

# **Making Human Rights Universal: Achievements and Prospects**

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## **INTRODUCTION: ASSESSING THE ACHIEVEMENTS OF THE HUMAN RIGHTS PROJECT**

When the General Assembly on 10 December 1948 proclaimed the Universal Declaration on Human Rights (hereinafter referred to as the Declaration) as “a common standard of achievement for all peoples and all nations”, it initiated the United Nations project to universalise human rights. Through “progressive measures, national and international, their universal and effective recognition and observance” was to be ensured.<sup>1</sup> The ultimate aim was set out in Article 28 of the Declaration: “*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.*”

The purpose of this article is to make some assessments of what had been achieved by the end of the second millennium, and to reflect on contemporary challenges, prospects and tasks ahead. It has a limited perspective, focussing mainly on the measures taken within the United Nations to ensure ‘effective recognition and observance’ of human rights.

International human rights law is ‘law-in-the-making’. The purpose is not simply to set the standards and to establish the appropriate institutions and procedures for their enforcement. What counts, in the end, is whether human rights are realised in practice – whether the standards and the attendant institutions serve to bring about the changes required in order to make it possible for all fully to enjoy all human rights. There is a constant need to check the reality and to move forward with determination when it can be shown that reality falls short of the promises contained in the international instruments.

The significance of the Declaration must be seen in the wider context of the world order as envisaged by the United Nations Charter, and be interpreted in that context. The objectives to be pursued in the development of that world order as set out in Article 1 of the UN Charter are essentially threefold:

- the maintenance of international peace, which includes the protection of the territorial integrity of states against external aggression and intervention;
- the development of friendly relations among nations, taking into account the principles of sovereign equality and self-determination of peoples. The latter has led to a comprehensive process of decolonisation, which has fundamentally changed the architecture of the international system by vastly increasing the number of sovereign states and dismantling empires of all kinds;
- the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character, including the promotion and encouragement of respect for human rights and

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<sup>1</sup> Universal Declaration of Human Rights, preamble.

fundamental freedoms without distinction as to race, sex, language or religion.

The Universal Declaration is directly related to this third purpose. It clarifies the content of human rights, which were only vaguely referred to in the Charter itself.

While the overriding goal of the United Nations is the maintenance and development of world peace, the Declaration has made it clear that peace can only be built on respect for human rights. Its Preamble states that “recognition of the inherent dignity and of the equal and unalterable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” This article explores the achievements step by step. The first was to establish the foundation and contents of the human rights project. The second step was to elaborate the standards, institutions and procedures. The third was to clarify the responsibilities of states, and the fourth was to demand the inclusion in domestic law of effective remedies. Since conditions for the realisation of human rights also depend on global structural factors, the fifth step was to face the structural obstacles. From there followed the need to explore international obligations in the age of globalisation.

The roots of the human rights project are much older than the Universal Declaration of 1948. It may be convenient here to date it back to the discussion during the 17th century of the social contract, and in particular to the introduction of the notion of natural rights, as distinct from the much older but less relevant concept of natural law. The purpose of this chapter is not to explore the pre-United Nations history of human rights. It may nevertheless be useful to keep in mind three basic dimensions of the evolution of human rights: (1) the process from idealisation through positivisation to realisation; (2) the broadening of the scope of human rights; and (3) universalisation in its strictest sense, which is to extend the rights, socially and geographically, to everyone throughout the world.

Fundamental to the analysis of the evolution of human rights is the difference and the relationship between ‘rights’ and ‘law’. Two different approaches can be observed: From a legal perspective, ‘law’ precedes ‘rights’, and rights are constituted by the law. From a human rights perspective, rights precede law. Rights limit, qualify and give substance to law.<sup>2</sup>

Serious scholarly discussion of human rights became possible only once a distinction emerged between natural rights and natural law. Earlier notions of natural law, from Greek and Roman times and subsequently adopted by the Catholic Church, assumed that there was an eternal law set by the gods or by God. Human beings were the subject of that eternal law. The initial theories of natural rights, on the other hand, claimed that human beings had inherent and

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<sup>2</sup> See Mieczyslaw Maneli, *Juridical Positivism and Human Rights*, New York: Hippocrene Books, 1981.

inalienable rights, which they did not and could not give up when they joined together in organised societies and established legal systems.<sup>3</sup> The theory of a social contract used the construction that there had previously existed a prior, non-organised ‘state of nature’. Obviously this was a challenge to authoritarian rulers who sought to impose their commands in the name of the law, and later it also became a challenge to notions of exclusive domestic jurisdiction. It was – and remains – a major challenge to cultural traditions that embody lack of freedom, and systems of dominance and subordination.

