per General Comment 3, n.72 above, at para.10

[84] ibid

[85] Indeed, this view receives the support of two experts in this area, who assert: "While the Covenant itself is, inevitably, devoid of specific allocational benchmarks, there is presumably a process requirement by which States might be requested to show that adequate consideration has been given to the possible resources

One commentator has, however, expressed the view that by being encouraged to focus on this minimalist approach, some governments might regard the "peripheral" ones as unimportant.[86] The submission, however, is that this approach represents perhaps the best illustration of how to achieve progressive realization. For example, although family rights[87] do not constitute part of the core obligations, progressive measures towards their realization must remain, at all times, on the government's agenda. Indeed, as Brigit Toebes herself points out, the minimum core content approach is an integral part of many international instruments and municipal legislation, insofar as these often specify the extent to which certain provisions can be derogated from.[88] Thus, in the context of the ESCRs, it must be seen merely for what it is: a recognition of the problem of resource constraints, particularly for developing countries. It is now considered necessary to examine how the minimum core approach is interpreted by the CESCR in relation to the relevant rights.

2.4.4.1(a) The Right to Food

The importance of adequate nutrition to human existence does not require much by way of academic exposition. However, as stated earlier, the ICESCR proclaims it under Article 11(1) of the ICESCR, thus obliging States Parties to recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." It is thus recognized legally as being "indivisibly linked to the inherent dignity of the human person and [as being] indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights."[89] Indeed, in his updated report to the UN Sub-commission on the

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available to satisfy each of the Covenants requirements, *even if the effort was ultimately unsuccessful.* If a State is unable to do so, then it fails to meet its obligations of conduct to ensure a principled policy-making process - one reflecting a sense of the importance of the relevant rights" [emphasis added]. (See P Alston and G Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights." (1987) *Hum. Rts. Q*, vol.9, no.2, at pp. 180-181.

[86] See B C A Toebes, *The Right to Health as a Human Right in International Law* (Oxford: Intersentia-Hart, 1999), at p.276

[87] See Art.10 of the ICESCR, n.50 above.

[88] See n.86 above, at pp.276-277

[89] Committee on Economic, Social and Cultural Rights, Twentieth session, Geneva, 26 April-14 May 1999, Agenda item 7, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and

Prevention of Discrimination and Protection of Minorities, Asbjorn Eide highlights its significance by alluding to the newly conceived "life-cycle approach" to the understanding of malnutrition, by which is meant the realization that the "pernicious impact of malnutrition can affect the whole life-span of human beings."[90]

Although to be realized progressively by virtue of Article 2(1), States Parties have a core obligation to take the necessary action to mitigate and alleviate hunger...*even in times of natural or other disasters*"[91] [emphasis added]. Thus, it is one of those rights which are non-derogable even in times of emergency. Its core content thus implies *inter alia*: "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture."[92] Indeed, its importance is illustrated by the imposition of legal remedies for "any person or group" who has been a victim of a violation, in form of restitution, compensation, satisfaction or guarantees of non-repetition.[93]

2.4.4.1(b) The Right to Health

The right to health is multifaceted, and, like the right to food, is as fundamental to a life of dignity as it is interrelated to other rights. Indeed, so multidimensional is its very nature that one commentator has devoted an entire publication almost exclusively to it.[94] Its interrelatedness has been acknowledged by the CESCR in these terms: "Health is a fundamental human right indispensable for the exercise of other human rights..."[95] Examples of other related rights include: the rights to food, housing, work, education,

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Cultural Rights: General Comment 12, UN Doc E/C.12/1999/5, of 12 May 1999 [hereinafter General Comment 12], at para.4

90 See UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Fifty-first session, Item 4 of the provisional agenda: The Right to Adequate Food and to be Free from Hunger, Updated study on the right to food, submitted by Mr. Asbjorn Eide in accordance with Sub-Commission decision 1998/106, UN Doc E/CN.4/Sub.2/1999/12 of 28 June 1999, at para.19 et seq.

91 See General Comment 12, n.89 above, at para.6

92 ibid, at para.8

93 ibid, at para.32

94 See B C A Toebes, *The Right to Health*, n.88 above.

95 See Committee on Economic, Social and Cultural Rights, Twenty-second Session, Geneva, 25 April-12 May 2000, Agenda item 3, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), UN Doc E/C.12/2000/4, of 14 August

human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.[96] Thus, its scope extends well beyond the realms of the ICESCR into that of the ICCPR, thus further illustrating the interdependence of human rights.

Under Article 12(1), of the Covenant, States Parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The measures which States Parties are obliged to adopt in order to ensure their realization include:

- those aimed at reducing still-birth rates, infant mortality, and healthy development of children;
- improvements to all aspects of environmental and industrial hygiene;
- the prevention, treatment and control of epidemics, occupational and other diseases; and
- the establishment of medical facilities.[97]

In addition to the above, the CESCR has reaffirmed the importance of non-discrimination in the delivery of healthcare,[98] as well as of the need to include vulnerable groups such as:

- women[99]
- the elderly[100]
- the disabled[101] as well as
- indigenous peoples.[102]

In the Committee's view, the core obligations include "at least" the following:

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- to ensure equitable distribution of all health facilities, goods and services;

2000 [hereinafter General Comment 14], at para.1

[96] ibid, at para.3

[97] Per Art.12(2)(a)-(d) of the ICESCR, n.87 above.

[98] Per para.18, General Comment 14, n.95 above.

[99] ibid, at paras.20-22

[100] ibid, at para.25

[101] ibid, at para.26

[102] ibid, at para.27

- to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.[103]

In addition to the above, the CESCR also considers the following to be "of comparable priority":

- To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- to provide immunization against the major infectious diseases occurring in the community;
- to take measures to prevent, treat and control epidemic and endemic diseases;
- to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and
- to provide appropriate training for health personnel, including education on health and human rights.[104]

As regards the role of the State, the Committee asserts: "It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable."[105]

2.4.4.1(c) The Right to Housing

Like the right to food, the right to adequate housing derives from Article 11(1) of the ICESCR. It is therefore an aspect of the broader right to an adequate standard of living as proclaimed under this provision. The CESCR has not explicitly delineated the core elements of the right to housing as it has done in regard to the rights to food and health. However, this does not mean that it has no such core elements. The Committee's position is that the right to housing "should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head...Rather it should be seen as the right to live somewhere in security, peace and dignity."[106] For this reason, it has outlined a number of criteria for assessing the meaning of the term "adequate housing" as proclaimed under the Covenant. These include:

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[103] ibid, at para.43
[104] ibid, at para.44
[105] ibid, at para.47
[106] See UN Committee on Economic, Social and Cultural Rights, The Right to Adequate Housing (Art. 11 (1) of the Covenant)(Sixth session, 1991), General Comment 4, UN Doc E/1992/23, of 13 December 1991, at para.7

- Legal security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordability;
- habitability;
- accessibility;
- location; as well as
- cultural adequacy.[107]

Thus, although the very idea of a duty to provide adequate housing might suggest a positive duty on governments to construct homes for its citizens, this is not necessarily the case. Of course, where they do not already exist, the right to housing implies a duty to provide them. However, in many cases, the State's obligation would be very similar to the so-called "negative" rights under the ICCPR such as freedoms of thought and of expression.[108] Indeed, according to the CESCR, certain obligations merely require the State to refrain from acting in a manner that is capable of constituting a violation.[109] Presumably, these would include the forced eviction of already marginalized communities from so-called "illegal settlements" of the kind allegedly carried out by the Nigerian government in the 1990s, prompting an inquiry by the World Bank.[110] Moreover, in many circumstances, the State is only obliged to put in **place legislative measures aimed at protecting the tenure and quality of** housing[111] – in other words, measures aimed at controlling the unscrupulous landlord, whether private or public. Like other core elements of the ICESCR, the right to housing might also be interpreted in a way that imposes an obligation on those engaged in armed conflict to refrain from creating a refugee crisis.

2.4.4.1(d) The Right to Education

As with other core aspects of ESCRs, the importance attached to education by the ICESCR cannot be overstated. Indeed, it is a measure of that level of importance that the right to education is proclaimed

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[107] ibid, at para.8

[108] Per Arts. 18 and 19 of the ICCPR, n.53 above.

[109] See n.107 above, at para.9

[110] See for example The World Bank Group, Panel Request, Nigeria: Lagos Drainage and Sanitation Project (IDA Credit No. 2517-0, June 1998), Request No. IPNREQUEST RQ98/3; at http://wbln0018.worldbank.org/ipn/ipnweb.nsf/Wrequest/.

[111] See n.109 above, at para.17.

under two separate provisions (Articles 13 and 14) within the Covenant.[112] It comes as no surprise, therefore, that the CESCR has, so far, issued two General Comments in relation to these provisions.

As explained by the Committee, the importance attached to education is informed by the fact that as well as being a human right in itself, it is also "an empowering right," – particularly useful in terms of lifting such marginalized groups as women and children out of poverty.[113] Indeed, one might even mention the fact that without basic education, the individual would be incapable of exercising many of his or her other basic rights. For example, an uneducated woman is as likely to fall prey to a corrupt politician who might "buy" her vote, as she is likely to become a victim of sexual exploitation and unplanned childbirths – with predictable impacts on her (and the child's) rights to health and food. Indeed, this might even set in motion a vicious cycle which is more commonly associated with the poverty trap.

As regards the obligations assumed by States Parties under Article 13, the CESCR acknowledges the problem of resource constraints, but explains that certain obligations "are of immediate effect." Of particular relevance is the obligation to "guarantee" that the right "will be exercised without discrimination of any kind" as proclaimed under Article 2 (2) and the obligation "to take steps" towards full realization (as per Article 2(1)). Such steps, it is also explained, must be "deliberate, concrete and targeted" towards the full realization of the right to education.[114]

The core obligations assumed by States Parties in respect of the right to education are articulated in two parts. Under Article 13, the core obligations are:

- to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
- to ensure that education conforms to the objectives set out in Article 13(1);
- to provide primary education for all in accordance with article 13 (2)(a);

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[112] Art.13, it will be recalled, proclaims the right to education. Article 14 requires those States Parties that have not done so at the time of ratification, to "work out and adopt a detailed plan of action" for progressive implementation of free and compulsory for all.

[113] See UN Committee on Economic, Social and Cultural Rights, Twenty-first session (15 November-3 December 1999), Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (Article 13 of the Covenant), UN Doc. E/C.12/1999/10, of 8 December 1999 [hereinafter General Comment 13]., at para.1

[114] ibid, at para.43

- to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and
- to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" as provided under Articles 13(3) and (4).[115]

As regards Article 14, the CESCR acknowledges the impediment posed by the structural adjustment policies imposed by the IFIs on poor countries, but reiterates that these cannot absolve governments of their obligations under Article 14.[116] The core obligation under this provision, therefore, is to adopt concrete and verifiable measures which are to be implemented within specified time periods. The implication of this obligation is that even where resources are not available domestically, it is envisaged that foreign assistance (which the CESCR explicitly alludes to)[117] would be used to implement policies that have already been drawn up by the recipient government. The tendency on the part of some African governments, to abandon their basic responsibilities to the aid agencies (as highlighted in chapter 11) would therefore constitute a direct violation of this provision.

2.4.4.2. Realization Through "Benchmarking"

As indicated at the outset, the disparity in the level of treatment given to the two human rights categories is self-evident, both from available literature and in practice. Aside from the reasons already cited, there is broad agreement regarding the main reason for this state of affairs – this being that the contents of the ICESCR, unlike those of the ICCPR, were not based on any significant body of domestic jurisprudence. For example, whereas phrases such as "cruel, inhuman and degrading treatment"[118] had already received substantial judicial and academic interpretation even before their inclusion in the ICCPR, most of the provisions of the ICESCR had enjoyed no such advantage, with the result that lawyers are still trying to understand the meaning of some of its provisions.[119] This state of affairs is

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[115] ibid, at para.57

[116] See Committee on Economic, Social and Cultural Rights, Twentieth session Geneva (26 April-14 May 1999), Agenda item 7, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 11 (1999), UN Doc. E/C.12/1999/4, CESCR General Comment 11, of 10 May 1999, at para.3

[117] See para.11, ibid.

[118] Per Art.7 of the ICCPR, n.108, above.

[119] See P Alston, "The Committee on Economic, Social and Cultural Rights," in P Alston and J Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) at p.490. See also, A R

further compounded by the very nature of ESCRs, which, to be sure, have traditionally been the subjects of economic analyses, rather than of law. It is for these reasons that statistical indicators and "benchmarks" have become integral to the monitoring process, particularly at the level of the CESCR, although benchmarks are the "preferred strategy."[120] According to Alston, however, indicators differ significantly from benchmarks because indicators are essentially statistical in nature, requiring a high level of technical expertise in their compilation and interpretation. And because of inherent methodological flaws in these processes, they need to be treated with caution. On the contrary, he further explains, benchmarks are targets set by governments after due consultative processes. And although they may contain quantitative elements (which makes them similar to indicators), they are also qualitative, thus allowing for flexibility depending on a country's circumstances.[121] It is with these difficulties in mind that the next proposal will be examined.

2.4.4.3. A "Violations Approach" to Realization

In her widely-cited paper, Audrey Chapman proposes a "violations approach" to the realization of ESCRs. Evidently drawing upon her experience as Rapporteur to the UN seminar on appropriate indicators to measure achievements in the progressive realization of ESCRs, her thesis is based on the belief that the current approach "has...been hampered by conceptual and methodological problems that other categories of human rights have not experienced."[122] She also believes that the current approach "is extremely complicated and requires an enormous amount of good-quality data;" the problem with these data being that "they are unrealistic and virtually impossible to handle."[123] Few States Parties, she further contends, "have either the requisite data or the willingness to share such detailed data with a UN supervisory body or with nongovernmental organizations."[124] And at any rate, she adds, progressive

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Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights," (1996) *Hum. Rts. Q.* vol. 18 no.1, at p.30

[120] See H J Steiner and P Alston, *International Human Rights in Context*, n.79 above, at p.316 et seq.

[121] See P Alston, "International Governance in the Normative Areas," in UNDP, *Background Paper: Human Development Report 1999*, at pp.15-18, reproduced ibid).

[122] See A R Chapman, "A Violations Approach" n.119, at p.29

[123] ibid, at pp.33 and 34.

[124] ibid, at p.34

realization presupposes that States Parties "would take their obligations seriously and move steadily toward full implementation...," which, she notes, is not currently the case.[125] A violations approach, she explains, is not new, and is based on existing monitoring processes used for other human rights instruments. Indeed, she acknowledges that the CESCR already adopts this approach in its Concluding Observations on States Parties' reports. It therefore merely requires, she further asserts, a "reorientation" of efforts on the part of NGOs, governments, and human rights-monitoring bodies towards "identifying and rectifying violations."[126]

It is necessary to point out that the violations approach has not been universally accepted as the way forward. One commentator, for example, while acknowledging that it "is valuable in many respects," argues that it "defines violations very loosely by considering virtually all critical comments by the Committee as prima facie violations...whether or not this body...viewed a particular act or omission as a violation."[127] Indeed, at first sight, it is tempting to conclude that the violations approach represents a rejection of progressive realization (and by extension, the minimum core approach). A closer reading, however, reveals that this is not the case. Indeed, Chapman explicitly acknowledges the importance of indicators, though only as useful complements to the violations approach.[128]

Nor is she seeking to reject the minimum core approach. Such an attempt would, in any event, also be fruitless given that as already noted, it has been explicitly endorsed by the CESCR. What she proposes, it seems, is a change in the *methodology* of monitoring progressive realization in a way that is capable of preventing the violation of (at the very least) the core aspects of ESCRs. Indeed, she notes that "[e]fforts to improve the implementation of these rights also require the conceptualization of their content (*particularly the core minimum of each right*)..." [emphasis added].[129] Thus, without necessarily undermining the notion of progressive realization, a violations approach adopts an uncomplicated view of what constitutes a "violation" under the Covenant, thus making it easy for individuals or groups who

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[125] ibid, at p.38
[126] ibid, at pp.36-37
[127] See S Leckie, "Another Step towards Indivisibility," n.4 above, at p.97.
[128] See A R Chapman "A Violations Approach," n.126 above, at p.37
[129] ibid, at p.42

are victims of violations to register their complaints with the CESCR as envisaged under the proposed Optional Protocol to the ICESCR.[130] Indeed, Chapman envisages this by asserting that her proposal:

> offers a greater possibility of promoting and protecting the [ESCRs] of individuals...After all, the goal of any approach to human rights is to enhance the enjoyment of rights of individual subjects and to bring them some form of redress when the rights are violated, not to abstractly assess the degree to which a government has improved its level of development on a range of statistical indicators.[131]

The significance of this approach becomes more evident when viewed from the perspective of poor countries. Aside from its obvious benefits to individuals or groups who are intended to be the beneficiaries of the proposed Optional Protocol, it would also assist in the monitoring of violations in poor countries, where, as she rightly points out above (and as noted in chapter 7 in the context of sub-Saharan Africa), even the seemingly simple task of furnishing data to multilateral institutions for the purposes of development assistance has often been impossible.

2.4.4.4. An Integrated Approach to Realization[132]

2.4.4.4(a). At the Human Rights Committee[133]

In addition to the foregoing, it is becoming apparent that an "integrated approach" to the realization of both CPRs and ESCRs has been adopted both at the level of the HRC and at the European Court of Human Rights (ECHR). Indeed, as will be shown later, this approach has also been embraced by the African Commission in its interpretation of the African Charter on Human and Peoples' Rights. In the context of the HRC, however, the first examples relate to its views concerning the issue of non-

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[130] Regrettably, progress on the proposed Optional Protocol to the ICESCR, which would allow for individual and group complaints, has been frustratingly slow. See, however, United Nations High Commissioner for Human Rights, Optional protocol to the International Covenant on Economic, Social and Cultural Rights Sub-Commission on Human Rights resolution 2000/9, 25th meeting, 17 August 2000 [Adopted without a vote.] (available via: http://www0.un.org/cyberschoolbus/treaties/economic.asp).

[131] See A R Chapman, "A Violations Approach," n.129, at p.38

[132] It is important to point out at the outset, that the integrated approach does not represent an explicit rejection of any of the above approaches. On the contrary, it is a convenient judicial means through which the two rights categories can be realized. Indeed, from the earlier analysis of the violations approach, it is possible to argue that this represents an implicit endorsement of it, at least insofar as the focus is on individual violations.

[133] The HRC, it will be noted, is a body established by virtue of Art.28 of the ICCPR, and performs the same role as the CESCR *vis-a-vis* CPRs.

discrimination under Article 26 of the ICCPR. The issue arose from two cases involving two Dutch nationals, whose national legislation effectively denied certain unemployment benefits to married women, which were available to both single women and men of any status.[134] Social security and social insurance, it must be remembered, are guaranteed under Article 9 of the ICESCR. Although the "author's" (i.e., plaintiff's) claim had become unnecessary following the retrospective repeal of the legislation in question, the Dutch government persisted in defending its position: While it accepted that Article 26 of the ICCPR prohibits discrimination, it argued that any claim under it was only actionable under the Optional Protocol to the ICCPR (this being the instrument allowing for individual Communications). Civil and political rights, it further argued, must be treated separately from ESCRs.[135]

The position of the HRC is instructive:

> Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.[136]

A further example of this integrated approach was evident in a General Comment (by the HRC) relating to Article 6 of the ICCPR, which obliges States Parties to protect, by law, the right to life. According to the HRC, this provision "has been too often narrowly interpreted." It "requires that States adopt positive measures" to achieve it. It is thus "desirable," it was stated, that they adopt "all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[137] Thus, the right to life is not limited to the prohibition of the death penalty; it also involves taking steps in the direction of eliminating all threats to life, such as disease and hunger which, as noted earlier, are core aspects of ESCRs.

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[134] See *F. H. Zwaan-de Vries v the Netherlands*, Communication No. 182/1984 (9 April 1987), U.N.Doc. Supp. No. 40 (A/42/40) at 160 (1987). See also *S. W. M. Brooks v. the Netherlands*, Communication No. 172/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 139 (1987).

[135] See *Zwaan-de Vries*, ibid, at para.8.3

[136] ibid, at para.12.4

[137] See General Comment 6 (Sixteenth Session, 1982), 37 UN GAOR, Supplement No.40 (A/37/40), Annex V, at para.5.

2.4.4.4 (b) At the European Court of Human Rights

The ECHR has also offered good examples of how the integrated approach can be a useful tool in the realization of ESCRs. One such example was in its interpretation of Article 6(1) of the European Convention on Human Rights[138] in *Airey v Ireland* [139] - a case involving the issue of free legal assistance. The court seized the opportunity to examine the relationship between the two rights categories, and came to the view that while the Convention relates to what are essentially CPRs, many of these have implications of a social and economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of ESCRs should not be a determinative factor against such an interpretation, it was held, as there was no watertight way of separating both rights categories.[140]

Two other decisions of the court offer a further insight into its jurisprudence in this regard. In *Feldbrugge v The Netherlands,*[141] the applicant had been denied certain allowances relating to health insurance. Her complaint was that the initial decision-making process as stipulated by law in her country did not allow her proper participation, while her appeal rights were too restrictive. These, she argued, violated her right under Article 6 of the Convention (which guarantees the right to a fair hearing in civil and criminal matters). The issue, essentially, was therefore whether (given the fact that the social and health insurance schemes operating in the Netherlands at the time had public and private elements) her claim was of a "civil" nature. It was held that although there was a public law element in relation to the claim, its private characteristics were predominant. It was therefore of a civil nature; hence, the dispute was covered by Article 6(1) of the Convention.[142]

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[138] See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4November 1950, entered into force 3 September 1953, 213 UNTS 221, Art.6(1) of the which entitles everyone to a fair public hearing at an impartial and independent tribunal established by law in the determination of their CPRs.

[139] Judgement of 9th October 1979, Publications of the European Court of Human Rights, Series A, No.32

[140] ibid, at para.26

[141] *Feldbrugge* Case, Judgement of 29 May 1986, Publications of the European Court of Human Rights, Series A, No.99

[142] See ibid, at para.40

A similar decision was reached in *Deumland v Germany*[143] which involved a widow's right to supplementary pension resulting from a policy of compulsory insurance against industrial accidents. The proceedings at municipal level had lasted almost eleven years. The questions therefore were whether the substantive dispute itself fell within the scope of Article 6(1), and secondly, whether her right to a fair trial "within a reasonable time" had been infringed. Employing the same analysis as in *Feldbrugge*, it was held that Article 6(1) was applicable, since it was her private rights that had been violated by the length of the proceedings.[144]

In its subsequent proceedings on the applicability of Article 6(1) to ESCRs, the court has effectively put an end to the public/private distinction in determining similar cases. In *Salesi v Italy*,[145] the applicant had been held ineligible for statutory monthly disability allowance after proceedings lasting more than six years in her country. After revisiting its earlier decisions in *Feldbrugge* and *Deumland*, the court stated: "...[T]he development in the law that was initiated by those judgements and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6(1) does apply in the field of social insurance."[146] Her rights had thus been infringed since she was "claiming an individual economic right flowing from specific rules laid down in statute..."[147] Thus, as far as this provision is concerned, it no longer matters whether the claim in question has its roots in private or public law.[148]

2.5. The Realization of ESCRs in Sub-Saharan Africa

Thus far, this chapter has focused on the controversy surrounding the very nature of ESCRs and the question of their realizability in the broader global context. Given that the geographical focus of this

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[143] *Deumland* Case, Judgement of 29th May 1986 [of the same forum], Series A, No.100

[144] See ibid, at paras. 62-74, and 90. These decisions have been followed in *Schuler-Zgraggen v Switzerland*, Judgement of 24 June 1993 [of the same forum], Series A, No.263.

[145] Judgement of 26 February 1993, Publications of the European Court of Human Rights, Series A, No.257 E

[146] ibid, at para.18

[147] ibid

[148] The rule was also applied in *Schuler-Zgraggen v Switzerland* (Judgement of 24 June 1993, Publications of the European Court of Human Rights, Series A, No.263), in which the applicant had been denied a statutory invalidity pension partly on the basis of an assumption that because she was married with a child, she would not have returned to work even if she was not in poor health. It was held that the decision infringed her rights under both Articles 6 and 14 of the European Convention (Article 14 being the non-discrimination provision).

thesis is the region of sub-Saharan Africa (SSA), it is considered necessary to relate the issues already examined to the region. This is even more necessary because as pointed out in the introductory chapter, SSA has become synonymous with the very phenomenon of economic underdevelopment, and thus with an inability to realize the aims envisaged within the ICESCR.

In embarking on a project of this nature, it would be natural to begin with a country-by-country analysis of the legislative measures adopted in this regard; legislation, after all, is a core requirement for realization under Article 2(1) of the ICESCR. However, the sheer number of the countries concerned, the language differences between them, and the multiplicity of the issues and themes to be examined within the broader scope of the research makes this a practical impossibility. In any event, and as pointed out in the Limburg Principles, legislative measures, in themselves are not sufficient: other measures (administrative, judicial, economic, social and educational) are also of equal necessity.[149] It therefore suffices merely to state that ESCRs are mentioned (though not explicitly guaranteed) in many of the region's Constitutional provisions.[150] Indeed, a body of case law is beginning to emerge in some countries of the region in this regard, as will be shown after an examination of the Charter.

2.5.1. The African Charter

Africa's regional human rights instrument, the African Charter on Human and Peoples' Rights (also known as the Banjul Charter because of its Gambian origin) was adopted in 1981 by the 18th Assembly

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[149] See the Limburg Principles, n.76 above, at paras.17 and 18.

[150] Examples include: Nigeria (1999), Chapter II, though proclaimed in very vague and general terms under the rubric of "Fundamental Objectives and Directive Principles of State Policy;" South Africa (1996 as amended): s.26 (housing); s.27 (health, food, water, and social security); s.28 (children); s.29 (education). However, a "Table of Non-Derogable Rights" under s.37 (which guarantees essentially aspects of CPRs) suggests ESCRs are derogable. Ghana (1992), Chapter VI: Like Nigeria's, proclaimed under the rubric of "Directive Principles of State Policy." As to their enforceability, the President is merely required under s.34(2) to report to Parliament at least once a year all the steps taken towards their realization. Uganda (1995): Proclaimed under Chapter IV titled "Fundamental and Other Human Rights and Freedoms": s.30 (education); s.32 (affirmative action in favour of marginalized groups); s.34 (children's rights); s.35 (the disabled); s.40 (labour rights, though called "economic rights"); while s.50 grants rights of redress. Others include: Part II of the Cape Verde Constitution (1992); Part II of the Mozambique Constitution (approved and enacted November 1993); Title II of the Togo Constitution (adopted by the Referendum of 27 September 1992 and promulgated 14 October 1992); Chapter III of the Namibian Constitution (adopted February 1990); and Title III of the Guinea Constitution (1985).

of Heads of State and Government of the now defunct Organization of African Unity,[151] and entered into force on the 21st of October 1986. Although its birth should have been a cause for celebration, it is hard to ignore the fact that very few (if any) of the assembled rulers had any democratic mandate from those they were supposed to represent.[152] A human rights charter was thus founded on a flagrant violation of a people's right to vote (as proclaimed under Article 25 of the ICCPR). Even more bizarre was the fact that the very adoption of the Charter constituted a direct breach of one of its own provisions.[153] To be sure, Africa is no longer the world's bastion of one-party dictatorships and ruthless military regimes. Nor is it still plagued by the morbid buffoonery that characterized the Bokassa and Idi Amin era. But whether this supposed "new dawn of democracy" offers much hope in human rights terms to its longsuffering people is best judged against the region's continuous inability to realize the basic rights proclaimed under universally agreed human rights instruments. Indeed, as one commentator has aptly noted,[154] and as pointed out in chapter 13, very little has changed since the days of independence.[155] These, then, provide a useful background for the examination of the Charter and its impact on the continent's human rights situation. These notwithstanding, some of the elements of the Charter, particularly its treatment of ESCRs, deserve a brief critical examination.

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[151] See The African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 59 (1982). The so-called African Union, which replaces the OAU, also proclaims the supposed commitment of the continent's rulers to human rights (See particularly Art.3 of the Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001) [hereinafter the AU Treaty], available at http://www.dfa.gov.za/for- relations/multilateral/treaties/auact.htm

[152] See M wa Mutua, "The African Human Rights System in a Comparative Perspective" (1993), *Rev Afr. Comm. Hum. & Peoples' Rts.*, vol.3, no.5, at p.7 who states: "Without exception, they presided over highly repressive states. It was...the same club of dictators who adopted the African Charter in Nairobi...in 1981." See also, C A Odinkalu, "Analysis of Paralysis" n.8 above, at p.329

[153] This being Art.13(1) of the Charter which states: "Every citizen shall have the right to participate freely in the government of his country..."

[154] See J Oloka-Onyango, "Human Rights and Sustainable Development" n.55 above, at p.39

[155] For a detailed and insightful account of past and on-going violations (particularly of CPRs) on the continent, see N J Udombana, "Can the Leopard Change its Spots? The African Union Treaty and Human Rights" (2002) *17 Am. U. Int'l L. Rev. 1177*

2.5.2. The Charter and its Distinctive Features

It is not the intention here to offer a detailed critique of the Charter; much, in any event, has been done in this respect.[156] It suffices, therefore, for present purposes, merely to state that it is widely seen as the most comprehensive among the main regional human rights instruments because of its incorporation of the "new generation" of human rights. Among these are "the right of all peoples" to: development;[157] national and international peace and security;[158] and to "a general satisfactory environment favourable to their development."[159] The rights to communicate,[160] and to share in the common heritage of mankind are also recognized.[161]

A further distinctive characteristic of the Charter lies in its delineation of the notion of "duties." In an evidently deliberate affirmation of a cultural relativist attitude to human rights, it obliges its States Parties to "[take] into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights."[162] It thus devotes Chapter II (Articles 27-29) to the imposition of duties upon the individual towards others, including the State and "his family." As noted by Alston and Steiner, many other human rights instruments also refer, although mainly in correlative terms (and at any rate, in relation to the State) to the notion of duties, examples being Article 29 of the UDHR, the Preamble to the ICCPR, and the Preamble to the UN Charter.[163] What sets the African Charter apart, as also pointed out, is its

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[156] Examples include: J Swanson, "The Emergence of New Rights in the African Charter," (1991) *12 N.Y.L. Sch. J. Int'l & Comp. L.* 307; R M D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter" (1985) *Journal of African Law*, vol.29; and C A Odinkalu, "Analysis of Paralysis" n.152 above.

[157] See the Preamble to the Charter, n.151 above, at para.8; and Art.22 which provides that "all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." By virtue of Art.20(1), the right to development is indistinguishable from the right to self-determination. It provides thus: "All peoples shall...have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen..." Also, Art.21 proclaims the peoples' sovereignty over their own natural resources.

[158] Per Art.23, ibid

[159] Per Art.24, ibid

[160] Per Art.9 which provides thus: (1) "Every individual shall have the right to receive information. (2) Every individual shall have the right to express and disseminate his opinions within the law."

[161] See Art.22(1), ibid

[162] See the Preamble to the African Charter, ibid, at para.5

[163] See H J Steiner and P Alston, *International Human Rights in Context*, n.120 above, at p.355

enumeration of, and the "forceful attention" given to, the notion of *individuals'* duties;[164] so much so that it lends itself to interpretation in ways that "may impinge in clear and serious ways on the Charter's definitions of rights themselves."[165] Such fears, it must be noted, have so far proved unnecessary, due in no small measure to the attitude adopted by the African Commission in its deliberations, as will be discussed below.

2.5.3. ESCRs Under the Charter

Judging by its preambular reference to ESCRs, it would be safe to argue that the African Charter represents a bold attempt to reaffirm their inherent importance. This is because in addition to reaffirming the indivisibility of the two rights categories,[166] it goes on to proclaim that "the satisfaction of economic, social and cultural rights *is a guarantee* for the enjoyment of civil and political rights" [emphasis added].[167] Indeed, this apparent (if unnecessary) elevation of ESCRs above CPRs has caused one commentator to argue that it would "undoubtedly grant a State great(er) latitude..."[168] Whether a rights-violating regime necessarily requires the legal legitimacy of a human rights instrument in order to violate its citizens' rights is of course open to debate, given that such regimes, by their very definition, act without reference to laws. What is clear, however, upon an examination of the substantive provisions of the Charter is that this enthusiasm does not appear to be sustained beyond the Preamble. The relevant provisions will now be examined.

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[164] ibid

[165] ibid, at p.356. Indeed, one commentator has sought to justify the cultural relativist position in these terms: "Individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individuals. This appears to be more true of Africa than any other place. The individualist, narrow formulation of human rights is not sufficient to pull the African continent back from the abyss." (See M wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) *35 Va. J. Int'l L.339*, at pp.340-341))

[166] (by declaring that "civil and political rights cannot be disassociated from economic, social and cultural rights...,")

[167] Per Preamble to the African Charter, ibid.

[168] See R Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1982) *22 Va. J. Int'l L. 667*, at p.687

Among the traditional aspects of ESCRs are the rights to work "under equitable and satisfactory conditions,[169] and to equal pay for equal work.[170] The rights to health (which arguably precludes preventive healthcare measures because of the phrase "when they are sick" in Article 16(2)), education,[171] and to participation in cultural life are also proclaimed.[172] It however remains silent in respect of certain core elements of the ICESCR such as the rights to an adequate standard of living (including the rights to food, housing and clothing), and to social security. Joseph Oloka-Onyango has suggested that the scant reference to ESCRs might have been due to the drafters' weariness of repeating the provisions of the ICESCR, pointing to the fact that Article 60 allows the Commission to "draw inspiration" from other international human rights instruments in interpreting the Charter.[173] However, as he in fact concedes, such an omission cannot be reconciled with the rhetoric of the Charter's Preamble.[174] Nevertheless, opinions expressed in regard to the Charter generally range from enthusiastic support to outright condemnation. For example, while some commentators commend its incorporation of the "new generation" of human rights[175] and the notion of individual duties,[176] others have been more diplomatic in their criticisms.[177] The prevailing opinion (and certainly the most persuasive), however, is that articulated by Onyango who asserts: "All in all, the African Charter is a serious let-down in both the formulation and in the reconceptualization of economic and social rights."[178]

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169 Per Art.15

170 ibid.

171 Per Art. 17(1). This simply states: "Every individual shall have the right to education." Again, this could be said not to include free elementary education as proclaimed under the ICESCR.

172 Per Art 17(2) ibid

173 See J Oloka-Onyango, "Human Rights and Sustainable Development" n.154 above, at p.60.

174 ibid.

175 See for example J Swanson, "The Emergence of New Rights," n.156 above; and R M D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter" (1985) *Journal of African Law*, vol.29, at p.72

176 See M wa Mutua, "The Banjul Charter and the African Cultural Fingerprint," n.165 above, although he had earlier dismissed is as "a facade, a yoke that African leaders have put around our necks"(See M wa Mutua, "The African Human Rights System in Comparative Perspective" (1993) *3 Rev. Afr. Comm. Hum. & Peoples' Rts. 5*, at p.11.

177 See H J Steiner and P Alston, International Human Rights in Context, n.165 above, at p.920, according to whom it is "[t]he newest, the least developed or effective...the most distinctive and the most controversial of the three established regional human rights regimes..."

178 See J Oloka-Onyango, Human Rights and Sustainable Development, n.174 above, at p.61. See also, A Rosas and M Scheinin, "Implementation Mechanisms and Remedies," in A Eide et al (eds.), *Economic, Social and Cultural Rights*, n.63 above, at p.374, who have questioned its very significance.

2.5.4. The African Commission

Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights with a mandate "to promote human and peoples' rights and ensure their protection..." Its functions are outlined under Article 45, and include a list of measures to be adopted in the fulfilment of its roles, which include, *inter alia*: research, the formulation of legal rules upon which governments may base their domestic legislation, protection of human rights as proclaimed under the Charter, as well as the interpretation of its provisions.[179]

In addition to these functions, the Commission also has evidence-gathering powers under Article 46.[180] However, its powers of examining "serious or massive violations" are severely restricted by the requirement that these be drawn to the attention of Heads of States and Government,[181] whose Chairman "may request an in-depth study"[182] - a clear indication that systematic violations are beyond the Commission's mandate. Nevertheless, the Commission operates an interstate complaints mechanism,[183] and monitors the compliance of State Parties with Charter provisions through a State reporting procedure, under which it receives and considers reports submitted every two years.[184]

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[179] See Art.45(1) and (2) of the Charter.

[180] Under this provision, the Commission can "resort to any appropriate method of investigation," including consultation with the Secretary-General of the OAU "or any other person capable of enlightening it." Moreover, it can also seek assistance from expert governmental or non-governmental or inter-governmental sources as it sees fit. One major handicap in this regard, however, is that as pointed out by one of its members, its dependence on diplomatic niceties means that "states have to approve missions and invite the Commission to their countries." This, it is further revealed, makes it impossible for States to be proactive in dealing with violations. (See B B Pityana, in R Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Hart Publishing, 2000), at preface (p.vi)).

[181] See Art. 58(1)-(3) of the Charter

[182] See subsection (3) ibid

[183] Per Arts.47-54 of the Charter

[184] See Art.62 of the Charter, under which State parties commit themselves to submit "a report on the legislative and other measures taken with a view to giving effect to the [rights under the Charter]."

2.5.4.1 The Non-State Complaint Procedure

In addition to the above, the Commission also operates a non-State complaint procedure.[185] Indeed, it allows for some degree of anonymity on the part of the complainant: Under Article 56(1) of the Charter, communications can be considered if they "[i]ndicate their authors even if the latter request anonymity..." Although complaints can only be referred to it after domestic remedies have been exhausted, it provides for a direct complaint procedure where it appears that local remedies are subject to undue delays.[186] The exhaustion of local remedies is defined (by the Commission) in reasonably broad terms, subject to their availability, adequacy, and effectiveness; by which is meant that the complainant is not bound to comply with it if such remedies are "neither adequate nor effective."[187] In *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*,[188] a number of West African nationals had been expelled from Zambia (and as the Commission later established) without adequate judicial safeguards. In response to an objection by the Zambian government to the admissibility of the deportees' complaint, the Commission held that the latter were not expected to "exhaust any local remedy which is found to be, as practical matter, unavailable or ineffective."[189] This decision received further support in *World Organization Against Torture et al v Zaire*,[190] in which it was held that complainants could not be expected to exhaust domestic remedies where it would be "impractical or undesirable."[191] The extent to which this represents an individual complaint mechanism

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[185] This is deducible from Art.55 of the Charter which entitles the Secretary of the Commission to consider "communications other than those of States parties..."

[186] See Art.56(5) ibid

[187] See *Zamani Lekwot & Six Others v Nigeria* [1996] 3 Int'l Hum. Rts. Rep. 137, at p.138. See also Communication 87/93, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (1994-95), Eighteenth Ordinary Session, 2nd – 11th October 1995, ACHPR/AHG/201/XXXI, Annex VI, at p.16 and 18.

[188] Communication 71/92, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996–97, Thirty-third Ordinary Session, 2–4 June 1997, Doc. OS/(XXII), Annex X (1997), reprinted in 6 Int'l Hum. Rts. Rep. 825

[189] ibid

[190] Communications 25/89, 47/90, 56/91, 100/93, in Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995–96, Thirty-second Ordinary Session, 7th–10th July 1996, at para.37

[191] ibid. This principle also applies in circumstances involving "a large number of individual victims", and serious human rights violations. (See *World Organization Against Torture* ibid. See also *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter Africaine des Droits de l'Homme (RADDHO), Collectif des Veuves et Ayants-droit & Association Mauritanienne des Droits de l'Homme v Mauritania* (Merits), Communications 54/91, 61/91, 98/93, 164/97, and 210/98, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000), ACHPR/AHG/222(XXXVI) Add. 136 (2000), at 85.

within the Charter, especially in regard to ESCRs is not clear.[192] What is clear, however, is that as will be shown below, the Commission appears to regard it as such.

2.5.4.2The African Commission and ESCRs

As acknowledged by its former chairman, the early days of the Commission were not very promising in regard to ESCRs. This, as explained, was because a supposed need for pragmatism dictated that a hierarchy was created in its deliberations between the categories of rights – in direct violation of the Preamble to the Charter.[193] In its more recent deliberations, however, the Commission has shown a commendable willingness to adopt an imaginative approach to interpreting the provisions of the Charter in cases involving (whether directly or not) violations of ESCRs. Again, in *World Organization Against Torture et al v Zaire,*[194] for example, the Commission held *inter alia* that where, due to widespread corruption, a State Party is unable to fulfil its obligations in respect of providing such necessities as healthcare, safe drinking water or electricity, this amounts to a violation of the right to health under Article 16 of the Charter. It also held that the arbitrary closure of universities and schools, followed by non-payment of teachers' salaries, violate educational rights.

A further example highlighting the Commission's creative interpretation of the Charter was in *John K Modise v Botswana,*[195] the facts of which, on the surface, had little to do with ESCRs: Mr Modise had sought to acquire Botswanan nationality by birth – a status which would have enabled him to contest for the country's presidency. He was instead offered nationality by registration which was a lower category of citizenship and would have made him ineligible to pursue his ambition. Upon his refusal of this offer,

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[192] For a detailed discussion of this, as well as the opposing views, see C A Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) *8 Transnat'l L. & Contemp. Probs. 359*, particularly at p.369 et seq.

[193] See U O Umozurike, "The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights," (1988) *1 Afr. J. Int'l L. 65*, at p.81. According to this account, this decision was informed by a suspicion that the inclusion of ESCRs would attract "too many cases from too many countries."

[194] See n.191 above.

[195] Communication 93/97, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996–97, Thirty-third Ordinary Session, 2nd–4th June 1997, Doc. OS/(XXII), Annex X (1997), reprinted in 6 Int'l Hum. Rts. Rep. 828

he was subjected to a series of deportations, first to South Africa, and then to the "homeland" of Bophuthatswana, from where he was sent back to Botswana. He was subsequently abandoned in an area close to the country's border called "no man's land," where he lived for a prolonged period. In addition to upholding his claim that the original deportation was calculated to violate his right under Article 13 of the Charter (i.e., his right to political participation), the Commission held that by effectively rendering him homeless, the respondent government had violated Article 5 of the Charter, which guarantees an individual's freedom from inhuman and degrading treatment, and had therefore violated his human dignity.[196] Thus, although the allusion to human dignity within the Charter is only in the context of CPRs,[197] and although the right to housing is not explicitly recognized within the Charter, the Commission successfully applied the principle of interconnectedness in a way that compensates for the absence of a core element of ESCRs.

In *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter Africaine des Droits de l'Homme (RADDHO), Collectif des Veuves et Ayants-droits & Association Mauritanienne des Droits de l'Homme v Mauritania* (Merits),[198] the complainants sought to highlight the treatment of the majority Black population of Mauritania by the ruling (Arab) Moors, between 1986 and 1992.[199] At the core of the complaints were allegations of routine enslavement, arbitrary evictions or displacements from their land, which was subsequently appropriated by the government. The complaints also included systematic denials of employment and related rights, as well as arbitrary detentions, death by starvation, exposure to the elements (which also resulted in a number of deaths), and denial of medical care while in detention. After commenting on the obvious violations of various Charter provisions, the Commission went on to elaborate on the issue of slavery. It argued that apart from this being against Article 23(3) of the UDHR under which every employed person is entitled to just and favourable remuneration which is

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[196] See ibid, at 32

[197] Art.5 proclaims the right to human dignity and of legal recognition and prohibits "all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment."

[198] Communications 54/91, 61/91, 98/93, 164/97, and 210/98, in Thirteenth Annual Activity of the African Commission on Human and Peoples' Rights (1999-2000), ACHPR/AHG/222 (XXXVI) Add. 136,158 (2000).

[199] This is also highlighted by Kevin Bales, the UN's leading expert on slavery. (See K Bales, *Disposable People: New Slavery in the Global Economy* (London: University of California Press, 2000).

necessary for the provision of a reasonable standard of living for himself and his family, it also violates Article 7 of the ICESCR. It was thus against Article 5 of the African Charter, as the alleged practices were analogous to slavery, and therefore an exploitation and degradation of man.[200]

Part of the alleged violations in the same case involved the denial of cultural rights to the Black population, including the use of their languages. Although these could not be proved to its satisfaction, the Commission held that this would be against Article 17 (2) and (3) of the Charter.[201] Language, it was explained, "is an integral part of...culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identity."[202]

In *Amnesty International v Zambia*,[203] the respondent government had deported two opposition politicians to neighbouring Malawi, in violation of their family rights under Article 18 of the Charter. The Commission, however, did not restrict itself to this provision, noting that "the government of Zambia has deprived them...of their family and is depriving their families of the men's support, and this constitutes a violation of the dignity of a human being."[204] Thus, it successfully associated the complainants' family rights to their rights to human dignity as proclaimed under Article 5 of the Charter.[205]

An even broader approach was adopted in *Union Inter Africaine des Droits de l'Homme et al v Angola*,[206] in which hundreds of individuals of various West African nationalities had been expelled by the respondent State in 1996. It held that mass expulsion, whether on the basis of nationality, religion,

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[200] ibid, at p.158

[201] Article 17(2) provides thus: "Every individual may freely take part in the cultural life of his community." Subsection 3 states that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

[202] ibid, at p.158

[203] Communication 212/98, Twelfth Annual Activity of the African Commission on Human and Peoples' Rights (1998-99), AHG/215/(XXXV), Annex V (1999).

[204] ibid, at 50

[205] See also *Civil Liberties Organization v Nigeria*, Communication 151/96, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights (1999-2000), Annex V, 71 (2000); and *Constitutional Rights Project v Nigeria*, Communications 143/85 and 150/96 (*ibid*), for a similar opinion.

[206] Communication 159/96, Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights (XXIII), Annex II, 30 (1998).

ethnic, racial or other considerations, constituted "a special violation of human rights," because it threatens such other provisions of the Charter as the rights to property, work, education, and the family. And in *Annette Pagnoule (on Behalf of Abdoulaye Mazou) v. Cameroon* (Merits), the unlawful detention of a magistrate was held to constitute a violation Article 15 of the Charter (i.e., his right to work under satisfactory and equitable conditions).[207]

The above are by no means the only decisions involving ESCRs, and certainly give reasons to believe that many more will be made in the future. What is instructive is that the Commission has proved itself to be a significant (if largely ineffective) force in the fight against human rights violations on the continent of Africa, particularly in its willingness to adopt a broad and integrated approach in its interpretation of the Charter. It has also applied the principle of interconnectedness in a way that compensates for the absence of some of the core aspects of ESCRs within the Charter. However, its work has also been impeded by major obstacles, which are outlined below:

2.5.5. Obstacles Facing the Commission

One of the obstacles encountered by the Commission in its effort to fulfil its mandate has been non-cooperation by States Parties. This was highlighted in two complaints alleging serious and large-sale violations against the government of Malawi.[208] After numerous requests and reminders went unacknowledged, the Commission sent one of its members – a former senior judge in Botswana – on a fact-finding mission. The emissary was simply refused entry into the country. The Commission was thus left with the choice of issuing condemnatory statements. A situation not dissimilar to this arose in *Free Legal Assistance Group et al v Zaire* (1996) (Merits),[209] prompting the Commission to send up to twenty reminders to the government of Zaire, which went unacknowledged over a period of five-and-a-half

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[207] Communication No. 39/90 (adopted by the Commission at its 21st Ordinary Session, April 1997, para. 26), in [1996] 3 Int'l Hum. Rts. Rep. 123

[208] See Communication No. 64/92, *Krischna Achutan (on behalf of Aleke Banda) v. Malawi* (Merits), jointly heard with Communication No. 68/92 and 78/92, *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi* (Merits), reprinted in [1996] 3 Int'l Hum. Rts. Rep. 134

[209] Communication No. 25/89, reprinted in [1997] 4 Int'l Hum. Rts. Rep. 89

years. It is not yet clear whether this represents an on-going problem. What is worth noting, however, is that in the face of such deliberate violations and subsequent obstructions, the Commission was unable to take any punitive action of any kind.

A second obstacle to the Commission's effectiveness arises from an acute lack of basic resources – both financial and human – as highlighted in its interim report to an OAU Council of Ministers in 1998. The report noted the impact that this was having on its ability to function in accordance with its mandate.[210] Indeed the seriousness of the situation was highlighted in a 1998 report issued by it, according to which it was finding it impossible to perform its basic administrative functions, hence, its reliance on financial aid from foreign donors, such as the Swedish International Development Agency.[211] With these in mind, it becomes safe to conclude that the evident reluctance on the part of the region's governments to ratify the Protocol aimed at establishing a human rights court (which might prove more effective in terms of imposing sanctions) cannot be a mere coincidence, especially given the speed with which the treaty establishing the African Union - which is a mere "Constitutive Act" as opposed to a directly enforceable human rights instrument - was ratified.[212]

A third impediment to the Commission's work can be found under Article 59(1) of the Charter, which states: "All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide." Also,

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[210] See Interim Report on the Activities of the African Commission on Human and Peoples' Rights, Council of Ministers: Sixty-Seventh Ordinary Session (Addis Ababa, Ethiopia, 23-27 February 1998), at para.22, CM/2056 (LXVII) (1998)

[211] See Comments of the General Secretariat on the Report of the Board of External Auditors on the Accounts of the Organization for the 1996/97 Financial Year, Council of Ministers: Sixty-Seventh Ordinary Session (Addis Ababa, Ethiopia, 23-27 February 1998), Annex 10, at p.2, CM/2026 (LLXVII) (1998). Remarkably, and as will be illustrated in chapter 11, this tendency to abandon a basic governmental function to foreign aid agencies appears to have become part of the psychology of governance in the region.

[212] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT III, adopted at the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Ouagadougou, Burkina Faso, on 9 June 1998 (reprinted in 6 Int'l Hum. Rts. Rep. 891). Under Art.34 of the Protocol, the Court will come into effect after due ratification by fifteen countries. As of June 2002 - four years after its adoption - only Burkina Faso, Mali, Senegal, Gambia, and Uganda have ratified it. This is in marked contrast with the fact that it took only nine months to establish the African Union, which has been ratified by all the countries on the continent, with the exception of Morocco. (See the Constitutive Act of the African Union, n.151above).

subsection 3 provides that a report by the Commission can only be published "after it has been considered by the Heads of State and Government." Again, the extent to which the region's rulers have impeded the work of the Commission through this process remains unclear. What is worrying, however, is that even the publication of the Commission's findings is subject, effectively, to the veto of the possible violators themselves. What these mean therefore, is that the effectiveness of the Commission in fulfilling even its limited mandate can only be fully determined when judged against these impediments.

Given the highlighted shortcomings within the substantive provisions of the Charter and the outlined obstacles facing the Commission, it becomes safe to conclude that as some of the above commentators have already pointed out, the Charter, as it currently exists, cannot be the basis for the realization of human rights on the continent of Africa. The problem, however, is that even the best instrument in the world, on its own, cannot guarantee the realization of human rights. Much therefore depends on the will of Africa's rulers themselves.

2.5.6. ESCRs and the Municipal Courts

In examining the attitude of the municipal courts to the recognition of ESCRs as *fundamental* rights, it is necessary to begin by acknowledging that this is not well known. To the extent that this can be ascertained, however, it is possible to state that this varies from court to court, and from country to country. In *Archbishop Olubunmi Okogie & Seven Others v The Attorney General of Lagos State*,[213] for example, the action was necessitated by a decision by the provincial government of Lagos State (Nigeria) to abolish private elementary education. The plaintiffs challenged the decision, arguing that it violated an old Constitutional provision guaranteeing freedom of expression, which, they further argued, "included the freedom to hold opinions and to receive and impart ideas and information without interference;" as well as the right of parents to "bring up their children...and to educate them in the best institutions that they can think of..." Although the court granted their appeal, it also stated *obiter*, that

[213] [1981] 1Nig. Const. L. Rep. 218.

ESCRs were "fundamental objectives and directive principles of State policy" and were thus non-justiciable.

The Ghana Supreme Court was similarly cautious when confronted with: In *New Patriotic Party v The Attorney General*,[214] the Court held that the courts were "mandated to apply them in their interpretative duty when [they] are read...in conjunction with other enforceable parts of the constitution." In other words, ESCRs were not enforceable on their own, as rights. A similar view was taken by the Ugandan Constitutional Court in *Salvatori Abuki & Obuga v Attorney General.*[215]

Neither did the South African Constitutional Court offer much help to a terminally ill patient who had been denied treatment in a State hospital: In *Soobramoney v Minister of Health (Kwa Zulu-Natal)*,[216] the appellant was a 41-year-old unemployed diabetic who also suffered from an ischaemic heart condition and cerebro-vascular disease which resulted in a stroke in 1996. This in turn caused his kidneys to fail. He thus needed regular renal dialysis to stay alive. However, because the facilities for such treatment in the public sector were limited, it had become a matter of policy that automatic treatment would only be available to patients whose conditions were of an *acute* nature, as opposed to being *chronic* and irreversible as was the case with the appellant. Put simply, the inadequacy of resources meant that the appellant's right could not be guaranteed in the public sector. And since he could not afford private treatment, his only hope lay in the decision of the court.

In his judgement, the President of the court stated, *inter alia*:

> The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state...But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security...The state has to manage its limited resources in order to address all these claims. There will be times when this

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[214] [1996-1997] Sup. Ct. of Ghana L. R. 728, at 745, per Bamford Addo (JSC).
[215] [1998] 3 Butterworths Hum. Rts. Cases 199
[216] 4 B.H.R.C 308 (1999) 50 B.M.L.R.224, per P Chaskalson.

> requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals...[217]

In *Government of the Republic of South Africa v Grootboom and Others*[218] however, the same court recognized the right of a group of desperately poor evictees to housing, noting that this, and the rights to food and clothing are essential to human dignity. The decision of a lower court in that country also offers some hope: In *B v Minister of Correctional Services*,[219] the Cape Provincial Division of the South African High Court was asked to determine the level of healthcare that prisoners who were suffering from HIV/AIDS were entitled to, considering the problem of resource constraints. The court held that although budgetary constraints were a relevant factor in determining such matters, prisoners were nevertheless constitutionally entitled to a higher level of care than ordinary citizens. Given, however, that this is a decision of a lower court, it is doubtful whether it sets any useful precedent.

In Zimbabwe, the Supreme Court was faced with an issue of flagrant discrimination against women in *Venia Magaya v Nakayi Shonhiwa Magaya*.[220] The question to be determined was whether a woman was entitled to inherit her father's estate if he died intestate. The court was of the view that in traditional African society, the patriarch (or senior man) was responsible for controlling the lives of women and junior members of the family. The judge went on to assert thus: "The woman's status is therefore basically the same as that of any junior male in the family."[221] On the question of the impact of international legal instruments prohibiting discrimination of any kind,[222] the court took the view that domestic laws which discriminate against women were "exceptions" to such instruments.[223] It however cited the Preamble to, and Article 29(1), of the African Charter, which deviate from internationally

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[217] ibid
[218] 2000 (11) BCLR 1169 (CC)
[219] [1997] 6 BCLR 787, at ss.40-53
[220] Judgement No. S.C.210/98/Civil Appeal No.635/92 of the Supreme Court of Zimbabwe (unreported).
[221] ibid, at p.10
[222] Art.18(3) of the Charter, for example, provides thus: "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Also, Art.2 which states: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Further, Art.3(1) and (2) provide thus: "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law."
[223] ibid, at p.5

agreed norms,[224] thus highlighting the dangers posed by cultural relativism to the realization of human rights.

In the Botswana case, *Attorney General v Unity Dow*,[225] however, the court adopted a position that should serve as an example in terms of the irreconcilability of supposed traditional norms, with the modern age of rights. Relying on the above Charter provisions and the country's constitutional Bill of Rights, the court held that the victim's citizen rights were of greater importance to supposed traditional norms.

2.6. Conclusion

This chapter has been presented in three main sections: The first began by highlighting the danger inherent in the maintenance, by both the international community and in human rights advocacy, of a wholly artificial distinction between the two categories of human rights. In an attempt to expose the myths often circulated regarding the realizability of ESCRs, it went on to examine their very nature as proclaimed under the ICESCR in the second section. The central theme in this regard was that contrary to common assumptions, their realizability does not always depend on the availability of resources – and at any rate, not to any greater extent than many aspects of CPRs. Indeed, it could be added that even if ESCRs were more resource-dependent than CPRs, a failure to guarantee them inevitably undermines the ability to realize, at the very least, the core aspects of CPRs.

The third section examined the main regional human rights instrument in SSA – the African Charter – as well as the attitude of the municipal courts towards the realization of ESCRs, and noted that their treatment by the courts varied from country to country, and indeed, from court to court. In the context of the Charter, however, it was noted, firstly, that in spite of its enthusiastic preambular commitment to realizing ESCRs, its substantive provisions have made no reference to the majority of their core elements, focusing instead, on the escapist notions of "duties" and "the virtues...and the values of

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[224] ibid, at p.19. (Paragraph 5 of the Charter's Preamble urges parties to "[take] into consideration the virtues of their historical tradition and the values of African civilization..." while Art. 29(1) imposes a duty on individuals "[t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family...")).

[225] [1991] C.A. Civ. App. No.4/91

African civilization." Secondly, it was noted that in spite this deficiency, and notwithstanding severe resource constraints, the African Commission has been remarkable in its willingness to adopt a broad approach to its interpretive mandate in a manner which compensates for the substantive omissions. Regrettably, the Commission has no enforcement powers. Moreover, even if the proposed human rights court were to come into existence, there is no guarantee that even its enforcement powers would make a qualitative difference. Indeed, as aptly asserted by some commentators, looking to the courts, and one might add, international tribunals such as the African Commission "for the first and last word" in the realization process can be fruitless and even dangerous.[226] What these mean is that the realization of ESCRs (and indeed of both categories of human rights) depends more on the political will of the region's rulers themselves, than on any legal instrument or institution. Ironically, by incorporating the right to development into the Charter, African rulers have unwittingly imposed upon themselves a duty they have so far failed to take seriously. The next chapter examines, amongst other related issues, the nature of that responsibility.

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[226] See C Scott and P Macklem, "Constitutional Ropes of Sand Or Justiciable Guarantees? Social Rights in A New South African Constitution" (1992) *141 U. Pa. L. Rev. 1*, at pp.6-7

Chapter 3

ECONOMIC DEVELOPMENT: A HUMAN RIGHTS APPROACH [1]

3.1. Introduction

In chapter 2, the controversies surrounding ESCRs *as human rights* were discussed. In addition to highlighting the artificiality behind the traditional attempt to distinguish them from CPRs, the issues surrounding their realizability were also examined. In attempting to relate these issues to sub-Saharan Africa, it became clear that although the African Charter is silent in regard to certain core elements of ESCRs, it gives explicit recognition to the "new" or "third generation" of human rights, including the right to development. While the subject of economic development is inherently complex, it is nevertheless possible to assert that its central question is simply one of how a country's scarce resources can best be utilized in a way that meets, at the very least, the basic needs of its citizens (which, incidentally are the same as the core elements of ESCRs), as well as guaranteeing their fundamental freedoms, assuming that there is universal agreement regarding their equal importance. There are, of course, irreconcilable views on how this simple aim can be achieved; hence the existence of what might be called ideological trenches to which the various commentators belong. In 1986, the UN General Assembly adopted a Declaration on the Right to Development, effectively establishing the framework for a "human rights approach to development."[2]

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[1] In human rights discourse, various terms are commonly used interchangeably. Thus, for examples, the Office of the UN High Commissioner for Human Rights employs such terms as "rights in development," "development from a human rights perspective," as well as "rights-based approach to development" on its website. Moreover, it also explains that these are in consonance with those also in use by such other bodies as the ILO, UNICEF, and the UNDP (See Office of the UN High Commissioner for Human Rights, "Human Rights in Development: Rights-Based Approaches, available at http://www.unhchr.ch/development/approaches-06.html)

[2] See Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 U.N. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/53 (1986). The Resolution declares thus: "The achievement of the right to development requires a concerted international and national effort to eliminate economic deprivation, hunger and disease in all parts of the world without discrimination in accordance with the Declaration and the Programme of Action on the Establishment of a New International Economic Order, the International Development Strategy for the Third United Nations Development Decade and the Charter of Economic Rights and Duties of States. To this end, international co-operation should aim at the maintenance of stable and sustained economic growth with simultaneous action to increase concessional assistance to developing countries, build world food security, resolve the debt burden, eliminate trade barriers, promote monetary stability and enhance scientific and

This chapter aims to build upon this foundation, first, by addressing some of the doubts often expressed regarding the validity of the Declaration itself as a legal instrument. A further aim is to examine the contents of the Declaration, and to highlight their implications for African development (and indeed, for the developing world generally). In so doing, it is appreciated that this might be seen as a deviation from the set paradigm of the International Bill of Human Rights (IBHR). However, as will be shown later, the right to development represents a reaffirmation of the IBHR in every respect; thus its examination in no way constitutes a digression. At any rate, it is believed that any attempt to examine the legal aspects of economic development without reference to such an important instrument would simply be unjustifiable.

3.2. The Right to Development in Context

Contemporary human rights discourse recognizes the right to development as a core element of an emerging set of "third generation of human rights" among which are the right to a clean environment[3] and the right to peace.[4] Available literature points to two individuals who are widely credited with their formulation. While the idea in general is believed to have been first enunciated by the former legal adviser to UNESCO and French jurist, Karel Vasak,[5] the idea of a right to development is attributed to Senegalese jurist Keba M'Baye.[6] Under Vasak's direction, a conference was convened by the UNESCO in 1978 as part of its response to a Resolution by the Commission on Human Rights proclaiming a right

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technological co-operation." (See United Nations General Assembly, Right to Development, A/RES/41/133, 97th Plenary Meeting, 4 December 1986). The contents of the Declaration are spelt out later in this chapter.

[3] The right to a clean environment first gained recognition within the UN system at the UN Conference on the Human Environment, held in June 1972, in which it was acknowledged that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being..." (See Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972, at p.4). Its main sources now include: The Rio Declaration on Environment and Development, UN Doc. A/Conf.151/5/Rev.1(1992); Agenda 21, UN Doc. A.Conf.151/26/Rev.1 (1992); and the Framework Convention on Climate Change, UN Doc.A/AC.237/18(Part 2)/Add.1 (1992) (entered into force 21 March 1994).

[4] In addition to the Preamble of the UN Charter, under which nations affirm their "[determination] to save succeeding generations from the scourge of war..," the UN also adopted the Declaration on the Right of Peoples to Peace in 1984 (See UN General Assembly Res. 39/11, Annex, 39 UN GAOR Supp. (No.51) at 22, UN Doc. A/39/51 (1984) which provides: "The General Assembly, [r]ecognizing that the maintenance of a peaceful life for peoples is the sacred duty of each State, (1) [s]olemnly proclaims that the people of our planet have a sacred right to peace..."

[5] See P Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) *29 Neth. Int'l L. Rev. 307*, at p.309 et seq.

[6] See for example, W Mansell and J Scott, "Why Bother About a Right to Development?"(1994) *Journal of Law & Society*, vol.21, no.2, at p.172. See also J Swanson, "The Emergence of New Rights in The African Charter" (1991) *12 N.Y.L.Sch. J. Int'l &Comp. L.307*, at 317. See further, K M'Baye, "Le droit au développement comme un droit de l'homme." 5 *Revue des droits de l'homme,* 503, 522 (1972).

to development, where the organization's Deputy Assistant Director-General drew the attention of the delegates to the notion of "solidarity rights," including the rights to peace and development.[7] It was also at this forum that the assembled experts noted the existence of different "generations" of rights – with the first and second generations defined in terms of the perceived existence of "a degree of conflict" among different societal groups, while the third was based on a perception of solidarity among the peoples of the world.[8]

Evidently influenced by his native French Revolutionary ideals of *liberté, égalité et fraternité*, Vasak argued, in his inaugural lecture to the International Institute of Human Rights in 1979, that the first generation consists of "attributive rights" (or rights to *freedom*) which can be invoked by the individual against the State, and which create an expectation of non-interference on the latter's part.[9] As noted by Stephen Marks, rights of this nature were mainly of interest to the middle classes, whose concern for their political and individual freedoms led to the French and American Revolutions in the 18th Century.[10] The second generation, it is believed, were conceived essentially as socialist ideals, and were a reaction to the economic and social exploitations which were prevalent, particularly at the beginning of the 1900s.[11] According to Vasak, these were "rights of credit" against the State, national, and international institutions, which, to be realized, must be claimed against the State. These he called *equality* rights, because they required State intervention, with the aim of ameliorating the impacts of economic and social inequalities that exist in society. The third generation, he further contended, were *solidarity* rights in the sense that they are "born of the obvious brotherhood of men and of their indispensable solidarity; rights which would unite men in a finite world."[12] They were also "new" because their focus is on infusing a human element into the notion of human rights. They may thus be both

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[7] See Final Report of UNESCO Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order, Paris, 19-23 June 1978, UNESCO Doc. SS- 78/CONF.630/12, at para.6

[8] Per Alston, "A Third Generation of Solidarity Rights," n.5 above, at p.310

[9] K Vasak, "For the Third Generation of Human Rights: The Rights of Solidarity," presented at the Inaugural Lecture of the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2-27 July 1979, at paras.9-10

[10] See S P Marks "Emerging Human Rights: A New Generation for the 1980s?" (1981) *33 Rutgers L. Rev. 441*, at p.438

[11] See L B Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) *32 Am. U. L. Rev.1*, at p.33

[12] See K Vasak, "For the Third Generation of Human Rights: The Rights of Solidarity" n.9 above.

invoked against, and demanded of, the State; and are only realizable "through the concerted effort of all the actors on the social scene."[13]

The idea of a third generation of human rights is controversial because as pointed out by Marks, it suggests that the first two generations are outdated.[14] Indeed, according to Alston, similar concerns were expressed by some NGOs at a conference held in Mexico City in 1980.[15] Specifically, these were articulated in these terms:

> Why speak of 'new' rights when the 'old' ones are not properly respected? Is there not a danger that these 'new' rights will supplant the 'old'? Might it not be true that the more rights introduced the less weight they carry? Does not the term 'third generation' imply that the 'first generation' rights have become dated?[16]

The idea of "generations," although formulated with the best of intentions, thus provides intellectual impetus to those who have always sought to maintain an artificial hierarchy between human rights. An irony therefore arises in the sense that although some of these claims have received the explicit recognition of the General Assembly, such categorizations place them in direct conflict with other UN Declarations proclaiming the indivisibility of human rights, examples being the Teheran and Vienna Declarations.[17] Indeed, as pointed out by Alston, such an approach "is not only directly at odds with the United Nations' insistence that human rights are indivisible and interdependent but [sic] tends to ossify outdated or overdrawn distinctions such as those between 'individual' and 'collective' rights, 'positive' and 'negative' rights and 'costless' and 'costly' rights."[18] These notwithstanding, the right to development

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[13] ibid

[14] See S P Marks, "Emerging Human Rights," n.10 above, at p.451

[15] See P Alston, "A Third Generation of Solidarity Rights" n.8 above, at pp.311-312

[16] See Final Report of a Colloquium on the New Human Rights, Mexico City, 12-15 August 1980, "The Rights of Solidarity: An Attempt at Conceptual Analysis," (1980) UNESCO Doc. SS-80/CONF.806/6, at para.5.

[17] See the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, UN Sales No.E.68.XIV.2, Art.13 of which states: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." See also United Nations General Assembly, World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, adopted 25 June 1993, A/CONF.157/23, of 12 July 1993 (adopted 25 June 1993), para.5 of which declares: "All human rights are universal, indivisible and interrelated..."

[18] See P Alston, "A Third Generation of Solidarity Rights" n.15 above, at p.316

(as well as the named aspects of the "third generation" of human rights) retains its inherent validity as a *human* right, as subsequent analysis will demonstrate.

3.3. An Era of Proliferation

The foregoing formulations aside, the last few decades have witnessed what Upendra Baxi persuasively describes as "an overproduction of human rights norms."[19] These formulations are numerous, hence, only a snapshot is considered necessary: They include: the right to globalization,[20] the right to democracy,[21] the right of the child to a clean environment,[22] the right to be different,[23] the human right to sexual orientation,[24] the right to property,[25] the right to communicate, the right to share in the common heritage of mankind, the human right to tourism,[26] the right to quality of life, the right to leisure, the right to progress,[27] the right to receive humanitarian assistance,[28] and the right to be free to experiment with alternative ways of life.[29] Even without being privy to Vasak's thoughts, it is possible to imagine his sense of unease (or even outrage) at some of these formulations, particularly given that this

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[19] See U Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002), at p.67

[20] See M Pendleton, "Technology, the Law, and a Changing World in the Twenty-First Century : A New Human Right – The Right to Globalization" (1999) *22 Fordham Int'l L.J. 2052.*, at p.2079, who contends that there is "an individual human right to globalization."

[21] See The Universal Declaration on Democracy, adopted by the Inter-Parliamentary Union in Cairo, Egypt, on 16 December 1997. See also T M Franck, "The Emerging Right to Democratic Governance" (1992) *86 Am. J. Int'l L. 46.* Indeed, one of the aims of the Vienna World Conference of 1993 was to consider the relationship between development, democracy, and human rights (See Preamble to the Vienna Declaration, n.17 above)

[22] This being the subject of a workshop in 1997 at the Queen Mary and Westfield College, University of London. For its contents, see M Fitzmaurice, "The Right of the Child to a Clean Environment" (1999) *23 S. Ill. U.L.J. 611.*

[23] See P Alston, "A Third Generation of Human Rights," n.18 above, at p.313

[24] See U Baxi, *The Future of Human Rights*, n.19 above, at p.76, who also suggests that the failed Multilateral Agreement on Investment (MAI) was an attempt to formulate a new set of rights for "global capital."

[25] See, for example, Art.14 of the African Charter which provides thus: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." Art.17 of the UDHR also guarantees the right to property.

[26] See U Baxi, *The Future of Human Rights*, n.24 above, at p.67. According to the World Tourism Organization, "tourism has become increasingly a basic need, a social necessity, a human right." (See Press Release, ECOSOC/1977 of 18 July 1978, UN Office, Geneva).

[27] These three were alluded to at the 1982 session of the UN Commission on Human Rights, by the French representative. (See Doc E/CN.4/1982/SR.32, of 23 February 1982).

[28] According to Alston, the right to humanitarian assistance was first broached at the first international conference on *Droite et Morale Humanitaire*, held in Paris on 28 January, 1987 as "a right of the human person, correlative to the duty of solidarity imposed on all humanity..." See *Reconnaissance du Devoir D'Assistance Humanitaire et du Droit a cette Assistance, in Le Devoir D'Ingerence* 291- 292, at para. (h), 1987. (See P Alston, "Making Space for New Human Rights: The Case of the Right to Development," (1988) *Harvard Human Rights Yearbook*, vol. 1, at pp.1-38

[29] Per J Galtung and A Wirak, "On the Relationship Between Human Rights and Human Needs," UNESCO Doc. SS-78/CONF. 630/4 (1978), at p.48

"overproduction" of human rights does not appear to be confined to the fringes of academic discourse. Ernst-Ulrich Petersmann, for example, believes that "UN human rights law must overcome its long-standing neglect of economic liberties, property rights and of competition law as a necessary complement of human rights."[30] It is now considered necessary to examine the pros and cons of proliferation.

3.3.1. The Case for Proliferation

The perceived need for a new set of human rights finds expression in the works of many commentators. Imre Szabo, for example, argues that because citizens' and human rights are products of positive law and its development (as determined by the development of society), human rights necessarily become more numerous as society progresses and takes in new spheres of social life and human existence.[31] Szabo may have only intended to reject the natural law theory as the source of human rights; his thesis, however, presents a case for proliferation.

Other commentators have also made a strong case for a dynamic approach to human rights advocacy (though not necessarily for proliferation). Thus, Richard Bilder once asserted:

> As our societies' technology, problems, attitudes, and expectations change, there is bound to be a corresponding change in the claims we view as basic...Moreover, there is perhaps something to be said for an increase...in the number and types of broadly humanitarian claims we are prepared to call human rights...[32]

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[30] See E-U Petersmann, "Human Rights and International Economic Law in the 21st Century: A Need to Clarify their Interrelationships" (2001) *J. Int'l. Econ. L*, at pp.3-4. For an excellent critique of this position, see P Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann," (2002) *EJIL*, vol.13, no.4, 815-844. Upendra Baxi has also argued: "This much is...compellingly clear: the emergent collective human rights of global capital present a formidable challenge to the paradigm inaugurated by the UDHR." (See U Baxi, *The Future of Human Rights*, n.26 above, at p.70).

[31] See I Szabo, "Historical Foundations of Human Rights," in K Vasak and P Alston (eds.), *The International Dimensions of Human Rights* vol.1, (Connecticut: Greenwood Press, 1982), at p.19.

[32] See R Bilder, "Rethinking International Human Rights: Some Basic Questions" (1969) *1 Wis. L. Rev.171*, at p.175.

Alston has also argued that their conceptualization "epitomizes the dynamism of the human rights tradition by seeking to respond, by means of the proclamation of new human rights, to the most pressing issues currently on the agenda of the international community."[33] It would, he further contends, "be both shortsighted and counter-productive to underestimate the importance of adopting a dynamic approach to the development of human rights concepts,"[34] adding: "the vitality and enduring significance of the human rights tradition depend in large measure on the extent to which it can respond to *new needs* and can accommodate the concern with which the majority of the peoples of the world are pre-occupied"[35][emphasis added].

For Theodoor van Boven the necessity of a dynamic approach is based on the belief that human rights are a product of history and human civilization; hence, he contends, they are subject to evolution and change. This evolutionary trend, he further argues, began as a political concept, i.e., respect by the State for a sphere of freedom of the human person in the form of civil rights, such as the right to liberty, the security, the physical and spiritual integrity of the human person. Then followed "political rights," i.e., rights which enable man to participate in the structuring of his society; followed by economic, social and cultural rights which are only realizable through the medium of the State.[36]

3.3.2. The Dangers of Proliferation

It is important to note, at the outset, that the case against the proliferation of rights is not premised upon an outright rejection of a dynamic approach to human rights advocacy. Indeed, it is believed that such an approach has the inherent benefit of continually testing the established paradigm of the IBHR, and for that matter, other recognized human rights norms. However, it is also believed that gratuitous human rights formulations inexorably undermine the cause of human rights advocacy in ways that might not

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[33] See P Alston, "A Third Generation of Solidarity Rights," n.23 above, at p.314
[34] ibid
[35] ibid
[36] See T C van Boven, "Distinguishing Criteria of Human Rights" in K Vasak and P Alston, (eds.), *The International Dimension of Human Rights*, n.31 above, at p.49).

have been anticipated. One of the main concerns is the danger of what Alston calls "obfuscation."[37] In very simple terms, this refers to the very real possibility that the distinction might become blurred between valid conceptualizations of human rights (such as the right to development), and gratuitous formulations (such as the "rights" to globalization, or to receive humanitarian assistance). Allied to the danger of obfuscation is the risk of subjecting the cause of human rights advocacy to outright derision, as evidenced by Jack Donnelly's widely-cited thesis "In Search of the Unicorn."[38]

Proliferation also poses an even greater danger, particularly for the victims of human rights violations. If nothing else, it raises unrealistic expectations on their part, and, in the words of Bilder, "[moves] the entire human rights idea to the level of utopian aspiration, to which governments need feel little present obligation..."[39] What these all mean is that human rights advocates must resist the tendency to assume that a new set of human needs has emerged since the adoption of the IBHR, or that its framework has become inadequate for addressing them. As will be shown later, what distinguishes the right to development from many other formulations is the ease with which it is reconcilable with the IBHR.

3.4. The Right to Development as a Human Right

One of the defining characteristics of the IBHR is that because it is a product of international treaties and custom, its validity as a source of law is unchallengeable. The same cannot be said, *prima facie*, of the right to development, or indeed, of the other non-nebulous formulations, even though they have received confirmation as such within the international human rights system. The task of determining their validity is not made easier by controversy surrounding the General Assembly as a law-making institution. This section aims to assess the concerns expressed in regard to the validity of the right to

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[37] See P Alston, "A Third Generation of Solidarity Rights," n.33 above.

[38] Donnelly begins his thesis thus: "A philosopher is a person who goes into a dark room on a moonless night to look for a nonexistent black cat. A theologian comes out claiming to have found the cat. A human rights lawyer, after such an on-site visit, sends a communication to the Commission on Human Rights; and a member of the Commission leaves the room drafting a resolution on the treatment of black cats." (See J Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) *15 Cal. W. Int'l L.J.473*)).

[39] See R Bilder, "Rethinking International Human Rights" n.32 above, at pp.175-176

development. It will also become necessary to examine, briefly, the role of the General Assembly as a law-making body.

3.4.1. Concerns and Opposition to the Right to Development

Although it is widely accepted that the right to development has received the most rigorous scrutiny of the "third generation" of human rights,[40] it has, paradoxically, generated the highest level of controversy, and in some cases, outright opposition regarding its validity as a human right.[41] For Antonio Cassese, for example, the idea behind it is simply "misguided," although he concedes that the considerable efforts already invested by developing and [former] Socialist countries "are like avalanches: they cannot be stopped, and an attempt to divert their course might be counter-productive."[42] Georges Abi-Saab, on his part, appears to have chosen the path of caution.[43] At the governmental level, the position of the United States representative to the Working Group of Governmental Experts on the Right to Development was even more dismissive. Having cast the only vote against the Declaration and withdrawn from the Group, the following explanations, among others, were given:

- that it was premature to pursue the matter further before governments had been given adequate time for reflection;
- that further studies or other specific measures would not constitute a productive use of the UN's limited resources;
- that the subjects of economics, international trade or arms control were beyond the mandate and competence of the Working Group;

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[40] See for example, A Sengupta, "On The Theory and Practice of the Right to Development," (2002), *Hum. Rts. Q.*, vol. 24, no.4, at pp.839-840 who notes thus: "Throughout the 1970s, the international community repeatedly examined and debated the different aspects of the right to development. The Commission on Human Rights' Resolution 4 (XXXV) of 2 March 1979 expressly recognized [it]as a human right and asked the Secretary-General to study the conditions required for the effective enjoyment of the right by all peoples and individuals. Subsequently, various reports examining the right to development, and extensive discussions in the Commission and the General Assembly, led to the formulation of the draft declaration on the right to development, which was formally adopted by the General Assembly in December 1986." See also, P Alston, "Making Space for New Human Rights," n.28 above, at p.39. See further, I Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1999), at p.583.

[41] See S P Marks, "Emerging Human Rights," n.14 above, at 451.

[42] See A Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at pp.370-371

[43] His position is that the right to development merely synthesizes the disparate aspects of international law, which have previously been artificially categorized either under the rubric of human rights, or of economic development; thus stopping short of recognizing it as a human right. He further questions the basis for regarding it as an individual, as opposed to a group right. (See G Abi-Saab, "The Legal Formulation of a Right to Development," in R J Dupuy (ed.), *The Right to Development at the International Level* (The Hague: Kluwer Law International, 1980), at pp.159, 163 and 164.

- that some of the loudest advocates of the right to development "denied their citizens the opportunity to develop themselves in every possible way";
- that it was "more important to look at the tremendous contributions made by... the United States to the actual development of developing countries than to listen to rhetoric...from countries that had contributed nothing positive to assist developing nations"; and
- that efforts at codifying the right were "pointless and should not be undertaken.[44]

The Clinton Administration, however, appeared to have moved from this position by endorsing, along with 170 other countries, the 1993 Vienna Declaration, paragraph 10 of which explicitly recognizes the right to development as a human right.[45]

Even Jack Donnelly, whose contribution to the philosophical dimensions of the human rights discourse has been considerable and persuasive,[46] attacks the very idea behind its conceptualization at great length, although it is not the intention here to address all of the points raised.[47] It is however hard to ignore the fact that apart from anything else, his article was published in 1985 – one year before the Declaration on the Right to Development was adopted by the General Assembly. Thus, in a sense, it is possible to dismiss his entire thesis simply as one that was as ill-timed as it was flawed, given that any objective commentator would have waited to study the contents of the Declaration before passing any judgement on it. Nevertheless, some of the assumptions that are evident in Donnelly's thesis are potentially persuasive, coming, as they do, from such an eminent commentator, and are thus capable of fatally undermining the case against the Declaration. Moreover, given that they encapsulate the views expressed by other sceptics, it becomes necessary to examine some of them in turn.

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[44] See "Statement by the Representative of the United States of America," in *Report of the Working Group of Governmental Experts on the Right to Development*, 43 U.N. ESCOR Annex II (Prov. Agenda Item 8), U.N. Doc. E/CN.4/1987/10 (1987), at pp.11-12

[45] See annex II to the Vienna Declaration, n.21 above, which contains a list of all the countries concerned. Judging, however, from the attitude of the so-called neo-Conservative attitude of the Bush Administration (with its evident contempt for multilateral agreements) it is safe to assume that Clinton's position was merely a momentary concession.

[46] See, for examples: J Donnelly, *International Human Rights: Dilemmas in World Politics* (Colorado and Oxford: Westview Press, 1993); J Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 1993); and J Donnelly, *International Human Rights* (Boulder, Colorado: Westview Press, 1993).

[47] For an excellent critique on this, see W M Masell and J Scott, "Why Bother About a Right to Development?" n.6 above. See also, P Alston, "Making Space for New Human Rights," above, n.40 above, at pp. 1-38.

3.4.1.1. A Right of Dubious Origins?

One of Donnelly's arguments against the right to development is that since its initial enunciation by Keba M'baye, who, as Chairman of the Commission on Human Rights in 1977 was instrumental to securing its first formal recognition "with almost the most cursory discussion," there has been no substantial scholarly discussion of the subject. Its entry into the UN human rights arena, he claims, was "peculiarly brusque..."[48] Yet Philip Alston, a veteran of the UN human rights system, and known advocate of the need for an "*appellation controlee*" vis-à-vis the new conceptions of human rights[49] asserted thus in 1988: "Of all the various new rights...the right to development has attracted the greatest scholarly and diplomatic attention to date."[50] Moreover, as Donnelly in fact acknowledges, the right to development has been the subject of numerous reports by various UN bodies;[51] as well as being a product of a General Assembly Resolution. Indeed, in addition to the numerous stages of scrutiny already cited, there have been numerous other deliberations.[52]

Aside from the foregoing, the Declaration has been reaffirmed at various UN fora as an inalienable human right. Examples include: the World Conference on Human Rights held between the 14th and 25th of June 1993, resulting in the Vienna Declaration and Programme of Action;[53] the 1994

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[48] See J Donnelly, "In Search of the Unicorn," n.38 above, at pp.474-475

[49] See P Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) *78 Am. J. Int'l L. 607*, at p.618-619.

[50] See P Alston, "Making Space for New Human Rights," n.47 above, at p.39

[51] See n.48 above, at p.476. The examples given are: the UN Commission on Human Rights Resolution 4 (XXXIII) and 5 (XXXV), and Report on the Thirty-Third Session, 62 U.N. ESCOR Supp. (No.6), U.N. Doc. E/5927 (1978); The Secretary-General's Report titled "The International Dimensions of the Right to Development as a Right in Relation with Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Needs," U.N. Doc. E/CN.4/1334 (1979). Such other General Assembly Resolutions as G.A. Res. 174, 35 U.N.GAOR (1980); G.A. Res. 133, 36 U.N. GAOR (1981); G.A. Res. 199, 37 U.N. GAOR (1982); G.A. Res. 124, 38 U.N. GAOR (1983); and the draft resolution adopted by the Third Committee on November 30, 1984 (U.N. Doc. A/C3/39/L36) are all dismissed as "an annual ritual in the Assembly."

[52] For the latest of these, see United Nations Economic and Social Council, Commission on Human Rights, The Right to Development: Report of the Open-Ended Working Group on the Right to Development, Third Session (Geneva, 25 February-8 March 2002), E/CN.4/2002/28/Rev.1, of 11April 2002. The 2003 session was held on the date indicated (See United Nations High Commissioner for Human Rights, Opening Statement of the High Commissioner for Human Rights to the Fourth Session of the Open-Ended Working Group On the Right to Development, 7 February 2003, at http://www.unhchr.ch)

[53] See the Vienna Declaration and Programme of Action, n.45 above, at para.10 which states: "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights." It is also

International Conference on Population and Development;[54] the 1995 World Summit for Social Development;[55] the Platform for Action at the 1995 Fourth World Conference on Women;[56] the 1996 World Food Summit;[57] as well as the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.[58]

3.4.1.2. A Collective or Human Right?

Donnelly also asserts that the very idea behind the Declaration is "an especially dangerous one," because as a "collective human right," "the most plausible 'person' to exercise [it] is, unfortunately, the state."[59] His argument is that if human rights derive from the inherent dignity of the human person, "collective" human rights are only logically possible if social membership is seen as an inherent part of human personality, with individual rights having been subsumed into collective rights. This, he asserts,

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worth noting that the Declaration was adopted by 171 countries, at a conference that was, according to the UN High Commissioner for Human Rights, "marked by an unprecedented degree of participation." (See Office of the Commissioner for Human Rights, World Conference on Human Right, 14-25 June 1993, Vienna, Austria, at www.unhchr.ch/html/menu5/wchr.htm)

[54] See United Nations Population Information Network, UN Population Division, Department of Economic and Social Affairs Report of the International Conference on Population and Development (Cairo, 5-13 September 1994), UN Doc. A/CONF.171/1, of 18 October 1994, the third Principle of which declares: "The right to development is a universal and inalienable right and an integral part of fundamental human rights, and the human person is the central subject of development."

[55] See United Nations, World Summit for Social Development (Copenhagen, Denmark, 6-12 March 1995), UN Doc. A/CONF.166/9, of 19 April 1995, Commitment 1(n) of which reaffirms the right to development as an inalienable human right.

[56] See United Nations, Fourth World Conference on Women, Report of the Fourth World Conference on Women (Beijing, China, 4-15 September 1995), UN Doc. A/CONF.177/20, of 17 October 1995. Art.213 of the Platform for Action of the Declaration emphasizes the indivisibility of all human rights, including the right to development.

[57] FAO, World Food Summit, (Rome, 10-13 June 2002), Declaration of the World Food Summit: Five Years Later, at para.5, where heads of state and government "reaffirm the importance of strengthening the respect of all human rights and fundamental freedoms including the right to development..." (information available at http://www.fao.org/DOCREP/MEETING/005/Y7106E/Y7106E09.htm

[58] See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, 31 August-7 September 2001, available at http://www.unhchr.ch/html/racism/Durban.htm. Art.78 of the Declaration recognizes the right to development as "a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance..."

[59] See J Donnelly, "In Search of the Unicorn," n.51 above, at 498-499. This is often discussed in terms of a supposed lack of "subject" *vis-à-vis* the right to development. (See B Rajagopal, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights" (1993) *11 B.U. Int'l L.J. 81*, at p.97, although there is no suggestion that the author necessarily holds that view.

would be problematic because of the inalienable nature of human rights, which are held by individuals against society.[60]

First, this analysis presupposes that the rights of individuals are always in conflict with those of society. While this is in fact the case under dictatorial regimes (where the people's interests are often at odds with those of "the State"),[61] this ignores the fact that the Declaration itself explicitly envisages only a democratic dispensation,[62] the very idea of which implies, in a direct sense, that the rights of individuals remain sacrosanct at all times, except where the State can establish a clear and compelling case for infringing them.[63]

Secondly, any attack on the idea of "collective rights" directly challenges one of the cornerstones of the IBHR itself, given that the two Covenants both have as their first substantive provisions, the right to self-determination.[64] It is necessary to point out that Donnelly is not alone in preoccupying himself with this age-old but redundant interpretive conundrum. The international human rights discourse is replete with attempts to draw a distinction between "individual" and "collective" rights.[65] Whatever the merits of these arguments might be, they fail to take into account the fact that at worst, this only poses a difficulty no greater than the age-old hermeneutical question – the question in this case being whether society has an identity distinctly separate from the individuals that exist within it. Thus, all that can be said in this

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[60] ibid, at p.497. This clearly ignores the fact that Arts. 1(1) and 2 (1) of the Declaration explicitly recognize the individual as its subject.

[61] See M Sakah "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects (1993) *15 Hum. Rts. Q. 485*, at p.493. See also, H M Scoble, "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter," in C E Welch Jr. and R I Meltzer (eds.), *Human Rights and Development in Africa* (State University of New York Press, 1984), at p.199.

[62] See for example, Art.3(2) of the Declaration on the Right to Development, n.2 above.

[63] Indeed, under Art.4 of the ICCPR, the envisaged circumstances are times of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed..." and at any rate, such infringements must be "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law..."

[64] See Arts.1 of both the ICCPR and the ICESCR. Indeed, Donnelly acknowledges the evident similarity between the Declaration and the right to self-determination (See J Donnelly, "In Search of the Unicorn," n.60 above, at p.483

[65] See for example, G Abi-Saab, "The Legal Formulation of the Right to Development," n.43 above, at p.163-164. See also M J Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (The Hague: Kluwer Academic Publishers, 1987), at pp.19-48 (although he was commenting primarily in the context of the right to self-determination). See further, H G Espiell, "The Right of Development as a Human Right," (1981) *16 Texas Int'l L.J. 189*, at p.196 who notes that "it is correct to state that the right of development is...both a collective and an individual right."

regard is that many, if not all, of the rights proclaimed within the IBHR can only be enjoyed by individuals in their position as members of society.[66] Indeed, it is impossible to imagine any circumstance in which the right of an individual can be exercised outside the context of his society, considering that if he were to lead an entirely solitary existence, his needs, desires, and interests would never come into conflict with anybody else's – and thus would never have any reason to seek to protect his rights in the first place.

3.4.1.3. A Right Not Founded on International Law?

One of Donnelly's reasons for denouncing the right to development is based on the evident lack of explicit reference to it within the IBHR or the UN Charter.[67] Given that the Declaration was only adopted at least two decades after these instruments were drafted, one is at a loss as to how it would have been possible to have made any reference to it. Nevertheless, even the most cursory examination of these instruments reveals that the issue of economic development is mentioned either explicitly, or impliedly: Apart from the explicit reference to it within the right to self-determination under Articles 1 of both Covenants, Part III (Articles 6-15) of the ICESCR is devoted to rights which, as already suggested, are unrealizable without economic development.[68] Moreover, there is explicit reference to economic development within the UN Charter. For example, the Preamble to the Charter refers, *inter alia*, to the need "to employ international machinery for the promotion of economic and social advancement of all peoples," while Article 55 commits the organization to promoting: "(a) higher standards of living, full employment, and conditions of economic and social progress and development;" as well as "(b) solutions of international economic, social, health, and related problems..." Indeed, in a report to the UN Commission on Human Rights in 1978, a former Secretary-General reaffirmed the cited instruments as

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[66] This, it is submitted, includes even such "individual" rights as those relating to: privacy (Art.17 ICCPR); freedom of thought, conscience and religion (Art.18 ICCPR); and the right to hold opinions, which includes the freedom to express them (Art.19 ICCPR).