In terms of the theory of social contract that emerged from the early discussions of natural rights, it was less clearly articulated that by joining together in organised societies an additional set of rights became possible which did not and could not exist in the state of nature: rights to due process and political participation, and to economic and social rights. Nor was it then sufficiently taken into account that in order to make it possible for everyone to enjoy human rights in practice, the members of organised society would also have to accept certain duties towards each other and to society as a whole.

The theories of natural rights were challenged in the 19th century by legal positivism, initiated by Jeremy Bentham, the founder of utilitarianism in Britain.<sup>4</sup> Positivism was further developed by John Austin, who in his ‘The Province of Jurisprudence Determined’, published in 1832, sought to clarify the distinction between law and morality, which he considered to be blurred by doctrines of natural rights.<sup>5</sup> Austin elaborated his definition of law as a species of command from a sovereign accompanied by a threat of punishment (the “sanction”) for disobedience.

While this conception was at odds with theories of natural rights, it served as a useful reminder that talk of natural rights could be empty rhetoric unless it informed the operative law of the land. Secondly, the early conceptions of natural rights were narrow and non-responsive to the needs of a complex society that was quickly evolving in the process of industrialisation.

What needs to concern us here is that the openly or potentially conflictual relationship between ‘rights’ (in their human rights sense) and ‘law’ has been with us in new and other forms for centuries and will continue to be so. It can be detected in much of the language of international human rights.

Legal positivism reigned supreme in most Western societies from the beginning of the 19th century until the end of World War II, but there were strong undercurrents challenging the positivist ideologies. The most tragic consequences of unmitigated positivism were those experienced during the Nazi era. This experience was one of the reasons why notions of inherent rights

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<sup>3</sup> John Locke, *Two Treatises of Government*, passim, 1690.

<sup>4</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, London: Athlone Press, 1970, originally published in 1789.

<sup>5</sup> John Austin, *Lectures in Jurisprudence or the Philosophy of Positive Law*. Edited publication by Robert Campbell, New York: James Cockcroft and Company, 1875, originally published in 1832.

got a tremendous revival at the end of World War II, this time with a much broader and inclusive scope than those of the 17th and 18th centuries.

During World War II, refugees and immigrants moved to the Americas from many cultures and political systems in Europe and Asia which had revolted against the political processes taking place in their homelands or against continued colonial rule. They participated in the discourse on human rights and provided the intellectual and emotional basis for the adoption of the Universal Declaration, which from one perspective can be seen as a set of ideal aspirations to be promoted throughout the world.

Moving from rights to law requires *positivisation*, the insertion of human rights ideals into standards of law. It moves the concern from morality to law and from soft law to hard law, and in some cases from international to domestic law. The Universal Declaration, in combination with the Charter of the United Nations, can be seen as the first step of that process at the global level. It transformed the ideals into specific language deriving its legal validity from the obligations states had undertaken when becoming members of the United Nations, and thus made them parts of international law. The next step up the ladder of positivisation was the adoption of legally binding international treaties: the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the various other conventions that have since been adopted by the United Nations and regional organisations. The third and most important step in the process of positivisation consisted of the legislative measures adopted by states to give international human rights application in domestic law.

*Realisation* refers to the cultural and social domain and entails the evolution and creation of conditions under which the normative standards are implemented and respected in practice. It may require a wide range of measures by the state, including the establishment and proper functioning of courts, law enforcement agencies, welfare institutions and others. But it also requires acceptance among the public: knowledge of their own rights, respect for the rights of other members of society, and co-operation in order to contribute to the common welfare. In brief, it is a question of an evolving human rights culture. It also requires the adoption of international measures of co-operation and assistance.