[67] See Donnelly, "In Search of the Unicorn," n.64 above, at pp.482-483

[68] Examples include: the right to work (per Art.6); the right to social security (per Art.9); the right to an adequate living standard (per Art.11); the right to health (per Art.12); and the right to education (per Art.13). Indeed, the same is true of even some of the "negative" rights under the ICCPR such as: the right to life (per Art.6), and the right to due process (per Art.9); at least insofar as their realization depends on the ability of the State to establish, respectively, an effective law enforcement mechanism, and an efficient judicial system.

representing "a very substantial body of principles...which demonstrate the existence of a human right to development in international law."[69] Donnelly's position (as with similar opinions) is therefore based, for the most part, on a mixture of factual inaccuracies and misconceptions, all based on an evident failure to refer to the Declaration itself.

3.4.2. The UN General Assembly as a Source of Law

As already acknowledged, the Declaration on the Right to Development is not based on any treaty; neither, as a product of a General Assembly Resolution, does it automatically constitute a source of law. A case therefore remains to be made as to why the Declaration is considered to have created a right recognized as such under international law. A good starting point is a consideration of an opinion once expressed by Richard Bilder, to the effect that although there are no definitive criteria for distinguishing between a mere claim from a human right, "in practice, a claim is an international human right if the United Nations General Assembly says it is."[70] This position has received the support of Philip Alston, who asserts that the adoption of the UDHR constituted an implicit acceptance by the international community, of the authority of the General Assembly as the final arbiter in determining the validity of human rights – an authority reinforced between 1949 and 1966, when the two Covenants were being drafted.[71] In one sense, he further argues, this authority derives from Article 13 of the UN Charter, under which the General Assembly is mandated to "initiate studies and make recommendations for the purpose of...(b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and [to assist] in the realization of human rights and fundamental freedoms..." The exercise of this mandate "with a view to proclaiming an International Bill of Rights," he further explains, had been envisioned at the San Francisco Conference of 1945, where the UN Charter was adopted.[72]

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[69] See Report of the Secretary-General on "The International Dimensions of the Right to Development as a Human Right in Relation With Other Human Rights Based on International Co-operation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Needs," U.N. Doc. E/CN.4/1334, 2 January 1979, at para.78 et seq.

[70] See R Bilder, "Rethinking International Human Rights," n.39 above, at p.173

[71] See P Alston, "Conjuring Up New Human Rights," n.49 above, at p.608-609

[72] ibid

As they stand, however, the stated views do not represent the whole picture, given that the expressed functions of the General Assembly under the UN Charter do not include law-making powers *as such*.[73] Article 10, for example, merely provides that it "may discuss any questions or any matters within the scope of the present Charter, and...make recommendations to the Members of the United Nations or to the Security Council or to both..." It is also the case that every other function or authority given to the General Assembly is expressed merely in exhortatory terms. Subsequent explanations have, however, made the position clearer. For example, Judge Herman Mosler (although commenting in a non-judicial context) expresses the view that "[t]here can be no single answer to the question – resolutions must be distinguished according to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority in favour of their adoption."[74] Even Antonio Cassese (who, as noted earlier, has questioned the validity of the Declaration) also believes that General Assembly Resolutions "can be fitted into either of the traditional law-making processes: treaty-making or custom."[75] Thus, provided the stated conditions are satisfied, the capacity of the General Assembly to make laws becomes unquestionable. These questions will now be addressed in the context of the content of the right to development:

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[73] See Chapter IV, Arts. 10-17 of the UN Charter

[74] See H Mosler, *The International Society as Legal Community* (Kluwer Academic Publishers, 1980), at pp.88-89. This position receives the support of Georges Abi-Saab, who suggests the following three criteria for recognizing such Resolutions as being more than merely recommendatory. First, the circumstances surrounding its adoption, and in particular, the degree of consensus regarding its contents. Secondly, the "degree of concreteness" of the contents and whether they are specific enough (either in themselves or in conjunction with other Resolutions) to become operative as law; and thirdly, whether there exist effective follow-up mechanisms "generating a continuous pressure for compliance." (See G Abi-Saab, *Analytical Study on* Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, Report of the Secretary-General, UN Doc. Doc A/39/504/Add.1, at pp.36-37).

[75] See A Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at p.193. Cassese's examples include the UN Declaration on Friendly Relations (1970); or Resolutions recognizing inter-State agreements. Blain Sloan asserts thus: "Where...there is an intent to declare law...and the resolution is adopted by a unanimous or near unanimous vote or by genuine consensus, there is a presumption that that the rules and principles embodied in the declaration are law." This presumption, he adds, is only rebuttable by "evidence of substantial conflicting practice supported by an opinio juris contrary to that stated or implied in the resolution." (See B Sloan, "General Assembly Resolutions Revisited" (1987) *58 Brit. Yearbook of International Law 45*, at p.140). See further, I Brownlie, *Principles of International Law*, n.40 above, at p.14, who asserts that although General Assembly Resolutions are generally not binding on member States, "when they are concerned with the general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions." A similar view was expressed by the ICJ. (See Judgement of the *Case of Nicaragua v United States* (Merits), ICJ Reports (1986), at pp.98-104, and 107-108)).

3.5. The Content of the Right to Development

One of the most disturbing aspects of the debate surrounding the validity of the right to development is that very few commentators appear to have examined the content of the Declaration itself. It therefore becomes necessary to spell out the core elements of it, which, incidentally, also represent both the intention of the General Assembly, as well as the content of the Declaration, as suggested by Judge Mosler. By adopting the Declaration, the General Assembly clearly envisaged the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[76] It also recognized:

- the human person as "the central subject" of development;[77]
- the right to self-determination as guaranteed under the ICCPR and ICESCR;[78]
- the right (and duty) of States to formulate appropriate policies for the well-being of their peoples "on the basis of their active, free and meaningful participation...and in the fair distribution of the benefits resulting therefrom";[79]
- a "primary responsibility" on States for "the creation of national and international conditions favourable to [its realization]";[80]
- a duty on States to "take resolute steps to eliminate the massive and flagrant violations" of human rights resulting from *inter alia*, "...aggression, foreign interference and threats against national sovereignty," and "threats of war";[81]
- "full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations";[82]
- the indivisibility and interdependence of "all human rights and fundamental freedoms";[83]
- a duty by the State "to take steps to eliminate obstacles to development resulting from failure to observe [both CPRs and ESCRs]";[84]
- a duty by the State to "encourage popular participation...as an important factor in development and in the full realization of all human rights";[85]
- a reaffirmation of the purposes and principles of the United Nations, and the IBHR;[86] and
- a duty by the State to take steps to ensure its full realization, "including the formulation, adoption and implementation of policy, legislative, and other measures at the national and international levels."[87]

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[76] See Art.1(1) of the Declaration on the Right to Development, n.62 above.
[77] See per para.13 of the Preamble, and Art.2(1), ibid
[78] Per Art.1 (2) (ibid). This includes, "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."
[79] Per Art 2(3), ibid
[80] Per Art.3(1), ibid
[81] Per Art.5, ibid
[82] Per Art.3(2), ibid
[83] Per Art.6(2), ibid
[84] Per Art.6(3), ibid
[85] Per Art.8(2), ibid
[86] Per Art.9(2), ibid
[87] Per Art.10, ibid

Regarding the level of support for the Declaration at the General Assembly, one of the UN's independent experts on the subject offers an insight: It was adopted by a majority, with only eight countries abstaining – the United States casting the only vote against.[88] Thus, when considered in conjunction with the stated intentions of the General Assembly, as well as the content of the Declaration, it becomes clear that the right to development is indeed a human right under international law.

3.6. Economic Development: The Neo-Liberal Orthodoxy

The classic neo-liberal definition of economic development appears in the *Penguin Dictionary of Economics*, which defines it as "[t]he growth of national income per capita of developing countries." According to this view, "[s]uch countries need to generate sufficient saving and investment in order to diversify their economies from agriculture to industry, with the necessary supporting infrastructure such as roads and seaports..."[89] The crucial word therefore is "growth," which refers simply to the increase in gross domestic product (GDP) of a country.[90] Among the numerous proponents of this model is the Nobel Laureate Arthur Lewis who once declared: "Our subject matter is growth, not distribution," explaining that the growth-based approach "gives man greater control over his environment and thereby increases his freedom."[91]

Although some economists believe that this view has become dated,[92] it is the case that the single most valid criticism of the international development agencies, particularly the IFIs, has been their unquestioning adoption of this model as their main development strategy, as noted in chapter 4. To be

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[88] See A Sengupta, "On the Theory and Practice of the Right to Development," n.40 above, at p.840, and footnote 10). Those that abstained were: Denmark, Finland, the [then] Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom. Four countries did not vote: Albania, Dominica, South Africa, and Vanuatu. In the third committee vote on the Declaration, Norway also abstained.

[89] See G Bannock et al (eds.), *Penguin Dictionary of Economics* 6th ed., (London: Penguin Books, 1998) at p.117.

[90] GDP is defined as "A measure of the total flow of goods and services produced by the economy over a specified time period, normally a year or a quarter" (See ibid, at p.180)

[91] See W A Lewis, *The Theory of Economic Growth* (London: Allen and Unwin, 1955) at pp.9-10, and 420-421

[92] See for example, M P Todaro, *Economic Development*, 7th ed., (Harlow, UK: Addison-Wesley, 2000), at p.14. See also, United Nations Economic and Social Council, Commission on Human Rights, Fourth Report of the Independent Expert on the Right to Development, E/CN.4/2002/WG.18/2 (20 December 2001) at para.5, in which the growth-based approach is referred to in the past tense.

sure, and as acknowledged in chapter 5, the rhetoric emanating from the World Bank in recent times is such that any human rights advocate would enthusiastically endorse. For example a relatively recent statement from the Bank asserts "that creating the conditions for the attainment of human rights is a central and irreducible goal of development."[93]

Yet, it is hard to ignore the fact that the enduring theme of much of the literature emanating from the IFIs has promoted the growth-based model above the available alternatives. For example, the same report for the year 2002 was devoted to promoting the supposed virtues of a market-friendly approach to development.[94] Nor is it easy to ignore a recent statement by the IMF's Director of Research and Economic Counsellor which asserts: "It's time to... focus on more pressing economic debates, such as how best to promote global growth and financial stability."[95] The same theme is reiterated in an IMF Working Paper which, while acknowledging the failure of GDP growth in the 1990s in alleviating poverty in SSA, nevertheless argues that there is "a need to raise substantially per capita real GDP growth rates on a sustained basis.[96] The paper further argues that the region needs to "move forward more decisively...with the implementation of growth-conducive structural reforms...including privatization, financial sector reform, and trade liberalization."[97] Thus, there is, at best, a dissonance of views within the IFIs on the way forward. Indeed, given that a former Chief Economist at the World Bank has revealed that the IMF is the dominant partner in the relationship between both institutions,[98] it becomes safe to assert that very little has changed.

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[93] See IBRD/World Bank, *Development and Human Rights: The Role of the World Bank* (Washington DC: IBRD, 1998), at p.2. See also OECD, *Shaping the 21st Century: The Contribution of Development Co-operation* (Paris: OECD, 1996), which also highlights the importance of poverty reduction as an aim of development.

[94] See World Bank, *World Development Report 2002: Building Institutions for Markets* (Oxford University Press), which, according to its authors, "is about building market institutions that promote growth and reduce poverty, addressing how institutions support markets..." (See p.iii).

[95] See K Rogoff, "The IMF Strikes Back," *Foreign Policy*, at http://www.foreignpolicy.com/issue_janfeb_2003/rogoff.html

[96] See E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," April 1999, *IMF Working Paper, WP/99/51*, IMF (Africa Department), at p16.

[97] ibid. Other recommended measures include creating a conducive atmosphere for competition and FDI, and legal safeguards for property rights.

[98] See J E Stiglitz, *Globalization and its Discontents* (London: Penguin, 2002), at p.14

What these demonstrate is that in spite of efforts of various UN agencies such as the UNDP and UNCTAD aimed at shifting the focus of the discourse to people-centred development strategies, there is still considerable resistance within the main institutions responsible for development.[99] The preponderance of neo-liberal prescriptions in development literature has not escaped the attention of Nobel laureate, Amartya Sen, who notes that "[i]f one examines the balance of emphases in the publications in modern economics, it is hard not to notice...the neglect of the influence of ethical considerations in the characterization of actual human behaviour." Thus, he further contends, "[n]o intrinsic importance is attached to the existence or fulfilment of rights..."[100]

3.6.1. The Usual Case for Growth

According to the UNDP, "[t]he faith in growth was based on the assumption that its benefits would eventually be widely spread."[101] This, it will be noted, is the hallmark of the "trickle down" theory of economic development. In a speech the Citibank group in Lahore, Pakistan, former UK Prime Minister Thatcher articulated this position in these terms:

> For many peoples of the world the question is: what system of political economy will not only raise the standards of living...but create enough wealth to help raise others out of poverty?...[C]ountries are rich whose governments have policies which encourage the essential creativity of man who, in order to succeed, must work with others to produce goods and services which people choose to buy. So Japan, Switzerland, Hong Kong, Taiwan, Singapore and so on have no natural resources but are now among the most prosperous countries in the world. And how have they achieved this prosperity? Through the market.[102]

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[99] As acknowledged in chapter 5, it is tempting to regard the HIPC initiative as signalling a shift in the direction of a human rights approach. However, for reasons stated therein, it may, in the end, be nothing more than what one commentator has described (although not in direct reference to that initiative) as "a manipulative trick to involve people in struggles for getting what the powerful want to impose on them..." (See G Esteva, "Development," in W. Sachs (ed) *The Development Dictionary: A Guide to Knowledge and Power* (London: Zed Books, 1996) at p.8)).

[100] See A Sen, *On Ethics and Economics* (Oxford: Blackwell Publishers, 1989), at pp.7 and 49.

[101] See UNDP, *Human Development Report 1996: Economic Growth and Human Development* (New York: UNDP, 1996) at p.4.

[102] See M Thatcher, "The Challenges of the 21st Century," Speech to Citibank in Lahore, 27 March 1996, available via the Margaret Thatcher Foundation website: http://www.margaretthatcher.org/default.htm

Yet, as another Nobel Laureate and former World Bank Chief Economist has pointed out, the East Asian countries – "a regional cluster of countries that had not closely followed the Washington consensus prescriptions...had somehow managed the most successful development in history."[103] In other words, market fundamentalism of the kind espoused by Thatcher and her ideological forbears is not a prerequisite for economic development. Nor is it guaranteed that economic growth necessarily results in poverty reduction; as various studies have shown, economic deprivation exists even in the richest nations of the world.[104] Nevertheless, with the same fundamentalist mindset governing global economic relations, it becomes even less surprising that the same pattern is evident *between* nations: Although more than three-fourths of the world's population live in developing countries, they enjoy only 16 percent of its income; while the richest 20 percent have 85 percent of its income.[105]

3.6.2. The Mechanics of the Growth-Based Model

As revealing as the foregoing might be, however, they do not shed much light on how this development model works. John Galbraith is just one of various economists whose explanations have been most helpful: It is disadvantageous because its emphasis is on increasing the total per capita income and product of the country through plan outlays which are selected in accordance with their capital-output ratios; which means that success is measured in terms of the amount by which the capital increases

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[103] See J E Stiglitz, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland, at p.2.

[104] See UNDP, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000), at p.91. See also J E Stiglitz, "Towards a New Paradigm for Development: Strategies, Policies and Processes," 19th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, Geneva, 19th October 1998, at p.8, whose example is based on the south of Italy. See further, J Galtung and A Wirak, *Human Needs, Human Rights, and the Theory of Development* (Paris: UNESCO, 1976), at p.2 and endnote, who cite the situation in Venezuela between the 1950s and 1970s. A recent IMF working paper acknowledges this in the context of SSA, in the following words: "Despite the recent upturn in economic growth rates, poverty is still widespread and in many parts of the continent extremely acute." (See E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," April 1999, IMF Working Paper, WP/99/51, IMF (Africa Department), at p.4)). Indeed, this is borne out by the situation in Botswana, which, in spite of its annual growth rate averaging 7.3 percent between 1970 and 1995 still had a life expectancy of about 46, with a quarter of its adult population remaining illiterate (See K Owusu et al, *Through the Eye of a Needle: The Africa Report – A Country by Country Analysis* (Jubilee 2000 Coalition, 2000), at p.8).

[105] See UNDP, *Human Development Report 1995: Gender and Human Development* (Oxford: Oxford University Press, 1995), at p.14. See also, World Bank, *World Development Report 1999/2000: Entering the 21st Century* (Oxford: Oxford University Press, 2000), at p.35, which notes that although 85 percent of the global population live in developing countries, 1.5 billion of these live on less than $1 per day.

total output.[106] The problem, he further explains, is that priorities that cannot be so easily calculated are often underestimated (in terms of their contribution to development) or excluded from the equation altogether; examples being social welfare, education, and healthcare.[107] He also asserts that because this model usually creates extremes of wealth and poverty, those with the power to influence demand often do so in the direction of luxury goods, thus drawing resources away from socially desirable goals.[108]

Indeed, for Jack Donnelly, "...markets *systematically* deprive some individuals in order to achieve the collective benefit of efficiency"[109] [emphasis added]. This, in his view, is because "market distributions are based on contribution to economic value added, which varies sharply and systematically across social groups (as well as between individuals)."[110] Thus, because the poor tend to be uneducated, in poor health, and/or with none of the skills considered useful in the market place, they always inexorably become victims (rather than beneficiaries) of the growth-based approach. Ironically, it was a former President of the World Bank who once acknowledged that this approach had created so much misery in developing countries that it "degrades the lives of individuals below minimal norms of human decency."[111]

Aside from any other objection to this model, it is necessary to highlight its basic and universally acknowledged flaw. In his address at the 10th Raul Prebisch Lecture, Gerald Helleiner explained it thus:

> Most economists now recognize that there is a vast, unrecorded sphere of extremely valuable daily activity, that *should* be described as 'economic,' involving the care of one's fellow human beings (notably children, the disabled and the aged)...Markets are not involved when we interact within families, within private businesses (including transnational corporations), or within communities, universities, governments or indeed all manner of bureaucracies, nations or international

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[106] See J K Galbraith, *Economic Development* (Harvard University Press, 1965), at p.3 et seq.

[107] ibid. Another commentator calls it the "Eurocentric" model and explains that the idea is merely to turn citizens into consumers. (See O Mehmet, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (London: Routledge, 1999) at p.2.))

[108] See J K Galbraith, ibid

[109] J Donnelly, "Human Rights, Democracy, and Development" (1999) *Hum. Rts. Q.*, vol. 21 no.3, at p.628.

[110] ibid

[111] See R McNamara, Address to the Board of Governors of the World Bank Group, Nairobi, Kenya, 24 September 1973

> institutions. Within these various institutions, there are all manner of relationships...that do not lend themselves easily to simpleminded 'market analysis [emphasis unchanged].[112]

The import of this becomes even more noteworthy in the light of a recent World Bank study which shows that women constitute a major part of the workforce in developing countries, comprising about 60 percent of Africa's informal sector, and 70 percent of its agricultural labour.[113] Thus, even if it were useful for any other reason, the fact that it has this inherent flaw means it cannot be relied upon as a true measurement of a country's development.

3.6.3. A Note of Clarification

It is important to note that a critique of the growth-based model does not mean a total rejection of it. Nor, as Raj Bhala has pointed out, must it be read as an implicit endorsement of the Marxist model.[114] These points are well articulated by Johan Galtung and Anders Wirak, who argue that a "needs-oriented theory of development" does not necessarily imply an outright rejection of the neo-liberal approach to development.[115] Indeed, in his third report, the UN's independent expert on the right to development

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[112] See G K Helleiner, "Markets, Politics and Globalization: Can the Global Economy be Civilized?" 10th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, at the Palais des Nations, Geneva, 11 December 2000, at p.7.

[113] See The World Bank Group, *World Development Report 1999/2000: Entering the 21st Century* (Washington DC: World Bank Group, at p.20. Indeed, one might even point to the tragic fact that in much of sub-Saharan Africa, the scourge of poverty has meant that some children are voluntarily offered by their desperate parents to unscrupulous intermediaries, often in the vain expectation that they would be given some rudimentary education, healthcare, and food. In reality, they are often effectively sold into slavery, an ordeal which often involves years of hard and exploitative labour either in farms, homes, or small business establishments, usually in return for derisory food rations or for the lucky ones, rudimentary education or apprenticeship; all of which means that such services, as objectionable as they evidently are, are never recorded. (See for example, M Sheil, "A Filthy Business" 24 May 2001, at http://abcnews.go.com/sections/wnt/WorldNewsTonight/slavetrade_photog_010522.html. Mike Sheil's report, commissioned by the British-based charity Anti-Slavery International, highlights the plight of very young children sold across the region of West Africa, who, aside from the other obvious serious human rights violations involved in the sordid trade, are forced to work as slaves. See also, E Blunt, "West Africa's 'Little Maids'" 16 April 2001, at http://news.bbc.co.uk/1/hi/world/africa/1279776.stm. Highlighting the attitude of the slave masters/mistresses, the BBC Africa correspondent Elizabeth Blunt states: "It would not occur to them that working for no pay could be considered slavery."

[114] See R Bhala, "Marxist Origins of the 'Anti-Third World' Claim" (2000), *24 Fordham Int'l L.J.132* (generally) and particularly at p.154

[115] See J Galtung and A Wirak, *Human Needs, Human Rights, and the Theory of Development* (Paris: UNESCO, 1976), at p.40. A similar point was made in the Brudtland Report in its enunciation of the notion of sustainable development. (See World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at p.10)).

reaffirmed the view that an argument in favour of a people-centred approach to development "does not mean...that it is possible to achieve human development only by following a rights-based approach...and ignoring policies for economic growth."[116]

Indeed, however valid the criticisms of the neo-liberal model might be, it is undeniable that one of the factors that distinguish a developed from a developing country is the disparities in their GDP per capita.[117] It is, after all, an incontestable fact that one of the most debilitating causes of the Africa's state of underdevelopment relates to its decrepit, or in some cases, non-existent infrastructure, a situation not helped by the usual and misguided equation of infrastructural development with "white elephant" projects, as highlighted in chapter 13. On the contrary, the availability of a good road network, for example, can have positive human rights impacts for the poor rural farmer: he would not only be able to transport his produce to the market with ease, but might be able to earn sufficient income to pay his children's school fees, or even pay for a relative's medical treatment, particularly in a country with no State provisions. By the same token, a proper drainage or sewage system can reduce a country's healthcare budget (not to mention its impact on the quality of people's lives) by eradicating the mosquitoes that spread the malarial parasite. Indeed, a general growth in a country's GDP, if well harnessed, can bring significant benefits to the poor. Thus, growth and human development *need not always* involve zero-sum calculations. The argument therefore is that the right balance needs to be struck between the traditional focus on growth on the one hand, and policies which cater for the basic needs of the people on the other, so that provided a government is genuinely representative of its people as envisaged in the Declaration, it would be embarking on that process with their informed consent.[118]

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[116] See United Nations, Economic and Social Council, Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/5, E/CN.4/2001/WG.18/2, 2 January 2001, at para.14

[117] See J E Stiglitz, "Towards a New Paradigm for Development: Strategies, Policies and Processes," 9th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, Geneva, 19th October 1998, at p.6, although he emphasises that GDP growth must not be confused with human development. He also argues (at p.14) that focusing on the latter might actually contribute to GDP growth.

[118] This position receives support in the fourth report of the independent expert to the Commission on Human Rights, who explains that the difference between the two approaches is that "the rights- based approach imposes additional constraints on the development process, such as maintaining transparency, accountability, equity, and non-discrimination in all the programmes." (See United Nations Economic and Social Council,

3.7. Economic Development: The Human Rights Approach

In chapter 4, it is argued that the structural adjustment policies imposed by the IFIs on indebted countries were informed by neo-liberal fundamentalism. While it is necessary to acknowledge that some of the individuals involved may have been motivated by a genuine desire to save the countries concerned from the debt crisis with the aim of enabling them to embark on the task of poverty reduction, it is equally important to point out that some of them may have been constrained by their almost complete unfamiliarity with the essence of poverty.[119] Very few commentators are better able to capture the essence of it than Denis Goulet, who once noted:

> Underdevelopment is shocking: the squalor, disease, unnecessary deaths, and hopelessness of it all! No man understands if underdevelopment remains for him a mere statistic reflecting low income, poor housing, premature mortality or underemployment...The prevalent emotion of underdevelopment is a sense of personal and societal impotence in the face of disease and death, of confusion and ignorance as one gropes to understand change, of servility toward men whose decisions govern the course of events, of hopelessness before hunger and natural catastrophe. Chronic poverty is a cruel kind of hell, and one cannot understand how cruel that hell is merely by gazing upon poverty as an object.[120]

These, then, encapsulate the nature of poverty – a state of affairs which undermines the very idea of human dignity in every imaginable sense. With this in mind, it becomes easy to appreciate the nature of the problems posed by an unadulterated neo-liberal model, and why it is considered irreconcilable with the idea of human development, on which the human rights approach is based. A human rights approach to development is therefore one that seeks as its primary aim, the restoration of that essential dignity to the human person as envisaged in both the IBHR and the UN Charter, thus enabling him to realize his full potentials, as opposed to merely seeking to create wealth in the hope that it would

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Fourth Report of the Independent Expert on the Right to Development, n.92 above, at para.38).

[119] See J E Stiglitz, *Globalization and its Discontents* (London: Penguin, 2002), at pp.23-24, who offers an insightful account of the attitude and conduct, particularly of IMF staff members, whom he reveals, simply implement programmes "dictated from Washington" and "...make themselves comfortable in five-star hotels." See also G Hancock, *Lords of Poverty: The Freewheeling Lifestyles, Power, Prestige and Corruption of the Multibillion Dollar Aid Business* (London: Mandarin, 1991)

[120] See D Goulet, *The Cruel Choice: A New Concept in the Theory of Development* (New York: Atheneum, 1971), at p.23

eventually trickle downwards. It now becomes necessary to examine some of the suggestions that have been offered as an alternative.

3.7.1. Development as a Comprehensive Process

As already pointed out, the Declaration on the Right to Development defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."[121] The same concept, according to Michael Todaro, might be defined as "the sustained elevation of an entire society and social system toward a 'better' or 'more humane' life."[122] Although he acknowledges the inherent subjectivity of the term "the good life," he nevertheless argues that this should be based upon three core values: sustenance, self-esteem, and freedom; because these "relate to fundamental human needs and find their expression in almost all societies and cultures at all times."[123] Of central importance therefore are: the well-being of all individuals, and the equitable distribution of the benefits of development, to be achieved on the basis of free, informed, and active participation.

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[121] See Preamble to the Declaration on the Right to Development, n.76 above, at para.2. Gustavo Esteva offers examples of some of the other definitions often used to describe people-centred approach to development. These include "the political mobilization of the people to achieve their objectives; development with self-confidence;" "development from the bottom up;" and "participatory development." (See G Esteva, "Development," in W. Sachs (ed) *The Development Dictionary: A Guide to Knowledge and Power* (London: Zed Books, 1996) at p.7.

[122] M P Todaro, *Economic Development*, n.92 above, at p.16.

[123] ibid, at pp.16-18. (Sustenance is described as the ability to meet such basic needs as shelter, food, health, and protection. Self-esteem, in his view, means a sense of worth and self-respect, and of not being used as a tool by others for their own ends – he suggests might be called identity, authenticity, respect, honour, recognition, or dignity. Freedom, he explains, means to be able to choose, and implies human emancipation from such debilitating conditions as social marginalization, ignorance, other people, misery, and institutions. It also encompasses such aspects of political freedom as personal security, the rule of law, freedom of expression, political participation, and equality of opportunity).

3.7.2. Implications for the State

As noted earlier, the Declaration imposes a duty for the realization of human rights *primarily* on the State[124] - an evident reaffirmation of the duties that governments assume upon their ratification of the two Covenants,[125] and one which is clearly at odds with the usual suggestion that the right to development implies "a right to be developed."[126] This has important implications, particularly for some of the countries of sub-Saharan Africa: Development must no longer be regarded as a process in which governments are mere passive observers; neither is it synonymous with an eternal "right" to receive foreign aid,[127] but must be seen as a two-way process which also requires a degree of responsibility which, as highlighted in chapter 13, has been lacking in many countries of the region.[128] Indeed, this point is helpfully highlighted in the Fourth Report of the Independent Expert on the Right to Development, which asserts: "The primary responsibility for implementing the right to development belongs to the nation-State...the obligation to deliver the right is absolute for all parties irrespective of whether others are fulfilling their obligations...[Such State obligations, he further asserts] 'trump' all other duties and activities and have first priority in determining the allocation of...resources."[129] Thus, although the Declaration makes reference to a new international economic order (at paragraph 15 of its

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[124] According to Steiner and Alston, this means that States have a duty to: respect the rights of others; create the institutional machinery for their realization; protect rights and prevent their violations; provide goods and services to satisfy rights; and to promote them. (See H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed. Oxford: Oxford University Press, 2000), at pp.182-184)). Indeed, at the Third UN Conference on the Least Developed Countries, the participating governments acknowledged these roles by committing themselves to, *inter alia*, the eradication of poverty. They also "recognize[d] that the primary responsibility for development in LDCs rests with LDCs themselves..." (See United Nations General Assembly, Third United Nations Conference on the Least Developed Countries, Brussels, Belgium, 14-20 May 2001 (Declaration, A/CONF.191/L.20), 20 May 2001)).

[125] Under Art.2(1) of the ICCPR, each State party "undertakes to respect and to ensure to all individuals within its territory...the rights recognized in the present Covenant..." The same undertaking can be found under the same provision under the ICESCR. Indeed, both require States parties to honour these obligations by legislative measures. (See Art.2(1) of the ICESCR, and Art.2(2) of the ICCPR)).

[126] See J Donnelly, "In Search of the Unicorn," n.67 above, at p.484

[127] For an examination of the problem of Africa's aid-dependency, see chapter 11

[128] In her opening statement to the General Assembly Special Session on Social Development held in Geneva in June 2000, the UN High Commissioner for Human Rights pointed out that the rights- based approach to development brings the promise of more effective, more sustainable, more rational and more genuine development processes. In particular, and among others, they offer: Enhanced accountability by identifying specific duties and duty-bearers in the development process. In this way, development moves from the realm of charity to that of obligation, making it easier to monitor progress, she explained. (See United Nations, Office of the High Commissioner for Human Rights, "Human Rights in Development: Rights-Based Approaches," available at http://www.unhchr.ch/development/approaches-07.html)

[129] See United Nations Economic and Social Council, Commission on Human Rights, Fourth report of the Independent Expert on the Right to Development, n.118 above, at para.18

Preamble), this can no longer be read in its immediate post-colonial historical context, as the roles of governments have now been brought to the fore.

Moreover, acts of aggression, including threats of war constitute direct violations of Article 5 of the Declaration. Thus, rulers who have come to see armed conflict as an instrument of power are in direct violation of the right to development. Furthermore, given that the Declaration explicitly recognizes the need for "active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom" by the people,[130] the idea of democracy must no longer be seen merely as a devious means of gaining international respectability.[131]

What can be deduced from these is that the State must not abandon its basic functions to the market; it must necessarily formulate and put into effect a definite plan aimed primarily at poverty reduction. As suggested by the independent expert on the right to development, this may involve two basic requirements, beginning with an identification of appropriate indicators and benchmarks to assess the realization of specific rights.[132] Such indicators, it is explained, must not simply represent quantitative advances, but must be indicative of the quality of what is to be delivered. Thus, an assessment of the realization of the right to food, for example, should not merely reflect access to, or the availability of food, but must include the extent to which it is equitably distributed;[133] just as the right to housing cannot be considered realized if the aim is simply to provide a roof over peoples' heads. As recommended by the UN Committee on Economic, Social and Cultural Rights, it means the right to live somewhere in security, peace and dignity."[134]

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[130] Per para.2 of the Preamble to, and Art 2(3) of, the Declaration on the Right to Development, n.121 above.

[131] The "charade of democratic governance" is discussed in chapter 13

[132] See Fourth Report of the Independent Expert on the Right to Development, n.129 above, at para.37

[133] ibid. Incidentally, this reflects an earlier suggestion by Mansell and Scott, whose suggestion was that the realization of the right to education should address the problem of quality as well as quantity. (See Mansell and Scott, "Why Bother About a Right to Development" n.47 above, at p.185).

[134] See UN Committee on Economic, Social and Cultural Rights, General Comment No.4 (Sixth Session, 1991), UN Doc.E/1992/23, at para.7. Indeed, the Comment covers such aspects of housing as security of tenure; availability of services (including materials, facilities and infrastructure); affordability; habitability; accessibility; location; and cultural adequacy (per para.8 (a) – (g))

It should also involve programmes aimed at ameliorating what the independent expert calls "capability poverty," i.e., poverty flowing from lack of access to such needs as education, healthcare, adequate nutrition, and infrastructural programmes designed to help disadvantaged groups or regions. This, he argues, must not necessarily be to the exclusion of GDP growth. Where there is a conflict between both, however, policy makers must be willing to accept a reduction in expectations in relation to the latter, in the interest of equity.[135] Also, a simple provision of social welfare to marginalized groups may not be the right policy; instead, development strategies should include offering them the opportunity to work or to be self-employed – a strategy which may not lend itself to market rationalizations.[136] A goal should be set, he further suggests, for the reduction of "income-poverty" by half, and for removing the three major aspects of "capability poverty" through the implementation of the rights to food, primary healthcare, and basic education, in consonance with the Millennium Development Goals.[137]

Admittedly, the foregoing suggestions are bound to raise questions relating to matters of practicability, especially considering that in much of the developing world (and particularly in SSA), some of them might be seen even by the poor themselves as mere luxury: The sick, possibly disabled, uneducated, homeless, hungry, destitute and elderly individual, who might have been a mere peasant farmer all his working life, and with no form of welfare entitlement whatsoever, would consider even an occasional, nutritiously-deficient meal to be more of a basic need, than living in a "culturally appropriate" environment. However, they offer the most persuasive reasons as to why the right to participation is often considered so indispensable to the realization of other human rights. For example, his full participation in the democratic process becomes the only safe means of determining what his priorities really are, taking into account the peculiarities of his circumstances.[138]

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[135] See Fourth Report of the Independent Expert on the Right to Development, n.131 above, at paras.12 and 13

[136] ibid, at para.13

[137] ibid, at para.21

[138] Indeed, even the World Bank appears to support this position by acknowledging that its policies should involve an understanding of the causes and effects of poverty. This, it explains, means "asking the poor themselves what they need most, and what will make the biggest difference in their lives." (See IBRD/World Bank, *Development and Human Rights*, n.93 above, at pp.5-6). However, the hollowness of this claim is revealed in a speech by its former Chief Economist, who notes that its favoured approach has been a simplistic reliance on "a few economic indicators – inflation, money supply growth, interest rates, budget and trade deficits..." In some cases, he further reveals, "economists would fly into a country, look at and attempt to verify these data, and make macroeconomic recommendations for policy reforms all in a space of a couple of weeks." See J E

3.7.3. Implications for International Actors

The Declaration on the Right to Development also imposes a duty on international actors, although it needs to be pointed out that this arises largely by direct implication from the duties imposed on the State. Thus, the reaffirmation of the right to self-determination[139] can be safely construed as obliging the IFIs to refrain from imposing policies which subordinate human rights considerations to the interests of the market. Indeed, this point has been acknowledged by Judge Bedjaoui of the ICJ, who argues that the right to development it is based primarily on the right of peoples to their economic and social systems without outside interference or constraints, and to determine, with equal freedom, their own models of development. This, he adds, is the very essence of the notion of State sovereignty.[140]

Again, according to the UN's independent expert on the right to development, the Declaration also implies a change in the structure of production and distribution in the economy to ensure growth and equity,[141] which, again, is irreconcilable with an unadulterated growth-based approach to development. Moreover, at the Third United Nations Conference on the Least Developed Countries, various targets were set out in a Programme of Action, the stated aim of which was "to significantly improve the human conditions of more than 600 million people in 49 LDCs."[142] The "overarching goal," it was explained, is to "make substantial progress toward halving the proportion of people living in extreme poverty and suffering from hunger by 2015, and promote the sustainable development of LDCs."[143] The idea is for the various development agencies to work in concert with the LDCs to achieve specific targets which

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Stiglitz, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland, at p.6. This account is confirmed by another former senior economist at the Word Bank who states that officials do indeed "parachute in for missions of a few days..." (See R Kanbur, "Aid, Conditionality and Debt in Africa," in F Tarp and P Hjertholm (eds.), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000), at p.414.

[139] Per para.6 of the Preamble to, and Art.1(2) of, the Declaration on the Right to Development, n.130 above.

[140] See M Bedjaoui, "The Right to Development," in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (The Hague: Kluwer Academic Publishers, 1991), at 1182 et seq. In fact, in para.6 of its Preamble, the Declaration makes reference to the right to self-determination. See also H G Espiell, "The Right of Development as a Human Right," (1981) *16 Texas Int'l L.J.189*, at p.199, for a similar analysis.

[141] See Fourth Report of the Independent Expert on the Right to Development, n.137 above, at para.11.

[142] See United Nations General Assembly, Third United Nations Conference on the Least Developed Countries, Programme of Action for the Least Developed Countries, adopted in Brussels on 20 May 2001 (A/CONF.191/11, 8 June 2001) at para.4

[143] ibid, at para.6

are categorized under such headings as social infrastructure and social service delivery; population; education and training; health, nutrition and sanitation; and social integration.[144] Particularly noteworthy are the commitments to ameliorate problems associated with reproductive health, improve access to compulsory primary education on the basis of equality, provision of vocational training, promotion of measures aimed at encouraging peaceful resolution of conflicts, reduction of infant mortality rate, reduction of the number of undernourished people, and improvement of access to safe drinking water by the target year.[145]

The agreed Programme of Action also recognizes the importance of infrastructural development; transfer of technology;[146] industrial development in the areas of agriculture, mining and manufacturing; rural development and food security; market access for developing country goods; and environmental protection;[147] as well as the debt burden.[148] Put simply, these imply the establishment of a new approach to international economic relations, albeit one in which the State is no longer able to shield itself behind vacuous rhetoric and escapist antics, of the kinds that have come to define Africa's approach to development, as noted in chapter 13.

3.7.4. Implications for Human Rights Advocacy

In addition to imposing specific duties on the State and on international actors, the Declaration on the Right to Development has arguably also changed the nature of human rights advocacy by introducing a new balance of emphases, particularly for SSA, where, as argued in chapter 13, leadership constitutes an impediment to the people's emancipation. This means that as well as the traditional focus on such exogenous factors as protectionism in Western markets and debt relief, the searchlight must also be

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[144] See ibid, at paras.32-41

[145] ibid

[146] That there is a compelling moral case for the transfer of technology to developing countries is beyond debate. Whether it is possible to articulate this as a legal right is less certain, given that the rights concerned (for example drug patents) are presumably already recognized as legal rights both within national laws and under the TRIPs Agreement. At any rate, this is a subject which might be explored at some future date.

[147] See n.145 above, at paras.57-75

[148] ibid, at paras.85-87.

focused on individual governments and on how they treat their citizens. It also means that wherever human rights have been violated, the State becomes the first point of enquiry, and only escapes liability where its complicity can be ruled out.

3.8. Conclusion

This chapter had two main aims: to challenge the assumptions and doubts often expressed about the right to development *as a human right*, and to examine its implications for economic development. In the course of examining some of the stated presuppositions, it was noted that they are based, for the most part, on a fundamental misconception of the content of the Declaration. Moreover, of all the "third generation" of human rights, the right to development stood out as the one most firmly rooted in international law. In examining its implications for economic development, it became clear that the contents of the Declaration are irreconcilable with the market fundamentalism which informs the policies of the IFIs. There is thus, at the very least, an implied duty to on these institutions to refrain from impeding the ability of the State in striving to ensure the realization of human rights. But as already noted, the Declaration has changed the very nature of human rights advocacy in relation to African development, not least because it imposes a definite obligation on its rulers to take steps aimed at lifting their people from economic misery. In the chapters that follow, therefore, the culpability of the IFIs in frustrating this duty will be judged against the conduct of the region's rulers themselves in realizing the aims proclaimed not only within the Declaration, but also under the IBHR.

Chapter 4

THE INTERNATIONAL FINANCIAL INSTITUTIONS AND AFRICA'S (UNDER)DEVELOPMENT

4.1. Introduction

In discussing Africa's relationship with the global economic regime, it is necessary to begin by highlighting the fact that it is mediated almost entirely by its infamous aid-dependency and crippling debt burden – themes which are discussed in chapters 11 and 12 respectively. The aims of this chapter are to offer a background to the debt crisis, examine the policies imposed as solutions by the IFIs, and to highlight their human rights ramifications. Put differently, it is an attempt to illustrate how the IFIs (even as specialized agencies of the United Nations) undermined the very essence of the latter within the region, by pursuing an agenda that was irreconcilably opposed to any known notion of economic development.

4.2. The Origins of the Debt Crisis

Much of the extensive literature on the debt crisis traces its roots to the 1970s – a period of considerable instability within the global economy.[1] The narrative can be summed up as follows: It was a period that came to be defined by a series of economic shocks, beginning with the unilateral suspension of the par value system by the United States government in 1971, the transition from fixed

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[1] A sample of the literature from which the facts are taken include: M Todaro, *Economic Development* (Harlow, UK: Addison Wesley Longman, 2000), at pp.549 et seq; W Mansell, "Legal Aspects of International Debt," (1991) *J. of Law & Soc.*, vol.18, no.4, at p.384; W N Eskridge, "Les Jeux Sont Faits: Structural Origins of the International Debt Problem," (1985) *25 Va. J. Int'l. L. 281*; D H Fieldhouse, *The West and the Third World* (Malden, UK: Blackwell Publishers, 1999); S P Riley (ed) *The Politics of Global Debt* (London: St Martin's Press, 1993); F Stewart, *Adjustment and Poverty: Options and Choices* (London: Routledge, 1995); P Adams, *Odious Debts: Loose Lending Corruption and the Third World's Environmental Legacy* (London: Probe International/Earthscan, 1991); S George, *A Fate Worse Than Debt* (London: Penguin Books, 1994); S E Goldman, "Mavericks in the Market: The Emerging Problem of Hold-Outs in Sovereign Debt Restructuring," (2000) *5 UCLA J. Int'l L. & Foreign Aff. 159*, at p.165 et seq; B Milward, "What is Structural Adjustment?" in G Mohan et al (eds.), *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000), at p.25; and J W Miller, "Solving the Latin American Sovereign Debt Crisis," (2001) *22 U. Pa. J. Int'l Econ. L. 677*, at p.679 (for the Latin American perspective).

to flexible exchange rates, the OPEC-instigated oil price increases of 1973 and 1979, and the rise in global interest rates. For developed countries, the oil price increases led to domestic economic difficulties, leading to a fall in their demand for primary products from developing countries. According to UNCTAD, world prices for most commodities exported by SSA were at historically low levels in the 1980s and early 1990s, with cocoa and coffee down by 40 percent on their 1950s prices.[2] For the oil exporters such as Gabon and Nigeria, it meant a surplus of earnings,[3] which they deposited in Western banks. With developing countries experiencing a decline in foreign exchange receipts, and Western banks with excess liquidity in their vaults, a coincidence of wants thus emerged, with the banks eager to lend, and developing countries desperate to borrow. The stage was thus set for what was to become "the debt crisis."

4.2.1. The Causation Debate

Although there is near-universal agreement regarding the immediate causes of the debt crisis, there is disagreement about the events leading up to it. On the ideological right are the IFIs, which have argued that the import-substitution strategies embraced by much of the developing world in the preceding decades prevented them from adopting an export-oriented, growth-promoting strategy necessary for their integration into the global economy.[4] Among the individual commentators who were instrumental in promoting this view was Anne Krueger (currently the First Deputy Managing Director of the IMF) who once drew a contrast between countries that adopted import-substitution, and those that favoured export-promotion and concluded thus: "[t]he results were far more spectacular than even the most

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[2] See UNCTAD, *African Development in a Comparative Perspective* (Geneva: UNCTAD, 1998/1999), at p.9.

[3] ibid, at p.7. That Nigeria also became one of the region's largest debtors is therefore a measure of how corrupt its leadership has been.

[4] The World Bank Group, *Report on Adjustment Lending II: Policies for the Recovery of Growth* (Washington DC: World Bank Group, 1990). See also, World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington DC: World Bank, 1989), at p.132. See further, International Monetary Fund, "Fund-Supported Programs, Fiscal Policy and Income Distribution," *IMF Occasional Papers No. 46* (1986), Washington DC; and World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (Washington DC: World Bank, 1982).

ardent proponents of free trade would have forecast. Growth rates rose to heights that had previously been regarded as unattainable..."[5]

On the opposing side are those who attribute the blame to a North-South/centre-periphery power relationship which, it is argued, perpetuates the unequal relationship between developed and underdeveloped countries, by making it impossible for the latter to become self-reliant. This position finds expression in the so-called dependency theory which posits that economic dependency is a function of a symbiotic relationship between elitist groups in poor countries, capitalist structures and institutions in rich countries – such as TNCs – who, it is argued, stifle development through the establishment of the latter's subsidiaries in developing countries, but without due regard for the developmental needs of the countries concerned. This, it is contended, is a mutually beneficial arrangement which perpetuates the status quo by remaining resistant to genuine redistributive change, and explains why developing countries have failed to progress from being mere producers of raw materials for Western markets, to becoming industrialized economies in their own rights.[6] Indeed, according to a UN Independent Expert on the Right to Development, Fantu Cheru, the rules by which Africa was to participate in the global economy was predetermined by the West: Africa was to remain a producer of raw materials and agricultural goods for Western industries and consumers. Thus, Kenya was to produce coffee and tropical fruits, and Sudan cotton, with the Ivory Coast producing bananas and pineapples. Ghana was to specialize in cocoa production, and Senegal, groundnuts.[7] Elements of this theory are evident in those earlier articulated by such commentators as Raul Prebisch, Max Singer, and Gunnar Myrdal;[8] for whom this reliance on primary products represented a vicious cycle which

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[5] See A O Krueger, *Perspectives on Trade and Development* (Hemel Hempstead: Harvester Wheatsheaf, 1990), at p.51. The countries cited include Taiwan, Hong Kong, Singapore, and Brazil.

[6] Examples: P Baran, *The Political Economy of Neo-Colonialism* (London: Heinemann, 1975); K Griffin and J Gurley, "Radical Analysis of Imperialism, the Third World, and the Transition to Socialism: A Survey Article," (1985), *Journal of Economic Literature* vol.23, at pp.1089-1143; and C Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* London: Heinemann, 1975). Among the right wing conspiracy theorists is Doug Brandow of the US-based Heritage Foundation who has argued that the developing world, acting through the UN system, has an elaborate hidden agenda of usurping global economic power from developed countries (See "The US Role in Promoting Third World Development," in Heritage Foundation, *US Aid to the Developing World: A Free Market Agenda* (Washington DC: Heritage Foundation, 1985), at pp. xxiii – xxiv.

[7] See F Cheru, "Structural Adjustment, Primary Resource Trade and Sustainable Development in Sub-Saharan Africa" (1992), *World Development*, vol.20, no.4, at p.498

[8] See: R Prebisch, *The Economic Development of Latin America and Its Principal Problems* (New York: UN Economic Commission for Latin America, Department of Economic Affairs, 1950); H Singer, "The Distribution of Gains Between Investing and Borrowing Countries" (1950) *American Economic Review*, vol.40, at pp.473-485.

could only be broken by interventionist policies, as well as foreign assistance.[9] The debate has never been settled (and almost certainly never will never be), although the onset of the debt crisis is now seen as a vindication for the position adopted by the IFIs, highlighting the failure of the import-substitution and interventionist strategies previously adopted by developing countries.[10]

4.2.2. Enter the IFIs

The intervention of the IFIs in SSA is believed to have been based upon a realization by the Reagan Administration, of how interdependent the global economy was: It became clear, it is explained, that America could not isolate itself from the crisis engulfing the developing world, especially as Mexico had, by 1982, signalled its intention to default on its debt obligations.[11] A proposal was thus initiated in 1985 by former US Treasury Secretary James Baker, whereby commercial banks would extend new loans to a select group of debtor-countries for the purpose of economic regeneration.[12] However, it was soon realized that the problems experienced by some of the debtor-countries was one of effective insolvency, as opposed to one of liquidity, as many of the countries simply could no longer service their debts.[13] It was therefore assumed that these countries required a fundamental adjustment of their economies based on a perceived need to move away from the protectionist and interventionist policies of the past, in consonance with the neo-liberal revolution that characterized the period in both the United States and the United Kingdom. The reforms would thus be financed through loans from the IFIs, which, by now had moved away from their original mandate under the Bretton Woods agreement.[14]

See also G Myrdal, *Economic Theory and Underdeveloped Regions* (New York: Harper Torchbooks, 1957).

[9] Julius Nyerere highlighted this position in these terms: "First, where in our lands are those citizens who have sufficient capital to establish modern industries; and second, how would our infant industries fight other capitalist enterprises?" (See J Nyerere, *Man and Development* (Dares Salaam: Oxford University Press, 1973), atp.116)).

[10] R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton and Oxford: Princeton University Press, 2001), at p.313.

[11] See M J Trebilcock and R Howse, *The Regulation of International Trade* (London and New York: Routledge, 1995) at p.320. See also R Gilpin, ibid, at p.313

[12] Per M J Trebilcock and R Howse, ibid.

[13] See Gilpin, n.11 above, at p.314

[14] ibid, at p.314-315

As early as 1979, however, the World Bank had already become convinced that longer-term measures would be necessary, particularly in the case of the most heavily indebted countries such as Brazil and Mexico. It thus approved what has come to be known as Structural Adjustment Lending (or Loans) (SALs) in 1980, the aim being "...to support major changes in policies and institutions of developing countries that would reduce their current account deficits to more manageable proportions in the medium term, while maintaining the maximum feasible development effort."[15] This was soon adopted by the IMF and other lenders, including the regional development banks.[16] By this time, some SSA countries had also received some form of official development assistance.[17] Indeed, an IMF report shows that as early as 1970, Liberia and Somalia had received seven stand-by loans from it for balance of payments and budgetary purposes, while Burundi had received five.[18] It also shows that Ghana, Mali and Rwanda had each received four such loans, with Sierra Leone and Sudan having received three. By this time also, Zaire had already completed its first supervised devaluation.[19] As of 1989, more than half the countries in the region were implementing what came to be known as structural adjustment programmes (SAPs) (explained below). In all, 36 countries had obtained 49 SALs, plus an additional 41 variant of these – the so-called sectoral adjustment loans (SECALs).[20] This trend has continued apace,

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[15] See World Bank, *Annual Report,* vol.1, no: 20091 of January 1, 1981, Washington DC, at p.69. See also I E Elbadawi, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers,* Country Economics Department, October 1992, Washington DC: World Bank at p.3

[16] See D Simon et al, *Structurally Adjusted Africa: Poverty, Debt and Basic Needs* (London: Pluto Press 1995),p.3.

[17] See S Schadler et al, "Economic Adjustment in Low-income Countries: Experience Under the Enhanced Structural Adjustment Facility," Occasional Paper No. 106, IMF, Washington, at pp.22-23, who note that nearly all the LDCs had high and increasing debts at the time, and were resorting to "abnormal" and "exceptional" financing of some sort, either accumulating arrears to external lenders, rescheduling interest and/or principal repayments, or receiving balance-of-payments support from multilateral agencies.

[18] See International Monetary Fund, *Annual Report 1970* (Washington DC: IMF, 1970), at pp.138-139. See also T A Oyejide, "Supply Response in the Context of Structural Adjustment in Sub-Saharan Africa," (1990), *African Economic Research Consortium, Special Paper 1*, Nairobi, Kenya; and I A Elbadawi, ibid, at p.52, whose table includes the following: Ivory Coast, Ghana, Kenya, Madagascar, Malawi, Mauritania, Mauritius, Nigeria, Senegal, Tanzania, Togo, Zambia (these being countries that received 2 SALs or 3 adjustment operations or more, with the first adjustment operation in 1985 or earlier). The others are: Burkina Faso, Burundi, Central African Republic, People's Republic of Congo, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone, Somalia, Sudan, Zaire, and Zimbabwe. See further, UNCTAD, *The Least Developed Countries Report 2000 – Aid, Private Capital Flows and External Debt: The Challenge of Financing Development in the LDCs* (New York and Geneva: United Nations, 2000) at endnote 3 and p.102.

[19] ibid. Indeed, according to a World Bank report with some input from Zaire's one-time Finance Minister, an IMF supervised stabilization programme leading to a 300 percent currency devaluation was announced under Mobutu as early as June 1967. (See S Devarajan et al (eds.), *Aid and Reform in Africa: Lessons From Ten* Case Studies (Washington DC: World Bank, 2001), at p.629. See also, N van de Walle, African Economies and the Politics of Permanent Crisis, 1979-1999 (UK: Cambridge University Press, 2001), at p.211.

[20] See E Jesperson, "External Shocks, Adjustment Policies and Economic and Social Performance," in G A Cornia

with the result that as of 1997, the total external debt of SSA (from both official and commercial sources) was valued at $223 billion, out of a total debt of $245 billion owed by the 41 so-called Heavily Indebted Poor Countries (HIPCs).[21] By 2000, this figure had increased to $342 billion.[22]

These all confirm the view that for SSA, the debt crisis was only a catalyst to its present economic malaise.[23] The role played by African rulers in perpetuating the underdevelopment of the continent is examined in depth in chapter 13. In this chapter, it suffices to state merely that the conduct of the region's rulers in creating the current state of chaos cannot be ignored. For example, Nicolas van de Walle points out that the policies adopted in the 1960s and 1970s tended to favour consumption over investment, imports over exports, and urban interests over rural concerns[24] - a point also made by George Ayittey, who highlights the enthusiasm with which African rulers childishly aped the colonialists, importing all manner of goods from canned sardines and evaporated milk (staple items for those colonialists who did not believe that Africa had edible food), and Maserati cars, as well as embarking on preposterous projects – a manifestation of their perverse understanding of the notion economic development.[25]

Indeed, there are strong indications that some of the loans were simply transferred into the private accounts of some of the rulers themselves,[26] although it is impossible to support this with hard evidence. What is indisputable, however, is that as is now evident from Africa's state of underdevelopment, very little, if anything at all, was ever spent on the needs of ordinary Africans by

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et al (eds.), *Africa's Recovery in the 1990s: From Stagnation and Adjustment to Human Development (*New York: St Martin's Press, 1993), at p.12.

[21] See United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, 11 September 1998, at p.4

[22] See United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa, 2000," UN Doc. E/2001/13, of 30 May 2001, at p.3.

[23] This view is stated thus in a World Bank Research Paper: "the adverse exogenous shocks that impacted the continent – and other developing countries – over the first half of the 1980s, have certainly been the trigger that pushed these economies to the brink of the crisis..." (See I A Elbadawi, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers* (Washington DC: World Bank Group, Country Economics Department, October 1992), at p.44. See also, E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," *IMF Working Paper, WP/99/51*, (Washington DC: IMF, Africa Department, April 1999), at p.4. See further, N van de Walle, *African Economies*, n.19 above, at p.211; and F Stewart, *Adjustment and Poverty*, n.1 above, at pp. 1-2).

[24] ibid, at p.207.

[25] See G B N Ayittey, *Africa in Chaos* (New York: St Martin's Griffin, 1999), at pp.132-138

[26] See S George, *A Fate Worse Than Debt* (London: Penguin Books, 1994) at p.19.

their rulers. In the meantime, with the Thatcher/Reagan monetarist crusade already gaining momentum, the stage was set for a bleak economic prospect on the part of the borrowers from developing countries, as interest rates were raised from an average of 1.3 percent between 1973 and 1980, to of 5.9 percent between 1980 and 1986.[27] The terms of trade for SSA also deteriorated.[28] Also, lending from commercial sources had ceased, while these countries had accumulated substantial balance of payments deficits. The IFIs thus became the only real hope of reversing this trend.[29]

4.3. The Nature of Structural Adjustment Lending

The World Bank defines SAPs as "reforms of policies and institutions covering micro-economic (such as taxes and tariffs), macro-economic (fiscal policy) and institutional interventions."[30] These changes, it explains, "are designed to improve resource allocation, increase economic efficiency, expand growth potential and increase resilience to shocks."[31] Thus, on the surface, it is tempting to regard them simply as harmless measures aimed at correcting perceived imbalances within an ailing economy.[32] However, as explained by Walden Bello et al, the "conditionality" often attached to SALs have direct impacts on

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[27] See J Toye, "Structural Adjustment: Context, Assumptions, Origin and Diversity," in Van Der R Hoeven, and F Van Der Kraaij, (eds.), *Structural Adjustment and Beyond in Sub-Saharan Africa* (London and Portsmouth: James Currey & Heinemann, 1994), at p. 20. See also D Wheeler, "Sources of Stagnation in Sub-Saharan Africa" (1984), *World Development* 12, vol.1, Oxford, Pergamon Press, at pp 1-23

[28] See IMF, *World Economic Outlook*, (Washington DC: IMF, April 1986).

[29] Per Stewart, n.23 above. See also, World Bank, *World Bank Development Report: Opportunities and Risks in Managing the World Economy* (Oxford: Oxford University Press, 1988)

[30] See World Bank, *Structural Adjustment and Poverty: A Conceptual, Empirical and Policy Framework* (Washington DC: World Bank, 1990), at p.22.

[31] ibid. The main aim of SALs is "to support programmes of policy and institutional change necessary to modify the structure of the economy so that it can maintain both its growth rate and the viability of its balance of payments in the medium term." (See The World Bank Group, *Structural and Sectoral Adjustment Lending: World Bank Experience* (1980-1992), Sector Study Number 14691 (World Bank, Operations Evaluation Department, 1995), available at http://wbln0018.worldbank.org/oed/oeddoclib.nsf/

[32] Although the policies of the IFIs have now become largely synchronized and indistinguishable, Frances Stewart offers the following technical differences: The Fund is concerned with "stabilization policies," aimed at correcting perceived imbalances in the short run; thus its emphasis on: demand restraint (i.e., public spending cuts, credit control, and wage restraint); switching policies (e.g., exchange rate reform and devaluation; and long-term supply policies (such as financial reform and trade liberalization). What makes the roles of both so indistinguishable therefore is the fact that SAPs often contain some elements of demand restraint, switching, and long-term supply policies; while IMF programmes often contain elements of SAPs. Moreover, acceptance of the Fund's adjustment package is usually a precondition for the Bank's adjustment loans (See: F Stewart, *Adjustment and Poverty*, n.29 above, at p.8 et seq; and D E Sahn et al, *Structural Adjustment Reconsidered: Economic Policy and Poverty in Africa* (Cambridge UK: Cambridge University Press, 1999), at pp.4-5.

the policy choices facing the recipient governments. Some of the policies (and their usual justifications) include:

- drastic reductions in government spending, as a way of controlling inflation and of reducing the demand for capital inflows from abroad;
- reductions in wages as a way of checking inflation and making exports more competitive;
- the liberalization of imports in order to make local industry more efficient, while encouraging the production of goods for the export market – supposedly a good source of foreign exchange and a more dynamic source of growth than the domestic economy;
- the relaxation of rules on FDI both in industry and in the financial services, supposedly to introduce efficiency in the domestic market, owing to the presence of foreign competitors;
- currency devaluation - to make exports more competitive; and
- the privatization of State enterprises and radical deregulation, to promote the allocation of resources by market-based mechanisms.[33]

4.4. Some Human Rights Implications of SAPs

As Asif Qureshi asserts, the treatment of conditionality as mere technical economic prescriptions "obscures the very important fact that the system it engenders is underpinned by political and ideological choices."[34] These choices are premised upon one central belief: that the State constitutes an obstacle to the operation of a successful economy, i.e., one in which the only inviolable rights are those mediated by the market. Thus, it becomes easy to understand why the idea that the State has a duty to guarantee such basic rights as healthcare, education, or social welfare is viewed with much hostility. To the extent that the State becomes desirable in this neo-liberal setting, its duty is simply to facilitate the operation of the market, as well as protecting corporate interests – hence the tendency, for example, to curb active trade unionism because of the threat it poses in terms of wage demands or improved working conditions. The evident human rights implications aside,[35] the point to note is that although a freeze or reduction in wages may indeed result in low inflation and make the country's exports more competitive, it may also, for instance, render workers unable to maintain an adequate standard of

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[33] See: W Bello et al, *Dark Victory: The United States and Global Poverty* (Food First and the Transnational Institute 1999), at p.27; M Barratt Brown and P Tiffen, *Short Changed: Africa and World Trade* (London: Pluto Press, 1994), at p.10. See also UNCTAD, The *Least Developed Countries Report 2000*, n.18 above, at p.103

[34] See A H Qureshi, *International Economic Law* (London: Sweet & Maxwell, 1999), at p.188.

[35] Namely, the violation of Arts.7 (rights to favourable working conditions, including, *inter alia*, fair wages) and 8 (trade union rights) of the ICESCR

living,[36] with predictable impacts on such rights as education[37] and healthcare,[38] particularly in countries with no equivalent of the Welfare State.

State intervention may also serve corporate interests by relaxing existing national laws in favour of inward investment; hence the fact that this often constitutes a core requirement of SAPs. And while it must be acknowledged that foreign direct investment (FDI) can in fact provide much-needed inflows of capital into a developing country, it is equally important to point out that the economic and legal measures that are often required can result in direct violations of basic human rights. For example, given that transnational corporations are naturally attracted to countries with few trade union rights (as illustrated by the *Ngcobo* case, cited below), an ensuing "race to the bottom"[39] may force governments to clamp down on such rights in a bid to be seen as being business-friendly. This, again, may result in wage controls, with predictable knock-on effects on standards of living, healthcare or educational rights.

The relaxation of investment rules may also mean that safety standards become dangerously compromised, in some cases resulting in serious personal injuries, long-term illnesses, and even death. Nothing illustrates this better than the case of *Ngcobo & others v Thor Chemicals Holdings Ltd*,[40] in which the defendant company relocated from England to apartheid South Africa, where it was able to deliberately expose black workers to highly toxic substances, which resulted in serious illnesses and death.[41]

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[36] Per Art.11 ibid, which includes the right to food and housing

[37] Per Art.13 ibid

[38] Per Art.12 ibid

[39] For an official acknowledgement of this, see Department for International Development, *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Cm 5006 (December 2000), at p.23 [hereinafter *The White Paper on International Development*] which asserts: "Private capital is highly mobile and will go to where business can be carried out safely and where it can make the best return."

[40] TLR, November 10, 1995. See also, *Sithole & Others v Thor Chemicals Holdings Ltd & Anoth* TLR, February 15 1999. While it is not suggested that these companies were necessarily influenced by the policies or programmes of the IFIs, their examples illustrate the argument that where standards are seriously compromised, flagrant violations almost inevitably follow.

[41] Thus violating Arts.6(1) of the ICCPR (right to life), 2(2) of the ICESCR which prohibits discrimination on grounds of (*inter alia*) race; as well as 7(b) of the ICESCR which guarantees the right of individuals to *(inter alia)* just and favourable conditions of work.

Other listed policy requirements, such as trade liberalization or currency devaluation may also appear impact-free on the surface. But their potential human rights ramifications cannot be overstated. The sudden exposure of a peasant farmer to competition from giant corporations may well deprive him of his only source of income; just as the devaluation of a currency inexorably means higher living costs for those least able to absorb its impacts. It is such concerns that have prompted Upendra Baxi to assert:

> I believe that the paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This new paradigm reverses the notion that universal human rights are designed for the dignity and well being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that 'justify' corporate well-being and dignity over that of the human persons.[42]

For SSA, therefore the introduction of SAPs marked the beginning of its engagement with the realities of the international economic regime.[43] The problem, however, was that this regime was (and still is) one characterized by a novel (and therefore essentially experimental) implementation of neo-liberal economic fundamentalism,[44] of a kind that would almost certainly have caused much concern to even Adam Smith.[45] "Novel implementation" because it is impossible to find any evidence of such policies having been implemented before the introduction of SAPs in the 1980s in the history of international

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[42] See U Baxi, "Voices of Suffering and the Future of Human Rights," (1998) *8 Transnat'l L.& Contemp.Probs.125*, at pp.163-164.

[43] A World Bank publication acknowledges this in these terms: "In Africa more than in any other region, engagement with the international community has come in the context of aid and debt." (See World Bank, *Can Africa Claim the 21st Century?* (Washington DC: World Bank, 2000), at p.235

[44] The term "fundamentalism" is in fact borrowed from a UK government White Paper which notes that "...the market fundamentalism of the 1980s and 1990s has been thoroughly discredited..." (See *The White Paper on International Development*, n.39 above, at p.23). The term is considered appropriate because like religious fundamentalism, economic neo-liberalism thrives on perverting an established doctrine.

[45] Adam Smith would almost certainly have been concerned because he was, after all, not unmindful of the need for protectionism in certain circumstances. For example, he supported the imposition of tariffs aimed at protecting defence-related industries, and described the Act of Navigation as one which "very properly endeavours to give the sailors and shipping of Great Britain the monopoly of trade..." (See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (J S Nicholson ed., London: T Nelson & Sons, 1895), at p.187. Indeed, he explicitly acknowledged the importance of basic needs to human dignity, by which he meant "...not only those things which nature, but those things which the established rules of decency have rendered necessary..." (See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (R H Campbell et al eds., Oxford: Clarendon Press, 1976) at p.870. Smith's position in this regard has been summed up thus by a contemporary commentator: "...although Adam Smith is often portrayed as an ardent supporter of free markets, his analysis of the situation in which government intervention is justified – if modified to embrace the institutional, technological, and social environment of the late twentieth century – suggests that he was fully aware of the role of governments as overseers of an economic system in which market forces might flourish." (See J H Dunning (ed), "Governments and the Macro-Organization of Economic Activity: A Historical and Spatial Perspective," in *Governments, Globalization, and International Business* (UK: Oxford University Press, 1999) at pp.37-38)).

economic relations, or for that matter, of domestic political economy; given that from the mercantilism that defined imperialist trade to President Roosevelt's New Deal policies, from the generous social welfare systems of Western Europe to the undisguised protectionism that currently defines the trade policies of industrialized countries, the history of international economic relations is replete with examples interventionism of one kind or another.[46]

4.5. Structural Adjustment: Its Challenge to International Law

The temptation to confine the role played by the IFIs to the realms of economic analysis is quite strong. The problem, however, is that even if human rights advocates were sufficiently knowledgeable in the field of economics to be taken seriously, the conclusions reached would not be significantly different from those already reached on either side of the debate; economics, after all, is not a value-free science. It therefore becomes pertinent to highlight the fact that international economic relations has a legal dimension that is firmly rooted in the broad ambit of international law, as well as within the specialized area of international human rights law, and that conducting the debate in these contexts represents the way forward.

Critics may wonder why it is believed that moving the debate from one area of knowledge to another would necessarily improve the quality of it. The answer is that although the quality may not necessarily be improved by so doing, employing the language of law carries with it the important elements of rights, duties, and possible sanctions – elements which no other discipline can guarantee. These are considered important because economic deprivation must no longer be seen merely as a matter of objective scientific analysis, but as an experience which, at best, undermines, and at worst, destroys, the essential humanity of those so adversely affected. As the great African novelist Chinua Achebe

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[46] See O Mehmet, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (London: Routledge, 1999), at p.62 who highlights the reliance of war-torn Western economies on Keynes' interventionist approach to economic regeneration; and D Rodrik, "Sense and Nonsense in the Globalization Debate" (1997) *Foreign Policy* 19, Washington DC: The Carnegie Endowment for International Peace, at p.23 who states: "Indeed, a key component of the implicit postwar social bargain in the advanced industrial countries has been the provision of social insurance and safety nets at home (unemployment compensation, severance payments ...for example) in exchange for the adoption of freer trade policies."

once asserted in his own inimitable way at an OECD conference, "Africa is people, real people"[47] – human persons who must no longer be regarded as mere objects of economic rationalizations.

What, then, are the legal implications of these policies? The answer lies within their very philosophic foundation: the fundamentalist belief in the market mechanism as the only means of improving the human condition. By direct implication, therefore, the nation-State ceases to be in a position to make the difficult choices that affect the lives of its citizens, thus making a nonsense of a basic principle of international law – the right to self-determination as guaranteed under the two Covenants.[48] These, however, are not the only rights that are directly threatened by these policies. By imposing limitations on governmental choices, they directly impede the realization of every imaginable aspect of ESCRs (and indeed, CPRs too, at least insofar as they hinder the State's ability to create an environment in which the citizen can enjoy the freedoms proclaimed under the ICCPR). They also violate the UN Declaration on the Right to Development, particularly Articles 3 and 6, under which the State is the primary guarantor of human rights.[49] Indeed, by impeding the realization of the above rights, SAPs directly undermine the UN Charter itself, particularly Articles 55 and 56, [50] and by extension, the very foundation upon which the international community is built, and, together with the threats they pose to individual rights, explain why human rights advocates have been so vociferous in their criticisms of them.

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[47] See C Achebe, "Africa Is People," speech delivered to the World Bank Group, available at http://www.worldbank.org/wbi/lectures/africa-text.html. According to Achebe, he first used this phrase in a speech before an OECD audience in Paris in 1989.

[48] See Arts.1 of the ICCPR and of the ICESCR, subsection (1) of which provide thus: "All peoples have the right to self-determination. By virtue of that right they...freely pursue their economic, social and cultural development." Subsection (2) provides thus: "In no case may a people be deprived of its own means of subsistence." They also undermined the explicit undertaking by governments under Arts.2 of both Covenants to take steps to ensure the realization of human rights.

[49] See Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 U.N. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/53 (1986)

[50] Art 55 of the UN Charter reiterates the right to self-determination, and mandates the UN to promote: "(a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all..." Under Art.56, "[a]ll Members pledge themselves to take joint and separate action in co-

4.6. Structural Adjustment: Views From the Experts

4.6.1. A Flawed Diagnosis

Criticisms of SAPs are not based exclusively on their violation of international law. Studies by renowned economists have cast doubts, for example, on both the actual diagnosis of the underlying problems within the economies of the countries concerned by the IFIs, and on the timing of their intervention. Thus, for Massachusetts Institute of Technology economists Fanelli et al, the obstacle to growth was not the alleged structural distortions in the economies of developing countries, but the OPEC oil price increases and the debt crisis. Relying on the World Bank's own data, they point out that the much-criticized import-substitution strategies were at the very least, not unhelpful in promoting productivity in Latin American economies during the 1960s and 1970s. The difference between this period and the 1980s, they argue, was the impact of these factors, which not only cut off capital inflows to developing countries, but also caused massive outflows of resources which should have been invested domestically.[51]

Another study by staff members of the World Bank who examined the South Korean economy supports this position, noting that "the pace of capital accumulation...was not the outcome of market signalling but to a large extent deliberately contrived by the government."[52] In other words, State intervention was crucial to the Korean success story. Thus, the assumption that the economic difficulties experienced by developing countries were caused by interventionist policies is, at best, to be treated with caution, and otherwise, simply untenable.

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operation with the Organization for the achievement of the purposes set forth in Article 55.

[51] See J M Fanelli et al, "The World Development Report 1991: A Critical Assessment" in United Nations Conference on Trade and Development, *International Monetary and Financial Issues for the 1990s* (New York: UNCTAD, 1992), at pp.3-15.

[52] See World Bank, "Capital Accumulation and Economic Growth: The Korean Paradigm," *Staff Working Papers, no. 712* (Washington DC: World Bank, 1985), at p.9.

Indeed, another expert on this subject has questioned the very timing of the intervention by the IFIs. According to Frances Stewart, if the IFIs had been more proactive and had accelerated official financial flows to Africa, the process of adjustment would have been more gradual, and therefore less burdensome to the economies concerned. Moreover, she further asserts, if action had been taken to reverse the collapse of commodity prices (instead of the introduction of neo-liberal policy prescriptions), the need for adjustment would have been significantly reduced.[53]

4.6.2. An Insider Speaks Out

It is safe to assert that of all the criticisms of SAPs, those of Joseph Stiglitz represent not just the most authoritative, but also the most insightful. Authoritative because he is not only a former Chief Economist at the World Bank, but also a key policy adviser to President Clinton; and insightful because he exposes the prime motivations behind the policies at the time, as well as the uneasy relationship that existed between the World Bank and the IMF regarding these policies. Stiglitz's revelations can be summed up thus: The Reagan/Thatcher era and the free market ideology they espoused necessitated what was, in effect, a purge involving the senior economists at the IFIs in favour of those with neo-liberal credentials. The IFIs thus became "the new missionary institutions, through which these ideas were pushed on the reluctant poor countries..."[54] With the fall of communism, the roles of the two institutions became increasingly blurred, although the IMF was to become the dominant partner, adopting "a rather imperialistic view" of its role.[55] It also "often got impatient with the World Bank..."and "had the answers (basically, the same ones for every country), [and] didn't see the need for...discussion..."[56] Nevertheless, the two institutions, he reveals, were "driven by the collective will of the G-7...and

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[53] See F Stewart, n.29 above, at p.7.

[54] See J Stiglitz, *Globalization and its Discontents* (London: Penguin, 2002) at p.13

[55] ibid, at p.14

[56] ibid. In what appears to be a direct rebuttal of Stiglitz's views, the Director of the IMF's research department and Economic Counsellor has stated: "...As a rule, fund programs lighten austerity rather than create it... Critics must understand that governments from developing countries don't seek IMF financial assistance when the sun is shining; they come when they have already run into deep financial difficulties, generally through some combination of bad management and bad luck... The economic policy conditions that the fund attaches to its loans are in lieu of the stricter discipline that market forces would impose in the IMF's absence." (See K Rogoff, "The IMF Strikes Back," *Foreign Policy*, at http://www.foreignpolicy.com/issue_janfeb_2003/rogoff.html)

especially their finance ministers and treasury secretaries, and too often, the last thing they wanted was a lively democratic debate about alternative strategies."[57]

Equally instructive is the almost routine manner in which certain individuals have secured senior appointments between the US Treasury, Wall Street, and the IFIs. For example, as Stiglitz has noted, former US Treasury Secretary Robert Rubin moved from the largest investment bank Goldman Sachs, to the largest commercial banking group Citigroup. Similarly, the number two person at the IMF Stanley Fischer went from the Fund to Citigroup.[58] Another renowned economist, Baghwati puts it thus:

> Secretary Rubin comes from Wall Street; Altman went from Wall Street to the Treasury and back; Nicholas Brady, President Bush's Secretary of the Treasury, is back in finance as well; Ernest Stern, who has served as acting president of the World Bank, is now managing director of J.P. Morgan; James Wolfensohn, an investment banker, is now president of the World Bank...[59]

These individuals, Stiglitz reveals, "naturally see the world through the eyes of the financial community."[60] Hence, whereas the World Bank has ensured that a substantial fraction of its staff are permanently resident in its programme countries, the IMF relies on single "resident representatives" whose powers are limited because "programs are typically dictated from Washington, and shaped by short missions during which its staff members pore over numbers in the finance ministries and central banks and make themselves comfortable in five-star hotels in the capitals."[61] Indeed, a major World Bank study acknowledges that the policies of the 1980s "sometimes tended to overshoot the mark."[62]

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[57] See J Stiglitz, ibid, at pp.14-15. The policy prescriptions flowing from this powerful alliance is what he calls "a new 'Washington Consensus' – a consensus between the IMF, the World Bank and the U.S. Treasury about the 'right' policies for developing countries..." "New" because as he further explains, it is a radical departure from the Keynesian ideals that informed creation of the Fund, which acknowledged the inherent fallibility of the market (See p.16). Incidentally, a former policy adviser to the Director-General of the GATT and famous proponent of free trade had earlier described this alliance in terms of "a Wall Street-Treasury Complex," i.e., "a power elite...a definite networking of like-minded luminaries among the powerful institutions – Wall Street, the Treasury Department, the State Department, the IMF, and the World Bank..." which, "is unable to look much beyond the interest of Wall Street, which it equates with the good of the world." (See J Bhagwati, "The Capital Myth: The Difference Between Trade in Widgets and Dollars" *Foreign Affairs* (May/June 1998) vol.77, no.3, New York, at p.10 et seq.

[58] Per J Stiglitz, ibid, at p.19

[59] See Bhagwati, n. 57 above.

[60] See n.58 above

[61] ibid, at pp.23-24

[62] See World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.24. And it goes on to urge (at p.75): "Every country must look to build and adapt its institutions, not

Thus, aside from the threats posed by SAPs to the noted aspects of international (human rights) law, the IFIs (particularly the IMF) acted with utter disregard for history, and rejected the laws of development economics.[63]

It has to be conceded that the above revelations make it logical to conclude that at the time the official debts were incurred, African governments had no real choice in the face of such powerful influences. Such a conclusion would however be misleading: If nothing else, it would ignore the fact that as already explained, the reckless borrowings by many of the region's rulers had rendered their respective countries virtually bankrupt. And since there was no hope of a rescue by the same commercial lenders which, in any event, had been complicit in these dubious transactions, official assistance through the IFIs became the only alternative. What these mean is that although the ulterior motivations behind official assistance have now come to light, there can be no doubt that if African rulers had acted with their people's interests at heart at the outset, the region would almost certainly not have become mired in the current economic morass.

4.7. Structural Adjustment Policies: An Assessment of their Impact

4.7.1. The General Picture

As noted in the introductory chapter, any attempt to assess the impact of SAPs on SSA (and indeed, on any other region) is bound to come up against the methodological problem of establishing a *counterfactual*, i.e., the situation as it would have been had these policies not been implemented. Indeed, as also pointed out therein, and as will become evident in chapter 13, the conduct of some African rulers has made it impossible to determine with any degree of certainty, the extent to which

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dismantle them."

[63] Even Walt Rostow would almost certainly have rejected these prescriptions, especially considering that his *Non-Communist Manifesto* only argues for phased and gradual liberalization. (See *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1977)), at pp.4-10.

these policies are responsible for the people's misery. Nevertheless, it is possible to proceed by examining some of the available empirical evidence.

As might be expected, there are perhaps as many views on the impacts of SAPs in SSA as there are commentators. Nevertheless, it is possible to describe them in terms of those that believe they have been a success, and those who disagree. An IMF working paper, for example, states: "For the first time in a generation, there is clear evidence of economic progress in an increasing number of countries [in SSA]."[64] This, it is asserted, is because of structural reforms such as the removal of domestic price controls, the liberalization of exchange and trade systems, the restructuring or privatization of public enterprises, financial sector reforms, reforms in investment codes, and of labour laws. According to this account, the average annual growth rate of per capita GDP, which was negative throughout most of the 1980s, and –2.2 percent between 1990 and 1994, rose to 1.2 percent between 1995 and 1997, during which period growth performance improved in 37 of the 46 countries examined.[65]

The same report also states that available data for 32 countries show that between 1995 and 1997, the share of total expenditure allocated to health and education increased in about half the countries.[66] An internal evaluation of the programme also arrives at a similar conclusion.[67] Predictably, these reports have chosen to highlight mere statistical trends, with very little regard to their relevance to the human condition. Indeed, David Sahn, whose work is seen by some as the best and most comprehensive study on Africa, concludes that "concern for the welfare of the poor is a weak excuse for inaction and the perpetuation of failed policies."[68]

Others of the pro-adjustment school have resorted to misleading categorizations as a way of explaining why some countries have been more "successful" than others. For example, a World Bank Working

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[64] See E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," *IMF Working Paper, WP/99/51*, (Washington DC: IMF, Africa Department, April 1999), at p.4
[65] ibid, at p.12
[66] ibid, at p.14
[67] See IMF, "The ESAF at Ten Years: Economic Adjustment and Reform in Low-Income Countries," *Occasional Paper No. 156* (Washington DC: IMF, 12 February 1998)
[68] See D E Sahn (ed), *Economic Reform and the Poor in Africa* (Oxford: Clarendon Press, 1996), at p.22.

Paper divides the region into "early adjusters," "late adjusters," and "nonadjusters"[69] – a categorization which, in a moment of levity might be conveniently described in terms of "the good, the bad, and the ugly." What these reports have failed to explain is why it is that in spite of these levels of commitment to adjustment, only Mauritius and Botswana (which, incidentally, are *not* among the so-called "star adjusters") are emerging as true success stories in the region.[70] Or why, as pointed out by Stiglitz, the so-called "tiger economies" of South East Asia have managed to achieve their historic success even though they "had not closely followed the Washington consensus prescriptions..."[71]

As might be expected, commentators on the opposite side of the ideological divide have painted a different picture. For example, it has been noted that negative trends had been evident in such countries as Sierra Leone (before the civil war) and Nigeria, where even middle-class professionals such as teachers, health workers and civil servants had been turned into "the new poor," as some had seen their jobs vanish overnight, while others went for months without pay.[72] In Tanzania, Julius Nyerere's people-centred successes in the area of social sector reforms are reported to have been reversed, as the new government has been forced to reduce spending on education from 11.7 percent (of total recurrent expenditure in 1980-81), to 4.8 percent in 1988-89 – a development which has resulted in a fall in

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[69] See I E Elbadawi, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers*, Country Economics Department, October 1992, Washington DC: World Bank. An OECD Technical Paper adopts the same approach. Thus, the "strong liberalisers" in SSA were Ghana, Uganda, and Zambia; while the "intermediate" ones were Ivory Coast, Kenya, Mauritius, South Africa, and Tanzania. The "weak" ones were Nigeria and Zimbabwe (See Y M Tsikata, "Globalisation, Poverty and Inequality in Sub-Saharan Africa: A Political Economy Appraisal," *OECD Technical Papers No.183*, (Paris: OECD, December 2001), at p.11). See further, World Bank, *Adjustment in Africa: Reforms, Results and the Road Ahead* (New York: Oxford University Press, 1994).

[70] See World Bank, *Can Africa Reclaim the 21st Century?* n.43 above, at p.54

[71] See J E Stiglitz, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland, at p.2. John Madeley also points out that before trade liberalization (i.e., between 1960 and 1980), income per head in Africa grew by a third. Since 1980, it has fallen by a quarter. In Latin America, average incomes grew by 73 per cent between 1960-80; since 1980, they have shrunk to less than six per cent. On the contrary, where protectionism has been extensively used, (for example in South Korea, Taiwan, Indonesia and China), there has been a reduction in poverty levels since 1980. (See "World Bank Edits Out Penalty on the Poor," *The Observer*, 23 December, 2000, at http://www.observer.co.uk/business/story/0,6903,405969,00.html According to this account, it was this omission that caused the former World Bank staff Ravi Kanbur to resign in protest in May of that year.

[72] G Mohan et al: *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000), at p.62

enrolment rates, particularly in the primary sector which recorded a drop from 28.3 percent to 9 percent of total development spending.[73]

The above negative trend has been acknowledged even by the World Bank itself. For example, a study which examined the situation in the region in the 1990s estimates that gross school enrolment ratios declined during the 1980s in twenty of the forty-four countries for which data were available, while the rate of immunization against measles had either declined or stagnated in thirteen countries, though some of these are attributed to civil conflict.[74]

Furthermore, in a major study which compared adjusting and non-adjusting countries over the period between 1973 and 1988, Moshin Khan of the IMF concluded that "the growth rate is significantly reduced in program countries relative to the change in non-programme countries."[75] Further still, a study by UNICEF's Eva Jespersen which focused on 24 programme countries in the region in the 1980s revealed the following: a decline in capital accumulation in 20 of the 24 countries; a stagnation or slow-down in manufacturing in 18 countries; and a drop in export volumes in 13 countries.[76] Also, although the study noted an increase in export volumes in 11 countries, it also pointed out that this was offset by the fact that there was no corresponding increase in their balance of payments situation.[77] It is also hard to ignore the findings of a recent study by UNCTAD which asserts thus: "...while structural adjustment programmes have been applied more intensely and frequently in Africa than in any other developing region, barely any African country has exited from such programmes with success..."[78] These, then, represent the general picture regarding the impact of SAPs in SSA. It now becomes necessary to examine some specific cases of alleged violations of human rights by these policies.

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[73] See J P Lugalla, "Structural Adjustment Policies and Education in Tanzania," in Gibbon P (ed.), *Social Change and Economic Reform in Africa* (Uppsala, Sweden: Nordiska Afrikainstituted, 1993) at p.198.

[74] See World Bank, *A Continent in Transition: Sub-Saharan Africa in the Mid 1990s* (Washington DC: World Bank, 1995) at p.29

[75] M Khan, "The Macroeconomic Effects of Fund-Supported Adjustment Programs,"(June 1990) *IMF Staff Papers*, vol.37, no.2, Washington DC, at p.215.

[76] See E Jesperson, "External Shocks," n.20 above, at p.5

[77] ibid

[78] See UNCTAD, *Economic Development in Africa: Performance, Prospects and Policy Issues* (New York and

4.7.2. A Snapshot of Empirical Evidence

4.7.2 (a). Ghana

Ghana is often regarded as a "star pupil" among the countries of SSA in terms of its reform efforts, and there is little doubt regarding the extent of its reform programme. For example, Peter Beinart asserts as follows: Ghana, which has stuck to the SAP reforms, has registered significantly higher growth rates than its neighbors. For twenty years population growth outstripped food production; now that trend has been reversed in SAP countries.[79]

However, this ignores the true experience in that country since its adoption of SAPs. For example, according to the World Bank, the country's external debt rose from US$1.7 billion in 1983 (when structural adjustment began) to $3.5 billion in 1990, which represents an increase (in GNP terms) of 57 percent, from 41 per cent in 1983. This means that as a percentage of the country's export receipts, it rose from 345 in 1983 to 353 in 1990. The figures relating to the country's debt obligations are not impressive either. As a percentage of its exports of goods and services, its debt repayments rose from 31 per cent in 1983 to 35 per cent in 1990.[80]

It also ignores some of the human impacts of the reforms, such as job losses and an inevitable decline in living standards.[81] For example, up to 50,000 civil service employees (about 15 per cent of the entire labour force) were forced out of their jobs, as demanded by the IFIs, in an apparent attempt to reduce the country's budget deficit.[82] The consequence, it is also pointed out, was that a double blow was inflicted upon these ex-public sector workers, as the same policies which required their retrenchment had decimated the so-called informal sector on which most of workers relied to compensate for their

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Geneva: United Nations, 2001), at p.5.

[79] See P Beinart, "Out of Africa," *The New Republic*, December 26, 1994, Washington DC, at p.18. Indeed, according to the *Financial Times* (London) of August 17, 1992, Ghana had witnessed an average annual growth rate of 5 per cent, a reduction in inflation from 123 per cent in 1983 to 18 per cent in 1991, restored confidence and stimulated investment , while the country's debt arrears had been eliminated by 1990.

[80] See World Bank, *World Bank Debt Tables 1991-1992* (Washington DC: World Bank, 1991), at p.150.

[81] Per E Jespersen, "External Shocks, n. 76 above, at p.51

meagre incomes while in employment.[83] It was in recognition of this that the IFIs introduced the Programme of Actions to Mitigate the Social Costs of Adjustment (PAMSCAD) as a way of assisting the retrenched workers in finding new jobs in the agricultural sector.[84] As noted by Eva Jespersen, less than half of those affected benefited from the scheme.[85] In its assessment of Ghana's adjustment experience, a UNICEF report notes that in terms of the urban population living in poverty, the only other country in the region of SSA whose ratio is higher than Ghana's (at 59 percent) is war-torn and famine-ravaged Ethiopia.[86]

4.7.2 (b). Uganda

Following the morbid pantomime that characterized the Idi Amin misrule in Uganda, the economy deteriorated rapidly. Even after his overthrow by Tanzanian forces, the period between 1971 and 1986 was characterized by social unrest, at the end of which Museveni's National Resistance Movement seized power. After initial suspicions about the IFIs, structural reforms were initiated in 1987.[87] This however coincided with a decline in global coffee prices, reducing its terms of trade by 24 percent between 1986 and 1990.[88] As in Ghana, the civil service workforce was reduced by one-third, while the army was cut by one-half.[89] Similarly, a Programme to Alleviate Poverty and the Social Cost of Adjustment (PAPSCA) was set up, its main aims being: to offer assistance to retrenched government

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[82] See A Roe and H Schneider, *Adjustment and Equity in Ghana* (Paris: OECD, 1992), at p.114.

[83] ibid.

[84] See A B Zack-Williams, "Social Consequences of Structural Adjustment," in G Mohan et al (eds.), *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000), at pp. 68-73, who also notes the existence of similar schemes in several SSA and Latin American countries.

[85] See E Jespersen, "External Shocks," n.81 above, at p.22. See also J Ravenhill, "A Second Decade of Adjustment: Greater Complexity, Greater Uncertainty," in T M Callaghy and J Ravenhill (eds.), *Hemmed In: Responses to Africa's Economic Decline* (New York: Columbia University Press, 1993), at p.36, who notes that similar SDA schemes were also set up in other countries, including the Ivory Coast, Gambia, Guinea, Mauritania, and Senegal.

[86] See UNICEF, *The State of the World's Children* New York: Oxford University Press, (1993), at p.78. A World Bank study acknowledges the job cuts in Ghana, and also of 20,000 in Uganda, and30, 000 in Guinea. (See L de Merode and C Thomas, "Implementing Civil Service Pay and Employment Reform in Africa: The Experiences of Ghana, Gambia and Guinea," in D Lindauer and B Nunberg (eds.), *Rehabilitating Government: Pay and Employment Reforms in Africa* (Washington DC: World Bank, 1994) at pp.60-210)).

[87] See K Botchwey, et al, Report of the Group of Independent Persons Appointed to Conduct an Evaluation of Certain Aspects of the Enhanced Structural Adjustment Facility (Washington DC: IMF, 1998), at p.82 [hereinafter the *IMF External Evaluation Report*]

[88] ibid

[89] ibid, at p.83

workers, and to initiate projects in the areas of primary education, health, and rural infrastructure.[90] Although the terms of trade experienced a further decline of 22 percent between 1989 and 1993, the government achieved a per capita GDP growth of 40 percent.[91]

The IMF-appointed independent experts, however, note that the reforms would have brought a heavy cost, especially to the retrenched public sector workers, except for the fact that they had already learned to adapt to the informal economy.[92] Although the proportion of children receiving full immunization rose by nearly 60 percent during the 1990s, that of malnourished children showed no change. In the meantime, primary school enrolment declined due to the high cost of procuring educational services.[93] Moreover, they also note that "parts of the rural population have yet to gain substantially from the program."[94] The opinions of the independent experts appear to confirm earlier conclusions. For example, Seshamani had earlier noted that in spite of an annual growth rate of 5 percent and a low monthly inflation rate of 0.3 percent, "Ugandans are worse-off than they were 20 years ago.[95]

4.7.2 (c). The Ivory Coast

The Ivory Coast enjoyed a prolonged period of growth after independence, which came to an end at the beginning of the 1980s, following the end of the coffee and cocoa booms of 1976-1979. Its economic reforms thus began following the ensuing fiscal crisis. A brief period of growth resumed in 1985 and ended in the late 1980s owing to "a conjunction of a further deterioration in the terms of trade of 40 percent and lax public spending."[96] In the meantime, the government's stand-by agreement with the IMF meant that subsidies to cocoa and coffee producers, which were aimed at offsetting declining world

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[90] ibid
[91] ibid, at p.84
[92] ibid
[93] ibid, at pp.86-87
[94] ibid, at p.88
[95] See V Seshamani, "Structural Adjustment and Poverty Alleviation: Some Issues on the Use of Social Safety Nets and Targeted Public Expenditures," in Van Der Hoeven and Van Der Kraaij (eds.) *Structural Adjustment and Beyond in Sub-Saharan Africa*, n.27 above, at p.114.
[96] See IMF, *External Evaluation Report*, n.94 above, at p.64

prices had to be halved.[97] At the same time, urban poverty had "increased dramatically" following devaluation, particularly in Abidjan, rising from 5 percent to 20 percent between 1993 and 1995.[98] The unemployment rate rose to 15 percent, and between 1989 and 1995, "poverty more than doubled," particularly among food and cash crop-producing households, and within the urban informal sector.[99]

The reforms also resulted in a decline in real per capita public expenditure on health, which in turn led to the introduction of user charges in 1991.[100] The educational sector suffered a decline of over 35 percent. Moreover, although the number of primary school teachers increased slightly, the required cut in wage bills was achieved through a reduction in teachers' salaries.[101] The report however blamed these on the government's inability to adopt pre-emptive policies, for example, by not adjusting its exchange rate because of its membership of the regional currency agreement, the Franc des Colonies Françaises d'Afrique (CFA).[102]

One of the most disturbing accounts of how SAPs have directly resulted in human rights violations was highlighted by the UN's adviser on slavery, Kevin Bales, in his Channel 4 television documentary titled "Slavery: A Global Investigation," which was aired on 28 September, 2000. The programme revealed how the policies of the IFIs had forced the government of the Ivory Coast to abandon its support to cocoa farmers, causing them to resort to the enslavement and brutal torture of young men who had been lured from neighbouring Mali into remote farms with promises of employment. In an interview with one of the farmers, one of his "justifications" was that the withdrawal of government assistance had drastically reduced his profit margin, hence the need to ensure that his "workers" became more productive.[103] Evidently, the individuals responsible for such violations must bear personal responsibility for their conduct, as must the government, for failing to protect the victims. Nevertheless, it is still

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[97] ibid, at p.65
[98] ibid, at p.67
[99] ibid
[100] ibid, at p.68
[101] ibid, at pp.68-69
[102] ibid, at p.70
[103] See the programme's outline at http://www.channel4.co.uk/nextstep/slavery/. See also, K Bales, *Disposable People: New Slavery in the Global Economy* (London: University of California Press, 2000), where Bales explores the issue of modern-day slavery in a wider global context, establishing a connection between it and

possible to argue that by demanding the withdrawal of State support for farmers without adequate compensatory measures, the IFIs had contributed to those violations.

4.7.2 (d). Malawi

Malawi had enjoyed a long period of rapid growth since independence, followed by a one percent per annum decline between 1979 and 1987, when a combination of factors resulted in economic deterioration. First, the conflict in neighbouring Mozambique created a refugee crisis, as well as causing transport disruptions which both had knock-on effects on its economy. Moreover, an unusually severe drought (the worst in the century) plagued the country in 1992.[104] In the meantime, the economy was also hit by "unusually severe external shocks," causing a 65 percent cumulative terms-of-trade decline.[105] Nevertheless, because the reform programme, particularly under the post-Banda era had a pro-poor element built into it, the result has been encouraging. For example, primary school fees have been abolished, resulting in a 50 percent increase in enrolment between 1995 and 1999.[106] Again, the report blamed the Banda regime for its over-reliance on State parastatals as engines of growth, although it also acknowledges its success at the initial stages.[107]

4.7.2 (e). Zambia

The Kaunda government was renowned for its interventionist approach to governance. Because of its over-reliance on copper as the country's main export, however, it suffered a terms-of-trade imbalance following a deterioration in world copper prices – an experience which forced it to seek IMF assistance in 1976.[108] In contrast, the Chiluba government, like Ghana's, had come to earn the reputation of an enthusiastic adjuster. In fact, with its expenditure cut by half between 1991 and 1993, it was judged

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the phenomenon of globalization.

[104] IMF, *External Evaluation Report,* n.102 above, at p.73

[105] ibid

[106] ibid, at p.75

[107] ibid, at p.73

[108] ibid, at p.95

"considerably more draconian than had been planned."[109] The country was also affected by the severe drought of 1992. The new government attempted to diversify the economy from its import-substitute sectors such as fabricated metal products, to agro-processing activities such as food, beverages and tobacco, with the State sector, however, remaining a basis for patronage.[110] There was "a severe poverty problem" by 1991, particularly among smallholders and urban wage earners. Moreover, with a "sharp decline" in health and education spending, there was a noticeable impact in health-related social indicators during the first phase of adjustment between 1976 and 1991.[111]

During the second phase (i.e., between 1991 and 1994), rural household incomes fell by around 30 percent.[112] The country also witnessed the introduction of user fees in hospitals, a further burden on an already impoverished population. Indeed, as of the year 2000, relentless cuts in spending resulted in the desperate decision to merge the tuberculosis and obstetrics wards at the country's Siavonga Hospital, with predictable consequences.[113] A World Bank study acknowledges the state of primary education in Zambia in these terms: "[t]he pupil/textbook ratio in primary schools in 1992 was 8:1 in Mathematics, 5:1 in English and about 20:1 in social studies." It also acknowledges that conditions were so poor that many schools had to close during the rainy season to protect children from cholera.[114] The (IMF's) external evaluation report however blames the Kaunda government's antipathy to liberalization, and the wrong sequencing of reforms.[115]

4.7.2(f). Zimbabwe

Following its independence from the racist regime of Ian Smith, the newly independent government of Zimbabwe was faced with the task of redistribution and investment in health and education. Because

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[109] ibid, at p.96
[110] ibid, at pp.96-97
[111] ibid, at p.98
[112] ibid
[113] See G Monbiot, "To Keep them Destitute and Starving: The World Bank's Practices Allow the Rich to Steal from the Poor," *The Guardian*, London, 13 April, 2000.
[114] See World Bank, *Zambia: Prospects for Sustainable and Equitable Growth, Report No.11570-ZA* (Washington DC: World Bank, 1993), at pp.131-134
[115] See IMF *External Evaluation Report*, n.105 above, at pp.101-102

the previous regime was a virtual autarky, growth was already slowing down; thus, the redistributive programme became unsustainable.[116] Reforms began in 1991, followed by reductions in spending. Moreover, the country was also affected by the severe regional droughts of 1992. The ensuing economic crisis, which had resulted in a deterioration in the value of students grants and living costs, triggered the 1992 riots, followed in 1993 by a wave of bread riots.[117] The reforms thus carried "tremendous social costs" on the Zimbabwean population. The expert evaluation report, however, blames these on "political miscalculation in the sequencing of economic reforms."[118] As noted in chapter 13, however, the extent to which Mugabe has gone towards violating every aspect of his people's basic rights makes it impossible to blame any exogenous factor(s) for that country's tragedy.

4.7.2(g). Somalia

The impact of economic reforms in Somalia is not as easy to evaluate, for the simple reason that unlike some of the named countries, that country has been plagued by warlordism almost from independence in 1960.[119] The post-independence regime was overthrown in 1969 by Siad Barre, under whom the country became a pawn in the cold war rivalry. In the meantime, expansionist ambitions on the part of Barre saw the country at war with neighbouring Ethiopia in an attempt to create a "Greater Somaliland,"[120] although the massive aid (first from the Soviet Union, and later from the United States, and then from the Italian Socialists) it had received never reached its people. The economy was therefore already in ruins by 1980 when the IMF intervened. In the meantime, every sign of protest was met with brutal repression. According to Human Rights Watch, the Barre regime "unleashed a reign of

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[116] ibid, at p.103

[117] ibid, at p.110. Similar riots were also reported in Sudan, resulting in the overthrow of the Nimeri regime in 1984, and in Zambia in 1992, as a result of Kaunda's reluctant withdrawal of subsidies on the country's staple food, mealie meal. (See, respectively, F Stewart, *Adjustment and Poverty*, n.32 above, at p.7, and N van de Walle, African Economies, n.23 above, at p.24). There are further accounts of similar protests in Sao Paolo (Brazil) in 1984, and Caracas (Venezuela) in 1989 (See W Bello et al, *Dark Victory*, n.33 above, at pp.53-54). Indeed, Anne Orford argues that the economic reforms initiated in former Yugoslavia played a significant role in fanning the ethnic tensions that led to the disintegration of the country, although like Arlene Kanter's views on Rwanda, this must be regarded as mere conjecture. (See, nevertheless, A Orford, "Locating the International: Military and Monetary Interventions After the Cold War" (1997) *38 Harv. Int'l L.J. 443*, at pp.451-459.

[118] ibid

[119] See G B N Ayittey, *Africa in Chaos*, n.25 above, at p.51

[120] ibid

terror against [civilians of the Isaaq clan] killing 50,000 to 60,000 between May 1988 and January 1990."[121]

The picture looks totally different from the perspective of Michel Chossudovsky, whose widely cited account can be summed up thus: Somalia was a self-sufficient country in terms of food, and one which had no need for any form of food aid before the 1970s. With the introduction of adjustment policies in the 1980s, the fragile "exchange relationship" between the nomadic and pastoral economies was shattered, as a very tight austerity programme was imposed on the government as a way of releasing funds required to service the country's debt.[122] The import of cheap surplus wheat and rice meant a displacement of local producers, while currency devaluation in 1981 (and subsequent devaluations) led to hikes in the prices of fuel, fertilizer, and other farm inputs. In the meantime, even urban purchasing power had declined dramatically, just as the government's support programmes was curtailed.[123] The livestock economy fared no better, as prices of imported veterinary drugs increased with the depreciation of the country's currency. Effectively, veterinary services became privatized, as the IFIs encouraged the imposition of user fees for veterinary services. With no reliable veterinary services in place, a rinderpest epidemic took hold, forcing the traditional importers of Somali cattle - Saudi Arabia and other Gulf States to switch their demands to Australia and the European Union.[124] The ensuing drought therefore only had a last-straw impact on the humanitarian catastrophe that followed in the early 1990s.

The reforms are also said to have brought about the disintegration of health and educational programmes in Somalia. By 1989, expenditure on health had dropped by 78 percent in relation to its 1975 level, while the level of recurrent expenditure on education in 1989 was down from US$82 per primary school pupil (per annum) in 1982 to $4 in 1989. Between 1981 and 1989, school enrolment

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[121] See Human Rights Watch, Somalia: Beyond the Warlords - The Need for a Verdict on Human Rights Abuses, available at http://www.hrw.org/reports/1993/somalia/

[122] Per M Chossudovski, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (London: Zed Books, 1998), at p.101 et seq.

[123] ibid.

[124] ibid.

rates dropped by 41 per cent in spite of an increase in the number of school-age children, just as teachers' and other public servants' salaries fell by up to 90 per cent of their mid-1970 levels. The stage was thus set for the collapse of the country's civil administrative machinery.[125] Given the atrocious and irresponsible nature of the country's successive regimes, however, it is, at the very least, doubtful as to whether any exogenous factors can be blamed for the state of literal anarchy that now prevails in Somalia.

4.7.2(h). Rwanda

As in Somalia, there have been suggestions that economic reforms contributed to the Rwanda genocide of 1994. For example, Arlene Kanter argues that "...failing commodity prices, IMF/World Bank structural adjustment programs – were...the leading elements in the run-up to the genocide."[126] First, critics of the aid agencies have not been able to establish a persuasive causal connection between the aid regime and the genocide. Secondly, their position ignores the noted roles of key public officials, some of whom have now been indicted for inciting the genocide by the Rwandan War Crimes Tribunal in Tanzania. In any event, even if their position were based on factual reality, this would only have been the case in Rwanda and nowhere else; and can therefore not serve as sufficient evidence to illustrate that economic reforms necessarily result in economic marginalization and genocide. The reality, therefore, is that although the policy changes that are often required in return for aid might have contributed to such outcomes as social exclusion, elitism and deep resentment on the part of the marginalized sectors of society, the responsibility for that human tragedy must rest, first with the individuals concerned, and secondly, with the government for failing to adopt the principle of non-discrimination in the distribution of

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[125] ibid.

[126] See: A Kanter, "Fifty Years of the UN Genocide Convention: What Does it Mean for Africa?" (1999) *26 Syracuse J. Int'l L. & Com. 173*, at p.183; and P Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (West Hartford, CT: Kumarian Press, 1998), who believes that complacency on the part of the donor agencies in the face of preparations for the genocide by Hutu extremists contributed to it, and also that the aid system created a climate of growing inequality, social exclusion and prejudice, which contributed to the bitterness which resulted in the 1994 massacre.

resources. This has in fact been acknowledged by another proponent of the "economic reforms/genocide theory," Regine Andersen.[127]

4.8. Conclusion

As already pointed out, it is impossible to determine, with absolute certainty, what Africa's economic situation would have been like had the IFIs not intervened in a supposed effort to save it from the consequences of irresponsible leadership. Nor, for that matter, is it possible to measure, with any level of accuracy, the actual impact of SAPs on the continent, given that the conduct of many of he region's rulers - which are discussed in chapter 13. Nevertheless, it is hard to ignore the fact that the response from the IFIs was driven by an ideological fantasy – a manifestly dangerous experiment with policies that had not only never been tested anywhere else, but have always been consciously avoided even by the richest nations. Moreover, as acknowledged by even the IMF's former Managing Director, they placed a grossly unfair burden on the poor.[128] By so doing, they acted with total disregard for the facts and lessons of history, rejected the established principles of development economics, and violated the core elements of international law. It is however also necessary to note that for African rulers, the intervention of the IFIs served another heinous purpose: it became a most convenient excuse (if one were ever needed) for absolving themselves of even the most basic governmental responsibilities to their fellow citizens, which, more than anything else, explains the human tragedy that unfolds daily on the continent.

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[127] See R Andersen, "How Multilateral Development Assistance Triggered the Conflict in Rwanda" (2000) *Third World Quarterly,* vol.21, no.3, at pp 441-456; and M Chossudovski, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (London: Zed Books, 1998), at pp.111-120. Although Chossudovski has offered persuasive statistical evidence to illustrate the impacts of structural adjustment in that country shortly before the war, the submission nevertheless remains that at the very best, these policies (though manifestly detrimental in general human rights terms) would only have played a peripheral role in the ensuing genocide.

[128] Addressing the ECOSOC, Camdessus is reported to have acknowledged: "Too often...it is the poorest segments of the population that have carried the heaviest burden of economic adjustment." (See "Camdessus Details SAF Proposal, New Strategy for Poorest Countries," *IMF Survey*, vol.16, no.13, 29 June 1987, at p.195. For a similar acknowledgment by the World Bank, see: World Bank, World Development Report 1990: Poverty (Oxford University Press, 1990), at p.103; and IBRD, *Sub-Saharan Africa, From Crisis to Sustainable Growth: A Long Term Perspective Study* (Washington DC: IBRD, 1989), at p.21.

Chapter 5

THE INTERNATIONAL FINANCIAL INSTITUTIONS AND HUMAN RIGHTS

5.1. Introduction

Except for transnational corporations, the Bretton Woods institutions have come to represent the public face of globalization.[1] And while they do not have the ubiquitous presence of some of the TNCs, the IFIs have come under attack from commentators for their roles in promoting an almost exclusively neo-liberal global economic order, the human rights impacts of which were examined in chapter 4 as they relate to SSA. But SSA is not the only casualty of this mindset; its consequences have become evident in many countries (the latest example being Argentina)[2] and in fact constitute the central theme of an insightful book by the World Bank's former Chief Economist.[3]

The primary focus of this chapter is on the vexed question as to whether the IFIs can in fact be saddled with human rights responsibilities *as a matter of law*, especially given the explicit rejection, by their Legal Advisors, of any such possibility, and their argument that such responsibilities cannot, at any rate, be construed from their respective Articles of Agreement. An attempt will be made to argue that even if

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[1] By "Bretton Woods institutions" is meant the World Bank, the IMF, and the WTO. It is however acknowledged that although the WTO only came into being in 1995 (as a successor to the GATT, it is widely regarded as an institution whose role is intimately linked to those of the IFIs by leading international economic lawyers. (See: A H Qureshi, *International Economic Law* (Manchester, UK: Manchester University Press, 1999), at p.9; J H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., (Cambridge Mass., MIT Press, 2000), at p.7. See also, J E Stiglitz, *Globalization and its Discontents* (London: Penguin, 2002), at p.15, who notes that the Bretton Woods agreement did in fact call for the establishment of a World Trade Organization.

[2] Argentina, however, is not an exception. A useful background to its economic collapse has been provided by the centre-right magazine, the Economist. According to this account, it all began with Mexico's currency collapse between 1994-1995 which prompted Argentina to adopt an "export-and investment-led recovery – only to be buffeted by further external troubles," including "the emerging-market malaise of 1997-98," Brazil's devaluation in 1999, a strong dollar to which the Argentinian Peso was pegged, and low prices for farm exports. A new President who assumed office in 1999 tightened fiscal policy, "hoping to win back investors' confidence." Tax hikes generated a "deflationary trap." Other events followed, resulting in the collapse of the Peso. (See "The Background: Argentina's Economy," *The Economist*, 23 January 2003, available at www.economist.com). A policy analyst for the Catholic aid agency Cafod however puts the blame squarely on the IFIs. (See D Green, "IMF's Argentinian Incontinence" *The Guardian*, 10 February 2003, at http://www.guardian.co.uk/business/story/0,3604,892338,00.html)

[3] See J E Stiglitz, *Globalization and its Discontents*, n.1 above.

this were the case, any objective interpretation of the broader rules of international law renders such views unsustainable.

The chapter, nevertheless, acknowledges an evolutionary change in the way they have come to perceive their functions over the years in relation to the problem of underdevelopment (if only in rhetorical terms), specifically through the Heavily Indebted Poor Countries (HIPC) initiative, which itself represents an implicit acknowledgement of the failure of the structural adjustment policies of the 1980s; and assesses the significance of this initiative to African development - and by extension, the realization of ESCRs.

5.2. The IFIs: A Brief Historical Perspective

In embarking upon an exercise of this nature, it is tempting to begin with a detailed history of the IFIs. This, however, will not be attempted here. To begin with, it would be impossible to satisfactorily carry out such a task, given that that would inexorably shift the focus from the stated themes. At any rate, much has already been written in that regard.[4] Nevertheless, it would equally be inappropriate not to provide a brief contextual backdrop to the defined themes. Hence, it is necessary to highlight the fact that the two institutions are products of the dismal economic circumstances that beset the global economy soon after WWI, culminating in the stock market crash of 1929, the Great Depression of the 1930s, and, as some commentators have noted, the rise of Nazism in Germany.[5] The allied powers, particularly the United States and the United Kingdom, were thus determined to ensure that the

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[4] Examples of these include: E S Mason and R E Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and the Other Members of the World Bank Group* (Washington DC: Brookings Institution, 1973); M Garristen de Vries, *The IMF in a Changing World, 1945-85* (Washington DC: IMF, 1986); and B D Schaefer, *The Bretton Woods Institutions: History and Reform Proposals* (Washington DC: The Heritage Foundation 2000) [hereinafter *Bretton Woods Institutions*]

[5] See S I Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001), at p.15 [hereinafter *Human Rights Obligations*]. See also S Blanco and E Carrasco, "Pursuing the Good Life: The Meaning of Development as it Relates to the World Bank and the IMF" (1999), *9 Transnat'l L.& Contemp. Probs. 67,* at p.68. Rosa Lastra explains its connection to Nazism in these terms: "The disastrous experience of hyper-inflation in Germany in 1923, in an economy already overburdened with onerous war debts and reparations as well as high unemployment, created enormous popular discontent. This paved the way for the ise of National Socialism..." (See R M Lastra, "The International Monetary Fund in Historical Perspective," (2000) *J. Int'l Econ. L, 507-523,* at p.508).

conditions that led to those tragic events were not allowed to recur.[6] The first step was the establishment of the IMF, the first aim of which was to "promote international monetary co-operation through a permanent institution that provides the machinery for consultation and collaboration on international monetary problems."[7] The history of the World Bank began with the establishment, in 1945, of its premier constituent organization, the International Bank for Reconstruction and Development (IBRD), the first "purpose" of which was to assist in the reconstruction of post-war Europe, as well as "the encouragement of the development of productive facilities and resources in less developed countries."[8] Because the reconstruction of Europe was also mainly facilitated by the Marshall Plan, its role in that regard was soon to become practically redundant. Coincidentally, the process of decolonization meant that its focus was to be directed towards the developmental aspect of its

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[6] Those events could be summed up thus: Speculative activities pushed up the prices of already over-supplied commodities, resulting in the 1929 crash. With commodity prices in sharp decline, export incomes followed suit. Countries then resorted to hoarding gold and the dollar as a way of protecting their fast dwindling reserves, in the event, creating a scarcity of both. This was followed by competitive devaluation, as each country sought to make its exports cheaper. The result was a scramble for protectionist measures among the trading nations, leading to a decline in global economic output. (See S Blanco and E Carrasco, "Pursuing the Good Life," ibid, at p.69).

[7] Per Art.I(i) of the Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944; entered into force 27 December 1945, amended effective 28 July 1969, by the modifications approved by the Board of Governors in Resolution No. 23-5, adopted May 31, 1968; amended effective April 1, 1978, by the modifications approved by the Board of Governors in Resolution No. 31-4, adopted April 30, 1976; and amended effective November 11, 1992, by the modifications approved by the Board of Governors in Resolution No. 45-3, adopted June 28, 1990.available at: http://www.imf.org/external/pubs/ft/aa/aa.pdf. Other stated "purposes" are: "(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy; (iii) to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation; (iv) to assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade; (v) to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity; (vi) in accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members."

8 Per Art.I(i) of the Articles of Agreement of the International Bank for Reconstruction and Development (as amended effective 16 February 1989), available at http://www.worldbank.org. Other stated "purposes" are: (ii) "[t]o promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources; (iii) to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories; and (iv) to arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first; and (v) to conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy."

mandate.[9] Thus, it becomes easy to understand why the other four arms of the Bank, particularly the International Development Association (IDA) (the primary mandate of which is to provide loans on concessional terms to developing countries), and the International Finance Corporation (IFC), (whose main purpose is to promote private sector investments in developing countries), were later established.[10]

5.2.1. The Evolution of the IMF

Even after the fund had begun to address issues relating to economic development, the fixed exchange rates system that operated until the 1970s placed some limits on the scope of its so-called Article IV consultations with its members in the sense that since the purpose was to determine a member's ability to remain within established monetary boundaries, the discussions would often concentrate on those macroeconomic factors affecting the member's currency value, such as interest rates, money supply, government debt, inflation, and the current account of its balance of payments.[11] Moreover, further constraints were to be found in Article IV itself, which requires the Fund to "respect the domestic social and political policies of members, and in applying these principles...[to] pay due regard to the circumstances of members"[12] – a provision widely seen as a prohibition against interference in members' internal political affairs,[13] and thus, in human rights matters.

As noted by Sigrun Skogly, the roles of the two institutions have not changed in any significant way, although formulated more than half a century ago. Nevertheless, they have been able to adapt them to

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[9] Per S I Skogly, *Human Rights Obligations*, n.5 above, at p.16. See also B D Schaeffer, *The Bretton Woods Institutions*, n.4 above, at p.22

[10] The other constituents of the group are: the Multilateral Investment Guarantee Agency, and the International Centre for the Settlement of Investment Disputes. Details of these, including their respective Articles of Agreement, are available at the Group's website: http://www.worldbank.org

[11] See D D Bradlow, "Critical Issues Facing the Bretton Woods System: The World Bank, The IMF and Human Rights," (1996) *6 Transnat'l L.& Contemp. Probs 47,* at p.68. Article IV consultations are in consonance with Article IV(3) of the IMF Articles of Agreement, which authorizes it, *inter alia*, to "exercise firm surveillance over the exchange rate policies of members, and [to] adopt specific principles for the guidance of all members with respect to those policies."

[12] See Art.IV (3)(b) of the Fund's Articles of Agreement.

[13] Per D D Bradlow, n.11 above.

the circumstances of the post-war world.[14] Thus, although the IMF was not concerned with matters affecting the developing world at the initial stage of its creation,[15] this is no longer the case. In simple terms, its central roles now involve the promotion of international financial stability and of sound macro-economic and financial policies within its member States, and assisting them in gaining access to private capital flows.[16] It has also been described as the financier of temporary balance of payments deficits, the regulator of international financial markets (by virtue of its role as overseer of exchange-rate policy), as well as a lender of last resort to its members.[17]

With the collapse of the par value system in 1971 following its unilateral suspension by the US government, a new, more market-oriented exchange mechanism emerged.[18] Also, the advent of the debt crisis brought the Fund into the new role of providing funds for the purpose of addressing the balance of payments difficulties of the developing countries concerned. Because the loans were granted on the basis of agreed structural reforms, the Fund became involved in matters of economic development. Its new role has been explained thus: "The use of resources was no longer undertaken in defense of a par value system but to promote effective and durable adjustment and of the conditions for balanced and sustained economic growth."[19] Because members were now operating a floating exchange rate system, they were able to adjust their exchange rates to address balance of payments problems, as well as implementing other domestic policies (such as those relating to healthcare, labour relations, or agriculture) as they deemed appropriate.

The implication of this was that because such policies can also have a direct impact on a country's balance of payments situation, they became valid subjects of the Fund's periodic Article IV

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[14] See n.9 above, at p.17

[15] See D D Bradlow, n.13 above, at p.71

[16] See [UK's] Department for International Development, *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Cm 5006 (December 2000, at p.52 [hereinafter *The White Paper on International Development*]. See also B D Schaefer, *The Bretton Woods Institutions*, n.9 above, at pp.47-53

[17] See M P Todaro, *Economic Development*, 7th ed (Harlow, UK: Addison Wesley Longman, 2000), at p.570-571.

[18] This system was formally recognized by the Second Amendment to the Fund's Articles in April 1978, which also abolished the gold standard. See International Monetary Fund, *Gold in the IMF: A Factsheet* ,31 July 2000, at http://www.imf.org/external/np/exr/facts/gold.htm

[19] See M Garristen de Vries, *The IMF in a Changing World*, n.4 above, at p.120

consultations. Indeed, Daniel Bradlow notes that such discussions may now cover such areas as military expenditure, the environment, governance, social welfare, and unemployment policies.[20] Thus, it could be argued that the Fund has now adapted its remit to cover many of the aspects of the two human rights Covenants.[21] For example, discussions concerning healthcare and social welfare would essentially be an assessment of a member's commitment to Articles 12 and 9 (respectively) of the ICESCR, while those concerning governance would effectively relate to the right of participation in public life (including the right to vote),[22] the rights to due process,[23] or to freedom of peaceful assembly.[24] The Fund's change of attitude has in fact been acknowledged by the independent experts appointed by it to assess the impact of its policies in a number of developing countries, who noted: "In recent years, there has been a noticeable increase in the attention paid to social impact in fund documents."[25]

5.2.2. The World Bank Group

It is often difficult to establish which of the four development-related organs of the World Bank Group[26] is responsible for any specific project or programme at any given time. It suffices, however, to state that the IBRD is responsible for lending to relatively wealthy countries at the so-called London Interbank Offering Rate (LIBOR),[27] while the IDA is mainly concerned with the extension of credits to member

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[20] See D D Bradlow, n.15 above, at p.70.

[21] These being the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res.2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967); and the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI) UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967)

[22] See Art.25 of the ICCPR

[23] See Art.14, ibid

[24] See Art.21, ibid

[25] See K Botchwey et al, *Report of the Group of Independent Persons Appointed to Conduct an Evaluation of* Certain Aspects of the Enhanced Structural Adjustment Facility (Washington DC:IMF, 1998) at p.27 [hereinafter, the External Evaluation Report].

[26] These being the IBRD, the IDA, the IFC, and the Multilateral Investment Guarantee Agency (MIGA) which, *inter alia*, promotes (through guarantees, including coinsurance and reinsurance) the flow of foreign direct investment to member countries. (See Art.2(a) of the Convention Establishing the Multilateral Investment Guarantee Agency, available at http://www.miga.org/screens/about/convent/convent.htm#1. The ICSID, as the name suggests, is concerned with the mediation or conciliation of investment disputes between governments and private foreign investors. (See the ICSID website at http://www.worldbank.org/icsid/about/about.htm)

[27] The LIBOR is the rate available to international banks considered sufficiently creditworthy and able to deal in Eurodollars, which forms the benchmark for international lending rates. (See B D Schaefer, above, note 16, at

States that are unable to satisfy market expectations in regard to creditworthiness.[28] Both provide loans to governments (or to public or private bodies with government guarantees), for projects or programmes aimed at promoting social and economic progress. However, the main difference between the two is that while the IBRD relies on funds raised through the issue of bonds on the international capital markets, the IDA (which was created in 1960) relies on donations (usually) from rich countries. Thus, it is the latter which is responsible for providing loans on concessional (usually interest-free) terms to countries considered too poor to obtain them from the IBRD.[29]

As Bradlow has pointed out,[30] the term "development" is not defined in the Bank's Articles, and this should not be surprising, considering that as mentioned earlier, the main developmental task facing its founders was the post-war infrastructural reconstruction of Europe, which was never in any state of *underdevelopment*.[31] Indeed, Robert Gilpin points out that attempts by India and other developing countries to include the issue of economic development on the agenda at the Bretton Woods conference were rejected by the United States and other dominant powers, and that the IFIs were thus set up to serve the interests of the latter.[32]

5.2.3. The Bank's Evolution

Over the years, there have been attempts on the part of the Bank (as within the IMF) to adapt its role. This, it is widely believed, is traceable to the pioneering work of Robert McNamara, the Bank's president between 1968 and 1981, who is credited with introducing the ILO's Basic Needs Programme into the its

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p.20)

[28] It has to be noted however, that these criteria are not set in stone. For example, Nigeria and South Korea are considered eligible for both IBRD loans and IDA credits. (See World Bank Group, *The World Bank Annual Report 1999* (Washington DC: World Bank, 1999), at pp.272, 313-314

[29] See: Blanco and Carrasco, n.5 above, at p.77 et seq; and R Mikesell, "The Bretton Woods Debates: A Memoir," *Essays in International Finance*, No.192, Princeton University Department of Economics, at p.30 et seq.

[30] See D D Bradlow, n.15 above, at p.53

[31] See A G Frank, "The Development of Underdevelopment," in D N Balaam and M Veseth (eds.) *Readings in International Political Economy* (USA: Prentice Hall, 1996) at p.64. To be sure, and as mentioned earlier, Art.I of the Bank's Articles alludes to "the encouragement of the development of productive facilities and resources in less developed countries." The question, therefore, is the extent to which this was given due attention.

[32] See R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton and Oxford: Princeton University Press, 2001), at p.305.

operations.[33] The extent to which this attempt to adopt a more people-oriented approach to development was embraced within the Bank itself remains unclear. For example, in its *World Development Report* for the year 1990, the Bank acknowledged that poverty-alleviation was not of primary concern to it even in the 1980s;[34] although Sigrun Skogly notes that McNamara's ideas changed the Bank's approach as early as the 1970s.[35] What is clear, however, is that concerted campaigns on the part of NGOs and various UN agencies, culminating in the publication of UNICEF's much-cited book *Adjustment With a Human Face* in 1987, were instrumental in drawing international attention to the plight of victims of the IFIs' policy of structural adjustment in indebted developing countries.[36] Hence, since the same year, the Bank's staff guidelines have required policy framework papers for low-income countries to include an assessment of possible social impacts of intended adjustment programmes. Moreover, all Bank President's reports relating to adjustment must now include its possible impacts on the poor, as well as suggested solutions.[37] Also, the Bank now routinely promotes its human rights programmes, such as its $1.9 billion loan during the 1998 fiscal year, directly to programmes such as healthcare and nutrition; and $1.7 billion for education in poor countries, both within the preceding few years. Indeed, according to the report, "[t]he Bank has placed health and education at the center of its lending and advisory programs in poor countries."[38]

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[33] For more about his contributions, see W Bello et al, *Dark Victory: The United States and Global Poverty* (Food First and the Transnational Institute 1999), at p.13 et seq; and O Mehmet, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* London: Routledge, 1999), at p.89 et seq. See also M Garristen de Vries, *The IMF in a Changing World*, n.19 above, at p.13

[34] See World Bank, *World Development Report 1990:Poverty* (Oxford University Press, 1990), at p.103. The report states: "...when structural adjustment issues came to the fore, little attention was paid to the effects on the poor."

[35] See: S I Skogly, *Human Rights Obligations*, n.14 above, at p.18; and M Garristen de Vries, n.33 above.

[36] See G A Cornia, et al (eds.) *Adjustment With a Human Face: Protecting the Vulnerable and Promoting Growth* vol.I (Oxford: Clarendon Press, 1987); and G A Cornia et al, *Country Case Studies* vol.II (Oxford: Clarendon Press, 1988). See also UNICEF, *Executive Speeches: Investing in our Children's Future* – an address by the organization's deputy executive director Kul C Gautam to the World Bank in Washington DC, on 10 April, 2000, at http://www.unicef.org/exspeeches/00esp08.htm.

[37] See E Zuckerman, "Adjustment Programs and Social Welfare" *World Bank Discussion Paper* 44, (Washington DC: World Bank, 1989). See also, World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington DC: World Bank, 1989), at p.77 which acknowledges the need to invest in basic education, "since it is intrinsic to development in the widest sense; empowering people, especially the poor, with basic cognitive skills is the surest way to render them as self-reliant citizens."

[38] See International Bank for Reconstruction and Development, *Development and Human Rights: The Role of the World Bank*, (Washington DC: IBRD, 1998), at pp.6-7. (This was a document published to mark the 50th anniversary of the Universal Declaration of Human Rights in September 1998).

It also seeks to improve the status of women, minorities, and other vulnerable groups.[39] Also, according to its *Participation Sourcebook* for the year 1996, it has attempted to incorporate public participation into most of its operations, while promoting environmental protection schemes and encouraging good governance in member States.[40] It has also identified itself with a variety of roles which include infrastructure financing, facilitation of FDI, offering advice on sustainable development and support for free markets, promoting social programmes, championing debt relief, and offering guidance on globalization.[41] Other areas of involvement include judicial, educational, and civil service reforms.[42] In response to criticisms of its role over the years, the Bank has recently created an Inspection Panel to monitor its compliance with these reforms.[43] It has also initiated a programme called "Strategic Compact," which aims, among other things, to improve the effectiveness of its services, its responsiveness to its borrowers' needs, and to decentralize its activities.[44] Indeed, its functions are now seen in some circles as being concentrated in the areas of poverty reduction, structural reform, and social development – roles which, it is claimed, make it a *de facto* intermediary between the capital markets and developing country borrowers who would otherwise not have access to such markets.[45] The aim, it is further expleined, is to manage the global economy (in concert with the IMF and the OECD countries) in a way that promotes FDI and the integration of developing countries into it.[46]

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[39] See World Bank, *The World Bank Operational Manual, Operational Directive 4.20: "Indigenous Peoples,"* (September 1991), which discusses its policy on indigenous peoples. See also, World *Bank, Operational Directive 4.30: "Involuntary Settlement,"* (June 1990), which claims that the Bank's policy on such resettlements is that those affected should enjoy the benefits of the project. However, see World Bank, *Resettlement and Development: The Bank-wide Review of Projects Involving Involuntary Resettlement 1986-1993* (Washington DC: World Bank, 1994), which reveals its inability to implement this policy. Much of the Bank's new roles have, however, been acknowledged by the United Nations. (See United Nations, *Poverty Reduction Strategies: A Review* (New York: Department of Economic and Social Affairs, United Nations, 1998), particularly at p.27)).

[40] See World Bank, *The World Bank Participation Sourcebook: Environmentally Sustainable Development* (Washington DC: World Bank, 1996)

[41] See B D Schaefer, *The Bretton Woods Institutions*, n.26 above, at p.21. This was recently confirmed by a former World Bank President. (See L T Preston, *The World Bank Group: Learning From the Past, Embracing the Future* (Washington DC: World Bank, 1999), at p.5, who notes that "...the Bank has evolved from being simply a financier of development to being also a trusted advisor on development...helping borrowers reduce poverty and improve living standards through sustainable growth and investment in people."

[42] See D D Bradlow, n.15 above, at p.56; and M P Todaro, *Economic Development*, n.17 above, at 574.

[43] See for example, *The Inspection Panel, Panel Request No. RQ99/6* of 12 October 1999 from Kenya requesting an inspection of the IDA-funded Lake Victoria Environmental Management Project (IDA Credit 2907-KE) (GEF TF 23819), at http://wbln0018.worldbank.org/ipn/ipnweb.nsf/(webnews3)/

[44] See IBRD, *Strategic Compact: A Summary Note*, at http://www.worldbank.org/html/extdr/backgrd/ibrd/comsum.htm

[45] See *The White Paper on International Development*, n.16 above, at p.52

[46] ibid

5.3. The IFIs and Human Rights: An Evaluation of an Apparent Sea-Change

By any objective standard, therefore, the IFIs have shown an apparent willingness to adapt their roles to take account of what can rightly be described as human rights concerns. Whether this represents a genuine change of heart is quite a different matter altogether, and at any rate, can only be judged in the light of the impact of the policies they impose on developing countries. Thus, although the days in which they had no misgivings about lending to manifestly corrupt and rights-violating *kleptocracies* (such as Mobutu's Zaire) appear to be over,[47] it remains to be seen whether the apparent sea-change is one of substance, as opposed to a shrewd (if not cynical) response to pressure from human rights advocates and NGOs.

5.3.1. The Heavily-Indebted Poor Countries (HIPC) Initiative

One of the areas in which the apparent change of policies by the IFIs can be assessed is debt relief. As argued in chapter 13, any critique on Africa's state of underdevelopment which ignores the culpability of African rulers, not only in imposing an unsustainable debt burden on their people, but in perpetuating the status quo, is inherently flawed. However, as also pointed out in chapter 4, the imposition, by the IFIs, of supposedly remedial policies that were manifestly inappropriate (namely, the structural

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[47] According to a report by the debt campaign group Jubilee 2000, the IMF continued to lend to Mobutu even after its own representative in Zaire, Edwin Blumenthal, resigned in 1980, citing "sordid and pernicious corruption" that was so serious that "there is no chance, I repeat no chance, that Zaire's numerous creditors will ever recover their loans." At the time of Blumenthal's report, the loans stood at $5 billion; by the time Mobutu was toppled in 1998, it had been increased to $13 billion (See J Hanlon, "Dictators and Debt," Jubilee 2000 Report, November 1998, at http://www.jubilee2000uk.org/jubilee2000/news/dictatorsreport.html) The Bank's involvement was no less deplorable, and began in 1967, just two years after Mobutu assassinated his country's first Prime Minister. An example of its involvement was the extension, in 1975, of an additional loan of $100 million to the regime, in spite of the fact that at the time, the despot had already incurred an interest arrears of $1.2 billion on a $1.5 billion loan obtained from private sources in Italy and the USA. (See S Devarajan et al (eds.), *Aid and Reform in Africa: Lessons From Ten Case Studies* (Washington DC: World Bank, 2001), at pp.631-632. Interestingly, one of the contributors to this paper, Gilbert Kiakwama, served as the country's Minister of Finance between 1983-1985. The World Bank president once had these to say in response to a question from an audience in the Czech Republic: "Let us assume that mistakes were made on Zaire with Mobutu, which I am not accepting, but let us assume that deliberately people gave money that was misused, which I do not believe. Even if it were true, it is impossible to suggest that the majority of the work of the Bank should be stopped because of some problems that we ran into." (See Remarks to the Bohemiae Foundation Opinion Leaders' Forum by James D Wolfensohn, President of the World Bank Group, Cernin Palace [Ministry of Foreign Affairs], Prague, Czech Republic, 31 May, 2000), at http://www.worldbank.org/html/extdr/extme/jdwsp053100b.htm

adjustment policies of the 1980s), if nothing else, provided a convenient excuse (if one were ever needed) to rulers who saw the impoverishment of their people as a way of remaining in power. As part of the noted change of policies by the IFIs, these (essentially neo-liberal) reforms, while still being regarded as articles of faith, are supposed to be mitigated by the HIPC initiative.

Launched in September 1996 by both IFIs, the initiative "is designed to provide exceptional assistance to eligible countries following sound economic policies to help them reduce their external debt burden to sustainable levels." [48] To become eligible, a country must, however, satisfy a set of criteria. Specifically, it must:

- "face an unsustainable debt burden, beyond available debt-relief mechanisms;" and
- "establish a track record of reform and sound policies through IMF- and World Bank-supported programs."[49]

It must also have adopted a "Poverty Reduction Strategy Paper (PRSP)[50] by a so-called "*decision point*," and have made progress in its implementation by at least one year by the "*completion point*."[51] In

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[48] See IMF, "Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative: A Factsheet" August 2002, at http://www.imf.org/external/np/exr/facts/hipc.htm. As of August 2002, the following SSA countries were classified as being heavily indebted: Angola, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Ivory Coast, Democratic Republic of Congo, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia. See also, M Ahmed and H Bredenkamp, "Supporting Poverty Reduction in Low-Income Developing Countries: The International Community's Response," *Finance & Development*, vol.37, no.4, December 2000, International Monetary Fund, Washington DC.

[49] See IMF, "Debt Relief Under the HIPC Initiative," ibid

[50] The PRSP represents a commitment on the part of the applicant country to a poverty reduction strategy on the basis of which the country is entitled to concessional lending from the Fund's Poverty Reduction and Growth Facility (PRGF). According to the Fund, it is based on the "active participation by civil society--including the poor--and other development partners" in the countries concerned. (See IMF, "The IMF's Poverty Reduction and Growth Facility (PRGF): A Factsheet," September 2002, at http://www.imf.org/external/np/exr/facts/prgf.htm.

[51] To appreciate the meaning of these terms, it is necessary to have some understanding of the complicated scheme on which a country's eligibility depends: The process begins with a "first phase," at which a country "must adopt adjustment and reform programs supported by the IMF and the World Bank and establish a satisfactory track record." At the end of this, a "debt sustainability analysis" is carried out, on the basis of which the Executive Board of the IFIs determines its eligibility. This is the "decision point," and is also where commitments are made to provide further assistance. Then comes the "second phase," where the country "must establish a further track record of good performance under IMF/World Bank-supported programs." This is not time-bound, but "depends on the satisfactory implementation of key structural policy reforms agreed at the decision point." During this phase, bilateral and commercial creditors are generally expected to reschedule obligations falling due, "with a 90 percent reduction in net present value." The IFIs also provide "interim relief" between the decision and completion points, and other multilateral donors consider what assistance would be needed. This is the "completion point," where remaining assistance is disbursed. This is done on these bases: For bilateral and commercial creditors, a reduction in the net present value of the stock of debt proportional to

short, the HIPC initiative and the Poverty Reduction and Growth Facility (PRGF) were introduced to mitigate the impacts of the infamous structural adjustment policies of the 1980s and its variant – the Enhanced Structural Adjustment Facility (ESAF).[52] It thus becomes pertinent to inquire as to whether it represents the way forward, in human rights terms.

The simple answer is that it is not possible to offer a straightforward assessment of it. It is, however, possible to argue that it is comparable in every respect with the proverbial curate's egg: partly good and partly rotten. On the positive side, the fact that poverty reduction based on the idea of popular participation constitutes a central prerequisite for assistance can only be a welcome development, especially given that this it is directly linked to the UN's Millennium Development Goals.[53] If nothing else, it represents a recognition that the development process should not only have at its heart the needs of the human person, but should also be an inclusive one – and one in which the voices of the poor themselves are no longer ignored. Indeed, the UN's independent expert, Fantu Cheru, acknowledges the evident good intentions in his report.[54]

Cheru however highlights a number of shortcomings, the most critical one being the lack of finance.[55] Of particular concern is the fact that no provision exists for the relief of debts owed to non-Paris Club (i.e., commercial) creditors,[56] as well as the fact that many of the G-7 countries have been unsuccessful in securing the required funds from their respective legislatures.[57] He also points to what he describes as "the policy disconnect" between the set macroeconomic goals and that of poverty reduction, a problem

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their overall exposure to the HIPC. For multilateral creditors, "a (further) reduction in the net present value of their claims on the country based on broad and equitable action by all creditors sufficient to reduce the country's debt to a sustainable level."(See IMF, "Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative, n.48 above).

[52] See United Nations Economic and Social Council, The Highly Indebted Poor Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP) – Report submitted by Mr Fantu Cheru, independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights, E/CN.4/2001/56, 18 January 2001, at para.5 [hereinafter *The HIPC Report*].

[53] Countries are required to show clear links between their macroeconomic policies and the Millennium Development Goals. (See ibid, at para.22)

[54] ibid, at para.13

[55] ibid

[56] ibid, at para.19

[57] ibid, at para.15

he blames on "the unequal power relations" between the indebted countries and the IFIs – a situation which makes the former too eager to "placate" the latter, since debt relief is "conditioned upon good performance."[58] He goes on to describe the built-in debt sustainability analysis as a "bogus indicator" which could place countries such as Senegal, Tanzania and Zambia in the perverse position of paying more in debt relief under the scheme.[59]

5.3.2. Further Criticisms

As noted earlier, the abandonment of structural adjustment by the IFIs in favour of the HIPC initiative represents a direct acknowledgement of the inappropriateness of that approach to development. However, it is hard to ignore the fact that the present approach is based on an apparent contradiction: On the one hand, governments are required to adopt the same neo-liberal policies that defined the structural adjustment era; and on the other, are required to demonstrate a definite commitment to the UN's programme of poverty reduction. This evidently is a difficult balance to strike, not least because they have to balance the requirement to disengage as much as possible from their role as policy-makers, against their legal responsibilities as the primary guarantors of human rights, as provided by Articles 2 of the two Covenants. This point is well articulated by Anthony Anghie, who notes (in the context of FDI) that as well as being compelled to create the right conditions for investment, developing countries are also expected to minimize their own legislative powers within the domestic economy, while cushioning their citizens from the widely acknowledged impacts of globalization.[60] This, then, is the nature of the quandary in which many developing countries have become trapped.[61]

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[58] ibid, at paras.24-26

[59] ibid, at para.36

[60] See A Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World," (2000) *32 N.Y.U.J. Int'l L. & Pol. 243*, at pp.256-257. See also V A Leary, "Globalization and Human Rights," in J Symonides (ed.), *Human Rights: New Dimensions and Challenges* (Aldesrshot, UK: Ashgate and UNESCO Publishing, 1998), at p.266)). See further, S Picciotto, "Introduction: What Rules for the World Economy?" in S Piccioto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan and Oxfam, 1999), at p.4

[61] The Bank's duplicitous proclivity appears to be a manifestation of well-rehearsed practice. In his speech to the UN Economic Commission for Africa in 1998, Mr Wolfensohn remarkably admitted thus: "When I speak of Africa in the United States, I, of course, say that economic statistics have shown increases in overall GNP growth and in per-capita GNP growth. That civil society is flourishing. That there is a new spirit of optimism which I share. But, even as I say that, I know that more people are dying on this continent for reasons that could be avoided

In addition to the foregoing, the UNCTAD Secretary-General Rubens Ricupero has raised questions regarding the adequacy of the efforts aimed at debt reduction, as well as the speed at which relief is granted.[62] He therefore proposes "[a] comprehensive assessment of the sustainability of African debt," to be carried out by an independent body that would not be unduly influenced by the interests of the creditors.[63] The significance of this proposal becomes evident both as a matter of commonsense, as well as of economic analysis. From a commonsensical perspective, it is manifestly the case that unsustainable debt, even in a family setting, represents an encumbrance on that family's ability to meet its children's basic needs. Its economic impact has been acknowledged even by the IMF which explains that high levels of external indebtedness tend to reduce the efficacy of economic reforms in a number of ways, the most relevant of which (for present purposes) is that a large debt complicates stabilization efforts.[64] This, it is further explained, is because it brings into conflict the usual main requirements of the stabilization process, namely, cuts in expenditure on the one hand, and devaluation of the local currency on the other.[65] Devaluation, it is noted, increases the percentage of income allocated to servicing external debts (both pubic and private), as well as increasing the fiscal deficit. Eventually, this might result in "increased capital flight, which puts further pressure on the domestic currency (to depreciate further) and on domestic interest rates (to be pushed higher to combat capital flight), leading to "further deterioration of the fiscal situation."[66] Indeed, as argued by UNCTAD, "[t]he current policy of making successful adjustment a condition which must be met before debt relief is irrevocably provided puts the cart before the horse..."[67] Debt reduction, it is argued, should be a *sine qua non* for economic reforms in highly indebted countries.[68]

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than anywhere else. I know that some parts of the continent are wracked by chaos and conflict; that in these parts not only is there no growth, but people are dying of malnutrition." (See James D Wolfensohn, Address to the Economic Commission for Africa of the United Nations, Addis Ababa, 27 January 1998, at http://www.worldbank.org/html/extdr/extme/jdwsp012798_2.htm)

62 See UNCTAD, *African Development in a Comparative Perspective* (Geneva: UNCTAD, 1998/1999), at p. viii

63 ibid

64 See IMF, Theoretical Aspects of the Design of Fund-Supported Adjustment Programmes: A Study by the Research Department of the IMF, Occasional Paper No.55, IMF: Washington, at p.45. Indeed, a more recent study by the Fund's staff members acknowledges that "on the basis of current fiscal policies, debt levels will remain unsustainable even after these countries graduate from the HIPC Initiative." (See A Fedelino and A Kudina, Fiscal Sustainability in African HIPC Countries: A Policy Dilemma? IMF Working Paper WP/03/187 (IMF, Washington DC: September 2003) at p.1))

65 See IMF, Theoretical Aspects, ibid

66 ibid

67 See UNCTAD, *The Least Developed Countries Report 2000 – Aid, Private Capital Flows and External Debt:*

5.4. The IFIs and Human Rights

Given the nature of the debate surrounding the roles of the IFIs *vis-à-vis* the developing world, it is tempting to conclude that their human rights responsibilities are beyond question. Indeed, it could be argued that the adaptation of their functions represents an explicit recognition of that fact. This, however, leaves unanswered, the question as to whether such assumed roles are based on legal principles. In addressing this question, it is pertinent to point out that their mandates do not include any explicit human rights obligations. In fact, under its Articles, the World Bank is precluded from taking into account any matters considered to be of a political nature.[69] The position of the IMF is, at best, unclear,[70] and otherwise, quite similar to that of the Bank.[71] Indeed, the former Chief Legal Advisor to the World Bank once warned against "[d]rawing the Bank into a direct and explicit political role for which it has neither the mandate nor the competence."[72] Quite how it was possible to maintain such a fictional distinction between what was considered political on the one hand, and what was deemed purely economic will never be satisfactorily explained, given that a decision by a government to cut public expenditure, for example, is just as political as it is economic. Nevertheless, questions still remain regarding the basis upon which their supposed human rights responsibilities exist.

The Challenge of Financing Development in the LDCs (New York and Geneva: United Nations, 2000), at p.120.

[68] ibid

[69] See, for example, Article IV(10) of the IBRD's Articles of Agreement which states: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

[70] Unclear because under Art.IV(3)(b) of its Articles, the "principles" adopted during the Fund's surveillance missions are required to "respect the domestic social and political policies of members [and]... pay due regard to the circumstances of members." Thus, although it is quite possible to interpret this as an explicit recognition of human rights concerns, this remains a matter of debate.

[71] See J Gold, "Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for the Use of Resources," *IMF Survey*, 23 May 1983, at p.146. Gold's position was echoed subsequently by the Fund in response to a UN report on the realization of ESCRs, according to which "rights cannot be realised in the absence of structural adjustment." (See Written Statement Submitted by the International Monetary Fund to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 43rd Session, UN Doc. E/C4/Sub.2/1991/63, at para.7).

[72] See: I Shihata, "Democracy and Development" (1997) *46 Int'l &Comp. L.Q. 635*, at p.642; and I Shihata, "The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements," (paper submitted to the Third World Legal Studies Association Conference in Miami, Florida on January 8 1988.

5.4.1. The Question of Legal Personality

It is now axiomatic that international law only recognizes, as its subjects, entities that possess rights and duties under it –"subjects" in this case being entities that are capable of possessing international rights and duties and having the capacity to maintain their rights by bringing international claims. [73] Thus, it is often assumed that only a State is capable of possessing that status. It follows that non-State actors, such as the IFIs, are, *prima facie*, not to be so regarded. The question of international legal personality and how it affects the human rights responsibilities of non-State actors has been discussed in chapter 10. In this context, it suffices to point to some facts which certainly support the view that the IFIs are subjects of international law, and thus have international (human rights) responsibilities.

States aside, certain international organizations are also recognized as having international legal personality. Thus, the status of the United Nations has never been in doubt.[74] The question, however, is whether that status extends to such of its specialized agencies as the IFIs. On the surface, it is possible to argue that as specialized agencies, they automatically acquire the status of the UN. However, the nature of the relationship is at best, contradictory, in the sense that they also operate as independent organizations.[75] Moreover, as Sigrun Skogly points out, academic opinion is by no means undivided,[76] although a review of available literature suggests that the disagreement is not necessarily in regard to whether international organizations should have international legal personality, but about the factors which they must possess to acquire that status. Thus, for Rosalyn Higgins, for example, they must possess: the capacity to contract, the capacity to sue and be sued, the ability to own property, and an ability to contractually commit their membership.[77] For Ian Brownlie, these are:

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[73] See *Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174, at p.179

[74] See I Brownlie, *Principles of Public International Law*, 5th ed., (Oxford, UK: Oxford University Press, 1999), at p.62. See also, the *Reparation* case, ibid.

[75] See Art.I(2) of the Agreement Between the United Nations and the International Monetary Fund, Selected Decisions and Selected Documents of the IMF, Twenty-Sixth Issue, as updated as of December 31, 2002, available at http://www.imf.org/external/pubs/ft/sd/index.asp?decision=DN12. A similar agreement (which entered into force on 15 April 1948) exists between the World Bank and the United Nations.

[76] See S I Skogly, *Human Rights Obligations*, n.35 above, at p.63

[77] See R Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), at p.46

1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states; and
3. the existence of legal powers exercisable on the international plane and not solely within the national system of one or more states.[78]

In the absence of any explicit reference to this issue in their respective Articles,[79] and given the lack of agreement amongst commentators in this regard, it becomes necessary to inquire as to whether it can be gleaned from other authorities. In the *Reparation* case, where the ICJ was faced with a question not dissimilar to this in relation to the UN, the court was evidently influenced by the nature of the *functions* and *rights* enjoyed by the organization, in determining whether it had international legal personality or not.[80] Applying the same reasoning to the IFIs, it becomes clear that although they are autonomous institutions *vis-à-vis* the UN, they can be said to possess the same status as the UN itself, particularly given their crucial and pervasive roles within the global economy, as within the various countries of the world. It is also possible to construe the existence of international legal personality from the fact that as already pointed out, their respective Articles confer upon them, a wide range of privileges and immunities. These, it will be noted were also crucial in persuading the ICJ in its acknowledgement of the UN's legal personality in the *Reparation* case.[81] Furthermore, in its Advisory Opinion on the *Interpretation of the Agreement Between the WHO and Egypt*, the ICJ noted: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions, or under international agreements to which they are parties."[82] Thus, assuming that they are in fact subjects of international law (their autonomous status *vis-à-vis* the UN notwithstanding), they would be bound by such obligations as are now universally recognized as international legal norms, including human rights.

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[78] See I Brownlie, *Principles of Public International Law*, n.72 above, at pp.679-680

[79] Under Art.IX, the IMF possesses "full juridical personality," in addition to wide-ranging immunities. The World Bank has similar provisions under Art.VII. It appears, however, that they are only exercisable within the territories of its members, and not on the international plane.

[80] See *Reparation for Injuries* case, n.73 above, at p.179

[81] See ibid. Also, in *J H Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others* [1990] 2 AC 418 (also known as the *International Tin Council* case), the House of Lords was faced with the question as to whether an organization established by 23 countries by a treaty in 1956 had international legal personality separate from its member States, even though this was not stated within the treaty. It was held that the organization's status was distinct from those of its members, although it is necessary to add that the Law Lords were evidently influenced by the fact that the organization had been declared a body corporate by virtue of secondary legislation in the UK (See, particularly, Lord Templeman, at p.478 et seq).

[82] See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 ICJ Rep.73, at pp.89-90 (Advisory Opinion of December 20)

5.4.2. Responsibilities Implied by their Functions

It is also possible to construe the human rights responsibilities of the IFIs from the nature of their stated functions, as contained within their Articles. Indeed, as illustrated in the context of their structural adjustment programmes in SSA, their policies, projects or programmes impinge upon every imaginable aspect of life in the countries concerned, at least insofar as they influence the choices that governments can make. Again, in the *Reparation* case, the ICJ, stated that "the [international] rights and duties of an entity...must depend upon its purposes and functions as specified or *implied* in its constituent documents and developed in practice" [emphasis added].[83] Thus, although the Bank's Articles might in fact preclude it from taking the human rights implications of its policies into account, and although the Fund's Articles do not recognize them in explicit terms, the very fact that such policies can impact upon almost every aspect of human life within the countries concerned means they are implied in the Articles. It is, after all, the case, as persuasively argued by Sigrun Skogly, that their functions cannot be interpreted to preclude a duty to evaluate the human rights impact of their policies.[84]

5.5. Conclusion

This chapter began with a brief contextual background to the establishment of the IFIs, and also examined the evolution of their roles since their establishment. It was noted that although there is no specific reference to human rights within their respective Articles of Agreement, and that although there was initial resistance on their part to the recognition of such responsibilities, the last few years have witnessed (at least in rhetorical terms) a gradual shift from that position. The HIPC initiative represents the latest in that process of change. The central question, however, was whether, given the absence of any explicit authority in this regard, such responsibilities are based on any legal principles. An analysis of case law led to the conclusion that their human rights responsibilities flow from the nature of their functions and rights within the international economy.

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[83] See *Reparation for Injuries* case, n.81 above, at p.180

[84] See S I Skogly, "Structural Adjustment and Development: Human Rights – An Agenda for Change," (1993) *Hum. Rts Q*, vol.15, at p.761

The chapter also carried out an assessment of the HIPC initiative itself, based, for the most part, on the findings of the UN expert appointed to examine its impact; and the conclusion was that at best, it poses a difficult conundrum for the countries concerned in terms of their policy options. Given the dynamics of the current global economic regime (particularly the fact that the powerful interests that control it are almost viscerally opposed to the very idea of economic rights), it is safe to conclude that the HIPC initiative represents the farthest limit in their evolutionary journey, at least for the foreseeable future, especially considering that the idea of total debt cancellation has already been ruled out. [85] For African rulers, this carries an important implication: the HIPC (or whatever eventually replaces it) represents the best they can expect from the international community. They must either seize this imperfect opportunity with both hands and do their best to liberate their people from poverty and disease through responsible leadership, or allow them to languish in perpetual misery through their usual indulgence in escapist antics, wars, and other self-serving preoccupations as highlighted in chapter 13.

[85] In a joint statement in response to the call for a 100 percent debt relief, both institutions assert thus: "Total debt cancellation for those countries alone would come at the expense of other borrowing countries, including those non-HIPCs which are home to 80 percent of the developing world's poor. Those who call for 100 percent cancellation for the HIPCs alone, must recognize that this would be inequitable for other poor countries." (See IMF, "100 Percent Debt Cancellation? A Response from the IMF and the World Bank," July 2001, at http://www.imf.org/external/np/exr/ib/2001/071001.htm)

Chapter 6

TRADE THEORY: AN OVERVIEW

6.1. Introduction

The general information website of the WTO sums up the organization's position on trade theory in these terms: "The economic case for an open trading system based upon multilaterally agreed rules is simple enough and rests largely on commercial common sense." And it adds:"...liberal trade policies – policies that allow the unrestricted flow of goods and services – multiply the rewards that result from producing the best products, with the best design, at the best price." The alternative, it argues, is protectionism, which leads to "bloated, inefficient companies, supplying consumer with outdated, unattractive products." Ultimately, it further asserts, factories close and jobs are lost; and to drive home the message, the picture of David Ricardo is conspicuously displayed, along with an explanation of his theory of comparative advantage.[1] Thus, for the WTO, the Ricardian *laissez faire* model represents the only path to economic development.

6.2. Free Trade: A Theoretical Perspective[2]

As stated on the WTO website, international trade theory is premised upon the Ricardian concept of comparative advantage.[3] Over the years, it has been articulated by some of the most prominent political

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[1] See World Trade Organization, "*The Case for Open Trade*," available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm

[2] In addition to the specific references that follow, this section draws on several sources, including M J Trebilcock and R Howse, *The Regulation of International Trade* 2nd ed., (London: Routledge, 2000); J H Jackson et al, *Legal Problems of International Economic Relations: Cases, Materials and Text* (Minnesota: West Group, 1995); R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Oxford, UK: Princeton University Press, 2001); and A O Sykes, "Comparative Advantage and the Normative Economics of International Trade Policy" (1998), *Journal of International Economic Law*, vol.1, at pp.49-82.

[3] See D Ricardo, *The Principles of Political Economy and Taxation* (New York: E P Dutton, 1911, first published in 1817), who illustrated his thesis with a mathematical model using England and Portugal as follows: England produces a given quantity of cloth using the labour of 100 men, and a given quantity of wine using 120 men. Portugal produces the same quantity of cloth using 90 men, and the same quantity of wine using 80 men. In this example, Portugal enjoys an absolute advantage over England in the sense that it can produce both goods with

economists and trade theorists. Thus, for Paul Samuelson, "[t]here is essentially only one argument for free...trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of nations, and makes possible higher standards of living all over the globe."[4] Samuelson's former pupil, Jagdish Bhagwati describes it as a "fundamental intuition of Economics," which "has never been plausible to the general public."[5] Thus, although a difficult concept in its own right,[6] the theory has been explained, rather conveniently for a student of law, with the following analogy: It envisages a leading lawyer whose fees are among the highest in the profession, and who also happens to be a highly efficient home decorator. Although it might seem economically logical for him to practise law and paint his own house, the comparative advantage theory dictates that he concentrate on his legal work, since he is *comparatively* better at it than in painting. And although other painters might be less efficient than he is, hiring them to paint his house is a better option, since he would, in effect, be selling his more expensive legal skills to purchase the services of the painters.[7] By so doing, it is argued, both parties enjoy a benefit that would otherwise have been lost.

The theory therefore holds that countries should concentrate their resources on the production of those goods and services in which they have a relatively lower cost over other trading nations.[8] At its heart lies the idea of specialization: a country which adopts this approach is most able to employ fewer resources in the process of production, thus maximizing its returns on the factors employed.[9] It follows

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fewer men than England. However, this, in Ricardo's view, is not a beneficial position for either country. It is in England's interest, he argues, to export to Portugal the cloth produced by 100 men in exchange for the wine produced by Portugal with 80 men because otherwise, England would have required 120 men to produce the same quantity of wine. By the same token, Portugal gains by employing only 80 men to produce the cloth instead of the 90 that would otherwise have been required.

[4] Per P Samuelson, *Economics*, 11th ed., (New York: McGraw Hill, 1980), at p.651

[5] See J N Bhagwati, "Challenges to the Doctrine of Free Trade" (1993) *25 N.Y.U.J. Int'l L. & Pol. 219*, at p.220

[6] See for example, R W Jones, *International Trade: Essays in Theory,* vol.4 (Amsterdam: North-Holland Publishing, 1979), at p.33 et seq., for an elaboration on the concept. See also, R Vernon, *The Economic Environment of International Business* (Englewood Cliffs, New Jersey: Prentice-Hall Inc., 1972), at p.83 et seq; and M P Todaro, *Economic Development*, 7th ed., (Harlow, England: Addison Wesley Longman Inc., 2000), at p.468 et seq.

[7] See R Vernon, *The Economic Environment of International Business*, ibid, at p.83. See also J N Bhagwati, "Challenged to the Doctrine of Free Trade" n.5 above, at pp.219-220; and P Samuelson and A Scott, *Economics* (Toronto: McGraw Hill, 1980), at p.807.

[8] ibid. See also, M P Todaro, *Economic Development*, ibid, at pp.468-469.

[9] This, it might be noted, is not dissimilar to the Smithian thesis on international trade. (A Smith, *An Inquiry into the*

therefore, it is argued, that countries should trade freely with each other as a way of achieving national specialization and efficiency. The argument is that it is only through such unhindered interaction within the global economy that economic prosperity can be realized, as competition from abroad forces domestic producers to adopt not only more efficient practices, but to also reduce prices and increase consumer choice.[10] Thus, from this perspective, a neo-liberal approach to international trade represents the most efficient way for countries to realize the aims set out in the ICESCR.

6.3. Variations on the Ricardian Theme

6.3.1. The Heckscher-Ohlin Model

The 1920s witnessed the reformulation, by Swedish economists Eli Heckscher and Bertil Ohlin, of a close variant of the Ricardian theory. According to Robert Gilpin, the Heckscher-Ohlin (H-O) theory (or the factor proportions hypothesis) "has been accepted as the standard explanation of international trade."[11] Like the comparative advantage theory, it holds that countries will tend to specialize in the production and export of those goods in which they have a cost advantage over other countries. Just as the comparative advantage theory was premised upon the most improbable of assumptions,[12] the H-O theory also posits:

- that returns to scale always remain constant;
- that the relevant technologies are universally available; and
- that a country's comparative advantage and trade pattern is dependent on its factor endowments.[13]

Nature and Causes of the Wealth of Nations (J S Nicholson ed.) (London: T Nelson & Sons, 1895), at p.185, who asserts thus: "What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom...If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage."

[10] Per J H Jackson et al, *Legal Problems of International Economic Relations*, n.2 above, at p. 13 et seq. See also R Gilpin, *Global Political Economy*, n.2 above, at p.197 et seq. For a more detailed exposition of this theory, see A O Sykes, "Comparative Advantage and the Normative Economics of International Trade Policy" n.2 above.

[11] See R Gilpin, *Global Political Economy*, ibid, at p.206.

[12] The assumptions include: full employment among the trading nations, and constant costs at all levels of production. (See M J Trebilcock and R Howse, *The Regulation of International Trade* (London: Routledge, 1995), at pp.3 and 4.

[13] Per R Gilpin, n.11 above, at p.206. See also, J N Bhagwati, "The Heckscher-Ohlin Theorem in the Multi-

However, as pointed out by Gilpin, the basic problem with the H-O theory is that actual trade patterns frequently differ from what it predicts.[14] For example, they often result from factors other than natural endowments, some of these influenced by corporate strategies. Among these are: historical accidents, government policies, economies of scale, research and development (R&D), technological innovations, or indeed, what is now known as "learning-by-doing."[15] Furthermore, it is now widely accepted that a substantial percentage of world trade takes place as intra-firm transfers, at prices set by the parent company, as part of its global corporate strategy, a phenomenon which explains the fact that in the 1990s, over 50 percent of American and Japanese trade followed this pattern.[16]

6.3.2. The Product Cycle Theory

Evidently unpersuaded by the H-O theory (particularly with the supposition that a country's comparative advantage and trade pattern is dependent on its factor endowments),[17] Raymond Vernon undertook a study of firms in US and other industrialized economies in 1966, and observed that because firms had access to generous amounts of finance and highly specialized forms of human capital, they were able to enjoy a comparative advantage in the R&D stage of product development. He also established that international specialization in manufacturing occurred in stages, the first beginning with production aimed at a small domestic and custom-oriented market. Then followed a stage where production was expanded to cater for mass domestic consumption. The third involved the export of the manufactured goods, usually through the establishment of subsidiaries abroad (i.e., the emergence of the TNC). The fourth was characterized by the standardization of the product, particularly in countries with low labour costs. As the product became better understood, production became more routine in the host countries, from where it might even become mass-produced and exported to where the innovation began. The study also established a correlation between American FDI in the 1960s and its *competitive* advantage

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Commodity Case" (September/October 1972) *Journal of Political Economy*, vol.80, at pp.1052-1055.

[14] See R Gilpin, ibid, at p.207

[15] ibid, at pp.207-210

[16] ibid, at p.210

[17] See R Vernon, *The Economic Environment of International Business*, n.7 above, at p.96

in product innovation, which had the tendency of discouraging foreign competition. Thus was born his "product cycle" theory of international trade.[18]

6.3.3. From Comparative to Competitive Advantage

Vernon's work marked the beginning of a shift from comparative advantage to competitive advantage, as well as a recognition that trade patterns can also result from non-traditional factors, as opposed to always depending on factor endowment.[19] The competitive advantage theory has however been substantially developed by Michael Porter, a former adviser to President Reagan's Commission on Industrial Competitiveness. Porter's empirical work (which is based a study of ten industrialized nations and on a detailed examination of over one hundred industries) argues that the emergence of TNCs has rendered the Smithian/Ricardian, as well as the H-O trade theories obsolete because of their basic assumptions (for example, that factors of production only exist in form of land, capital, and labour, and are fixed gifts of nature).[20] These, he believes, ignore the impact of such factors as technology, and the resulting economies of scale.[21]

Porter argues that the globalization of industries has created a paradox: although companies now "seem to have transcended countries," the leaders in particular industries "tend to be concentrated in a few nations and sustain competitive advantage for many decades." As alliances are formed, competitive

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[18] See R Vernon, "International Investment and International Trade in the Product Cycle,"(1966)*Quarterly Journal of Economics*, vol. 80, no.2, at pp.190-207. See also R Vernon, "The Product Cycle Hypothesis in a New International Economic Environment" (1979) *41 Oxford Bulletin of Economic Statistics* 255. He also alludes to this theory in R Vernon, *Sovereignty at Bay* (London: Longman Group Ltd., 1971), at p.65 et seq; and in R Vernon, *The Economic Environment of International Business*, n.17 above, at p. 96-103. See also, A O Sykes, n.10 above, at p.56.

[19] See P R Krugman, *Geography and Trade* (Cambridge, Mass.: MIT Press, 1991), at p.7. It is also necessary to acknowledge the contribution of Stephen Hymer to this discourse, particularly his suggestion that firms invest abroad so as to maximize profits arising from their competitive advantage. (See S Hymer, *The International Operations of National Firms: A Study of Foreign Direct Investment* (MIT Press, 1976)).

[20] The fallacy inherent in the focus on the traditional factors of production, he argues, is illustrated by the fact that countries which would have been considered uncompetitive under the above models have enjoyed high living standards despite, for examples, budget deficits (in Japan, Italy, and Korea), appreciating currencies (in Germany and Switzerland), and high interest rates (in Italy and Korea). Neither, he further contends, have high labour costs and labour shortage had an adverse effect on the economies of Germany, Switzerland or Sweden. Germany, Japan, Italy and Korea, he notes, have all prospered in spite of their limited natural resources. (See ibid, at pp.3-4).

[21] ibid, at pp.13-14

advantage is created through "a highly localized process." The ability to compete abroad, he explains, depends on a number of domestic factors, such as differences in national economic structures, values, cultures, institutions, and histories – all of which constitute a source of the skills and technology that underpin competitive advantage at the domestic level, which in turn influences the international competitiveness of particular sectors of the domestic economy. Thus, he argues that an economy with a competitive advantage in a particular sector invariably has several strong firms in that sector, and that as intense competition develops among these domestic firms, they become stronger in the international markets.[22]

6.3.4. The Strategic Trade Theory

A common feature of the post-Ricardian trade theories is that in addition to the challenge they pose to the idea of comparative advantage, they also acknowledge (at least by implication) the role of the State in enabling their domestic firms to enjoy a competitive advantage over those of other nations. In the process, they also highlight the fact that the modern TNC represents the single most important element in trade policy. The strategic trade theory (STT) explains these intimately related features of international trade. What, then, it might be asked, are the dynamics of STT? Robert Gilpin offers a most insightful explanation of the concept: It is simply a collection of earlier challenges to the Ricardian model because it represents a growing appreciation of such factors as the economies of scale (and scope), "learning by doing," the importance of R&D, and the role of technology, and thus poses a direct challenge to the notion of free trade.[23]

The idea of strategic trade is based on the mechanics of the contradictory phrase: "oligopolistic competition."[24] In a perfectly competitive domestic market, strategic decisions are impossible due to the inability of the various firms within a particular sector to significantly influence market conditions for

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[22] ibid, at pp.18-21. These are all elaborated upon at pp.33-175

[23] See R Gilpin, *Global Political Economy*, n.16 above, at p.214

[24] Contradictory because the very term "oligopoly" is irreconcilable with the idea of market competition, at least in the *laissez faire* sense. (See G Bannock et al, *Penguin Dictionary of Economics*, 6th ed., (London: Penguin Books, 1998), at p.303, which defines it as "[a] market which is dominated by a few large suppliers.")).

other firms. In an oligopolistic market, the almost-inevitable emergence of economies of scale means that the market can only support one, or at best, a handful of large firms, which are thus able to dictate policies that affect the market – for example, by increasing output or reducing prices – in a bid to either maximize profits, or preserve their market dominance. In the context of international trade, this can become useful in capturing a foreign market, or in protecting domestic producers from low returns by dumping the surpluses in a foreign market, which creates an artificial scarcity at home, thus increasing prices.[25] It is the possibility of such market dominance that makes strategic trade an attractive choice for some governments, especially those with high-tech industries. Strategic trade therefore simply takes the idea of oligopolistic competition one step further by acknowledging the importance of State intervention through subsidies or other protectionist measures, essentially aimed at creating or preserving a strategic advantage for domestic firms.[26]

What this means is that the resolute adherence by the WTO to the comparative advantage doctrine is misleading, at least insofar as it ignores the evident shift of doctrinal focus. But it also highlights the fallacy that underlies the very idea of free trade itself. As highlighted in a recent UNCTAD study, one of the main consequences of such anti-competitive practices is to "cut off developing country enterprises from access to developed country markets or otherwise restrain competition, just as governmental trade barriers or the effects of government subsidies can do."[27] Indeed, the study also notes that such market restraints are not only possible in the area of manufactures, but also affect agricultural products and services from developing countries. It cites, for example, the fact that "[m]onopoly practices in air freight

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[25] ibid, at p.215

[26] ibid, at pp.216-217. See also M J Trebilcock and R Howse, *The Regulation of International Trade* (1995 ed), n.12 above, at pp.9-10. Indeed, although commenting in a slightly different context, Peter Muchlinski highlights the roles played by such factors as the Marshall Aid in 1948 in attracting US firms to Europe, as well as the importance of tax concessions offered by the US government to domestic firms to encourage FDI. (See P T Muchlinsli, *Multinational Enterprises and the Law* (Oxford, UK and Cambridge, USA: Blackwell, 1999), at p.26)). Other works in this regard include D B Yoffie and B Gomes-Casseres, *International Trade and Competition: Cases and Notes in Strategy and Management* (New York: McGraw-Hill, 1994), at pp.5-17; P R Krugman (ed.), *Strategic Trade Policy and the New International Economics* (Cambridge, Mass.: MIT Press, 1986); and J D Richardson, "The Political Economy of Strategic Trade Policy" (1990) *International Organization*, vol.44, at p.107 et seq.

[27] See E Supper, *Is There Effectively a Level Playing Field for Developing Country Exports?* Policy Issues in International Trade and Commodities Study Series No.1 (New York and Geneva: United Nations, 2001), at p.35. See also UNCTAD, *Concentration of Market Power and its Effects on International Markets: Report by UNCTAD Secretariat*, TD/B/RPB/80/Rev.2 (New York and Geneva: United Nations, 1993) which made a similar point almost a decade earlier.

have substantially hampered the expansion of exports of fresh fruits and vegetables from West African countries;" as have similar arrangements in the sea transport industry.[28] Interestingly, a recent independent study lends credence to this view. For example, it has been shown not only that the largest UK retailers now control 70-90 percent of fresh produce imports from Africa, but also that the growth of African fresh vegetables trade is influenced *directly* by the needs of the major supermarkets, namely, Asda, Waitrose, Marks & Spencer, and Sainsbury, who import asparagus and runner beans from Zimbabwe; baby corn, mangetout, carrots, fine beans from Kenya; and dwarf beans, globe artichoke and mangetout from Egypt.[29]

6.4. From Mercantilism to Protectionism: Whither Free Trade?

Just as mercantilism defined the conduct of global trade between the 17th and 19th centuries,[30] the new global economic order is characterized almost exclusively by protectionism. Indeed, as pointed out by economic historian Paul Bairoch, protectionism has historically been the rule and free trade the exception.[31] The EU's much-criticized common agricultural policy (CAP) may represent the best known example of such practices; but at least EU countries have not been as vocal as the United States, in calling for liberalized trade. Nothing, however, can disguise the duplicity of successive US Administrations in this regard, given their professed commitment to *laissez faire* neo-liberalism, both in

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[28] See E Supper, ibid, at p.36, who also notes the existence of certain trade rules which, on the surface, appear to prohibit such practices. The problem, however, is that as with many rules of global trade, the relevant one in this case leaves some room for manoeuvre. Of particular interest is Art.11 of the WTO Agreement on Safeguards which provides (at subsection b and footnote no.4 thereof) that members "shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side." The prohibited measures include the establishment of compulsory import cartels and discretionary licensing schemes. The point to note, however, is that these do not include, for example, the award of R&D grants to a company to improve its global competitiveness, which might be the preferred approach to strategic trade.

[29] Per C Dolan and J Humphrey, "Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticultural Industry" (2000), *Journal of Development Studies*, vol. 37, no.2, at pp.152-154.

[30] See M J Trebilcock and R Howse, *The Regulation of International Trade* (1995 ed), n.26 above, at p.1

[31] See P Bairoch, *Economics and World History: Myths and Paradoxes* (University of Chicago Press, 1993), at p.16. See also R Gilpin, *Global Political Economy*, n.23 above, at p.196, who asserts: "Despite this powerful inclination...to favor free trade and open markets, trade protection has never totally disappeared...restricted trade has been a pervasive feature of the world economy." For further confirmation of this, see *The Economist*, "Global Agenda: A Turning Point for Trade?" at http://www.economist.com, where it is stated: "Indeed, for all the talk of free trade, to which most countries claim they are committed, protectionist instincts are often close to the surface."

general economic policy and in regard to trade. Their maintenance of substantial agricultural subsidies in the name of the Export Enhancement Programme,[32] simply make a nonsense of the notion of free trade. Indeed, as various studies have shown, OECD countries have consistently maintained protectionist measures, particularly in the agricultural sector;[33] and as an IMF report points out, the removal of agricultural support (i.e., tariffs and subsidies) as part of a comprehensive effort to lower trade barriers would raise global economic welfare by $128 billion annually.[34]

For developing countries generally, the duplicity surrounding the idea of free trade is illustrated by the fact that protectionism is maintained in an area in which they have what might still be called a comparative advantage, namely, agriculture. Moreover, even the GATT, which, by being subsumed within the newly-created WTO, has supposedly been transformed from a power-based mechanism, to a rules-based system of international economic relations, and whose much-acclaimed success has been the "liberalization" of global trade, has become a convenient forum for the operation of policies which are so manifestly protectionist, and so obviously against the interests of the developing world.

The duplicity of industrialized nations in the liberalization discourse is visible at two levels: At one stage is the convenient avoidance of history. As noted by the 19th century German political economists

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[32] See also "Bush Signs Emergency Agriculture Spending Bill" at http://www.cnn.com/2001/ALLPOLITICS/08/13/bush.agriculture/index.html According to this report, the signing, in August 2001, of $5.5 billion emergency aid package to American farmers by President George W Bush brings the total aid package approved by Congress to farmers since 1998 to $30.5 billion. For insightful details of the various protectionist measures adopted by OECD countries, see E Supper, *Level Playing Field*, n.27 above, at pp.40-138.

[33] As acknowledged by the Director-General of the WTO, OECD agricultural subsidies amounted to $311 billion in 2001. (See WTO, Trade Policy Review Body, Overview of Developments in the International Trading Environment: Annual Report by the Director-General, WT/TPR/OV/8, 15 November 2002, at p.2)). According to an UNCTAD study, the EU, USA, and Japan accounted for 94 percent of agricultural subsidies as of 1997, to the tune of $264 billion, with the EU alone accounting for 40 percent or $110 billion. The USA followed closely with $72.4 billion, and Japan with $67.3 billion. By 1999, the total amount of agricultural support in OECD countries had risen from $267 billion in 1997 to $361 billion, or 1.4 percent of their collective GDPs.(See E Supper, *Level Playing Field*, ibid, at pp.20-22 (including tables citing OECD Secretariat sources). See also OECD, *Agricultural Policies in OECD Countries*: vol.I, Monitoring and Evaluation (Paris: OECD, 2000); and vol.II, Measurement of Support and Background Information (Paris: OECD, 2000). See further, OECD, *Agricultural Policies in OECD Countries: Monitoring and Outlook* (Paris: OECD, 1999), according to which, protectionism in the agricultural sector in OECD countries rose from 32 percent in 1997 to 37 percent in 1998, an 11.84 percent increase within one year. More recent confirmation of these can be found in OECD, *OECD Agricultural Outlook, 2002-2007 – Highlights* (Paris: OECD, 2002), at p.5; and OECD, *Agricultural Policies in OECD Countries – Monitoring and Evaluation*, Paris: OECD, 2002), at p.9.

[34] See IMF, *2002 World Economic Outlook* (Washington DC: IMF, 2002), at p. 85.

Frederich List, protectionism was a *sine qua non* for Western economic development.[35] Yet in the current era of globalization, developing countries must, to borrow the well-worn cliché, "trade their way out of poverty," a position that stands in contrast not only to current trade policy in all developed countries, but also to their developmental history. The second level is the prescription (or indeed, the imposition through the IFIs) of economic doctrines which are blatantly eschewed by those who prescribe them; a fact articulated thus by former World Bank Chief Economist Joseph Stiglitz: "When good economic analysis works in favour of self-interest, it is invoked; but when it does not, so much the worse for economic principles."[36]

6.5. Conclusion

It is tempting to regard the policies of the industrialized countries as a simple reflection of the realities of international economic relations – a global regime which is unavoidably governed by self-interest. However, it is equally important to note that this invariably undermines the very foundations upon which the global trading regime was built: It was, after all, the understandable preoccupation, by the post-war trading nations, with their own self-interest through competitive devaluation, that contributed to the Great Depression, which in turn necessitated the creation of the Bretton Woods institutions in the first place.

For developing countries generally, the undeclared shift from comparative advantage (and its variants) to strategic trade captures the very essence of the global economic regime – a regime with a set of

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[35] See F List, *The National System of Political Economy* (trans. by S S Lloyd, (London: Longmans, Green & Co, 1904), at p.107. Even Waltz Rostow's *Non-Communist Manifesto* rejects the whole-sale liberalization of trade during a country's early stages of development. (See W W Rostow, The *Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1977), at pp.4-10, who asserts that the stages of development can be categorized as follows: (1) The traditional society; (2) preconditions for take-off; (3) the take-off; (4) the drive to maturity; and (5) the age of mass consumption. See also, P Gibbon and A O Olukoshi, *Structural Adjustment and Socio-economic Change in Sub-Saharan Africa: Some Conceptual, Methodological and Research Issues*, Research Report No.102, (Uppsala, Sweden: Nordiska Afrikainstitutet, 1996), at p.50. An insightful UNCTAD study also highlights the importance of protectionist policies to Western economies during their developmental stages. (See M Schafaeddin, How Did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA, UNCTAD Discussion Papers No. UNCTAD/OSG/DP/139, December 1998, Geneva: UNCTAD.

[36] See J Stiglitz, "Developing Countries and the WTO: A Proactive Agenda" (2000) *The World Economy*, vol.23, no.4, at p.439.

rules which only apply to countries least able to abide by them, and which, at any rate, were never in any position to have actively participated in their formulation. In the meantime, those most able to do so revel in the luxury of their ability to change them at whim. It is this constantly shifting goalpost that belie the very notion of free trade, and which lends much credence to the commonly held view that the global trading regime is inherently disadvantageous to the needs of developing countries.

Chapter 7

THE MULTILATERAL TRADING REGIME: WHAT IMPACT ON AFRICA'S (UNDER)DEVELOPMENT

7.1. Introduction

As noted in chapter 4, Africa's engagement with the global economic regime is defined almost entirely, and quite paradoxically, by its marginalization from it. As well as its inability to attract foreign investment (a subject discussed in chapter 9), the region's inability to trade with the rest of the global community, and thus, its failure to realize the goals envisaged, particularly within the International Covenant on Economic, Social and Cultural Rights (ICESCR) constitutes the theme of this chapter.[1] The key aim is to examine the cause(s) of this marginalization.[2] Specifically, the critique aims test the common assumption that the problem lies within the rules of the multilateral trading regime, which, it is argued, constitute an insurmountable impediment to the developmental goals of the region.[3] The chapter thus begins with an overview of the rules governing the multilateral trading regime, and goes on to examine the rules as they affect the group of countries known as least developed countries (LDCs) – a group overwhelmingly made up of sub-Saharan African countries.[4]

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[1] It is not intended here to relate the defined theme to specific human rights provisions. For an excellent example of this, see C Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes, and Possible Strategies," (2002) *Hum Rts Q*, vol.24, at pp.1-50

[2] Some commentators have rejected the suggestion that Africa is marginalized. For example, it has been argued that because marginalization is not a peculiarly African problem, the region cannot be described as such. (See P C Aka, "Africa in the New World Order: The Trouble with the Notion of African Marginalization," (2001) *9 Tul. J. Int'l & Comp. L. 187*)). This, of course, represents, at best, a minority opinion, and at worst, one that ignores the overwhelming empirical evidence to the contrary. For example, according to a collaborative study by UNCTAD and the Commonwealth Secretariat, exports from SSA countries are mainly made up of primary products and account for about 5 percent of total global trade in the same category. Their share of the market in other product categories is under 1 percent. (See UNCTAD/Commonwealth Secretariat, *Duty and Quota Free Market Access for LDCs: An Analysis of Quad Initiatives* (Geneva and London: UNCTAD and Commonwealth Secretariat, 2001), at Executive Summary [hereinafter *Analysis of Quad Initiatives*]. See also Francis Ng and A Yeats, *Good Governance and Trade Policy: Are They the Keys to Africa's Global Integration and Growth?* Policy Research Working Paper 2038 (Washington DC: World Bank Development Research Group, 1999), at p.24, who note that SSA has not only been increasingly marginalized in both trade and the global economy over the last two or three decades, but that it also has "a far below average record for almost all measures of economic performance."

[3] The marginalization of poor countries has in fact been articulated in terms of "global apartheid." (See J P Trachtman, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'" (2003) *J Int'l Econ. L.*, at pp.3-21

[4] As of August 2002, 34 of the 49 countries designated by the UN as LDCs were in SSA. These were: Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central Africa, Chad, Comoros, Democratic Republic of Congo,

7.2. A Brief Backdrop to the Uruguay Round[5]

Created in 1947,[6] the General Agreement on Tariffs and Trade was merely a negotiating forum, as opposed to an international trade organization; its perceived shortcomings ranging from a lack of rule-making authority or dispute-settlement mechanism, to the fact that its mandate mainly covered trade in manufactured goods.[7] The various negotiating "Rounds" that were held after its creation were considered to have brought only piecemeal achievements, particularly in eliminating trade barriers. By the mid-1980s, it had become apparent, particularly to the Reagan Administration, that the original GATT trading regime was no longer adequate to cope with a global economy that was becoming increasingly integrated and characterized by the oxymoron of "oligopolistic competition." Also, although the original GATT regime might have been convenient for an American economy characterized by mass production, further technological innovations and related developments within the economy meant that it was rapidly becoming a service-oriented, high-tech economy. At this stage, advocates of economic liberalization were already becoming frustrated with the so-called "new protectionism" of the 1970s (i.e., an economic regime characterized by such non-tariff barriers as import quotas or government subsidies); while regionalism, particularly the steady movement towards European integration was widely seen as a threat to the multilateral trading regime under the GATT. It was against this backdrop that the United States government initiated a new Round of negotiations which began in Uruguay in

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Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tanzania, Uganda, and Zambia. (Information available at the UN website: http://www.un.org/special-rep/ohrlls/ldc/list.htm)

[5] This section draws on various works, including C Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* Policy Research Working Paper 2388 (Washington DC: World Bank Trade and Development Research Group, 2000); S Ostry, "Looking Back to Look Forward: The Multilateral Trading System After 50 Years," in World Trade Organization, *From GATT to the WTO: The Multilateral Trading System in the New Millennium* (The Hague: Kluwer Law International, 2000), at pp.97-112; J Bhagwati, "Fifty Years: Looking Back, Looking Forward," in World Trade Organization, *From GATT to the WTO*, at pp.57-65; and J H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., (Mass: MIT Press, 2000), at pp.31-78.

[6] See Protocol of Provisional Application, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308, Oct.30, 1947. See also WTO, Legal Texts: The General Agreement on Tariffs and Trade (GATT 1947), available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (hereinafter the General Agreement).

[7] See Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton and Oxford: Princeton University Press, 2001), at p.218. See also D F Vagts, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001), at p.39.

1986 (concluded in 1993) paving the way for the establishment of the World Trade Organization in 1995.[8]

The Uruguay Round is therefore seen by proponents of free trade as a major achievement because the GATT (which became subsumed under the institutional framework of the WTO)[9] was now substantially extended to cover trade in agriculture (through the Agreement on Agriculture), services (through the General Agreement on Trade in Services), the protection of intellectual property rights (through the TRIPs Agreement, and FDI (through the TRIMs Agreement).[10] There was also an agreement on the establishment of a dispute-settlement mechanism as evidenced by the creation of a Dispute Settlement Understanding (DSU),[11] as well as a Trade Policy Review Mechanism (TPRM);[12] all of these being supplemented by a number of Ministerial Decisions and Declarations.[13]

Provisions were also made for regional trading agreements (RTAs),[14] while substantial reductions in tariff and non-tariff barriers were achieved, and trade rules extended to cover such areas as agriculture and textiles. Legal personality was also conferred on the WTO.[15] Further, the WTO treaty mandates it to

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[8] For a comprehensive and authoritative history of the Uruguay Round, see J Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Geneva: World Trade Organization, 1995).

[9] See the Preamble to, and Art.II of The Marrakesh Agreement Establishing the World Trade Organization, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations* (Cambridge, UK: Cambridge University Press, 2001), at pp.4 and 5.

[10] See for example, World Trade Organization, *Guide to the Uruguay Round Agreements* (Geneva: WTO Secretariat, 1998), at p.235.

[11] See C Michalopoulos, Policy Research Working Paper 2388, n.5 above, at p.13, and Article III:3, and Annex 2 of the Agreement Establishing the WTO.