The second dimension has been the process of broadening the *scope* of human rights. Initially, the concerns included personal integrity (freedom from arbitrary execution and arrest, torture, and slavery), due process and fair trial, and freedom of religion, expression and information – already articulated in the 18th century – together with the protection of property. Later, the scope expanded to include more wide-ranging rights to association, assembly and political activity, over which there were major struggles throughout the 19th century, leading to major victories in parts of the world. In other parts, progress was recorded only in the 20th century, particularly in the 1980s and 1990s, but is still far from complete.

The 20th century saw the inclusion of economic, social and cultural rights. It started modestly in some countries at the end of the 19th century, making somewhat more headway after World War I but still very precariously, and really only finding explicit support and wide acceptance in international standards after World War II. These sets of rights are still resisted or narrowly circumscribed even by some Western states. As pointed out by the High Commissioner for Human Rights, there has been an imbalance in promotion at the international level of economic, social and cultural rights and the right to development. She has argued that extreme poverty, illiteracy, homelessness and the vulnerability of children to exploitation through trafficking and prostitution are telling indictments of leadership in our world.

The third dimension is the geographical expansion of the recognition and application of human rights. From their origins in the triangle of Britain, the North American colonies (later the United States) and France in the 17th and 18th centuries they expanded to wider European and Latin American acceptance in the 19th and early 20th centuries. They nevertheless endured tenuous circumstances and frequent and severe reversals, including the fascist regimes in Europe between the two world wars. Despite setbacks such as the military dictatorships in Latin America in the 1960s and 1970s, they finally became a universal concern after World War II through the Charter of the United Nations. Since only 59 states were members of the UN in 1948, the truly universal acceptance took place only at the World Conference on Human Rights held in Vienna in 1993, where nearly 180 governments expressed their commitment to universal human rights.

One important aspect of the process of geographical diffusion as a contribution to the universalisation of human rights has been the emergence of regional human rights mechanisms that build on universal rights but apply them in their regional context. Such instruments have so far been adopted in Europe, the Americas, and in Africa. The substance of rights is closely modelled on the Universal Declaration, but some of them go beyond it to include duties. In the case of Africa, collective and solidarity rights have also been included.

## **STEP 1: ESTABLISHING THE FOUNDATION AND SUBSTANCE OF INTERNATIONAL HUMAN RIGHTS LAW**

Article 1 of the Universal Declaration proclaims that “all human beings are born free and equal in dignity and rights...”. This is not a statement of empirical fact, but rather a normative aspiration. Its implication is that all human beings shall enjoy freedom and be treated as equals. That Declaration, given its intended worldwide application, was a historical event without precedent in any earlier stage of the evolution of global civilisation.<sup>6</sup>

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<sup>6</sup> A detailed presentation of the background to and the drafting and content of the Universal Declaration is found in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, Boston and London: Martinus Nijhoff Publishers, 1999.

To make human rights universal by translating this aspiration into legal, political and cultural reality is a long and complicated process fraught with conflict. In the 1960s major steps forward were made towards the elimination of racial discrimination, and the 1970s and 1980s saw the realisation of equality between the sexes move many steps forward, both in law and in fact. A major achievement was the elimination of *apartheid* by the 1990s. But then came severe setbacks through the ethnicised or religiously fuelled conflicts in the Balkan and Caucasus regions of Europe, in Africa (the Great Lakes region, with Rwanda as the worst case) and in Asia (Sri Lanka, Kashmir, Indonesia). These conflicts bore witness to the reality that the fundamental principles of equality and non-discrimination continued to be challenged in many places.

In Article 1 of the Declaration, 'equality' is coupled with 'freedom'. Freedom can be understood in several ways. One is to have a wide range of significant options (or opportunities) to choose from. Another is to be independent of others in deciding on the choice of the available options. A third is to be free to set one's own values and priorities, and to live by them. Equality could be understood in the same vein: to have available an equally wide range of significant opportunities as others have; to be equally independent of others; or to be equally free to determine one's own values and priorities.

The content and scope of equality and its relationship to freedom have in the past been highly controversial and a source of deep political cleavage. They contributed to the ideological schism and division of Europe which started with the Russian revolution in 1917 and extended throughout the Cold War. At the ideological level, it took the form of a confrontation between various strands of liberalism on the one hand and marxism on the other, a confrontation that ended only around 1990. Its ending was due, in no small measure, to the growing acceptance of the broad conception of human rights in the Universal Declaration. This does not mean, however, that controversy over the relationship between equality and freedom is over.