[12] See WTO, Uruguay Round Agreement: Trade Policy Review Mechanism (TPRM), available at http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm

[13] See World Trade Organization, "Legal Texts: Uruguay Round Final Act - Developing Countries and the Uruguay Round: An Overview" (note by the Secretariat, 10 November 1994) (Geneva: Committee on Trade and Development, 1994), at p.3

[14] See Art. XXIV of the General Agreement. RTAs have, however, received a mixed appraisal from the new Director-General of the WTO who has asserted thus: "While Members' agreement in Doha on the DDA reconfirmed their commitment to multilateralism, regional alternatives are a significant challenge to the multilateral trading system. When fully in line with WTO provisions, regional trade agreements (RTAs) can complement the strengthening and liberalization of world trade. But by discriminating against third countries and creating a complex network of trade regimes, such agreements pose systemic risk to the global trading system. (See WTO, Trade Policy Review Body, Overview of Developments in the International Trading Environment: Annual Report by the Director-General, WT/TPR/OV/8, 15 November 2002, at p.3) [hereinafter *The Director-General's Annual Report*]

[15] See Article VIII:1 of the Agreement Establishing the World Trade Organization which states: "The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions."

cooperate with the International Financial Institutions (IFIs), with the aim of achieving greater coherence in global economic policy-making.[16] The GATT/WTO regime thus became a rules-based framework for the conduct of international trade. For developing countries generally, the inclusion of such sectors as agriculture, textiles and clothing as well as the agreement to abolish the so-called Voluntary Export Restraints (VER) in the Safeguards provision, which had previously been a barrier to the export of footwear and clothing from developing countries, all added to a sense of achievement.[17] In 2001, a new Round of negotiations was launched in Doha, Qatar, where trade ministers reaffirmed their belief in the role of free trade in promoting economic development and in alleviating poverty, and pledged to ensure that "the increased opportunities and welfare gains that the multilateral trading system generates" would be extended to all.[18]

7.3. The General Agreement: Its Basic Structure and Principles[19]

As originally drafted, the GATT was divided into three parts. Part I (Articles I and II) deals with tariffs; Part II (Articles III to XXIII) deals with non-tariff barriers (NTBs); and Part III (Articles XXIV to XXXV) regulates procedural and administrative matters, some exceptions to the general principles, and rules for tariff negotiations; while Part IV (Articles XXXVI to XXXVIII) deals with the interests of developing countries.[20] At the heart of the GATT are the twin principles of non-discrimination and reciprocity in global trade relations. Underlying these are, first, the most-favoured nation (MFN) principle, by which is

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[16] See Article III:5 (ibid), which provides thus: "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." For details of the Agreements Establishing the WTO, including the Uruguay Round Final Act, see World Trade Organization, *The Legal Texts*, n.9 above, at p.2 et seq.

[17] See Michalopoulos, n.11 above, at p.13.

[18] See Doha WTO Ministerial 2001: Ministerial Declaration, at pp. 1-2, (14 November 2001), available at http://www.wto.org/english/thewto_e/min01_e/mindecl_e.htm

[19] Unless otherwise indicated, all references to GATT provisions are taken from World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations* (Cambridge, UK: Cambridge University Press, 2001), which was used in conjunction with World Trade Organization, *Guide to the Uruguay Round Agreements* (Geneva: WTO Secretariat, 1998).

[20] See D F Vagts, *Transnational Business Problems*, n.7 above, at pp.40 and 69. See also WTO, *The Legal Texts*, n.16 above, which contains the various agreements and their annexes.

meant that any concession made by one Contracting Party must be immediately and unconditionally extended to like products originating from any other country.[21]

The second major obligation of the General Agreement is that of National Treatment (under Article III), which requires imports to be accorded the same treatment as are available to domestically produced equivalents, its main aim being to discourage the imposition, by the importing country, of NTBs such as taxes and regulatory policies, thereby giving an advantage to domestic goods.[22] The GATT also requires the "binding" of tariffs, which is aimed at providing a stable and predictable basis for trade.[23]

7.4. Non-Discrimination: The Policy Rationales

John Jackson identifies two policy rationales behind the principle of non-discrimination – the economic and the political. From the economic perspective, it is argued that it minimizes distortions within the global market, as nations do not need to search beyond their immediate neighbours for the most advantageous terms of trade, thereby wasting resources on such transactions as shipment, customs valuation, and other administrative processes. This, it is believed, encourages the liberalization of trade, the ultimate goal in international economic relations. Politically, it is argued that it reduces the danger of countries forming "trade cliques," which can generate rancour and resentment on the part of those that feel excluded.[24]

Whatever the apparent merits of these explanations might be, it is difficult to reconcile them with the current realities in international trade. For example, apart from the fact that the notion of free trade is more of a myth than a reality (as noted in chapter 6), the establishment of such regional trading

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[21] Per Art. I of the General Agreement, this being the most widely known of similar provisions. Others are: Articles IV; III(7); V(2), (5) and (6); IX (1); XIII(1); XVII(1); and XX(i). The origins of the MFN principle have been traced by John Jackson to a 1936 League of Nations standard MFN clause which, it is explained, became the basis of the (still-born) International Trade Organization's (ITO) MFN clause, a precursor to the same provision in the GATT (See J H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2000)), at p.58

[22] See J H Jackson, *The World Trading System*, n.5 above, at p.213

[23] Per Art.II of the General Agreement. By "binding" is meant a commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected party.

[24] See J H Jackson, *The Jurisprudence of GATT*, n.21 above, at p.60

arrangements as the North American Free Trade Agreement (NAFTA) and the European Union, constitute evident obstacles to this very ideal. The irony of this is not lost on the fact that these arrangements are in consonance with the MFN provision itself, which allows for the creation of regional trading areas (RTAs).[25]

7.5. GATT Principles and Developing Countries

The issue of economic development was not a major concern when the GATT was established in 1947, even though 11 of the 23 original Contracting Parties would have been categorized as developing countries at the time.[26] Thus, all Contracting Parties were expected to trade on the bases of non-discrimination and reciprocity.[27] The same rules generated so much discontent among developing countries that many Latin American countries opted to stay out of the system for decades afterwards.[28] The discontent revolved around the following issues:

- lack of market access;
- the need to derogate from the reciprocity principle in order to maintain whatever protectionist measures were considered necessary for domestic industries;
- general flexibility in the application of GATT rules; and
- the stabilization of global commodity prices.[29]

According to Constantine Michalopoulos of the World Bank, the 1954-1955 review session was the first occasion on which these grievances were recognized; hence the addition of three main provisions namely Articles XVIII(B) and (C) (which amended the original Article XVIII). The 1957 GATT Ministerial Conference also appointed a commission of experts headed by Gotfried Haberler, which produced the

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[25] See Art. XXIV of the General Agreement, which allows for the creation of Customs Unions and Free Trade Areas.

[26] See C Michalopoulos, n.17 above, Policy Research Working Paper 2388, at p.2 upon which this section draws. (The countries concerned were Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Rhodesia, and Syria). See also, WTO, Press Brief: Fiftieth Anniversary of the Multilateral Trading System, at http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm)

[27] Per Michalopoulos, ibid.

[28] per J H Jackson, *The World Trading System*, n.22 above, at pp.319-320

[29] See C Michalopoulos, Policy Research Working Paper 2388, n.27 above, at p.3

much-cited Haberler Report in 1958, to look into these grievances. In its report, the commission acknowledged some of the grievances.[30]

7.5.1. Derogations from GATT Principles

The GATT also contains a number of other provisions which allow for derogation from the MFN principle, some of which relate specifically to developing countries. For example, Articles XII allows for general exceptions where certain restrictions (such as quotas) are necessary for balance of payments reasons (with Article XIII recognizing the need to impose import restrictions for balance of payments purposes). A special waiver was initially agreed under the auspices of both UNCTAD and some OECD countries in 1971, for a special right of derogation from the MFN principle, resulting in what was to become the Generalized System of Preferences (GSP), the aim of which was to extend the preferential status granted by former colonial powers to their former colonies, to other developing countries.[31] Although originally intended to last for ten years, this was extended to last indefinitely during the Tokyo Round negotiations, and during which an "Enabling Clause" was also agreed, formally putting the S&D status of developing countries (and of LDCs) within a legal framework,[32] although the exhortatory language employed meant it was to remain non-binding.[33] Nevertheless, the GSP scheme allows developed countries to trade with developing ones on preferential, non-reciprocal basis, although as will be noted in chapter 8, the former usually dictate such terms as product coverage, level of tariff concessions, rules of origin, and which country to extend them to.[34]

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[30] See GATT, *Trends in International Trade: A Report by a Panel of Experts* (Geneva: GATT Secretariat, 1958)

[31] See GATT Contracting Parties, *Generalized System of Preferences*, Decision of 25 June 1971,BISD, 18th Supp. 24 (1972). See also C Michalopoulos, Policy Research Working Paper 2388, n.29 above, at p.5.

[32] See GATT Contracting Parties, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, L/4903, BISD 26th Supp 203 (1980). The needs of developing countries were also subsequently acknowledged in the Agreement Establishing the WTO, which "[recognizes]...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 of international trade commensurate with the needs of their economic development. (See Preamble to the Marrakesh Agreement Establishing the World Trade Organization, at Preamble, para.2).

[33] See: J H Jackson, *The World Trading System*, n.28 above, at p.319 and C Michalopoulos, n.31 above, at p.6 et seq. The interests and concerns of LDCs have also been explicitly recognized in paragraphs 2-3, 9, 15-16, 21-22, 24-28, 32-33, 36, 38-39, 42-44 and 50 of the Doha Ministerial Declaration. (See WTO, *The Director-General's Annual Report*, n.14 above, at p.44, and footnote 90 thereof).

[34] The US was the last of the major trading nations to initiate a preference scheme – 4 years after the agreement.

A further major provision of the GATT is Article XI which contains a general prohibition on quantitative restrictions on both imports and exports. However, as with those already mentioned, this is subject to a range of exceptions which are often considered to be of benefit to developing countries. Apart from the general exceptions for countries experiencing balance of payments difficulties under Articles XII and XIII, the General Agreement provides for "additional facilities" to assist in the establishment or protection of their infant industries, and for balance of payments or development needs.[35] The additional facilities are set out in sections A-C of the preamble to Article XVIII. For example, section A(7)(a) provides that a developing country may, where it wishes, "to promote the establishment of a particular industry" reopen negotiations on bound tariffs with any Contracting Party with which such a concession was initially negotiated. Such negotiations might involve tradeoffs which might take the form of suggested compensatory measures. If rejected by the other party, the developing country can apply to the GATT Council for the right to proceed unilaterally.

Article XVIII(B) reiterates, but also extends the general balance of payments exceptions under Article XII. It allows a developing country, for example, to impose quantitative restrictions on a discriminatory basis, i.e., "in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development," provided this is done for balance of payments reasons.[36] Further, Article XVIII(C) allows for derogation where a developing country "finds that government assistance is required to promote the establishment of a particular industry with a view to raising the standard of living of its people."[37] Where difficulties persist in this regard, it can also notify the GATT Council accordingly, with suggested measures.[38]

Congress delegates authority to the President under the Trade Act of 1974. See United States, Trade Act of 1974, Pub. L. No. 93-618, 19 USC ss.2101-2487, 88 Stat. 1978, Title V, approved January 3 1975).

[35] See Art. XVIII:2

[36] See Art.XVIII(B):10

[37] See Art.XVIII(C):13

[38] The GATT Council may, within 30 days of such notification, allow the country concerned to proceed accordingly, or recommend further consultations.

7.5.2. Part IV of the GATT (Articles XXXVI –XXXVIII)

Following persistent demands from developing countries, particularly through the agency of UNCTAD, this part of the GATT was introduced in 1965, for the specific purpose of addressing the problems of economic development;[39] the noticeable difference from Article XVIII being that whereas the latter merely allows for derogation from general GATT principles (if such is needed for the protection of infant industries), Part IV focuses on market access. Thus, Article XXXVI urges developed countries to provide market access for products on which developing countries depend, just as Article XXXVII calls on developed countries to "give active consideration to the adoption of other measures designed to provide greater scope for development of imports from [LDCs]..." Similar exhortations are contained in Article XXXVIII. Thus, it could be argued that although Article XVIII encourages import-substitution, Part IV promotes export-led growth strategy which, as highlighted in chapter 4, was at the heart of the structural adjustment policies of the 1980s.[40]

7.5.3. GATT Rules and Sub-Saharan African Countries

There is of course no specific mention of SSA within the GATT. It is however, the case that SSA countries constitute the majority of countries that make up the category of least developed countries – a category which receives special attention within the rules of the multilateral trading regime.[41] Thus, in

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[39] See "Protocol Amending the General Agreement on Tariffs and Trade to introduce a Part IV on Trade and Development and to Amend Annex I," concluded at Geneva, 8 February 1965, in GATT, 13th Supp. BISD 1-11 (1965).

[40] For evidence of this, see Part IV, Art.XXXVI:1(b) which states: "...the export earnings of less-developed Contracting Parties can play a vital part in their economic development."

[41] Different multilateral agencies use different criteria for determining which country is to be recognized as such, although it is to be noted that in the end, many SSA still fall within this category. Thus, for example, in its latest triennial review of the list of LDCs in 2000, the UN's Economic and Social Council used the following criteria: (a) low income based on a three-year average estimate of the GDP per capita (under US$ 900 for inclusion, over $1030 for graduation; (b) human resource weakness (involving Augmented Physical Quality of Life Index – APQLI – which is based on such indicators as nutrition, health, education and adult literacy; (c) economic vulnerability involving and Economic Vulnerability Index (EVI) – based on stability of agricultural production, stability of exports of goods and services, economic importance of non-traditional activities (i.e., share of manufacturing and modern services in GDP), merchandise export concentration, and the handicap of economic smallness. Source: UNCTAD, *Statistical Profiles of the Least Developed Countries* (UNCTAD/LDC/Misc.72), (New York and Geneva: UNCTAD, 2001), at p.iii. Twenty nine SSA countries currently qualify for inclusion in this list.

addition to the above provisions relating to developing countries generally, LDCs receive special attention under the General Agreement. Indeed, whereas the problem of economic development was not recognized at initial GATT negotiations,[42] this has now received a significant degree of attention. For example, the preamble to the Marrakesh Agreement Establishing the WTO states: "...[T]here is a need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development."[43] To this end, the various agreements that constitute the GATT contain special clauses aimed at addressing the needs of LDCs.[44] Indeed, the Ministerial Decisions and Declarations agreed at the Uruguay Round effectively exempt LDCs from all the agreements, including the ones they might have ratified,[45] while the Doha Ministerial conference reaffirmed the participants' commitment to the needs of developing countries, in such areas as market access and S&D treatment.[46]

7.5.4. Other Specific Measures

Further still, are a number of other initiatives such as the 1994 Decision on Measures in Favour of Least Developed Countries, and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food-Importing Developing Countries, both of which were agreed during the Uruguay Round negotiations on agriculture, in the light of an expected rise in the prices of agricultural imports to LDCs and net food-importing developing countries (NFIDCs);[47] and the Decision on Waiver for Preferential Tariff Treatment of LDCs. Other measures include the on-going

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[42] Per C Michalopoulos, Policy Research Working Paper 2388, n.33 above, at p.4

[43] See WTO, *The Legal Texts*, n.19 above, at p.4

[44] See World Trade Organization, *Guide to the Uruguay Round Agreements* (Geneva: WTO Secretariat, 1998), which spells out in convenient format, the various Agreements and the relevant LDC provisions.

[45] See Ministerial Decisions and Declarations: Decisions on Measures in Favour of Least-Developed Countries, in WTO, *The Legal Texts*, n.43 above, at p.384, s.1 of which "[d]ecides that, if not already provided for in the instruments negotiated in the course of the Uruguay Round, notwithstanding their acceptance of these instruments, the least-developed countries...will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities..." See also C Michalopoulos, Policy Research Working Paper 2388, n.42 above, at pp.31-33.

[46] See WTO Ministerial Declaration (WT/MIN(01)/DEC/1),adopted 14 November 2001, Ministerial Conference, Fourth Session Doha, 9 - 14 November 2001, at paras.42-44. Indeed, the interests and concerns of LDCs were explicitly recognized in paragraphs 2-3, 9, 15-16, 21-22, 24-28, 32-33, 36, 38-39, and 50 of the Declaration.

[47] See World Trade Organization, *Guide to the Uruguay Round Agreement*, n.19 above, at pp.238 and 241.

follow-up Programme on the High-Level Meeting on LDCs (held in October of 1997) and its Integrated Plan of Action, the central aim of which is the alleviation of poverty among the LDCs. These include the "Integrated Framework" and "Mainstreaming" schemes.[48] While the Integrated Framework scheme aims to increase the benefits that LDCs derive from trade-related technical assistance offered by various development agencies,[49] Mainstreaming involves the process and methods of identifying and integrating trade priority areas of action into the overall framework of a country's development plans and poverty-reduction strategies.[50]

There is also the Joint Integrated Technical Assistance Programme (JITAP), initiated by the International Trade Centre (ITC), the WTO, and UNCTAD, which was launched in May 1996 and has been operational since 1998 for the purpose of building institutional capacity in LDCs to assist in the understanding and implementation the WTO Agreements.[51] Numerous other measures, including those reaffirmed or introduced at the Doha Ministerial conference as part of the so-called Doha Development Agenda (DDA) have been highlighted in the latest report by the WTO Director-General. These range from the establishment of an Advisory Centre on WTO Law (to assist developing countries seeking to utilize the dispute settlement process), to the organization of seminars and workshops.[52] There is also the Diagnostic Trade Integration Study (DTIS) and Action Plan developed as a result of the IF exercise as the WTO's input to the IMF/World Bank's poverty reduction strategy papers (PRSPs), which is being implemented through a pilot scheme in Cambodia, Madagascar, and Mauritania, and is being extended

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[48] See C Michalopoulos, Policy Research Working Paper 2388, loc it, note 45, at p.23. See also G Olivares, "The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs" (2001) *Journal of World Trade*, vol. 35, no.3, at pp. 545-551

[49] See WTO, "Integrated Framework for Trade-Related Technical Assistance to Support Least Developed Countries in their Trade-Related Activities" (Doc. WT/LDC/SWG/1F/1) of 29 June 2000, at p.10. The agencies involved include the IMF, World Bank, ITC, WTO, UNCTAD, and UNDP.

[50] See WTO, Integrated Framework (IF) Seminar, "The Policy Relevance of Mainstreaming Trade into Development Strategies: Perspectives of Least-Developed Countries" (Doc.WT/LDC/SWG/IF/9/Rev.1), 29-30 January 2001. The IF was redefined at the Doha Ministerial Conference to "mainstream" international trade policy and priorities in the overall sustainable development and poverty reduction goals of LDCs. (See WTO, "A New Strategy for WTO Technical Cooperation: Technical Cooperation for Capacity Building, Growth and Integration" WT/COMTD/W/90, September 21, 2001, Note by the Secretariat)

[51] See WTO, Trade Policy Review Body, *Annual Report by the Director-General*, n.33 above, at p.45. This includes the WTO Reference Centre Programme, established in 1997 for the provision of links between LDCs and the WTO through a network of computerized information centres, enabling access to WTO documents and activities. The original beneficiaries were Benin, Burkina Faso, Ivory Coast, Ghana, Kenya, Tanzania, Tunisia, and Uganda, and a further 10-15 countries have been selected for inclusion.

[52] See ibid, at p.41 et seq.

to an additional 11 countries.[53] By any objective standard therefore, these constitute what the WTO itself has described as a "universe of special and differential treatment."[54]

7.6. The GATT Regime and the Development Controversy

Given therefore that the above evidently represent a comprehensive set of measures which arguably are sufficient to protect the interests of developing countries (especially the LDCs) within the GATT regime, there is a *prima facie* case for arguing that the multilateral trading regime does not impede economic development. Indeed, it could be argued, instead, that the rules in fact facilitate economic development, given that they allow developing countries to adopt measures which are not in consonance with the MFN and national treatment principles. However, this conclusion would ignore the very basic fact that defines the multilateral trading regime. Of particular concern is that the same rules allow the most powerful countries to impose import restrictions in the very sectors in which many developing countries have what might still be called a comparative advantage: agriculture and textiles.[55] Thus, it is possible to state that in spite of the extensive measures, the rules which permit the maintenance of such restrictions constitute a definite impediment to the economic development.[56]

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[53] ibid, at p.45. The countries Burundi, Djibouti, Eritrea, Ethiopia, Guinea, Lesotho, Malawi, Mali, Nepal, Senegal, and Yemen.

[54] This phrase is in fact borrowed from the WTO Secretariat itself, which notes that the measures consist of 145 provisions spread across the different Multilateral Agreements. Of these, it is further noted, 22 apply to LDC Members. See WTO Secretariat, *Note on Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc. WT/COMDT/W/77, of 25 October 2000, at p.3

[55] See C Michalopoulos, n.48 above, at p.9. As acknowledged by the Director-General of the WTO, OECD agricultural subsidies amounted to US$311 billion in 2001. (See WTO, Trade Policy Review Body, Overview of Developments in the International Trading Environment: Annual Report by the Director-General, WT/TPR/OV/8, 15 November 2002, at p.2)). According to an UNCTAD study, the EU, USA, and Japan accounted for 94 percent of agricultural subsidies as of 1997, to the tune of $264 billion, with the EU alone accounting for 40 percent or $110 billion. The USA followed closely with $72.4 billion, and Japan with $67.3 billion. By 1999, the total amount of agricultural support in OECD countries had risen from $267 billion in 1997 to $361 billion, or 1.4 percent of their collective GDPs (See E Supper, *Is There Effectively a Level Playing Field for Developing Country Exports?* Policy Issues in International Trade and Commodities Study Series No.1 (New York and Geneva: United Nations, 2001), at pp.20-22 (including tables citing OECD Secretariat sources). See also OECD, *Agricultural Policies in OECD Countries*: vol.I, Monitoring and Evaluation (Paris: OECD, 2000); and vol.II, Measurement of Support and Background Information (Paris: OECD, 2000). See further, OECD, *Agricultural Policies in OECD Countries: Monitoring and Outlook* (Paris: OECD, 1999), according to which, protectionism in the agricultural sector in OECD countries rose from 32 percent in 1997 to 37 percent in 1998, an 11.84 percent increase within one year. More recent confirmation of these can be found in OECD, *OECD Agricultural Outlook, 2002-2007 – Highlights* (Paris: OECD, 2002), at p.5; and OECD, *Agricultural Policies in OECD Countries – Monitoring and Evaluation*, Paris: OECD, 2002), at p.9.

[56] The relevant legal basis for the maintenance of protectionism in the agricultural sector is the Agreement on

7.6.1. Africa's Marginalization: A Discordant Refrain

As in the contexts of structural adjustment, any discussion of Africa's marginalization in regard to trade would be incomplete without an acknowledgement of the vast literature (and the controversy) that this issue has generated, as well as the various empirical accounts of how the region may have become a victim of the global trading regime. For some, it is unable to trade because the GATT/WTO system, which is beholden to the interests of Western-based TNCs represents an impediment to its developmental goals.[57] It is to be noted that the various NGOs, such as Oxfam, the Trade Justice Movement (which now incorporates Christian Aid and Cafod), the Third World Network, Seeds for Africa, the World Development Movement, not to mention the intrepid and ubiquitous anti-globalization activists, share this view. For others its marginalization is simply a function of its supposed failure to embrace *laissez faire* neo-liberalism in its trade and general economic policies[58] – a theory which

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Agriculture – a complex set of provisions, which, however, have three basic elements, categorized under the following criteria: market access, domestic support, and export subsidies. The key elements of market access are the reform commitments made by countries for the "tarrification" of imports (i.e., subjecting them to agreed tariff bindings, in place of quotas and other non-tariff barriers), with the aim of their gradual reduction. Domestic support measures are aimed at the eventual reduction, as far as possible, of policies which distort production and trade. These are broadly made up of the so-called "Green Box" measures such as grants for research and training, which are deemed to have no distorting effect (hence the word "green" denoting their acceptability), and the "Amber Box" measures which include "market price support," deemed to have more distorting effects. There are also the "Blue Box" measures which include certain direct payments aimed at limiting production. Export subsidies were previously explicitly authorized under the original GATT (Art. XVI:4), although there were attempts to limit their application in the Tokyo Round negotiations (see Agreement on the Interpretation of and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Tokyo Round Code of 1979: Article 10)). The Uruguay Round Agreement prohibits their use, although with various exceptions. Furthermore, there is also the Agreement on the Application of Sanitary and Phytosanitary Measures (Art. XX), which may be invoked for the protection of human, animal, or plant life or health, but which may also serve as a convenient protectionist measure. (For details of the various Agreements mentioned, see WTO, *The Legal Texts*, n.45 above, at relevant pages, and WTO, *Guide to the Uruguay Round Agreements*, n.19 above, at p.58 et seq.). For textiles, the relevant provision is the Multi-fibre Arrangement (MFA), which is essentially a series of complex bilateral arrangements between developed and developing countries, allowing the former to restrict the imports of textiles and clothing. The Agreement on Textiles and Clothing (ATC) is intended to permit a smooth and progressive transition to normal GATT principles in this regard. (For more details on this, see WTO, *Guide to the Uruguay Round Agreements*, n.19 above, at p.71 et seq.).

[57] See: M Barratt Brown and P Tiffen, *Short Changed: Africa and World Trade* (London: Pluto Press & the Transnational Institute, 1994); J Madeley, *Hungry for Trade; How the Poor Pay For Free Trade* (London: Zed Books, 2000); J Cavanagh et al (eds.), *Beyond Bretton Woods: Alternatives to the Global Economic Order* (London: Pluto Press, 1994); B Coote and C LeQuesne, *The Trade Trap: Poverty and the Global Commodity Markets* (UK and Ireland: Oxfam, 1996); M J Trebilcock and R Howse, *The Regulation of International Trade* (London: Routledge, 2000).

[58] See for example, F Ng and A Yeats, *Open Economies Work Better! Did Africa's Protectionist Policies Cause its Marginalization in World Trade?* Policy Research Working Paper 1636 (Washington DC: World Bank International Economics Department and International Trade Division, 1996); and F Ng and A Yeats, *Good Governance and Trade Policy: Are They the Keys to Africa's Global Integration and Growth?* Policy Research Working Paper 2038 (Washington DC: World Bank Development Research Group, 1999);

underpinned the neo-liberal fundamentalist policies that defined the World Bank/IMF-contrived structural adjustment policies of the 1980s (discussed in chapter 4).

Thus, on the one hand, it is argued that the region has done as much as should be expected, as contended in a recent study by UNCTAD which noted that "...the ratio of trade to GDP in countries of both sub-Saharan Africa and North Africa is very much in line with their population size and per capita income."[59] This view is shared by Dani Rodrik who asserts: "The bottom line is this: Africa trades as much as is to be expected given its geography and its level of per-capita income."[60] A recent World Bank study sums up the contrary view in these terms:

> Africa's share of world trade fell from more than 3 percent in the 1950s to less than 2 percent in the mid-1990s (and to only 1.2 percent, excluding South Africa). The erosion of Africa's world trade share in current prices between 1970 and 1993 represents a staggering annual income loss of $68 billion – or 21 percent of regional GDP. Part of this loss reflected the erosion of the trade share for traditional products, as well as *policies that discouraged private investment and diversification* into products for which world demand was growing more rapidly[61] [emphasis added].

Thus, even at a very basic level, there is disagreement among some of the most renowned authorities on the subject. Needless to add therefore, that reconciling both positions has become one of the most intractable problems facing any objective commentator in this area. Nevertheless, even without the benefit of the expertise that these commentators are renowned for, it is hard to ignore a basic (and very common) flaw in their adopted positions, namely, their resort to unhelpful generalizations. Hence,

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[59] See UNCTAD, *African Development in a Comparative Perspective* (Geneva: UNCTAD, 1998/1999), at p.70.

[60] See D Rodrik, "Trade Policy and Economic Performance in Sub-Saharan Africa" (1997) - Paper prepared for the Swedish Ministry of Foreign Affairs, at p.7 (obtained courtesy of the author). This paper is the product of a study which was based on the import statistics of OECD countries and the UN's COMTRADE database, for the period between 1964 and 1994. Thus, by implication, the study excludes the impact of intra-African trade, and of the continent's trade with non-OECD countries; although this should not affect its validity to any significant degree, since it is well known that the region's trade with non-OECD countries is relatively insignificant. See further, D Coe and A Hoffmaister, "North-South Trade: Is Africa Unusual?" (1999) *Journal of African Economies*, vol.8, no.2, at pp.228-256.

[61] See World Bank, *Can Africa Reclaim the 21st Century?* (Washington DC: World Bank, 2000) at p.20. See also A J Yeats, et al, *Did Domestic Policies Marginalize Africa in World Trade?* (Washington DC: World Bank, 1997), particularly at p.24 et seq.; and J Sachs and A Warner, "Sources of Slow Growth in African Economies" (1997) *Journal of African Economies*, vol.6, at pp.335-376. See further, P Collier and W Gunning, "Africa's Economic Performance" (1999) *Journal of Economic Literature*, vol.37, at pp.64-111; and D Dollar, "Outward-Oriented Developing Countries Really Do Grow More Rapidly: Evidence from 95 LDCs, 1976-85" (April 1992) *Economic Development and Cultural Change*, vol.40, no.3, at pp.523-544.

"Africa"[62] is either a region which cannot be expected to do more for itself – an unfortunate casualty of an unfavourable global economic regime – or a victim of its rejection of neo-liberal economic policies. Furthermore, as in the context of the structural adjustment controversy, Africa has been divided into two convenient categories: the liberalizers (hence their relative good performance in trade);[63] and the non-liberalizers (hence, their apparent lack of success).

There is little doubt that at first sight, some of these categorizations carry a strong appeal, given, for example, that countries such as Uganda, Botswana, and Mauritius have become the "success stories" of the region.[64] This, however, is also misleading: If nothing else, these countries also happen to be those whose governments have some form of purposeful leadership within the region.[65] Indeed, as Rodrik points out, the Botswana government even defied neo-liberal prescriptions, spending over 50 percent of its GDP in the early 1990s – one of the highest spending levels in the world – with the result that its population is fast becoming one of the most literate in the region.[66] The same point has been

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[62] "Africa" in this sense meaning a single homogenous entity, as opposed to the vast continent with diverse political arrangements that it is. Admittedly, this thesis may also have given a similar impression in some of its chapters. Indeed, the very title of it suggests that the region can be so simplistically categorized. Nevertheless, it has also been noted, where appropriate, that there are some governments in the region which, although not paragons of democracy, have striven, like other poor countries, to liberate their citizens from economic misery.

[63] See for example, World Trade Organization, *Trade Policy Review: Mauritius*, October 1995 (Press Release PRESS/TPRB/15) dated 13 October 1995, at http://www.wto.org/english/tratop_e/tpr_e/tp15_e.htm, which attributes the country's economic success to market-oriented reforms. See further: I E Elbadawi, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers*, Country Economic Department, October 1992, Washington DC: World Bank. An OECD Technical Paper adopts the same approach. Thus, the "strong liberalisers" in SSA were Ghana, Uganda, and Zambia; while the "intermediate" ones were Ivory Coast, Kenya, Mauritius, South Africa, and Tanzania. The "weak" ones were Nigeria and Zimbabwe. (See Y M Tsikata, "Globalisation, Poverty and Inequality in Sub-Saharan Africa: A Political Economy Appraisal," *OECD Technical Papers No.183*, (Paris: OECD, December 2001), at p.11). See further, World Bank, Adjustment in Africa: Reforms, Results and the Road Ahead (New York: Oxford University Press, 1994).

[64] Interestingly, as an OECD study shows, some of the "strong liberalisers" such as Ghana and Zambia have not been as successful as, for example, Mauritius – an "intermediate liberaliser." (See *OECD Technical Papers No.183*, (Paris: OECD, December 2001), at p.11). Indeed, as Rodrik points out, the Gambia has failed to make any significant gains, in spite its comprehensive reform programmes (See D Rodrik, n.60 above, at p.32).

[65] It is necessary to acknowledge that while Botswana and Mauritius have a history of democratic governance, the same cannot be said of Uganda, where Museveni has effectively imposed a one-party State. Nevertheless, it would be erroneous to compare his government with, for example, the democratic travesty in Nigeria or that in Liberia, given Museveni's seriousness in attempting to address his people's basic needs. Indeed, it is possible to compare the Ugandan government with those in South East Asia, which, according to a World Bank study, have achieved their economic success without necessarily becoming full democracies. (See World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.163, according to which the difference lies in Asia's "powerful commitment to rapid economic development...as well as the ability to deliver on the economic and social fundamentals: sound economic management, basic education and health care, and infrastructure").

[66] See D Rodrik, n.64 above, at p.24.

made in regard to Mauritius, which adopted a "two-track strategy" of a liberalized export market within an export processing zone, and a highly protected domestic sector, particularly its sugar cane industry.[67] Thus, the above generalizations inevitably ignore the efforts of individual governments within the region, and invariably constitute an impediment to objective analysis.

7.6.2. A Snapshot of Empirical Evidence

Empirical studies have also highlighted problems experienced by SSA (and other developing) countries as a result of the reforms undertaken following the Uruguay Round negotiations. For example, a study by the FAO has alluded to some of the difficulties experienced by sixteen developing countries, including some from SSA.[68] It notes, for example, that although the trend towards the "concentration" of farms in these economies brought "increased productivity and competitiveness with positive results, in the virtual absence of safety-nets, the process also marginalized small producers and added to unemployment and poverty."[69] In its evaluation of the situation in Senegal, for example, the study points out that a 50 percent devaluation of the country's currency as part of its liberalization process has resulted in the influx of cheap imports of dairy products, rice, onions, and sugar, which absorb 29 percent of the country's total foreign exchange earnings.[70] This has in fact been acknowledged in a report by the WTO's Committee on Trade and Development which notes that "the potential situation in

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[67] ibid, at p.27. Rolf Alter of the IMF puts it thus: "...as soon as import-substitution opportunities were exhausted, Mauritius switched to an export-oriented development policy." (See R Alter, "Export Processing Zones for Growth and Development: The Mauritian Example," *IMF Working Paper (WP/90/122)*, December 1990, at p.4)).

[68] See United Nations Food and Agriculture Organization, *Experience with the Implementation of the Uruguay Round Agreements on Agriculture – Developing Country Experiences: Synthesis of Country Case Studies*, (presented at a symposium titled "Agriculture, Trade and Food Security: Issues and Options in the Forthcoming WTO Negotiations from the Perspective of Developing Countries." Geneva, 23-24 September 1999, by its Commodities and Trade Division.

[69] ibid, at para.18. The sixteen economies studied included the following SSA countries: Botswana, Kenya, Senegal, and Tanzania. The non-SSA countries were Egypt, Bangladesh, Brazil, Fiji, Guyana, India, Jamaica, Morocco, Pakistan, Peru, Sri Lanka, and Thailand.

[70] ibid, at paras.75-77. Similar impacts have also been noted by other commentators. For example, John Madeley contends that EU farm subsidies stabilize food prices in Europe, but transfer the fluctuations that would have occurred on to the world market, which then create insecurity and difficult production conditions in developing countries. Moreover, he also argues that the unnatural advantage that EU farmers enjoy enables them to produce cheap food for exports to these same LDCs, making it uneconomic for them to compete. (See J Madeley, *Hungry for Trade*, n.57 above, at p.69. Also, according to Paul Goodison, the dumping of beef and tomatoes by the EU, has destroyed Namibia's canning industry, as other canners in the region have begun to compete for cheap EU beef imports. The South African fruit canning industry is reported to have suffered the same fate. (P Goodison, European Research Office, speech to a EuronAid/EU-NGDO conference, "Agenda 2000 CAP Reform and Global Food Security", Madrid, November 1998).

net food-importing developing countries is of particular concern."[71] To this end, "potential problems relating to least-developed and net food-importing developing countries are the subject of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries," it points out, noting also that the Decision recognizes that these countries may experience negative effects with respect to food supplies on reasonable terms and conditions.[72] Furthermore, a major World Bank study acknowledges that SSA would suffer a loss (albeit a small one) because of the Uruguay Round agreements, but that this would be a result of lack of liberalization, small increases in world food prices, and in textiles and apparel products.[73]

In addition to the above, another World Bank study has identified further problems relating to the Uruguay Round agreements. These include issues of implementation, "ownership" of the rules,[74] and problems of market access.[75] The difficulties are summed up thus:

> More is involved in the implementation of the of WTO rules on customs valuation, intellectual property rights and SPS than the simple removal of bad policies. Implementation is about creating infrastructure, about creating the institutions that facilitate economic activity...Implementation involves investment: purchase and installation of equipment and procedures, training of staff, etc.[76]

Citing a proposal submitted to the Tanzanian Revenue authorities by a customs consultant, the study notes that implementing a comprehensive reform of Tanzania's customs procedures, for example, would cost between $8 to 10 million over three years,[77] while reforms relating to the TRIPs agreement

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[71] See World Trade Organization, *Legal Texts: Uruguay Round Final Act - Developing Countries and the Uruguay Round: An Overview,* Note by the Secretariat (Geneva: Committee on Trade and Development: Geneva, 10 November 1994), at p.9

[72] ibid.

[73] See W Martin and L A Winters (eds.), *The Uruguay Round and the Developing Countries* (Cambridge: Cambridge University Press, 1996), at p.13

[74] By "ownership" is meant the extent to which developing countries generally were able to actively participate in the formulation of the multilateral trade rules at the Uruguay Round negotiations. For more on this, see E O Ogunkola, "African Capacity for Compliance and Defense of WTO Rights," Paper presented at the African Economic Research Consortium (AERC)-sponsored conference, "Africa and the World Trading System," Yoaunde, Cameroon, 17-18 April 1999) at p.3, who notes, for example, that only 3 percent of all the written proposals and comments came from SSA.

[75] See J M Finger and P Schuler, Implementation of Uruguay Round Agreements: The Development Challenge, Policy Research Working Paper 2215 (Washington DC: World Bank Development Research Group, October 1999), at p.3 et seq. (Also published under the same title in *The World Economy*, vol.23, no.4 (April 2000).

[76] ibid, at p.3

[77] ibid, at p.8. These would cover such measures as computerization, valuation procedures, cargo controls,

would cost between $1 and 1.5 million.[78] It also notes that livestock vaccination in Madagascar pursuant to the SPS agreement would cost $18.8 million.[79] Thus, on the basis of these, it is safe to argue that the multilateral trading regime represents an impediment to the developmental goals of the countries concerned.

7.6.3. Other Emerging Themes

Over the years, various (but broadly identical) themes have emerged in the trade/development discourse, highlighting, essentially, the unequal power relationships that exist within the multilateral trading regime. Thus, for example, some commentators have focused on the dominance of TNCs in the commodities trade, which, it is argued, marginalizes small-scale farmers in the developing world,[80] while others focus on the perils of the international futures markets, particularly their impact on poor commodity farmers, whom, it is argued, are caught in a trap: the more they produce, the lower the price on the international markets.[81] Some have focused on the institutional impediments to free and fair trade, noting that the export-led strategy advocated by the Bretton Woods institutions pose a threat to food security in the developing world, as productive resources are diverted from the production of food crops (for domestic consumption), to cash crops (for exports).[82] These then, represent a snapshot of

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building refurbishment, administrative reforms, screening fro drug interdiction, and legislative reforms.

[78] ibid, at p.21. The necessary reforms include the drafting of new laws, as well as the development of enforcement capability.

[79] ibid, at p.16. From World Bank experience in Argentina, compliance with SPS standards was to entail a variety of measures including, for examples: upgrading veterinary services, laboratories, quarantine stations, disease and pest eradication programmes, certification (of disease-free and pest-free zones), training, facilities and equipment for seed certification and registration, as well as staff training. (See pp.16-17).

[80] See for example, J Madeley, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (London and New York: Zed Books, 2000). Madeley's work focuses on the areas where the activities of TNCs are concentrated – such as agriculture, forestry, fisheries, mining/oil extraction, manufacturing, and tourism – and highlights the weaknesses between these productive links with the host governments concerned. He also highlights how these impact upon the ability of the governments concerned to adopt appropriate strategies for development, arguing that it is the poor that are the ultimate losers. See also, J Madeley, *Hungry for Trade: How the Poor Pay for Free Trade*, n.70 above, for broadly identical themes.

[81] See for example, B Coote and C LeQuesne, *The Trade Trap*, n.57 above. Indeed, an article in the Independent offers an insight into how TNCs profit from the coffee trade at the expense of poor farmers in the developing world. (See S Crenshaw, "Coffee Prices are Slumping (Not that You Would Know It in Starbucks)," *The Independent*, London, 17 May 2001, at p.3); and C Charveriat, "Bitter Coffee: How the Poor are Paying for the Slump in Coffee Prices," Oxfam Policy Paper (May 2001), available at http:// www.oxfam.org.uk/policy/papers/coffee/coffee.htm.

[82] See for example, J Cavanagh et al (eds.), *Beyond Bretton Woods*, n.57 above. See also M Barratt Brown and P Tiffen, *Short Changed: Africa and World Trade*, n.57 above. Indeed, one African commentator

evidence suggesting that even if the multilateral trading rules themselves do not have a direct negative impact on developing countries, they may in fact have what might be called real-life outcomes.[83]

7.7. An Analysis of the African Experience

As already indicated, there is a strong *prima facie* case for arguing that the above empirical evidence illustrates that Africa is as much a casualty of the global trading regime as any other developing region of the world. However, as also pointed out, Africa does not lend itself to such sweeping generalizations: there is, after all, a glaring distinction between Wade's Senegal, for example, and Mugabe's Zimbabwe – a distinction which makes it possible to argue that Senegal (with no history of *kleptocratic* tyranny) is in the same position as any other poor country *vis-à-vis* the global trading regime. Moreover, the above conclusion would hardly address the question as to why so many SSA countries have become more susceptible to these predicaments than any other region of the world.

A closer reading of the evidence also suggests that most of the identified problems are, for the most part, attributable to either poor infrastructure within the countries concerned, or their deficient institutional capacities[84] – problems which are attributed to irresponsible leadership in chapter 13. Thus, it comes as no surprise that even the simple matter of furnishing data to multilateral institutions such as UNCTAD (without which the provision of the necessary technical assistance is practically impossible) is beyond the capability of many African countries. Indeed, as pointed out by Francis Ng and Alexander

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asserts, rather bizarrely, that this unequal power relationship is a function of an "evolutionary trickery" which, he further contends, "appears to have privileged the fortunes of developed countries over those of developing and least developed countries..." (See B Chigara, "Trade Liberalization: Savior or Scourge of SADC Economies?" (2001-2002) *10 U.Miami Int'l & Comp. L. Rev.7*, at pp.7-8))

[83] John Jackson describes such outcomes as "the facts and circumstances of the real world." (See J H Jackson, *The World Trading System*, n.33 above, at p.320.

[84] The WTO has acknowledged that LDCs do indeed experience obstacles relating to their export potentials. According to the report, these are mainly in the following specific areas: infrastructural deficiencies (such as erratic power supply, underdeveloped telecommunication and transport networks); weaknesses in technological capacity; poor financial and banking systems; shortage of skilled manpower; and deficient regulatory regimes. (See WTO, *Market Access for Exports of Goods and Services of Least Developed Countries*, WT/COMTD/LDC/W/11/Rev.1 (WTO Secretariat, 1998). This is based on responses received by the WTO Secretariat, to questionnaires sent to various LDCs in the context of the Integrated Framework initiative.

Yeats, many of these countries have not furnished the UN with trade data since the early 1980s.[85] Another World Bank study is just as instructive: Practically all developing countries had established institutions to maintain technical standards and to enforce health and SPS requirements, although information varied from country to country. In East Asia and Latin America, "there was little doubt about the adequacy of the institutions; "in others, *especially in Africa*, it was impossible to tell" [emphasis added].[86] Thus, although "most developing countries" have legislation defining national standards based on those of the International Standards Organization, in Zambia, for example, "there appear to be no government testing facilities."[87] Of course, as noted in the introductory chapter, Africa does not lend itself to open-ended generalizations. Indeed, even without the benefit of empirical evidence, would be safe to assume that countries such as Mauritius and Botswana are exceptions to this state of affairs, given their relative state of development. Nevertheless, what these studies suggest is that Africa's inability to trade cannot be blamed entirely on so-called exogenous factors. There is thus a need to begin to enquire, at the very least, as to whether enough (in terms of practical steps) is being done to turn the situation around.

7.7.1. The Problem of Dependency

Africa is also constrained by its obstinate dependency on primary produce as its main export base.[88] According to an UNCTAD report, even these are often concentrated on a limited number of traditional

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[85] See F Ng and A Yeats, *Open Economies Work Better!* n.58 above, at p.3

[86] See C Michalopoulos, Trade Policy and Market Access Issues for Developing Countries: Implications for the Uruguay Round, Policy Research Working Paper 2214 (Washington DC: World Bank Development Research Group, 1999), at p.41

[87] ibid. A further World Bank study puts it thus: "It is widely recognized that data on SSA are weak not only in terms of collection and quality within the SSA countries themselves, but also in terms of reporting to international organizations. Indeed, the failure of many SSA countries consistently to report their international trade data to the United Nations...and their trade and trade barriers to the WTO and UNCTAD is itself one aspect of their weak commitment to integrating with a world in which 'information is king.' The failure of SSA countries to collect and report data undermines efforts to understand the nature of African economic problems and opportunities, and could clearly lead to misconceptions in important areas such as the effectiveness of policy, the sustainability of growth and the eligibility for debt packages..." (See Z K Wang and L A Winters, *Africa's Role in Multilateral Trade Negotiations*, Policy Research Working Paper 1846 (Washington DC: World Bank, Economic Development Institute, New Products and Outreach Division and Development Research Group, 1997), at pp.2-3)).

[88] See UNCTAD, *Trade and Development Report* 1999, (Geneva: United Nations, 1999), at p.13, according to which 39 out of 47 African countries now depend on only two primary commodities for over 50 percent of their

products, which explains why they are often more vulnerable to natural disasters and global market conditions than those of other regions,[89] and also explains why SSA's share of global exports declined from 2.5 percent in 1980 to 0.9 percent in 1999.[90] Diversification, it might be argued, thus becomes the only logical policy option, given that it is most unlikely that there will ever be a regime to regulate the activities of the futures markets which dictate the prices of Africa's export commodities.[91] However, an IMF study of countries for which data was available estimated that only 6 had made any improvements in this regard for the period between 1988 and 1996.[92] In the event, a tragic twist of irony has manifested itself: It was, after all, about five decades ago that Raul Prebisch had warned that liberal trade policies would stymie the development of infant industries in developing countries, while dependency would expose them to the volatility of the international market, thus adversely affecting their terms of trade.[93] Prebisch may have been calling for the redressing of the imbalance in international economic relations as he saw it at the time; but it is impossible to ignore the fact that African rulers, by failing to diversify their economies, have contributed in no small way towards making his thesis a self-fulfilling prophesy.

The difficulties inherent in a diversification process must not be underestimated. As explained in one of the listed UNCTAD publications, this would be a difficult undertaking for SSA. For example, undue emphasis on rapid diversification into manufactures "can prejudice policy efforts aimed at maximizing

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export earnings. See also, M P Todaro, *Economic Development*, 7th ed., (Harlow, UK: Addison-Wesley, 2000), at pp.462-463, who notes that during the 1990s, primary commodity exports represented over 80 percent of the total exports of the region. See further, Multilateral Development Banks/IMF, *Global Poverty Report, G-8 Okinawa Summit*, July 2000, at p.5 which identifies, *inter alia*, "excessive dependence on a narrow range of commodities for export earnings" as the causes of poverty in the region. For a more detailed analysis of this, see UNCTAD, *Economic Development in Africa: Performance, Prospects and Policy Issues* (New York and Geneva, 2001), at p.28. According to this account, over 80 percent of the region's exports consist of oil and non-oil commodities – a situation which "becomes more striking as one moves from regional averages to individual countries," where "[t]he share of 28 non-oil primary commodities in total exports has been estimated at 75 per cent or above in 17 countries..." (The latter figures are taken from A Deaton, "Commodity Prices and Growth in Africa,"(1999) *Journal of Economic Perspectives*, vol.13, no 3, at p.26).

89 See UNCTAD, *African Development in a Comparative Perspective*, n.59 above, at p.76.

90 See UNCTAD, *Economic Development in Africa*, n.88 above, at Table 8, p.27.

91 For an insightful account of how the futures markets operate, see B Coote and C LeQuesne, *The Trade* Trap, n.57 above, at p.56 et seq

92 See: A Subramanian et al, "Trade and Trade Policies in Eastern and Southern Africa," Occasional Paper 196 (Washington DC: IMF, 2000), at pp.22-23; and F Ng and A Yeats, *Open Economies*, n.85 above, at p.13

93 See R Prebisch, *The Economic Development of Latin America and Its Principal Problems* (New York ECLA/UN Department of Economic Affairs, 1950); and H Singer, "The Distribution of Gains Between Investing and Borrowing Countries" (1950) *American Economic Review*, vol.40, pp.473-485

rents which arise from the effective exploitation of natural resources in the initial stages of development."[94] Nor, as it also points out, should the dynamics of a modern competitive global economy be totally discounted, not least because TNCs are able to "allocate different stages of production to different countries," with the result that some labour-intensive manufactures such as computer chips and apparel, "have begun to exhibit the kind of unfavourable price dynamics previously associated with primary commodities.[95] But it is not an impossible feat either. As the same report also points out, Mauritius did not need an economic miracle to diversify from sugar production into becoming a major exporter of textiles.[96] Thus, African rulers do not even have to look beyond their region for a good example of how such a difficult undertaking can be accomplished.

7.7.2. Africa's Dismal Performance: A Brief Comparative Overview

The scale of Africa's poor trade performance can only be appreciated when the entire subcontinent is compared with some East Asian countries. Malaysia – a country roughly the same size and population as Ghana, and both of which gained independence in 1957 – provides a useful example. It began its post-independence existence with just two main export commodities: rubber and tin. However, soon after independence, it was able to pre-empt the impacts of a decline in global rubber prices in the 1950s and 1960s, as well as an inevitable decline in its tin deposits, by diversifying into palm oil production, with the result that it now controls an estimated 60 percent of the global market in that produce, and 10 percent of global oils and fats.[97] The result has been that as of 1995, its exports were valued at $74 billion, while the entire subcontinent of SSA accounted for $73 billion (including South Africa which alone accounted for $28 billion). Thus, a single country with a similar history of colonial exploitation to many African countries, has managed to outperform an entire subcontinent of 48 countries put

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[94] See UNCTAD, *African Development in a Comparative Perspective*, n.89 above, at p.76
[95] ibid.
[96] ibid, at p.78
[97] ibid, at p.82, Box 3.

together.[98] Indeed, as highlighted in an OECD study, Malaysia has now become one of the major investors in the region.[99]

The comparison does not end with Malaysia. In 1960, incomes per capita in much of East Asia were only "a little higher than in Africa."[100] Governments in the two regions were also similar in size, although not in composition. By the mid-1990s, incomes in East Asia were more than five times those in Africa.[101] Also, in 1966, Ethiopia and Thailand were both poor countries, with the majority of their population living on less than $1 a day (at 1985 prices).[102] Between then and 1990, Thailand had tripled its per capita income, becoming more than 10 times wealthier than Ethiopia.[103] Thailand had also reduced its poverty levels to just 2 percent, with evident impacts on various social indicators. For example, of 1,000 babies born in 1967, 84 did not survive their first year of life. By 1994, that figure had been reduced by nearly two-thirds, compared with a 27 percent fall in Ethiopia. By 1990, Thailand had also achieved universal primary education for girls, with Ethiopia achieving only 19 percent.[104]

To be sure, the share of exports for developing countries generally declined from 33 percent in 1950 to 27.7 percent in 1995. However, SSA's share for the same period declined from 3.3 to 0.8 percent.[105] Even Bangladesh, again, a former British colony, and a country prone to natural disasters, has now emerged as "the largest LDC exporter," as highlighted in a recent joint study by UNCTAD and the

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[98] See ibid, at p.70

[99] See L Odenthal, "New Forms of Co-operation and Integration in Emerging Africa: FDI in Sub-Saharan Africa," OECD Technical Papers No.173, (CD/DOC (2001)) 5 March 2001, at pp.17-18.

[100] See World Bank, *World Development Report 1997*, n.65 above, at p.32

[101] ibid

[102] See D Dollar and L Pritchett, *Assessing Aid: What Works, What Doesn't, and Why – A World Bank Policy Research Report* (Oxford: Oxford University Press, 1998), at p.29

[103] ibid

[104] ibid. The UNDP also highlights a similar trend in its 1999 Human Development Report which shows that the countries of south east Asia and the Pacific performed much better in most of the human development indicators than those of SSA. (See UNDP, *Human Development Report 1999* (New York: Oxford University Press, 1999), at p.137)). Ethiopia's problems are often blamed on draught. Yet, as noted above, Bangladesh is also known for its share of natural disasters. Furthermore, it is also the case that if the Mengistu regime had not been too preoccupied with violating his people's rights, or in fighting senseless wars during his reign, the full impact of the 1980s disaster would almost certainly have been minimized, if not avoided, given that resources would have been used in building simple grain silos instead of arms procurement. The same can be said of the current ruler who, before the current incidence of drought, must have wasted scarce resources on his war with neighbouring Eritrea.

[105] See UNCTAD, *African Development in a Comparative Perspective*, n.94 above, at p.71, table 14

Commonwealth Secretariat.[106] This disturbing trend has not escaped the attention of the Secretary-General of UNCTAD Rubens Ricupero who notes that "there are important lessons that can be drawn from other developing countries which have emerged from economic and social instability and stagnation into periods of fast and sustainable growth."[107]

7.8. Conclusion

This chapter began with an examination of the rules of the multilateral trading regime, with the primary aim of establishing the cause(s) of Africa's marginalization. This necessitated an examination of the relevant rules of global trade, in the course of which it became clear that there are in fact specific provisions allowing for derogation for developmental purposes. Thus, to this extent, it is safe to argue that the rules of global trade are not disadvantageous to the needs of poor countries generally. However, it was also noted that the maintenance protectionist measures by the industrialized countries, in the sectors in which developing countries have a comparative advantage undermines the highlighted concessions. Moreover, empirical evidence also indicated that poor countries have been adversely affected by the technical reforms that are now required following the Uruguay Round agreements.

In regard to SSA, however, the argument is that the above conclusion is not sufficient to explain its inability to trade, given that other regions in similar circumstances have emerged from their marginal status (or are in the process of doing so) to confront the acknowledged challenges, and are beginning to realize the aims set out in the ICESCR. Africa's future in regard to trade and development thus depends, to a great extent, on the willingness of its rulers to face up to their responsibilities in a way that is not currently the case.

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[106] See UNCTAD/Commonwealth Secretariat, *Analysis of Quad Initiatives*, n.2 above, at p.xvii.

[107] See UNCTAD, *African Development in a Comparative Perspective*, n.105 above, at p.vii. Interestingly, a World Bank study reaches a not entirely dissimilar conclusion, though by emphasizing the perceived need for the region "to appropriate trade and structural adjustment policies..." It concludes: "*In short, the future of African economies will be determined by Africans themselves and not by outsiders.*" [emphasis unchanged]. (See F Ng and A Yeats, World Bank Policy Research Working Paper 1636, n.58 supra, at p.29). Another World Bank study concludes: "...there is, in act, rather little evidence that hostile markets are the primary cause of SSA countries' poor export performance. Indeed, much evidence points to the alternative of the SSA countries' policies themselves." (See Z K Wang and L A Winters, Africa's Role in Multilateral Trade Negotiations, n.88 above, at p.6).

Chapter 8

SUB-SAHARAN AFRICA AND THE PREFERENTIAL TRADING REGIME

8.1. Introduction

The idea of preferential trade is, strictly speaking, not integral to the multilateral trading regime. Indeed, as noted in chapter 7, the generalized system of preferences (GSP) only came into operation by virtue of a special derogation from the GATT rules,[1] thus allowing rich countries to trade essentially on bilateral terms with poor countries of their choice, and, at any rate, on the former's own terms.[2] This chapter aims to examine the two main preferential (or special and differential (S&D)) regimes: the United States and the EU schemes.[3] Specifically, the focus will be on the US government's African Growth and Opportunity Act (AGOA), and the EU's Lome Convention[4] and its Everything But Arms (EBA) initiative. Given Africa's virtual inability to trade within the framework of the multilateral regime, the idea is to determine whether the S&D regime is indeed as beneficial to its interests as is often suggested. At any rate, the critique will attempt to ascertain the extent to which it has been able to utilize the S&D regime as it currently exists.

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[1] See Generalized System of Preferences, Decision of the Contracting Parties, 25 June 1971, GATT,BISD, 18th Supp. 24 (1972).

[2] Two trade analysts have suggested that the trade and development debate can be conducted in terms of the "rights" to resort to protectionism, and of preferential market access. Whether the latter is in fact a right in the legal sense is of course very doubtful. (See D Greenway and C Milner, *The Uruguay Round and Developing Countries: An Assessment*, Economic Paper 25 (London: Commonwealth Secretariat, 1996), at p.35.

[3] Other OECD countries administer their own independent schemes. The focus on the US and EU schemes are therefore merely an acknowledgement of the dominance of the global trading regime by these two groups. For others, see UNCTAD, *Handbook on Special Provisions for Least Developed Countries (Under the Schemes of E.C., Japan, U.S., Canada) (INT/97/A06)*, UNCTADTechnical Cooperation Project on Market Access, Trade Laws and Preferences, UNCTAD/ITCD/TSB/Misc., May 2001, at p.31[hereinafter the *UNCTAD GSP Handbook*]., at p.25 et seq.

[4] For the various agreements, see Lome I (1975) 14 ILM 595; Lome II (1980) 19 ILM 327; Lome III (1985) 24 ILM 571. For the Fourth Lome Convention which was signed on 15 December 1989 (entering into force on 1 September 1991), see Decision of the Council and Commission, 91/400, OJ (1991), L229.

8.2. The United States' GSP Scheme

The US GSP scheme is based on the Trade Act of 1974 (as amended by the Trade and Tariff Act 1984),[5] although the Clinton Administration introduced the African Growth and Opportunity Act (AGOA) in 2000 (as part of the Trade and Development Act 2000) to cater specifically for the interests of SSA countries.[6] Based, theoretically, on the principle of non-reciprocity, the 1974 Act however mandates the President to withdraw preferential status from a country which does not allow "reasonable access to its market and to its commodities, or if it fails to offer "adequate and effective protection of intellectual property rights."[7] The Act also authorizes the President to withdraw preferential status from governments that expropriate US property without due compensation, act in breach of contract involving a US citizen, or are communist in orientation (except they are already beneficiaries of the most-favoured-nation (MFN) treatment from the United States, and are members of the GATT and the IMF).[8]

Countries that are members of the OPEC or engage in activities aimed at "withholding supplies of vital commodity resources" in order to increase their prices are also excluded,[9] as are "import sensitive articles."[10] Also, by virtue of s.502(c) of the 1974 Act, a developing country which grants preferential treatment to a developed country runs the risk of losing its S&D status if that concession is deemed to have a potentially adverse effect on US trade. Thus, countries within the EU or similar programmes could automatically lose their eligibility because of the introduction of the principle of reciprocity into the US scheme. Furthermore, a "competitive need formula" was introduced, whereby a recipient country

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[5] See Title V of the 1974 Trade Act, Pub.L.93-618, 88 Stat.2067; 19 USCA s.2461 et seq. (1980 and Supp.1988); and Trade and Tariff Act of 1984, Pub.L. 98-573, Title V, 98 Stat.3018, 19 USCA s.2461 et seq. (1988 and Supp 1988).

[6] See Office of the United States Trade Representative, Executive Office of the President, "USTR Announces New Trade Benefits for Africa," *USTR Press Release*, 19 December 2000, available at http://www.ustr.gov/releases/2000/12/00-91.html. Other US schemes include the Caribbean Basin Initiative, a product of the Caribbean Basin Trade Partnership Act.

[7] See s.505 (b) of the Trade and Tariff Act 1984

[8] See J H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Mass: MIT Press, 2000), at p.325, citing s.502(b) of the 1974 Act

[9] Per s.502(b)(2) ibid

[10] Per s.503(c) ibid

which exceeded a certain threshold in terms of its export of a specified good to the US market would forfeit its preferential status.[11] Thus, as of 2001, only 35 countries were eligible under the scheme.[12]

It also creates a "graduation" scheme under which beneficiary countries which attain a per capita GDP level of $8,500, indexed to a formula based on half the annual US growth rate, become ineligible.[13] Indeed, even where the country concerned has not reached the specified growth level, the graduation can be applied to a specific product, once that country has become a major world exporter in that category.[14] As highlighted by UNCTAD, although 1,783 new products originating from beneficiary LDCs were added to the scheme in its 1997 review (for duty-free treatment), certain items such as textiles, watches, footwear, handbags, and other such "manufactures" or "semi-manufactures" are excluded.[15] Such imports therefore become subject to the policy of "tariff escalation" by which is meant the staged increase in tariffs on imports from developing countries, depending on the level of processing involved.[16] Thus, it could be argued that this represents a real impediment to the ability of developing countries wishing to diversify from primary produce exports to manufactured goods. Also, the so-called "competitive need limits," could be said to represent ceilings for each product and country, given that a country automatically loses its status if these limits are exceeded, except if it is considered an LDC.[17]

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[11] Per s.504 ibid. This was set to the value of $25 million (adjusted for inflation), or as a percentage of the country's total imports of that article.

[12] See UNCTAD/Commonwealth Secretariat, *Duty and Quota Free Market Access for LDCs: An Analysis of Quad Initiatives* (Geneva and London: UNCTAD and Commonwealth Secretariat, 2001), at p.28, which also notes that even certain countries designated as LDCs by the UN have been excluded. These are: Afghanistan, Eritrea, Liberia, Mauritania, Laos, Maldives, Myanmar, Solomon Islands, and Sudan.

[13] See M J Trebilcock and R Howse, *The Regulation of International Trade* (London: Routledge, 2000), at p.374. See also, *UNCTAD GSP Handbook*, n.3, above at p.31. In determining whether a country qualifies for graduation, the GSP Subcommittee takes into account: (1) the country's general level of development; (2) its competitiveness in regard to the product in question; and (3) the country's practices as regards such issues as trade, investment and workers' rights; and (4) the overall economic interest of the United States.

[14] See Title V of the Trade Act of 1974 (19 USC 2461)

[15] See *UNCTAD GSP Handbook*, n.13 above, at p.31. See also, B Balassa, (ed.), "Liberalizing Trade Between Developed and Developing Countries," in *New Direction in the World Economy* (New York: New York University Press, 1989), at p.359, who also notes some of the above exclusions.

[16] Per M J Trebilcock and R Howse, n.13 above, at p.375. This is also known as the "effective tariff rate" problem. (See J H Jackson, *The World Trading System*, n.8 above, at p.321).

[17] See UNCTAD, *GSP Handbook*, n.15 above, at p.31. The "upper" limits are exceeded if, during any calendar year, US imports of that product from that country: (1) account for 50 percent or more of the value of total US imports of that product; or (2) exceed a certain dollar value, which is annually adjusted in proportion to the change in the nominal GNP of the USA. Moreover, products which are considered "sufficiently competitive" when imported from a specific beneficiary country are subject to the "lower" competitive limit, i.e., if imports exceed 25 percent or a dollar value set at approximately 40 percent of the "upper" level.

8.2.1. Rules of Origin Under the US Scheme

As with general eligibility rules, the rules of origin are, by and large, open to interpretation by individual countries, and attempts to address this problem during the Uruguay Round negotiations proved unsuccessful.[18] Thus, the US rules of origin stipulate, in broad terms, that imports from beneficiary countries be shipped direct from that country without passing though the territory of any other country, or that if shipped through any other country, the merchandise must not have entered the commerce of that country on its way to the United States. It also requires that all such goods must show the United States as its final destination.[19] Further, it provides that the sum of the cost or value of materials produced in the beneficiary country, together with the processing costs, must equal at least 35 percent of the appraised value of the merchandise at the time of entry into the United States.[20]

8.2.2. The African Growth and Opportunity Act

As already indicated, the AGOA is the latest US initiative aimed at creating a new trade and investment policy in SSA.[21] The 2000 Act gives wide-ranging powers to the President to designate any SSA country as a beneficiary under the scheme, subject to a number of eligibility requirements. Specifically, the President must be satisfied that the beneficiary country has established, or is in the process of establishing:

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[18] See J H Jackson, *The World Trading System*, n.16, above, at p.168. They are however governed by the International Convention on the Simplification and Harmonization of Customs Procedures (signed in Kyoto on 18 May 1973, and entered into force on 25 September 1974). The US is only a partial signatory to the Convention. It is also important to note that rules of origin are widely seen, effectively, as a counterbalance to trade preferences. (See for example, B Hoekman, Economic Development and the WTO After Doha, World Bank Policy Research Working Paper 2851, June 2002, at p.12)

[19] See *UNCTAD GSP Handbook*, n.17 above, at p.31, which also contains detailed information on merchandise trans-shipped through a third country.

[20] ibid, at p.32. Again, the term "costs of processing" is quite detailed and ranges from actual costs of production, research, blue-print cost of engineering, advertising, and commissions/expenses.

[21] The AGOA is a constituent part of the Trade and Development Act 2000 and was signed into law on 18 May 2000. Of particular interest is Title I (Extension of Certain Benefits to Sub-Saharan Africa). The abbreviations "AGOA" and "The 2000 Act" may therefore be used interchangeably. The full text of the Act is available at http://www.agoa.gov/About_AGOA/agoatext.pdf

- a market-based economy which guarantees property rights, and eliminates interventionist policies such as subsidies and State ownership of economic assets;
- the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law. They must also:
- eliminate barriers to United States trade and investment, including by: (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment; (ii) the protection of intellectual property; and (iii) the resolution of bilateral trade and investment disputes;
- promote economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;
- establish a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
- observe internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Moreover, they must not:
- engage in activities that undermine United States national security or foreign policy interests; or
- engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism. They must support international efforts to eliminate human rights violations and terrorist activities.[22]

The Act gives considerable discretion to the president, who is required to monitor, review and report to Congress on the progress of designated countries,[23] and ultimately has the power to exclude any country from the list of beneficiaries.[24]

In addition to country eligibility, the AGOA has detailed rules on product eligibility. The Act authorizes the president, acting on the advice of the US International Trade Commission, to provide duty-free access for certain products from beneficiary countries, provided the goods are not considered "import

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[22] See s.104 (a-b) of the 2000 Act. See also The *UNCTAD GSP Handbook*, n.19 above, at pp.33-34.

[23] See for examples, United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The First of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2001). See also, United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The Second of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2002).

[24] Per s.104 (b) of the 2000 Act. As of 31 December 2002, the following countries were designated as beneficiaries: Benin, Botswana, Cameroon, Cape Verde, Central Africa, Chad, Congo, Democratic Republic of Congo, Ivory Coast, Djibouti, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. The list omits countries such as Angola, Burkina Faso, Burundi, Comoros, and Togo. (See White House, Office of the Press Secretary, Statement by the Deputy Press Secretary, 4 January 2003, at http://www.whitehouse.gov/news/releases/2003/01/20030104-1.html)

sensitive."[25] So far, some 1,800 items benefit from the AGOA scheme, and these include about 214 products such as footwear, luggage and handbags, which were excluded under the normal GSP scheme, as are wine, fruits and juices.[26] Indeed, even those non-LDCs that enjoyed fewer benefits under the normal GSP scheme now enjoy duty-free treatment on all GSP-eligible products.[27]

The AGOA also extends duty/quota-free treatment to certain categories of textiles and clothing to the tune of about 17.5 percent (in terms of duty advantage on imports of similar products in to the US market), subject, however, to the illegal trans-shipment clause.[28] Also, pursuant to the Special Rule for Lesser Developed Countries (which is a special provision under the AGOA), all SSA countries, with the exception of Botswana, Equatorial Guinea, Gabon, Mauritius, Namibia, Seychelles, and South Africa, are eligible to incorporate third country fabric into their products, until 30 September 2004, subject, however, to the above quantitative restriction; and after which date they are required to use US fabric.[29] The AGOA further exempts beneficiary countries from the competitive need limitations imposed on other GSP-eligible countries, and extends GSP treatment to eligible countries until 30 September 2008 – seven years longer than the rest of the world.[30]

8.3. The EU's GSP Scheme

The S&D trading regime of the EU is believed to be the most extensive yet, operating both internally by removing "numerous barriers to imports," and externally by extending its network of free trade

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[25] Per s.111(a)(1) of the 2000 Act

[26] Per s.112(a) and (b) of the 2000 Act, although subsection (c) imposes, detailed rules on beneficiary countries aimed at preventing unlawful trans-shipments.

[27] Per *UNCTAD GSP Handbook*, n. 22 above, at p.33

[28] ibid, at p.35. Materials made from African/regional fabric are however subject to an annual cap of 1.5 percent in the first year, which is subject to an annual increase over an eight-year period by equal instalments, rising ultimately to 3.5 percent of total annual apparel shipment to the US market; after which the normal MFN treatment applies.

[29] Per 112 (b) of the 2000 Act. See also, *The UNCTAD GSP Handbook*, n.27 above, at p.35.

[30] See UNCTAD, *Analysis of Quad Initiatives*, n.12 above, at p.29. On 6 August 2002, President Bush signed the Trade Act of 2002 into law. AGOA II, as it is called, "substantially expands preferential access for imports from beneficiary Sub-Saharan African countries." It also "clarifies and narrowly expands the trade opportunities for Sub-Saharan African countries under AGOA and encourages more investment in the region. It provides additional Congressional guidance to the Administration on how to administer the textile provisions of the bill." (Information available at http://www.agoa.gov/agoa_legislation/AGOII_summary.pdf)

agreements.[31] The scheme is divided into four product groups, on which preferential treatment is granted according to the product's perceived "sensitivity" (i.e., its possible impact on the sector producing a similar product within the EU), and as a percentage of the applicable MFN tariff rate. Thus, the import might be deemed "very sensitive," in which case the MFN preferential margin is 15 percent; "sensitive," in which case the margin increases to 30 percent; or "semi-sensitive," which attracts a 65 percent MFN preferential tariff margin. It may also be considered "non-sensitive," which entitles it to duty-free access.[32] It is also worth noting that since 1995, the EU has eliminated all of its quantitative restrictions, although it has maintained its graduation scheme[33] which, upon close examination, is not entirely dissimilar to that of the United States. The EU market is also considered the most important for LDC exports in terms of their actual value, given that as of 1999, it absorbed 37 percent of LDC exports, with only 3 percent still attracting import tariffs.[34]

In addition to operating both internally and externally, the EU regime can also be said to exist at two separate levels. The first is the normal GSP scheme which, from 5 March 2001, allowed unlimited duty and quota-free access for all products originating from LDC beneficiaries, except arms/ammunition and three "sensitive " products: rice, sugar, and fresh bananas, on which existing duties are to be phased out over a transition period. This is the so-called "Everything But Arms" (EBA) scheme.[35] Under this

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[31] See UNCTAD, *Analysis of Quad Initiatives*, ibid, at p.17. The EU's GSP scheme is based on Art.133 (originally Art.113) of the Treaty of the European Community which states: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements..." (See European Union, Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community (2002) (2002/C 325/01), Official Journal of the European Communities, C 325/1, of 24 December 2002). For the current framework, see Council Regulation (EC) No 2501/2001 of 10 December 2001applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31December 2004, in Official Journal of the European Communities, L 346/1, of 31 December 2001.

[32] UNCTAD, *Analysis of Quad Initiatives*, ibid

[33] ibid

[34] ibid, at p.18, where it is also revealed that of the 49 LDCs, 15 are dependent on the EU market for over 50 percent of their exports.

[35] See EC Regulation 2820/98, OJ L 357, of 30 December 1998. The EBA amendment was introduced pursuant to Regulation 416/2001, OJ L 60/43, of 1 March 2001, and became effective on 5 March 2001. For the specific amendments relating to a wide range of agricultural/meat products, see Art.6Regulation 416/2001. The only exception are: fresh bananas – for which full liberalization is to be implemented between 1 January 2002 and 1 January 2006, by a yearly 20 percent reduction in tariffs; rice – on which all customs duties are to be eliminated between 1 September 2006 and 1 September 2009. In the interim, rice imports from LDCs are to be allowed duty-free, but subject to improved quota restrictions. Full liberalization for sugar is to be phased in between 1 July 2006 and 1 July 2009. In the interim, raw sugar imports from LDCs are allowed duty-free within the limits of a tariff quota, while imports from ACP countries are excluded from the quota restrictions.

scheme, beneficiary countries can apply (under the "special incentive arrangement") for additional preferences to be extended to sensitive products, provided they can demonstrate their compliance with specific environmental and labour standards.[36]

The second has its origins in the Lome Convention – a treaty between the former European powers and their former colonies.[37] The series of agreements that constituted the Lome agreement have now been succeeded by the ACP-EC Cotonou Partnership Agreement, which provides for an eight-year extension of the Lome Convention (with minor amendments) until 2008.[38] Under the various Lome/Cotonou schemes, about 94 percent of all ACP exports enjoyed duty/quota-free access to EU markets (100 percent for industrial products and 80 percent for agricultural imports).[39]

Furthermore, the Lome regime contained four commodity Protocols covering beef, sugar, bananas, and rum, allowing certain ACP countries to enjoy quota-free access; as well as guaranteeing certain export earnings from the sale of raw materials through the so-called STABEX and SYSMIN arrangements.[40] An important feature of the post-Lome regime is the proposed introduction, by 2008, of the principle of reciprocity between the EU and the ACP countries, which, it could be argued, conflicts with the commitments that some of the ACP countries have under their various regional trading agreements. However, given that Articles 29(b) and 84 of the Cotonou agreement strongly encourages LDCs to

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[36] These standards are contained in Arts. 14, 15, 21& 22 of Council Regulation (EC) No 2501/2001, above, note.31.

[37] The Convention had four different phases: Lome I (1975) 14 ILM 595; Lome II (1980) 19 ILM 327; Lome III (1985) 24 ILM 571. For the Fourth Lome Convention which was signed on 15 December 1989 (entering into force on 1 September 1991), see Decision of the Council and Commission, 91/400, OJ L229. (1991)

[38] The ACP-EC Agreement is one between the EU and 78 African, Caribbean and Pacific countries and was signed in Cotonou, Benin, on 23 June 2000. Pending ratification, it became provisionally effective on 2 July 2000, according to the modalities laid down in Decision No. 1/2000 of the ACP-EC Council of Ministers of 27 July 2000 (2000/483/EC, Official Journal L 195 of 1.8.2000), at p.46. The EBA initiative was clearly anticipated during the ACP-EC Agreement because Art.37(9) committed the EU to starting "a process by which, by the end of the multilateral trade negotiations and at the latest 2005, will allow duty-free access for essentially all products from all LDCs, building on the level of the existing trade provisions of the of the Fourth ACP-EC Convention and which will simplify and review the rules of origin, including cumulation provisions, that apply to their exports." See also *UNCTAD GSP Handbook*, n.29 above, at p.8. See also M J Trebilcock and R Howse, *The Regulation of International Trade*, n.16 above, at p.373, and J H Jackson, *The World Trading System*, n.18 above, at p.322 et seq., although these accounts do not take account of the noted developments.

[39] See UNCTAD, *Analysis of Quad Initiatives*, n.33 above, at p.18

[40] ibid. STABEX means the Stabilization Fund for Export Earnings, and is aimed at guaranteeing earnings from the sale of raw materials, while SYSMIN is a similar arrangement in the minerals trade. They are to be abolished under the Cotonou scheme.

engage in such arrangements, it remains to be seen whether that apparent conflict would exist in reality. Of greater concern, however, is the fact that as mentioned earlier, membership of the EU-ACP scheme arguably also conflicts with the general GSP scheme of the United States, given that s.502(c) of the 1974 Act threatens to withdraw preferential status from beneficiary countries that grant preferential treatment to other *developed* countries. Nevertheless, it remains to be seen what the real impact of these might be.

As with its US equivalent, the EU GSP regime provides for the withdrawal of S&D status in whole or in part, in certain circumstances. Specifically, these include where the beneficiary country:

- practices any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956, and ILO Conventions Nos. 29 and 105;
- exports goods made by prison labour;
- exhibits shortcomings in customs controls in regard to drugs or allied substances, or a failure to comply with international Conventions on money laundering;
- is fraudulent or fails to provide administrative cooperation as required for the verification of certificates of origin;
- engages in unfair trading practices; or
- infringes any of the listed Conventions relating to the conservation ad management of fishery resources.[41]

Unlike its US equivalent, however, the EU scheme has a number of failsafe measures[42] against the automatic withdrawal of S&D treatment, all of which are spelled out under Articles 23-26 of EC Regulation 2820/98, of 30 December 1998; with procedures which may be initiated in specified circumstances by the Commission, an EU member State, any person (both legal and natural) or association not endowed with legal personality, provided they can demonstrate an interest in the proposed withdrawal. A Generalized Preferences Committee, acting in concert with the Commission and member States, then considers the withdrawal proposal, whereupon a decision is reached as to what measures are considered appropriate as specified under Article 24 of the above Regulation.[43]

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[41] Per Art.22 of the EC Regulation 2820/98, n.35 above. A further reason for withdrawal of S&D status was introduced by the EBA amendment. This relates to where there is evidence of "massive increases in imports into the Community of products originating in [beneficiary countries] in relation to their usual levels of production and export capacity."

[42] The use of the word "safeguards" is deliberately avoided here because as will soon become evident, it could be easily confused with a similar term which refers to the protectionist measures authorized under Article XIX of the GATT.

[43] See *UNCTAD GSP Handbook*, n.38 above, at p.11, which contains a detailed list of procedures to be followed before withdrawal is eventually effected.

The EU scheme also contains safeguards clauses, which allow for the reintroduction of MFN treatment in regard to any import at the request of a member State, or at the discretion of the Commission, if imports from a beneficiary country are causing or threatening to cause serious difficulties to an EU producer of similar or directly competing products.[44] Pursuant to the EBA amendment, safeguard measures can also be invoked in regard to the imports of sugar, bananas, or rice.[45] Also, like the US equivalent, the EU preferential trading regime has its rules of origin which are too detailed to be spelled out here.[46] Suffice it to state, however, that these are categorized in terms of:

- origin criteria;
- direct consignment conditions; and
- documentary evidence.[47]

8.4. An Evaluation of Both S&D Regimes

8.4.1. Implications for Developing Countries Generally

Apart from being a special derogation from the MFN principle of the GATT, a further common feature of the above S&D regimes is that they are, in essence, instruments of bilateral relations between the donors and the recipients. And because they are largely discretionary, it is understandable that some commentators have suggested that they can be withdrawn at will.[48] Thus, it could be argued that trading within this framework denies the beneficiary countries the relative certainties offered by the rules-based

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[44] Per Art.28, para.1 of the 1998 Regulation. It is necessary to point out, however, that this is different from the safeguard provision relating to the CAP under Art.43 of the Treaty of Rome, or under Art.113 of the same Treaty, which relates to general commercial law and competition.

[45] See Art.5, Regulation 416/2001, which amends Art.28 of Regulation 2820/1998, n.41 above, by inserting a new paragraph 2 to it. Safety measures against abuse by domestic interests also exist in this regard under Annex VI of Art.28 ibid. Thus, in determining the nature of the perceived harm, the Commission is to have regard to a variety of factors, such as reduction in the market share of Community producers, reduction in their production, bankruptcies, jobs, and prices, among others.

[46] These are spelled out under European Commission Regulation No. 2454/93 of 2 July 1993, which lays down the conditions for the implementation of Council Regulation 2913/92 establishing the European Community Customs Code, as amended by Regulation 1602/2000.

[47] See *UNCTAD GSP Handbook*, n.43, above at p.12 et seq., for details.

[48] See M J Trebilcock and R Howse, *The Regulation of International Trade*, n.38 above, at p.373. Whether this is true of the EU Schemes is debatable, given the stated safeguards. Moreover, considering that the EU-ACP regime is based on treaty law, it arguably offers a level of legal protection which is lacking within the US programme, although whether a beneficiary country would seek to enforce a claim against a donor country is a different matter altogether.

system that the GATT/WTO regime has become.[49] Moreover, some commentators have argued that because the levels of tariffs have fallen after each successive GATT Round, it is doubtful as to whether preferential trade terms have any real benefits to their beneficiary countries.[50] With these in mind, it becomes clear that preferential regimes are not the ideal framework within which a country should aim to conduct its foreign trade in perpetuity.

There have also been criticisms relating, for example, to the "several non-trade" eligibility criteria under the AGOA, and of the fact that the extension of S&D treatment to textiles and clothing will only benefit the recipient countries within four years of the scheme, after which they will be required to source their production from US markets.[51] To these may be added the fact that some of the eligibility requirements under the AGOA are not dissimilar to the failed policies introduced by the IFIs during the days of structural adjustment, these being the emphases on wide-ranging neo-liberal economic reforms.[52]

The S&D regimes also highlight a problem which Bela Balassa describes as a "Faustian bargain":[53] On the one hand, they enable the beneficiary countries to trade on a non-reciprocal basis, and on the other, significant tariffs are imposed on products in which they have what might still be called a comparative advantage, i.e., agricultural exports. Indeed, a former UNCTAD Secretary-General had made a similar observation in relation to the Enabling Clause of the Tokyo Round (i.e., the first legal basis for S&D treatment) noting that the very idea of preferential treatment was effectively counterbalanced by the

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[49] As of 2002, no SSA country had any direct involvement in the GATT/WTO Dispute Settlement process. Those that have had any degree of involvement have done so as mere third parties (along with numerous other countries). Thus, Nigeria is listed as such in *United States – Import Prohibition of Certain Shrimp Products*, Appellate Body Reports, WT/DS58/AB/R, 12 October 1998; while some of the ACP/Lome Agreement countries (such as Senegal, Cameroon, Zimbabwe and Ivory Coast) are mentioned in similar capacities in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997. Further insights on this topic have been provided by two members of the Appellate Body itself. See J Lacarte-Muro and P Gappah, "Developing Countries and the WTO Dispute Settlement System: A View From the Bench," (2000) *Journal of International Economic Law*, at pp.395-401

[50] Per M J Trebilcock and R Howse, n.48 above. Other commentators put it thus: "Since all schemes frame their preferences by reference to MFN tariffs, any reduction in the latter must inevitably erode the value of those preferences..." (See D Greenway and C Milner, *The Uruguay Round and Developing Countries*, n.2 above, at p.35).

[51] See *The UNCTAD GSP Handbook*, n.47 above, at p.33

[52] These policies and their human rights ramifications were discussed in chapter 5

[53] See B Balassa, "Liberalizing Trade Between Developed and Developing Countries," in B Balassa (ed.), *New Directions in the World Economy* (New York: New York University Press, 1989), at p.360

graduation clause requiring recipient countries to assume fuller responsibilities within the GATT that was commensurate with their improved circumstances.[54] Nevertheless, an earlier study conducted before the introduction of the AGOA and EBA schemes by both UNCTAD and the WTO maintains that the GSP "remains a valuable tool for promoting developing country exports."[55]

8.4.2. Implications for SSA Countries

The above conclusions are evidently premised upon the supposition that the recipient countries are in a position to utilize the relevant preferential regimes. However, while that may have been the case with many developing countries (including some former LDCs which had graduated from the various OECD GSP schemes, such as Singapore, Hong Kong and Taiwan), the reality is that very few countries in SSA are in any such position – a point noted in a World Bank Working Paper.[56] Indeed, as suggested by UNCTAD, the underutilization of these schemes by African countries might explain why Asian firms are relocating to such countries as Senegal, Mauritius, South Africa, Malawi, and Tanzania, to take advantage of the temporary benefits.[57]

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[54] See UNCTAD, Assessment of the Results of the Multilateral Trade Negotiations: Report by the Secretary-General, UNCTAD Doc. T/B/778/Rev.1 (1980), at p.29. For the Enabling Clause, see GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries," in GATT, 26th Supp. BISD 203 (1980). See also The Enabling Clause (Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979 (L/4903), at para.7.

[55] See UNCTAD/WTO, *Market Access Developments Since the Uruguay Round: Implications, Opportunities and Challenges, in Particular for Developing Countries, and Least Developed Countries, in the Context of Globalization and Liberalization* (Geneva: UNCTAD, 1997), at p.9

[56] See F Ng and A Yeats, *Open Economies Work Better! Did Africa's Protectionist Policies Cause its Marginalization in World Trade?* Policy Research Working Paper 1636 (Washington DC: World Bank, International Economic Development Dept., International Trade Division, 1996) at p.16, footnote 13. The study however also notes that some exports from the region (pre-EBA) were in fact faced with average tariffs rates of between zero to five-tenths of a percent, with Uganda recording a high of 0.6 percent. Only Swaziland is found to have paid a full MFN duty of 4 percent on mandarins and other citruses, as well as on other fresh agricultural produce; and 8.5 percent on coal, to the EU. Mauritius is also found to have met with quota restrictions on 88 percent of its textiles and clothing exports to the US market (pre-AGOA). (See pp.18-19 and 22). Nevertheless, although the general theme of the study overemphasises the importance of neo-liberal reforms, its conclusion on the narrow issue of Africa's trade potential is supported by subsequent findings by UNCTAD, highlighting the fact that no SSA country was able to make effective use of the EU's pre-EBA S&D regime. (See *The UNCTAD GSP Handbook*, n.51 above, at p.8).

[57] See UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (New York and Geneva: United Nations, 2002), at pp.54-55 and 199. A similar observation has been made in relation to the EU's pre-EBA GSP regime, under which "the only effective LDC users" were non-African; these being Afghanistan, Bangladesh, Bhutan, Laos, Cambodia, Nepal, Yemen, and Maldives. (See *The UNCTAD GSP Handbook*, ibid, at p.8. The other named country was Myanmar, which was temporarily excluded because of

Moreover, a joint UNCTAD/Commonwealth projection indicates that even with the EU's EBA scheme in place, there will only be a marginal impact on SSA exports, with the most likely beneficiaries being Malawi (by just over 4 percent), Tanzania (by just over 6 percent), Zambia (by about 3 percent), Uganda (by less than 1 percent), and the rest of SSA by just above 1 percent. The study also indicates that even if all the Quad countries[58] were to adopt the EBA initiative, only Tanzania and Malawi would benefit to any significant degree (with Tanzania benefiting by over 10 percent, and Malawi by over 8 percent); and the rest of SSA by just over 2 percent.[59] These all confirm the view that although the lack of market access represents an obstacle to developing country trade generally, the problems it poses are often overstated in relation to SSA.[60]

To a keen observer of the African economic and political situation, however, this should come as no surprise: As a major World Bank study points out, "[m]any countries in Sub-Saharan Africa are suffering from a crisis of statehood – a crisis of capability. An urgent priority is to rebuild state effectiveness through an overhaul of public institutions..."[61] The report cites the examples of Nigeria, Tanzania, and Guinea, where there is an inability to make budget forecasts based on sound and realistic assumptions, and where no system exists for "costing out policy proposals or subjecting them to scrutiny,"[62] and

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its use of forced labour, per European Council Regulation 552/97 of 24 March 1997).

[58] The term "Quad" refers to the quadrilateral meetings involving trade ministers from the major trading countries, these being Canada, the EU, Japan and the United States.

[59] See UNCTAD/Commonwealth Secretariat, *Analysis of Quad Initiatives*, n.40 above, at p.xvii, fig.2. Admittedly, the study notes that "sub-Saharan Africa stands to gain the most" if all the Quad countries were to follow the EU's lead. However, a closer examination reveals that Bangladesh, which has become the largest LDC exporter over the past decade stands to gain the most as a country, in comparison with the named SSA countries. At any rate, it is important to note that these are mere projections, which, by definition, are premised upon various assumptions, not least of which must have been purposeful leadership in the countries concerned.

[60] As might be expected, the most vociferous critics of the multilateral trading rules are African rulers, often through their policy advisers. This had in fact become the dominant theme at recent conferences attended by African officials. Examples include: The OAU Council of Ministers held in Tripoli, Libya, in February 2001; the pretentiously titled High-Level Brainstorming Meeting for African Trade Negotiators Preparatory to the Fourth WTO Ministerial Conference, Addis Ababa, 26-29 June 2001; and the Third Ordinary Session of the OAU/African Economic Community Ministers of Trade, Cairo, September 2000. Indeed, a former Nigerian ambassador to Washington, Zubaire Kazaure, is reported to have asserted thus: "Certainly, Nigeria is not free from worldwide economic and social malaise, largely caused by external factors, like unfavourable trade terms and fluctuating commodity prices." (See *Washington Post*, 15 January 1992, at p. A22). And this, in spite of the fact that Nigeria has, since the discovery of oil, virtually abandoned its agricultural sector.

[61] See World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.14

[62] ibid, at pp.83-84. This conclusion was subsequently confirmed in a Financial Times report which describes a "sclerotic" civil service in Nigeria – a system crippled by endemic corruption, inefficiency and apathy. (See A Goldman, "Survey – Nigeria," *Financial Times*, London, 30 March 2000, at p.10

concludes: "An institutional vacuum of significant proportions has emerged in many parts of sub-Saharan Africa..."[63] In other words, SSA countries simply lack the institutional capacity without which they will remain incapable of utilizing the opportunities (adequate or not) that are gradually being created in developed country markets.

8.5. Conclusion

This chapter began with an overview of the two major preferential trading regimes, and highlighted their implications for African trade. In the course of the critique, it became clear that even within this framework, the region's ability to trade remains in serious doubt. Some commentators might argue that more needs to be done by the rich countries to assist the region. Yet, this does not address the question as to why Africa should be in a more disadvantageous position than any other region of the world. Until that question is addressed, it can be safely stated that nothing by way of foreign assistance will save the region and its people from economic misery. In the meantime, what is clear is that like the Heavily Indebted Poor Countries (HIPC) initiative, the above S&D schemes represent the very best that it can expect. It is, after all, axiomatic that international economic relations have never been based on altruism. The usual clamour for a fairer regime (however morally persuasive) is therefore a function of a dangerously naive view of international economic relations; dangerous because it gives false hopes to the already indigent people of Africa.

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[63]See *World Development Report*, ibid, at p.162

Chapter 9

TRANSNATIONAL CORPORATIONS AND SUB-SAHARAN AFRICA: SOME HUMAN RIGHTS CONSIDERATIONS

9.1. Introduction

To anyone with some knowledge of sub-Saharan Africa, any allusion to the role of transnational corporations within its political economy is bound to be met with derision: This, after all, is the one region of the world whose rulers appear to have made an eternal pact with economic underdevelopment – a region whose engagement with the global economy is mediated only by its crippling debt, and where aid-dependency has ostensibly replaced legitimate policy goals. It might also be pointed out that of all the regions of the developing world, it has become the most unattractive for foreign direct investment, except for the fact that its vast oil and mineral reserves have become too irresistible to the major oil and other so-called extractive interests, some of which, in any event, operate off-shore, and thus virtually outside their host economies. For these reasons, it becomes easy to appreciate why some observers might argue that the TNCs/human rights discourse has little or no relevance to the region.[1]

Such a conclusion would, however, be mistaken: Although Africa operates virtually outside the global economy, and although FDI flows to the region have been negligible by any standard, it has been at the centre of some of the most flagrant human rights violations in the world involving TNCs. Thus, it would be safe to argue that Africans have in fact borne a disproportionate burden of corporate human rights violations. It follows that on this basis alone, Africa deserves to be at the centre of this discourse. There is,

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[1] Indeed, an OECD study alludes to this by asserting: "At first sight, the debate over the potential effects of FDI in most African countries seems largely academic, as the amount of investment during the past 20-30 years is so small..." (See L Odenthal, "New Forms of Co-operation and Integration in Emerging Africa: FDI in Sub-Saharan Africa," OECD Technical Papers No.173, (CD/DOC (2001))5 March 2001, at p.11 [hereinafter OECD Technical Papers No.173].

however, a further reason why this should be the case: Depressing economic performance or not, Africa remains part of the international community. This means that if the discourse were ever to result in the formulation of a new set of mandatory rules to govern corporate conduct at the international level, these would apply as much to the region as they would to any other part of the world; thus, the circumstances of the region cannot be totally ignored.