In the decades prior to the adoption of the Universal Declaration, liberal thinking and practice in democratic countries had become socially oriented, moving away from very limited 'natural' rights towards a more comprehensive and inclusive conception of freedom and equality. This development can be exemplified by a statement made by the then President of the United States, Franklin D. Roosevelt. In his 1944 State of the Union Address, Roosevelt advocated the adoption of an 'Economic Bill of Rights', and argued that

We have come to the clear realization of the fact that true individual freedom cannot exist without economic security and independence. Necessitous men are not free men. People who are hungry and out of job are the stuff of which dictatorships are made.<sup>7</sup>

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<sup>7</sup> For the context and details of this statement, see P. Alston, 'U.S. Ratification of Economic, Social and Cultural Rights', *American Journal of International Law*, vol. 84 (1990), p. 387.

This process culminated in the adoption of the Universal Declaration of Human Rights. It gives *substance* to the principle of equality, which was originally conceived in a much more formal sense. This was achieved partly by adding economic and social rights to the civil and political rights. It also avoided the endorsement of atomistic individualism by emphasising in Article 29 that the full and free development of any person's personality is possible only when he or she forms part of a community and observes her or his duties to it. It does not make the enjoyment of human rights dependent on the observance of those duties but makes it clear that the full development of the human being – and of a humane society – is possible only when people generally also observe their duties to their own community and to society at large.

The negative understanding of freedom held by adherents of extreme liberalism – maximum autonomy of the individual from the community and the state – is alien to the Universal Declaration. Under human rights law as set out in the International Bill of Human Rights, the state as an agent of the national community has positive roles to perform. Responsibility under international law for the realisation of human rights rests with the state. To live up to its responsibility the state must shoulder three sets of obligations: to *respect* the freedom of the individual; to *protect* that freedom and other human rights against third parties; and, where required, to *provide* access to welfare covering basic needs such as food, shelter, education and health.

If states are to conform to the requirements of the Universal Declaration and corresponding conventions, they have to take steps, including domestic legislation, to deal with social, economic and cultural rights. In so far as they do take such steps, the protection provided by law must be made without discrimination. Not only should all human rights be enjoyed without discrimination (Universal Declaration Article 2), but any right provided by national law should be enjoyed without unjustified distinctions (Article 26 of the International Covenant on Civil and Political Rights, and Article 1 of Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms).

States are obliged not only to abstain from discrimination, but increasingly also to prevent discrimination between private parties, which is the main thrust of the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women. Common to these conventions is that they take a new step, beyond the two taken previously (equality before the law, and equal protection of, or by, the law). The two new conventions require the *elimination* of discrimination, but open the way for affirmative action, which amounts to a call for the creation of equality by means of law. To fulfil their obligations under these two conventions, states are required to be rather active, and possibly more so than some may find politically acceptable.

Most employment opportunities exist in the private sector. Giving effect to the right to work requires the state, *inter alia*, to prohibit policies of discrimination on the part of private employers. Other examples could be added. The scope of the principle of equality and non-discrimination – and the corresponding obligations of states – in regard to the private sector still remains controversial, however.

The Universal Declaration was adopted in 1948 as a package of interrelated and interdependent rights, which includes and further strengthens elements of three hundred years of development. In 1950, T.H. Marshall focused on the historical development in the West of those attributes which were vital to effective ‘citizenship’.<sup>8</sup> He distinguished three stages in this evolution, tracing the formative period in the life of each principal type of rights to a different century and relating it to an evolving concept of citizenship. First, civil rights had been the great achievement of the 18th century, laying the foundation of the notion of equality of all members of society before the law. Second, political rights were the principal achievement of the 19th century by allowing for increasingly broader participation in the exercise of sovereign power. Third, social rights were the contribution of the 20th century, making it possible for all members of society to enjoy satisfactory conditions of life.

These three components were to form building blocks for the more comprehensive system of rights contained in the Declaration. To these were added further elements. All of them were made into a package of rights in the sense that the different rights were to be interdependent and therefore indivisible. This point has been made repeatedly by the United Nations, most recently by the World Conference on Human Rights held in Vienna under UN auspices in 1993.