In chapter 6, it was noted that the theory of comparative advantage (which is often assumed to govern the multilateral trading regime) has been supplanted by the notion of strategic trade. It was also noted that the conscious distortion of the rules of free trade (by the same governments which are the most vociferous advocates of liberalization) is aimed, primarily at enhancing the interests of the TNCs in their quest for global dominance. This chapter aims to assess the dangers posed (in human rights terms) by the global dominance of TNCs to Africa, and indeed, to developing countries generally. To be able to do so, however, it is considered necessary to begin with an examination of the competing theories that inform the TNCs/human rights debate. This will be followed by an overview of the nature of the modern TNC, as well as the impact of this on the global economy. It will then proceed to discuss the nature of the violations that might (or in fact do) flow from this corporate pervasiveness.

9.2. TNCs and Human Rights: Competing Theories[2]

The TNCs/human rights discourse is informed by three dominant theories. The first is one that regards corporate enterprises as "engines of development." The second – the Hymer thesis – challenges this view. The third is the "null hypothesis," which rejects the validity of both.[3] In the light of the flagrant violations that

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[2] This section draws, though to a limited extent, on W H Meyer, *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression* (New York: Praeger, 1998), at p.94 et seq; and on W H Meyer, "Human Rights and MNCs: Theory Versus Quantitative Analysis" (1996) *Hum. Rts Q.* vol.18, no.2, at p.373 et seq.

[3] See ibid.

will be highlighted in the latter part of this chapter (and in greater depth in chapter 10), it can safely be stated that the null hypothesis is inherently flawed. The remaining two will however be examined in turn:

9.2.1. TNCs as Engines of Economic Development

This essentially neo-liberal theory holds that TNCs are "engines of development" and are thus agents for the promotion of human rights in the developing world. The argument is that TNCs promote economic development through the transfer of technology and new capital, which in turn enhance the realization of ESCRs.[4] It is also believed that the resulting economic prosperity creates a politically stable middle class, which ultimately promotes political inclusiveness and tolerance within society, thus enhancing the realization of CPRs.[5] There is thus a definite similarity between this worldview and the rhetoric employed in the promotion of the phenomenon of globalization generally; hence, although it is axiomatic that the overriding aim of FDI is profit maximization, this is often couched in the altruistic language of economic development.[6] In addition to the above claims, it is also believed that FDI to poor countries increases foreign exchange

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[4] See UNCTAD, *Foreign Direct Investment and Development: UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations, 1999), particularly at p.31 et seq. See also K Pritchard, "Human Rights and Development: The Theory and Data," in D P Forsythe (ed.), *Human Rights and Development* (London/Basingstoke: Macmillan 1989), at p.329. Former US Secretary of State Kissinger is reported to have asserted thus before the UN General Assembly in 1975: "Transnational Enterprises have been powerful instruments modernization both in the industrial nations where they conduct most of their operations – and in the developing world, where there is often no substitute for their ability to marshal capital, management, skills, technology and initiative. Thus, the controversy over their role and conduct is itself an obstacle to economic development." To be fair, the statement did in fact acknowledge that TNCs have a duty to obey local laws and customs, refrain from political interference, provide employment to qualified local personnel or "qualify local people through training." Nevertheless, the point to note is the emphasis on TNCs as the only engines of development. (See *New York Times*, 2 September 1975, at p.20).

[5] See D Lerner, *The Passing of Traditional Society: Modernizing the Middle East* (New York: Free Press, 1964).

[6] See for example, foreword by Prime Minister Tony Blair, in Department for International Development, *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Cm 5006 (December 2000) who asserts: "Globalization creates unprecedented new opportunities and risks. If the poorest countries can be drawn into the global economy and get increasing access to modern knowledge and technology, it could lead to a rapid reduction in global poverty..." This was earlier articulated in a report prepared by the multilateral development banks and the IFIs, at the G-8 summit in Okinawa in July 2000, where it was asserted thus: "Globalization will increase the flow of investments, trade, and technology...The challenge for developing countries is to enact domestic policies that attract more foreign direct investments...as well as adopting structural reforms..." (See Multilateral Development Banks/IMF, *Global Poverty Report* (G-8 Okinawa Summit, July 2000), at p.14. See further, E K Fitzgerald, *The Development Implications of the Multilateral Agreement on Investment (MAI)* (London: Department for International Development, 1998).

earnings by generating exports from the host economy, creates employment, as well as stimulating competitiveness and efficiency.[7]

9.2.2. The Hymer Thesis

The opposite theory is the much-cited Hymer thesis, which is premised upon the existence of two "laws" of economic development: the law of increasing firm size, and the law of uneven development.[8] Hymer explained the first "law" in these terms: "Since the beginning of the Industrial Revolution, there has been a tendency for the representative firm to increase in size from the *workshop* to the *factory* to the *national corporation* to the *multi-divisional corporation* and now to the *multinational corporation*" [emphases unchanged].[9] On the basis of this, he predicted that the 1980s would be a period of increased FDI flows, a prediction which was to prove remarkably accurate.[10]

Hymer's second "law" is an extension of the first, predicting that as a result of increased FDI flows, there would be "a tendency...to produce poverty as well as wealth, underdevelopment as well as development."[11] Drawing upon the work of Alfred Chandler and Fritz Redlich,[12] he then proceeded to identify three levels of

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[7] See M Geist, "Toward a General Agreement on the Regulation of Foreign Direct Investment," (1995) *26 Law & Pol'y Int'l Bus. 673*, at p.679.

[8] See S Hymer, *The Multinational Corporation: A Radical Approach* (R B Cohen ed.), (Cambridge/London: Cambridge University Press, 1979), at p.54 et seq. S Hymer, "The Multinational Corporation and the Law of Uneven Development," in G Modelski (ed.), *Transnational Corporations and World Order* (San Francisco, California: W H Freeman, 1979), at p.386 et seq. See also S Hymer, *The International Operations of National Firms* (Cambridge Massachusetts: MIT Press, 1976), and S Hymer, *The Multinational Corporation* (New York: Cambridge University Press, 1979).

[9] ibid, The Multinational Corporation, at p.54. See also, "The Multinational Corporation and the Law of Uneven Development" at p.386. It is noteworthy that the validity of this aspect of Hymer's thesis has been acknowledged thus in an OECD publication: "The pattern of trade and development in the world economy clearly shows the key role played by history: cumulative causation has created concentrations of industrial activity in particular locations and left other areas more dependent on primary activities." (See OECD Technical Papers No. 173, n.1 above, at p.8)

[10] See also, WTO, "Some Facts and Figures," which notes that Global FDI flows grew 27 fold (or 14 percent annually) between 1973 and 1998, reaching $645 billion in 1998 ($24 billion in 1973, $60 billion in 1985), available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/22fact_e.htm

[11] S Hymer, "The Multinational Corporation and the Law of Uneven Development," n.9 above, at p.387

[12] See A D Chandler and F Redlich, "Recent Developments in American Business Administration and their Conceptualization" (1961) *Business History Review*, at p.103.

organizational hierarchy in the modern TNC, beginning with level III (the lowest management level), which is believed to be responsible for day-to-day matters. Level II is responsible for co-ordinating the activities of those at level III, while level I (the top management) sets the goals and plans for the entire organization. This arrangement ensures that level III activities spread across the globe according to the requirement for manpower and raw materials, while level II operations tend to concentrate in large cities (close to level III). It also ensures that level I operations are even more concentrated than those of level II, and often consists of general offices, located close to the capital markets, the news media, and the seat of government.[13] The consequence of this organizational structure, it is contended, is "specialization by nationality" within the TNCs hierarchy, which in turn results in "a division of labour based on nationality" at the global level.[14] It is this structural arrangement that makes the Hymer thesis synonymous with the dependency theory categories of "centre and periphery," with level III representing the rural periphery of developing countries, while level II is to be found in the urban centre(s) of such countries; leaving level I operations in the industrialised centres of the West.

The human rights implications of this thesis are instructive: This pattern of dual development leads ultimately to the deterioration of human rights of both categories, as management activities are concentrated within the affluent urban areas of major industrialized cities, with the rural dwellers (i.e., the ordinary citizens of the developing world) paying the highest price to maintain it while themselves remaining in poverty. Hymer argues that it is in the interest of the TNC to preserve this arrangement by exercising control over the marginalized groups, through measures which might include counterinsurgency operations, such as those carried out by the US government in Latin America and Asia.[15]

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[13] S Hymer, "The Multinational Corporation and the Law of Uneven Development," ibid, at pp.393-394

[14] ibid, at p.396

[15] ibid, at p.400. The role played, particularly by US intelligence agencies acting in the interest of US-owned TNCs may never fully come to light, by their very nature. Nevertheless, there are fairly credible accounts of such activities, in some cases involving the destabilization of even democratically elected governments in the developing world. Perhaps the most well-known of these is that by former CIA insider in: P Agee, *Inside the Company: CIA Diary* (London: Penguin Books, 1975). For the role of US-owned TNC, the International Telephone and Telegraph Company (ITT) in the overthrow of Allende's left-leaning government in Chile, see A Sampson, *The Sovereign State of ITT* (New York: Stein & Day, 1981).

Hymer might not have written an article of faith, and it is not beyond the realms of possibility that some aspects of his thesis might be just as falsifiable as any other within the FDI and development discourse. Indeed, Peter Muchlinski's seminal work in this area (although not primarily focused on the theme of economic development) makes it necessary to enquire as to whether the traditional view of the TNC as a monolithic, rigid, almost pyramidal, hierarchical structure remains valid.[16] This, nevertheless, does not undermine the essential validity of the Hymer thesis. For example, it is the case that although FDI flows have increased dramatically over the last two decades, many of the TNCs remain headquartered in Western capitals.[17] Indeed, it is worth noting that among the developed countries, the United States remains the hub of corporate activities.[18] Moreover, it is now axiomatic that globalization (with TNCs as its driving force) creates disparities both within and between the nations of the world.[19] Thus, it is possible to conclude that the "engines of development" thesis needs, at the very least, to be treated with caution.

The debate, however, must not end with a casual dismissal of the neo-liberal position, not least because the universally acknowledged phenomenal successes of the South East Asian economies (some of which share a common history with many SSA countries) now present a persuasive challenge to the view that FDI is an

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[16] See: P T Muchlinski, *Multinational Enterprises and the Law* (Oxford, UK: Blackwell, 1999), at pp.57-61; and P T Muchlinski, "Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review" (2002) *Company Lawyer*, vol.23, no.6, at pp.170-171. Indeed, as he further points out, the establishment of legal liability no longer necessarily depends on the structural relationship between the various organizations that constitute a TNC; given that the existence of tortious liability (upon which much of their human rights responsibilities are premised) does not always depend on their organizational structure; nor does their strict liability where, for example, exposure to hazardous substances is alleged (See P T Muchlinski, Holding Multinationals to Account," at p.171)

[17] See P N Doremus et al, *The Myth of the Global Corporation* (New Jersey: Princeton University Press, 1999), at p.4, and Ch.3. Ironically, the authors made this point in their attempt to challenge the view that FDI has become a truly global phenomenon. See also, *UNCTAD, World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (New York: Oxford University Press, 1999), particularly at Chapters I, II, and III. See further, R Boyer and D Drache, *States Against Markets: The Limits of Globalization* (New York: Routledge, 1996), at p.2, who note that as of the 1990s, 85 percent of all such investments circulated within the United States, the EU and Japan. See further, P Civello, "The TRIMs Agreement: A Failed Attempt at Investment Liberalization," (1999) *8 Minn. J. Global Trade 97*, at p.99, and M E Porter, *The Competitive Advantage of Nations* (Basingstoke and London: Macmillan Press, 1998), at pp.18-19.

[18] See UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (New York and Geneva: United Nations, 2002), at p.37

[19] See UNDP, *Human Development Report 1999: Globalization with a Human Face* (New York: Oxford University Press, 1999), at p.30-31. See also C Thomas, "International Financial Institutions and Social and Economic Human Rights: An Exploration," in T Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (Manchester and New York: Manchester University Press, 1998) at p.163.

impediment to economic development. Indeed, as highlighted by various authoritative studies, these countries have become famous for their ability to harness the benefits of FDI to the ultimate advantage of their citizens.[20] Thus, with this in mind, it becomes difficult to argue that FDI constitutes a definite impediment to economic development (and thus to the realization of human rights).

Yet, even this apparent proof of its benefits is in fact misleading. As some of the most authoritative commentators on this subject have pointed out, the so-called Asian miracle was not purely a function of economic neo-liberalism; the State played a central role in bringing about the widely acclaimed successes.[21] Indeed, as has been pointed out in chapter 6, the idea that impoverished economies should expose themselves to the same market forces that even the richest and most powerful nations have always insulated themselves from, would have been dismissed as simply ludicrous, but for the serious human rights implications (to be discussed infra). In any event, and as has been widely acknowledged, many African countries have in fact embarked upon wide-ranging neo liberal economic and regulatory reforms since the heydays of structural adjustment.[22] Moreover, as noted by UNCTAD, most of the countries of Africa are signatories to international treaties dealing with the protection of FDI, such as the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), and the Convention on the Settlement of Investment

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[20] See, for example, D Dollar and L Pritchett, *Assessing Aid: What Works, What Doesn't, and Why – A World Bank Policy Research Report* (Oxford: Oxford University Press, 1998), at p.29. See also World Bank, World *Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.32. See further, UNCTAD, *Economic Development in Africa, From Adjustment to Poverty Reduction: What is New?* (New York and Geneva: United Nations, 2002), at p.36; and UNDP, *Human Development Report 1999* (New York: Oxford University Press, 1999), at p.137.

[21] See J E Stiglitz, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland, at p.2; and J E Stiglitz, "Some Lessons from the East Asian Miracle" (1996) *World Bank Research Observer*, vol.11, at pp.151-177. See also J H Dunning (ed.), "Governments and the Macro-Organization of Economic Activity: A Historical and Spatial Perspective," in *Governments, Globalization, and International Business* (UK: Oxford University Press, 1999), at pp.32-39, where he describes this approach as "alliance capitalism," or "state-guided capitalism."

[22] See, for example, E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," April 1999, IMF Working Paper, WP/99/51, (IMF Africa Department), at pp.4-12; UNCTAD, *Trade and Development Report* 1998 (Geneva: United Nations, 1998), at p.124; and World Economic Forum (WEF), *Africa Competitiveness Report* (Cologny/Geneva: World Economic Forum, 1998), at p.20.

Disputes Between States and Nationals of Other States.[23] Thus, if market reforms were indeed a guarantee for sustained investment flows, it would be safe to conclude that Africa would, at the very least, not be as far behind the other regions of the world as it currently is. What these mean is that just as market reforms, on their own, constitute a definite impediment to economic development (and thus to the realization of ESCRs), FDI, on its own, can only be a catalyst for development if the ability of the State to regulate it is not constrained by the economic (and indeed legal) reforms that are often required. The "engine of development" thesis thus needs to be treated with the high degree of caution that it deserves.

9.3. The Nature of the Modern TNC

9.3.1. What is a Modern TNC?

A good starting point for examining the nature of the modern TNC is to offer a working definition of it.[24] Thus, it is possible to define it as "an entity which, from its headquarters in its home State exercises its

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[23] See UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (New York and Geneva: United Nations, 1999), at pp.7-9. As of February 2003, the list African countries concerned were: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo (Democratic Republic of), Congo (Republic of), Ivory Coast, Equatorial Guinea, Ethiopia, Eritrea, Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe (See the Multilateral Investment Guarantee Agency's website, at http://www.miga.org/screens/about/members/members.htm)

[24] Terms such as multinational corporations, transnational business enterprises, or even meganational enterprises are also used to describe the TNC. In his seminal work in this area, however, Peter Muchlinski offers an insightful explanation of the implications of most of these terms (See for example, P T Muchlinski, *Multinational Enterprises and the Law*, n.16 above, at pp.12-15). He explains that the word "enterprise" might be preferred in some circumstances because it "avoids restricting the object of study to incorporated business entities and to corporate groups based on the parent/subsidiary relations alone." See P T Muchlinski, "Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review" (2002) *Company Lawyer*, vol.23, no.6, at p.169. The OECD also favours this term. (See OECD, *Guidelines on Multinational Enterprises*, available at www.oecd.org/daf/investment/guidelines/mnetext.htmatp.3). Nevertheless, in the context of this exercise, the term transnational corporation is preferred, not because it has any inherent advantage over the others, but because it is the term of choice within the UN system, particularly the UNCTAD. (See, for example, UNCTAD, *Foreign Direct Investment and Development: UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations, 1999), at p.5 (and endnote) which states: "TNCs are firms that control assets and engage in the production of goods and services in more than one country." According to this definition, they include both incorporated and unincorporated enterprises).

activities there as well as in one or several further States (host states)"[25] – an activity known as foreign direct investment (FDI). According to the WTO, this occurs "when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset."[26] In most instances, both the investor and the asset(s) it manages abroad are business enterprises, and where this happens, the investor is typically referred to as the "parent company," and the asset(s) as "affiliate(s)" or "subsidiary(ies)."[27] A TNC is therefore simply a traditional business enterprise which owns, manages, or controls assets in one or more foreign countries.[28]

9.3.2. TNCs and the Global Economic Order

That TNCs wield enormous powers within the global economy is now a widely acknowledged fact,[29] although some commentators have attempted to challenge this view.[30] Nevertheless, as pointed out by Henry Steiner and Philip Alston, they are not only powerful within national economies, but are in fact the main driving force behind the phenomenon of globalization.[31] As highlighted by UNCTAD, 14 of the 50

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[25] See I Seidl-Hohenveldern, *International Economic Law* (The Hague: Martinus Nijhoff, 1992), at p.14. For this purpose, "home State" refers not to the State of incorporation, but where the headquarters of theTNC is located.

[26] See WTO, *Trade and Foreign Direct Investment: New Report by the WTO* (PRESS/57, 9 October 1996), at p.6. According to this report, it is this "management dimension" which distinguishes FDI from portfolio investments in foreign stocks, bonds and other financial instruments. John Dunning describes it thus: "(1) The investment is made *outside* the home country of the investing company, but *inside* the investing company. Control over the use of the resources transferred remains with the *investor*. (2) It consists of a 'package' of assets and intermediate products, such as capital, technology, management skills, access to markets and entrepreneurship" [emphases unchanged]. (See J H Dunning, *Multinational Enterprises and the Global Economy* (London: Addison Wesley, 1992), at p.5)).

[27] per WTO Report, ibid.

[28] This, it is believed, takes account of the loose and informal organizational structures that Muchlinski describes (See PT Muchlinski, *Multinational Enterprises and the Law*, n. 24 above, at pp. 57-61)

[29] See for example, M K Addo, (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, The Netherlands: Kluwer Law International, 1999), at p.4

[30] See for example, P N Doremus et al, *The Myth of the Global Corporation* (New Jersey: Princeton University Press, 1999), who challenge the view that the modern TNC has become so powerful. Considering Paul Doremus' position as Senior Analyst in the US Department of Commerce, it is impossible to accept that he is unaware of the evident enormous influence that American corporations have had on both domestic policies, through their generous funding of political parties, which in turn dictates his government's attitude *vis-à-vis* multilateral agreements such as the GATT/WTO treaty, not to mention the influence of the oil companies in its repudiation of the Kyoto treaty. See also J Spero, *The Politics of International Economic Relations* (New York: St Martins, 1990) at p.5, who asserts that the operations of international economic actors, e.g., TNCs, are largely determined by the actions and policies of international political actors, i.e., States.

[31] See H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford, UK:

largest "economies" in the world as of the year 2000 were TNCs.[32] Another report by the UNDP reveals, for example, that Unilever's corporate annual sales (in 1994 US dollar terms) was $49.7 billion, compared with Nigeria's GDP of $30.4 billion; while the top five TNCs had a turnover of $871.4 billion – over eleven times the GDP of all the 48 LDCs.[33] Indeed, the annual sales of General Motors (of $168.8 billion) was said to be greater than the combined GDP of Turkey and Denmark; while Norway's GDP of $109.6 billion was less than the annual sales of Royal Dutch-Shell, valued at $109.8 billion.[34] Detlev Vagts sums these up thus:

> That the multinational enterprise is an actor of major significance in the world economic stage is a fact that has become widely recognized among decision-makers and the general public...Taken individually, the economic power of the largest among the multinational enterprises can be compared with that of some medium-sized countries. Taken collectively, their power can be compared with that of such international institutions as the International Monetary Fund, or all national central banks together.[35]

This, however, is not a new phenomenon. Such corporate giants as the Dutch East India Company and the Massachusetts Bay Company arguably wielded much more influence than the modern TNC, given that they in fact commanded armies and fleets, had their own foreign policies, and controlled vast territories.[36] The Royal Niger Company's influence in Nigeria was no less enormous.[37] Nor is their direct complicity in human rights violations a new development. As pointed out by Peter Muchlinski, corporate enterprises were

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Oxford University Press, 2000), at p.1349. See also OECD Technical Papers No.173, n.9 above, at p.9, where FDI is described as "one of the main engines of globalization." See further, W H Meyer, "Human Rights and MNCs: Theory Versus Quantitative Analysis" (1996) *Hum. Rts Q.* vol.18, no.2, at p.373, who asserts thus: "As the globe becomes more interdependent...as nonstate actors (such as MNCs) eclipse the income of and power of nation-states, multinationals move to center stage in the international arena." See further, G Monbiot, *Captive State: The Corporate Takeover of Britain* (London: Macmillan, 2000), particularly for the British perspective.

[32] See UNCTAD, *World Investment Report 2002*, n.18 above, at p.90, quoting the findings of an unpublished study: S Anderson and J Cavanagh, *Top 200: The Rise of Corporate Global Power* (Washington DC: Institute for Policy Studies, 2000).

[33] See UNDP, *Human Development Report 1997: Human Development to Eradicate Poverty* (New York: Oxford University Press, 1997), at p.92 (figures computed from table 4.1).

[34] ibid

[35] See D F Vagts, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001), at p.113.

[36] See R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton and Oxford, UK: Princeton University Press, 2001), at pp.278-279. See also N Ferguson, *Empire: How Britain Made the Modern World* (London: Penguin Books, 2003)

[37] See, for example, A C Burns, *History of Nigeria* (London: Harper Collins, 1972)

involved in the grave violations that defined the Nazi era, as well as the apartheid regime in South Africa.[38] Thus, it would be no exaggeration to argue that the earlier TNCs were perhaps more pernicious, at least insofar as they deliberately sought, not just to adopt exploitative policies (which some of the modern TNCs still do), but to also profit from the above violations, as well as subjugating the "native" peoples in their "territories."[39]

From this perspective therefore, the temptation to conclude that the modern TNC has made welcome progress in human rights terms is understandably very strong. However, this would also be quite misleading. While it is indeed the case that the presence of a TNC in a developing country can, for example, pull working conditions up (with predictable knock-on effects on standards of living, healthcare, and other basic rights); and that the activities of the NGOs have forced some TNCs to become increasingly conscious of their corporate reputation,[40] these must not detract from the fact that as some of the examples in this critique will demonstrate, some TNCs still conduct their operations with contemptuous disregard for even that most sacred of human rights – the right to life. In the meantime, others (though by no means all) have even become complicit in such grave violations as torture and the use of forced labour, as evidenced by the substantial body of case law that is emerging from the American and British jurisdictions, as highlighted below, and in greater depth in chapter 10. Indeed, some commentators have identified an instructive parallel between the operational ethos of the modern TNC and old-style imperialism.[41] Thus, it would be equally

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[38] See P T Muchlinski, "Human Rights and Multinationals: Is There a Problem?" (2001) *International Affairs*, vol.77, no.1, at p.31. Corporate support for the apartheid regime in South Africa has now become a subject of litigation in the US courts. According to the campaign group Corporate Watch, some of the named companies include: IBM, General Motors, Exxon Mobil, J.P Morgan Chase, Citigroup, Caltex Petroleum Corporation, Ford Motor Company, and the Fluor Corporation – just a fraction of the 20 banks and corporations that "supplied critical support" to the regime. (See A Raphael, "USA: Apartheid Victims Sue Global Corporations" OneWorld US, 13 November 2002, at http://www.corpwatch.org/news/PND.jsp?articleid=4856. See also R Caroll, "S Africa Shuns Apartheid Lawsuits" at http://www.guardian.co.uk/international/story/0,3604,848359,00.html).

[39] See R Gilpin, *Global Political Economy*, n.36 above, at p.279, although he does not employ the language of human rights.

[40] See P T Muchlinski, "Human Rights and Multinationals: Is There a Problem?" n.38 above, at pp.38-39.

[41] Lester Thurow puts it thus: "In the modern world, corporations offer the best opportunities for empire building. The nation-state forbids making war on the neighboring clan, the days of colonial empires are over, expanding one's national boundaries by conquest is rare, and nuclear weapons make conquering the world a goal not worth pursuing..." (See L Thurow, *Head to Head: The Coming Economic Battle Among Japan, Europe, and America* (New

valid to conclude that very little has changed since the early days of the TNC. For the remaining few, therefore, it can only be a relentless struggle to reconcile the drive for profit maximization with human rights concerns. It is this evident conflict of interests that underlies the call for a mandatory regulatory regime at the international level – an issue which is discussed at length in chapter 10.

9.3.3. The Modern TNC: Its Distinguishing Features

It could thus be argued that what has changed since the early days of the TNC has been the structure, *modus operandi*, and general level of sophistication of the modern corporation, in the sense that unlike its forebears which were largely integrated, monolithic entities that specialized in one product (usually primary commodities), the modern TNC has assumed an amorphous characteristic, with degree of complexity that does not lend itself to effective centralized jurisdictional control.[42] Indeed, as highlighted in the latest *World Investment Report*, the very idea of corporate structures is fast becoming obsolete, especially for TNCs dealing in tradable goods and services. In an increasingly globalized world, the report notes, "the 'F' in FDI is fading."[43]

Admittedly, this may not always be based on a conscious attempt to evade regulatory controls as often suggested in the "race to the bottom" thesis, although it must be pointed out that where the need to evade regulatory regimes coincides with the company's commercial considerations, it is impossible to imagine that this would not be a crucial factor.[44] Nevertheless, as pointed out by Peter Muchlinski, corporate growth often

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York: William Morrow, 1992), at p.120)). See also D C Korten, *When Corporations Rule the World* (West Hartford, CT: Kumarian Press, 2001)

[42] See P T Muchlinski, *Multinational Enterprises and the Law*, n.28 above, at p.57 et seq. See also, H J Steiner and P Alston, *International Human Rights in Context*, n.31 above, at p.1349, who have highlighted further problems that militate against their regulation. These include: reluctance on the part of governments (especially in relation to labour matters); the question of cost (particularly for developing countries); concerns by governments that regulation could make their economies less attractive to FDI (the "race to the bottom" thesis); and the difficulty in determining what the common minimum standards should be among nations, particularly in relation to labour rights.

[43] See UNCTAD, *World Investment Report 2002*, n.32 above, at p.14. Nevertheless, for an insightful study of the structural complexity of the modern TNC, see P T Muchlinski, *Multinational Enterprises and the Law*, ibid, at ch.3

[44] Indeed, Clive Schmitthoff makes this point in the context of the choice to be made between the establishment of a

demands a degree of specialization and division of labour within the firm which might be necessary in response to emerging functions, as well as new products and services.[45] The company may thus eventually become "divisionalized" in line with the emerging managerial functions, products, and areas of operation. Ultimately, whatever structure is adopted, he explains, often depends on business or related considerations.[46] The TNC, for these reasons, may find itself adopting several types of legal structures, all depending on such factors as:

- the nature of the business activity itself,
- the transaction costs involved,
- the extent to which the law requires the use of a particular structure,
- the principal national characteristic of the firm, and
- the legal cultures from (and within) which it operates.

The overriding aim, it is further explained, is "to create a legal structure that will offer the fewest regulatory burdens while permitting the maximum operational flexibility..."[47]

9.4. Sub-Saharan Africa and FDI

Any discussion of the state of FDI in SSA must take into account the following facts: There are currently some 65,000 firms that control assets, with around 85,000 affiliates outside their home countries, while global FDI trends reached $7 trillion in 2001.[48] As of 2001, the number of people employed by these affiliates worldwide stood at 54 million.[49] Also, according to the World Development Movement, the world's largest 500 TNCs dominate 70 percent of world trade,[50] and it is further estimated that the total stock of FDI within the global economy (in 1996) was worth $3.2 trillion, while annual average flows accelerated from $55

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branch or a subsidiary. He asserts: "Two considerations have to be taken into account: first, whether the local legislation...is more favourable to one of these alternatives..." (See C M Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade,* 9th ed. (London: Stevens & Sons, 1990), at p.318)).

[45] See P T Muchlinski, *Multinational Enterprises and the Law*, n.43 above, at pp.57-58

[46] ibid, at pp.58-61. Michael Porter's "strategic theory" also supports this conclusion. (See generally, M E Porter, *The Competitive Advantage of Nations* (New York: Free Press, 1990)).

[47] See P T Muchlinski, ibid, at pp.61-62.

[48] See UNCTAD, *World Investment Report 2002*, n.43 above, at p.14

[49] ibid, at p.15

[50] See the World Development Movement's webpage, at http://www.wdm.org.uk/campaign/peprof.htm

billion in for the period 1981-1986, to $243 billion between 1991-1996.[51] These, however, represent the global picture, and as mentioned earlier, SSA operates, at best, on the periphery of these trends. It now becomes necessary to examine its marginalization in context.

As of 1996, SSA attracted less than 1 percent of global FDI, two-thirds of which went to Nigeria and Angola for oil exploration.[52] Indeed, according to the UN Secretary-General, Africa attracted only 5 percent of FDI flows to *developing countries* in 1999.[53] Of the most usually cited reasons for this dismal performance, poor governance, armed conflict, political instability, poor infrastructure, often rank above the rest.[54] Recent studies have however tended to paint a more optimistic picture. For example, if the claims made in two recent reports by the US President to Congress pursuant to the African Growth and Opportunities Act (AGOA) can be taken at face value, its adoption in May 2000 is already beginning to yield results: it is generating new trade and investment interests in a number of beneficiary countries.[55] The reported interests can be summed up as follows:

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[51] V N Balasubramanyan, "Foreign Direct Investment and Developing Countries," in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (UK: Macmillan Press and Oxfam 1999), at p.29 et seq.

[52] Per J Sachs and S Sievers, "Foreign Direct Investment in Africa," in World Economic Forum, *The Africa Competitiveness Report 1998* (Geneva: World Economic Forum, 1998), at p.37. See also S M Nsouli and F Le Gall, "The New International Financial Architecture and Africa," (December 2001) *Finance & Development*, vol.38, no.4 (Washington DC: IMF), at http://www.imf.org/external/pubs/ft/fandd/2001/12/nsouli2.htm, who assert thus: "[s]ub-Saharan Africa accounts for a very small share of the large amounts of foreign direct investment in the world economy..."

[53] See United Nations Economic and Social Council, "The Role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development," Report of the Secretary-General (E/2001/83 of 12 June 2001), at p.11

[54] Others include uncertain property rights, and the implications of poor healthcare on labour productivity. (See J Sachs and S Sievers, "Foreign Direct Investment in Africa," ibid, at p.37. See also, J O Ebuetse, "Measures to Attract and Encourage Transfer of Technology by Nigeria," paper presented at the UNCTAD Expert Group Meeting on Home Country Measures, Geneva, 8-10 November 2000. See also, P Collier and J W Gunning, "Explaining African Economic Performance," (1999) *Journal of Economic Literature*, vol.37, no.1, at pp. 64-111; T Killick, "Explaining Africa's Post-independence Development Experiences," paper presented at the Second Biennial Conference on African Economic Issues, Abidjan, Ivory Coast, 13-15 October 1992; and World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth (Washington DC: World Bank, 1989).

[55] See United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The First of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2001). See also, United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The Second of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2002).

Cape Verde: acquisition of a fish-processing plant by a US firm, and further interests announced by two Portuguese companies in the garments industry;

Ghana: an investment by a US firm in a local tuna-processing plant

Kenya: announcement by the local government of new investments in the garments industry worth $13 million, and the creation of over 20,000 new jobs;

Malawi: investment by European and Taiwanese firms in existing garments factories, creating over 4000 jobs, with the potential of increasing to 10,000 – half the country's total work force;

Mauritius: investment worth $78 million, with further interests by Asian and European companies in its cotton-yarn and spinning mills;

Senegal: proposed partnership between a local textile company and a Malaysian firm with potential of creating 1000 new jobs;

South Africa: the establishment of a $100 million clothing firm by a Malaysian company, expected to create 1, 3000 people, as well as new orders from US clothes retailers;

Namibia: expected new investment worth $250 million, expected to create 8,000 jobs in the next five years, and 18,000 in the next ten years;

Tanzania: possible expansion in the textile industry in partnership with a US firm with potential of creating 1,000 new jobs.[56]

Although the above might seem encouraging, it is hard to ignore the fact that almost every single one of the reported inflows goes into existing industries, as opposed to creating new areas of economic activity without which the region's notorious dependence on single items of export is bound to continue. It is equally worth noting that much of these activities, in any event, takes place in the textiles industry. The significance of this is that as pointed out by UNCTAD, the inflows may be no more than a shrewd attempt by the investors to exploit the temporary privileges currently enjoyed by the SSA countries concerned, i.e., the essentially

[56] See ibid, at pp.114-115, and pp.30-31 respectively.

bilateral privileges extended to them by the industrialized countries in this sector.[57] The foregoing trend also conceals the fact that as highlighted by the OECD, Africa's share of FDI has not only been negligible, but has actually been in decline, even though "the share of developing countries has steadily increased over the past decades, despite the backlash in the aftermath of the Asian financial crisis in 1997."[58]

A recent UNCTAD report also puts FDI flows to the region in context. Although total flows to the continent as a whole rose from $9 billion in 2000 to over $17 billion in 2001, this conceals the fact that for most countries in the region, they remain at 2000 levels.[59] The $8 billion increase, the report notes, "is largely due to a few large FDI projects – notably in South Africa and Morocco..."[60] Specifically, it relates to two transactions: the "unbundling of cross-share holdings involving London-listed Anglo American and De Beers of South Africa" (which are recorded as FDI inflows because Anglo American purchased its stake in De Beers with its overseas-held shares); and the sale of a 35 percent stake in the Moroccan company Maroc-Telecom to the French telecommunications corporation Vivendi Universal. These pushed the FDI flows for the whole continent from 1 percent in 2000 to 2 percent in 2001.[61] The study also reveals that although flows surpassed the $10 billion mark to reach $11.8 billion in 2001, this was only due to the above transactions in South Africa, which is almost equal in value to the overall FDI into the region.[62] A separate study further reveals that much of Japanese investment in the region has been driven by tax considerations, and are, at

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[57] See UNCTAD, *World Investment Report 2002*, n.49 above, at pp.55 and 199. Until recently, trade in textiles was regulated by a series of ad hoc arrangements under the GATT, the penultimate one being the Uruguay Round Agreement on Textiles and Clothing which entered into force on 1 January 1995, and Under which these restrictions were to be phased out over a ten-year transition period. It was essentially a derogation from the general principles of the GATT, which allowed the industrialized counties to impose quantitative restrictions on textile imports to protect their domestic markets. The latest regulatory mechanism is the Agreement on Textiles and Clothing which sets out a liberalization process in four broad categories: tops and yarns, fabrics, made-up textiles, and clothing; over a ten-year period ending on 1 January 2005. The relevant point is that other textiles-exporting developing countries do not enjoy the same "privileges" as the LDCs in this respect. (See also, J H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., (Cambridge, Mass: MIT Press, 2000), atpp.206-209)).

[58] See OECD Technical Papers No.173, n.31 above, at p.9, 11, and 15. Africa's share of FDI flows to developing countries, it is noted, actually decreased from 25 percent at the beginning of the 1970s to just 5 percent in 1999, thus accounting for just 0.7 percent of global flows in the same year. See also, UNCTAD, *Foreign Direct Investment in Africa*, n.23 above, at p.3

[59] See UNCTAD, *World Investment Report 2002*, n.57 above, at p.50

[60] ibid, at p.48

[61] ibid, at pp.48-49

[62] ibid, at p.50

any rate, concentrated in "flags-of-convenience" investments in Liberia's shipping sector.[63] Moreover, every significant flow into the region in recent years has been in the oil or mining industry. Thus, for example, following behind South Africa have been Angola and Nigeria, which have only managed to attract FDI into their respective oil industries. Indeed, the modest flows into Tanzania and Mozambique have been attributed to their proximity to South Africa. What this means is that only Uganda has managed to attract a steady flow of FDI in recent years among the countries of the region.[64]

9.5. TNCs and Human Rights Violations

As suggested at the outset, Africa's inability to attract FDI is not a valid reason for excluding it from the important debate concerning the pervasiveness of TNCs within the global economy and the threats they pose to internationally recognized human rights norms. Indeed, as noted in chapter 10 (and hereunder), some of the most flagrant human rights violations by TNCs have occurred within the region. It is therefore possible to discuss the violation of human rights by TNCs at two levels of responsibility: direct and indirect.

9.5.1. Examples of Direct Responsibility

Direct violations can be further divided into two (though not necessarily distinct) subcategories, the first relating to corporate involvement in the delivery of basic necessities. This is evidenced by the dominance of such corporate enterprises as McDonalds, Nestle, Cadbury's, and Unilever in the food sector, just as the US corporation Enron was a global giant in the energy sector before its infamous collapse. Healthcare, on its part, has almost always been the exclusive domain of such groups as Pfizer, Glaxo-Wellcome and Smithkline-Beecham; while GAP, Levi Strauss, Addidas, and Nike do not only dominate the clothing industry but are in fact a major influence on youth culture. It is therefore beyond debate that corporate activities have

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[63] See UNCTAD, *FDI In Least Developed Countries at a Glance* (New York and Geneva: United Nations, 2001) at p.10

[64] ibid, at p.50. See also, UNCTAD, *Foreign Direct Investment in Africa*, n.58 above, at p.23, which adds Ghana to the list.

a direct impact on the daily lives of individuals. Indeed, as noted by Michael Addo, this makes the corporate enterprise "a mainstream policy institution and less of an isolated private commercial undertaking."[65]

It is important to acknowledge that these trends can, and do bring benefits to many within society. The production of cheap food or medicines, for example, can only reinforce the rights to food and health,[66] while the availability of fashionable clothing undoubtedly gives young people a sense of belonging and well-being, and thus, of human dignity,[67] without which the very idea of human rights would be meaningless. But they also raise serious concerns: The realization of the rights to food and health, for examples, depends both on their affordability and their quality. And although most families in affluent countries would not have as much difficulties with affordability as those in poor countries, even they are not entirely immune from the dangers posed by the marketing of dangerous food products and misleading advertisement, which pose a direct threat to the right to health.[68] Indeed, a recent BBC documentary series titled "Food Junkies" offers an insight into the extent to which the food industry poses a threat to the right to health both in the United States and the United Kingdom.[69] One might even mention the fact that as of the year 2003, the real health impacts of genetically modified food are yet to be scientifically ascertained. Thus, it is possible to argue that if the extensive regulatory measures available in the West are not sufficient to protect their citizens from such human rights-related dangers, the threat posed to the deregulated economies of the developing world can only be imagined.

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[65] See M K Addo, "Human Rights and Transnational Corporations – An Introduction," in M K Addo (ed.), *Human Rights Standards*, n.29 above, at p.7. For an insightful historical parallel of this trend, see P T Muchlinski, *Multinational Enterprises and the Law*, n.47 above, at p.20 et seq.

[66] See, respectively, Arts. 11 and 12 of the ICESCR

[67] See the Preambles to the ICCPR and the ICESCR

[68] Nothing illustrates this better than the promotion, by Nestle, of unsuitable baby-milk substitutes in Africa. See P T Muchlinski, *Multinational Enterprises and the Law*, n.65 above, at p.7 (footnote 19).

[69] Details available on the BBC website: www.bbc.co.uk/foodjunkies Some of the revelations include how the World Health Organization's effort to offer impartial advice on safe sugar consumption levels has been undermined by (among others) Alex Malispina, current head of the International Life Sciences Institute – a supposed NGO funded by Coca Cola – who himself was once a Senior Vice President of the Company. Other revelations include the tactics employed by corporate interests to discredit unfavourable research findings and those behind them. See also, *Smithkline Beecham Plc v Advertising Standards Authority*, No. CO/2291/2000 [2001] WL 14905, where the appellant company was found, by the UK's Advertising Standards Agency to have misled the public by suggesting that its product, "Ribena Tooth Kind" was beneficial to dental health was misleading. Its appeal by way of judicial review was dismissed by the High Court.

In addition to the foregoing examples, corporate conduct has also involved violations of a more heinous (and in most cases, of the criminal) kind. A mere snapshot of the available examples include: the "business" of colonial subjugation through the agency of corporate enterprises such as the Royal Niger Company,[70] corporate complicity in the atrocities committed by the Nazis (as highlighted in the *Zyklon B* case),[71] their sustenance of the apartheid regime in South Africa,[72] the overthrow of democratically elected governments,[73] the introduction of manifestly unsafe working practices in India,[74] the deliberate exposure of black workers to highly toxic materials in apartheid South Africa,[75] the complicity of Shell in the execution of environmental activists in South Eastern Nigeria,[76] the involvement of the American oil company Unocal in

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[70] See A C Burns, *History of Nigeria*, n.37 above.

[71] See *Zyklon B (British Military Tribunal)*, reported in *42 Am J Int'l L. 299 (1948)*, at pp.317-318. Other examples of corporate involvement in the plunder of Jewish assets during the holocaust have recently been highlighted in American courts, mainly involving German, Austrian, French, and Swiss financial institutions, although they were settled before the issues came to trial. See, for example, *Bodner v Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). See also *In re Holocaust Victims Assets Litigation.*, 105 F. Supp. 2d 164 (S.D.N.Y. 2000).

[72] Corporate support for the apartheid regime in South Africa has now become a subject of litigation in the US courts. According to the campaign group Corporate Watch, some of the named companies include: IBM, General Motors, ExxonMobil, J P Morgan Chase, Citigroup, Caltex Petroleum Corporation, Ford Motor Company, and the Fluor Corporation – just a fraction of the 20 banks and corporations that "supplied critical support" to the regime. (See A Raphael, "USA: Apartheid Victims Sue Global Corporations" OneWorld US, 13 November 2002, at http://www.corpwatch.org/news/PND.jsp?articleid=4856. See also R Caroll, "S Africa shuns apartheid lawsuits" at http://www.guardian.co.uk/international/story/0,3604,848359,00.html).

[73] The role of the American corporation ITT in the overthrow of the democratically elected government of Allende in Chile is perhaps the most widely cited example of corporate interference in democratic governance. (See for example, P T Muchlinsli, *Multinational Enterprises and the Law*, n.68 above, at pp.6-7, who also notes that the Congressional investigations that followed resulted in the enactment of the Foreign Corrupt Business Practices Act 1977. See also, C Michalet , "France" in J H Dunning (ed.), *Governments, Globalization, and International Business* (UK: Oxford University Press, 1999), at p.318. For a detailed account of the company's role in Chile, see W H Meyer, Human Rights and International Political Economy in Third World Nations, n.3 above, at pp.117-188. For an account of corporate involvement in armed conflicts, see J C Zarate, "The Emergence of a New. Dog of War: Private International Security Companies, International Law, and the New World Disorder," (1998) *34 Stan. J.* Int'l L. 75.

[74] See J W Salacuse, "Toward a New Treaty Framework for Direct Foreign Investment," (1985) *50 J. Air. L. & Com 969*, at p.977, highlighting the example of the Union Carbide chemical plant disaster in Bhopal. India, on 3 December 1984 which killed 8000 people in its immediate aftermath, and has injured over half a million victims (See the Corporate Watch web page www.corpwatch.org/trac/bhopal/lawsuit.html

[75] See *Ngcobo & others v Thor Chemicals Holdings Ltd.* [1995] T.L.R. 579

[76] See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). Also available at http://www.asil.org/ilib/ilib0327.htm#02. For an account of further alleged gross violations in the area by Shell, see Human Rights Watch, "The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities," at http://www.hrw.org/reports/1999/nigeria/index.htm. See also J G Frynas, Political Instability and Business: Focus on Shell in Nigeria," (1998) *Third World Quarterly*, vol.19, no.3, at pp.457-478. Among the violations alleged is the company's collusion with the local security forces, leading to the killing of 80 local people. It also highlights "an interconnectedness of Shell with state structures" in the country. For an official rebuttal by Shell, see A Detheridge and N Pepple, "A Response to Frynas," ibid, at pp.479-486. See further, J Hoppin, "Chevron Hit With Human Rights Claim," (24 April 2000) *National Law Journal*, at B1; J P Eaton, "The

the use of forced/child labour in Burma, and the training of death squads in Colombia by British Petroleum.[77] The incidental aspects of these violations are no less serious. For example, the sheer brutality that accompanied the process of colonization aside, it also was a violation of the right to self-determination,[78] as well as the right to democratic participation.[79] By the same token, the Soweto Massacre of 1976 might have been a watershed in the history of apartheid in South Africa, but it was also accompanied by systematic denials of basic rights to the black population in such areas as housing and education; just as the execution of the environmentalists in South Eastern Nigeria was a culmination of decades of environmental degradation (with obvious impacts on the rights to food and health).

9.5.2. Examples of Indirect Responsibility

Corporate enterprises can also violate human rights through their relationship with governments. In the first place, and as noted earlier, the symbiotic relationship between corporate interests, particularly in the American, and to a lesser extent, British political process, means that they effectively dictate government policies in their respective areas of business activity.[80] By so doing, they arguably violate Articles 2 of the two Covenants, under which governments explicitly undertake to guarantee the rights proclaimed therein.

Nigerian Tragedy: Environmental Regulation of Transnational Corporations and the Human Rights to a Healthy Environment" (1997) *15 B.U. Int'l L.J. 261*; "The Shell Game in Nigeria" *New York Times*, 3 December 1995, at A14; G Brooks, "Shell's Nigerian Fields Produce Few Benefits for Region's Villagers," *Wall Street Journal*, 6 May 1995; B Naanen, "Oil Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People," (1995) *Journal of Commonwealth and Comparative Politics*, vol.33, at pp.45-78; and E Osaghae, "The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State" (1991) *African Affairs*, vol.94, at pp.325-344.

[77] See "BP Hands 'Tarred' in Pipeline Dirty War," *The Guardian*, 17 October 1998, at p. 20, reporting allegations of violations by security forces hired by BP to protect its oil installations in Colombia. Also, "BP Accused of Funding Colombian Death Squads" *The Observer*, 20 October 1996, at pp.1 and 18. For an account of similar conduct by Shell in Ogoniland, see D Cassel, "International Security in the Post Cold-War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A New Human Rights Revolution?" (1996) *19 Fordham Int'l Law Journal 1963*,at pp.1965-1966.

[78] Per Art.2 of both the ICCPR and the ICESCR

[79] Per Art.25 of the ICCPR

[80] While no clear connection has yet been established between such donations and government policy, a series of scandals involving the Blair government is, at the very least, strongly indicative of that possibility. See M Tempest, "New Claims Over Ecclestone Links," *Society Guardian*, 15 April 2002, at http://society.guardian.co.uk/publichealth/story/0,11098,684798,00.html. See also, S Boseley et al, "Labour Donor's Firm Gets £32m Vaccine Contract" *The Guardian*, 13 April 2002, at

A less obvious kind of violation emanates from the ideology they promote through their influence, particularly within the Bretton Woods institutions, much of which was discussed in chapters 4 and 6 in the contexts of structural adjustment and trade. It thus suffices, in this context, to merely allude to the evident dilemma that this ideology poses for governments in their quest to balance the human rights of their citizens against the requirements of market fundamentalism, especially given that even the most powerful governments are increasingly ceding their democratic mandates to these interests in practically all areas of policy.[81]

9.6. Conclusion

This chapter began by highlighting Africa's inability to attract FDI. In the course of the critique, it became necessary to examine the dominant theories in the FDI/human rights debate, with the aim of determining whether FDI, on its own, can enhance the realization of human rights in the region. The conclusion was that aside from the direct involvement of some TNCs in flagrant violations of CPRs, the policy reforms that are often a prerequisite for attracting FDI do often outweigh the expected benefits, as noted in chapter 4. Thus, the "engines of development" thesis must, at the very least, be treated with caution. This, however, must not be taken to mean that FDI is invariably detrimental to the realization of ESCRs. Indeed, as also pointed out, the countries of South East Asia have successfully harnessed its benefits to the good of their people. What

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http://politics.guardian.co.uk/labour/story/0,9061,683701,00.html; and A Rawnsley, "The Corruption of Tony Blair," *The Observer*, London, 17 February 2002, available at http://www.observer.co.uk/comment/story/0,6903,651583,00.html. For examples of similar scandals in the United States, see D Waller, "Campaign Finance: Looking for the Loopholes" *Time*, 25 February 2002; and K Tumulty, "Bush in the Glare," *TIME*, 21 January 2002, at www.time.com

[81] See G Monbiot, *Captive State*, n.31 above. Evidently drawing upon the Thatcherite agenda of the 1980s, the Blair government has come to embrace the idea of corporate involvement even in such previously "sacred" areas of policy as the health service and education, although under the ingenious guise of the so-called Private Finance Initiative (PFI). For an interesting comment on how the proposed future funding of the National Health Service has affected the relationship between Blair and his Chancellor of the Exchequer, see W Hutton, "War Looms Between Blair and Brown" *The Observer*, 6 October 2002, at http://www.observer.co.uk/comment/story/0,6903,805470,00.html. See also, W Hutton, "By the Left, Quick March," *The Observer*, 21 July 2002, at http://www.observer.co.uk/comment/story/0,6903,759143,00.html, who highlight's the dissatisfaction felt by trade union leaders about the increasing involvement of big business in the management of public services. This, however, does not mean that Western governments are opening their economies to foreign competition. Indeed, as noted in chapter 6, protectionism remains as entrenched as ever in practically all the OECD countries. On the contrary, the ceding of governmental powers in these countries to corporate interests merely illustrates the unassailability corporate influence within their respective governments.

this means for Africa is that its rulers must take the issue of economic emancipation beyond the escapist antics and grandiose rhetoric (described in chapter 13) that have come to define their approach to economic development. Like the phenomenon of globalization itself, the existence of the TNC must not become yet another excuse for the perpetration of *kleptocratic* tyranny in Africa.

Chapter 10

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: THE CASE FOR A MANDATORY INTERNATIONAL REGULATORY REGIME

10.1. Introduction

In the much-cited *Barcelona Traction* case, the International Court of Justice noted the absence of a single body of laws laying down universally recognized standards for the treatment of foreign investment. This, it was explained was due to "an intense conflict of systems and interests" between States, which, it was further noted, prevented the emergence of such a system.[1] It is hard to ignore the irony that only three decades later, it is the conduct and policies of corporate entities that are prompting calls for their regulation at the international level. To the casual observer, the irony may not be immediately apparent; to the human rights advocate, it is almost too obvious to state: events have turned full circle – the "vulnerable" has itself become a threat to every imaginable aspect of the IBHR.

The global dominance of TNCs (and thus the threat they pose to human rights) is, however, not accidental. As noted in chapter 8, much of it was in fact predicted by the late Stephen Hymer. Moreover, as pointed out in chapter 5, corporate interests are in fact integral to the notion of strategic trade – a

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1 See *Case Concerning the Barcelona Traction, Light and Power Company Ltd* (Second Phase) Judgment of 5 February 1970, at paras.89-90. For a detailed examination of the various international efforts aimed at protecting corporate interests at the international level, see P T Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) *International Lawyer*, vol.34, at pp.1033-1053; S Picciotto, "Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement of Investment" (1998) *19 U. Pa. J. Int'l Econ. L.731*. The rights of TNCs are also protected under such other GATT rules as the TRIMs (particularly as regards the prohibition of certain performance requirements, i.e., measures that are considered to have distorting effects on trade (see UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (New York and Geneva: United Nations, 1996), at p.151). Others include: the GATS (which contains rules relating to the establishment by a service provider, of a "commercial presence" in another country); the TRIPs (which protects intellectual property rights); and the Agreement on Subsidies and Countervailing Measures (which regulates the granting of incentives to domestic industries, especially as it relates to export-oriented FDI). Moreover, the Doha WTO Ministerial Conference on Investment in 2001 specifically devoted some time for issues investment-related issues although with due recognition for the needs of developing and least-developed countries. (See WTO, "Ministerial Declaration," Ministerial Conference. Fourth Session. WT/MIN(01)/DEC/W/1, Doha, 9-14 November 2001, at paras.20-22, available at http://www.wto.org/english/thewto/_e/minist_e/min01_e/min01_chair_speaking_e.htm

development which has come to replace the concept of comparative advantage and thus, of free trade itself. It therefore becomes easy to appreciate why TNCs have become the focus of attention for the anti-globalization protesters.

This global dominance, however, raises problems beyond the paradigm of international economic relations. Specifically, these manifest themselves within the context of international (human rights) law. The marketing of dangerous products has direct impacts on the right to health, while corporate collaboration with despotic regimes has resulted in the violation of the right to life. This chapter aims to present a case for their mandatory regulation at the international level, arguing that this represents the only way of ensuring their compliance with internationally recognized human rights norms. Before doing so, however, it is important to acknowledge that various control mechanisms already exist, both at the municipal, as well as at the international level. The idea is to begin with an examination of some of these regimes, with the aim of identifying their inherent flaws. This will be followed by an examination of the pros and cons of establishing a mandatory international regime, from a human rights perspective. It is however recognized that for such a regime to become a reality, the thorny problem regarding the status of corporate entities in international law will have to be addressed; this will also be given some attention.

10.2. Control at the Municipal Level

10.2.1. The Benefits of Pre-emptive Action

Any attempt to examine the available mechanisms for controlling corporate conduct within the national jurisdiction should perhaps begin with an acknowledgement of the possibility of adopting what might be called a proactive approach within the host country, and of the fact that if effectively employed, the chances of flagrant violations could be significantly reduced. Some of these measures, although often spelled out in contractual form, are essentially economic. Thus, for example, the contract might require the TNC to adopt certain "investment measures" or "performance requirements" which are deemed

beneficial to the domestic economy.[2] Governments also have the theoretical liberty of adopting whatever legislative measures are considered appropriate to regulate corporate conduct within their jurisdictions; this, after all, is the very essence of the notion of national sovereignty.[3] It follows that governments should be able to incorporate specific clauses aimed at protecting basic rights, such as those relating to employment and the environment. Thus, provided both parties to the contract are willing to honour their own side of the agreement, such practices as child labour, poor working conditions, or environmental degradation would be kept to a minimum.

These, of course, are based on the supposition that every government is in a position to impose such measures. As noted in chapter 8, this is clearly not the case, given that even the most powerful economies are effectively beholden to the pervasive influence of the modern TNC. It follows that for developing countries, such basic rights can be no more than merely theoretical.[4] To begin with, there are good reasons for suspecting that a government may not be in such a strong bargaining position: the TNC, might, for example, choose to join the "race to the bottom" and take its investment elsewhere. The government might even be concerned about being labelled "anti-business" – a modern-day stigma which very few (if any) governments are willing to bear.[5] Thus, the idea of a proactive approach to the

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[2] See E M Kwaw, "Trade Related Investment Measures in the Uruguay Round: Towards a GATT for Investment," (1991) *16 N.C.J. Int'l L.& Com. Reg.*, at p.319; investment measures are often imposed in the form of "entry restrictions." These simply relate to such measures as the host may deem necessary in order to meet its strategic economic objectives. For examples, it may require that the TNC should locate its business only in a particular region of the country, engage only in a particular high-priority sector of the economy, or that it enters into some form of partnership with local firms. Once entry restrictions are agreed, the host may further subject the investor to certain "performance requirements," which are also known as "operational restrictions." These are often in the form of local content requirements, i.e., a stipulation that a specified percentage of production input be locally sourced; or the host country may also impose restrictions relating to its balance of trade needs, requiring the TNC to match the value of its imports with a corresponding amount of exports. Other kinds of performance requirements include restrictions on foreign exchange remittances, local equity participation, technology transfer, and local employment requirements. It is also worth noting that the host country can resort to measures such as expropriation or nationalization, although these are widely considered to be hostile measures, and are only invoked only when relations have broken down. For a detailed list of further possible domestic regulatory mechanisms, see P T Muchlinski, *Multinational Enterprises and the Law* (Oxford, UK: Blackwell, 1999), at p.172 et seq.

[3] See R McCulloch, "Investment Policies in the GATT," (1990) *13 World Econ.* at p.541

[4] See S Skogly, "Economic and Social Human Rights: Private Actors and International Obligations" in M K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, The Netherlands: Kluwer Law International, 1999), at p.247.

[5] This point is also shared by Sarah Joseph, who points out that "[t]he economic power of MNEs may...be abused to dissuade corruptible and/or vulnerable governments from establishing regulatory regimes..." See S Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights," (1999) *46 Neth. Int'l L. Rev.*, at p.177.

regulation of corporate conduct is likely to remain a matter of theory (at least from the perspective of developing countries) for some time to come.

10.2.2. The Role of Municipal Courts

Although not necessarily influenced by human rights considerations in the narrow sense, the American and British jurisdictions have so far offered the best hope of redress to victims of violations from developing countries. Together, they have generated an immense volume of case law in this regard. It now becomes necessary to examine some of these, the aim being to assess their adequacy from the perspective of the victims of violations.

10.2.2.1. The United States of America

In examining the developments within the American jurisdiction, it is necessary to begin with an important Constitutional provision, which empowers Congress to "define and punish [*inter alia*] offenses against the law of nations."[6] The Alien Tort Claims Act (ATCA) – a product of this provision – confers upon US District Courts original jurisdiction in "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7] The courts, in recent times, have shown a willingness to interpret this in a way that accommodates human rights violations. Thus, in *Filartiga v*

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[6] See Art.1, s.8, clause 10 of the US Constitution available at the Cornell University website: http://www.law.cornell.edu/constitution/constitution.overview.html

[7] See Act of Sept. 24, 1789, ch. 20, s. 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. s.1350). The Act was adopted by the first Congress of the United States in 1789. It is impossible to establish the prime motivation behind its enactment, and opinions differ. Some of the reasons offered, however include: national security considerations, particularly the fear that a denial of justice to foreigners might provoke an international incident. Other given reasons include: the desire to attract foreign investors by guaranteeing their access to the federal courts; the desire to extend the domestic right of access to foreign diplomats; and the desire to give effect to the norms of international law. (See J Rabkin, "Universal Justice: The Role of Federal Courts in International in International Civil Litigation" (1995) *95 Colum. L. Rev.2120*, at pp.2125-2126. It has also been described as "this archaic, sparse statute that was originally designed to provide U.S. courts as a forum for foreign victims of pirates and slavers..." (See S H Hall, "Multinational Corporations' Post-UNOCAL Liabilities for Violations of International Law," (2002) *34 Geo. Wash. Int'l L Rev. 401*, at p.402.

Pena-Irala,[8] where the plaintiff's son had been tortured to death by a police officer under the Stroessner dictatorship in Paraguay, the Federal Court of Appeals for the Second Circuit, in regard to the substantive suit before it, remarked that "international law does not require any particular reaction to violations of law," and that "[w]hether and how the United States wishes to react to such violations are domestic questions."[9] The court then went on to acknowledge that acts of torture committed by the State amounted to a violation of international law.[10]

In *Kadic v Karadzic,*[11] the plaintiffs brought action against the former leader of the self-declared Bosnian Serb Republic, Radovan Karadzic, for various violations including rape, genocide, forced prostitution, torture, cruel and degrading treatment. The district court had dismissed the case on grounds of lack of jurisdiction, holding that the Bosnian Serbs were a non-State entity and thus, not subjects of international law. This was overruled on appeal, the court rejecting the view that non-State actors could not be subjects of international law. The Appeals Court went on to assert: "Certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[12] The court also stated: "The allegations that [Karadzic] personally planned and ordered [the above crimes] clearly state a violation of the international law norm proscribing genocide, regardless of whether [he] acted under color of law or as a private individual..."[13] In addressing the issue of genocide, the court was influenced by a Resolution of the UN General Assembly which states that genocide is a crime under international law whether the perpetrators are "private individuals, public officials or statesmen;"[14] and by Article IV of the Convention on the Prevention and Punishment of the

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[8] 630 F. 2d 876 (2d Cir. 1980)

[9] ibid, at p.777-778.

[10] See ibid, at p.878. The issue of damages was referred to a different court for determination. After a prolonged hearing the sum of $10, 385,364 was eventually awarded against the defendant in 1980. (See *Filartiga v Pena-Irala*, 577 F. Supp. (E.D.N.Y. 1984), at p.860)). The US Congress has effectively codified this decision by enacting the Torture Victim Protection Act of 1991 (TVPA). (See Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (1994); and S. Rep. No. 102-249 (1991), at pp.4-5

[11] See also *Doe v Karadzic*, 70 F.3d 232 (2nd. Cir, 1995).

[12] ibid, at p.239

[13] ibid, at p.242

[14] See ibid, at p.241, citing UN G.A. Res. 96(I), GOAR U.N. Doc. A/64/Add.1 (1946), at p.188-189. The Court of Appeals also had regard to Art.6 of the International Military Tribunal (Nuremberg) Charter, under which similar crimes are punishable whether the accused acted as "individuals or members of organizations." (See also, UN G.A. Res. 95(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1 (1946), at p.188).

Crime of Genocide, under which those convicted "shall be punished, whether they are...public officials or private individuals." [15]

10.2.2.1(a). Their Significance to the Liability of Corporate Entities

The above two decisions have served to revive the centuries-old ATCA, and a considerable volume of litigation has taken place ever since.[16] These, however, were decided in the context of human rights violations by natural (as opposed to juristic) persons. Thus, on their own, these cases have not extended the law beyond the underlying principle of the ATCA, i.e., that non-US citizens can be held liable (under tortious principles) for their conduct overseas, if these violate international human rights norms. Nevertheless, they provide a solid basis for the extension of liability for human rights violations to corporate entities, especially when read in the light of subsequent decisions.

10.2.2.1(b). Recent Judicial Developments in US Jurisdiction

The conduct of two TNCs – the Union Oil Company of California (UNOCAL) and the French oil company Total S.A., both operating in Burma – are strongly indicative of the willingness of the US courts to extend the scope of the ATCA and its judicial spin-offs to corporate entities. The two companies had entered into a joint venture with the State-owned Myanmar Oil & Gas Enterprise (MOGE), for the purpose of constructing the Yadana gas pipeline which was to be routed through neighbouring Thailand. In the first of two civil actions,[17] a group of local farmers alleged that the two companies (and some of their officers), acting in concert with the Burmese military regime and MOGE

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[15] See Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948, entered into force on 12 January 1951, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm

[16] These include the half a dozen civil suits brought against the estate of the late dictator of the Philippines Ferdinand Marcos, alleging various violations including torture, murder, and disappearances against either the dictator or his associates. See, for example, *In re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v Marcos*, 978 F. 2d 493 (9th Cir. 1992) in which the plaintiff had been kidnapped, tortured and killed my military personnel acting under the direction of the dictator's daughter; *Hilao et al v Estate of Ferdinand Marcos*, 25 F. 3d 1467; 1994 U.S. App. LEXIS 14796; and *Hilao v Marcos*, 103 F 3d 767 (1996). Others include *Paul v Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (against former Haitian dictator Prosper Avril); and *Xuncax et al v Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (for a series of gross violations by former Guatemalan Defence Minister).

[17] See *Doe v UNOCAL Corp*, 963 F. Supp.880 (C.D. Cal 1997)

had committed a series of violations against them, including forced labour, forced relocation of entire communities, torture, violence against women, arbitrary arrests and detention, cruel, inhuman and degrading treatment. The District Court of California dismissed the claim against the military regime and MOGE on grounds of sovereign immunity, but allowed the action against UNOCAL and Total to proceed.[18]

In the first *UNOCAL* case, the court expressed the view that if sufficiently proven, the company's conduct would have been indistinguishable from partaking in the slave trade – a crime recognized as a grave violation of human rights in international law – whether committed by a State or by a private actor. Indeed, the view was also expressed, that if this was in fact the case, the company would, in effect, be regarded as the main perpetrator in this sordid enterprise, with the Burmese regime playing the part of an "overseer," given that although there was no allegation that the regime was actually selling its citizens to the defendants, the latter would have been "accepting the benefit of and approving the use of forced labor."[19] It was also acknowledged that in certain circumstances, the conduct of a private entity could become so entangled with that of a State that it could correctly be read as *de facto* State conduct.[20] The cases against UNOCAL were however, subsequently dismissed on the ground that it had not actually participated or cooperated in the alleged violations. Nevertheless, the instructive point is that the court accepted the possibility of corporate liability for human rights violations committed abroad.[21]

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[18] See *Doe v UNOCAL Corp*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998). The claim against Total was dismissed for reasons relating to lack of personal jurisdiction. The second action was brought by three parties: the National Coalition Government of the Union of Burma (NCGUB), the Federation of Trade Unions of Burma (FTUB), and an individual (See *National Coalition Government of the Union of Burma v UNOCAL Inc.*, 1997 U.S. Dist. Lexis 2097). The claim by NGCUB was dismissed on grounds of *locus standi*, while FTUB was held to be entitled only to sue for damage caused to its interests as an organization. The individual plaintiff was allowed to proceed in his claim for torture and forced labour.

[19] See *Doe v UNOCAL* (I), 963 F. Supp.880 (C.D. Cal 1997), n.17 above, at p.891. The court was also influenced by the Nuremberg decisions (cited infra).

[20] ibid

[21] See also, *Doe v UNOCAL Corp/ Roe v UNOCAL Corp.*, Case Nos. CV 96-6959, CV-6112 (C.D. CA 2000)

The same principle was accepted in *Aguinda v Texaco*[22] (in the context of environmental degradation) where the plaintiffs alleged that Texaco had improperly dumped large quantities of toxic waste into local rivers, and that the Trans-Ecuadorian pipeline, which the same company had constructed, had leaked substantial quantities of oil, causing widespread environmental damage. Referring to the Rio Declaration and to US environmental laws, the Southern District Court of New York held that the ATCA could be invoked "if there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law."[23]

The case of *Wiwa v. Royal Dutch Petroleum Co*[24] arose from the flagrant and much-publicized human rights violations in Nigeria's Niger Delta, which culminated in the execution by the Abacha regime, of the environmentalist Ken Saro Wiwa and another activist in 1995. The plaintiffs alleged that Royal Dutch Shell recruited the Nigerian military to suppress opposition to the company's operations in the region, and that the resulting arrests, imprisonment, and torture of Saro Wiwa were just a precursor to their eventual execution. The company was also alleged to have instigated, planned, and facilitated every aspect of these violations; providing money, weapons, and logistical support to the military and assisting in the fabrication of murder charges against the deceased.[25] Following a dismissal of the suit on forum grounds by the District Court (on the condition that the defendant accepted England as an alternate jurisdiction) the Court of Appeals reversed the decision on the grounds that the District Court had failed to accord "proper significance" to:

- the US-resident plaintiffs' choice of forum, which it regarded as requiring "substantial deference;" or
- the "policy interest implicit" in federal statutory law providing a forum for claims involving "law of nations" violations.[26]

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[22] (1994) U.S. Dist. Lexis 5728 (S.D.N.Y.)

[23] ibid, at p.24. This case went through a successful, if convoluted appeals process after the initial action was dismissed on (inter alia) *forum* grounds. It culminated in *Jota v Texaco Inc.*, 157 F. 3d 153 (2d Cir.1998), after a new Ecuadorian government became a party to it. See also *Beanal v Freeport-McMoran,* 969 F. Supp. 362 (E.D. La 1997); and *Beanal v Freeport McMoran Inc.,* No. 98-30235 (5th Cir. 1999), where the plaintiff alleged that the defendant's mining operations in Irian Jaya, Indonesia, had destroyed the habitat and religious symbols of the Amungme people, forcing them to relocate. The action was however ultimately dismissed because the plaintiff was unable to adduce sufficient evidence to support his claim.

[24] 226 F.3d 88 (2d Cir. 2000).

[25] ibid, at p.92-93

[26] ibid.

The Appeals Court further held that the Torture Victim Protection Act (TVPA)[27] explicitly recognized international human rights violations as violations of US laws, and that the Act "expresses a policy favoring receptivity" by US courts to such suits; and "conveys the message that torture committed abroad under color of law is our business."[28] It thus held that in determining the issue of jurisdiction, regard should be had to both the ATCA and the TVPA; and that the alleged violations could be heard in the United States.[29]

10.2.2.1(c). A Note of Qualification on the ATCA

The above notwithstanding, it is necessary to note that the utility value of the ATCA is not as far-reaching as might be expected from a plaintiff's perspective. For an action to succeed, two main obstacles must be overcome, namely, the "subject matter" and the "personal jurisdiction" requirements. Under the subject matter requirement, the courts' interpretation of the nature of infractions that amount to a violation of the law of nations has been subject to a number of qualifications. Hence, in a number of decided cases, various alleged breaches were not considered to be sufficiently serious to have violated the law of nations.[30] What this means is that the American courts still maintain the position that only State actors can be liable for violations, except where it can be shown that the violation(s) by a non-State actor are particularly grave, or at any rate, of the same degree of seriousness as war crimes, genocide, slave trading, or piracy.[31]

The personal jurisdiction rules are based on section 4 of the US Federal Rules of Civil Procedure. As was demonstrated in the *UNOCAL* decisions, it is for the plaintiff to establish, first, that a court in one of the States of the federation has personal jurisdiction over the defendant, and secondly, that that

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[27] See n.10 above

[28] n.26 above

[29] ibid

[30] See: *Beanal v Freeport-McMoran Inc.* 197 F. 3d 161 (5th Cir. 1999) (cultural genocide, environmental abuses); *Amlon Metals Inc v FMC Corp.*, 775 F Supp. 668 (S.D.N.Y. 1991) (environmental degradation); *Guinto v Marcos*, 645 F. Supp 276 (S.D. Cal. 1986) (denial of free speech); and *Akbar v New York Magazine Co.,* 490 F. Supp. 60 (D. D. C. 1980) (libel).

[31] See *Kadic v Karadicz*, n.11 above, at pp.239-240. See also *In re Estate of Ferdinand E Marcos Human Rights Litigation*, 978 F. 2d 493 (9th Cir. 1992), at pp.501-502; and *Doe v UNOCAL Corp*, 110 F. Supp 2d 1294 (C.D. CAL.2000), at pp.1304-1305

jurisdiction does not infringe a Constitutional clause, i.e., the Fifth Amendment's due process requirement. Thus, for example in the *UNOCAL* case, even an inventive attempt by the plaintiffs to attribute liability to Total SA's French-based parent company by invoking the alter ego/agency analysis[32] was insufficient to establish that its Californian-based subsidiaries had sufficient presence in an American State to give rise to either a specific or general jurisdiction.[33] It is possible that the *Wiwa* decision represents the way forward, given that the Court of Appeals of the Second Circuit held that the presence of the defendant company's investor relations office in New York constituted "a continuous and systematic general business presence...."[34] Nevertheless, as Peter Muchlinski has suggested, it is important to note that the fact that the plaintiffs are US residents might have been the determining factor.[35]

10.2.2.2. The United Kingdom

10.2.2.2(a). The Traditional Conflicts/Tortious Approach

The UK courts have also played a leading role in holding corporate enterprises to account for human rights violations committed outside their jurisdiction, although because there are no similar legislative instruments to the ATCA, victims have had to rely on established *conflicts* and tortious principles for determining the question of jurisdiction. One of the most glaring instances of flagrant human rights

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[32] The subject of corporate group liability is examined at length by two of the most renowned authorities on this subject (See P T Muchlinski, *Multinational Enterprises and the Law*, n.2 above, at chapter 9; and P I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993), at p.65 et seq). In its most rudimentary sense, it refers to the extent to which the parent of a corporate group can become liable for the conduct of its subsidiary. Much depends on the degree of managerial control between the parent and the subsidiary. Thus, in *The Amoco Cadiz* [1984] 2 Lloyd's Law Reports 304, the American courts held that where it could be shown that a TNC was run as an integrated group under one central control, the parent could be sued directly. (See also *In re Amoco Cadiz Oil Spill, 1984* A.M.C.2123 (N.D. Ill. 1984), affirmed, 954 F. 2d 1279 (7th Cir.1992), acknowledging, in effect, that a parent company can be liable for the conduct of its overseas subsidiary, following an oil spill involving the latter's tanker.

[33] See *Doe v UNOCAL*, ibid, at p.1190.

[34] See *Wiwa v Royal Dutch Shell*, n.24 above, at pp.97-98

[35] See P T Muchlinski, "Human Rights and Multinationals: Is There a Problem?" (2001) *International Affairs*, vol.77, at p.42

violations was highlighted in *Ngcobo & others v Thor Chemicals Holdings Ltd.*[36] The defendant company was a manufacturer of mercury-based substances in England in the 1980s. In the course of an investigation by the Health and Safety Executive, high levels of mercury were found in the blood and urine samples of workers at the plant. Thor Chemicals promptly ended its operations in England and relocated to (apartheid) South Africa, with key personnel and plant; where the same dangerous practices were not only repeated but intensified. Indeed, a "revolving scheme" was introduced, whereby, unskilled, casual black workers who usually queued at the factory gate for work each day, were employed on a temporary basis; their period of employment depending on the level of mercury they had absorbed into their system. Those with intolerably high doses were simply replaced with others queuing at the gate.

In 1992, these cases came to light after three workers had died and many others had been poisoned to varying degrees. A criminal prosecution in the local Magistrates' Court resulted in the award of only (the equivalent of) £3000 against the defendant. Compensation claims were subsequently initiated in England on behalf of the twenty labourers against the defendant company and its chairman, on the grounds that the parent company in England had negligently designed, transferred, set up, operated, supervised and monitored an inherently dangerous process. The resulting harm was therefore "foreseen." The defendant company's attempt to escape liability on *forum* grounds was rejected because the claim was held to have some connection with England. This was upheld on appeal, although the court also took into account the fact that the defendant company had acceded to English jurisdiction by serving a notice of defence.[37] In a related development, an application by the defendant company for a stay of execution on *forum* grounds was rejected at first instance, and leave to appeal was denied by the Court of Appeal.[38]

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[36] [1995] T.L.R. 579

[37] The case was eventually settled out of court.

[38] See *Sithole & Others v Thor* Chemicals Holdings Ltd [1999] T.L.R.110

In *Connelly (Respondent) v RTZ Corporation plc & Another,*[39] the plaintiff, a UK citizen, had migrated to South Africa in 1971. Between 1977 and 1982, he was employed at a uranium mine operated by another UK-based TNC called Rossing Uranium Ltd. (RUL) in Namibia. Three years after returning to Scotland in 1983, he was diagnosed with cancer of the larynx, which he claimed was caused by inhaling silica uranium and its radioactive products while at the mine, and subsequently underwent a laryngectomy. RUL was a subsidiary of the first defendant (RTZ). The plaintiff's solicitors first demanded out-of-court compensation from RTZ, but were referred to RUL in Namibia, who denied liability. In 1990, the Legal Assistance Centre in Namibia lodged a compensation claim on the plaintiff's behalf (under the Workmen's Compensation Act 1941 of South Africa and Namibia) which was rejected by the local authorities.

In 1994, the plaintiff commenced proceedings in the UK against both the first defendant and another called RTZ Overseas Services Ltd, claiming damages on the ground that he contracted the cancer as a result of their failure to provide a reasonably safe system of work affording protection from the uranium dust he was exposed to at the mine. The defendants argued that the most appropriate *forum* was Namibia. After a series of appeals,[40] the House of Lords (reaffirming its earlier decision regarding the question of *forum*)[41] held that the stay of proceedings sought by the defendants would only be granted if there was some other *forum* having competent jurisdiction which was appropriate for the trial, i.e., in which the case may be tried more suitably "for the interests of all the parties and the ends of justice."[42] In considering that question, it was explained:

> [t]he court will look first to see what factors there are which point in the direction of another forum, i.e., connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection... However, even if the court concludes at that stage that the other forum is clearly more appropriate for the

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[39] [1998] A.C. 854

[40] At a stage, the plaintiff's solicitors agreed to act on a conditional fee basis, and indeed, also succeeded in persuading counsel and some of the expert witnesses to do the same.

[41] See *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460, per Lord Goff, at p.476 et seq. These principles are two-fold. First, it is necessary to enquire as to which of the possible forums is most appropriate, given all the surrounding circumstances, and particularly the nature of the subject-matter and the convenience of the parties. The second is to consider whether (even if a foreign jurisdiction is considered most appropriate) substantial justice would be served there.

[42] Per Lord Goff, n.39 above, at p.858

> trial of the action, the court may nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted.[43]

It was on the basis of the second part of Lord Goff's reasoning that he concluded that Namibia was not the most appropriate forum.[44] Thus, on the surface, it can be stated that (as with the US jurisdiction)[45] provided the company concerned has some connection with a UK jurisdiction, a victim of human rights violation which occurred in another jurisdiction, can successfully bring a claim against it in the UK. Indeed, Lord Hoffman (dissenting) alluded to this when he asserted: "If the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world."[46]

Issues not dissimilar to the foregoing have also had to be determined in a series of related cases (and appeals) involving the large-scale exposure of workers and local residents to asbestos poisoning by South African-based subsidiaries of a company called Cape plc which itself was based in England. The defendants had argued that South Africa, where the violations occurred, was the appropriate forum. Again, the case went all the way to the House of Lords, where the *Spilidia* and *Connelly* principles were applied to the benefit of the plaintiffs.[47]

10.2.2.2(b). Corporate Criminal Liability in UK Courts

Although the UK courts have been at the forefront of holding corporate entities to account for human rights violations committed abroad, it has so far (and quite ironically) been less successful at home. This

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[43] ibid, at pp.871-872

[44] ibid, at p.874

[45] Though see *The Union Carbide* cases, infra, note 91, where the courts held otherwise – the plaintiffs having argued (inter alia) that the United States was the appropriate jurisdiction because India did not have the expertise to handle their complex claims.

[46] See n.44 above, at p.876

[47] See *Lubbe v Cape Plc (No.2), Afrika v Cape plc* [2000] 2 Lloyd's Rep. 383. After a campaign involving a number of British Members of Parliament, the matter was settled for only £25 million, with each of the 7,000 plaintiffs receiving £3,500 – a derisory sum given that the alleged illnesses ranged from asbestosis to mesothelioma, a form of cancer. (See BBC, "Asbestos Miners 'Would Settle for £25m,'" available at http://news.bbc.co.uk/1/hi/business/1627957.stm)

has been amply illustrated by their failure of prosecutions brought against a number of companies whose negligence resulted in a series of fatal accidents. The main difficulty relates to their inability to identify which individual officers were "the directing mind and will" of the companies concerned, as required by the House of Lords in *Tesco Supermarkets Ltd v Nattrass*.[48] Thus, in *R v P & O European Ferries (Dover) Ltd* [49](a case involving the much-publicised Herald of Free Enterprise ferry disaster off Zeebrugge which resulted in the loss of 189 lives), Turner J stated: "Homicide is the killing of one human being by another. No act or omission of a company which causes death can itself amount to manslaughter, because the act or omission which kills must ex hypothesi be the act or omission of a human being."[50] He was however willing to concede that where the conduct of a natural person is indistinguishable from that of the company, both may be guilty of manslaughter.[51]

Also, in *Attorney-General's Reference (No 2 of 1999)*,[52] a high speed train had crashed into a freight train at Southall, near London, killing seven people and injuring many others. The trial judge had dismissed a manslaughter charge brought against the rail company on the ground that a corporate entity could only be liable if the guilt of the (natural) person with whom it could be attributed was also established. Given that no charge had been brought against any of the company's officers, the case was dismissed. In response to one of the Attorney-General's certified questions, Rose LJ, relying on the *P & O Ferries* case, stated thus: "...unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company the company is not, in the present state of the common law, liable for manslaughter..."[53]

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[48] [1972] A.C. 153, particularly at p.188, per Viscount Dilhorne,

[49] (1991) 93 Cr. App. R. 72

[50] ibid, at p.87. And this, in spite of the fact that an official report commissioned by the Department of Transport had concluded: "[F]rom top to bottom the body corporate was infested with the disease of sloppiness." (See Department of Transport, *MV Herald of Free Enterprise, Report of Court No. 8074* (London: Her Majesty's Stationery Office 1987), at para.14.1)).

[51] ibid, at p.89

[52] [2000] 2 Cr. App. R. 207

[53] ibid, at p.217

However, in *R v Kite and OLL Ltd*[54] the defendant, a one-man company and its director were convicted of manslaughter following the deaths of four teenagers in a canoeing accident while on an outdoor activity run by the co-defendant. The evidence was that he had previously been alerted to the risks by two former instructors, who had complained about inadequate safety measures at the centre. Thus (and quite ironically), the smallness of the company became its greatest disadvantage in terms of its ability to evade liability.

10.3. Municipal Law: The Way Forward?

By any standard, the approaches adopted by the American and British courts represent a welcome step in the right direction, and indeed make it tempting to conclude that municipal law represents the way forward. However, these successes conceal some serious difficulties. For example, the very real possibility that non-US resident victims may not be able to bring claims for violations in the US courts[55] highlights the likelihood of them being left with no remedy at all in their home jurisdictions. By the same token, although there have been successful actions in the UK courts against UK-based corporations that have violated human rights abroad, it remains the case that for an impecunious victim who resides in a developing country, the idea of bringing action in a foreign court against a giant corporation is simply a practical impossibility, except where (as in the *Connelly* case) his legal representatives are willing to act on a conditional fee basis, or even *pro bono*. At any rate, the task of adducing the relevant evidence necessary for sustaining a complex trial may even prove too onerous – a possibility acknowledged in these terms by Lord Goff in the *Connelly* case: "There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia..."[56]

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[54] (Unreported, Winchester Crown Court, 8 December 1994)

[55] See P T Muchlinski, "Human Rights and Multinationals," n.35 above, at p.42

[56] See *RTZ v Connelly*, n.46 above, at p.335 et seq. It is pertinent to mention that the issue of lack of expertise (in India) was also raised by the plaintiffs in the Union Carbide cases as the basis for their choice of the United States as the appropriate forum – an argument rejected both at first instance and on appeal. (See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India*, 809 F. 2d 195 (U.S.C.A. 2d Cir.), 26 I.L.M. 1008 (1987). See also P T Muchlinski, "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors," (1987) *50 Modern Law Review 545.*

Moreover, given that it is for a plaintiff to identify the "directing mind and will" of a company in certain circumstances, a victim of human rights abuses may find that obtaining justice in the UK is not as straightforward as some of the cases suggest. These, however, are obstacles which an international prosecutor would overcome with relative ease, given the level of expertise and the amount of resources at the disposal of an international tribunal.

10.4. Attempts at International Regulation

As already pointed out, the absence of a mandatory regime at the international level to respond to the amorphous structure of the modern TNC has highlighted the existence of a regulatory vacuum, and one which is increasingly being filled by a number of initiatives formulated at the international level either multilaterally or by NGOs. Some of these are examined in this section.

10.4.1. Multilateral Regimes

In 1977, the United Nations attempted to address the problem of corporate human rights violations by drawing up a code of conduct calling on transnational corporations to "respect human rights and fundamental freedoms in the countries in which they operate."[57] The draft code, which was never adopted, included only minimal reporting requirements and was thus largely non-binding.[58] Just over two decades later in 1999, the current Secretary-General proposed the Global Compact, a voluntary initiative to promote corporate responsibility with respect to human rights, labour rights, and the environment – again, with no mandatory powers,[59] although it must be acknowledged that many large

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[57] See Proposed Text of the Draft Code of Conduct on Transnational Corporations, 2nd Sess., Agenda Item 7(d), U.N. Doc. E/1990/94 (1990), at p.7

[58] ibid, at pp.17-18. For a detailed list of standards envisaged by the defunct code, see UNCTAD, *International Investment Instruments: A Compendium*, vol.I (New York and Geneva: United Nations, 1996), at pp.161-171.

[59] SeeThe Global Compact: What It Is and Isn't, at http://www.unglobalcompact.org/gc/UNWeb.nsf/content/whatitis.htm The Global Compact has been criticised, for example, by the NGO Human Rights Watch for lacking an independent monitoring mechanism, and for the vagueness of its guidelines. (See Human Rights Watch, "Business and Human Rights: The Role of the International Community," at www.humanrightswatch.org/wr2k1/special/corporations3.html

TNCs have subscribed to it.[60] Other initiatives include:

- The Codex Alimentarius Commission which was set up as a subsidiary body of the FAO and WHO to set food standards;[61]
- the World Bank's 1992 Guidelines for the Treatment of Foreign Direct Investment;[62]
- the OECD's Guidelines on Multinational Enterprises;[63]
- the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[64]
- the WHO's Code of Marketing of Breast-milk Substitutes[65]
- various initiatives by the World Development Movement; [66]
- the Amnesty International (UK) Business Group's Human Rights Guidelines for Transnational Companies.[67]

10.4.2. Voluntary Codes of Conduct

There are conflicting views about the origins of voluntary codes of conduct. For some, their origins can be traced to the 1990s following revelations involving such corporate enterprises as Levi Strauss, Sears, and Toys 'R' Us, which were alleged to have benefited from the use of prison and child labour in their factories in China.[68] This was followed by various other initiatives such as the New York-based Council for Economic Priorities' attempt to create an international factory standard similar to those operated by the International Standards Organization (ISO), by establishing an accreditation agency which has formulated a set of standards called the SA8000, drawing on core ILO standards, including

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[60] The list of the companies concerned is available at http://www.un.org/partners/business/gcevent/participants_C.htm

[61] See Food and Agricultural Organization of the United Nations and World Health Organization, *Understanding the Codex Alimentarius* (Rome: FAO/WHO, 1999), available at http://fao.org/waicent/faoinfo/economic/esn/codex/default.htm. Its credibility has however been called into question (See S Picciotto, "Introduction: What Rules for the Global Economy?" in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (UK: Macmillan Press and Oxfam 1999), at p.10, who notes that because of the involvement of representatives from the food industry both on its committees and on governmental delegations, it is widely seen as being industry-dominated.

[62] See World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, 21 September 1992, 31 I.L.M. 1363 (1992)

[63] For a detailed list of the updated guidelines, see OECD, *The OECD Guidelines for Multinational Enterprises: Text* (Paris: OECD, 2000). Also available at www.oecd.org/daf/investment/guidelines/mnetext.htmatp.3).

[64] Available at http://www.ilo.org/public/english/standards/norm/sources/mne.htm

[65] See World Health Organization, *International Code of Marketing of Breast-Milk Substitutes* (Geneva: WHO, 1981)

[66] See for example, World Development Movement, "Making Investment Work for People: An International Framework for Regulating Corporations" February 1999, at http://www.wdm.org.uk/cambriefs/wto/TNCs.htm

[67] See Amnesty International, United Kingdom Business Group, *Human Rights Guidelines for Companies* (London: Amnesty International United Kingdom, 1998), particularly at pp.1-7.

[68] See N Kearney "Corporate Codes of Conduct: The Privatized Application of Labour Standards," in S Picciotto and R Mayne, *Regulating International Business*, n.61 above, at p.209

the prohibition of child/forced labour, and discriminatory practices.[69] It also sets stringent health and safety standards, and prescribes support for ex-child labourers.[70] On the contrary, the notion of Corporate Social Responsibility (CSR), which broadly encapsulates the voluntary codes in a theoretical framework, has been traced to the rise of the modern corporation itself.[71] The same idea has also been articulated in the context of business ethics.[72] Thus, virtually every large corporation now displays a corporate responsibility statement on its website.[73]

In the United Kingdom, certain retail chains have become some of the best known examples of corporate self-regulation. For example, the Cooperative supermarket chain has recently introduced its "fair trade" initiative for cocoa farmers in Ghana.[74] The Sainsbury's chain, on its part, developed its Code of Practice for Socially Responsible Trading between 1997 and 1998 for its UK and US-based subsidiaries "because Sainsbury's has long recognized a social responsibility to improve employment conditions;" and because it "enabled us to set out the principles by which we want to underpin our trading relationships with our own-label suppliers."[75] UNCTAD has identified a number of other voluntary codes, including the General Mills Statement of Corporate Responsibility 1994;[76] the Caterpillar Code of Worldwide Business Product and Operating Principles 1992;[77] and the Levi-Strauss Business Partner Terms of Engagement and Guidelines for Selection 1994.[78] These, then, are some of the existing international regimes that seek to hold corporate enterprises to account for human rights violations. It is,

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[69] ibid

[70] ibid, at p.208. See also UNCTAD, *Social Responsibility: UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations, 2001), at pp.34-34.

[71] ibid, at p.3. For others commentators, however, it has only been in existence "for decades", and only attracted academic attention in the United States in the mid-1970s (See, for example, D J Wood, "Corporate Social Performance Revisited" (1991) *Academy Management Review*, vol.16, no.4, at p.691

[72] See for example, S Williams, "How Principles Benefit the Bottom Line: The Experience of the Co-operative Bank" in M K Addo, *Human Rights Standards*, n.4 above, at pp.63-68; and S Webley, "The Nature and Value of Internal Codes of Ethics," in M K Addo, *Human Rights Standards*, ibid, at pp.107-113.

[73] An example of this rend is ChevronTexaco's Global Sullivan Principles, available at http://www.chevrontexaco.com/social_responsibility/human_rights/

[74] Under the scheme, all "own-brand" chocolate bars are to use cocoa from Ghana. The arrangement, it is claimed, will enable producers to "get a stable price, including a living wage and money to fund vital local projects." (See "Cocoa Deal to Boost Fair Trade Market," at BBC Ceefax 2, 26 November 2002, at p.115).

[75] See P Fridd and J Sainsbury, "The Role of Voluntary Codes of Conduct and Regulation – A Retailer's View," in S Picciotto and R Mayne (eds.), *Regulating International Business*, n.70 above, at p.221.

[76] See UNCTAD, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (Geneva: United Nations, 1994), at p.317.

[77] ibid, at p.319

[78] ibid, at p.325

however, difficult to ignore the fact that they all share a common characteristic: they are all non-binding and thus unenforceable (except, of course, in circumstances where they form part of a contract, e.g., between the corporation and a supplier).

In emphasizing the inadequacy of these regimes for the realization of human rights, it is important not to underestimate the fact that some companies may in fact take these various codes seriously. Indeed, in this age of globalization where a company's public or global image is an invaluable asset to its shareholders, very few companies would wish to attract negative media scrutiny. Moreover, as Peter Muchlinski has pointed out, corporate enterprises can push labour standards up within their host countries, and this can have salutary knock-on effects on a variety of economic rights.[79] Moreover, the fact that some companies offer above-average conditions to their employees indicates a recognition that this often results in high levels of productivity. Thus, it could be argued that since it may in fact be in a company's commercial interest to observe established human rights norms, the case for a mandatory imposition of human rights standards is unsustainable. However, a closer examination reveals that such a conclusion would be largely specious. To begin with, if these were indeed the case, the highlighted violations (not to mention those that never come to light) would never have occurred. Moreover, this would ignore the fact that companies might choose to observe one particular human rights norm at the expense of another. For example, the need to maximize profit might mean that offering high remuneration (which ensures an adequate living standard and other ESCRs for employees) necessitates the use of harmful chemicals (as opposed to organic farming) as a way of staying competitive. What these demonstrate is that human rights are simply too important to be allowed, effectively to compete with a company's profit motive.