The Declaration starts with the classical civil rights: integrity rights, freedom of action, and rights pertaining to fair trial and due process. The integrity rights include the right to life, liberty and security of the person. Torture and maltreatment are prohibited, and so are slavery and forced labour, arbitrary arrest, detention and exile. Freedom of action includes the right to free movement and choice of residence inside the country, the right to leave any country and the right to return to one’s own country. It further includes freedom of religion, of expression and information, and of assembly and association.<sup>9</sup>

Most of the integrity rights are absolute in the sense that no derogation is permissible. Freedoms of action, however, can and to some extent must be constrained in order to protect the rights of others. For instance, freedom of expression must be constrained in order to prevent hateful speech.

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<sup>8</sup> See T. H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press, 1950. The lectures were given in honour of the famous economist Alfred Marshall.

<sup>9</sup> A thorough analysis of the interpretation of each of the rights is found in Manfred Nowak, *UN Covenant on Civil and Political Rights (CCPR) Commentary*, Kehl, Strasbourg and Arlington: N. P. Engel Publisher, 1993.

There cannot be unlimited freedom of action in any society. Indeed, one of the purposes of state formation is to maintain law and order, to ensure that persons do not act towards others in ways which destroy their integrity and freedom, or block the measures taken to ensure welfare in society. The state is bound, therefore, to set some restrictions and impose some duties, which is done through penal and other law, and through administrative acts based on law. In order to ensure that penal prosecution and the law on which it is based are compatible with human rights requirements, the right to fair trial and due process is important. The right to a fair trial, as set out in the Declaration's Article 10, is an essential part of any legal system purporting to be based on the rule of law. Due process requires, *inter alia*, that there are judges competent to interpret the laws and apply them to individual cases, and that these judges are independent of any outside interference as well as impartial vis-à-vis the parties concerned.

The Declaration states in Article 21 that “the will of the people shall be the basis of authority of the government”. This goes beyond the conceptions held by most adherents of the social contract in the 18th century, which required only that the government had the consent of the governed. Only a select few were held to be suited to participate in the exercise of authority. Article 21 implies a right for all to participate, directly or through freely chosen representatives, in the exercise of government, and equal rights for all of access to public service. It consolidates, therefore, the notion of freedom with and through participation.

The greatest innovation made by the Universal Declaration is the inclusion of economic, social and cultural rights.<sup>10</sup> Article 22 refers to the economic, social and cultural rights “indispensable for (one's) dignity and free development of (one's) personality” and to “the right to social security”, which entitles everyone to access to welfare state provisions. It precedes five subsequent articles which declare the rights to work (Article 23), to rest and leisure (Article 24), to an adequate standard of living (Article 25), to education (Article 26), and to participate freely in the cultural life of the community (Article 27).

At the core of *social* rights is the right to an adequate standard of living (Article 25). The enjoyment of this right requires, at minimum, that everyone shall enjoy the necessary subsistence rights – adequate food and nutrition, clothing, housing and the necessary conditions of care and health services. Closely related to these rights is the right of families to assistance, briefly mentioned in Article 25 and elaborated in greater detail in subsequent provisions such as Article 10 of the International Covenant on Economic, Social and

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<sup>10</sup> On the economic, social and cultural rights in the Universal Declaration, see Alfredsson and Eide, 1999, *op.cit.*, articles 22–27. On the further development of those rights, see Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995.

Cultural Rights and Article 27 of the International Convention on the Rights of the Child.

In order to enjoy these social rights, there is also a need to enjoy certain *economic* rights. These are the right to property (Article 17), the right to work and other work-related rights (Articles 23 and 24) and the right to social security (Articles 22 and 25).

The combination of economic and social rights serves the dual function of freedom and equality. The right to property, which had a prominent place in the early theory of natural rights, serves as a basis for entitlements which can ensure an adequate standard of living, and is also a basis of independence and, hence, of freedom. But property in the traditional understanding of the word cannot be enjoyed on an equal basis by all. It has to be supplemented, therefore, by the right to work that can provide an income commensurate with an adequate standard of living, and by the right to social security that can supplement, and where necessary fully substitute, insufficient income derived from property or from work. The right to work is also a basis of independence, provided the work is freely chosen by the person concerned, that sufficient income is obtained from it, and that workers can protect their interests through free trade unions and collective bargaining.