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[79] See P T Muchlinski, "Human Rights and Multinationals," n.55 above, at pp.38-39

10.5. Mandatory Regulation at the International Level

10.5.1. The Case Against

It is necessary to highlight the fact that the idea of regulating corporate conduct at the international level has not received universal endorsement. Understandably, the given reasons are varied, and will be examined in turn.

10.5.1(a). Human Rights: The State's Business

It has been argued that because the mechanisms for the realization of human rights belong to the State, corporate entities should not be saddled with such responsibilities.[80] Indeed, this position would certainly find support within the two Covenants, at least insofar as their signatories (i.e., States parties) explicitly undertake to take steps to guarantee the realization of human rights.[81] Thus, it could in fact be argued that corporate enterprises are, by implication, precluded by law from undertaking human rights responsibilities, except on the basis of tort. Yet, as has been shown above, the very fact that some of them have been implicated in the most flagrant violations, often in circumstance where the State is either powerless or complicit in such violations means that the same governments cannot be expected to protect their citizens as envisaged in the Covenants.

It has also been argued that an imposition of human rights responsibilities would amount to a tacit legitimization of their virtual usurpation of governmental functions. This position has been articulated thus by Friedrich von Hayek: "[O]nce the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decisions whatever is regarded as the public or social

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[80] See: R Martin, "Human Rights and Civil Rights," in M Winston (ed.), *The Philosophy of Human Rights* (Belmont,Ca: Wadsworth, 1989) at p.75. See also, M Lipmann, "Multinational Corporations and Human Rights," in G W Shepherd and V Nanda (eds.), *Human Rights and Third World Development* (Greenwood Publishing, 1986), at p.252.

[81] See Arts.2 of both the ICCPR and the ICESCR.

interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power..."[82]

This, however, presupposes that corporations are required to assume the roles of governments – a view that would be at odds with mainstream opinion in the field of human rights advocacy. Moreover, as Peter Muchlinski has pointed out, "[i]t may be said that the extension of human rights responsibilities to corporations makes them appear more important than they should be...That is to give them a constitutional status that they neither deserve nor need."[83] The submission is that although human rights must remain the responsibility of the State, this in no sense absolves corporate entities of their responsibilities in a non-ideal situation where they become *de-facto* governments, and/or act in a way that directly violates human rights.[84]

10.5.1 (b). A Practical Impossibility

Aside from the view that human rights are the responsibility of the State, there is the very fact that the imposition of such responsibilities on corporate entities would be a practical impossibility. This is because the interests that drive the process of globalization are sufficiently determined and powerful to ensure that this does not materialize. In fact, it could be argued that the entire process of globalization itself represents an attempt to protect corporate interests from what is undoubtedly seen by the ideological right as undue constraints on "the market." Thus, apart from the liberalization agenda promoted by the Bretton Woods institutions, the failed Multilateral Agreement on Investment (MAI) represented an unmistakable intent on the part of TNCs to ensure that they were able to enjoy the

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[82] See F Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, (London: Taylor & Francis, 1982), at p.82.

[83] See P T Muchlinski, "Human Rights and Multinationals," n.79 above, at p.44.

[84] The position of Royal Dutch Shell in the Niger Delta area of Nigeria during the Abacha years is a case in point. Even if Shell's denial of collusion with the regime in the murder of Saro Wiwa and other environmental activists were in any sense credible (for which, see A Detheridge and N Pepple, "A Response to Frynas," (1998) *Third World Quarterly*, vol.19, no.3, at pp.479-486), the very fact that there was no real attempt to dissuade the regime from carrying out the executions makes it impossible to argue that it was not in support of it. In other words, the line between inaction and complicity in such a situation becomes a very fine one (See Amnesty International, United Kingdom Business Group, *Human Rights Guidelines for Companies* (London: Amnesty International United Kingdom, 1998), particularly at pp.1-7).

widest possible level of legal protection, while avoiding as much of the attendant responsibilities as possible.[85] Yet, this would be an unsustainable argument: the fact that a mandatory international regulatory regime appears unrealizable cannot be an argument for its undesirability. If this were the case, the apartheid regime in South Africa (with its seemingly invincible terror machine) would still be in place.

10.5.1(c). TNCs Already Subject to Municipal Control

In arguing for the regulation of the conduct and policies of TNCs at the international level, it is important to acknowledge the fact that these corporations are already subject to the traditional forms of legal control within their home jurisdictions. Apart from the extensive regulatory measures available within such regional economic blocs as the EU or NAFTA, national laws seek to protect the individual against corporate conduct in such areas as product safety, trade description, health and safety at work, labour relations, and the environment. These, of course, rely on the traditional mechanisms of tort and contract law, which continue to represent an effective regime for regulating the conduct of corporate enterprises vis-à-vis the individual. Indeed, in spite of the existing obstacles to the imposition of criminal liability (discussed above), it could be argued that this represents a further potential mechanism for corporate accountability. Thus, there is a valid question to be raised as to whether these mechanisms are not sufficient, or to put it differently, whether regulation at the international level would not in fact be superfluous.

10.5.2. The Case for Regulation

Paradoxically, it is possible to assert that the existence effective regimes in Western jurisdictions illustrate the need for a mandatory regulatory regime at the international level. As highlighted by the substantial body of case law generated in the US and UK courts, the plaintiffs either had no adequate

85 For more on the MAI, see P T Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment" n.1above.

remedies, or had none at all, in their home jurisdictions. Thus, the welcome approach adopted by the US and UK courts has merely served to highlight what might be called a regulatory lacuna at the international level. Moreover, the very fact that Western countries have deemed it necessary to put in place comprehensive sets of rules to govern corporate conduct at the national level could be interpreted as further acknowledgement of the potential dangers of unfettered corporate power. It follows that if the most powerful nations require such effective mechanisms, the poorer ones deserve an even greater level of protection.

Furthermore, although the American and British courts have been favourably disposed to claims from victims of rights violations committed outside their jurisdictions, an impecunious victim living in an African or Asian village is unlikely to be in a position to initiate action in a London or New York court. The advantage inherent in an international tribunal, on the contrary, is that if nothing else, it would make it possible for complaints to be heard close to where the violations took place, thus making it easier for the victims to seek an effective remedy. Indeed, the location of the Rwandan War Crimes Tribunal in neighbouring Tanzania serves as a useful model in this regard.

10.5.2 (a). The Problem of the Modern Corporate Structure

Aside from the pervasiveness of the modern TNC, its structure (or the absence of it) represents a major reason for a mandatory regulatory regime at the international level. This view is articulated by Philip Blumberg, who argues that the current legal principles – particularly those relating to a company's legal personality and the parent/subsidiary relationship – have become obsolete and archaic, "in a world where business is conducted worldwide by giant corporate groups, composed of affiliated companies organized in dozens of countries."[86] Another commentator asserts: "Increased economic integration and interdependence needs to be underpinned by a strengthened international regulatory framework."[87]

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[86] See P I Blumberg, *The Multinational Challenge to Corporation Law*, n.32 above, at preface.
[87] See S Picciotto, *Regulating International Business; Beyond Liberalization*, n.74 above, at p.vii

Thus, the very dynamics of globalization, as evidenced by a breakdown of the monolithic structure of TNCs dictates that regulatory measures be adapted accordingly.

10.5.2(b). The Powerlessness of Host Governments

The above, however, are not the only reasons why a mandatory approach at the international level is considered necessary. The dominance of a TNC in its host economy should also be a matter of concern. For example, given that some TNCs are richer, and thus more powerful than some developing countries, even if the resident subsidiary has sufficient assets in the host jurisdiction to make a claim worthwhile, its dominant influence within that economy might influence the government to adopt subtle measures aimed at frustrating a claim by a victim of human rights violations. This has been amply illustrated by the conduct of the federal authorities in India following the Union Carbide disaster: As the victims' actions in the Indian courts were still pending, the federal government arrogated unto itself the power to settle the claims with Union Carbide on their behalf, by virtue of the Bhopal Gas Leak (Processing of Claims) Act 1985.[88] Indeed, the victims were also excluded from all negotiations conducted with Union Carbide.[89] The government has also sought to reduce the culpable homicide charge against the company's fugitive chairman.[90]

The Bhopal tragedy highlights a further shortcoming in the status quo: the lack of uniformity in the existing national regulatory and remedial regimes. Indeed, the fact that the plaintiffs later resorted to the United States as the preferred *forum* is strongly indicative of the fact that India was not an appropriate

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[88] See "Bhopal Gas Tragedy: The Economic and Legal Aspects," at http://www.geocities.com/Athens/Forum/8266/Bhopal-3.htm

[89] M R Anderson, "Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?" in D Robinson and J Dunkley (eds.), *Public Interest Perspectives in Environmental Law* (London: Wiley & Chancery, 1995) at pp.156-157

[90] See M Ullah, "Court Refuses to Reduce Murder Charge Against Bhopal Chief" *Guardian Unlimited*, 29 August 2002, at http://www.guardian.co.uk/international/story/0,3604,782028,00.html. Indeed, as noted on a campaign site for the victims of the disaster, the Indian government has been complicit in a series of grossly negligent conduct on the part of Union Carbide. The allegations made include: underplaying the death and damage caused by the disaster; suppressing information on contamination of soil and groundwater around the factory; and a refusal to publish 24 Indian Council of Medical Research studies on the tragedy. (See "The Indian Government: Colluding With Carbide," available at http://www.bhopal.net/mergerinfo4.html). See also, Corporate Watch http://www.corpwatch.org/trac/bhopal/lawsuit.html or http://www.bhopal.net/legal.htm

forum in terms of the adequacy of the expected compensation.[91] What these all demonstrate is that domestic laws are inadequate to deal with such matters. Indeed, Robert Gilpin puts it thus: "In light of the increased significance of the MNC in every facet of the global economy, it is remarkable that there are no international rules to govern FDI..."[92]

10.6. International Law: An Obstacle to Mandatory Regulation?

The foregoing notwithstanding, it is necessary to highlight the fact that the establishment of the envisaged regulatory regime is not unproblematic from a legal perspective. Aside from the cited obstacles, there are major technical difficulties which must be overcome before any such regime becomes a reality. This section aims to examine some of these difficulties.

10.6.1. The Question of Legal Status

Any discussion of the possibility of holding corporate entities to account under international law for human rights violations must necessarily begin with their legal status. Given that they possess the same legal personality as natural persons in municipal law, it becomes convenient to begin with an examination of the status of the individual under international law. Opinions are divided as to what this

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[91] The initial actions began in 13 US states, but were later consolidated into a single class suit in the Southern District Court of New York, which dismissed the action on *forum* grounds. The plaintiffs included the government of India and several private plaintiffs at the initial stage; hence the different citations. The private plaintiffs had argued that the United States was the appropriate forum because *(inter alia)* India did not have the expertise to handle such complex litigation. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal India*, 634 F. Supp. 842 (S.D.N.Y. 1986) 25 I.L.M 771 (1986); affirmed in part 809 F 2d 195 (2d Cir. 1987) 26 I.L.M. 1008 (1987) sub nom. *Exec. Comm. Members v Union of India*, 484 U.S. 871 (1987). See also: *Complaint, Government of India v Union Carbide Corp.*, No.85 Civ. 2696 (S.D.N.Y. 1985); and *In re Union Carbide Gas Plant Disaster at Bhopal India Opinion and Order 12 May 1986*, 634 F. Supp. 842 (S.D.N.Y. 1986), 25 I.L.M. 771 (1986). For an insightful analysis of the disaster, see P T Muchlinski, "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors," (1987) *50 Modern Law Review 545*

[92] See R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton and Oxford, UK: Princeton University Press, 2001), at p.300. The UNDP also asserts thus: "[M]ultinational corporations are too important and too dominant a part of the global economy for voluntary codes to be enough." (See UNDP, *Human Development Report 1999* (New York: Oxford University Press, 1999), at p.100). See further, N Eberstadt, "What History Tells Us About Corporate Responsibilities," in A B Carroll (ed), *Managing Corporate Social Responsibility* (Boston: Little, Brown, 1977), at p.22, who asserts: "[A]t present, business has seldom enjoyed so much power with so little responsibility." See further, D F Vagts, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001), at p.113 for a similar view.

might be. For example, it has been argued that becoming a subject requires the possession of specific rights and duties which are clearly enforceable under international law.[93] The individual, it is added, "is not directly in contact with international law" because the rules of international law depend for their enforcement on States. It is also argued that although the manner in which the State has treated the individual might attract international concern, he can still only seek redress through the medium of other States.[94] Indeed, Henry Steiner and Philip Alston appear to endorse this view by highlighting the duties that international human rights law imposes on States.[95] Thus, although individuals have rights under international (human rights) law, they do not have specific duties, since it is the duty of States to prevent violations by both State and non-State actors.

This, however, is by no means an article of faith. As pointed out by Ian Brownlie, "[t]here is no general rule that the individual cannot be 'a subject of international law.'"[96] Indeed, contrary to common assumptions, the IBHR itself imposes human rights responsibilities on individuals. For example, Article 30 of the UDHR proclaims: "Nothing in this Declaration may be interpreted as implying for any State, group or *person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" [emphasis added]. The two Covenants also contain identical provisions.[97] Thus, it is equally safe to argue that the natural person is a recognized subject of international law.

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[93] See E Zoller, "The Status of Individuals Under International Law," in G Ginsburgs and V N Kudravtsev (eds.), *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff, 1990), at p.99

[94] ibid, at pp.101-102

[95] See H J Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford, UK: Oxford University Press, 2000), at pp.180-84.

[96] See I Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1999), at p.66. See also R Jennings and A Watts (eds.), *Oppenheim's International Law*, 9th ed., (Harlow, UK: Pearson/Longman, 1992), at pp.16-17. Indeed, Rosalyn Higgins has cast doubts on the usefulness of the usual distinction between subjects and objects of international law, arguing that both should be regarded as "participants," – a term which would include such parties as international organizations, NGOs, natural persons, as well as TNCs. (See R Higgins, *Problems and Processes: International Law and How We Use It* (Oxford University Press, 1995), at p.49)).

[97] See Arts.5 of both the ICESCR and the ICCPR.

10.6.2. A Personalized Approach: Some Lessons from Nuremberg

The various trials conducted by the United States and Britain under the Nuremberg Charter could be regarded as useful precedents in what might be called "a personalized approach" to punishing human rights violations.[98] In re *Flick and Others*,[99] for example, the United States Military Tribunal, acting under the terms of the German Control Council Law stated: "International law...binds every citizen just as does ordinary municipal law..." A similar decision was reached in *re Krupp and Others*,[100] where the Tribunal recognized the possibility of individual officers and agents of a corporate entity being held criminally liable for the conduct of a company, provided it could be shown that they had knowledge of the conduct, or that they actually directed or permitted it. In *re Karuch and Others*, the Tribunal stated:

> The corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Fabern as descriptive of the instrumentality of cohesion in the name of which the enumerated acts...were committed. But corporations act through individuals.[101]

Nor is it easy to ignore the *Zyklon B case*, in which the directors of the company Tesch & Stabenow were convicted by the British Military Tribunal for having sold substantial quantities of poison gas to the Nazis in the knowledge that it was to be used for mass extermination.[102]

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[98] See the Charter of the International Military Tribunal Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945, reprinted in *39 Am. J Int'l Law* (1945), at pp.258-260.

[99] (United States Military Tribunal, Nuremberg, 22 December 1947) in *14 Intl L. Rep* 266 (1947), at 269.

[100] (United States Military Tribunal at Nuremberg. 30 June 1948) *15 Intl L. Rep 620* (1948), at 627))

[101] (I G Fabern Trial) (United States Military Tribunal, Nuremberg, 29 July 1948) *15 Intl L. Rep. 668* (1948), at 678.

[102] See *Zyklon B (British Military Tribunal)*, reported in *42 Am J Int'l L 299* (1948), at 317-318. Apart from the fact that the individual person is increasingly being held to account for human rights violations in international (human rights) law, some international legal instruments expressly allow for the initiation of complaints by individuals. (See for example, the Optional Protocol to the ICCPR, and Art.14 of the Convention on the Elimination of Racial Discrimination of 1965). It is also pertinent to mention that the European Court of Human Rights has recognized the right of a corporate entity, namely, The Times Newspapers Ltd., to freedom of expression as guaranteed under Art.10 of the ECHR. While this may not have involved the violation of human rights by a corporate enterprise, it nevertheless demonstrates how easy it is for the courts to treat a corporate entity as a natural person. (See *Sunday Times v The United Kingdom No.2*, Eur. Ct. H.R. Series A.217; 14 (1992) E.H.R.R. 229; and *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. ser. A 216; 14 (1992) E.H.R.R.153 (for a similar decision). See further, *Editions Periscope v France*, 234 Eur. Ct. H.R. ser. A (1992) (holding that France had violated the right of a French company to a hearing within a reasonable period of time under article 6(1) of the ECHR)). The personalized approach is further recognized in these terms by the UN Genocide Convention: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." (See

Admittedly, these decisions were made in the context of such grave violations as war crimes and crimes against humanity; and the human rights advocate would be advised to be cautious not to equate them with some of the relatively minor categories of violations that a corporation might commit, which could perhaps more appropriately be categorized under the general rubric of tortious or statutory infractions. Comparing a simple fracture sustained due to the absence of a safe system of work in a factory, for example, with the crimes of rape or the killing of civilians can, after all, only serve to undermine the cause of human rights advocacy. Nevertheless, as highlighted above (and in chapter 8), corporate enterprises have been complicit, to varying degrees, in grave violations including torture, the use of slave/child labour, support for the apartheid regime, and even murder. Thus, the cited examples are in no sense inappropriate to this discourse.

10.6.3. International Law and the Juristic Person

It is important to acknowledge that the above decisions merely refer to the individuals concerned, and not to the corporate entities they represented. This means that the crucial question as to whether corporate entities are subjects of international law (and thus liable for human rights violations) remains unanswered. Nor, it also must be pointed out, is there an agreed position on it. As with natural persons, the controversy revolves around the issue of their rights and duties. For example, Antonio Cassese asserts that "multinational corporations possess no international rights and duties; they are only subjects of municipal and 'transnational' law."[103] Thus, on the basis of this opinion, they cannot be regarded as proper subjects of international law.[104] However, this would ignore the following crucial

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Art.IV of the Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December1948, entered into force 12 January 1951).

[103] See A Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at p.103.Cassese however does not explain what material difference there is between international and transnational law. In any event, it is difficult to see why he seeks to draw this distinction given that if (as he in fact acknowledges at pp.100-101) natural persons can be proper subjects of international law, the same would almost certainly be the case with corporate persons.

[104] A subject of international law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. (See the *Reparation for Injuries* case, *ICJ Reports* (1949), at p.179)); although it has been argued that these refer primarily to States. (See N Jagers, "The Legal Status of the Multinational Corporation under International Law" in M K Addo (ed.), *Human Rights Standards*, n.72 above, at p.262

facts. First, they have the status of juristic persons under municipal law, which confers on them the necessary legal personality.[105] This is reinforced by the fact that they can be subject to criminal sanctions under municipal law.[106]

Moreover, as pointed out by Ian Brownlie, even if an entity does not possess international rights and duties, it may still have legal personality, albeit "of a very restrictive kind, dependent on the agreement or acquiescence of recognized legal persons and opposable...only to those agreeing or acquiescent."[107] As he further explains, the contexts in which the question of personality has arisen have been in its:

- capacity to make claims in respect of breaches of international law;
- capacity to make treaties and agreements valid on the international plane; and
- enjoyment of privileges and immunities from national jurisdictions.[108]

Assuming that these represent the circumstances in which the question of legal personality may be determined, it is possible to argue that the modern TNC enjoys all of the listed benefits. For example, as Brownlie himself acknowledges, some investment contracts are now the subject of bilateral agreements between the TNC's home government and its host State.[109] Thus, the involvement of the home State becomes, in effect, a mere facade. This being the case, it becomes possible to argue that the TNC is in fact the main contracting party and not its home government. It follows that any dispute arising therefrom, although initiated by its home State, is, in reality, initiated by the TNC, since it is for the TNC to determine, for example, the terms to be agreed, and whether (in the event of a perceived breach) it is in their interest to seek legal redress or not. In any event, some investment contacts are made directly

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[105] See *Salomon v Salomon & Co* [1897] AC 22, HL. Brownlie however argues that "[i]n principle, corporations of municipal law do not have international personality" which, he further asserts, explains why a contract between a State and a foreign corporation is not governed by international law. (See I Brownlie, *Principles of International Law*, n.96 above, at p.66).

[106] See, for example, *Tesco Supermarkets Ltd v Nattrass*, n.48 above, although as also pointed out, prosecutions have so far failed because it has been impossible to determine "the directing mind and will" of the companies concerned. See however, C Wells, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 1993), at pp.94-116, who notes that common law jurisdictions recognize a wider ambit of criminal liability than civil law traditions.

[107] See I Brownlie, *Principles of Public International Law*, n.105 above, at p.57. Michael Anderson explains this "limited legal personality" status with this conundrum: "MNCs possess very limited legal personality under public international law, and are generally not subject to obligations under either treaty law nor customary international law. As private legal persons, MNCs are subject to international rules only indirectly, through the mediating structures of the state. Yet since no state controls all parts of a MNC, there is no entity charged with supervising the totality of its behavior." (See M Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" (2002) *Washburn Law Journal*, at p.402, footnote 8)).

[108] See Brownlie, ibid

[109] ibid, at p.548

between the TNC and its host government;[110] and although such cannot be accorded the status of an international treaty,[111] ensuing disputes can still be referred to the Centre for the Settlement of International Disputes. As pointed out by Ignaz Seidl-Hohenveldern, the Convention on the Settlement of Investment Disputes (ICSID)[112] makes the TNC a recognized legal personality in the sense that the convention is essentially concerned with disputes relating to corporate entities, which are recognized as juristic persons.[113] To this could be added the fact that dispute settlement under the ICSID rules emanate from a treaty between 149 countries,[114] all of which must have recognized that their ratification of the treaty would amount to committing the relevant parties to the rules of international law as its subjects.

Regarding its ability to enjoy privileges and immunities from national jurisdictions, it could be argued that although this is not expressly recognized under any rule of international law as such, it is in fact the case that a simple choice of law clause either in a bilateral investment treaty or in an ordinary contract between a TNC and its host, can have the same effect. Indeed, Borwnlie himself acknowledges that States may even create a juristic person by way of a treaty and confer such benefits on it, as was the case when fifteen European countries jointly established a railway company called Eurofima in 1955.[115] Thus, the question of legal personality need not remain an obstacle to holding corporate entities to account at the international level.

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[110] ibid, at p.549.

[111] See the *Anglo-Iranian Oil Co.* Case (UK v Iran), ICJ Rep. 1952, at p.89

[112] See Convention on the Settlement of Investment Disputes between States & Nationals of Other States, opened for signature 18 March 1965 (entered into force on 14 October 1966), 4 ILM (1965), 532. See also, D M Sassoon, "Convention on the Settlement of Investment Disputes," (1965), *J. Bus. Law 334.* For its incorporation by the United Kingdom, see the Arbitration (International Investment Disputes) Act 1966, as amended (effective from 18 January 1967)

[113] See I Seidl-Hohenveldern, *International Economic Law* (The Hague: Martinus Nijhoff, 1992), at p.11. It has been argued, however, that since the settlement of disputes under the auspices of the International Chamber of Commerce (ICC) does not necessarily make the TNC a subject of international law, there is no reason to suppose that this would be the case under the ICSID. (See for example, S J Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge University Press, 1990), at p.219 et seq.)).

[114] Position as of 26 March, 2003 (See The World Bank Group, ICSID: List of Contracting States, available at http://www.worldbank.org/icsid/constate/c-states-en.htm)

[115] See I Brownlie, *Principles of International Law*, n.110 above, at p.67. See also, P T Muchlinski, *Multinational Enterprises and the Law*, n.32 above, at pp.79-80

10.7. The International Criminal Court: A Missed Opportunity

The idea of an International Criminal Court (ICC) did bring the possibility of imposing criminal liability on corporate entities (as juridical persons) tantalizingly close. This was evident at the international conference for the establishment of the Court, where there was significant but insufficient support for it, as had earlier been proposed by its Preparatory Committee.[116] For example, a proposal by France envisaged an exclusive mandate for the Court in declaring the organization concerned "criminal," in which case State parties to the Treaty would be obliged to enforce any penalties imposed.[117] In the event, the Working Group on General Principles of Criminal Law was not persuaded by this, and omitted any use of the term "legal person" from its final draft.[118] Thus, the Statute itself only recognizes the natural person.[119] The hope therefore is that this idea will be reintroduced at future sessions, especially considering that Article 123 of the ICC Statute allows for a seven-yearly review conference under which such proposals or other amendments can be put forward. However, whether it will ever become law or not is as much a political matter as a legal one; political because it is difficult to imagine that there will ever be the required seven-eighths majority for it to be adopted, as required under Article 121 of the Statute.

10.8. Further Developments at the Regional and International Levels

There are, however, developments, mainly at the regional level which are strongly indicative of a willingness to hold corporate entities to account outside of the paradigm of municipal criminal law. Admittedly, most of these measures relate to the issue of bribery, which, although clearly a violation of the criminal laws of many countries, is not a direct violation of human rights; except insofar as it is

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[116] See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol.1, G.A., 51st Sess., Supp. No.22, A/51/22, 1996, at p.44, para. 194

[117] See *Proposal Submitted by France to the Committee of the Whole*, UN Doc. A/Conf.183/C.1/L.3 (16 June 1998). Art.25 of the Statute

[118] See UN Doc. A/Conf.183/C.1/WGCP/L.4 (18 June 1998).

[119] See Art.25 of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999, at pp. 1004-1099, The provision states: "The Court shall have jurisdiction over natural persons pursuant to this Statute."

intended to induce the recipient to violate them. Examples include the Council of Europe's Criminal Law Convention on Corruption;[120] the Inter-American Convention Against Corruption;[121] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[122] The most recent of these initiatives is the United Nations Convention Against Transnational Organized Crime, which was opened for signature on 12 December 2000.[123] It defines the international crimes of participation in an organized criminal group, money laundering, corruption, and obstruction of justice,[124] and obliges States parties to establish criminal, civil, or administrative liability for legal persons who commit them. The significant feature of these treaties is that in addition to accepting that corporate entities can incur criminal liability at the international level, they also recognize the need for the imposition of punitive measures. To date, however, no corporate entity has been successfully charged with these crimes.[125]

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120 Opened for signature Jan. 27, 1999, and requires States Parties to "adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering." (See Council of Europe, Criminal Law Convention on Corruption, ETS No. 173, available at http://conventions.coe.int/treaty/EN/searchsig.asp?NT=173&CM=&DF=. As of 30 January 2003, the treaty received 23 signatories, and 20 ratifications/accessions).

121 Opened for signature on 29 March 1996. Art.8 requires States Parties to "prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value." (See 35 I.L.M. 730) Twenty countries have ratified the Convention. (See Organization of American States, Secretary for Legal Affairs, B-58: Inter-American Convention Against Corruption, adopted at Caracas, Venezuela, on 29 March 1996, entered into force on 6 March 1997, available at http://www.oas.org/juridico/english/Sigs/b-58.html. As of 30 January 2003, 28 countries had ratified the treaty.

122 See the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, entered into force on 15 February 1999, available at http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-88-3-no-no-7198-88,00.html Article 1 spells out the elements of the offence thus: "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." Under Art.2, States parties undertake to "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons" for that offence. As of 10 October 2002, it had been ratified by 35 States.

123 See United Nations General Assembly, United Nations Convention Against Transnational Organized Crime, UN Doc. A/RES/55/35, of 8 January 2001. As of 30 January 2003, 147 countries had signed the treaty, while 28 had ratified it. (See United Nations Office on Drugs and Crime, http://www.undcp.org/odccp/crime_cicp_signatures.html)

124 Per Arts. 5, 6, 8, and 23, ibid

125 See, however, *Rex v Acres International Ltd*, CRI/T/2/2002, 13 September 2002, where the defendant, a Canadian company, was convicted by the Lesotho High Court, on two counts of bribery. (The full text of Chief Justice Lehohla's judgement is available on the Probe International website, at http://www.odiousdebts.org/odiousdebts/publications/JugdmentAcres.pdf)

10.9. A Core Set of Human Rights Responsibilities for TNCs?

The case for a mandatory international regulatory regime to govern the conduct of TNCs is obviously premised upon the supposition there is consensus as to what such areas of responsibility should be. To be sure, there have been a number of suggestions in this regard. Sarah Joseph, for example has offered a list of what she calls "substantive human rights duties for MNEs."[126] These include liability for engagement with rights-violating regimes; vicarious liability (i.e., liability for violations committed by their employees); labour rights; and various violations against the ICCPR.[127] For the UN Secretary-General, they include: "poverty alleviation, employment generation and the promotion of social integration, as well as the three core concerns of the Global Compact, namely, the promotion of human rights, labour standards and environmental protection."[128] Indeed, the Secretary-General's list includes "[donating] money, time or staff for benevolent causes..."[129] Even the OECD emphasizes their obligation to "contribute to economic, social and environmental progress with a view to achieving sustainable development."[130] NGOs have also had an input.[131] Moreover, a visit to many of the major corporate websites is sure to reveal a commitment to the notion of Corporate Social Responsibility.[132]

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[126] See S Joseph, "Taming the Leviathans," n.5 above, at p.187

[127] ibid, at pp. 187-199

[128] See United Nations General Assembly, Development of Guidelines on the Role and Social Responsibilities of the Private Sector: Report of the Secretary-General, Doc. A/AC.253/2, of 24 February 2000, at para.47.

[129] ibid, at para.5

[130] See OECD, *The OECD Guidelines for Multinational Enterprises: Text* (Paris: OECD, 2000), at pp.3-8, available at http://www.oecd.org/daf/investment/guidelines/mnetext.htm

[131] See for example, Amnesty International, *Human Rights Principles for Companies*, AI-index: ACT70/001/1998 of 1 January 1998, which argues that "[a]ll companies have a direct responsibility to respect human rights in their own operations." See the Amnesty International website at: http://web.amnesty.org/ See also Human Rights Watch, *World Report 2000*, at http://www.hrw.org/wr2k/Issues-03.htm which, among other things, highlights the role of TNCs within the apparel and footwear industries. Indeed, at the World Economic Forum in Davos on 31January 1999, the UN Secretary-General joined the call for TNCs to take human rights concerns seriously. (See "A Compact for the New Century," available at http://www.un.org/partners/business/davos.htm#speech)

[132] Shell, for example, makes the following claim on its corporate website: "Today our community development programme in the Niger Delta region [of Nigeria] is based on the principles of sustainable development and best global practice. In 2001 we invested over $50 million in health, education, agriculture, job creation, women's programmes, youth training and sponsorship..." (See http://www.shell.com/home/Framework?siteId=nigeria). ChevronTexaco asserts: "In Africa, thousands of high school, college, university and technical students have won company-supported scholarships. ChevronTexaco funds efforts to combat HIV/AIDS, bring electricity to rural villages, build clinics, schools and teacher housing, and improve science education. Other projects provide seed money for local entrepreneurs and skills training for the unemployed." (See http://www.chevrontexaco.com/operations/africa/#community_partners).

Evidently, much of these can be articulated within the paradigm of the IBHR: The introduction of substandard working practices, for example, is not only a violation of Article 7 of the ICESCR,[133] but is also actionable under tortious principles. Similarly, the degradation of the environment directly violates the right to health,[134] and would almost certainly also violate other rights.[135] By contrast, the "obligation" to donate to charitable causes remains within the realms of corporate philanthropy. Indeed, even those that are very much in consonance with the ICESCR may not be enforceable as legal obligations. The "obligation" to generate employment, for example, while reconcilable with Article 6 of the ICESCR, is not enforceable as a right (except in the event that this constitutes a term of the investment contract). By the same token, the alleviation of poverty is not enforceable as such, except when articulated in terms of a right to "just and favourable conditions of work."[136] Indeed, as Michael Todaro rightly points out, "[w]e must recognize that multinational corporations are not in the development business; their objective is to maximize their return on capital."[137] Thus, there is a need to be cautious in articulating the responsibilities of corporate enterprises, as failure to do so carries the risk of confusing moral expectations (however legitimate) with legal obligations. Indeed, this might even be counterproductive insofar as it raises false expectations on the part of the communities concerned, and ultimately undermines any attempt to focus international attention on countries where poor leadership remains the main cause of underdevelopment as well as violations of civil and political rights.[138]

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[133] (which recognizes the right of everyone to the enjoyment of just and favourable conditions of work, including "safe and healthy working conditions")

[134] Per Art.12 of the ICESCR

[135] The pollution may, for example, render agricultural land unusable, thus affecting the right to work (which includes an "opportunity to earn a living by work" under Art.6, ibid); and thus, the ability to pay children's school fees, thus also violating the right to education (per Art.13). Again, these may be actionable in tort, provided the necessary causal connection can be established.

[136] (which includes "fair wages and equal remuneration for work of equal value," actionable under employment legislation).

[137] See: M P Todaro, M P Todaro, *Economic Development*, 7th ed (Harlow, UK: Addison-Wesley, 2000), at p.578; S Skogly, "Economic and Social Human Rights: Private Actors and International Obligations" in M K Addo (ed), *Human Rights Standards*, n.104 above, at p.246, who asserts that "the aim...is to earn as much money as possible and to secure future profits through the free market operation of the economy, both on the national and international levels." See further, M Friedman, *Capitalism and Freedom* (Chicago University Press, 1962), at p.133

[138] Indeed, as noted by Peter Muchlinski, in all the major cases of corporate human rights violations, the host government was "prominently and actively involved." (See P T Muchlinski, "Human Rights and Multinationals," n.83 above, at p.44)

10.10. Conclusion

This chapter began with a simple aim: to present a case for a mandatory international regulatory regime to govern corporate conduct. In the course of the critique, it was acknowledged that various regimes already exist, both at the municipal and international levels, all aimed at achieving the same purpose. It was, nevertheless, concluded that these are inadequate to take account of the amorphous nature of the modern TNC, as well as its pervasiveness and influence. The problem, however, remains that although international law recognizes the liability of the natural person for human rights violations, its position vis-à-vis the corporate person remains a matter of academic debate. Nevertheless, as also argued, this should no longer remain the case, given that many national laws do not recognize this artificial distinction. Whether the proposed change will ever occur is therefore largely a political (and indeed, an economic) question, as opposed to a legal one.

Chapter 11

SUB-SAHARAN AFRICA AND THE PROBLEM OF FOREIGN AID

"In Africa more than in any other region, engagement with the international community has come in the context of aid and debt."[1]

11.1. Introduction

That colonialism was a flagrant violation of Africa's right to self-determination (as well as other categories of civil and political rights) is a self-evident fact.[2] But it also left a legacy of economic underdevelopment. While it is not the aim of this exercise to dwell on the subject of colonialism (not least because it is outside the defined scope hereof), it is difficult to ignore some of the glaring instances which clearly indicate that the underdevelopment of the continent was far from being a mere oversight. For example, after three centuries of Portuguese rule, the only industry that was bequeathed to Guinea Bissau was an old brewery which, in any event, had been built to serve the colonial troops stationed in the country.[3] They also left behind 14 university graduates, and an illiteracy rate of 97 percent.[4] The British were comparatively more generous, leaving two more graduates in Tanzania than the Portuguese did in Guinea Bissau;[5] and 100 in Zambia. In Mozambique, the Portuguese, again, left only five employees at its education ministry who were literate, with a 23-year old Minister.[6] The people of Belgian-colonized Congo fared no better. As a World Bank study points out, they only inherited "a handful of university graduates," with a recipe for civil conflict, for good measure.[7] These, then, provide

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[1] Per World Bank, *Can Africa Reclaim the 21st Century?* (Washington DC: World Bank, 2000), at p.235

[2] The right to self-determination in this context would have been as proclaimed in Art.1(2) of the UN Charter, as opposed to that adopted under Arts.1 of the two Covenants, which were only adopted in1966, ironically some years after the process of decolonization had begun in Africa.

[3] See D Lamb, *The Africans* (New York: Random House, 1983), at p.5

[4] ibid. In an ITV documentary aired on 25 August 2002 at 1310 hours, veteran reporter Michael Nicholson reported a deliberate and spiteful destruction of the Angolan infrastructure by departing Portuguese authorities and nationals, who even emptied the hospitals of vital medicines and equipment.

[5] Per D Lamb, ibid.

[6] See S George, *A Fate Worse Than Debt* (London: Penguin Books, 1994), a pp.86 and 87.

[7] See S Devarajan et al (eds.), *Aid and Reform in Africa: Lessons From Ten Case Studies* (Washington DC: World Bank, 2001), at p.630; the recipe for conflict being the imposition of an individual who not only promptly assassinated the country's Prime Minister, but became an embodiment of economic marginalization, brutality,

the backdrop for the discussion of the question of foreign aid in SSA, and make it easy to appreciate why it became a central element in Africa's quest for economic development. It would, however, be unfair to suggest that it was only in the context of African development that aid became such a necessity; as will be pointed out below, aid has been a central component of economic development globally for a considerable period of time.

11.2. Foreign Aid: A Brief Historical Perspective

It is impossible to state with any degree of certainty, when the world's first aid disbursement might have taken place, although according to a World Bank study, development assistance is only about 50 years old.[8] It is however possible to highlight some past instances of countries offering some form of assistance to others. The United States government, for example, granted aid to Venezuela as early as the 19th century through the Relief of the Citizens of Venezuela Act 1812; while the UK's Colonial Development Act of 1929 authorized the extension of loans and grants for infrastructural projects in its colonies, albeit only as a way of obtaining inputs for British industry.[9] In 1940, however, the Colonial Development and Welfare Act allowed for the funding of social sector activities.[10] President Truman's Four-Point Programme of January 1949, which extended technical assistance to developing countries was replicated by the British government in the same month, through the Colombo Plan which called for cooperation between rich and poor countries within the Commonwealth.[11] Two months later, the UN created the Expanded Programme of Technical Assistance (EPTA) – a forerunner of the UNDP.[12]

The various landmark events in world history have also influenced the flow of aid. For example, the Second World War and the need for European reconstruction in the 1940s gave rise to the Marshall

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and large-scale plundering of his country's resources.

[8] See D Dollar and L Pritchett, *Assessing Aid: What Works, What Doesn't, and Why – A World Bank Policy Research Report* (Oxford: Oxford University Press, 1998), at p.115

[9] See P Hjertholm and H White, "Foreign Aid in Historical Perspective: Background and Trends," in F Tarp and P Hjertholm (eds), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000), at pp.81-82

[10] ibid

[11] See N van de Walle, *African Economies and the Politics of Permanent Crisis, 1979-1999* (Cambridge, UK: Cambridge University Press, 2001) at p.191

[12] ibid

Plan,[13] while the post-war years saw the establishment of such NGOs as Oxfam and CARE.[14] The subsequent emergence of Soviet influence in the 1950s heralded an increase by the US government, of food aid and project assistance to developing countries.[15] Indeed, it is axiomatic that the defining feature of the cold war itself was the scramble for political and economic influence in the developing world by the superpowers, through the provision of military aid, as well as development assistance.[16] In the former colonies, the process of decolonization also had an impact on the flow of aid, if only because decolonization had exposed the stark realities of the economic conditions in the countries concerned, and the need for comprehensive development assistance.[17]

Very few commentators would therefore dispute the potential benefits of foreign aid to a developing economy. Indeed, one only has to look back at the Marshall Plan and its universally acknowledged impact on European reconstruction to realize how effective it can be. It is therefore a testament to Africa's state of chaos that this universal catalyst for development has in fact become one of the obstacles to its development,[18] as the following critique aims to illustrate, beginning with an explanation of the concept of aid itself.

11.2.1. The Nature of Foreign Aid

Like many other concepts in economic theory, foreign aid is frustratingly difficult to define. Indeed, considering how difficult it is to offer an all-embracing and satisfactory definition, it is doubtful whether

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[13] See P T Muchlinski, *Multinational Enterprises and the Law* (Oxford, UK and Cambridge, Mass.: Blackwell Publishers, 1999), at p.26. See also E S Mason and R E Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and the Other Members of the World Bank Group* (Washington DC: Brookings Institution, 1973), at p.239; and P Hjertholm and H White, "Foreign Aid in Historical Perspective," n.9 above, at p.81

[14] Per P Hjertholm and H White, ibid, at p.82

[15] ibid, at p.81

[16] See C J L Collins, "Congo/Zaire" (June 1997), *Foreign Policy in Focus*, vol.2, no.37, at pp.1-2, according to whom the US government directly supported Mobutu with close to $150 million in secret payments and bribes channelled through the CIA, as well as $1.03 billion in development aid, and $227 million in military assistance. It is also pointed out that Mobutu was recruited because of US fears that the democratically elected Prime Minister Lumumba, was willing to accept Soviet aid.

[17] See A Cassese, *International Law in A Divided World* (Oxford: Clarendon Press, 1986), at p.355

[18] A World Bank study highlights this fact by asserting: "In aid-dependent countries donors sometimes alleviate, but too often worsen, the problem of weak central capacity." (See World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.83.

such an attempt is a worthwhile exercise. Nevertheless, according to the *Penguin Dictionary of Economics* it is "[t]he administered transfer of resources from the advanced countries for the purpose of encouraging economic growth in the developing countries."[19] Although this represents a broadly accurate definition, it is nevertheless as misleading as the word "donor," at least insofar as it suggests that such transfers are always of the charitable or humanitarian kind.

Jagdish Bhagwati defines it in terms of flows of capital to poor countries which satisfy the following two criteria:

- that its objectives be non-commercial from the donor's perspective; and
- that its terms be concessional (i.e., that any accruing interests are lower that what is commercially available).[20]

Again, the flaw in this definition is that it would include military aid which has in fact proved detrimental to the development needs of many African countries, and which, in any event, is usually excluded from development statistics, as noted by Michael Todaro,[21] whose definition appears to be the most accurate of the three. Todaro defines it as "all official grants and concessional loans, in currency or in kind, that are broadly aimed at transferring resources from developed to less developed nations on development or income distribution grounds."[22] The difference between this and the first definition, therefore, is that it sufficiently highlights its non-charitable nature. For the purpose of this exercise, aid is understood as all transfers of resources, loans, or grants, whether of the humanitarian, bilateral, or multilateral kind from rich to poor countries for the purpose of economic development.

Still, it is necessary to highlight the important distinction between humanitarian aid (which is mainly administered by the NGOs), bilateral aid (i.e., aid given by one government to another), and multilateral aid (which is controlled by such agencies as the IFIs, as well as other agencies directly affiliated with the UN such as the FAO and the High Commissioner for Refugees). The critique that follows is primarily concerned with aid of the bilateral/multilateral kind, although given the depressing economic

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[19] See G Bannock et al (eds.), *The Penguin Dictionary of Economics*, 6th ed(London: Penguin, 1998), at p.161
[20] See J N Bhagwati, "Amount and Sharing of Aid," in C R Frank et al (ed.), *Assisting Countries: Problems of Debt, Burden-Sharing, Jobs, and Trade* (New York: Praeger, 1972), at p.73.
[21] See M P Todaro, *Economic Development* (Harlow, UK: Addison Wesley Longman, 2000), at p.591
[22] ibid.

circumstances in much of the continent (and the fact that humanitarian assistance has become a permanent feature in certain countries), it is doubtful as to whether such a distinction serves any useful purpose.

11.2.2. Foreign Aid: The Usual Motivations

Given that aid is not always driven by charitable motives, it is necessary to examine the main reasons why governments offer what they might call development assistance to poor countries. According to a World Bank study, all aid is ultimately aimed at promoting growth and reducing poverty, whatever the immediate objectives.[23] However, Todaro casts doubts on this by noting that although some development assistance may be motivated by moral and humanitarian desires, "there is no historical evidence to suggest that over...time, donor nations assist others without expecting some corresponding benefits...in return."[24] Nevertheless, some of these immediate motivations can be said to include:

- Altruistic/humanitarian concerns;
- Foreign policy, political, or commercial considerations: The dynamics of the cold war dictated that aid was given by both sides as a way of gaining ideological influence in the developing world, just as former imperial powers used it to maintain links with their former colonies. It is also often given as a way of promoting FDI in the recipient country, hence the idea of tied aid. Raymond Hopkins explains that foreign aid is sometimes determined by the economic interests of powerful groups within the donor country, through the influence they exert on the executive and legislative branches of their government.[25]
- Economic development: Aid can also be given for developmental purposes. This can either be aimed directly at such goals as poverty alleviation, gender equality, or for the creation of conducive markets in the recipient country.[26]

11.3. Aid and Sub-Saharan Africa

Official (multilateral) aid flows to SSA began in earnest during the 1980s following the debt crisis, which prompted the cessation of lending from commercial sources to the region. As noted in chapters 4 and 5, the intervention of the IFIs thus became the only way of saving the countries concerned from virtual

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[23] See D Dollar and L Pritchett, *Assessing Aid*, n. 8 above, at p.28.

[24] See M P Todaro, *Economic Development*, n.22 above, at p.595

[25] See R F Hopkins, "Political Economy of Foreign Aid" in F Tarp and P Hjertholm (eds.) *Foreign Aid and Development*, n.9 above, at p.424

[26] See S Robinson and F Tarp, "Foreign Aid and Development: Summary and Synthesis," in F Tarp (ed.) *Foreign Aid and Development*, ibid, at p.2; and M P Todaro, *Economic Development*, n.22 above, at p.595. See further, A Alesina and D Dollar "Who Gives Aid to Whom and Why?" (June 1998), *National Bureau of Economic Research Working Paper*, No.W6612 for a more extensive discussion.

bankruptcy. Although this should have been a welcome intervention, the policies the IFIs prescribed effectively turned the region into a laboratory for a dangerous experimentation with a development model that even the richest countries had always shielded their economies from – a model which de-emphasized the role of governments, and by the implicit admission of the then IMF Managing Director, effectively penalized the poor for their misery.[27] Indeed, apart from the policies themselves (which have been examined in chapter 4), the nature of the assistance offered left much to be desired. For example, according to former World Bank Chief Economist for the Africa Region and an architect of the HIPC initiative, "much of the aid inflows are motivated simply to ensure 'normal relations' with regular debt servicing."[28] An UNCTAD report notes: "The more debt service payments a country has to make, the more official finance it receives."[29] It follows therefore that the better a country performs in terms of debt repayment, the less it was able to attract in terms of concessional assistance.[30] The flow of aid was thus dictated by how beneficial it was to the IFIs themselves (and presumably to the commercial lenders too), as opposed to the extent to which it facilitated the process of economic development.

According to the same account, the usual response to the debt-servicing difficulties experienced by debtor countries has been to maintain a sufficient flow of new loans as a way of ensuring the continuous servicing of past debts – a situation which continues even under the HIPC scheme, except where such countries reach their "decision point," at which stage they begin to receive interim assistance.[31] This "defensive disbursements," it is explained, enables creditors to conceal embarrassing arrears in their records,[32] which, according to Claessens et al, explains their unwillingness to agree to total debt relief, as this would be seen as "a large accounting loss" which might adversely affect their reputation within

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[27] See *IMF Survey*, 29 June 1987, at p.195. According to Michel Camdessus, it was the poor who "too often...carried the heaviest burden of adjustment." For a similar acknowledgment by the World Bank, see: World Bank, World Development Report 1990: Poverty (Oxford University Press, 1990), at p.103; and IBRD, *Sub-Saharan Africa, From Crisis to Sustainable Growth: A Long Term Perspective Study* (Washington DC: IBRD, 1989), at p.21.

[28] See R Kanbur, "Aid, Conditionality and Debt in Africa" in F Tarp and P Hjertholm (ed), *Foreign Aid and Development*, n.25 above, at p.421.

[29] See UNCTAD, *The Least Developed Countries Report 2000 – Aid, Private Capital Flows and External Debt: The Challenge of Financing Development in the LDCs* (New York and Geneva: United Nations, 2000), at pp.124 and 125

[30] ibid

[31] See ibid, at p.123. The mechanics of the HIPC scheme are explained in chapter 5.

[32] ibid

the financial markets.[33] Thus, except for outright grants and humanitarian assistance, the reality of multilateral aid is nothing more than a cynical and devious exploitation of the poor by the rich and powerful. It comes as no surprise therefore, that for SSA, the accumulated arrears on interests and principal payments reached $64 billion in 1996 – about 27.4 percent of its total debt at the time; or that two-thirds of the increase in debt since 1988 has been due to arrears.[34]

11.3.1. Aid Flows in Context

Before highlighting the phenomenon of aid-dependency in SSA, it is necessary to point out that overall aid flows to the region declined by an estimated 24 percent in real terms between 1990 and 1996,[35] a trend which has accelerated to 40 percent within the past decade.[36] This, however, is understandable, given that as noted above, some of the usual reasons for the giving of aid no longer exist. Indeed, with the cold war now over, it is doubtful whether Africa still has any real strategic importance to any of the rich countries, except perhaps to the Bush Administration in its so-called war against terrorism. It is, however, also possible that donors have simply become apathetic to giving aid. If this is in fact the case, it should also come as no surprise, given that aid has, at best, had virtually no impact at all, or at worst, been counterproductive in Africa. For example, humanitarian agencies (or even bilateral donors) would be justified in wondering why there should be yet another human catastrophe in southern Africa in spite of past aid flows to the region;[37] or indeed, why the same human tragedy that prompted the much-publicized Live Aid appeal for Ethiopia in 1984 should be recurring almost two decades afterwards.[38]

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[33] See S Claessens et al, "Analytical Aspects of the Debt Problems of Heavily Indebted Poor Countries," in Z Iqbal and R Kanbur (eds.), *External Finance for Low Income Countries* (Washington DC: IMF Institute, 1997) at pp.32-33. Indeed, the IFIs have rejected the idea of total debt relief in a recent joint statement. (See IMF, "100 Percent Debt Cancellation? A Response from the IMF and the World Bank," July 2001, at http://www.imf.org. Part of the statement reads thus: "Total debt cancellation for those countries alone would come at the expense of other borrowing countries, including those non-HIPCs which are home to 80 percent of the developing world's poor. Those who call for 100 percent cancellation for the HIPCs alone, must recognize that this would be inequitable for other poor countries."

[34] See UNCTAD, *African Development in a Comparative Perspective* (Geneva: UNCTAD, 1998/1999), at p.15

[35] See S A O'Connell and C C Soludo, "Aid Intensity in Africa," paper presented at the Africa Economic Research Consortium/Overseas Development Council conference titled "Managing the Transition from Aid Dependency in Sub-Saharan Africa," Nairobi, 21-22 May, 1998, at p.2

[36] See The World Bank Group, *World Bank Brief: Sub-Saharan Africa 2002*, which also notes (at p.4) that official aid now stands at $13.5 billion.

[37] According to latest reports, up to 14 million people are affected by famine in Southern Africa (See "Africa

11.3.2. The Nature of Aid Dependency

The nature of Africa's aid-dependency is cogently summed up thus by Ravi Kanbur: "Africa is aid dependent, some African countries grotesquely so..."[39] The region's aid-dependency takes various forms. From the ludicrous dedication, by Senegalese officials, of endless man-hours, in return for a paltry sum of $38,957 from the Finnish Ministry for Foreign Affairs and Development Cooperation in 2001, to the production, by the Tanzanian government, of more than 2,400 reports annually for its various donors (who in turn send some 1000 missions the country each year);[40] from endless debt rescheduling rounds upon which some officials have built enviable careers, Africa has become plagued by this most debilitating dependency – a dependency that has led to the virtual abandonment, by governments, of their basic functions to aid agencies. For example, drawing on his extensive knowledge of the region, Nicolas van de Walle points out that between 1990 and 1995, aid represented over 50 percent of government revenue in SSA, and 71 percent of its public investment.[41] He further notes: "In many countries in the region, virtually the entire nonrecurrent component of the budget as well as large

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Famine to Last Into 2004," 7 January 2003, at http://news.bbc.co.uk/1/hi/world/africa/2635089.stm Draught or not, the conduct of the region's rulers must remain the cause of this human catastrophe. Apart from the fact that Mugabe has effectively outlawed food production in his country in the name of land reform, As Malawi's ministers were blaming the IMF for ordering the sale of the country's grain stock, little did the world realize that it was in fact these same officials who had taken that decision, purely for personal enrichment. (See BBC, "UN Criticises Handling of Malawi Crisis," Ceefax page 107, 26 December 2002). Indeed, the IMF has categorically denied ever advising the Malawi government to adopt such a measure. In response to a letter published in the *Irish Times* of 28 August 2002, the IMF stated that it merely agreed with a study conducted by the government, which recommended the partial sale of its stock as a way of releasing funds for healthcare and education. Indeed, it was revealed that government officials apparently appropriated the entire stock, prompting a criminal enquiry by the country's prosecuting authorities. (See IMF, "IMF and Malawi Grain Reserves: A Letter to the Editor," by Thomas C Dawson, Director, External Relations Department, International Monetary Fund, *Irish Times*, September 6, 2002, available at http://www.imf.org/external/np/vc/2002/090602.htm. For a more detailed account, see IMF, "Malawi – The Food Crises, the Strategic Grain Reserve, and the IMF," a Factsheet, July 2002, at http://www.imf.org/external/np/exr/facts/malawi.htm

[38] See "Red Cross Launches Ethiopia Famine Appeal," 11 November 2002, at http://www.guardian.co.uk/famine/story/0,12128,838011,00.html. The so-called Prime Minister of Ethiopia is reported to have stated: "The disaster we had in 84-85, the number involved was roughly a third to one half of the number of people involved now. So if that was a nightmare, this will be too ghastly to contemplate." What makes his appeal for aid so unpalatable is the fact that as pointed out in chapter 13, it was this same ruler who wasted the country's scarce resources on a most senseless war with neighbouring Eritrea only a few years ago - resources that almost certainly would have provided sufficient grain storage facilities, given that drought in the region is not an unknown phenomenon.

[39] See R Kanbur, "Aid, Conditionality and Debt in Africa," in F Tarp and P Hjertholm (eds.), *Foreign Aid and Development,* n.28 above, at p.409

[40] See W Easterly, "The Cartel of Good Intentions," *Foreign Policy*, at http://www.foreignpolicy.com/issue_julyaug_2002/Easterly.html

[41] Per N van de Walle, *African Economies*, n.11 above, at p.220

parts of the recurrent budget were financed by the donors."[42] And he adds: "It was not unusual for forty-odd bilateral and multilateral donors plus twice that many Western NGOs to be implementing over a thousand distinct aid activities, and essentially dominating if not taking over key governmental functions."[43]

Kenya offers an example of this tragedy. Having gained notoriety as the nerve-centre of donor activities in the East African sub-region, the country is believed to have received more foreign exchange from the UN's presence there than from horticulture, tourism, coffee, and petroleum products, with some 23 UN offices in Nairobi, which generated an estimated $350 million annually in the late 1990s, including $130 million in salaries to the 1291 national, and 922 international staff employed by the agencies.[44]

In Tanzania, donors were implementing no fewer than fifteen projects in the health sector alone in the early 1990s, each with its own administrative, logistical, and auditing machinery, beside the civil service;[45] while Malawi's agricultural sector alone had up to 44 separate projects.[46] Guinea's primary education sub-sector received assistance from numerous sources in the mid-1990s, including UNESCO, UNICEF, the World Bank, the African Development Bank, the EU, the Agence de Cooperation Culturelle et Technique (ACCT), the Peace Corp; while also receiving bilateral aid from the United States, France, Japan, and Canada.[47] In Mali, a World Bank study reveals that the government did not allocate any budgetary resources towards primary healthcare and health education programmes in 1997 because these were being funded entirely by external donors.[48] A similar study found that

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[42] ibid

[43] ibid. See also M Robinson and G White, "The Role of Civic Organizations in the Provision of Social Services," UNU/WIDER Research for Action Paper no.37 (1997), at pp.9-13, who note that in many countries of the region, the role of the State vis-à-vis social provisions has become subordinated to that of NGOs, just as in the days of colonial rule when Christian missionaries had assumed the some of the responsibilities of the government.

[44] See "UN Presence Keeps Kenyan Economy Afloat," *Financial Times*, London, January 15, 2000, at p.5

[45] See M Bagachwa et al, *A Study of Danish Aid Effectiveness in Tanzania* (Dar Es Salaam: Economic Research Bureau and the Social and Economic Research Foundation, 1996).

[46] See E J Berg, *Rethinking Technical Co-operation* (New York: UNDP, 1993) at p.132

[47] See N van de Walle, *African Economies*, n.43 above, at p.203 (footnote omitted).

[48] See World Bank, *The World Bank and Health Sector in Mali: An OED Country Sector Review*, Report no. 18112 (Washington DC: World Bank, 1998) at p.31

nearly all the capital projects in the public health sector throughout the region were funded by donors during the 1990s.[49]

As Kanbur also points out, "for too much of the time [Africa's] policymaking and implementation energies are devoted to interacting with external donor agencies...more often simply doing routine business of reporting to donors, servicing donor consultants..." which, he argues, represents a long a tedious distraction, and ultimately undermines the logic of domestic political economy.[50] Indeed, according to a World Bank study, between 1980 and 1986, 25 SSA countries rescheduled their debts with the Paris Club some 105 times,[51] which suggests that this had become a full time preoccupation by the officials concerned. Nicolas van de Walle puts it thus: "A small number of officials in Ghana's Ministry of Finance and Central Bank have been able to achieve a degree of notoriety from their central role in negotiations with the donors..."[52] Incidentally, the independent experts appointed to evaluate the impacts of adjustment programmes also noted how influential the Zimbabwean Finance Minister had become – so much so that whenever he was not personally available for negotiations with IMF missions, "the government appeared rather unprepared and unable to present a credible and consistent view-point."[53]

Aid-dependency also manifests itself in the way that African rulers perceive the nature of international economic relations. The thinking appears to be that soliciting for aid is the main function of government. As recent events have shown, they have become inured to the indignity of parading themselves at every international forum, often in return for a mere photo opportunity, token promises, or barely-concealed derision from potential donors. Astonishingly, it was Nigeria's Obasanjo – a man who has come to earn

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[49] See D H Peters et al, *Health Expenditures, Services and Outcomes in Africa* (Washington DC: World Bank, 1999) at p.14

[50] See R Kanbur, "Aid, Conditionality and Debt in Africa," in F Tarp and P Hjertholm, *Foreign Aid and Development*, n.39 above, at p.419

[51] See World Bank, Operations Evaluation Department, *The Special Programme of Assistance for Africa: An Independent Evaluation* (Washington DC: World Bank, 1997), at p.24

[52] See N van de Walle, *African Economies*, n.47 above, at p.227. See also, T Callaghy, "Lost Between State and Market: The Politics of Economic Adjustment in Ghana, Zambia, and Nigeria," in J Nelson (ed.), *Economic Crisis and Policy Choice: The Politics of Economic Adjustment in the Third World* (Princeton, New Jersey: Princeton University Press, 1990).

[53] See K Botchwey et al, *Report of the Group of Independent Persons Appointed to Conduct an Evaluation of* Certain Aspects of the Enhanced Structural Adjustment Facility (Washington DC: IMF, 1998), at p.109

the reputation of "the flying president" in his country because of his evident addiction to foreign travel – who is reported to have stated: "In three years, I went round the world and I didn't get anything...From April 1999, I went round the countries in Europe, twice over, I went to Japan, to America, to Canada and got good words...but no action at all."[54]

It might therefore have been expected that such a humiliating experience would persuade him to stay at home and attempt to address some of his country's pressing and very basic problems.[55] Instead, it appears only to have strengthened his resolve; hence his arrival, with fellow African rulers (including South Africa's Thabo Mbeki) at the 2002 G-8 Summit in Canada with a supposedly new initiative called the New Partnership for African Development (NEPAD).[56] As should have been obvious to any discerning observer, however, the G-8 had more pressing issues to address. Apart from the usual economic concerns of the G-8, Russia needed help with its nuclear decommissioning programme, hence, the so-called "10 plus 10 over 10" initiative.[57] The presence of African rulers, though welcome

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[54] See "Nigeria Struggles Under Weight of Foreign Debt: Michael Peel Analyses Why President Obasanjo's Efforts to Win Relief on 28bn Dollars of Foreign Debt Have So Far Come to Nothing," *Financial Times*, USA Edition, 26 July, 2002, at p.8. Astonishingly, this was confirmed by his economic adviser Magnus Kpalkol on the BBC "Newsnight" programme of 2 September 2002.

[55] A good starting point in this regard might be, for example, the establishment of a public service machinery or in some cases, not undermining what already exists through petty political patronage, clientelism, or corruption, as highlighted in a World Bank study which highlighted, for example, the absence of a basic capacity to assess the viability of policy options in such countries as Nigeria, Tanzania, and Guinea. (See World Bank, *World Development Report 1997*, n.18 above, at pp.83-84).

[56] NEPAD represents an excellent illustration of the attitude of the region's rulers towards their people's emancipation. As its proponents have pointed out on many occasions, its main selling point is its so-called peer review mechanism. Just two months after receiving the needed "validation" from the G-8 leaders, Mugabe presented his peers with a simple test: He violated every imaginable aspect of his people's basic rights both before and after holding what was certainly a travesty of free and fair elections. Predictably, the response from his peers was a deafening silence, until, to the astonishment of the global community, Sam Nujoma of Namibia launched a most preposterous tirade, on live television, at the World Summit on Sustainable Development in Johannesburg against the person of Prime Minister Blair, blaming him for Zimbabwe's problems, to the rapturous applause of other African rulers and their delegates. (See R Dowden, "Why Blair's Missionary Message Flopped With African Leaders, *The Observer*, 8 September 2002, at http://www.observer.co.uk/comment/story/0,6903,788018,00.html). Indeed, according to a BBC report, a South African minister recently stated that peer review "would concentrate on the economy, not governance." (See B Philips, "Problems Thwart Africa's Big Plan," 16 January 2003, at http://news.bbc.co.uk/1/hi/world/africa/2664913.stm. Thus, like others before it, the NEPAD is already becoming a predictable fiasco. For a more optimistic assessment of the "initiative," however, see N J Udombana, "How Should We Then Live? Globalization and the New Partnership for Africa's Development" (2002) *20 B.U. Int'l L.J. 293*.

[57] Under this scheme, Russia would receive $10 billion from the United States, and the same amount from other G-8 members, over a ten-year period. (See P Reynolds, "G8 Analysis: Peanuts or Progress?" at http://www.bbc.co.uk

because of its evident media value,[58] was otherwise an irritating distraction. In the event, they were sent away, like errant schoolchildren, with mere promises of future assistance, to be based however, on their proven commitment to *their own initiatives*.[59] Predictably, the humanitarian NGOs could not conceal their anger and disappointment: Africa, they pointed out, had been let down yet again by the rich industrialized countries.[60] Their evident best intentions notwithstanding, what these agencies have failed to explain is why Africa deserves more help than anywhere else on earth.

11.3.3. African Leadership and Aid Dependency

It could be argued that Africa's aid-dependency simply reflects a realization on the part of the donors, of the pressing need for assistance, by the countries concerned. Indeed, there is a case for stating that the reason behind the proliferation of aid is simply a function of poor coordination among the donors, as opposed to a culture of dependency on the part of the recipients, who, in any case, are in no position to be selective as to whom to receive assistance from. The reality, however, is that much of the listed projects were implemented outside of the machinery of the public service in each of these countries because of an inability on the part of the recipient governments' institutions to coordinate their effectiveness, through the setting of appropriate parameters and sensible developmental goals.[61] Indeed, a World Bank study which examined the effectiveness of State institutions in various countries across the world highlights this problem in these terms: "It is in sub-Saharan Africa that the deterioration in the state's effectiveness has been most severe – the result of eroding civil service wages, heavy dependence on aid, and patronage politics."[62] The result, is further revealed, is that the majority now

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[58] Being seen to be "doing something for Africa" is, after all, a way of mollifying such interest groups as the liberal media establishment and public opinion, as well as NGOs within their domestic political arenas.

[59] See G8, Kananaskis Summit, Canada 2002, G8 Africa Action Plan, available at http://www.g8.gc.ca/kananaskis/afraction-en.pdf

[60] Andrew Mendleton of Christian Aid reportedly told the BBC: "The meeting has not solved the 'leaking bucket syndrome' in which aid to Africa leaks out in debt repayments." (See P Reynolds, n.57 above).

[61] See N van de Walle, *African Economies*, n.52 above, (particularly at pp.204-206). In contrast, an example is given of Botswana, where, because of its purposeful leadership and sound policy goals, aid has had the opposite effect to what obtains in many other African countries.

[62] See World Bank, *World Development Report 1997*, n.55 above, at p.162

have lower "state capability" than they did at independence.[63] Thus, it becomes safe to conclude that leadership (or lack of it) remains the cause of this deplorable state of affairs.

11.3.4. The Charade of Countless "Initiatives"

There is a discernible connection between what might be described as a burgeoning "initiatives" industry at the international level, and Africa's aid-dependency, although it is difficult to analyse the two in terms of cause and effect. What is inescapable, however, is the almost ritualistic charade of countless "initiatives" that have been formulated by both the international donor community and African rulers over the decades; initiatives which evidently have become a substitute for poverty alleviation.[64] Even the leaders of the G-8 were not unmindful of this, hence their statement at their 2002 summit in Canada which noted that "[t]he many initiatives designed to spur Africa's development have failed to deliver sustained improvements to the lives of individual women, men and children throughout Africa."[65] Africa's aid-dependency has thus coincided with the interests of donor governments and agencies in the industrialized countries, a symbiotic relationship that can only be to the advantage of one party.[66] In the

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[63] ibid. A subsequent report by the Financial Times on the state of the civil service in Nigeria's glittering new capital describes a "sleek, modern exterior of the Federal Secretariat [which] creates an impression of busy efficiency," but is in fact a "sclerotic system in which little is possible without either contacts or bribery." The report adds: "Increasingly, however, but for the most well-connected and established operators, even devices such as these cannot bypass the capacity problems that the civil service can no longer hide." (See A Goldman, "Survey: Nigeria," *Financial Times*, London, 30 March 2000, at p.10).

[64] Because of their sheer number, it is impossible to list all of these initiatives. Also, it is necessary to acknowledge that their supposed beneficiaries are not only the countries of Africa, although given that the most of the poorest countries in the world are in the region, it becomes safe to argue that they are essentially designed with Africa in mind. Nevertheless, the following represent a snapshot of these initiatives: the World Bank's Comprehensive Development Framework; the Special Facility for Africa (SFA), which was soon replaced by the Special Programme of Assistance to Africa (SPA); the UN's Strategic Compact; the HIPC initiative; the Poverty Reduction and Growth Facility; the Global Coalition for Africa; the UN's Millennium Declaration; the UN's System-wide Special Initiative for Africa (UNSIA); the United Nations Programme of Action for African Economic Recovery and Development (UN-PAAERD), now succeeded by the New Agenda for the Development of Africa (UN-NADAF); the Tokyo International Conference on African Development (TICAD); Commitment 7 of the Copenhagen Declaration on Social Development; and various G-7/G-8 Summits. In addition to these are what the WTO describes as a "universe of special and differential treatment," some of which have been highlighted in chapter 7. (See WTO Secretariat, *Note on Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc. WT/COMDT/W/77, of 25 October 2000, at p.3)

[65] See the G8 Africa Action Plan, n.59 above, at p.1. Indeed, the UK's International Development Secretary, Clare Short could barely conceal her irritation on the BBC television programme "Hardtalk" regarding a recent food conference organized by the Catholic NGO, Cafod. Asked why she had not attended, Ms Short's response was that there had been just "too many summits" of late. (The programme, presented by Tim Sebastian on BBC 2, was aired on 5 October 2002, at 0910 hours).

[66] This relationship is described in great depth by Graham Hancock in his insightful book. (See G Hancock, *Lords*

meantime, these "initiatives" have replaced any genuine quest by African rulers, for practical solutions that are capable of ameliorating the suffering of ordinary Africans.[67]

11.3.5. Africa's Response

As if not to be outdone, African rulers have matched each initiative with one or more of their own, formulating – or in some cases reformulating – an impressive number of apparently laudable developmental goals, which have come to epitomize their collective sense of escapism, in some cases childishly parodying Western institutions such as the EU. Hence, the OAU has now been re-branded the African Union (or AU), the aims of which, like the EU, include the establishment of a single currency, a court of justice, a Parliament, and everything else that has been achieved by its European counterpart.[68] Quite how such lofty aims are to be achieved by countries which, as already pointed out, have no functioning State institutions or basic infrastructure has, predictably, never been explained. Nevertheless, others include the 140-page Lagos Plan of Action (which, like NEPAD, was supposed to be the framework for the elimination of poverty *by the year 2000*);[69] the 1989 Alternative African Framework to Structural Adjustment Programmes for Socio-Economic Recovery Transformation (AAF-

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of Poverty: The Freewheeling Lifestyles, Power, Prestige and Corruption of the Multibillion Dollar Aid Business (London: Mandarin, 1991)

[67] One such initiative might be the restoration, or in some cases, the establishment, of *effective* State institutions (e.g., the civil service) which are capable of translating policies into visible results. In its 2000 Poverty Report, the UNDP stated thus: "Effective governance is often the 'missing link' between national anti-poverty effort and poverty reduction. For many countries, it is in improving governance that external assistance is needed." (See UNDP, *Poverty Report 2000: Overcoming Human Poverty* (New York: UNDP, 2000), at p.9)).

[68] See Constitutive Act of the African Union, adopted by the African Heads of State and Government in Lome, Togo, 11 July 2000 (CAB/LEG/23.15) at http://www.dfa.gov.za/for-relations/multilateral/treaties/auact.htm. The 2001 OAU summit which also launched the creation of the AU is reported to have cost $20 million, with the road from Lusaka (Zambia) having been hastily tarmarced for the fleets of Mercedes limousines specially imported from Europe for the occasion. Delegates were even issued with free mobile phones. (See D Walsh, "Divided by War, But Africa's Big Men Put on Show of Unity," *The Independent*, London, 10 July 2001, at p.3 et seq. Indeed, the very idea behind the proclamation of he region's human rights instrument, the African Charter, was evidently predicated upon this same penchant for parodying the West, given that the majority of the very rulers who celebrated its ratification were either unrepentant tyrants, *kleptocrats*, or both, whose domestic policies and conduct were evidently at odds with its principles. (For the text of the Charter, see the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5 (entered into force 21 October 1986), reprinted in 21 I.L.M 58 (1982)). For an excellent critique of the AU, see N J Udombana, "Can the Leopard Change Its Spots? The African Union Treaty and Human Rights," (2002) *Am. U. Int'l L. Rev.1177.*

[69] See Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980-2000, Addis-Ababa, Ethiopia (adopted by the Assembly of Heads of State and Government of the OAU, Second Extraordinary Summit, Lagos, Nigeria, 28-29 April 1980).

SAP); the Cairo Agenda of 1995, the Millennium Partnership for the African Recovery Programme (MAP),[70] the Omega Plan, the Abuja Declaration, and others (with matching acronyms) too numerous to mention. The consequence of these has been that Africa's domestic political economies have become a hostage to the perverse logic of these "initiatives," eroding any realistic hope of the region's economic emancipation.

11.4. Conclusion

This chapter began by highlighting the fact that Africa began its post-independence existence with the scars of injuries inflicted by colonialism. It thus acknowledged that aid was just as essential to its development as it was (or has been) for many other regions of the world. It however became clear that far from being a catalyst for development, aid has become one of its main impediments. The regrettable fact is that this state of affairs is a direct function of the surrender, by the region's rulers, of basic governmental functions, to the numerous aid agencies that have, consciously or otherwise, turned the region into a laboratory for countless initiatives. This, however, poses a definite danger to the long-term interests of the indigent people of Africa: As a World Bank study points out, "[a]id is no longer business as usual," the reason being that "[p]olitical support is waning."[71] Thus, "aid weariness" appears to be gripping the donor community. It is not clear which aspect of foreign assistance is most affected by this "weariness." What is clear, however, is that there is a very real danger that such apathy might spread to the humanitarian sector, which, regrettably, has come to represent the only lifeline for the people of the region.

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[70] See United Nations Economic Commission for Africa, "Compact for African Recovery: Operationalising the Millennium Partnership for the African Recovery Programme" Addis Ababa, 20 April 2001, at http://www.uneca.org/nepad/ (The so-called NEPAD is supposed to have resulted from this "initiative").

[71] See World Bank, *Can Africa Claim the 21st Century?*, n.1 above, at p.236

Chapter 12

SUB-SAHARAN AFRICA, THE DEBT CRISIS, AND INTERNATIONAL LAW

12.1. Introduction

In the preceding chapters, Africa's peripheral status in relation to the global economy was discussed. Nothing illustrates this state of affairs better than its crippling debt burden and aid-dependency. With available data already indicating that it is already destined to miss the 2015 targets set out in the UN's Millennium Development Goals,[1] it becomes safe to assume that Africa is already well on course to missing the 21st century, as it did the previous ones. Given that the region's people have never enjoyed any tangible benefits from the global economy, and considering that they have become saddled with a crippling debt burden,[2] it becomes safe to argue that these same impoverished people have become, in effect, net financiers of globalization, as resources continue to be transferred to service their countries' monumental debts.[3] Admittedly, this prognosis does in fact appear unnecessarily apocalyptic. However,

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[1] See United Nations Economic and Social Council, The role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development Report of the Secretary-General, UN Doc. E/2001/83, of 12 June 2001, at paras.13 and 41. For details of the Millennium Development Goals, see: United Nations General Assembly, Fifty-Fifth Session, Agenda Item 60(b), United Nations Millennium Declaration A/RES/55/2, 18 September 2000. The Millennium Declaration, like many other UN documents, is full of many promises. The relevant one for this purpose is in Part III, particularly para.19, under which world leaders "resolve...[t]o halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water." Other aims under this particular "resolve" include the provision of full basic education for boys and girls "everywhere;" a reduction in maternal mortality by three quarters, and under-five child mortality by two thirds of their current rates; to halt and begin to reverse the spread of HIV/AIDS, malaria, and other major diseases; to offer special assistance to children orphaned by HIV/AIDS; and by 2020, "to have achieved a significant improvement in the lives of at least 100 million slum dwellers as proposed in the 'Cities Without Slums' initiative." (See also, United Nations General Assembly, Third United Nations Conference on the Least Developed Countries, Programme of Action for the Least Developed Countries (adopted in Brussels on 20 May 2001) (A/CONF.191/11, 8 June 2001), particularly at para.4.

[2] As of 1997, the total external debt of SSA (from both official and commercial sources) was valued at $223 billion, out of a total debt of $245 billion owed by the 41 so-called Heavily Indebted Poor Countries (HIPCs). (See United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, 11 September 1998, at p.4). By 2000, this figure had increased to $342 billion (See United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa, 2000," UN Doc. E/2001/13, of 30 May 2001, at p.3).

[3] See K Owusu et al, *Through the Eye of a Needle: The Africa Report – A Country by Country Analysis* (Jubilee 2000 Coalition, 2000) [hereinafter *The Jubilee 2000 Report*]. Indeed, a major collaborative World Bank study highlights this alarming situation as follows: "In Africa more than in any other region, engagement with the international community has come in the context of aid and debt." (See World Bank, *Can Africa Reclaim the 21st*

with the IFIs having ruled out total debt relief as an option,[4] it becomes impossible to imagine the continent escaping from this burden at any point in the future without a radical solution.

This chapter should have begun with a discussion of the genesis of the debt crisis, but for the fact that this has already been examined in chapter 4. At any rate, although it is devoted to the region's debt crisis generally, the focus will mainly be on the commercial debts, as opposed to the official loans from the IFIs, which, as noted in chapter 4, were aimed at rescuing the region from the problems it encountered as a result of its rulers' grossly irresponsible borrowings from commercial sources.[5] The primary aim is to concentrate on the legal questions surrounding the supposed liability of ordinary Africans, for the debts incurred by those who had no democratic mandate to contract on their behalf, and who, at any rate, either conferred no benefit whatsoever on them with the proceeds, or used them in ways that continue to exacerbate their misery to this date.

12.2. The Doctrine of "Odious Debts" and the Lessons of History

The lessons of history provide a valuable context for the discussion of the legal aspects of the debt crisis, and such a context is considered important because history is notoriously littered with ironies. The irony in this case stems from the position adopted by the United States government regarding the question of assuming the debts incurred for purposes that it considered abhorrent. The relevant facts

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Century? (Washington DC: World Bank, 2000), at p.235

[4] See IMF, "100 Percent Debt Cancellation? A Response from the IMF and the World Bank," July 2001, at http://www.imf.org/external/np/exr/ib/2001/071001.htm). Part of the statement reads thus: "Total debt cancellation for those countries alone would come at the expense of other borrowing countries, including those non-HIPCs which are home to 80 percent of the developing world's poor. Those who call for 100 percent cancellation for the HIPCs alone, must recognize that this would be inequitable for other poor countries."

[5] To be sure, Africa was not alone in incurring what turned out to be an unsustainable debt burden; neither was the 1980s the first time there was a debt crisis. As pointed out by Detlev Vagts, Latin American countries were in default as early as the 19th century – a situation which ultimately resulted in the so-called Drago Doctrine in international law, outlawing the use of force in the collection of contract debts – just as WWI and the Great Depression caused "wide-spread repudiation and default" by such countries as Russia and Germany. (See D F Vagts, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001), at p.543, who also notes that in 1985, Brazil alone owed an estimated $100 billion, Mexico over $96 billion, and Argentina about $45 billion, in both private and public debts. What makes the African situation unique therefore is the fact that there is no known instance of the loans being spent on the basic needs of the people, which explains its state of perpetual underdevelopment.

can be summed up as follows:[6] In the late 19th century, the Cubans, disillusioned with Spanish rule, had resorted to guerrilla warfare, supported by the Americans. On 15th February 1898, an explosion believed to have been caused by the Spanish, sank the American naval ship *Maine* in Havana harbour, killing 260 – an event which provoked a war between both countries – a war which Spain lost. In the negotiations that followed,[7] the Spanish delegation argued that because the United States had now assumed sovereignty over Cuba, it should also inherit its debts. The position adopted by the US negotiators remains instructive: The debts were "imposed upon the people of Cuba without their consent..."[8] Moreover, because much of the debt was incurred as part of an effort to crush Cuban revolt, it followed that it was expended in a manner contrary to the interests of the people of Cuba. And because the Cuban people had had no say in the borrowing, the debt could not be considered theirs; it was therefore not binding on a successor State.[9] Even an attempt by the Spanish delegation to argue for the sharing of the debt burden was flatly rejected: The creditors, the Americans argued, must have appreciated the purpose of the loan from the beginning, as being for the "continuous effort to put down a people struggling for freedom." It was therefore a calculated risk on the creditors' part.[10] As it happened, the United States never accepted any responsibility for it, nor could Spain enforce its claim. Indeed, according to recent reports, the Bush Administration has adopted a position not dissimilar to this in relation to the debt incurred by the Saddam regime in Iraq, arguing that the Iraqi people should not be saddled with debts incurred by the ex-dictator.[11]

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[6] The facts are taken from various sources, including: P Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy* (London: Probe International/Earthscan, 1991), at p.162 et seq; M Kremer and S Jayachandran, "Odious Debt," (2002) *Finance & Development*, vol.39, no.2, at http://www.imf.org/external/pubs/ft/fandd/index.htm; full article available at http://www.imf.org/external/np/res/seminars/2002/poverty/mksj.pdf; *Yearbook of the International Law Commission 1977, vol.1, Summary Records of the Twenty-Ninth Session, 9th May-29 July 1977* (New York: United Nations, 1978), at p.56; J B Moore, *History and Digest of International Arbitrations to Which the U.S. Has Been a Party* (Washington DC: Government Printing Office, 1898); and D P O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, UK: Cambridge University Press, 1967), at p.459 et seq.

[7] Leading to the Treaty of Peace Between the United States and Spain, of 10 December, 1898. Source:U.S. Congress, 55th Cong., 3rd Sess., Senate Doc. No. 62, Part 1 (Washington: Government Printing Office, 1899), 5-11, reproduced on the Yale Law School web page: http://www.yale.edu/lawweb/avalon/diplomacy/spain/sp1898.htm

[8] See J B Moore, *History and Digest of International Arbitrations*, ibid, at p.358.

[9] ibid, at p.358 et seq

[10] ibid

[11] Per C Denny, "Writing Off Tyrants' Debt is a Principle That Should be Extended to Even Poorer Nations," *The Guardian*, 21 April 2003, at http://www.guardian.co.uk/business/story/0,3604,940455,00.html

That there are other numerous examples of such repudiation comes as no surprise, given that the issue of debt inheritance almost always arises whenever a State seeks to assume the sovereign responsibilities of another, or where, for whatever reason, a particular regime ceases to exist and is succeeded by another. Thus, for example, in seeking to repudiate the debts incurred by the Tsar in 1921, Chicherin, the People's Commissar for Foreign Affairs argued: "No people is obliged to pay the cost of the chains it has borne for centuries."[12]

The so-called *Posen Settlers* case offers another precedent. Germany had contracted a loan for the purpose of "Germanizing" a part of Poland by settling its nationals there. In the negotiations leading up to the Treaty of Versailles, Poland successfully absolved itself of all liabilities for the debt.[13] Also, in the Round Table Conference held at The Hague in 1949, Indonesia successfully absolved itself of all liabilities for debts incurred by The Netherlands, in its efforts to suppress the Indonesian national liberation movement; just as Algeria had refused to assume the debts incurred by France for the latter's military operations in its territory.[14] Indeed, as pointed out by Detlev Vagts, WWI and the Great Depression caused "wide-spread repudiation and default" by such countries as Russia and Germany.[15] These, then, provide a convenient historical context for the discussion of the African debt crisis.

12.3. International Law and the Doctrine of "Odious Debts"

The above examples obviously do not set legal precedents as such, although it could be argued that their historical value is no less significant. Indeed, the fact that the US government adopted the above position carries an added significance because of its dominance in global political/economic affairs, not to mention its position within what Jagdish Bhagwati calls the "Wall Street-Treasury Complex."[16] At any

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[12] See *Yearbook of the International Law Commission*, n.6 above, at p.56

[13] ibid

[14] ibid

[15] See D F Vagts, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001), at p.543.

[16] Bhagwati describes this as "a power elite...a definite networking of like-minded luminaries among the powerful institutions – Wall Street, the Treasury Department, the State Department, the IMF, and the World Bank..." (See J Bhagwati, "The Capital Myth: The Difference Between Trade in Widgets and Dollars" *Foreign Affairs* (May/June 1998) vol.77, no.3, New York, at p.10 et seq. It is therefore a relationship in which the interests of the US government and those of the main multilateral (and private) lending institutions, which are at the centre of

rate, the fact that this critique has at its core, a legal dimension makes it necessary to examine how compatible these precedents are with established norms of international law.

12.3.1. The Origins of the Doctrine

It is widely believed that the doctrine of "odious debts" was first articulated by Alexander Sack, a Russian émigré and legal academic, in his work *Les Effets des Transformations des Etats sur leurs Dettes Publiques et Autres Obligations Financieres*;[17] although a review of available literature suggests that other commentators were not very far behind in building upon the concept.[18] In any event, although much has been written on the broader issue of sovereign debts,[19] the literature on the specific subject of odious debts is not so extensive.[20] Moreover, many of the issues raised in relation to sovereign debts have centred on the problems associated with debt restructuring (as opposed to possible repudiation),[21]

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the so-called Third World debt crisis, are often indistinguishable.

[17] See A N Sack, *Les Effets des Transformations des Etats sur leurs Dettes Publiques et Autres Obligations Financieres* (Paris: Recueil Sirey, 1927).

[18] See for example, E H Feilchenfeld, *Public Debts and State Succession* (New York: Macmillan, 1931)

[19] See for example, K A Palzer, "Relational Contract Theory and Sovereign Debt" (1998) *8 Nw. J Int'l. L. & Bus.727*; S L Schwarcz, "Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach," (2000) *85 Cornell L. Rev. 956* who suggests that sovereign debt restructuring should be based on US insolvency laws, particularly as it allows for an automatic freezing of claims against an insolvent company (See Chapter 11 of the US Legal Code, U.S.C. s.362 (1994); S E Goldman, "Mavericks in the Market: The Emerging Problem of Hold-outs in Sovereign Debt Restructuring" (2000) *5 UCLA J. Int'l L. & Foreign Aff. 159* who focuses primarily on the problem of non-cooperation among creditors where collective agreement is required in the rescheduling process; T Allegaert, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts," (1997) *6 Minn. J. Global Trade 429*, who discusses the how the US courts should respond to disputes involving parties operating within the so-called secondary market for developing country loans.

[20] See, however: D P O'Connell, *The Law of State Succession* (Cambridge University Press, 1965); D P O'Connell, *State Succession in Municipal Law and International Law*, n.6 above, particularly at p.458 et seq; G Frankenberg and R Knieper, "Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts" (1984), *International Journal of the Sociology of Law*, vol.12, at pp.415-438; and W M Mansell, "Legal Aspects of International Debt" (1991) *Journal of Law and Society*, vol.18, no.4

[21] See for example, S L Schwarcz, "Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach" (2000), *85 Cornell L. Rev. 956*, at p.966, who suggests that sovereign debt restructuring should the subject of an international Convention, in line with US bankruptcy reorganization principles. For the relevant US legislation, see Chapter 11, U.S.C s. 362 (1994), which allows for an automatic freezing of claims against an insolvent company. Nor is it easy to ignore the contributions of economists to the subject of debt rescheduling/restructuring. (See K Raffer, "Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face," (1990) *World Development*, vol.18, no.2, at pp. 301 et seq., who advocates the use adoption of US insolvency law rules, particularly Chapter 9 of the US Legal Code, which offers protection to public bodies in the event of insolvency against creditors; and A O Krueger, *A New Approach to Sovereign Debt Restructuring* (Washington DC: International Monetary Fund, 2002). Ironically, it was Adam Smith who once recommended insolvency as "the measure which is both least dishonorable to the debtor, and least hurtful to the creditor." (See A Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, vol.II, (R H Campbell et al, eds.), (Oxford: Oxford University Press, 1979), at p.930

while efforts within the UN system have so far been concentrated within the narrow paradigm of State succession.[22]

12.3.2. Odious Debts Defined

Alexander Sack articulated the "*dettes odieuses*" doctrine as follows:

> When a despotic power incurs a debt which does not meet the needs or interests of the State, but aims at strengthening of the despotic regime, suppressing a popular insurrection, etc., then this debt is to be regarded as an odious one for the people of the entire State. This debt is not binding on the nation; it is a debt of the regime, a personal debt contracted by the ruler, consequently it goes with the demise of the regime...Odious debts, contracted and utilized for purposes which, to the debtor's full knowledge, are contrary to the interests of the nation, are not binding...The debtors have committed a hostile act against the people: they cannot count on a nation, which has freed itself of the despotic ruler, assuming odious debts because they are personal debts of the ruler [emphases omitted].[23]

According to the International Law Commission, they include "all debts contracted by [a] predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."[24] The test, as proffered by O'Connell, is "the extent to which [the debt] is unbeneficial to the population of the territory it burdens."[25]

12.3.3. An Arbitrator's Opinion

Although there is no explicit reference to the term "odious debts," the case of *Great Britain v Costa Rica*[26] provides a useful basis for its analysis. The facts were as follows: The legitimate government of Costa Rica had been overthrown in January 1917 by Frederico Tinoco, who called an election and set up a new Constitution the following June. He retired in August 1919 and left the country. The following

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[22] See for example, the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts, particularly Arts. 36-41 (reprinted in 22 ILM (1983)), which only provides for the passing of liabilities to a successor State as a general principle, and makes no specific reference to odious debts.

[23] See A N Sack, n.18 above, at p.127, as translated by G Frankenberg and R Knieper, "Legal Problems of Overindebtedness," n.21 above, at pp.428-429

[24] See *Yearbook of the International Law Commission*, n.15 above, at p.54.

[25] See D P O'Connell, *State Succession in Municipal Law and International Law*, n.20 above, at p.460.

[26] As reported in J F Williams and H Lauterpacht (eds.), *Annual Digest of Public International Law Cases, Years 1923 to 1924* (London: Longmans, Green & Co., 1933), particularly at pp.34-39, and pp.176-177.

September, his government fell. The incoming government promptly held a new election and restored the old Constitution. Shortly before the collapse of the Tinoco regime, he had authorized the Banco Internacional de Costa Rica by law to issue currency notes to the tune of 15,000,000 colones. Less than one month later, he amended the law by an "Order of the President" to issue bonds of 1000 colones, each to the value of 2,500,000 colones, to be treated as "bills" of the Banco Internacional, and which were to be realized by the Treasury. Then followed some other transactions including an agreement between his finance minister and the Royal Bank of Canada to the effect that certain bills be withheld from circulation and be replaced by current issues of notes. As alleged by the Royal Bank, the Tinoco regime had drawn cheques against these bills, which were all honoured, except for two, which were still held by it.[27]

The British contention was thus that the new Costa Rican government and the Banco Internacional were bound to recognize the validity of the bills held by the Royal Bank, or alternatively, to repay the money spent in honouring the cheques drawn for the benefit of the Tinoco regime. On its part, the new Costa Rican government argued, *inter alia*, that the Tinoco regime was neither the *de facto* nor the *de jure* government of the country under international law, and that it could therefore not bind its successors to any contract.[28]

The Sole Arbitrator, Chief Justice Taft, began by conceding that the Tinoco regime was the *de facto* government at the time, since there was no evidence indicating that his regime was not in actual and peaceful administration without resistance until its final days. He also acknowledged that it was a general principle of international law that a change of government had no effect on the international obligations a State.[29] He however noted that the payments by the bank were either for the benefit of Tinoco himself, or to his brother for his diplomatic duties abroad.[30] The case of the Royal Bank, he concluded:

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[27] See ibid, at pp.34-35
[28] ibid, at p.36
[29] ibid, at pp.36-37
[30] ibid, at p176

> depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican government under the Tinoco regime. *It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president...for his personal support...It could not hold his own government for the money paid to him for this purpose*[31][emphases added].