The work-related rights in Article 23 consolidate a development which had started at the beginning of the 20th century and been promoted through the International Labour Organisation (ILO), which was formed in 1919. The right to form and join trade unions ('freedom of association') without interference from the state was included as a basic principle of the constitution of the ILO. It represented a victory over the very restrictive economic liberalism of the 19th century, when legislation had prohibited or made redundant all agreements between employers and employees for advancing the latter's wages or working conditions. Of similar importance is the principle included in Article 23 that everyone shall have equal pay for equal work. Lower pay for women was – and still is – a deeply entrenched practice in many societies. By including this principle, the Declaration provided a basis for action that in most parts of the world has led to considerable equalisation of rates of pay between women and men, though much remains to be done.

The right to social security is essential when a person does not own the necessary property, or is not able to secure an adequate standard of living through work, due to unemployment, old age or disability (Articles 22 and 25).

The right to *education* enunciated in Article 26 of the Declaration is both a social and a cultural right. The right to education obligates states to develop and maintain a system of schools and other educational institutions in order to provide education to everybody – free of charge, if possible. The obligations of states to promote equality of opportunity and treatment in the matter of education are laid down in greater detail in the UNESCO Convention against Discrimination in Education of 1960. Since education enhances the human capital of society at

large, education is one of the few human rights where the individual has a corresponding duty to exercise the right.

*Cultural* rights, set out in Article 27 of the Declaration, accord everyone the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author; and the freedom indispensable for scientific research and creative activity. Cultural rights are closely linked to other rights such as that to education (Article 26).

One important aspect of cultural rights is the right to preserve the cultural identity of minority groups, which has implications for civil and political as well as for economic and social rights.<sup>11</sup> This makes it necessary to distinguish between two approaches to culture: the process-oriented and the system-oriented. The former sees cultural expression as the evolving achievements of artistic and scientific creation. The latter, on the other hand, conceptualises culture as a coherent, self-contained set of values and symbols “that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life”.<sup>12</sup> From the process-oriented perspective the individual is a producer of culture. From a system-oriented perspective she or he is a product of culture and reproduces it through her or his own activities.

## **STEP 2: ELABORATING THE STANDARDS, INSTITUTIONS AND PROCEDURES**

Important though it was, the Universal Declaration was not very intrusive for states. The rights were formulated in broad and general terms, and there was no machinery to monitor their implementation. It was the intention from the outset, however, to follow up the Declaration with one or more conventions which would be binding on the signatories. The effort to draft the conventions had already started in the United Nations Commission on Human Rights before the Declaration was adopted. But it turned out to be much more difficult to obtain the necessary political support for the drafting and adoption of the conventions than for the Declaration.

One factor which slowed down the process was a change of mind in the United States, which had been a driving force in the inclusion of human rights

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<sup>11</sup> For cultural rights as collective rights, see Rodolfo Stavenhagen, ‘Cultural Rights and Universal Human Rights’, in Eide, Krause and Rosas (eds.) 1995, *op.cit.* On the right to education as a social and cultural right, see Manfred Nowak, chapter 12 in the same publication. On the relationship between the preservation of cultural identity and the enjoyment of economic and social rights for minorities and indigenous peoples, see A-C. Bloch, chapter 20, also in the same publication.

<sup>12</sup> *Ibid.*, p. 66.

in the UN Charter and in the initial preparation of the Universal Declaration.<sup>13</sup> Very early on, opposition developed to the potential application of international human rights instruments to the legal order of the United States. The opposition consisted of a coalition of southern Democrats and conservative Republicans and must be understood against the background of the continued existence of legislation at state level in the southern parts of the Union mandating or at least condoning racial discrimination. Their reaction to the human rights project of the United Nations started during the last year of the Truman administration but was intensified when, after two decades of Democratic administrations in the United States, the Republican candidate, General Dwight D. Eisenhower, won the presidential election in 1952. In 1953, the Secretary of State, John Foster Dulles, made a policy statement that the US government did not intend to become a party to any covenant on human rights or present it as a treaty for consideration by the US Senate. This message was transmitted to the United Nations and had a seriously dampening effect on the ongoing negotiations.

The negative US policy continued until the Democrats won the presidential election in 1960 with John F. Kennedy, who submitted three international human rights-related treaties for ratification. This change in attitude also encouraged the process of negotiation in the General Assembly, which in 1966 managed to adopt the two covenants.