The same reasoning applied to transactions involving Tinoco's brother.[32]

12.3.4. Its Significance to the Odious Debts Doctrine

Before assessing the direct significance of Chief Justice Taft's decision to the African debt crisis, it is necessary to highlight the import of his opinion in relation to the status of the Tinoco regime, which he regarded as the *de facto* (and therefore a sovereign) government under international law. This was based essentially on the fact that the regime had "[established and maintained] a peaceful administration with the acquiescence of the people for a substantial period of time..."[33] On the basis of this principle, therefore, international legitimacy is conferred upon even the most undemocratic regimes in Africa, including those that purportedly committed their citizens to odious debts.[34]

Moreover, according to Frankenberg and Knieper, "[t]he law of nations does not ask who entered into the obligation as long as their competence in concluding a treaty (as head of state, minister or specially empowered authority) is beyond doubt."[35] They also note that "[i]t is...usually irrelevant who (i.e. which category of persons within the state) is favoured by a certain contractual agreement and for which purpose a loan...is used."[36] The implication is therefore that the institutions that lent so recklessly to

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[31] ibid
[32] ibid
[33] ibid, at p.37
[34] For an in-depth discussion of the issue of recognition of States and governments, see I Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, UK: Oxford University Press, 1999), at chapter V.
[35] See G Frankenberg and R Knieper, "Legal Problems of Overindebtedness," n.24 above, at p.421 (references omitted).
[36] ibid

African despots are able to insist on full repayment, in consonance with the *pacta sunt servanda* principle.[37]

Nor do existing international treaties offer much hope, from the perspective of a State Party seeking to repudiate such "contracts." The Vienna Convention on the Law of Treaties 1969, for example, is effectively silent on the matter, except insofar as Article 56 (1)(b) could be interpreted in such broad terms that it entitles a party to repudiate a loan obligation, for example, in circumstances where the *nature* of the agreement with a previous despotic regime makes it possible to argue that it had become null and void.[38] It thus becomes easy to understand why Wade Mansell has concluded that the debt crisis is just one manifestation of a global economic regime designed, with the help of international law rules, by wealthy countries, to ensure the continuous extraction of wealth from the poor in the developing world.[39]

The foregoing remarks notwithstanding, it is possible to argue that although Chief Justice Taft may not have appreciated it at the time, his substantive decision regarding Tinoco's transactions with the Royal Bank is highly significant to the odious debts doctrine. Of particular importance is his explicit recognition that the bank had a duty, effectively to ensure that the money lent to Tinoco was for legitimate governmental purposes.[40] Moreover, a close reading of the decision strongly suggests that the Sole

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[37] The appropriateness of invoking the doctrine in this circumstance has however been questioned, although not on the basis of existing rules of international law, but based on the belief that the increasing recognition of the unequal power relations between contractual parties in municipal economic transactions should be extended to the international plane. (See G Frankenberg and R Knieper, "Legal Problems of Overindebtedness," ibid, at pp.418-419).

[38] Under Art.56 (1), "[a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty."

[39] See W Mansell, "Legal Aspects of International Debt" n.20 above, at p.384

[40] Incidentally, this would also be in consonance with the Wade Mansell's position, i.e., that the banks should also bear some responsibility for their reckless lending to developing countries in the 1980s. (See W M Mansell, "Legal Aspects of International Debt" ibid, at p.385). Clearly, the ease with which commercial lending risks are transferred by lending institutions has an important role to play in dealings involving dictatorial regimes. Indeed, it has been suggested that this is due to the belief that sovereign States do not become bankrupt. (See C C Lichtenstein, "The US Response to the International Debt Crisis: The International Lending Supervision Act of 1983," (1985) *25 Va. J. Int'l L. 401*, at p.402). Thus, for example, certain commercial banks are reported to have extended a $2 billion loan to Croatia under the late dictator Franjo Tudjman, in spite of warnings to the contrary by various parties including the IMF and former British Foreign Secretary Robin Cook (See "UK Warns Croatia it Risks Losing Aid," *Financial Times*, London, 31 July 1997. See also, "Croats Find Treasury Plundered,"

Arbitrator was influenced more by the *nature* and *purpose* of the transactions than by the personalities involved. This view would be in consonance with those expressed by some commentators, although without reference to this case. For example, O'Connell asserts: "If a ruler acts in a private capacity his contract expires with his death or expulsion; but if he acts in his princely office his commitments relate not to himself but the people through whom, in virtue of the social contract, he ultimately derives his authority."[41] Thus, the nature of a regime notwithstanding, the purpose for which a debt is incurred appears to be the crucial factor in determining whether it is odious or not.

12.4. Implications for Sub-Saharan Africa

It has to be acknowledged that the temptation to assume that the odious debts doctrine is of direct relevance to the African situation is very strong. To begin with, during the 1970s and 1980s, when much of the debt was incurred, very few regimes in the region had even a semblance of democratic mandate.[42] Moreover, there is the question of the purposes to which the loans were put. While it is not possible to verify much of the allegations of loans simply being transferred from the creditors to the private accounts of African rulers and their officials,[43] there are good reasons for believing that this was indeed the case. If nothing else, the large-scale lootings that took place under Mobutu in Zaire, or Nigeria's successive rulers were hardly isolated acts.[44] And where there has been no Mobutu-style

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Washington Post, 13 June 2000. Nor are the multilateral lending institutions unblemished in this respect. For example, the World Bank extended, in 1975, an additional loan of $100 million to the Mobutu regime, in spite of the fact that at the time, the despot had already incurred an interest arrears of $1.2 billion on a $1.5 billion loan obtained from private sources in Italy and the USA. (See S Devarajan et al (eds.), *Aid and Reform in Africa: Lessons From Ten Case Studies* (Washington DC: World Bank, 2001), at pp.631-632

[41] See D P O'Connell, *State Succession in Municipal Law and International Law*, n.25 above, at p.9. See also G Frankenberg and R Knieper, n.38 above, at p.421.

[42] See C A Odinkalu, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights," (2001) *23 Hum. Rts. Q. 327*, at p.329, who notes that as of 1981 when the African Charter was adopted, very few of the rulers present had any such mandate.

[43] See S George, *A Fate Worse Than Debt* (London: Penguin Books, 1994), at p.19. Also, although not referring exclusively to Africa, Frankenberg and Knieper assert thus: "For obvious reasons, the ruling elites see to it that expenditures for weapons and luxuries are masked in the statistics. Construction projects and purchases of industrial plants may be listed in national development plans, however, this in no way guarantees that in terms of developmental utility narrow individual interests are ruled out." (See G Frankenberg and R Knieper, "Legal Problems of Overindebtedness," n.41 above, at pp.416-417)

[44] Mobutu may have become notorious for stealing over $10 billion from his people (See J Hanlon, Dictators and Debt," Jubilee 2000 Coalition, November 1998, at http://www.jubilee2000uk.org/jubilee2000/news/dictatorsreport.html). However, a BBC report gives some

looting, some rulers have turned their countries into grotesque showcases for some of the most preposterous "prestige projects" as highlighted in chapter 13. Moreover, with the region having become notorious for its endless wars, it is safe to assume that at the very least, some of the loans have been used in the procurement of weapons that sustain them, if not for domestic repression or both.[45] Thus, there is a strong prima facie case for arguing that the application of the odious debts doctrine to Africa is a self-evident necessity.

The problem, however, is that this is not necessarily the case, at least insofar as the doctrine envisages a transition from an undemocratic and/or atrocious regime to genuinely representative and democratic dispensation. A crucial question therefore remains as to whether there has been a genuine transition from *kleptocratic* despotism to inclusive democratic governance in Africa. To begin with, although it does appear that the old-style regimes have given way to democratic governance, the reality is that the same actors are still in positions of power in many countries of the region. In the most populous country on the continent, for example, an old-style military despot called General Obasanjo resumed power in 1998 after an election in which only himself and a fellow representative of the old guard – Olu Falae – were the only main candidates; and at any rate, after a series of coups, counter-coups, "interrupted" by what can only be described as a perversion of democratic governance between 1979 and 1983.[46] Even where events have not exactly followed this pattern, the notion of democratic governance has not been synonymous with any semblance of accountability or genuine popular participation, as explained in

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indication of the extent of this sordid enterprise (See "Africa Looted for $140bn, Leader Says," 13 June 2002, at http://news.bbc.co.uk/1/hi/business/2043403.stm). In Nigeria alone, the late despot Sani Abacha is reported to have stolen over $3 billion. The banks named in the scandal include: Deutsche Bank, Commerzbank BNP Paribas, Credit Agricole, Credit Suisse, UBS, HSBC, Barclays, NatWest, Goldman Sachs, Merrill Lynch, and Citibank. (See" Britain Goes After Abacha Millions," 18 October 2001, at http://www.bbc.co.uk.

[45] In his report to the 52nd Session of the General Assembly, the UN Secretary-General highlighted this with the following facts: Since 1970, more than 30 wars have been fought in Africa, the vast majority of intra-State origin. In 1996 alone, 14 out of 53 countries in Africa were involved in armed conflict, accounting for more than half of all war-related deaths worldwide, and resulting in more than 8 million refugees and other displaced persons. (See K Annan, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General," UN SCOR, 52 Sess., Agenda Item 10, at p.4, reprinted in *10 Afr. J. Int'l & Comp. L.549*, at 549-550 (1998). See also, [UK] Department for International Development et al, *The Causes of Conflict in Sub-Saharan Africa: Framework Document* (October 2001), at p.5, which notes that by 2000, over half of African countries were affected by conflict.

[46] Indeed, the on-going contest for the 2003 presidency is dominated by Obasanjo and another notorious despot called General Buhari. (See D Isaacs, "The Generals' Elections in Nigeria," 6 February 2003, at http://news.bbc.co.uk/1/hi/world/africa/2729467.stm)

chapter 13. Thus, it is possible to argue that the odious debts doctrine does not apply to many of the countries of SSA, insofar as there has not been a genuine break with the past.

Nevertheless, there is also the risk of ignoring the fact that there are some governments in the region which, although not paragons of democratic governance, can be said to belong to an entirely different category, particularly those that have emerged from an atrocious past. The Mbeki government in South Africa may be showing worrying signs of old-style escapism and misgovernment,[47] but one cannot ignore the fact that the post-apartheid dispensation represents an example of a break with a notorious past. Also, to varying degrees, the present governments in Uganda, Mozambique, Ghana, Rwanda, and (post-Arap Moi) Kenya, can be said to be in a similar situation. To governments in this category, therefore, the doctrine remains as valid as ever. The question thus becomes one of how best the debt crisis can be resolved.

12.4.1. Why Judicial Repudiation is not an Attractive Option

Regrettably, although the logic of legal analysis and historical precedents are evidently on the side of any democratic government which might seek to repudiate an odious debt, it is very unlikely that the African debt crisis will ever be judicially resolved, for the simple reason that a debtor-country which appears litigious in the eyes of international creditors naturally becomes a bad risk – a stigma that no country is willing to bear. Thus, although the law might seem reasonably clear, the mechanics of

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[47] Mbeki is known to be opposed to the basic scientific fact that AIDS is caused by the HIV virus. Equally astonishingly, he is reported to have blamed the reports on the pandemic in his country on America's CIA, which he accuses of "working with drugs manufacturers to promote the link between the HIV virus and Aids to boost profits." (See "Mbeki Accuses CIA Over Aids," 6 October 2000, at http://news.bbc.co.uk/1/hi/world/africa/959579.stm). His fellow South African and Managing Director of the World Bank, Mamphele Ramphele, however, recently described his reluctance to tackle the AIDS pandemic in his country as conduct "bordering on criminal irresponsibility," on the BBC News 24 programme "Hardtalk," aired at 0430 hours on 19 November 2002. She was also reported, on the same programme, to have once remarked that the current ruling elite in her country had the potential of being as supercilious as the apartheid regime in terms of its attitude towards the poor. In its latest annual report, the Human Rights Watch assesses his performance in these terms: "[I]n 2001, President Thabo Mbeki's government seemed to prefer to invest politic capital in fighting public relations skirmishes rather than addressing the economic and social challenges that confronted the country...The government was plagued by corruption scandals in connection with a multi-million rand arms deal...President Mbeki's refusal to confront his country's catastrophic AIDS epidemic risked undermining all other achievements." (See Human Rights Watch, *World Report 2002, Africa Overview: Major Political Developments*, at http://www.hrw.org

international economic relations dictates that for the countries concerned, this is not a recommended course of action. It would, after all, be a curious state of affairs that the post-apartheid South African government has declared its intention to repay the debts incurred by the apartheid regime, even though it was evidently used for the systematic and conscious dehumanisation of the black population in the country.[48]

For developing countries generally, therefore, the above illustrates the futility of relying on the current rules of international law for solutions to the debt crisis. For SSA, the debt crisis also highlights the real causes of its state of underdevelopment: a leadership unwilling to accept its basic responsibilities towards its people, and a global economic regime eager to exploit this to its advantage. For the people of the continent, it means a life of endless misery and unnecessary death.

12.4.2. The African Debt Burden and its Dilemmas

Given that the realities of international economic relations constitute an impediment to the operation of law *vis-à-vis* the debt crisis, it becomes necessary to examine the only available means for alleviating Africa's poverty: debt relief (which itself was explored in greater depth in chapter 5 in the context of the HIPC initiative). In so doing, it is recognized that an acceptance of this option might be construed as an acknowledgement of liability for the odious debts. Nevertheless, given that debt relief under the Heavily Indebted Poor Countries (HIPC) initiative remains the best (and indeed, the only) available offer for the

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[48] See "Banks Reschedule $8 billion in S. African Debt," *Washington Post*, 18 October 1989. See also "Business Accused of Helping Sustain Apartheid," *Financial Times*, 30 October 1998; "A Jubilee Celebration," *Financial Times*, 25 April 1997; and "SA To Begin Loan Payback Next Year," *Financial Times*, 31 July 1997. See further, "Samoza's Legacy: Plundered Economy," *Washington Post*, 30 November 1979; and "Cuba's Debt Mistakes: A Lesson for Nicaragua," *Washington Post*, 5 October 1980. According to these accounts, Ortega had announced his intention to repudiate Samoza's $500 million debt at the UN General Assembly, but was later counselled against this by the Cuban government, who feared it might provoke adverse reactions from the international financial institutions. Indeed, the Mbeki government has explicitly dissociated itself from a lawsuit initiated in the United States against a number of companies that sustained the apartheid regime (See R Carroll, "S Africa Shuns Apartheid Lawsuits: Country Needs Investment, Say Ministers, Not Compensation," 27 November 2002, http://www.guardian.co.uk/international/story/0,3604,848359,00.html)

foreseeable future,[49] it becomes necessary to examine the dilemma it poses for the region's development.

That unsustainable debt is an impediment to human development is perhaps too obvious to state; so much, after all, has been acknowledged by even a US President, who once stated:

> For many developing countries...there is a greater obstacle in the path to progress....Excessive and completely unsustainable debt can halt progress, drag down growth, drain resources that are needed to meet the most basic human conditions, like clean water, shelter, health care and education. Simply put, unsustainable debt is helping to keep too many poor countries and poor people in poverty.[50]

The UNDP also highlighted this in its 1997 *Human Development Report*.[51] Particularly worth noting is the fact that some African countries spend either the same, or substantially more, on debt servicing than on such necessities as healthcare or education.[52] It follows therefore that *prima facie*, total debt relief would be the most effective way of enabling the countries concerned to realize their legitimate aim of economic development. For SSA, however, the debt crisis throws up a tragic dilemma: Although debt relief seems to be the most effective way of emancipating the people of the continent from a life of economic misery, this presupposes that the dividends would be utilized in a way that addresses their basic needs. However, as shown in chapter 13, many of the region's rulers have demonstrated a manifest unwillingness to avail their citizens of even these basic rights. For the impoverished citizens of such countries, therefore, the granting of relief would, at best, have no effect whatsoever, and at worst,

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[49] As noted earlier, the IFIs have rejected the idea of total debt relief. Given that a judicial approach to repudiation places a country in a disadvantageous position vis-à-vis the global economic regime, this leaves extrajudicial repudiation as the only remaining alternative to relief under the HIPC scheme.

[50] See World Bank Group/IMF, Statement by the Hon. William J Clinton, President of the United States, at the Annual Meetings of the Boards of Governors of the World Bank Group and the International Monetary Fund, Press Release No.6, September 28–30, 1999, at p.3.

[51] See *UNDP, Human Development Report 1997: Human Development to Eradicate Poverty* (New York: Oxford University Press, 1997), at p.10, which states: "Debt is a millstone around the necks of Sub-Sahara and other least developed countries." Even the IMF also acknowledges this. (See IMF, "Theoretical Aspects of the Design of Fund-Supported Adjustment Programmes: A Study by the Research Department of the IMF, Occasional Paper No.55, September 1987, IMF: Washington, at p.45

[52] See *The Jubilee 2000 Report*, n.3 above. (Fact deduced from country by country analysis). The World Bank and the IMF have however rebutted this in a joint statement in which they assert thus: "For the first 26 countries that have qualified for HIPC relief, this is no longer the case: all of them are now spending more on social services than debt service, on average more than triple; and all have shown a marked increase in the share of health and education in their budgets under their recent IMF-supported programs." (See IMF, "Debt Relief for Poor Countries (HIPC): What Has Been Achieved?" A Factsheet, available via http://www.imf.org

be counterproductive, if only because it might become a source of further personal enrichment to the ruling elite. On the other hand, the withholding of such relief means the perpetuation of the status quo.

The following facts illustrate the view that debt relief does not necessarily result in poverty reduction: As of 1998, various African countries had secured various degrees of debt relief. These were: Ethiopia, Tanzania, Senegal, Rwanda and Madagascar which had secured a 67 percent reduction on their debt-service obligations, while Guinea and Cameroon had a 50 percent reduction.[53] The Ivory Coast, Mozambique and Uganda secured up to 80 percent reduction under various terms in agreement with the Paris Club.[54] In 1994, France announced the forgiveness of all arrears and half of all the future obligations owed on its official development debt by all the 14 countries that make up the Franc des Colonies Françaises d'Afrique (CFA) zone, amounting to $3 billion.[55] In the meantime, between 1988 and 1995, over $13 billion of bilateral debt had been written off.[56]

It would, of course, be unrealistic to expect an immediate correlative reduction in poverty levels as a result of what are largely bilateral debt relief which, after all, represent a fraction of the region's $342 billion debt burden.[57] Nevertheless, it is impossible to ignore the fact that there has been no indication whatsoever, of a correlative improvement in poverty levels in these countries as a result of such gestures. Indeed, in the case of the Ivory Coast, for example, decades of systematic tribal marginalization (a tried and tested means of preserving political power in Africa) has now resulted in yet another civil conflict on the continent.[58] Moreover, a recent assessment by the ECOSOC of the continent's prospects could not be more depressing: although there has been slight progress in poverty reduction worldwide (with the share of those living on less than $1 a day falling from 28 percent in 1987

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[53] See United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, 11 September 1998, at p.6.

[54] ibid

[55] See World Bank, *The World Debt Tables 1996* (Washington DC: World Bank, 1996) at p.32. The CFA Franc is the official currency of 14 West and Central African countries.

[56] ibid, at p.219

[57] See United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa," n.2 above.

[58] See T Coulibaly, "Rebellion Destabilises West Africa, Cote d'Ivoire: North v South," November 2002, at http://www.mondediplo.com

to 23 percent in 1998), Africa's situation has in fact become worse, with the population living on less than $1 per day having increased from 217 million in 1987 to 301 million in 1998.[59]

Also, as noted earlier, Africa has become the only region that is well on course to missing the UN's Millennium Development Goals, with no prospect whatsoever of meeting *any* of the specified targets.[60] Among the impediments cited for this depressing state of affairs are weak governance, poor economic policies, and insufficient investment in health and education.[61] But this should come as no surprise, as the example offered by Tanzania illustrates: As that government was negotiating the cancellation of its $83.6 million debt to Canada, [62] it was also negotiating the purchase of a totally unnecessary (and in any case, hopelessly inappropriate) air defence system with the British government worth £28 million.[63] It is therefore easy to appreciate why some observers of the debt crisis might argue that total debt relief would simply encourage greater mismanagement and corruption.

Understandable as the above argument might be, however, it offers no solution to the debt crisis (with its implications for the people of SSA). Thus, it becomes necessary to suggest that as a necessary first step, the international community must be willing to accept Africa for what it is: a region which, although with a largely homogenous people in almost every respect, is made up of governments with varying degrees of commitment (or in some cases, non-commitment) to the realization of their citizens' basic rights. Hence, governments of the region should, as part of this first step, be treated according to their levels of commitment to the realization of basic human rights: Charles Taylor's *kleptocratic* tyranny in Liberia, for example, should no longer be accorded the same level of legitimacy as the governments of neighbouring Senegal, or of Botswana. The benefit inherent in this approach would be that governments

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[59] See United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa," n.57 above, at para.17.

[60] See DFID, Departmental Report 2002: The Government's Expenditure Plans 2002/2003 to 2003/2004, presented to Parliament by the Secretary of State for International Development and the Chief Secretary to the Treasury, April 2002, at p.58.

[61] ibid. The report cites conflict, HIV/AIDS, weak governance, poor economic policies, and insufficient investment in health and education as the main impediments to progress.

[62] In 2002, Canada announced a cancellation of Tanzania's [Canada's] Department of Finance, "Canada Cancels Tanzanian Debt," at www.fin.gc.ca/news02/02-016e.html

[63] See D Hencke and L Elliott, "Just What they Need – a £28 Million Air Defence System," *The Guardian*, London, 18 December 2001.

that have shown a willingness to fight poverty would no longer be held back by the mistaken assumption that every country on the continent suffers from the same degree of corrupt misrule.[64] In a sense, this appears to be the idea behind the HIPC initiative, although the problems identified in chapter 5 make it difficult to regard it as a panacea. A second suggestion is offered in the conclusion that follows.

12.5. Conclusion: Is Extrajudicial Repudiation an Option?

The reality of the African debt crisis has been acknowledged, ironically, by an architect of the HIPC initiative in these terms: "Of course...African debt is a charade; it will not be repaid..."[65] Given that the IFIs have also ruled out total debt relief (as highlighted earlier), the grimness of the situation becomes all too apparent. This chapter had as its central theme, the legal issues surrounding the odious debts doctrine. In the course of the critique, it was noted that countries seeking to repudiate their odious debts would have a strong legal basis for doing so.[66] This assertion must, however, be tempered with a recognition that international law does not operate in isolation: it is, after all, inextricably associated with

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[64] To be fair, a major World Bank study has acknowledged the differences in the attitude of African rulers towards their people's emancipation by identifying four different categories of leadership: the successful and conservative, the radical and ideological, the predatory, and the tyrannical. Examples of the first are Botswana's Seretse Khama, Ivory Coast's Felix Houphuet-Boigny, and, to some extent, Kenya's Jomo Kenyatta, who, it is acknowledged, were successful in their attempts at liberating their citizens from a life of poverty. Under the second category are Ghana's Kwame Nkrumah and Julius Nyerere, whose success was only in terms of "molding national consciousness," although their interventionist policies are said to have resulted in economic disappointment. Among the third are those who "did the opposite" of focusing on efficient national resource management, turning State offices into their "personal money-making positions." Zaire's Mobutu and Nigeria's Abacha are cited as notable examples in this category. The notorious tyrants constitute the fourth category, examples being Uganda's Idi Amin, Equatorial Guinea's Nguema, and members of Rwanda's genocidal regime of the 1990s. (See World Bank, *Can Africa Reclaim the 21st Century?* n.3 above, at p.58). Whether this represents an accurate categorization is evidently open to debate, given, for example, that there was no material distinction between Nguema's tyranny, and Abacha's Nigeria. Moreover, it is, at best, doubtful as to whether the old-style one-party rule espoused by Nyerere and Houphuet-Boigny reconcilable with Articles 21 (right to peaceful assembly), 22 (freedom of association), and 25 (participatory rights, including the right to vote) of the ICCPR. Nevertheless, insofar as the aim was to draw a distinction between the different attitudes to leadership on the continent, this can only be a welcome a welcome approach.

[65] See R Kanbur, "Conditionality and Debt in Africa," in F Tarp and P Hjertholm (eds.), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000), at p.421

[66] Indeed, it has been persuasively suggested that an international tribunal be established, headed by independent-minded statesmen, scholars, and NGOs, for the purpose of determining the legitimacy of governments seeking to borrow from international sources. The benefit of this would be that once the tribunal has raised questions about a particular regime, its successor cannot be bound by any contract it would have entered into (See M Kremer and S Jayachandran, "Odious Debt: When Dictators Borrow, Who Repays the Loan?" *The Brookings Review* (Spring 2003), vol.21, no.2, at pp.32-35)).

the dynamics of international economic relations.[67] What this means is that the idea of repudiation must be treated with utmost caution. Indeed, a similar act by Ghana's former military ruler, Acheampong, is said to have resulted in the cancellation of all foreign credits to the country;[68] while a former US Deputy Treasury Secretary is said to have threatened a number of deterrent measures in the event of similar acts.[69] Given that Africa's debt may in fact *never* be repaid, and that the HIPC initiative is not an entirely satisfactory arrangement (for reasons stated in chapter 5), it becomes necessary to propose a further option: collective repudiation – the benefit of the collective approach being that unlike a unilateral approach, the sheer number of countries involved, and thus the scale of it would make it politically (if not practically) impossible for the threatened repercussions to be carried out. This, however, is premised upon the following assumptions: that African rulers necessarily wish to see the end of the debt crisis, given that it has so far proved an effective shield behind which their mindless plundering and deliberate misgovernment have continued largely unnoticeable; and secondly, that a clean slate would necessarily guarantee a fresh start. At any rate, it further assumes that (the usual posturing aside) Africa currently has the calibre of leadership with the political will, unity, and sense of purpose capable of translating the expected gains into poverty alleviation. Regrettably, these assumptions are likely to remain a pipe dream for a long time to come.

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[67] Indeed, it has been asserted that 90 percent of international law work is in reality, international economic law in some form or another (See J H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge, UK: Cambridge University Press, 2000), at pp.10-11.

[68] See G B N Ayittey, *Africa in Chaos* (New York: Martin's Griffin, 1999), at p.369

[69] These included: attachment of its foreign assets by its creditors, seizure of its exports at every port, a comprehensive sanctions regime (including a ban on its national airline, capital goods, spare parts, and even food in some cases), and restrictions on international credit (See R T MacNamar, "Treasury News," US Department of the Treasury, speech delivered to the International Forum of the US Chamber of Commerce on 12 October 1983, cited in S George, *A Fate Worse Than Debt* (London: Penguin Books, 1994), at p.67 and endnote

Chapter 13

LEADERSHIP: THE IMPEDIMENT TO AFRICAN DEVELOPMENT

> The quality of the leaders, the misery they have brought to their people and my inability to work with them to turn the situation around are very depressing. Unless we find a way of getting them to focus on resolving conflicts and turn to the key issues of economic and social development, the efforts that we are all making will be for naught. In many countries the wrong kind have made it to leadership. They seek power for the sake of power and for their own aggrandisement rather than having a real understanding of the need to use power to improve their countries.[1] [UN Secretary-General Kofi Annan on African rulers]

13.1. Introduction

For a man who has spent his entire working life within the corridors of the United Nations system (and who therefore must appreciate the need to choose his words carefully), the above statement by the Secretary-General represents a most serious indictment of the quality of leadership on the continent of Africa. It also reinforces the central theme of this thesis, which is that although the dynamics of globalization are evidently detrimental to the aspirations of developing countries generally, they are not in themselves sufficient to explain why Africa has become more susceptible to them, than any other developing region of the world. There is therefore a need to subject the African *status quo* to further examination. This chapter has two broad aims. The first attempts to bring to light, a crucial factor that is often either completely ignored, or only casually alluded to by those with an interest in Africa's state of underdevelopment. It is by no means a comprehensive critique of the region's political economy; this, in any event, has received a great deal of academic attention over the years, and by those most qualified to do so.[2] It simply aims to highlight how leadership has betrayed the people of Africa. In the process,

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[1] See W Shawcross, "Africa: The Black Man's Burden," *Sunday Times*, London, 9 April 2000, obtained via Lexis-Nexis LNEPROF/1125BQ.

[2] Examples include: G B N Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1993); G B N Ayittey, *Africa in Chaos* (New York: St Martin's Griffin, 1999); N van de Walle, *African Economies and the Politics of Permanent Crisis, 1979-1999* (Cambridge University Press, 2001); R Kanbur, "Aid, Conditionality and Debt in Africa," in F Tarp (ed.), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000), at pp.409-422; F Ng and A Yeats, *Open Economies Work Better! Did Africa's Protectionist Policies Cause its Marginalization in World Trade?* Policy Research Working Paper 1636 (Washington DC: World Bank

some of the theories often proffered, supposedly to explain the region's problems will be tested, and an explanation will be offered as to why leadership has been the greatest impediment to the emancipation of the region. The chapter also examines the role of international law in effectively perpetuating this misery, by maintaining a wholly fictional distinction between the two categories of human rights, and argues that contrary to prevailing legal opinion, there are no practical or conceptual obstacles to holding political leaders to account for the violation of the core elements of the ICESCR.

13.2. Post-Independence Africa: The Betrayal of a People

In chapter 11, the crimes that were committed against the people of Africa during the period of colonization were briefly highlighted. The systematic process of underdevelopment and the attendant human rights violations aside, the conscious desecration of traditional societal arrangements[3] were in themselves sufficiently dehumanising to warrant a struggle for independence. Regrettably, however, independence, for the people of Africa, has meant a life of even more flagrant human rights violations by their supposed liberators. As noted by the late Claude Ake, "[t]he struggle for power was so absorbing that everything else, including development, was marginalized."[4] By describing the situation in the past tense, Ake was evidently hoping to witness change in his lifetime. However, another keen observer of the region, Claude Welch (commenting primarily in the context of freedom of expression) asserts:

> The veneer of democratization that accompanied the achievement of self-

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International Economics Department and International Trade Division, 1996); F Ng and A Yeats, *Good Governance and Trade Policy: Are They the Keys to Africa's Global Integration and Growth?* Policy Research Working Paper 2038 (Washington DC: World Bank Development Research Group, 1999); D Rodrik, "Trade Policy and Economic Performance in Sub-Saharan Africa" (1997) - Paper prepared for the Swedish Ministry of Foreign Affairs, at p.7 (obtained courtesy of the author); World Bank, *Can Africa Reclaim the 21st Century?* (Washington DC: World Bank, 2000); A J Yeats, et al, *Did Domestic Policies Marginalize Africa in World Trade?* (Washington DC: World Bank, 1997); J Sachs and A Warner, "Sources of Slow Growth in African Economies" (1997) *Journal of African Economies*, vol.6, at pp.335-376; P Collier and W Gunning, "Africa's Economic Performance" (1999) *Journal of Economic Literature*, vol.37, at pp.64-111; and D Dollar, Outward-Oriented Developing Countries Really Do Grow More Rapidly: Evidence from 95 LDCs, 1976-85" (April 1992) *Economic Development and Cultural Change*, at pp.523-544.

[3] For an excellent articulation of this, see B Davidson, *West Africa Before the Colonial Era: A History to 1850* (London and New York: Addison Wesley Longman, 1998), particularly at p.233 et seq.

[4] See C Ake, *Democracy and Development in Africa* (Washington DC: The Brookings Institution, 1996), at p.7

> government was rapidly stripped away by leaders anxious to preserve their version of national unity, and/or by military elites who shot their way into power. Multi-party systems were consolidated into single-party systems, then into one-man systems. With the 'second independence' of the 1990s, in which open political competition returned to many countries, freedom of expression seemed to obtain a new lease on life. In my judgment, however, the overall climate remains inhospitable.[5]

From the very beginning, the creation of the Organization of African Unity (OAU) in 1963[6] heralded the birth of an institution which provided, whether by design or not, a most convenient framework for the perpetuation, and in many cases, the aggravation, of the people's misery. To be sure, the OAU Charter did in fact make references to what might be construed as human rights concerns, including the principles of the UN Charter and the UDHR (although only insofar as they both "provide a solid foundation for peaceful and positive cooperation among States").[7] There was also an allusion to "the welfare and well-being" of the people.[8] Nevertheless, it soon became clear that any reference to international human rights norms was simply a meaningless proclamation. Indeed, events on the ground were to prove that the promotion of the "unity and solidarity of the African States" and the defence of "their sovereignty, their territorial integrity and independence"[9] (however perversely interpreted) were to be the cornerstone of its Charter, as was the principle of non-interference in the internal affairs of member States.[10]

In retrospect, it is possible to see why the principle of non-interference remained so well guarded: It provided a convenient legal basis for the rejection of any inquiry into gross human rights violations within the region, by other members of the OAU. Thus, even the flagrant violations that occurred under Idi Amin in Uganda, Marcias Nguema in Equatorial Guinea, and "Emperor" Jean-Bedel Bokassa in the Central African Republic only managed to attract criticisms from Nyerere of Tanzania and Kaunda of

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[5] See C E Welch Jr., "The African Charter and Freedom of Expression in Africa," (1998) *4 Buff. Hum. Rts. L. Rev. 103*, at p.105

[6] See Charter of the Organization of African Unity, 25 May, 1963, 479 U.N.T.S. 39, reprinted in 2 ILM 766 (entered into force Sept. 13, 1963)

[7] ibid, at Preamble, para.9

[8] ibid, at para.10

[9] See Art. II(1)(a) and(c), ibid.

[10] per Art.III(2) ibid. For an excellent critique of this topic, see J Oloka-Onyango, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa" (1995) *26 Cal. W. Int'l L. J.1*, at p.42 et seq.

Zambia.[11] Indeed, as Philip Alston reveals, even when there were attempts to include some of Amin's excesses (e.g., the massacre of 75,000 of his fellow citizens within four years of coming to power) on the agenda of the UN Commission on Human Rights for consideration – fellow African rulers ensured that this did not happen; supposedly because Amin was the chairman of the OAU.[12] This resistance to scrutiny has continued to this date, the most recent being the blatant shielding of Charles Taylor, by the Obasanjo regime in Nigeria, from a UN-backed war crimes indictment for his role in the shocking mutilations that defined the civil conflict in nearby Sierra Leone, even though many of the victims included babies, innocent women and children.[13]

The prevailing attitude within the OAU has been summed up thus by Umozurike (who was later to become a Chairman of the African Commission on Human Rights): "The OAU maintained an indifferent attitude to the suppression of human rights in a number of independent African states by unduly emphasising the principle of noninterference..." noting what was in effect, an admission by Sekou Toure of Guinea that the organization was not "a tribunal which could sit in judgment on any member state's internal affairs."[14] Indeed, the idea of economic development was widely seen as a right belonging to the State, as opposed to the individuals that lived within it. Mahmud Sakah articulates it thus:

> Although claimed in the name of African ideals, collective rights serve state interests as well as the few who control state resources...most violations of human rights are often against those who speak out against the corrupt use of state resources[15]

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[11] Per U O Umozurike, "The African Charter on Human and Peoples' Rights," (1983), *77 Am. J. Int'l L. 902*, at p.903.

[12] See P Alston (ed.), "The Commission on Human Rights," in *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), at p.149. As pointed out in chapter 11, the NEPAD (the main selling point of which is its peer review mechanism, which supposedly obliges the governments of the region to hold each other to account in areas of governance and human rights) offers a further insight into the intentions of these rulers. Two months after its supposed validation by the G-8 leaders in Canada, the same rulers were faced with Mugabe's flagrant violations of both categories of human rights in Zimbabwe. To date, no African ruler has acknowledged these violations, much less condemn them. Indeed, Obasanjo has called for an end to even the meaningless suspension of Mugabe's regime from the Commonwealth, claiming that violations had "largely ended." (See BBC News, "'Readmit Zimbabwe' to Commonwealth, 17February 2003, at http://news.bbc.co.uk/1/hi/world/africa/2770025.stm

[13] For the text of Taylor's indictment, see *The Prosecutor Against Charles Ghankay Taylor* (aka Charles Ghankay Macarthur Dakpana Taylor), The Special Court for Sierral Leone, Case No. SCSL -03-1, dated 3 March 2003 (obtained with the kind assistance of Davidson Ogunade of the Special Court). See also Amnesty International, "Liberia: Nigeria's offer of "asylum" to President Taylor flouts international law" AI Index: AFR 34/015/2003 (Public), News Service No: 162, 7 July 2003, via the Amnesty website: www.amnesty.org.

[14] See U O Umozurike, n.11 above, at pp.902 and 903.

[15] See S Mahmud, "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects 1993) *15*

The State is thus often defined according to the interests of the ruling elite, and almost certainly explains why Mugabe, for example, has been unable to accept that his long period of despotic misrule has rendered his country bankrupt; since, like the Mobutu regime in Zaire, the national treasury and his personal assets are indistinguishable.

The indigent people of Africa have thus become caught in a tragic paradox: "liberated" as they were from the yoke of colonial exploitation and all that went with it, only to become trapped in what have been decades of tyrannical misrule, systematic impoverishment, and merciless exploitation by their own rulers. It follows therefore that the ideals of economic emancipation – the supposed inspiration behind the quest for independence, has become the subject of escapist antics,[16] grandiloquent rhetoric,[17] and/or outright buffoonery.[18] Indeed, although political power no longer seems to induce the same degree of psychosis that appeared to be commonplace in the Banda days,[19] countries such as Zimbabwe, Guinea Bissau and Liberia, to name but a few, have still not managed to escape the scourge of tyrannical misrule. It comes as no surprise therefore, that twenty-nine of the thirty-four – over 85 percent – of the poorest countries in the world (in terms of human development) are from SSA.[20]

Hum. Rts. Q. 485, at p.493. Indeed, Harry Scoble had noted earlier that this was the case regardless of the State's ideological inclination. (See H M Scoble, "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter," in C E J Welch Jr. and R I Meltzer (eds.), *Human Rights and Development in Africa* (State University of New York Press, 1984), at p.199).

16 The latest example of such antics being the so-called NEPAD, alluded to in chapters 11 and 12

17 Indeed, as noted by Winsome Leslie, Mobutu and his ilk saw themselves as a spokesmen for Africa's economic emancipation (See W J Leslie, *Zaire: Continuity and Political Change in an Oppressive State* (Boulder, CO: Westview Press, 1993), at pp.162-164).

18 Apart from the ghoulish escapades of Idi Amin in Uganda, Mobutu is known to have changed his name from Joseph Desire Mobutu, to *Mobutu Sese Seko Kuku Ngbendu Wa Zabanga*, which means "the earthy, the peppery, all-powerful warrior who, by his endurance and will to win, goes from contest to contest leaving fire in his wake." As if not to be outdone, Malawi's "President-for-Life Ngwazi Dr H Kamuzu Banda" is reported to have decreed thus: "Only to Banda belongs the right to wear a three-piece suit, top hat, carry a fly-whisk and ceremonial cane. Woe betide him that may exhibit the temerity to question or trample on this executive prerogative." (For both accounts, see, respectively, G B N Ayittey, *Africa Betrayed*, n.2 above, at p.105). Further, Mobutu is reported to have once dismissed his political opponents as power-hungry opportunists, in spite of having wielded unfettered powers for well over three decades himself (See S Kiley, Zaire: Apocalypse Now, *The Times*: London, 31 July 1993, at p.M10 a). He is also known to have once argued that "Zaire's one-party state system is the most elaborate form of democracy." (See G B N Ayittey, *Africa Betrayed*, at p.210).

19 According to one report, Malawi's longsuffering population had a duty to find the nearest window or sidewalk and wave obligingly, on seeing the motorcade of their "President for Life." (See Africa Watch, *Africa Report*, March – April 1992, at p.59).

20 See UNDP, *Human Development Report 1999: Globalization With a Human Face* (New York: Oxford University Press, 1999). Figures computed from pp.157-158

13.2.1. The Scourge of Incessant Wars

It was, again, no less a person than the UN Secretary-General who asserted thus in 1999: "For many people in other parts of the world, the mention of Africa evokes images of civil unrest, war, poverty, disease, and mounting social problems. Unfortunately, these images are not just fiction..."[21] Post-independence Africa has therefore become synonymous with armed conflict. But this reputation has not come about as a matter of ill luck. To begin with, some of the region's rulers became enmeshed in the Cold War game plan, apparently unable to appreciate that save for the odd evident bluff (such as the Cuban Missile Crisis), the main protagonists never seriously considered engaging each other in direct armed conflict. In the meantime, Africans became victims of supposed ideological wars in countries such as Ethiopia, Mozambique and Angola.[22] Indeed, in the case of Angola, its warring factions were not only unconcerned about the catastrophic impact of the conflict on their fellow citizens, but also became oblivious to the tragic irony that Russia had, by the 1990s, virtually become part of the G-7, as well as negotiating the terms of its association with the NATO alliance.[23] In a recent television documentary highlighting the impact of the war on the Angolan people and expressing the hope that the death of the notorious warlord, Jonas Savimbi, would bring them peace, a visibly exasperated veteran ITN reporter, Michael Nicholson, was moved to remark: "...in Africa, things don't quite happen the way they should."[24] Even where there had been no full-scale armed conflict, the impact of the Cold War was no less catastrophic; in Zaire, Mobutu's role as a supposed bulwark against communism became a license to oppress, brutalize, and impoverish his people in a way that had very few (if any) parallels in world history.[25]

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[21] See K Annan, "Foreword" in UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (New York and Geneva: United Nations, 1999).

[22] See B Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (London: James Currey, 1992), at p.253

[23] See R Popeski, "Milestone as Russia is Finally Admitted to G8," 27 June 2002, at http://www.guardian.co.uk/international/story/0,3604,744830,00.html. See also I Traynor, "Nato Ready to Form Alliance with Russia," 23 November 2001, at http://www.guardian.co.uk/international/story/0,3604,604294,00.html

[24] The programme was titled "Back to the Front," an obvious reference to Nicholson's ordeal while covering the war in the 1970s, as a result of which he became trapped for more than three months in the jungle. It was aired at 1310 hours on 25 August, 2002.

[25] See "In the Heart of Darkness," *The Economist*, 7 December 2000, at http://www.economist.com/displaystory.

Although the Cold War provided a convenient excuse for some of Africa's wars, it was by no means the only one; African rulers do not seem to need any such excuse. Hence, the governments of Ethiopia and Eritrea have, until recently, been enmeshed in what has been widely described as one of the most senseless wars in history.[26] Indeed, Africa has even managed to create its own "world war" right in the heart of the continent.[27] In his report to the UN Security Council, the Secretary-General highlighted the scourge of conflict within the region thus:

> Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons.[28]

By 2000, over half of African countries were affected by war, according to a paper published jointly by the UK's Department for International Development, the Foreign and Commonwealth Office, and the Ministry of Defence.[29] Armed conflict has thus become something that ordinary Africans must learn to live with.

Even as the international community is being duped into believing that a supposed peace accord signed by the warring factions in the Congo would bring an end to the brutalisation of the people of the region,[30] the Ivory Coast – long regarded as a beacon of hope for other African countries – has descended into bloody anarchy, due, in no small measure, to decades of tribal marginalization – a tried and tested

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[26] See D Gough, "Ethiopia Scents Victory in 'Senseless' War," *Guardian Unlimited*, 19 May 2000, at http://www.guardian.co.uk/ethiopia2000/article/0,2763,222409,00.html . See also, "Ethiopia's Divided Families: Split by a Pointless War," *The Economist*, 19 September 2002, at http://www.economist.com/displaystory.

27 See "Child Victims of Africa's 'World War,'" *The Observer*, 10 December 2000, at http://www.observer.co.uk/uk_news/story/0,6903,409239,00.html. The term was also used on a BBC "Newsnight" programme of 31 July 2002, in reference to the fact that the conflict has sucked in up to six neighbouring countries in the Great Lakes region.

[28] See UN Secretary-General's Report to the Security Council, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General," UN SCOR, 52 Sess., Agenda Item 10, UN Doc. A/52/871-S/1998/318 (1998), at para.4See also, [UK's] Department for International Development, *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Cm 5006 (December 2000) at p.28, which also points out that 20 percent of Africa's population live in countries affected by armed conflict.

[29] See DFID, FCO, and MOD, *The Causes of Conflict in Sub-Saharan Africa: Framework Document* (October 2001), at p.5

[30] See "Congo Peace Deal Signed," *Guardian Unlimited*, 17 December 2002, at http://www.guardian.co.uk/congo/story/

means of exercising political power on the continent – and one which has been successfully exploited by the rebel factions in that country.[31] At the same time, Liberia is effectively ruled by three armed gangs, as rebels attempt to replace Charles Taylor's *kleptocratic* tyranny with what is almost certainly destined to be a regime not entirely dissimilar to it.[32] Nigeria, on its part, is perched on a knife-edge, with self-seeking politicians evidently determined to accentuate and exploit religious and tribal diversity to their own ends;[33] a situation which will almost certainly result in a repeat of an attempt, between the late 1960s and early 1970s, to exterminate the mainly Igbo tribe in the south east of the country – in retrospect, a precursor to what was to follow two decades later in Rwanda. There is thus a very clear pattern of leadership merely serving the narrow interests of the ruling elites, who, in the meantime, continue to exhibit a contemptuous disregard for the basic needs and interests of Africa's indigent people.

13.2.2. The Charade of "Democratic" Governance

A poor Nigerian tailor called Muhammad Umaru is reported to have stated: "When we were in the military regime, we didn't get anything from the government, but we had peace. Now we are in a democracy, we don't get anything from the government, and we don't have peace."[34] Regrettably, commentators on African affairs often prefer to ignore such views in their writings. Hence, it has become normal to assume that there has been a new dawn of democracy in the region. A collaborative paper published by the World Bank puts it thus: "Most...African governments conceded the principle of

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[31] See T Coulibaly, "Rebellion Destabilises West Africa, Cote D'Ivoire: North v South," *Le Monde Diplomatique*, November 2002, at http://www.mondediplo.com

[32] See M Doyle, "Liberia's Unusual War," BBC News, 23 February 2002, at http://news.bbc.co.uk/1/hi/world/from_our_own_correspondent/1834492.stm. See also "How a Tyrant's 'Logs of War' Bring Terror to West Africa" *The Observer*, 27 May 2001. See further, BBC News, "Timber 'Fuels Liberia's War Machine,'" at http://news.bbc.co.uk/hi/english/world/africa/newsid_1480000/1480516.stm. Mercifully, the Bush Administration has now intervened using the agency of Nigerian troops, and forcing Taylor to escape into exile in Nigeria.

[33] The latest manifestation of this being the killing of Christians by Islamic mobs supposedly protesting about the hosting of the Miss World contest in the country. (See BBC News, "Nigeria Riots Spread to Capital," 22 November 2002, at http://news.bbc.co.uk/1/hi/world/africa/2501893.stm. Beauty contests, it must be pointed out, have been an intrinsic and uncontroversial part of Nigeria's cultural life since independence.

[34] Quoted in UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002), at p.85.

democracy in the first half of the 1990s. By 1999 nearly all countries had held multiparty elections..."[35] An IMF paper also highlights how supposed political liberalization and participatory democracy are complementing economic reforms in the region.[36] The reality, however, is that the so-called new breed of leaders are in no way different from their immediate post-independence contemporaries, and are in many ways worse. Indeed, the apparent manifestation of democratic governance has so far proved to be a cynical façade – a smokescreen for the preservation of the past, which explains why, for example, Thabo Mbeki's quest for an "African renaissance" seems to be rooted in an escapist attempt to challenge the universally accepted scientific fact (i.e., that AIDS is caused by the HIV virus), rather than taking steps to address the HIV/AIDS pandemic that is currently ravaging his country.[37]

In Nigeria, this supposed new democratic, post-Abacha era began with legislators awarding themselves up to 3.5 million *naira* (about $35,500 in a country where the average civil service salary is only about $200 a month) in furniture allowances, rather than taking steps to alleviate the suffering of ordinary Nigerians.[38] The same country's supposedly democratically elected leader, Obasanjo, has not only proved himself a consummate human rights violator, but has in fact sought to justify the massacre of unarmed civilians by his military forces.[39]

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[35] See World Bank, *Can Africa Reclaim the 21st Century?,* n.2 above, at p.54.

[36] E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," IMF Working Paper, WP/99/51, (IMF Africa Department, April 1999), at p.4

[37] According to a World Bank study, 70 percent of the world's HIV/AIDS infections occur in Africa. (See World Bank, *Can Africa Reclaim the 21st Century?* n.35 above, at p.11). Thus, the epidemic is not exclusive to South Africa. However, as pointed out by Human Rights Watch, "[t]he most severely affected region was southern Africa, including Botswana, with the highest known prevalence of HIV/AIDS in the world, and South Africa, with the largest number of people living with AIDS in any country in the world." (See Human Rights Watch, *World Report 2002: Africa Overview*, at www.hrw.org, which also asserts thus: "[I]n 2001, President Thabo Mbeki's government seemed to prefer to invest political capital in fighting public relations skirmishes rather than addressing the economic and social challenges that confronted the country...The government was plagued by corruption scandals in connection with a multi-million rand arms deal...President Mbeki's refusal to confront his country's catastrophic AIDS epidemic risked undermining all other achievements."

[38] See "Obasanjo's One Hundred Days," *Africa Confidential*, August 27, 1999, at p.1-3. See also "Self-Service for Nigerian Senators," The Economist, August 12, 2000, at p.41

[39] Obasanjo may have been democratically elected; but his contempt for human rights have been well documented. According to a Human Rights Watch report, his government "continued to deploy large numbers of soldiers and paramilitary Mobile Police across the oil-producing regions of the Niger Delta...[s]ecurity force action was often indiscriminate, or targeted those who had done nothing but exercise their rights to freedom of expression, assembly, and association. The federal task force charged with protecting oil pipelines carried out several extrajudicial executions in oil-producing communities in Delta State...In late November 1999, Nigerian soldiers moved into Odi...in Bayelsa State...engaged in a brief exchange of fire with a handful of young men, after the killing of twelve policemen there. They then proceeded to raze the town. The troops demolished virtually every building and killed dozens of unarmed civilians...In March and April 2000, repressive force was

In a decision remarkably reminiscent of Felix Houphet Boigny's squandering of his nation's resources on a multi-million dollar basilica in the remote Ivorian town of Yamossoukro at a time when the personal incomes of ordinary Ivorians were deteriorating by as much as 50 percent;[40] Obasanjo regards the installation of a satellite system in space to be more of a priority than the health and education of his fellow citizens.[41] The same can be said of Paul Biya of Cameroon, who, in 1999, had a personal airport built near his presidential retreat of Mvomeka.[42] As if not to be outdone, the so-called King of Swaziland has elected to squander the equivalent of his country's entire health budget of $45 million on the purchase of a private jet, at a time when his people are either dying of starvation as a result of the current drought affecting the region, or of AIDS, if not both.[43]

The above are by no means the exception. In1985, the dictatorship of Mengistu in Ethiopia treated the world to what was most probably the worst post-Biblical famine it has ever witnessed – a tragedy which shocked the world into launching the Live Aid campaign. Roughly two decades afterwards, the same

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once again used in Ogoniland, Rivers State...Paramilitary Mobile Police were deployed following disturbances in objection to development projects to be funded by Shell, killed at least one civilian, razed a number of buildings, and arrested several Ogoni activists..." (See Human Rights Watch, *World Report 2001: Nigeria*, at www.hrw.org The same approach was to be adopted about one year later in the Middle Belt area of the country against warring tribes, where about 19 soldiers had been killed. In revenge, over 200 unarmed civilians were killed, an event which attracted widespread condemnation. Responding to criticisms by the Human Rights Watch, Obasanjo is reported to have retorted: "I have dismissed the [Human Rights Watch] report with the contempt it deserves because it failed to condemn the killing of soldiers..." (See Human Rights Watch, "Nigeria: President Ignoring Gravity of Military Massacre" at http://www.hrw.org/press/2002/04/nigeria041902.htm. Reacting to a question regarding the incident, Obasanjo also spoke in terms of "cause and effect," arguing: "You don't expect me to fold my hands and do nothing because tomorrow neither soldiers nor policemen will go anywhere I send them. I sent soldiers. When you send soldiers they do not go there on picnic. They went on operation." Clearly irritated by further questioning about incident, he retorted: "This is the kind of thing one finds really irritating coming from people like you. Those soldiers, are they not human? Have they no rights, too? Action and reaction are not equal and opposite...In human nature, reaction is always more than action." (See W Wallis, Interview with the President, *Financial Times*, London, 9 April, 2002, at p.3).

[40] See "Ivory Coast Buries Founding Father," *New York Times*, February 8, 1994, at p.4. See also George Ayittey, "The Looting of Africa: African Kleptocracies," Free Africa Foundation, at http://www.freeafrica.org/lootingi.html, who estimates the cost of the basilica at about $360 million.

[41] See "Nigeria's Space Programme: Per Abuja Ad Astra," *The Economist:* London, 13 September 2003, at p.62. The programme, which is ready to be launched in Siberia, will cost $13 million. Indeed, according to a different report, it will cost $2.5 million a year. See BBC, "Nigeria Adopts Space Policy," at http://news.bbc.co.uk/hi/english/sci/tech/newsid_1426000/1426573.stm.

[42] See N van de Walle, *African Economies*, n.2 above, at p.108

[43] Challenged by Jeremy Vine in an interview on the BBC Newsnight programme of 4 September 2002, his explanation was that the decision to procure the aircraft was made by his ministers and not by himself. However, as Vine pointed out in his report, the country's cabinet has no say in decision-making. In any event, one might wonder whether, cabinet decision or not, a private jet should have been considered a priority at such a time. The plan has apparently been shelved for the time being (See "Plane Priorities" *The Guardian*, 1 October 2002, at p.15). The same ruler has recently abducted a teenage girl who is being kept as another of his countless "wives." Unsurprisingly, he appeared on the ITV news programme at about 1730 hours on 5 November 2002, and defended his action of grounds of "tradition."

country (this time under a supposed democratic dispensation) is experiencing a repeat of it, due, in no small measure, to a most senseless war with neighbouring Eritrea.[44] In Liberia, a supposed democratic mandate given to Charles Taylor after his brutal war which led to the ousting and the eventual murder of his equally brutal predecessor Samuel Doe has become a licence to subject his people to further misery, while he plunders his country's irreplaceable rainforest for personal gains.[45] At the same time, even Nyerere's successors in Tanzania have elected to waste the country's meagre resources purchasing a sophisticated military air defence system, even though fees have been introduced in schools.[46]

It therefore becomes understandable why the latest Human Rights Watch report devotes a section titled: "Elections, But Not Necessarily Democracy" to highlighting various forms of human rights violations ranging from rigged elections, the suppression of press freedom, to torture and killings on the continent.[47] Indeed, the hollowness of political reforms in Africa has been illustrated by *The Economist* which once declared: "A new sort of African leader is trying to break the addiction to foreign aid, and to the idea that Africa's woes can be blamed forever on the legacy of colonialism...Little noticed by the rest of the world, much of sub-Saharan Africa is in the midst of an upturn."[48] Three years later, the same publication highlighted the reality of African leadership in a cover story titled "Hopeless Africa."[49] For ordinary Africans therefore, a supposed new era of democracy on the continent has simply been a repeat of the transition from colonial subjugation to one of economic misery and tyranny.

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[44] See D Gough, "Ethiopia Scents Victory in 'Senseless' War," *Guardian Unlimited*, n.26 above.

[45] See "How a Tyrant's 'Logs of War' Bring Terror to West Africa" *The Observer*, 27 May 2001. See also BBC "Timber 'Fuels Liberia's War Machine,'" at http://news.bbc.co.uk/hi/english/world/africa/newsid_1480000/1480516.stm

[46] See D Hencke and L Elliott, "Just What they Need – a £28 million Air Defence System," *The Guardian*, London, 18 December 2001. Even the World Bank has been sufficiently concerned to seek the opinion of the International Civil Aviation Organization regarding the necessity of such a sophisticated system. According to the World Bank, the ICAO has in turn raised concerns about the system. (See "World Bank's Statement on Tanzania's Air Traffic Control (ATC)," News Release No: 2002/354/AFR, Washington, 13 June, 2002 at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/)

[47] See Human Rights Watch, *World Report 2002*, n.37 above.

[48] See "Emerging Africa," *The Economist*, 14 June, 1997, at p.13

[49] See *The Economist*, 13 May, 2000. Although the report was primarily about the civil conflict in Sierra Leone, it also highlighted the grim political and economic realities on the continent.

13.3. A Profusion of Specious Theories

The perversity, the tyrannical misrule, and superciliousness that have come to define African leadership have also exposed the region to all manner of theories, and it is the measure of the its state of chaos that almost every one of these seems to carry a certain degree of validity, except when subjected to even the most cursory examination. Some of these are examined below.

13.3.1. Africa: A Victim of History and Culture?

It has been contended that Africa's inability to develop is a function of its culture, a theory which forms the basis of the cultural relativist thesis.[50] Yet, even if this were the case, proponents of this theory have failed to identify this supposedly homogenous cultural pattern, a fact noted thus by Makau wa Mutua: "...the diversity of African peoples and their societies defy easy categorization or generalization."[51] In any event, as pointed out by George Ayittey, the virtues of participatory democracy and freedom of expression were well entrenched in the African social order before the arrival of the Europeans; these being particularly evident at village meetings where views were freely expressed and ideas exchanged. Also, the concepts of justice, order, and fairness were well developed.[52] Indeed, according to a renowned African historian, even those regarded as slaves could own property, elect and send representatives to the King's court, and request an audience with him. Hence, a certain Jubo Jubogha (renamed Jaja by the Europeans), who was born in 1821 and sold as a slave to a Bonny trader in 1833

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[50] See for example, "Africa: The Heart of the Matter," *The Economist*, 13 May 2000, at p.17, where it is asserted thus: "[M]ost of the continent's shortcomings owe less to acts of God than to acts of man...brutality, despotism and corruption exist everywhere – but African societies, for reasons buried in their culture, seem especially susceptible to them." It is also asserted, at p.22, that "Africa's biggest problems...were created by African society and history." A major World Bank study concludes thus about the state of governance in SSA: "Achieving a turnaround in the effectiveness of the state will not be easy since the roots of state failure are many and complex. Chief among them has been a continuing struggle between traditional forms of governance and social organization (often based on tribes, lineages, and language and kinship groups) and modern forms of government." (World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997), at p.162).

[51] See M wa Mutua, , "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," (1995) *35 Va. J.Int'l L. 339*, at p.346. Ironically, and as will be noted later, Mutua is a vociferous proponent of a supposed need to redraw the map of Africa to reflect the ethnic make-up of the continent as a whole.

[52] See G B N Ayittey, *Africa Betrayed*, note 18, at p.19

[in the Niger delta area of present-day Nigeria] was later elected head of the Anna Pepple House, and succeeded the King in 1863.[53]

Furthermore, freedom of association was "virtually total," and was mainly exercised in the context of cultural societies, workers' associations, occult associations, and associations for entertainment.[54] Freedom of movement is said to have been a sacred principle, the only obstacle being the insecurity of travel itself. People migrated and settled elsewhere and enjoyed equal rights as the indigenous population; and work was both a right and a duty. Education was the responsibility of everyone in society, although the curriculum mainly emphasised good citizenship qualities.[55]

An example of the existence of checks and balances within traditional African institutions is provided by Kofi Busia, drawing on his native Ghanaian societal order: Although the Akan chief is renowned for wielding enormous powers, this is only theoretical; the chief rarely makes policy. In the wider traditional setting, the chiefs are never above the customary norms and taboos that govern everyone else. To exercise checks on their powers, they are surrounded by various bodies and institutions. Before taking office, the chief is often required to take an oath. In the case of the Krontihene of the Ashanti, part of the formal admonishment is, "When we give you advice, listen to it. We do not want you to abuse us; we do not want you to regard us as fools; we do not want autocratic ways; we do not want bullying; we do not like beating...take the stool."[56] Thus, only if one consciously elects to ignore these facts could it be argued that African culture (whatever this might be, or however defined) promotes the violation of human rights. Regrettably, however, the conduct of many of contemporary African rulers has come to define the African social order.

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[53] See A A Boahen, *Topics in West African History* (New York: Longman, 1986), at p.92. Much of these accounts can also be found in B Davidson, *West Africa Before the Colonial Era*, n.3 above.

[54] K M'Baye and B Ndiaye, "The Organization of African Unity," in K Vasak and P Alston (eds.), *The International Dimensions of Human Rights* (Connecticut: Greenwood Press, 1982), at p.590.

[55] ibid

[56] See K A Busia, *The Position of the Chief in the Modern Political System of Ashanti* (London: Oxford University Press, 1951), at p.12.

13.3.2. Post-Colonial Africa: A Victim of Berlin?

There is a further thesis which attributes Africa's wars and economic problems to the outcome of the Congress of Berlin and the consequent partitioning of the continent in 1885 along what is widely believed to be arbitrary boundaries. The resultant dislocation of traditional arrangements, it is argued, has been a source of conflict in much of the continent.[57] Even the usually persuasive Basil Davidson has become one of the main proponents of this viewpoint by asserting:

> [I]n 1885, half a dozen powerful European nations...decided to share out Africa...but not, of course, without going to war against Africans...Africa was being divided up into many 'colonies'...ruled directly and dictatorially by European governments, along frontiers fixed between the European powers...A great and deep disaster for the peoples of Africa, the colonial period deprived them not only of their political freedom and the right to think for themselves, thus bringing to a stop the onward flow of Africa's own history, but also, in large measure, undermining their sense of confidence and self-respect.[58]

Yet, it was Nelson Mandela who recently asserted: "Africa is beyond bemoaning the past for its problems. The task of undoing that past is ours...we must take responsibility for our own destiny, that we will uplift ourselves only by our own efforts in partnership with those who wish us well."[59]

It is also hard to ignore the fact that as pointed out by the former Africa specialist of *The Economist*, Richard Dowden, none of the factions in the region's wars is calling for changes to boundaries drawn by the colonial powers; in fact, many, if not all, of the wars have been instigated by individuals seeking access to the trappings of power at the centre.[60] In any event, it is the case that colonialism *did* also

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[57] See W Easterly and R Levine, "Africa's Growth Tragedy: Policies and Ethnic Divisions," (1997) *Quarterly Journal of Economics* vol.112 no.4, MIT Press, at p.1208. See also C Ake, *Democracy and Development in Africa*, n.4 above, at pp.5 and 7.

[58] See B Davidson, *West Africa Before the Colonial Era*, n.53 above, at p.233. Indeed, another commentator, in an otherwise insightful thesis, has not only attributed the region's problems to these boundaries, but has called for them to be redrawn in a way that reflects the ethnic make-up of the continent. (See M wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) *16 Mich. J. Int'l L. 1113*, particularly at p.1118)).

[59] As cited on the UNECA website: http://www.uneca.org/nepad/. Commenting in the context of his native Nigeria, the novelist Chinua Achebe once stated: "...There is nothing basically wrong with the Nigerian character. There is nothing wrong with the Nigerian land or climate or water or air or anything else. The Nigerian problem is the unwillingness or inability of its leaders to rise to the responsibility, to the challenge of personal example which are the hallmarks of true leadership..." (See C Achebe, *The Trouble With Nigeria* (Enugu, Nigeria: Fourth Dimension Publishing, 1985), at p.3

[60] See *The Economist*, 25 January 1997, at p.17. In this regard, some commentators might be tempted to interpret the secessionist attempt by the mainly Igbo tribe from the Nigerian federation in the late1960s as evidence to

forge what might be described as an artificial union between the native Malays, the Chinese, and the Indians in Malaysia, a country comparable in many respects with Ghana, but which, as noted in chapter 7, has managed to outperform the entire region of SSA (including South Africa) economically. Indeed, it is ironic that the most heterogeneous country in SSA itself (namely Mauritius), with its medley of racial and religious groups (including Hindus, Muslims, Creoles, native Africans, and Europeans) has managed to achieve a level of development that has eluded even those African countries that are largely homogenous.[61] Notable examples of these are Somalia, Ethiopia, Equatorial Guinea, Togo, Benin, and the so-called "Democratic Republic" of Congo. Indeed, if the redrawing of boundaries were the solution to Africa's problems, its proponents might wish to explain why it was unable to prevent what was, even by Africa's standards, a most senseless war between Ethiopia and Eritrea soon after the latter's secession. Thus, again, only through a perverse analytical process can it be deduced that Africa is a victim of Berlin.

13.3.3. The Fallacy of the Economic Dependency Thesis

Africa's chaotic state has led even a renowned commentator of Fantu Cheru's standing to attempt to revive the dependency theory that gained a certain degree of validity in Africa's immediate post-independence years. Cheru contends that it was the Western European powers that established the rules by which the continent would participate in the global economy. Africa was to produce raw materials and agricultural goods for Western industries and consumers: coffee and tropical fruits in Kenya, cotton in Sudan, bananas and pineapple in the Ivory Coast, cocoa in Ghana, and groundnut in Senegal.[62] Yet, this cannot explain why it is that Ethiopia and Liberia, which have never been colonized (and therefore presumably have never been subject to such "rules") have become two of the poorest

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the contrary. This, however, would ignore the very events that led to the secessionist bid in the first place, namely, the struggle for power, and corruption among the country's post-independence rulers – events which are in fact highlighted by Mutua (See M wa Mutua, "Why Redraw the Map of Africa," n.58 above, at p.1156 et seq).

[61] See World Bank, *Can Africa Claim the 21st Century?* n.37 above, at p.54. Another study also notes the fact that Somalia became a failed State in spite of its ethnic homogeneity. (See World Bank, *World Development Report 1997*, n.50 above, at p.159.

[62] See F Cheru, "Structural Adjustment, Primary Resource Trade and Sustainable Development in Sub-Saharan Africa" (1992), *World Development*, vol.20, no.4, at p.498

and most chaotic countries in the region. In any event, this only raises questions as to why such "rules" should apply more rigidly to Africa than any other region of the world.

13.3.4. The Tsetse Fly: An Impediment to African Development?

It is the measure of the chaos that has come to define post-independence Africa that even the most outlandish of theories *seems* to hold a certain degree of validity. Thus, a certain thesis was mooted recently on a Channel 4 documentary series which blamed a mere insect – the tsetse fly – for the region's inability to develop. The narrative can be summed up thus: Behind every developed society lies a history of organized agriculture, from which trade and other economic activities have sprung. In the case of Africa, this has never been possible because the climate, which is ideal for the existence of the tsetse fly, does not allow for livestock farming, which in turn has meant an inability to breed the animals necessary for cultivating the land. Yet, as soon as this theory was tested (on the same programme) against the fact that Ethiopia's climate does not support the existence of such pests, it became instantly unsustainable.[63]

13.3.5. Specious Theories: A Possible Explanation

It is possible to offer an assortment of possibilities as to why commentators have resorted to specious theories about Africa. For example, those who argue that the region's problems are a function of its culture might, at best, be victims of the cultural relativist mindset; just as proponents of the dependency thesis seem to have become stuck in their leftist ideological trenches, unable to accept that that theory no longer holds, at least for other regions of the developing world. Others might simply have developed what is often called a patronizing interest in the region. Whatever happens to be the case, it can be safely stated that it is based on a fundamental misunderstanding of the region and its people[64] – a

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[63] The documentary series, aired on Channel4 television, began on 19 October 2002 at 1905 hours and was titled "Africa Unmasked."

[64] Indeed, Graham Hancock illustrates this point (though in the narrower context of foreign aid) by highlighting the tendency on the part of aid officials to prescribe policies merely on the basis of having paid a casual visit to a

misunderstanding based, for the most part, on the erroneous assumption that Africa is intrinsically different from other regions of the world. One notable manifestation of that misunderstanding is the patent inability (or perhaps an unwillingness) on the part of these commentators to distinguish between African rulers (and their selfish agendas), and their longsuffering people. Thus, even where an African country has been rendered effectively bankrupt and its citizens denied their basic rights as happened during the Mobutu and Abacha years, or where some rulers create wars for selfish reasons (as in the Great Lakes region of Central Africa); it has been almost impossible to find any commentator willing to blame these rulers, as would be the case if these tragedies had occurred elsewhere. The prevailing view thus seems to be that African rulers owe no responsibility whatsoever to their citizens. As pointed out by Ayittey, the reason for this reluctance is that doing so would be seen as "blaming the victim," the "victim" here being the people *and* their supposedly helpless leaders – a "politically correct" way of analyzing the situation.[65]

13.3.6. Perspectives From African Rulers

Unsurprisingly, African rulers have accepted no responsibility whatsoever for the continent's depressing state. For example, the so-called Lagos Plan of Action (itself a 1980s version of the NEPAD) blamed it on "[t]he effect of unfulfilled promises of global development strategies..."[66] It adds, "...despite all efforts

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country, without any real attempt to consult the victims of poverty themselves (See G Hancock, *Lords of Poverty: The Freewheeling Lifestyles, Power, Prestige and Corruption of the Multibillion Dollar Aid Business* (London: Mandarin, 1991). This has been recently confirmed by a former Chief Economist at the World Bank (See J Stiglitz, Globalization and its Discontents (London: Penguin, 2002), particularly at pp.23-24, who highlights a cavalier attitude, particularly on the part of IMF staff members towards developing countries and their problems.

[65] See G B N Ayittey, *Africa in Chaos*, n.2 above, at pp.274-275. To be fair, a veteran commentator on Africa has attempted to highlight that distinction in a newspaper article in response to Prime Minister Blair's promise to save Africa by asserting: "If Blair wants to help Africa he needs to listen more, preach less and tread softly in the prickly African bush. He must learn that poverty of the people does not mean weakness in the leaders and that Africa's leaders do not split neatly into goodies and baddies. Most are mixed, but all dance to a drum that will keep them in power..." (See R Dowden, "Why Blair's Missionary Message Flopped With African Leaders," *The Observer*, 8September 2002, at http://www.observer.co.uk/Print/0,3858,4496678,00.html)

[66] See Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980-2000, Addis-Ababa, Ethiopia, at Preamble (adopted by the Assembly of Heads of State and Government of the OAU, Second Extraordinary Summit, Lagos, Nigeria, 28-29 April 1980. The Plan of Action is a 104-page document containing a multitude of measures aimed at ending Africa's state of underdevelopment by the year 2000. In retrospect, it has proved to be nothing more than a meaningless set grandiose promises that very few, if any, of the participants intended to keep.

made by its leaders, Africa remains the least developed continent...exploitation has been carried out through neo-colonial external forces..."[67] This view was later echoed by Nigeria's ambassador the Washington who is reported to have once stated: "Certainly, Nigeria is not free from worldwide economic and social malaise, largely caused by external factors, like unfavourable trade terms and fluctuating commodity prices."[68] And this, in spite of the fact that economic mismanagement and endemic corruption has meant the conscious neglect of the country's agricultural sector by each of its post-independence regimes in favour of oil, which, as of 2002, accounted for over 85 percent of the country's export receipts.[69]

It was this escapist mindset that informed the position adopted by African rulers at the 2002 Commonwealth Conference in Australia, where they blatantly refused to condemn Mugabe's murderous regime in Zimbabwe, preferring to hide behind the result of an election that was evidently flawed and predetermined. In a communiqué issued at the end of the conference, they "recognised that as stated in the Abuja Agreement [sic] land is at the core of the crisis in Zimbabwe and cannot be separated from other issues of concern to the Commonwealth."[70] Quite how the land issue had become the cause of Mugabe's massacre of the Matabeles, or indeed, of the murder, harassment, or other rights abuses against supporters of the opposition Movement for Democratic Change (MDC) during the run up to the electoral travesty of March 2002 and afterwards has never been explained.[71] Nor is it possible to see

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[67] See ibid, at para.6

[68] See *Washington Post*, 15 January, 1992, at p. A22

[69] See World Bank Group, *Country Brief*, at http://www.worldbank.org/afr/ng2.htm

[70] See Commonwealth Heads of Government Meeting, Statement on Zimbabwe, 4 March 2002, at www.chogm2002.org/pub/statements/zimbabwe.html

[71] In her Channel 4 television news report, the veteran reporter Lindsay Hilsum revealed that Mugabe was "using food aid as a political weapon" against the people of Matabeleland, most of whom are supporters of his political opponents. The representative of the World Food Programme uncharacteristically asserted on the same programme that the main cause of the food shortage in the country was not drought, but Mugabe's policies. (The programme was the 1900 hours news bulletin of 20 November 2002). A similar documentary was presented by Peter Oborne, political editor of the *Spectator* on Channel 4 television on 12 January 2003. Among other things, the programme revealed a number of measures adopted by the regime as a way of deliberately starving the opposition, including impeding aid agencies, and confiscating food supplies destined for opposition areas, which were stored in a warehouse owned by government ministers, and were later resold at extortionate prices to even government supporters. In the meantime, impoverished families (including seriously malnourished children) were shown foraging for wild roots and leaves in the country's Binga district. (The programme was titled "Mugabe's Secret Famine," and was aired at 2000 hours).

how the land issue contributed to Mugabe's wrong-headed misadventure into an already messy and intractable conflict in the Congo, with its avoidable drain on his country's scarce resources.

13.4. Africa's Misery: Some Persuasive Insights

Of all the explanations often proffered for Africa's state of chronic underdevelopment, some of the most insightful and persuasive are those offered (separately) by George Ayittey[72] and Nicolas van de Walle.[73] For Ayittey, the people of the continent have been betrayed by their rulers – an elitist and "arrogant bunch of oppressive *kleptocrats*," who, in much of the region, are "worse than the European colonialists." Africa, he notes, "has been hijacked by gangsters, crooks, and scoundrels," and has become a continent where government officials do not serve the people, and where "anyone with an official designation can pillage at will."[74] The infamous excesses of such vicious tyrants as Mobutu and Bokassa, he suggests, are mere manifestations of a wider problem that has bedevilled the continent since independence.[75] One of these, he notes, stems from a misguided obsession with what he calls "the religion of development," i.e., a predisposition to "catch up quickly" with the rich countries – a tendency to copy everything their colonial masters had done, but without any attempt to understand the reasons behind them. Thus, even the tea-drinking habits of the colonialists became the pastime of the African elite, even though the African climate is hardly conducive to it. Economic development has come to be equated with unrestrained imports of whatever the colonialists had owned, and also explains the obsession with prestige projects such as Nigeria's [now derelict] steel mills and brand new capital at Abuja, all of which contributed to the country's debt crisis.[76] The second problem, he notes, is the systematic undermining of State institutions by the rulers as a way of strengthening their own grip on

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[72] See G B N Ayittey, *Africa in Chaos*, n.65 above, and G B N Ayittey, *Africa Betrayed*, n.52 above.

[73] See N van de Walle, *African Economies*, n.42 above. Van de Walle's work is considered insightful because it is based on his experiences as a consultant to a number of international aid agencies operating in Africa, as well as his own field work there.

[74] See G B N Ayittey, *Africa in Chaos*, n.72 above, at pp.129 and 151.

[75] ibid, at pp.136 and 150. Bokassa is believed to have squandered up to $20 million or 20 percent of his country's GDP to crown himself "emperor" of the Central African Republic, while Mobutu is said to have stolen up to $15 billion from his country's treasury.

[76] ibid, at pp.122-134. What is astonishing, however, is that in spite of their evident obsession with Western practices, African rulers have carefully avoided any of the positive aspects of these, such as the West's respect for human rights, the notion of democratic accountability, or its public service ethos.

power. Thus, although every country in the region has a judicial system, their primary purpose is to serve the interests of the elite, and violate the rights of the poor.[77]

For van de Walle, Africa's state of "permanent crisis" stems simply from what he calls "neopatrimonialism" – an essentially clientelist approach to governance which relies on a system of "favors" and "privileged access to public resources;" an inherently corrupt system in which the traditional divide between the public and the private has become blurred, and which forms the basis of policy choices that ultimately result in economic chaos.[78] This, he argues, has in turn created an "aid-dependency syndrome," as donor agencies attempt to fill the gap, often assuming the roles of government in many respects, with the result that "[b]y the early 1990s, Africa's relationship with the international economy was almost entirely mediated by public aid flows."[79]

What makes the above two views so instructive is the fact that although there is no evidence of collaboration between the authors, they both point to a single factor: the catastrophic failure of leadership.[80] Both also validate an earlier study by the World Bank which concluded thus: "It is in sub-Saharan Africa that the deterioration in the state's effectiveness has been most severe – the result of eroding civil service wages, heavy dependence on aid, and patronage politics."[81] The study also notes that the majority now have lower "state capability" than they did at independence, adding, "[a]n institutional vacuum of significant proportions has emerged in many parts of sub-Saharan Africa, leading to increased crime and an absence of security, affecting investment and growth."[82]

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[77] See ibid, at p.126-132. Indeed, he illustrates this with examples from his native Ghana, showing a clear pattern in the unequal dispensation of criminal justice between the rich and the poor.
[78] ibid, at p.50 et seq.
[79] ibid, at pp.189-220
[80] An IMF study also mentions such factors as rapid population growth, armed conflicts, inadequate infrastructure, political instability, which, evidently, are a function of poor leadership. (See E A Calamitsis et al, "Adjustment and Growth in Sub-Saharan Africa," April 1999, IMF Working Paper, WP/99/51, (IMF Africa Department), at p.4
[81] See World Bank, *World Development Report 1997*, n.61 above, at p.162
[82] ibid

13.5. Africa's Misrule: Its Unique Features

It is pertinent to acknowledge the fact that elitist exploitation is not a problem that is peculiar to Africa; it could, after all, be argued that every society in the world is ruled by some kind of elitist clique, at least insofar as they pursue an agenda that is not primarily in the interest of the people they govern. Moreover, as highlighted by Wade Mansell, it is the case that dictatorial regimes are no respecters of geography.[83] Nether is savage brutality an exclusively African preoccupation. For every Idi Amin in Africa, there has been a Pol Pot in Asia, or a Hitler in Europe. Nor is *kleptocratic* misrule an exclusively African phenomenon. For every Mobutu or Abacha, the world has witnessed the Marcoses, a Samoza, or the Ceausescus – just a few examples of rulers who regarded their countries' wealth as their own personal assets. Indeed, even poverty itself is evidently not a uniquely African experience; poverty, after all, exists in even the richest societies of the world.

What makes the African experience unique, however, is a combination of internal and external factors, both amply illustrated by the reactions to Mugabe's treatment of his fellow Zimbabweans. Internally, there is, amongst African rulers, a definite, cult-like determination to preserve the status quo, complete with the ritual of annual OAU (now AU) "summits," the purpose of which is only understood by the rulers themselves, and at any rate, has always been at odds with the legitimate needs of the people the purport to represent.[84] Hence, for example, none of them has so far been willing to condemn Mugabe (or indeed, any of his peers for that matter) for his conduct. Instead, the need to preserve the "fraternity" remains the overriding consideration.[85] This obstinately reactionary mindset has in turn prompted what can only be described as callous cynicism from some Western leaders, who regard even the most

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[83] See W M Mansell, "Legal Aspects of International Debt" (1991) *Journal of Law and Society*, vol.18, no.4, at p.384 et seq

[84] It was, after all, Sekou Toure of Guinea who, as chairman of the OAU, is reported to have asserted that the organization was not "a tribunal which could sit in judgment on any member state's internal affairs;" which thus raises questions as to what else such summits were about. (See U O Umozurike, "The African Charter," n.14 above, at p.903).

[85] A veteran African observer puts it thus: "...solidarity among Africa's rulers remains more important than the pledges they have made to good government, democracy and respect for human rights..." (See R Dowden "Why Blair's Missionary Message Flopped With African Leaders" n.65 above.

atrocious ruler in Africa as a "partner" in the development of the continent.[86] This was much in evidence at a recent conference organized by President Chirac of France on Africa titled "Africa and France, Together in Their New Partnership," to which every ruler on the continent was invited (except leaderless Somalia). Even Mugabe was also invited, in spite of a supposed EU-wide travel ban.[87] In any event, African rulers had reportedly threatened to boycott the conference if Mugabe was excluded.[88] Thus, a coincidence of selfish interests between the French government and African despots took precedence over every other consideration, including the need to isolate rulers who evidently constitute an impediment to the realization of the basic needs of the people of the region. To be sure, the French government does not operate in isolation. A visit to the websites of various multilateral agencies (including the UN) reveals an apparently obligatory, if patently naive, obsession with the idea of a "partnership" with African rulers.[89] The approach to African development thus depends on an apparent pact between these institutions (and governments), and rulers whose determination to perpetuate their people's misery has never been in doubt. Africa's misrule is thus unique in the sense that unlike other

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[86] Cynicism because it could be argued that the occasional photo opportunity between a Western leader and an African ruler (despot or not) gives the former's domestic constituency the impression that something is being done for the people of Africa. Moreover, as noted by Human Rights Watch, the "tradition of competitive foreign policies toward Africa" between the French and UK governments (both of which have significant input in the EU's foreign policy towards the region) has, over the years, dictated that one government's African pariah becomes the other's ally. Hence, while the British government was condemning Mugabe's atrocities (even if merely rhetorically), the French played host to the tyrant. (See Rights *Watch, World Report 2002,* n.47, above). Self-interest is evident at two levels: first, there is the problem of the tied aid regime, under which donors require recipient countries to contract with the former's domestic firms. This means that aid is simply a means of supporting corporate needs within the donor country. At a second level, it could be argued that employees of multilateral aid agencies have a vested interest in perpetuating poverty as a way of protecting their lucrative jobs; hence, the creation of what was described in chapter 11 as an "initiatives industry" which has over the years formulated countless programmes, even when it should be obvious that they have no chance of success. It is however also possible that some donor governments genuinely believe that it is possible to work with African rulers to change the plight of their people, although in light of the evident track record of these rulers, this degree of naivety would in fact be quite astonishing.

[87] Further information on the conference (including speeches) are available at the French Embassy's website: http://www.info-france-usa.org/news/statmnts/2003/franceafrica_summit.asp. The conference took place between the 19th and 21st of February 2003.

[88] See A Lefebvre, "Franco-African Summit: The Scramble for Africa Intensifies," 3 March 2003, at the World Socialist Web Site (WSWS): http://www.wsws.org/articles/2003/mar2003/

[89] A statement by the World Bank, for example, notes: "A new dynamic has emerged on the continent, with African people and leaders increasingly taking the reins of the development agenda..." (See http://www.worldbank.org/afr/issues_brief.htm). Also, in a report to the ECOSOC, the Secretary-General stated: "The United Nations system is...uniquely placed to help to create the momentum for a renewed international partnership between Africa and the international community, rooted in the commitment of African leaders." (See United Nations Economic and Social Council, The Role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development: Report of the Secretary-General, UN. Doc. E/2001/83, of 12 June 2001, at para.2).

regions of the developing world, it is nourished by the patronizing interests of foreign governments, as well as the multilateral aid agencies and humanitarian NGOs.

13.5.1. Rights Violations as an Instrument of Despotic Misrule

Understandably, it is easier to appreciate why the violation of CPRs might serve a despot's interests (primarily, his determination to remain in power), than it is to comprehend how his violation of ESCRs might serve the same purpose. A clampdown on freedom of speech, for example, is a safe way to stifle debate, just as the denial of participatory rights by a one-party regime means the absence of political opposition. On the contrary, it could be argued that the denial of the rights to food or healthcare might engender a sense of marginalization and thus, of popular agitation for change. For SSA, however, a combination of illiteracy, poverty, hunger, homelessness and disease (as highlighted in the introductory chapter) has rendered its people simply incapable of demanding political change. African rulers have therefore come to appreciate their utility, hence, their preference for escapist antics (such as NEPAD) as a substitute for simple, practical steps aimed at poverty alleviation.[90] Economic emancipation therefore represents as much a threat to despotism as freedom of expression,[91] or the right to participate in "genuine periodic elections" as envisaged under Article 25(b) of the ICCPR.[92] It thus becomes possible to assert that in much of Africa, poverty is not simply an unfortunate state of affairs, nor, as is often suggested, a consequence of globalization; it is, on the contrary, an effective means of mass disempowerment.

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[90] A former industry minister of Swaziland is reported to have urged a Taiwanese investor not to pay his local workers too much because "they wouldn't know how to spend the money." (See N Kearney, "Corporate Codes of Conduct: The Privatized Application of Labour Standards," in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan & Oxfam, 1999 at p.207). Apocryphal or not, that comment would be very much in consonance with the supercilious attitude for which many African rulers have become notorious.

[91] Per Art.19(2) of the ICCPR

[92] A recent report on the famine in the *Observer* highlights the problem in terms of the "profits" reaped by the rulers of the region (See P Harris, "Africa Starves as Rains Fail and Rulers Reap Profits" *The Observer*, 19 January 2003, at http://www.observer.co.uk/) Aside from the direct personal benefits accruing to these rulers (much of which is highlighted in this chapter) is the fact that "[w]hile millions of Malawians face starvation, one of the main concerns of President Muluzi is trying to change the constitution to allow him to stand for a third term..."

13.5.2. The Utility of Wars

Wars are also an effective instrument of power and human rights abuse. If nothing else, they remove any vestiges of accountability, and make the ruler's position unassailable, not to mention the personal gains that often flow from these conflicts.[93] They also make it possible to embark on a "rights violating spree," including the commission of such horrific crimes as rape, mutilations (examples being those perpetrated by Sierra Leonean warlords against even babies), and the conscription of child soldiers; thereby making it unnecessary to build hospitals or schools. Wars therefore serve the abhorrent purpose of perpetrating chaos and economic misery. It can thus be stated that Africa's state of intractable poverty is not a tragic fluke; it was, after all, the region's abundant natural resources that contributed to the building of powerful empires in Europe. Neither is it a function of exogenous factors as is often suggested; if this were the case, Africa would, at worst, be on the same level of development as any other developing region of the world. Nor is it a result of mere incompetence; even such stark illiterates as Idi Amin or Samuel Doe were surrounded by informed and able advisers. Much of the poverty in the region is therefore a direct function of a cult-like determination by its rulers to perpetuate their people's misery as a way of remaining in power.

13.5.3. The Curse of Leadership: An Analogy

The African status quo can therefore be represented by an imaginary scenario in which the continent is a ship, hijacked by a band of individuals consisting of hoodlums – a ship abandoned during the years of decolonization by its original pirates. The point to note is that the self-proclaimed "captains" have no

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[93] This has in fact been explicitly acknowledged by the UN Security Council which "[n]otes with concern that the plundering of the natural resources and other forms of wealth of the Democratic Republic of the Congo continues and is one of the main elements fuelling the conflict in the region..." (See UN Security Council, Resolution 1457 (2003), S/RES/1457 (2003), Adopted by the Security Council at its 4691st meeting, on 24 January 2003, at para.3)). See also D Walsh, "UN Calls for Sanctions to Stop 'Plunder' of Congo", *The Independent* London, 18 April 2001, at p.14, whose report names Uganda's Museveni, Rwanda's Kagame, and Zimbabwe's Mugabe as the main culprits. A World Bank report also highlights the allure of personal gains in the Liberian conflict: Initially, the war was caused by social and political factors, with control over the central Government as the main objective. However, "...control over Liberia's rich natural resources and other assets, in addition to being a means of ensuring funding for the war, has become an end in itself..." (See *World Development Report 1997*, n.81 above, at p.160)

intention of piloting it to shore, for the simple reason that the arrival of their longsuffering passengers at their destination would liberate them from their ordeal, thus rendering the "captain's" position redundant."[94] Having seized the helm of the African ship, they have proceeded to confine their helpless passengers below deck, looting the store room and stashing the available food supplies either on deck, or ashore (this, after all, is what the likes of Mobutu and Abacha had done with their countries' resources, using the ship's dinghies – in this case their private jets). The ship has been wrecked many times over, and is now marooned on a sand bank. In fact, some might even ensure the vessel cannot proceed by disabling the engines and shaft, just as the African rulers have found it necessary to undermine State institutions through patronage politics.

In the meantime, the helpless and trapped passengers are dying of heat, exhaustion, hunger and disease. For good measure, the "captains," while not subjecting them to further suffering, are busy reminding the world (often through various escapist "initiatives") about how the pirates who abandoned the ship many years ago had mistreated them, and of why it is necessary to take them their desired destination.

On their part, observers of this tragedy resort to simplistic or inane explanations: For some, the ship is marooned at sea because everyone on board (including the helpless passengers) is a drunken buffoon, unable to appreciate why the ship needs to proceed to its destination. For others, the blame rests squarely with the original pirates, even though they abandoned the ship long ago. Like the anti-globalization demonstrators and NGOs, the majority of observers resort to a naive extrapolation: because the sea is notoriously rough, and has in fact caused some other ships to sink, it must therefore have been the sole cause of this particular shipwreck. The fact that many other ships (some in a worse state than this particular one) have successfully negotiated the rough seas and arrived at their

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[94] The aim, after all, and as the UN Secretary-General has noted (see n.1 above), is to be in power for its own sake, or in this case, to enjoy the benefits of being a ship's captain, if possible, for life.

destinations is immaterial; the sea, they argue, should offer every ship an equally smooth passage to their destination.[95]

On their part, foreign donor agencies and governments are frantically dropping food, medicine and fuel on deck, even though it is evident that it is simply not getting through to the passengers. And just as aid has become part of the problem in some African countries, the relief supplies, while not being looted and carted ashore by the "captains," are fast becoming a hazard, sometimes causing the vessel to become dangerously overloaded. Some are even praising the "captains for life" for their "courage and vision," as happened at the 2002 G-8 summit in Canada.[96] The supplies, like the policies of the World Bank and IMF, might include hopelessly inappropriate items like rocket fuel and spare parts – after all, as they would argue, the ship needs to get to its destination fast, as evidenced by the structural adjustment policies imposed by the IFIs in the 1980s.[97] Other donors are also busy either welding the damaged hull, or repainting it, unwilling to accept that although these are necessary for the future operation of the ship, they are essentially a wasteful exercise, given the condition of the engine, not to mention the unwillingness of the "captains" to sail. Viewed from the perspective of this analogy, it becomes clear why Africa remains the only continent in the world still hopelessly marooned on a sandbank.

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[95] Admittedly, this appears to suggest that globalization is a natural state of affairs and not a function of policy choices. The problem, however, is that because the interests that determine these choices (e.g., corporate interests which fund political parties which then form the very governments that formulate the rules of the global economic regime) are so well entrenched, globalization itself has become more or less a *fait accompli*, at least for the foreseeable future. Thus, it could be argued that it is, at least in the short term, as immovable as the sea.

[96] See G8 Africa Action Plan, at http://www.g8.gc.ca/kan_docs/afraction-e.asp, at para.1, where the G-8 leaders stated thus in response to yet another "initiative" by African rulers: "We, the Heads of State and Government of eight major industrialized democracies and the Representatives of the European Union, meeting with African Leaders at Kananaskis, welcome the initiative taken by African States in adopting the *New Partnership for Africa's Development* (NEPAD), a bold and clear-sighted vision of Africa's development."

[97] Indeed, the supposed similarity between an airplane and Africa's economic development is evident in the explicit use of the phrase "take off" by such commentators as Waltz Rostow and Jorge de Macedo – president of the OECD Development Centre. (See respectively, W W Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1977), at pp.4-10; and J B de Macedo, in L Odenthal, New Forms of Co-operation and Integration in Emerging Africa: FDI in Sub-Saharan Africa, OECD Technical Papers No. 173, CD/DOC (2001)5, March 2001, at preface.