The official US approach to human rights took another downturn with the victory of the Republicans and the election of Richard Nixon as president in 1968. It was a time when the United States, through military aid, buttressed military regimes in several Latin American countries and elsewhere, culminating with the bloody coup against the elected President Salvador Allende in Chile in 1973. The reaction to such policies strengthened the pro-human rights activists and contributed to the victory of the Democratic Party with the election of Jimmy Carter as president in 1976. He made human rights a prominent feature of the platform for his administration and in 1977 he signed the two International Covenants as well as the American Convention on Human Rights. In 1978 he submitted these three and the International Convention on the Elimination of All Forms of Discrimination to the Senate for its advice and consent to ratification. No action was taken in the Senate, however, and in 1980 the Republicans again won the election with Ronald Reagan. Human rights were once again put on the backburner. Not until 1992 was the Covenant on Civil and Political Rights ratified, and two years later the Racial Discrimination Convention. The other major instruments are still to be ratified by the United States.

The reluctance of the major Western power had a discouraging impact on the enthusiasm for human rights. The United States was far from alone in its reluctance. The many new African and Asian states emerging out of colonial

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<sup>13</sup> On the US policy towards international human rights, see Thomas Burgenthal, *International Human Rights in a Nutshell*, St. Paul, Minnesota: West Publishing Co, 1995, chapter 7.

rule had their own hesitance with regard to human rights. The countries of the Eastern bloc during the Cold War were willing to ratify only as long as there were no effective monitoring and complaints-handling procedures connected with the international instruments. Western European states, however, had gone ahead by adopting their own regional instrument as early as 1950, and the Social Charter in 1961. The Latin American states had already adopted the Inter-American Declaration on the Rights and Duties of Man in May 1948 – before the Universal Declaration – and in 1969 they also adopted the Inter-American Convention on Human Rights.

The major standard-setting achievements at the United Nations were made in the period from 1965, when the convention on racial discrimination was adopted, until 1989, which saw the adoption of the Convention on the Rights of the Child. As noted, the two main covenants were adopted in 1966, the Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979, and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment in 1984. Gaining momentum nearly two decades after the adoption of the Universal Declaration, an impressive body of international human rights law has thus been adopted by the General Assembly, by the specialised agencies such as the ILO and UNESCO, and by regional organisations.

The elaboration of legal standards has given specific substance to the rather abstract formulation of rights in the Declaration. The standards have served to elaborate the rights and spell out the corresponding obligations. They have also established mechanisms for monitoring the implementation of and compliance with the norms espoused in these instruments. The conventions have been supplemented by additional declarations, codes of conduct, guidelines and basic principles. Particular attention in the standard-setting process has been given to the principle of non-discrimination, the administration of justice, labour rights, social welfare, nationality, statelessness and refugees, and to humanitarian law, war crimes and crimes against humanity. Of special importance is the draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (“human rights defenders”), adopted on 3 April 1998.<sup>14</sup>

### **Minorities and indigenous peoples**

When the Declaration was drafted, there was considerable debate about whether to include the rights of minorities, but the idea was rejected. The UN started taking the question of minorities seriously in the late 1960s. Article 27 of the International Covenant on Civil and Political Rights is the first general international provision on the rights of minorities. The efforts to elaborate the

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<sup>14</sup> UN Commission on Human Rights, resolution 1998/7, adopted on 3 April 1998.

rights expressed in Article 27 led to a decision to separate persons belonging to minorities from the rights of indigenous peoples.

In 1992 the General Assembly adopted the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities. It was followed by the establishment in 1995 of a Working Group on Minorities under the Sub-Commission on Promotion and Protection of Human Rights. In recent years, the issue of minority rights has also been taken up by regional organisations, particularly in Europe.

Indigenous peoples have been given separate attention. Indigenous peoples are those who are considered indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest, colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. A defining feature of indigenous peoples is their non-dominant position in the society in which they live, i.e. in the country as a whole. They generally have a collective conception of the ownership or use of land and other resources. The First Nations of the Americas, the Inuit of the circumpolar region, the Sami in northern Europe, the Aborigines of Australia, the Maori of New Zealand and numerous other groups world-wide form part of this category.