13.5.4. Somalia: Experimenting With *Mobocracy*

The country that was once called Somalia provides an important lesson on the extent to which leadership has become an impediment to the emancipation of Africa. The only known *mobocracy* in the world, that part of Africa is, astonishingly, now enjoying a degree of *relative* stability that even the Siad Barre regime was unable to guarantee. In what must be one of the most perverse political and economic developments in history, the prevalent anarchy has even spawned a thriving multi-purpose company called *al-Barakaat*, which at some stage became the largest employer in the country, its interests including banking, postal services and telecommunications, with a shareholding of 600.[98] It therefore becomes easy to appreciate why even such persuasive commentators as Ayittey and van de Walle, who, after rightly identifying leadership as the impediment to the region's economic development, have yielded to the temptations of the free market because of its natural abhorrence of State intervention.[99] Indeed, others have gone as far as arguing for the outright privatization of the continent.[100] Nevertheless, the situation in Somalia becomes instructive for two related reasons. First, the fact that it is not worse in any material respect than many so-called nation-States on the continent represents a serious indictment on the state of leadership in these countries. Secondly, the fact that so much has emerged from a state of literal anarchy, apart from also representing a serious indictment of the quality of the country's past regimes, serves as a clear indication of what the Somali people (like

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[98] At least until the Bush Administration included it among its list of terrorist-friendly organizations and threatened to put it out of business (See BBC news, "Somali Company 'Not Terrorist,'" at http://news.bbc.co.uk/1/hi/world/africa/1645073.stm). Indeed, a university of some sort has also sprung up in an area called Puntland (See R Walker, "Puntland University Seeks Peace Dividend," BBC News, 23 May 2003, at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/3050481.stm)

[99] See G B N Ayittey, *Africa Betrayed*, n.72 above, particularly at p.101, whose position is that the market has always had a prominent role in African history. See also N van de Walle, *African Economies*, n.73 above, particularly at p.115, whose position is influenced by the belief that State intervention inevitably only preserves the interests of the ruling elite, to the detriment of everything else.

[100] For example, a paper published by the London-based think tank proposes "a radical free-market solution to Africa's problems." This, it is explained, would involve a revival of the charter companies which were the engines of colonialism, and would involve the auctioning of leases to govern African countries, "giving the successful applicant the right to levy taxes in return for provision of specifically stated services." And because the sums involved would be large, "bidders would be likely to be multi-national companies or consortia of companies," with the various bids approved by popular vote. (See R Whelan, "Foreign Aid: Who Needs It?"(1996) *Economic Affairs* (London: Institute of Economic Affairs), at http://www.lse.ac.uk/clubs/hayek/Amagi/Volume1/number2/foreign_aid.htm

many other Africans) are capable of achieving for themselves, given the opportunity, not to mention the right kind of leadership.

13.6. A Human Rights Solution?

Assuming, therefore, that leadership is the obstacle to the realization of human rights in Africa, this invariably raises questions regarding what solution(s) might be appropriate. This question becomes necessary because given that this chapter is a core section of a law-based critique, its ultimate aim should be not just an analysis of the problems, but also to identify those on whom liability falls, thus making it possible to argue in terms of possible sanctions.

As of March 2003, the majority of countries in SSA had ratified the two Covenants.[101] By so doing, African rulers, like other world leaders, explicitly pledge themselves to the realization of the rights proclaimed under the IBHR.[102] Moreover, as highlighted in chapter 3, the UN Declaration on the Right to Development recognizes the State as the *primary guarantor* of human rights.[103] Thus, any examination of the problems faced by the region must recognize the legal obligations that its rulers have voluntarily

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[101] The following represents the status and year of ratification/accession by the named countries, of either or both Covenants: Angola, both, 1992; Benin, both, 1992; Botswana, ICCPR only, 2000; Burkina Faso, both, 1999; Burundi, both, 1990; Cameroon, both, 1984; Cape Verde, both, 1993; Central Africa, both, 1981; Chad, both, 1995; Congo, both, 1983; DRC, both, 1976; Djibouti, both, 2002; Ivory Coast, both, 1992; Equatorial Guinea, both, 1987; Eritrea ICCPR 2002, ICESCR 2001; Ethiopia, both, 1993; Gabon, both, 1983; Gambia, ICCPR 1979, ICESCR 1978; Ghana, both, 2000; Guinea, both, 1978; Guinea Bissau, ICESCR 1992; Kenya, both, 1972; Lesotho, both, 1992; Madagascar, both, 1971; Malawi, both, 1993; Mali, both, 1974; Mauritius, both, 1973; Mozambique, ICCPR, 1993; Namibia, both, 1994; Niger, both, 1986; Nigeria, both, 1993; Rwanda, both, 1975; Senegal, both, 1978; Seychelles, both, 1992; Sierra Leone, both, 1996; Somalia, both, 1990; South Africa, ICCPR, 1998; Sudan, both, 1986; Tanzania, both, 1976; Togo, both, 1984; Uganda ICESCR 1987, ICCPR 1995; Zambia, both, 1984; Zimbabwe, both, 1991. (Information, valid as of March 2003, is computed from the Treaty Section of the Office of Legal Affairs of the United Nations, available via the UN website).

[102] See Art.2 of the ICCPR, under which "[e]ach State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." Also, under Art.2 of the ICESCR, "[e]ach State party to the present Covenant undertakes to take steps, individually and through international assistance and co- operation...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[103] The relevant provisions are: Art.2(3), which recognizes the right (and duty) of States to formulate appropriate policies for the well-being of their peoples "on the basis of their active, free and meaningful participation...and in the fair distribution of the benefits resulting therefrom"; Art.3(1), which imposes a "primary responsibility" on States for "the creation of national and international conditions favourable to [its realization]"; and Art.5, which imposes a duty on States to "take resolute steps to eliminate the massive and flagrant violations" of human rights resulting from *inter alia*, "threats of war."

undertaken, a deliberate breach of which should no longer be consigned to the realms of endless economic analysis.

What, then, it might be asked, are these possible sanctions; and what are the bases for invoking them? The sanctions envisioned can be explained, first, in terms of punishment for the deliberate breach of the above undertakings under the two Covenants; while the form(s) that such punishments should take should necessarily be a matter for the United Nations to decide. One human rights advocate has persuasively advocated a "Crimes Against Humanity" approach, to be based on existing frameworks in international law, although it is doubtful whether the suggested liability thresholds would to be of much use in relation to African rulers.[104] Nevertheless, a good starting point would be the imposition of targeted sanctions against the individual actors within the rights-violating regime itself. An even stronger basis would, ironically, involve merely extending existing rules of international human rights law (which now recognize that State sovereignty is no longer a bar to holding individual rulers to account for violations of civil and political rights)[105] to include violations of economic rights. This, after all, would be a logical interpretation of the various UN Declarations proclaiming the "indivisibility" and

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[104] See S I Skogly, "Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?" (2001), *The International Journal of Human Rights*, vol.5, no.1, at pp.58-80.

[105] See for example, *R v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147. It is impossible to discuss the Pinochet trials here to any satisfactory degree, given that it effectively became an opportunity for the House of Lords to clarify the position regarding the liability of public officials (including heads of State and governments) for human rights violations – the decision itself running into almost 100 pages in length. Nevertheless, the trials centred around three related questions: Whether Pinochet was immune from prosecution in respect of acts performed in exercise of his functions as head of State; whether governmental acts of torture are attributable to functions of a head of State; and whether a former head of State was entitled to immunity in relation to acts of torture. The relevant decisions were: that a former head of State had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of state pursuant to s. 20 of the State Immunity Act 1978 when read with Art. 39(2) of the Diplomatic Privileges Act 1964; but that because torture was an international crime against humanity and *jus cogens*, and in light of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, there had been a universal jurisdiction in all the Convention State parties to either extradite or punish a public official who committed torture; that in the light of that universal jurisdiction the State parties could not have intended that an immunity for ex-heads of State for official acts of torture, or for systematic and widespread acts of official torture, would survive their ratification of the Convention; that since Chile, Spain and the United Kingdom had all ratified the Convention, Pinochet could have no immunity for crimes of torture or conspiracy to torture after that date. Further examples include the on-going trials of former president of Yugoslavia, Slobodan Milosevich for war crimes and crimes against humanity; as well as similar trials involving those implicated in the gruesome crimes in Rwanda and Sierra Leone. Indeed, reference may also be made to the Nuremberg trials (highlighted in chapter 10), insofar as the cited cases acknowledged the liability of those indicted in their capacity as individuals, and not as agents of the State.

"interdependence" of human rights.[106] The idea should be that rulers who *deliberately* expose their citizens to avoidable economic misery such as famine (through, for example, the denial of food aid to sections of the population), homelessness (e.g., through wars, which result in mass migration), and/or disease would be treated in the same way as those who commit torture or genocide.

In proffering the above suggestions, it is necessary to acknowledge that holding national leaders to account, even for violations of CPRs is not unproblematic. Indeed, it is the case that since the Nuremberg trials, the political will to hold State agents to account for human rights violations had been lost, until the horrors in Rwanda and the Balkans rekindled the need for action. Nor can the legal difficulties highlighted in the Pinochet extradition hearings in London (alluded to above) be easily dismissed. Nevertheless, the Pinochet case, and the on-going trials of Milosevich and the Rwandan genocide suspects for human rights violations represent a clear indication of the extent to which progress has been made in terms of holding State officials to account for human rights violations.[107] This being the case, it becomes possible to state that there are no conceptual or practical obstacles for extending this principle to the realms of economic rights. Indeed, the fact that the UN Security Council has now explicitly recognized violations of the right to health as a threat to international peace and security[108] also makes it possible to argue that if the above UN proclamations mean anything more than empty rhetoric, their significance must be evident at the level of enforcement.

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[106] See: The Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, UN Sales No.E.68.XIV.2, Art.13 of which states: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." See also United Nations General Assembly, World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, A/CONF.157/23, of 12 July 1993, at para.5, which states that both sets of rights are "universal, indivisible and interdependent and interrelated." It also asserts that "[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

[107] The establishment of the International Criminal Court also reinforces this principle by replacing the ad-hoc tribunals with a permanent one (See Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002 (entered into force on 1 July 2002), available at http://www.un.org/law/icc/statute/english/rome_statute(e).pdf))

[108] Among these is: United Nations Security Council Resolution 1308 (2000), adopted by the Security Council at its 4172nd meeting on 17 July 2000, S/RES/1308 (2000), particularly at para.11 of its Preamble which "[stresses] that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security," particularly as regards the role UN personnel involved in peacekeeping operations. Explaining the significance of the Resolution six months afterwards, the Executive Director of the Joint UN Programme on HIV/AIDS (UNAID), Peter Piot stated: "By overwhelming Africa's health and social services, by creating millions of orphans, and by decimating health workers and teachers, AIDS is causing social and economic crises which in turn threaten political stability."

13.7. Implications for Poverty Reduction in SSA

Again, it has to be conceded that at first sight, the above developments do not seem to have any direct relevance to the problem of economic underdevelopment in Africa or elsewhere. However, a closer examination suggests that they represent an important step forward in this direction. The proffered solutions would assist in poverty reduction in the following ways. First, if violations of economic rights also represent a threat to peace and security as acknowledged by the Security Council, the mandate for intervention on humanitarian grounds could be extended to include, if necessary, the forcible replacement of an atrocious regime, with some form of interim UN administration not dissimilar to the ones in parts of former Yugoslavia or East Timor, whose mandate would include the creation (or restoration) of essential public institutions and key infrastructure. Thus, the structural obstacles to the realization of economic (and to a large extent civil and political) rights would have been removed. It would also be mandated to hold genuinely democratic elections which should necessarily exclude all those who had had any kind of involvement with the previous regime(s) in the country concerned. This role would include an intensive public education campaign aimed at infusing into the population the fact that human rights of both categories are their universally recognized legal rights, and are therefore not the charitable largesse of those who govern them. In other words, they should be made to realize that human rights are non-negotiable.[109] Indeed, this would not be an entirely new idea. In 1993, the Vienna Declaration, in addition to emphasizing the importance of human rights education, training and public

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(See UNAIDS Press Release: "AIDS Now Core Issue at UN Security Council: UN Body Discusses Epidemic for Fourth Time in a Year," New York, 19 January 2001, available at http://www.unaids.org/whatsnew/press/eng/pressarc01/newyork_190101.html). Prior to this, the Security Council had also authorized humanitarian intervention in some countries, presumably to facilitate the delivery of such necessities as medical care, food, and shelter – all of which are core elements of the ICESCR (See United Nations Security Council Resolution 814 (1993), adopted by the Security Council at its 3188th meeting, on 26 March 1993, S/RES/814 (1993), particularly at para.4, which "[r]equests the Secretary-General...to provide humanitarian and other assistance to the people of Somalia..."). A similar Resolution recognizes that "the restoration of law and order throughout Somalia would contribute to humanitarian relief operations..." (See United Nations Security Council Resolution 837 (1993), adopted by the Security Council at its 3229th meeting on 6 June 1993, S/RES/837 (1993), at para.9, (Preamble)).

[109] There will of course be questions relating to the scarcity of resources. However, the new dispensation would make it easy to determine whether this is a function of natural scarcity (in which case the kind of compromise that has been achieved in even the most advanced economies becomes inevitable) or artificially created through corruption.

information, also proposed the designation of a special UN Decade for these purposes.[110] To this end, the General Assembly designated the period between 1995 and 2004 as the UN Decade for Human Rights Education.[111] Thus, there is already a framework in place through which the UN can seek to promote responsible governance, and thus, the realization of ESCRs.

13.8. Conclusion

It has become necessary to devote this chapter to the obstacle posed by leadership, to the emancipation of the people of Africa. This is because for far too long, even those seeking to find a solution to the plight of the region's people have laboured under the assumption that the problem lies in so-called exogenous factors. This tragic misconception has generated countless theories, some of which were tested above and found to be hopelessly unsustainable, if not simply outlandish. Nevertheless, the chapter also attempted to identify the ways in which the United Nations system might assist in engendering change. Admittedly, the suggested solutions appear much too radical, if not unrealistic. However, what is not in doubt is that Africa faces a desperate situation. Thus, nothing short of a radical solution would have any realistic chance of effecting the desired change. If the various UN Declarations reaffirming the indivisibility and interdependence of human rights mean more than empty rhetoric, international law must adapt its enforcement powers to take account of violations of economic, social and cultural rights. The political will necessary to accomplish this may not yet exist; but human rights advocates cannot afford not to highlight this possibility.

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[110] See Vienna Declaration and Programme of Action, n.106 above, particularly at paras.33, and 78-82.

[111] See United Nations General Assembly, United Nations Decade for Human Rights Education General Assembly Resolution 1994/184 , A/RES/49/184 of 6 March 1995, particularly at para.2

CONCLUSIONS

This thesis began with a simple originating question: *Is globalization the cause of Africa's state of underdevelopment?* Although framed in the language of economics, this question raised a number of legal issues which the critique attempted to address in the preceding chapters. Specifically, it was considered necessary to address them within the framework of human rights law because the ultimate aim was to identify the source of this very *human* tragedy and suggest possible sanctions, as opposed to merely offering the usual economic analyses. The main findings can be summed up as follows:

On Globalization

Two main findings emerged in regard to the phenomenon of globalization. The first was that contrary to common assumptions, it is not based on any understanding of economic liberalism, at least insofar as the major trading nations, which, ironically, are the most vociferous advocates of liberalization, have maintained protectionism (under its different guises) as the basis of their international economic relations. Thus, globalization, to begin with, is premised upon a duplicitous myth, with liberalization mainly taking place in developing (and so-called "transition") economies. The second finding was that although globalization has in fact brought prosperity, particularly to developed countries, it poses a definite threat to the realization of human rights, mainly in poor countries. On the basis of these findings, therefore, it becomes safe to conclude that globalization constitutes an impediment to the realization of human rights in developing countries generally.

On Sub-Saharan Africa

In regard to sub-Saharan Africa, however, the thesis began by acknowledging its manifest diversity. In spite of this, however, it soon emerged that the region's engagement with the global economic regime is mediated almost entirely by debt and aid-dependency, its trade relations confined mainly within the context of the various preferential trading regimes that exist outside of the GATT framework. Indeed, it

was also evident that so far, very few (if any) African countries have been able to utilize even these preferential regimes to any meaningful degree – a predictable state of affairs given that very few of them have the basic institutional and infrastructural capacities without which such economic activities will always remain a practical impossibility. Thus, it became impossible to support the view that the rules of multilateral trade constitute an impediment to the region's ability to "trade its way out of poverty" as is commonly suggested. Moreover, even if it were to be conceded that the structural adjustment policies imposed by the IFIs on the region have made it impossible for its rulers to pursue a poverty-alleviation agenda, this would ignore the fact that these policies, detrimental as they were bound to be to the interests of the poor, were an international (if cynical) response to the consequences of the gross irresponsibility that has defined much of the region's leadership since independence. Thus, globalization can rightly be seen merely as a convenient excuse, particularly by those rulers whose determination to perpetuate the status quo has never been in doubt.

Indeed, even if Africa were an integral part of the global economy, the supposition that it is a casualty of globalization would fail to explain why it has become more susceptible to its impacts than any other region, including those Asian countries that share a common history of colonial exploitation with it. In other words, the argument is that there is a need to look beyond the simplistic extrapolations that currently dominate the "globalization and human rights" discourse – the supposition that because globalization represents a threat to human rights in many developing countries, this must also be the case in *every* African country. This, it is submitted, represents a cruel distraction for the longsuffering people of the region.

Furthermore, although the thesis acknowledged that Africa does not lend itself to sweeping generalizations, it also identified certain patterns of conduct by many of its rulers which constitute a definite impediment to the aims proclaimed under the IBHR. Indeed, it was depressingly instructive that in the course of the research, three of the region's countries, namely, the Ivory Coast, Zimbabwe, and Liberia had either descended into varying degrees of bloody anarchy, or simply ceased to exist as viable States - and all the more depressing because the first two had for some time been regarded as

beacons of hope on the continent. Africa is therefore, it is submitted, a victim of a betrayal by the very rulers who are supposed to have liberated it from colonial exploitation, but who continue to exhibit a degree of callousness, superciliousness, or at best, irresponsibility that would almost certainly have caused a certain degree of unease amongst some of the colonialists they succeeded.

A further problem identified within the thesis was the virtual abandonment of basic governmental responsibilities in some countries to the international aid regime, as a result of which Africa has become the object of countless "initiatives," mainly emanating from the international aid agencies and "donor" governments, each based on an astonishingly naive supposition of a "partnership" with these same rulers – the untold suffering of its people almost entirely ignored by all sides. The consequences of this, as well as the scourge of senseless wars, it was further noted, have generated an assortment of specious theories, as commentators struggle to understand why so much "assistance" seems only to exacerbate the people's suffering. Many of these theories were examined and found to be hopelessly unsustainable.

It was also argued that contrary to what might seem apparent, Africa's inability to realize basic ESCRs is not a function of anything else, but a cult-like determination to disempower its people by rulers who, as acknowledged by the UN Secretary-General, seek power merely for their own ends. Indeed, it even became tempting to concede that in many instances, the conduct of these rulers has made fundamentalist neo-liberal economic reforms of the kind imposed by the IFIs (with all their acknowledged flaws) a more attractive alternative to the status quo, albeit only in the same sense that anarchy might be said to be more desirable for the Somali people, than the odious regimes that preceded that country's collapse. Leadership, it is safe to conclude, therefore constitutes a cancer that is destroying the very heart of Africa – a most insidious plague that is only curable with radical treatment.

A Human Rights Solution

It was in the light of the foregoing conclusions that it was considered necessary to examine the possibility of "a human rights solution" to this tragedy. It was noted, however, that human rights discourse is beset by one basic problem: an obstinate maintenance of a wholly fictional distinction between the two categories of human rights. Hence, for example, an evident willingness to punish individuals who violate the right to life through police torture on the one hand, and a manifest readiness to tolerate (or even indulge) those who cause the death of millions of their citizens by denying them food or healthcare, on the other. Yet, it is precisely at the level of enforcement that the various UN Declarations proclaiming the indivisibility and interdependence of human rights would have any meaning beyond the realms of empty rhetoric. Nevertheless, it was argued that contrary to common assumptions, developments in international law have removed any such distinction (if one ever existed), making it possible to bring to justice rulers who have come to regard the perpetuation of economic misery as a way of enhancing their self interests – whatever these might be.

It therefore becomes possible to argue that Africa represents a clear illustration of an urgent need to abolish this fictional distinction once and for all, and for ESCRs to be accorded their due prominence in human rights law and advocacy. If nothing else, this represents, at least for the foreseeable future, the only way of emancipating the people of the region from the very human tragedies that many of their rulers have either personally inflicted, or exacerbated through a kind of leadership that is both instinctively contemptuous of their basic needs, and totally insensitive to their suffering.

APPENDIX[1]

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***(entry into force* 23 March 1976, in accordance with Article 49)**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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[1] All the instruments contained herein are obtained via the Office of the UN High Commissioner for Human Rights' website: http://www.unhchr.ch/html/intlinst.htm

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

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

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16
Everyone shall have the right to recognition everywhere as a person before the law.

Article 17
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19
1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20
1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21
The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1 . The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37
1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38
Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39
1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40
1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41
1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information. 7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43
The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44
The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45
The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46 .

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47
Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49
1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50
The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51
1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52
Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53
1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

(*entry into force* 3 January 1976, in accordance with article 27)

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:
(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be

placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:
1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20
The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21
The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22
The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23
The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24
Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25
Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27
1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28
The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29
1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30
Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31
1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

Declaration on the Right to Development

Adopted by General Assembly resolution 41/128 of 4 December 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

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

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

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

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

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.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5 States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7 All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. 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.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10 Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

APPENDIX

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

THE GENERAL ASSEMBLY

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

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

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

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

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

BIBLIOGRAPHY

Articles

1. Ahmed M and Bredenkamp H, "Supporting Poverty Reduction in Low-Income Developing Countries: The International Community's Response," (December 2000) *Finance & Development*, vol.37, no.4, IMF, Washington DC
2. Aka P C, "Africa in the New World Order: The Trouble with the Notion of African Marginalization," (2001) *9 Tul. J. Int'l & Comp. L. 187*
3. Allegaert T, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts," (1997) *6 Minn. J. Global Trade 429*
4. Alston P, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) *29 Neth. Int'l L. Rev. 307*
5. Alston P, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) *78 Am. J. Int'l L. 607*
6. Alston P, "Out of the Abyss: The Challenges Confronting the New United Nations Committee on Economic, Social and Cultural Rights," (1987) *Hum Rts Q.*, vol. 9, no.1
7. Alston P and Quinn G, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights." (1987) *Hum. Rts. Q*, vol.9, no.2
8. Alston P, "Making Space for New Human Rights: The Case of the Right to Development," *Human Rights Yearbook* (1988), vol.1, Harvard: Mass
9. Alston P, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy," (1990), *84 Am. J. Int'l L.365*, at pp. 365-393.
10. Alston P, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann," (2002) *EJIL*, vol.13, no.4, 815-844
11. Andersen R, "How Multilateral Development Assistance Triggered the Conflict in Rwanda" (2000) *Third World Quarterly*, vol.21, no.3, pp 441-456.
12. Anderson M, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" (2002) *Washburn Law Journal*, vol.41, 399-425
13. Anghie A, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World," (2000) *32 N.Y.U.J. Int'l L. & Pol. 243*
14. Annan K, "Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities," (1997) *10 Harv. Hum. Rts. J. 1*
15. Baxi U, "Voices of Suffering and the Future of Human Rights," (1998) *8 Transnat'l L.& Contemp. Probs.*125
16. Bhagwati J N, "The Heckscher-Ohlin Theorem in the Multi-Commodity Case" (September/October 1972) *Journal of Political Economy*, vol.80
17. Bhagwati J N, "Challenges to the Doctrine of Free Trade" (1993) *25 N.Y.U.J. Int'l L. & Pol. 219*
18. Bhagwati J, "The Capital Myth: The Difference Between Trade in Widgets and Dollars" *Foreign Affairs* (May/June 1998) vol.77, no.3
19. Bhala R, "Marxist Origins of the 'Anti-Third World' Claim" (2000), *24 Fordham Int'l L.J.132*
20. Bilder R, "Rethinking International Human Rights: Some Basic Questions" (1969) *1 Wis. L. Rev.171*
21. Blanco S and Carrasco E, "Pursuing the Good Life: The Meaning of Development as it Relates to the World Bank and the IMF" (1999), *9 Transnat'l L.& Contemp. Probs. 67*
22. Bradlow D D, "Critical Issues Facing the Bretton Woods System: The World Bank, The IMF and Human Rights," (1996) *6 Transnat'l L.& Contemp. Probs 47*
23. Cassel D, "International Security in the Post Cold-War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A New Human Rights Revolution?" (1996) *19 Fordham Int'l Law Journal 1963*

24. Chandler A D and Redlich F, "Recent Developments in American Business Administration and their Conceptualization" (1961) *Business History Review*
25. Chigara B, "Trade Liberalization: Savior or Scourge of SADC Economies?" (2001-2002) *10 U.Miami Int'l & Comp. L. Rev.7*
26. Civello P, "The TRIMs Agreement: A Failed Attempt at Investment Liberalization," (1999) *8 Minn. J. Global Trade 97*
27. Cheru F, "Structural Adjustment, Primary Resource Trade and Sustainable Development in Sub-Saharan Africa" (1992), *World Development*, vol.20, no.4
28. Coe D and Hoffmaister A, "North-South Trade: Is Africa Unusual?" (1999) *Journal of African Economies*, vol.8, no.2
29. Collier P and Gunning J W, "Explaining African Economic Performance," (1999) *Journal of Economic Literature*, vol.37, no.1, at pp. 64-111
30. Collins C J L, "Congo/Zaire" (June 1997), *Foreign Policy in Focus*, vol.2, no.37
31. Cranston M, "Are There Any Human Rights?"(1983) *Daedalus*, vol.112, no.4
32. Deaton D, "Commodity Prices and Growth in Africa," (1999) *Journal of Economic Perspectives*, vol.13, no 3
33. Detheridge A and Pepple N, "A Response to Frynas," (1998) *Third World Quarterly*, vol.19, no.3, at pp.479-486.
34. Dicks- Mireaux L et al, "Evaluating the Effect of IMF Lending to Low-Income Countries" (2000) *Journal of Development Economics*, vol.61, no.2, at pp. 495-526
35. Dolan C and J Humphrey J, "Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticultural Industry" (December 2000), *Journal of Development Studies*, vol. 37, no.2, Frank Cass
36. Dollar D, "Outward-Oriented Developing Countries Really Do Grow More Rapidly: Evidence from 95 LDCs, 1976-85" (1992) *Economic Development and Cultural Change*, vol.40, no.3
37. Dommen C, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes, and Possible Strategies" (2002) *Hum Rts Q*, vol.24, at pp.1-50
38. Donnelly J, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) *15 Cal. W. Int'l L.J. 473*
39. Donnelly J, "Human Rights, Democracy, and Development" (1999) *Hum. Rts. Q.*, vol. 21 no.3
40. D'Sa R M, "Human and Peoples' Rights: Distinctive Features of the African Charter" (1985) *Journal of African Law*, vol.29
41. Easterly W and Levine R, "Africa's Growth Tragedy: Policies and Ethnic Divisions," (1997) *Quarterly Journal of Economics* vol.112 no.4, MIT Press
42. Eaton J P, "The Nigerian Tragedy: Environmental Regulation of Transnational Corporations and the Human Rights to a Healthy Environment" (1997) *15 B.U. Int'l L.J. 261*
43. Eskridge W N, "Les Jeux Sont Faits: Structural Origins of the International Debt Problem,"(1985) *25 Va. J. Int'l. L. 281*
44. Espiell H G, "The Right of Development as a Human Right," (1981) *16 Texas Int'l L.J.189*
45. Fitzmaurice M, "The Right of the Child to a Clean Environment" (1999) *23 S. Ill. U.L.J. 611*
46. Forsythe D, "Socioeconomic Human Rights: The United Nations, the United States and Beyond" (1982) *Hum. Rts. Q.*, vol.4
47. Franck T M, "The Emerging Right to Democratic Governance" (1992) *86 Am. J. Int'l L. 46.*
48. Frankenberg G and Knieper R, "Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts" (1984), *International Journal of the Sociology of Law*, vol.12
49. Frynas J G, Political Instability and Business: Focus on Shell in Nigeria," (1998) *Third World Quarterly*, vol.19, no.3, at pp.457-478.
50. Geist M, "Toward a General Agreement on the Regulation of Foreign Direct Investment," (1995) *26 Law & Pol'y Int'l Bus. 673*
51. Gittleman R, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1982) *22 Va. J. Int'l L. 667*
52. Gold J, "Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for the Use of Resources," (May 1983) *IMF Survey*

53. Goldman S E, "Mavericks in the Market: The Emerging Problem of Hold-outs in Sovereign Debt Restructuring" (2000) *5 UCLA J. Int'l L. & Foreign Aff. 159*
54. Griffin K and Gurley J, "Radical Analysis of Imperialism, the Third World, and the Transition to Socialism: A Survey Article," (1985), *Journal of Economic Literature* vol.23, at pp.1089-1143
55. Gutto S B O, "Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa" (1998) *4 Buff. Hum. Rts. L. Rev.79*
56. Hall S H, "Multinational Corporations' Post-UNOCAL Liabilities for Violations of International Law," (2002) *34 Geo. Wash. Int'l L Rev. 401*
57. Jackson J H, "International Economic Law: Reflections on the 'Boilerroom' of International Relations" (1995) *10 Am. U. J. Int'l L. & Pol'y 595*, at pp.595-606
58. Jackson J H, "The Perils of Globalization and the World Trading System" (2000) *24 Fordham Int'l L.J.371*, at pp. 371-382
59. Joseph S, "Taming the Leviathans: Multinational Enterprises and Human Rights," (1999) *46 Neth. Int'l L. Rev.*177.
60. Kanter A, "Fifty Years of the UN Genocide Convention: What Does it Mean for Africa?" (1999) *26 Syracuse J. Int'l L. & Com. 173*
61. Keohane R O and Nye J S (Jnr), "Globalization: What's New? What's Not? (And So What?)," (Spring 2000) *Foreign Policy*, no.118, at p.104 et seq.
62. Kremer M and Jayachandran, S, "Odious Debt," (2002) *Finance & Development*, vol.39, no.2
63. Kwaw E M, "Trade Related Investment Measures in the Uruguay Round: Towards a GATT for Investment," (1991) *16 N.C.J. Int'l L.& Com. Reg.*
64. Lacarte-Muro J and Gappah P, "Developing Countries and the WTO Dispute Settlement System: A View From the Bench," (2000) *J. Int'l Econ. L.*, at pp.395-401
65. Lastra R M, "The International Monetary Fund in Historical Perspective," (2000) *J. Int'l Econ. L, 507-523*
66. Leckie S, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights," (1998) *Hum Rts Q.* vol.20, no.1
67. Lichtenstein C C, "The US Response to the International Debt Crisis: The International Lending Supervision Act of 1983," (1985) *25 Va. J. Int'l L. 401*
68. Mahmud S, "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects (1993) *15 Hum. Rts. Q. 485*
69. Mansell W M, "Legal Aspects of International Debt" (1991) *Journal of Law and Society*, vol.18, no.4
70. Masell W M and Scott J, "Why Bother About a Right to Development?" (1994) *Journal of Law & Society*, vol.21, no.2.
71. Marks S P, "Emerging Human Rights: A New Generation for the 1980s?" (1981) *33 Rutgers Law Rev. 435*
72. McCorquodale R and Fairbrother R, "Globalization and Human Rights" (1999) *Hum Rts. Q.*, vol.21, no.3, at pp. 735-766
73. Meyer W H, "Human Rights and MNCs: Theory Versus Quantitative Analysis" (1996) *Hum. Rts Q.* vol.18, no.2
74. Mikesell R, "The Bretton Woods Debates: A Memoir," *Essays in International Finance*, No.192, Princeton University Department of Economics
75. Miller J W "Solving the Latin American Sovereign Debt Crisis," (2001) *22 U. Pa. J. Int'l Econ. L. 677*
76. Muchlinski P T, "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors," (1987) *50 Modern Law Review 545*
77. Muchlinski P T, "Human Rights and Multinationals: Is There a Problem?" (2001*) International Affairs*, vol.77, no.1
78. Muchlinski P T, "Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review (2002) *Company Lawyer*, vol.23, no.6
79. Muchlinski P T, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) *International Lawyer*, vol.34, at pp.1033-1053

80. Naanen B, "Oil Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People," (1995) *Journal of Commonwealth and Comparative Politics*, vol.33
81. Nsouli S M and Le Gall F, "The New International Financial Architecture and Africa," (December 2001) *Finance & Development*, vol.38, no.4 (Washington DC: IMF)
82. Odinkalu C A, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) *8 Transnat'l L. & Contemp. Probs. 359*
83. Odinkalu C A, "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights," (2001) *Hum. Rts. Q.* vol.23, 327-369
84. Olivares G, "The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs" (2001) *Journal of World Trade* vol. 35, no.3
85. Oloka-Onyango J, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa" (1995) *26 Cal. W. Int'l L. J.1*, at pp.1-71
86. Oloka-Onyango J, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000) *6 Buff. Hum. Rts L. Rev 39*
87. Orford A, "Locating the International: Military and Monetary Interventions After the Cold War" (1997), *38 Harv. Int'l L.J. 443*
88. Osaghae E, "The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State" (1991) *African Affairs*, vol.94
89. Palzer K A, "Relational Contract Theory and Sovereign Debt," (1998) *8 Nw. J Int'l. L. & Bus.727*
90. Pendleton M, "Technology, the Law, and a Changing World in the Twenty-First Century : A New Human Right – The Right to Globalization" (1999) *22 Fordham Int'l L.J. 2052.*
91. Petersmann E-U, "Human Rights and International Economic Law in the 21st Century: A Need to Clarify their Interrelationships" (2001) *J. Int'l. Econ. L*
92. Picciotto S, "Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement of Investment" (1998) *19 U. Pa. J. Int'l Econ. L. 731.*
93. Rabkin J, "Universal Justice: The Role of Federal Courts in International in International Civil Litigation" (1995) *95 Colum. L. Rev.2120*
94. Raffer K, "Applying Chapter 9 Insolvency to International Debts: An Economically Efficient Solution with a Human Face," (1990) *World Development*, vol.18, no.2
95. Rajagopal B, "Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights" (1993) *11 B.U. Int'l L.J. 81*
96. Richardson J D, "The Political Economy of Strategic Trade Policy" (1990) *International Organization*, vol.44
97. Rodrik D, "Sense and Nonsense in the Globalization Debate" (1997) *Foreign Policy* 19, Washington DC: The Carnegie Endowment for International Peace
98. Sachs J and Warner A, "Sources of Slow Growth in African Economies" (1997) *Journal of African Economies*, vol.6
99. Sakah M "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects (1993) *15 Hum. Rts. Q. 485*
100. Salacuse J W, "Toward a New Treaty Framework for Direct Foreign Investment," (1985) *50 J. Air. L. & Com 969*
101. Sassoon D M, "Convention on the Settlement of Investment Disputes," (1965), *J. Bus. Law 334.*
102. Schwarcz S L, "Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach," (2000) *85 Cornell L. Rev. 956*
103. Scott C and Macklem P, "Constitutional Ropes of Sand Or Justiciable Guarantees? Social Rights in
A New South African Constitution" (1992) *141 U. Pa. L. Rev. 1*
104. Seita A Y, "Globalization and the Convergence of Values" (1997) *30 Cornell Int'l L.J.429*, at pp.429-492
105. Sengupta A, "On The Theory and Practice of the Right to Development," (2002) *Hum. Rts. Q.*, vol. 24, no.4, pp. 837-889

106. Shihata I, "Democracy and Development" (1997) *46 Int'l &Comp. L.Q. 635*
107. Singer H, "The Distribution of Gains Between Investing and Borrowing Countries" (1950) *American Economic Review*, vol.40
108. Skogly S I, "Structural Adjustment and Development: Human Rights – An Agenda for Change," (1993) *Hum. Rts Q*, vol.15
109. Skogly S I, "Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?" (2001), *The International Journal of Human Rights*, vol.5, no.1, at pp.58-80.
110. Sloan B, "General Assembly Resolutions Revisited" (1987) *58 Brit. Yearbook of International Law 45*
111. Sohn L B, "The New International Law: Protection of the Rights of Individuals Rather than States" (1982) *32 Am. U. L. Rev.1*
112. Stiglitz J E, "Some Lessons from the East Asian Miracle" (1996) *World Bank Research Observer*, vol.11
113. Stiglitz J, "Developing Countries and the WTO: A Proactive Agenda" (2000) *The World Economy*, vol.23, no.4
114. Swanson J, "The Emergence of New Rights in the African Charter" (1991) *12 N.Y.L.Sch. J.Int'l & Comp. L.307*
115. Sykes A O, "Comparative Advantage and the Normative Economics of International Trade Policy" (1998), *Journal of International Economic Law*, vol.1
116. Trachtman J P, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'" (2003) *Journal of International Economic Law*, at pp.3-21
117. Udombana N J, "Can the Leopard Change Its Spots? The African Union Treaty and Human Rights," (2002) *Am. U. Int'l L. Rev.1177*
118. Udombana, N J, "How Should We Then Live? Globalization and the New Partnership for Africa's Development," (2002) *20 B.U. Int'l L.J. 293*, at pp.293-354.
119. Umozurike U O, "The African Charter on Human and Peoples' Rights," (1983), *77 Am. J. Int'l L. 902*
120. Umozurike U O, "The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights," (1988) *1 Afr. J. Int'l L. 65*
121. Vernon R, "International Investment and International Trade in the Product Cycle,"(1966) *Quarterly Journal of Economics*, vol. 80, no.2
122. Vernon R, "The Product Cycle Hypothesis in a New International Economic Environment" (1979) *41 Oxford Bulletin of Economic Statistics* 255.
123. Vierdag E W, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) *Netherlands Journal of Int'l Law*, vol.9
124. wa Mutua M, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," (1995) *35 Va. J.Int'l L. 339*
125. wa Mutua M, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) *16 Mich. J. Int'l L. 1113*, at pp.1113-1176
126. wa Mutua M, "The African Human Rights System in a Comparative Perspective" (1993), *Rev Afr. Comm. Hum. & Peoples' Rts.*, vol.3, no.5
127. Welch C E Jr., "The African Charter and Freedom of Expression in Africa," (1998) *4 Buff. Hum. Rts. L. Rev. 103*
128. Wheeler D, "Sources of Stagnation in Sub-Saharan Africa" (1984), *World Development* 12, vol.1, at pp 1-23
129. Wood D J, "Corporate Social Performance Revisited" (1991) *Academy Management Review*, vol.16, no.4
130. Zarate J C, "The Emergence of a New. Dog of War: Private International Security Companies, International Law, and the New World Disorder," (1998) *34 Stan. J. Int'l L. 75.*

Books

1. Abi-Saab G, "The Legal Formulation of a Right to Development," in R J Dupuy (ed.), *The Right to Development at the International Level* (The Hague: Kluwer Law International, 1980)
2. Achebe C, *The Trouble With Nigeria* (Enugu, Nigeria: Fourth Dimension Publishing, 1985)
3. Adams P, Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy (London: Probe International/Earthscan, 1991)
4. Addo M K, "Justiciability Re- examined" in R Beddard and D M Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (UK: Macmillan, 1992)
5. Addo M K, (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, The Netherlands: Kluwer Law International, 1999)
6. Ake C, *Democracy and Development in Africa* (Washington DC: The Brookings Institution, 1996)
7. Alston P, "The Purposes of Reporting," in *Manual on Human Rights Reporting* (New York: United Nations, 1991)
8. Alston P, "No Right to Complain about Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant," in A Eide and J Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address*, Essays in Honour of Torkel Opsahl (Oslo: Norwegian University Press, 1991)
9. Alston P, "Implementing Economic, Social and Cultural Rights: The Functions of Reporting Obligations," *Bulletin of Human Rights*, vol.89, no.1 (Geneva: UN Centre of Human Rights, 1991)
10. Alston P (ed.), "The Commission on Human Rights," in *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992)
11. Alston P, "The Committee on Economic, Social and Cultural Rights," in P Alston and J Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000)
12. Anderson M R, "Public Interest Perspectives on the Bhopal Case: Tort, Crime or Violation of Human Rights?" in D Robinson and J Dunkley (eds.), *Public Interest Perspectives in Environmental Law* (London: Wiley & Chancery, 1995)
13. Anderson S and Cavanagh J, *Top 200: The Rise of Corporate Global Power* (Washington DC: Institute for Policy Studies, 2000).
14. Ayittey G B N, *Africa Betrayed* (New York: St. Martin's Press, 1993)
15. Ayittey G B N, *Africa in Chaos* (New York: St Martin's Griffin, 1999)
16. Bagachwa M et al, *A Study of Danish Aid Effectiveness in Tanzania* (Dar Es Salaam: Economic Research Bureau and the Social and Economic Research Foundation, 1996)
17. Bairoch P, *Economics and World History: Myths and Paradoxes* (University of Chicago Press, 1993)
18. Balassa B (ed.), *New Directions in the World Economy* (New York: New York University Press, 1989)
19. Balassa, B (ed.), "Liberalizing Trade Between Developed and Developing Countries," in *New Direction in the World Economy* (New York: New York University Press, 1989)
20. Balasubramanyan V N, "Foreign Direct Investment and Developing Countries," in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (UK: Macmillan Press and Oxfam 1999)
21. Bales K, *Disposable People: New Slavery in the Global Economy* (London: University of California Press, 2000)
22. Bannock G et al (eds.), *The Penguin Dictionary of Economics* (6th ed., London: Penguin, 1998)
23. Baran P, *The Political Economy of Neo-Colonialism* (London: Heinemann, 1975)
24. Barratt Brown M and Tiffen P, *Short Changed: Africa and World Trade* (London: Pluto Press & the Transnational Institute, 1994)
25. Baxi U, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002)
26. Bedjaoui M, "The Right to Development," in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (The Hague: Kluwer Academic Publishers, 1991)

27. Bello W et al, *Dark Victory: The United States and Global Poverty* (Food First and the Transnational Institute 1999)
28. Bhagwati J N, "Amount and Sharing of Aid," in C R Frank et al (ed.), *Assisting Countries: Problems of Debt, Burden-Sharing, Jobs, and Trade* (New York: Praeger, 1972)
29. Bhagwati J, "Fifty Years: Looking Back, Looking Forward," in World Trade Organization, *From GATT to the WTO: The Multilateral Trading System in the New Millennium* (The Hague: Kluwer Law International, 2000)
30. Blumberg P I, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993)
31. Boahen A, *Topics in West African History* (New York: Longman, 1986)
32. Bossuyt M J, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (The Hague: Kluwer Academic Publishers, 1987)
33. Boyer R and Drache D, *States Against Markets: The Limits of Globalization* (New York: Routledge, 1996)
34. Brandow D, "The US Role in Promoting Third World Development," in Heritage Foundation, *US Aid to the Developing World: A Free Market Agenda* (Washington DC: Heritage Foundation, 1985)
35. Brownlie I, *Principles of Public International Law* 5th ed (Oxford: Oxford University Press, 1999)
36. Burns A C, *History of Nigeria* (London: Harper Collins, 1972)
37. Busia K A, *The Position of the Chief in the Modern Political System of Ashanti* (London: Oxford University Press, 1951).
38. Cable V, *Globalization and Global Governance* (London: Royal Institute of International Affairs, 1999)
39. Callaghy T, "Lost Between State and Market: The Politics of Economic Adjustment in Ghana, Zambia, and Nigeria," in J Nelson (ed.), *Economic Crisis and Policy Choice: The Politics of Economic Adjustment in the Third World* (Princeton, New Jersey: Princeton University Press, 1990)
40. Cassese A, *International Law in A Divided World* (Oxford: Clarendon Press, 1986)
41. Cavanagh J et al (eds.), *Beyond Bretton Woods: Alternatives to the Global Economic Order* (London: Pluto Press, 1994)
42. Chinkin C, "International Law and Human Rights" in T Evans (ed.), *Human Rights Fifty Years On: A Reappraisal* (Manchester, UK, and New York: Manchester University Press, 1998)
43. Chossudovsky M, The Globalisation of Poverty: Impacts of IMF and World Bank Reforms (London and New York: Zed Books, 1998)
44. Coote B and LeQuesne C, *The Trade Trap: Poverty and The Global Commodity Markets* (UK and Ireland: Oxfam, 1996)
45. Cornia G A, et al (eds.) *Adjustment With a Human Face: Protecting the Vulnerable and Promoting Growth* vol.I (Oxford: Clarendon Press, 1987)
46. Cornia G A et al, *Country Case Studies* vol.II (Oxford: Clarendon Press, 1988)
47. Cranston M, *What Are Human Rights?* (New York: Taplinger, 1973)
48. Croome J, Reshaping the World Trading System: A History of the Uruguay Round (Geneva: World Trade Organization, 1995)
49. Davidson B, *The Black Man's Burden: Africa and the Curse of the Nation-State* (London: James Currey, 1992)
50. Davidson B, *West Africa Before the Colonial Era: A History to 1850* (London and New York: Addison Wesley Longman, 1998)
51. Donnelly J and Howard R E (eds.), *International Handbook of Human Rights* (Connecticut: Greenwood Press, 1987)
52. Donnelly J, *International Human Rights: Dilemmas in World Politics* (Colorado and Oxford: Westview Press, 1993)
53. Donnelly J, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 1993)
54. Donnelly J, *International Human Rights* (Boulder, Colorado: Westview Press, 1993)

55. Doremus P N et al, *The Myth of the Global Corporation* (New Jersey: Princeton University Press, 1999)
56. Dunning J H, *Multinational Enterprises and the Global Economy* (London: Addison Wesley, 1992)
57. Dunning J H (ed.), "Governments and the Macro-Organization of Economic Activity: A Historical and Spatial Perspective," in *Governments, Globalization, and International Business* (UK: Oxford University Press, 1999)
58. Eberstadt N, "What History Tells Us About Corporate Responsibilities," in Carroll A B (ed), *Managing Corporate Social Responsibility* (Boston: Little, Brown, 1977)
59. Eide A and Rosas A, "Economic, Social and Cultural Right: A Universal Challenge," in A Eide et al (eds.), *Economic, Social and Cultural Rights: A Textbook* (The Netherlands: Martinus Nijhoff Publishers, 1995)
60. Esteva G, "Development," in W. Sachs (ed) *The Development Dictionary: A Guide to Knowledge and Power* (London: Zed Books, 1996)
61. Feilchenfeld E H, *Public Debts and State Succession* (New York: Macmillan,1931)
62. Fieldhouse D H, *The West and the Third World* (Malden, UK: Blackwell Publishers, 1999)
63. Ferguson N, Empire: How Britain Made the Modern World (London: Penguin Books, 2003)
64. Frank A G, "The Development of Underdevelopment," in D N Balaam and M Veseth (eds.) *Readings in International Political Economy* (USA: Prentice Hall, 1996)
65. Fridd F and J Sainsbury, "The Role of Voluntary Codes of Conduct and Regulation – A Retailer's View," in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan & Oxfam, 1999)
66. Friedman M, *Capitalism and Freedom* (University of Chicago Press, 1962)
67. Galbraith J K, *Economic Development* (Harvard University Press, 1965)
68. George S, *A Fate Worse Than Debt* (London: Penguin Books, 1994)
69. Gibbon P and Olukoshi A O, *Structural Adjustment and Socio-economic Change in Sub-Saharan Africa: Some Conceptual, Methodological and Research Issues,* Research Report No.102 (Uppsala, Sweden: Nordiska Afrikainstitutet, 1996)
70. Giddens A, *The Third Way* (Cambridge: Polity Press, 1998)
71. Gilpin R, *Global Political Economy: Understanding the International Economic Order* (Oxford, UK: Princeton University Press, 2001)
72. Goulet D, The Cruel Choice: A New Concept in the Theory of Development (New York: Atheneum, 1971)
73. Hancock G, *Lords of Poverty: The Freewheeling Lifestyles, Power, Prestige and Corruption of the Multibillion Dollar Aid Business* (London: Mandarin, 1991)
74. Hayek F, *Law, Legislation and Liberty* (University of Chicago Press, 1978)
75. Hayek F, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Taylor & Francis, 1982)
76. Higgins R, *Problems and Processes: International Law and How We Use It* (Oxford University Press, 1995)
77. Hirst P and Thompson G, "Globalization and the History of the International Economy," in D Held and A McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalization Debate* (Cambridge, UK: Polity Press, 2001)
78. Hjertholm P and White H, "Foreign Aid in Historical Perspective: Background and Trends," in F Tarp and P Hjertholm (eds.), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000)
79. Human Rights Watch, *Evil Days: 30 Years of War and Famine in Ethiopia* (Human Rights Watch, New York, 1991)
80. Hymer S, *The International Operations of National Firms: A Study of Foreign Direct Investment* (MIT Press, 1976)
81. Hymer S, *The Multinational Corporation* (New York: Cambridge University Press, 1979)
82. Hymer S, *The Multinational Corporation: A Radical Approach* (R B Cohen ed.) (Cambridge/London: Cambridge University Press, 1979)

83. Hymer S, "The Multinational Corporation and the Law of Uneven Development," in G Modelski (ed.), *Transnational Corporations and World Order* (San Francisco, California: W H Freeman, 1979)
84. International Commission of Jurists, *Economic, Social and Cultural Rights: A Compilation of Essential Documents* (Geneva, Switzerland, 1997)
85. Jackson J H et al, *Legal Problems of International Economic Relations: Cases, Materials and Text* (Minnesota: West Group, 1995)
86. Jackson J H, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, Mass.: MIT Press, 2000)
87. Jagers N, "The Legal Status of the Multinational Corporation under International Law" in M K Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, The Netherlands: Kluwer Law International, 1999)
88. Jackson J H, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2000)
89. Jennings R and Watts A (eds.), *Oppenheim's International Law*, 9th ed., (Harlow, UK: Pearson/Longman, 1992)
90. Jesperson E, "External Shocks, Adjustment Policies and Economic and Social Performance" in G A Cornia et al (eds.), *Africa's Recovery in the 1990s: From Stagnation and Adjustment to Human Development* (New York: St Martin's Press, 1992)
91. Jones R W, *International Trade: Essays in Theory*, vol.4 (Amsterdam: North- Holland Publishing, 1979)
92. Kanbur R, "Aid, Conditionality and Debt in Africa," in F Tarp and P Hjertholm (eds.), *Foreign Aid and Development: Lessons Learnt and Directions for the Future* (London: Routledge, 2000)
93. Kearney N "Corporate Codes of Conduct: The Privatized Application of Labour Standards," in S Picciotto and R Mayne, *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan & Oxfam, 1999)
94. Korten D C, *When Corporations Rule the World* (West Hartford, CT: Kumarian Press, 2001)
95. Krueger A O, *Perspectives on Trade and Development* (Hemel Hempstead: Harvester Wheatsheaf, 1990)
96. Krueger A O, *A New Approach to Sovereign Debt Restructuring* (Washington DC: International Monetary Fund, 2002)
97. Krugman P R (ed.), *Strategic Trade Policy and the New International Economics* (Cambridge, Mass.: MIT Press, 1986)
98. Krugman P R, *Geography and Trade* (Cambridge, Mass.: MIT Press, 1991)
99. Lugalla J P, "Structural Adjustment Policies and Education in Tanzania," in Gibbon P (ed.), *Social Change and Economic Reform in Africa* (Uppsala, Sweden: Nordiska Afrikainstituted, 1993)
100. Lamb D, *The Africans* (New York: Random House, 1983)
101. Leary V A, "Globalization and Human Rights," in J Symonides (ed.), *Human Rights: New Dimensions and Challenges* (Aldesrshot, UK: Ashgate and UNESCO Publishing, 1998)
102. Lerner D, The Passing of Traditional Society: Modernizing the Middle East (New York: Free Press, 1964)
103. Leslie W J, Zaire: Continuity and Political Change in an Oppressive State (Boulder, CO: Westview Press, 1993)
104. Lewis W A, The Theory of Economic Growth (London: Allen and Unwin, 1955)
105. Leys C, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism (London: Heinemann, 1975)
106. Lipmann M, "Multinational Corporations and Human Rights," in G W Shepherd and V Nanda (eds.), *Human Rights and Third World Development* (Greenwood Publishing, 1986)
107. List, F *The National System of Political Economy* (trans. by S S Lloyd) (London: Longmans, Green & Co, 1904)
108. Madeley J, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (London and New York: Zed Books, 2000)

109. Madeley J, *Hungry for Trade: How the Poor Pay for Free Trade* (London and New York: Zed Books, 2000)
110. Martin R, "Human Rights and Civil Rights," in M Winston (ed.), *The Philosophy of Human Rights* (Belmont, Ca: Wadsworth, 1989)
111. Martin W and Winters L A (eds.), *The Uruguay Round and the Developing Countries* (Cambridge: Cambridge University Press, 1996)
112. Mason E S and Asher R E, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and the Other Members of the World Bank Group* (Washington DC: Brookings Institution, 1973)
113. M'Baye K and Ndiaye B, "The Organization of African Unity," in K Vasak and P Alston (eds.), *The International Dimensions of Human Rights* (Connecticut: Greenwood Press, 1982)
114. Michalet C, "France" in J H Dunning (ed.), *Governments, Globalization, and International Business* (UK: Oxford University Press, 1999)
115. Milward B, "What is Structural Adjustment?" in G Mohan et al (eds.), *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000)
116. Mehmet O, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (London: Routledge, 1999)
117. Meyer W H, *Human Rights and International Political Economy in Third World Nations: Multinational Corporations, Foreign Aid, and Repression* (New York: Praeger, 1998)
118. Mohan G et al: *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000)
119. Monbiot G, *Captive State: The Corporate Takeover of Britain* (London: Macmillan, 2000)
120. Moore J B, *History and Digest of International Arbitrations to Which the U.S. Has Been a Party* (Washington DC: Government Printing Office, 1898)
121. Mosler H, *The International Society as Legal Community* (Kluwer Academic Publishers, 1980)
122. Mower A G, *The United States, The United Nations, and Human Rights: The Eleanor Roosevelt and Jimmy Carter Eras* (Westport, Connecticut: Greenwood Press, 1979)
123. Muchlinski P T, "Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community," in G Teubner (ed.), *Global Law Without a State* (Aldershot, UK: Ashgate Publishing, 1997)
124. Muchlinski P T, "A Brief History of Business Regulation," in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan & Oxfam, 1999)
125. Muchlinski P T, *Multinational Enterprises and the Law* (Oxford, UK and Cambridge, Mass.: Blackwell Publishers, 1999)
126. Myrdal G, *Economic Theory and Underdeveloped Regions* (New York: Harper Torchbooks, 1957)
127. Nwabueze B O, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (London: C Hurst & Co, 1977)
128. Nyerere J, *Man and Development* (Dar es Salaam: Oxford University Press, 1973)
129. O'Connell D P O, *The Law of State Succession* (Cambridge University Press, 1965)
130. O'connell D P, *State Succession in Municipal Law and International Law* (Cambridge, UK: Cambridge University Press, 1967)
131. Ostry S, "Looking Back to Look Forward: The Multilateral Trading System After 50 Years," in World Trade Organization, *From GATT to the WTO: The Multilateral Trading System in the New Millennium* (The Hague: Kluwer Law International, 2000)
132. Picciotto S, "Introduction: What Rules for the World Economy?" in S Piccioto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Great Britain: Macmillan and Oxfam, 1999)
133. Porter M E, *The Competitive Advantage of Nations* (Basingstoke and London: Macmillan Press, 1998)
134. Pritchard K, "Human Rights and Development: The Theory and Data," in D P Forsythe (eds.), *Human Rights and Development* (London/Basingstoke: Macmillan 1989)
135. Qureshi A H, *International Economic Law* (Manchester, UK: Manchester University Press, 1999)

136. Ravenhill J, "A Second Decade of Adjustment: Greater Complexity, Greater Uncertainty," in T M Callaghy and J Ravenhill (eds.), *Hemmed In: Responses to Africa's Economic Decline* (New York: Columbia University Press, 1993)
137. Rehof L A, "Development Assistance from the Point of View of Human Rights," in L A Rehof and C Gulman (eds.), *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (The Netherlands: Kluwer Academic Publishers, 1989)
138. Ricardo D, *The Principles of Political Economy and Taxation* (New York: E P Dutton, 1911, first published in 1817)
139. Riley S P (ed), *The Politics of Global Debt* (London: St Martin's Press, 1993)
140. Robertson, *Human Rights in the World* (Manchester University Press, 1972)
141. Rosas A and Scheinin M, "Implementation Mechanisms and Remedies," in A Eide et al (eds.), *Economic, Social and Cultural Rights* (The Netherlands: Martinus Nijhoff Publishers, 1995)
142. Rostow W W, The Stages of Economic Growth: A Non-Communist Manifesto (Cambridge University Press, 1977)
143. Sack A N, *Les Effets des Transformations des Etats sur leurs Dettes Publiques et Autres Obligations Financieres* (Paris: Recueil Sirey, 1927).
144. Sahn D E (ed), *Economic Reform and the Poor in Africa* (Oxford: Clarendon Press, 1996)
145. Sahn E et al, Structural Adjustment Reconsidered: Economic Policy and Poverty in Africa (Cambridge UK: Cambridge University Press, 1999)
146. Samuelson P and Scott A, *Economics* (Toronto: McGraw Hill, 1980)
147. Samuelson P, *Economics*, 11th ed., (New York: McGraw Hill, 1980)
148. Schmitthoff C M, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th ed. (London: Stevens & Sons, 1990)
149. Schaefer B D, *The Bretton Woods Institutions: History and Reform Proposals* (Washington DC: The Heritage Foundation 2000)
150. Scoble H M, "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter," in C E Welch Jr. and R I Meltzer (eds.), *Human Rights and Development in Africa* (State University of New York Press, 1984)
151. Seidl-Hohenveldern I, *International Economic Law* (The Hague: Martinus Nijhoff, 1992)
152. Sen A, *On Ethics and Economics* (Oxford: Blackwell Publishers, 1989)
153. Seshamani V, "Structural Adjustment and Poverty Alleviation: Some Issues on the Use of Social Safety Nets and Targeted Public Expenditures," in R van der Hoeven and F van der Kraaij (eds.) *Structural Adjustment and Beyond in Sub-Saharan Africa* (London and Portsmouth: James Currey & Heinemann, 1994)
154. Shelton D, *Remedies in International Human Rights Law* (Oxford University Press, 2000)
155. H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1980)
156. Simon D, et al, *Structurally Adjusted Africa: Poverty, Debt and Basic Needs*, (London: Pluto Press, 1995)
157. Skogly S, "Economic and Social Human Rights: Private Actors and International Obligations" in M K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, The Netherlands: Kluwer Law International, 1999)
158. Skogly S I, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001)
159. Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Nicholson J S ed.) (London: T Nelson & Sons, 1895)
160. Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (R H Campbell et al eds.) (Oxford: Clarendon Press, 1976)
161. Spero J, The Politics of International Economic Relations (New York: St Martins, 1990)
162. Steiner H J and Alston P, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford, UK: Oxford University Press, 2000)
163. Steiner H J, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?" in P Alston and J Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000)
164. Stewart F, Adjustment and Poverty: Options and Choices (London: Routledge, 1995)

165. Stiglitz J E, *Gobalization and its Discontents* (London: Penguin, 2002)
166. Strange S, *The Retreat of the State: The Diffusion of Power in the World* Economy (Cambridge: Cambridge University Press, 1996)
167. Szabo I, "Historical Foundations of Human Rights," in K Vasak and P Alston (eds), *The International Dimensions of Human Rights*, vol.1, (Connecticut: Greenwood Press, 1982)
168. Thomas C, "International Financial Institutions and Social and Economic Human Rights: An Exploration," in T Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (Manchester and New York: Manchester University Press, 1998)
169. Thurow K, Head to Head: The Coming Economic Battle Among Japan, Europe, and America (New York: William Morrow, 1992)
170. Todaro M P, *Economic Development*, 7th ed., (Harlow, UK: Addison-Wesley, 2000)
171. Toebes B C A, *The Right to Health as a Human Right in International Law* (Oxford: Intersentia-Hart, 1999)
172. Tomasevski K, *Development Aid and Human Rights* (London: Pinter, 1989)
173. Toope S J, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge University Press, 1990)
174. Toye J, "Structural Adjustment: Context, Assumptions, Origin and Diversity," in R van der Hoeven, and F van der Kraaij, (eds.), *Structural Adjustment and Beyond in Sub-Saharan Africa* (London and Portsmouth: James Currey & Heinemann, 1994)
175. Trebilcock M J and Howse R, *The Regulation of International Trade* (London: Routledge, 1995 and 2000 eds.)
176. Uvin P, *Aiding Violence: The Development Enterprise in Rwanda* (West Hartford, CT: Kumarian Press, 1998)
177. Vagts D F, *Transnational Business Problems*, 2nd ed., (New York: Foundation Press, 2001)
178. van de Walle N, *African Economies and the Politics of Permanent Crisis, 1979-1999* (UK: Cambridge University Press, 2001)
179. Vernon R, *Sovereignty at Bay* (London: Longman Group Ltd., 1971)
180. Vernon R, *The Economic Environment of International Business* (Englewood Cliffs, New Jersey: Prentice-Hall Inc.,1972)
181. Wells C, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 1993)
182. Williams J F and Lauterpacht H (eds.), *Annual Digest of Public International Law Cases, Years 1923 to 1924* (London: Longmans, Green & Co., 1933)
183. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987)
184. Yoffie D B and Gomes-Casseres B, *International Trade and Competition: Cases and Notes in Strategy and Management* (New York: McGraw-Hill, 1994)
185. Zack-Williams A B, "Social Consequences of Structural Adjustment," in G Mohan et al (eds.), *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000)
186. Zoller E, "The Status of Individuals Under International Law," in G Ginsburgs and V N Kudravtsev (eds.), *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff, 1990)

A Selection of Conference and Other Speeches

1. The Honourable Richard B Cheney [US Vice President], "Meeting the Challenge of the War on Terrorism," Heritage Lectures no.802, delivered on the 10th of October 2003
2. Helleiner G K, "Markets, Politics and Globalization: Can the Global Economy be Civilized?" 10th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, at the Palais des Nations, Geneva, 11 December 2000
3. Killick T, "Explaining Africa's Post-independence Development Experiences," paper presented at the Second Biennial Conference on African Economic Issues, Abidjan, Ivory Coast, 13-15 October 1992
4. McNamara R, Address to the Board of Governors of the World Bank Group, Nairobi, Kenya, 24 September 1973
5. O'Connell S A and Soludo C C, "Aid Intensity in Africa," paper presented at the Africa Economic Research Consortium/Overseas Development Council conference titled "Managing the Transition from Aid Dependency in Sub-Saharan Africa," Nairobi, 21-22 May, 1998
6. Ogunkola E O, "African Capacity for Compliance and Defense of WTO Rights," Paper presented at the African Economic Research Consortium (AERC)-sponsored conference, "Africa and the World Trading System," Yoaunde, Cameroon, 17-18 April 1999)
7. Shihata I, "The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements," (paper submitted to the Third World Legal Studies Association Conference in Miami, Florida on January 8 1988.
8. Stiglitz J E, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland
9. Stiglitz J E, "Towards a New Paradigm for Development: Strategies, Policies and Processes," 9th Raul Prebisch Lecture, delivered under the auspices of UNCTAD, Geneva, 19th October 1998
10. Thatcher M, "The Challenges of the 21st Century," Speech to Citibank in Lahore, 27 March 1996
11. World Bank Group/IMF, Statement by the Hon. William J Clinton, President of the United States, at the Annual Meetings of the Boards of Governors of the World Bank Group and the International Monetary Fund, Press Release No.6, September 28–30, 1999

Official Publications and Primary Sources

1. Alesina A and Dollar D "Who Gives Aid to Whom and Why?" (June 1998), *National Bureau of Economic Research Working Paper.* No.W6612
2. Alter R, "Export Processing Zones for Growth and Development: The Mauritian Example." *IMF Working Paper (WP/90/122),* December 1990
3. Amnesty International, *Human Rights Principles for Companies*, AI-index: ACT 70/001/1998 of 1 January 1998
4. Amnesty International, United Kingdom Business Group, *Human Rights Guidelines for Companies* (London: Amnesty International United Kingdom, 1998)
5. Amnesty International, *Amnesty International Report 2001: Zimbabwe*, AI Index: Pol 10/001/2001
6. Berg E J, *Rethinking Technical Co-operation* (New York: UNDP, 1993)
7. Botchwey K et al, Report of the Group of Independent Persons Appointed to Conduct an Evaluation of Certain Aspects of the Enhanced Structural Adjustment Facility (Washington DC: IMF, 1998)
8. Calamitsis E A et al, "Adjustment and Growth in Sub-Saharan Africa," IMF Working Paper, WP/99/51, (IMF Africa Department, April 1999)
9. Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5 (entered into force 21 October 1986), reprinted in 21 I.L.M 58 (1982)
10. Charveriat C, "Bitter Coffee: How the Poor are Paying for the Slump in Coffee Prices," Oxfam Policy Paper (May 2001)
11. Claessens S et al, "Analytical Aspects of the Debt Problems of Heavily Indebted Poor Countries," in Z Iqbal and R Kanbur (eds.), *External Finance for Low Income Countries* (Washington DC: IMF Institute, 1997)
12. Constitutive Act of the African Union, adopted by the African Heads of State and Government in Lome, Togo, 11 July 2000 (CAB/LEG/23.15)
13. de Merode L and Thomas C, "Implementing Civil Service Pay and Employment Reform in Africa: The Experiences of Ghana, Gambia and Guinea," in D Lindauer and B Nunberg (eds.), *Rehabilitating Government: Pay and Employment Reforms in Africa* (Washington DC: World Bank, 1994)
14. Department for International Development, *Eliminating World Poverty: Making Globalisation Work for the Poor*, White Paper on International Development, Cm 5006 (December 2000)
15. Department for International Development, Departmental Report 2002: The Government's Expenditure Plans 2002/2003 to 2003/2004, presented to Parliament by the Secretary of State for International Development and the Chief Secretary to the Treasury, April 2002
16. Department of Transport, *MV Herald of Free Enterprise, Report of Court No. 8074* (London: Her Majesty's Stationery Office 1987)
17. Devarajan S et al (eds.), *Aid and Reform in Africa: Lessons From Ten Case Studies* (Washington DC: World Bank, 2001)
18. DFID, FCO, and MOD, *The Causes of Conflict in Sub-Saharan Africa: Framework Document* (October 2001)
19. Dollar D and Pritchett L, *Assessing Aid: What Works, What Doesn't, and Why – A World Bank Policy Research Report* (Oxford: Oxford University Press, 1998)
20. Ebuetse J O, "Measures to Attract and Encourage Transfer of Technology by Nigeria," paper presented at the UNCTAD Expert Group Meeting on Home Country Measures, Geneva, 8-10 November 2000.
21. Elbadawi I E, "World Bank Adjustment Lending and Economic Performance in Sub-Saharan Africa in the 1980s: A Comparison of Early Adjusters, Late Adjusters, and Nonadjusters," *Policy Research Working Papers,* (Washington DC: World Bank, Country Economics Department, October 1992).
22. European Union, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (*Official Journal L 307 , 13/12/1993 P. 0018 – 0024*)

23. Fanelli J M et al, "The World Development Report 1991: A Critical Assessment" in United Nations Conference on Trade and Development, *International Monetary and Financial Issues for the 1990s* (New York: UNCTAD, 1992)
24. Fedelino A and Kudina A, Fiscal Sustainability in African HIPC Countries: A Policy Dilemma? IMF Working Paper WP/03/187 (IMF, Washington DC: September 2003)
25. *Final Report of UNESCO Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order*, Paris, 19-23 June 1978, UNESCO Doc. SS-78/CONF.630/12
26. Finger J M and Schuler P, Implementation of Uruguay Round Agreements: The Development Challenge, Policy Research Working Paper 2215 (Washington DC: World Bank Development Research Group, October 1999)
27. Fitzgerald E K, *The Development Implications of the Multilateral Agreement on Investment (MAI)* (London: Department for International Development, 1998).
28. Food and Agricultural Organization of the United Nations and World Health Organization, *Understanding the Codex Alimentarius* (Rome: FAO/WHO, 1999)
29. Galtung J and Wirak A, *Human Needs, Human Rights, and the Theory of Development* (Paris: UNESCO, 1976)
30. Garristen de Vries M, *The IMF in a Changing World, 1945-85* (Washington DC: IMF, 1986)
31. GATT, *Trends in International Trade: A Report by a Panel of Experts* (Geneva: GATT Secretariat, 1958)
32. GATT, *Tokyo Round Decisions,* BISD, 26th Supp. (1980)
33. Goodison P, European Research Office, speech to a EuronAid/EU-NGDO conference, "Agenda 2000 CAP Reform and Global Food Security", Madrid, November 1998.
34. Greenway D and Milner C, *The Uruguay Round and Developing Countries: An Assessment*, Economic Paper 25 (London: Commonwealth Secretariat, 1996)
35. Hoekman B, Economic Development and the WTO After Doha, World Bank Policy Research Working Paper 2851, June 2002
36. IBRD, Sub-Saharan Africa, From Crisis to Sustainable Growth: A Long Term Perspective Study (Washington DC: IBRD, 1989)
37. IBRD/World Bank, *Development and Human Rights: The Role of the World Bank* (Washington DC: IBRD, 1998)
38. International Monetary Fund, *Annual Report 1970* (Washington DC: IMF, 1970)
39. IMF, "Fund-Supported Programs, Fiscal Policy and Income Distribution," *IMF Occasional Papers No. 46* (1986), Washington DC; and World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (Washington DC: World Bank, 1982)
40. IMF, *World Economic Outlook*, (Washington DC: IMF, April 1986).
41. IMF, "Theoretical Aspects of the Design of Fund-Supported Adjustment Programmes: A Study by the Research Department of the IMF, Occasional Paper No.55, September 1987, (Washington DC: IMF, September 1987)
42. IMF, *The ESAF at Ten Years: Economic Adjustment and Reform in Low-Income Countries*, Occasional Paper No. 156 (Washington DC: IMF, 12 February 1998)
43. IMF, *2002 World Economic Outlook* (Washington DC: IMF, 2002)
44. Khan M, "The Macroeconomic Effects of Fund-Supported Adjustment Programs," (June 1990) *IMF Staff Papers,* vol.37, no.2, Washington DC
45. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17)
46. "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," (1998) *Hum. Rts. Q.*, vol. 20, no. 3, at pp.691-701
47. Michalopoulos C, Trade Policy and Market Access Issues for Developing Countries: Implications for the Uruguay Round, Policy Research Working Paper 2214 (Washington DC: World Bank Development Research Group, 1999)
48. Michalopoulos C, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* Policy Research Working Paper 2388 (Washington DC: World Bank Trade and Development Research Group, 2000)
49. Multilateral Development Banks/IMF, *Global Poverty Report* (G-8 Okinawa Summit, July 2000)

50. Ng F and Yeats A, *Open Economies Work Better! Did Africa's Protectionist Policies Cause its Marginalization in World Trade?* Policy Research Working Paper 1636 (Washington DC: World Bank International Economics Department and International Trade Division, 1996)
51. Ng F and Yeats A, *Good Governance and Trade Policy: Are They the Keys to Africa's Global Integration and Growth?* Policy Research Working Paper 2038 (Washington DC: World Bank Development Research Group, 1999)
52. Odenthal L, New Forms of Co-operation and Integration in Emerging Africa: FDI in Sub-Saharan Africa, OECD Technical Papers No. 173, CD/DOC5 (2001)
53. OECD, *Shaping the 21st Century: The Contribution of Development Co-operation* (Paris: OECD, 1996)
54. OECD, *Agricultural Policies in OECD Countries: Monitoring and Outlook* (Paris: OECD, 1999)
55. OECD, *Agricultural Policies in OECD Countries*: vol.I, *Monitoring and Evaluation* (Paris: OECD, 2000); and vol.II, *Measurement of Support and Background Information* (Paris: OECD, 2000)
56. OECD, *The OECD Guidelines for Multinational Enterprises: Text* (Paris: OECD, 2000)
57. OECD, *OECD Agricultural Outlook, 2002-2007 – Highlights* (Paris: OECD, 2002)
58. OECD, *Agricultural Policies in OECD Countries – Monitoring and Evaluation*, Paris: OECD, 2002)
59. Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980-2000, Addis-Ababa, Ethiopia (adopted by the Assembly of Heads of State and Government of the OAU, Second Extraordinary Summit, Lagos, Nigeria, 28-29 April 1980)
60. Owusu K et al, Through the Eye of a Needle: The Africa Report – A Country by Country Analysis (Jubilee 2000 Coalition, 2000)
61. Peters D H et al, *Health Expenditures, Services and Outcomes in Africa* (Washington DC: World Bank, 1999)
62. Prebisch R, *The Economic Development of Latin America and Its Principal Problems* (New York: UN Economic Commission for Latin America, Department of Economic Affairs, 1950)
63. Preston L T, *The World Bank Group: Learning From the Past, Embracing the Future* (Washington DC: World Bank, 1999)
64. Robinson M and White G, "The Role of Civic Organizations in the Provision of Social Services," UNU/WIDER Research for Action Paper no.37 (1997)
65. Rodrik D, "Trade Policy and Economic Performance in Sub-Saharan Africa" (1997) - Paper prepared for the Swedish Ministry of Foreign Affairs
66. Roe A and Schneider H, *Adjustment and Equity in Ghana* (Paris: OECD, 1992)
67. Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998,12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002 (entered into force on 1 July 2002)
68. Sachs J and Sievers S, "Foreign Direct Investment in Africa," in World Economic Forum, *The Africa Competitiveness Report 1998* (Geneva: World Economic Forum, 1998)
69. Schadler S et al, "Economic Adjustment in Low-income Countries: Experience Under the Enhanced Structural Adjustment Facility," Occasional Paper No. 106, IMF, Washington
70. Schafaeddin M, *How Did Developed Countries Industrialize? The History of Trade and Industrial Policy: The Cases of Great Britain and the USA*, UNCTAD Discussion Papers No. UNCTAD/OSG/DP/139 (Geneva: UNCTAD, 1998)
71. Stiglitz J E, "More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus," United Nations University/World Institute for Development Economics Research (WIDER) Annual Lectures 2, January 1998, Helsinki, Finland
72. Subramanian A at al, "Trade and Trade Policies in Eastern and Southern Africa," Occasional Paper 196 (Washington DC: IMF, 2000)
73. Supper E, *Is There Effectively a Level Playing Field for Developing Country Exports?* Policy Issues in International Trade and Commodities Study Series No.1 (New York and Geneva: United Nations, 2001)
74. Tsikata Y M, "Globalisation, Poverty and Inequality in Sub-Saharan Africa: A Political Economy Appraisal," *OECD Technical Papers No.183*, (Paris: OECD, December 2001)

75. UNCTAD, Assessment of the Results of the Multilateral Trade Negotiations: Report by the Secretary-General, UNCTAD Doc. T/B/778/Rev.1 (1980)
76. UNCTAD, *Concentration of Market Power and its Effects on International Markets: Report by UNCTAD Secretariat*, TD/B/RPB/80/Rev.2 (New York and Geneva: United Nations, 1993)
77. UNCTAD, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (Geneva: United Nations, 1994)
78. UNCTAD, *International Investment Instruments: A Compendium*, vol.I (New York and Geneva: United Nations, 1996)
79. UNCTAD, World Investment Report 1996: Investment, Trade and International Policy Arrangements (New York and Geneva: United Nations, 1996)
80. UNCTAD/WTO, *Market Access Developments Since the Uruguay Round: Implications, Opportunities and Challenges, in Particular for Developing Countries, and Least Developed Countries, in the Context of Globalization and Liberalization* (Geneva: UNCTAD, 1997)
81. UNCTAD, *Trade and Development Report* 1998 (Geneva: United Nations, 1998)
82. UNCTAD, *African Development in a Comparative Perspective* (Geneva: UNCTAD, 1998/1999)
83. UNCTAD, *Foreign Direct Investment in Africa: Performance and Potential* (New York and Geneva: United Nations, 1999)
84. UNCTAD, *Foreign Direct Investment and Development: UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations,1999)
85. UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (New York: Oxford University Press, 1999)
86. UNCTAD, *Trade and Development Report* 1999, (Geneva: United Nations, 1999)
87. UNCTAD, *The Least Developed Countries Report 2000 – Aid, Private Capital Flows and External Debt: The Challenge of Financing Development in the LDCs* (New York and Geneva: United Nations, 2000)
88. UNCTAD, *Social Responsibility: UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations, 2001)
89. UNCTAD, *Economic Development in Africa: Performance, Prospects and Policy Issues* (New York and Geneva: United Nations, 2001)
90. UNCTAD, *FDI In Least Developed Countries at a Glance* (New York and Geneva: United Nations, 2001)
91. UNCTAD/Commonwealth Secretariat, *Duty and Quota Free Market Access for LDCs: An Analysis of Quad Initiatives* (Geneva and London: UNCTAD and Commonwealth Secretariat, 2001)
92. UNCTAD, *Handbook on Special Provisions for Least Developed Countries (Under the Schemes of E.C., Japan, U.S., Canada) (INT/97/A06)*, UNCTAD Technical Cooperation Project on Market Access, Trade Laws and Preferences, UNCTAD/ITCD/TSB/Misc., May 2001
93. UNCTAD, *Statistical Profiles of the Least Developed Countries* (UNCTAD/LDC/Misc.72) (New York and Geneva: UNCTAD, 2001)
94. UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (New York and Geneva: United Nations, 2002)
95. UNCTAD, *Economic Development in Africa, From Adjustment to Poverty Reduction: What is New?* (New York and Geneva: United Nations, 2002)
96. UNDP, *Human Development Report 1990* (Oxford University Press, 1990)
97. UNDP, *Human Development Report 1994* (Oxford University Press, 1994)
98. UNDP, *Human Development Report 1995: Gender and Human Development* (Oxford: Oxford University Press, 1995)
99. UNDP, *Human Development Report 1996: Economic Growth and Human Development* (New York: UNDP, 1996)
100. UNDP, *Human Development Report 1997: Human Development to Eradicate Poverty* (New York: Oxford University Press, 1997)
101. UNDP, *Human Development Report 1999: Globalization With a Human Face* (New York: Oxford University Press, 1999)
102. UNDP, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000)

103. UNDP, *Poverty Report 2000: Overcoming Human Poverty* (New York: UNDP, 2000)
104. UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002)
105. UNICEF, *The State of the World's Children* New York: Oxford University Press, (1993)
106. United Nations, *Poverty Reduction Strategies: A Review* (New York: Department of Economic and Social Affairs, United Nations, 1998)
107. United Nations, *World Survey on the Role of Women in Development: Globalization, Gender and Work* (United Nations Publication, Sales No. E.99.IV.8, 1999)
108. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fourth session Item 8 of the provisional agenda, The Realization of Economic, Social and Cultural Rights, Final Report Submitted by Mr Danilo Turk, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1992/16, 3 July 1992
109. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Fifty-first session, Item 4 of the provisional agenda: The Right to Adequate Food and to be Free from Hunger, Updated study on the right to food, submitted by Mr. Asbjorn Eide in accordance with Sub-Commission decision 1998/106, UN Doc E/CN.4/Sub.2/1999/12 of 28 June 1999
110. United Nations Economic Commission for Africa, "Compact for African Recovery: Operationalising the Millennium Partnership for the African Recovery Programme" Addis Ababa, 20 April 2001
111. United Nations Economic and Social Council, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, preliminary report submitted by J Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8, E/CN.4/Sub.2/2000/13, 15 June 2000
112. UN Committee on Economic, Social and Cultural Rights, General Comment 1, Reporting by States Parties (Third session, 1989), 24 February 1989, UN Doc E/1989/22
113. UN Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States Parties Obligations (Art. 2, para. 1 of the Covenant) (Fifth Session, 1990) UN Doc.E/1991/23
114. UN Committee on Economic, Social and Cultural Rights, The Right to Adequate Housing (Art. 11 (1) of the Covenant)(Sixth session, 1991), General Comment 4, UN Doc E/1992/23, of 13 December 1991
115. UN Committee on Economic, Social and Cultural Rights, Report on the Seventh Session (23 Nov.-11 Dec. 1992), Economic and Social Council, Official Records, 1993, Supplement No. 2, Annex III, Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1993/22 (1993)
116. UN Committee on Economic, Social and Cultural Rights, Twentieth session, Geneva, 26 April-14 May 1999, Agenda item 7, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12, UN Doc E/C.12/1999/5, of 12 May 1999
117. UN Committee on Economic, Social and Cultural Rights, Twenty-first session (15 November-3 December 1999), Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (Article 13 of the Covenant), UN Doc. E/C.12/1999/10, of 8 December 1999
118. UN Committee on Economic, Social and Cultural Rights, Twenty-second Session, Geneva, 25 April-12 May 2000, Agenda item 3, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), UN Doc E/C.12/2000/4, of 14 August 2000
119. UN Committee on Economic, Social and Cultural Rights, Twenty-second Session, Geneva, 25 April-12 May 2000, Agenda item 3, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), UN Doc E/C.12/2000/4, of 14 August 2000
120. United Nations Economic and Social Council, *Summary of the economic and social situation in Africa, 2000* (E/2001/13), 30 May 2001

121. United Nations Economic and Social Council, "The Role of the United Nations System in Supporting the Efforts of African Countries to Achieve Sustainable Development," Report of the Secretary-General (E/2001/83 of 12 June 2001)
122. United Nations Economic and Social Council, Globalization and its Impact on the Full Enjoyment of Human Rights, Progress report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102, E/CN.4/Sub.2/2001/10, 2 August 2001
123. United Nations, Economic and Social Council, Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/5, E/CN.4/2001/WG.18/2, 2 January 2001
124. United Nations Economic and Social Council, Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, submitted in accordance with Commission Resolution 2001/9, E/CN.4/2002/WG.18/2, of 20 December 2001
125. United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa, 2000," UN Doc. E/2001/13, of 30 May 2001
126. United Nations Economic and Social Council, The Highly Indebted Poor Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP) – report submitted by Mr Fantu Cheru, independent expert on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights, E/CN.4/2001/56, 18 January 2001
127. United Nations Economic and Social Council, Commission on Human Rights, The Right to Development: Report of the Open-Ended Working Group on the Right to Development, Third Session (Geneva, 25 February-8 March 2002), E/CN.4/2002/28/Rev.1, of 11 April 2002.
128. United Nations General Assembly, Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda For Peace: Preventative Diplomacy, Peacemaking, and Peace-Keeping, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277-S/24111 (1992)
129. United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, 11 September 1998
130. United Nations General Assembly, Fifty-Fifth Session, Agenda Item 60(b), United Nations Millennium Declaration A/RES/55/2, of 18 September 2000
131. United Nations General Assembly, Third United Nations Conference on the Least Developed Countries, Programme of Action for the Least Developed Countries, adopted in Brussels on 20 May 2001 (A/CONF.191/11, 8 June 2001)
132. United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, of 11 September 1998
133. United Nations Economic and Social Council, "Summary of the Economic and Social Situation in Africa, 2000," UN Doc. E/2001/13, of 30 May 2001
134. United Nations Food and Agriculture Organization, *Experience with the Implementation of the Uruguay Round Agreements on Agriculture – Developing Country Experiences: Synthesis of Country Case Studies*, (presented at a symposium titled "Agriculture, Trade and Food Security: Issues and Options in the Forthcoming WTO Negotiations from the Perspective of Developing Countries." Geneva, 23-24 September 1999, by its Commodities and Trade Division.
135. United Nations General Assembly, World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, A/CONF.157/23, of 12 July 1993
136. United Nations General Assembly, World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, adopted 25 June 1993, A/CONF.157/23, of 12 July 1993 (adopted 25 June 1993)
137. United Nations General Assembly, United Nations Decade for Human Rights Education General Assembly Resolution 1994/184, A/RES/49/184 of 6 March 1995
138. United Nations General Assembly, "Debt Situation of the Developing Countries as of Mid-1998," Report by the Secretary-General, A/53/373, 11 September 1998
139. United Nations General Assembly, Development of Guidelines on the Role and Social Responsibilities of the Private Sector: Report of the Secretary-General, Doc. A/AC.253/2, of 24 February 2000

140. United Nations General Assembly, Globalization and its Impact on the Full Enjoyment of All Human Rights, Preliminary Report of the Secretary-General, A/55/342, 31 August, 2000.
141. United Nations General Assembly, Third United Nations Conference on the Least Developed Countries, Brussels, Belgium, 14-20 May 2001 (Declaration, A/CONF.191/L.20), 20 May 2001)
142. United Nations General Assembly, United Nations Convention Against Transnational Organized Crime, UN Doc. A/RES/55/35, of 8 January 2001
143. UN Secretary-General "The International Dimensions of the Right to Development as a Human Right in Relation With Other Human Rights Based on International Co operation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Needs," U.N. Doc. E/CN.4/1334 (1979)
144. UN Secretary-General's Report to the Security Council, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General," UN SCOR, 52 Sess., Agenda Item 10, UN Doc. A/52/871-S/1998/318 (1998)
145. United Nations Security Council, Resolution 794(1992), S.C. Res. 794, 47 U.N. SCOR at 63, U.N. Doc. S/RES/794 (1992) of 3 December 1992 (adopted by the Security Council at its 3145th Meeting)
146. United Nations Security Council Resolution 814 (1993), S/RES/814 (1993) of 26 March 1993 (adopted by the Security Council at its 3188th Meeting)
147. United Nations Security Council Resolution 837 (1993), S/RES/837 (1993) of 6 June 1993 (adopted by the Security Council at its 3229th Meeting)
148. United Nations Security Council, Resolution 929 (1994), S/RES/929 (1994) of 22 June 1994 (adopted by the Security Council at its 3392nd Meeting)
149. United Nations Security Council Resolution 1308 (2000), S/RES/1308 (2000), of 17 July 2000 (adopted by the Security Council at its 4172nd Meeting)
150. UN Security Council, Resolution 1457 (2003), S/RES/1457 (2003), of 24 January 2003 (adopted by the Security Council at its 4691st Meeting)
151. United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The Second of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2002)
152. United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The First of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2001)
153. United States Trade Representative (USTR), *Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act – The Second of Eight Annual Reports of the President of the United States to the United States Congress* (Washington DC: United States Government Printing Office, 2002).
154. Wang Z K and Winters L A, *Africa's Role in Multilateral Trade Negotiations*, Policy Research Working Paper 1846 (Washington DC: World Bank, Economic Development Institute, New Products and Outreach Division and Development Research Group, 1997)
155. World Bank, *Annual Report*, vol.1, no: 20091 of January 1, 1981, Washington DC
156. World Bank, "Capital Accumulation and Economic Growth: The Korean Paradigm," *Staff Working Papers, no. 712* (Washington DC: World Bank, 1985)
157. World Bank, *World Bank Development Report: Opportunities and Risks in Managing the World Economy* (Oxford: Oxford University Press, 1988)
158. World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth (Washington DC: World Bank, 1989).
159. World Bank, *World Development Report 1990: Poverty* (Oxford University Press, 1990)
160. World Bank Group, *Report on Adjustment Lending II: Policies for the Recovery of Growth* (Washington DC: World Bank Group, 1990)
161. World Bank, *Structural Adjustment and Poverty: A Conceptual, Empirical and Policy Framework* (Washington DC: World Bank, 1990)
162. World Bank, *World Bank Debt Tables 1991-1992* (Washington DC: World Bank, 1991)

163. World Bank, *Zambia: Prospects for Sustainable and Equitable Growth, Report No.11570-ZA* (Washington DC: World Bank, 1993)
164. World Bank, *Adjustment in Africa: Reforms, Results and the Road Ahead* (New York: Oxford University Press, 1994)
165. World Bank, *Resettlement and Development: The Bank-wide Review of Projects Involving Involuntary Resettlement 1986-1993* (Washington DC: World Bank, 1994)
166. World Bank, *World Development Report 1995: Workers in an Integrated World* (Oxford University Press, 1995)
167. World Bank Group, *Structural and Sectoral Adjustment Lending: World Bank Experience* (1980-1992), Sector Study Number 14691 (World Bank, Operations Evaluation Department, 1995)
168. World Bank, *A Continent in Transition: Sub-Saharan Africa in the Mid 1990s* (Washington DC: World Bank, 1995)
169. World Bank, *The World Debt Tables 1996* (Washington DC: World Bank, 1996)
170. World Bank, The World Bank Participation Sourcebook: Environmentally Sustainable *Development* (Washington DC: World Bank, 1996)
171. World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997)
172. World Bank Operations Evaluation Department, *The Special Programme of Assistance for Africa: An Independent Evaluation* (Washington DC: World Bank, 1997)
173. World Bank, *The World Bank and Health Sector in Mali: An OED Country Sector Review*, Report no. 18112 (Washington DC: World Bank, 1998)
174. World Bank Group, *The World Bank Annual Report 1999* (Washington DC: World Bank, 1999)
175. World Bank, *Can Africa Reclaim the 21st Century?* (Washington DC: World Bank, 2000)
176. World Bank Group, *World Development Report 1999/2000: Entering the 21st Century* (Washington DC: World Bank Group, 2000)
177. World Bank Group, *World Bank Brief: Sub-Saharan Africa 2002*
178. World Bank, *World Development Report 2002: Building Institutions for Markets* (Oxford University Press, 2002)
179. World Bank Group, *African Development Indicators 2003* (Washington DC: World bank , 2003)
180. World Economic Forum (WEF), *Africa Competitiveness Report 1998* (Cologny/Geneva: World Economic Forum, 1998)
181. World Health Organization, *International Code of Marketing of Breast-Milk Substitutes* (Geneva: WHO, 1981)
182. World Trade Organization, *Legal Texts: Uruguay Round Final Act - Developing Countries and the Uruguay Round: An Overview,* (note by the Secretariat, 10 November 1994) (Geneva: Committee on Trade and Development, 1994)
183. World Trade Organization, *Trade Policy Review: Mauritius*, October 1995 (Press Release PRESS/TPRB/15), 13 October 1995
184. WTO, *Market Access for Exports of Goods and Services of Least Developed Countries*, WT/COMTD/LDC/W/11/Rev.1 (WTO Secretariat, 1998)
185. World Trade Organization, *Guide to the Uruguay Round Agreements* (Geneva: WTO Secretariat, 1998)
186. WTO Secretariat, *Note on Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc. WT/COMDT/W/77, of 25 October 2000
187. WTO, "Integrated Framework for Trade-Related Technical Assistance to Support Least Developed Countries in their Trade-Related Activities" (Doc. WT/LDC/SWG/1F/1) of 29 June 2000
188. WTO Secretariat, *Note on Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Doc. WT/COMDT/W/77, of 25 October 2000
189. WTO, Integrated Framework (IF) Seminar, "The Policy Relevance of Mainstreaming Trade into Development Strategies: Perspectives of Least-Developed Countries" (Doc.WT/LDC/SWG/IF/9/Rev.1), 29-30 January 2001.
190. World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of the Multilateral Trade Negotiations* (Cambridge, UK: Cambridge University Press, 2001)

191. WTO, "A New Strategy for WTO Technical Cooperation: Technical Cooperation for Capacity Building, Growth and Integration" (WT/COMTD/W/90, September 21, 2001) Note by the Secretariat
192. WTO, Trade Policy Review Body, Overview of Developments in the International Trading Environment: Annual Report by the Director-General, WT/TPR/OV/8, 15 November 2002
193. WTO, Trade Policy Review Body, Overview of Developments in the International Trading Environment: Annual Report by the Director-General, WT/TPR/OV/8, 15 November 2002
194. *Yearbook of the International Law Commission 1977, vol.1, Summary Records of the Twenty-Ninth Session, 9th May-29 July 1977* (New York: United Nations, 1978)
195. Yeats A J, et al, *Did Domestic Policies Marginalize Africa in World Trade?* (Washington DC: World Bank, 1997)
196. Zuckerman E, "Adjustment Programs and Social Welfare" *World Bank Discussion Paper* 44, (Washington DC: World Bank, 1989)