Initially, UN activities were exclusively aimed at the prevention of discrimination against such peoples. It became increasingly clear that special measures would be required, particularly with regard to land rights and autonomy, to make it possible for indigenous peoples to preserve, reproduce, and develop their own cultures within the overall framework of universal human rights as set out in the Declaration. The Sub-Commission established in 1982 a special working group whose task was to draft a declaration on the rights of indigenous peoples. A draft was completed in 1993, and is currently under examination by a working group under the Commission on Human Rights.

In 1994, the General Assembly launched the International Decade of the World's Indigenous Peoples (1995–2004) to seek solutions to the problems of indigenous populations in such areas as health, education, development, the environment, and human rights. In 2000, the Commission on Human Rights decided, with the approval of the Economic and Social Council, to establish a Permanent Forum for Indigenous Peoples within the UN.

### **From ‘the rights of man’ to the rights of every man, woman and child**

“Everyone” has the right to a social and international order in which the rights contained in the Declaration can be fully realised. The word “everyone” covers here not only men but also women and children. The “rights of man” (in French: *les droits de l’homme*) was the main term used in the 18th century when the seeds of modern human rights were planted. At that time, the “rights of man” was, to a large extent, understood literally to mean the rights of the

male person. Such an interpretation was reflected in legislation and court practice during the 19th century.<sup>15</sup> The Universal Declaration provides that the rights it contains shall be enjoyed without distinction; nevertheless, it still contains male language in many parts. Much of this can be explained in terms of style, whenever the personal pronoun “his” is used instead of “his or hers.” There is no doubt, however, that at the time the Declaration was written, there was still a lingering, dominant perception that the man was the main actor, particularly in family relations, as is evidenced in the language of Article 23 (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”. A similar formulation is found in Article 25.

Over time, however, it has come to be understood that a “family” normally consists of at least three different and quite separate persons – the man, the woman, and the child – and that each of them has his/her own human rights and his/her own separate existence inside and outside the family context, within the overall framework of universal rights. The process of change in the conception of family life started with endeavours to ensure formal equality and gradually developed into a recognition that the achievement of equality would, in fact, require special measures and, to some extent, special rights. This was first recognised with regard to women, and later also with regard to children.

Shortly after the establishment of the Commission on Human Rights, the Commission on the Status of Women was established. Attention to the equal status and rights of women has been improved over time through a number of world conferences on this subject, including the Fourth World Conference on Women, held in Beijing in 1995. The conferences have contributed to efforts towards developing a comprehensive and multidimensional approach to the protection of the human rights of women.

Positive trends have been noted with regard to the elimination of sex-based discrimination in national legislation. In some countries, special programmes have been adopted to strengthen the social status of women and to encourage gender equality in the workplace as well as women’s participation in policy-making and decision-making. In world conferences and in human rights bodies, repeated appeals have been made for the eradication of traditional practices affecting the health of women and girl children.

The Vienna Declaration and Programme of Action’s request for the integration of issues relating to the status of women into the mainstream of United Nations activities has met a system-wide response among UN agencies and programmes. The various programmes designed by the agencies, as well as the increased co-operation and co-ordination between UN organs and relevant specialised agencies in this area, have been identified as a means to that end.

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<sup>15</sup> For examples, see Katarina Tomasevski, *Development Aid and Human Rights Revisited*, London: Pinter, 1993, pp. 1–16.

These efforts have three aims. The first is the prevention of and response to discrimination and violence against women. The second is the creation of new frameworks for developing policy and programmatic initiatives to improve the status of women and to support women's participation in political, economic, professional, social and cultural life. The final aim comprises initiatives focused on the development and empowerment of women (e.g. increasing rural women's access to and control of productive resources and services, as well as their role in decision-making, labour, finance and education). Technical assistance, advisory services for governments and civil society, education programmes, vocational training, and monitoring offered by the UN, all serve these objectives.

In 1994, the Commission on Human Rights took a major step towards the integration of women's rights into the human rights system when it established a Special Rapporteur on violence against women. Annual reports have since been presented to the Commission and have received a great deal of attention. The High Commissioner for Human Rights has strengthened the links between the activities of the Commission on Human Rights and those of the Commission on the Status of Women.

In 1989, the General Assembly adopted the International Convention on the Rights of the Child (CRC), which now is almost universally ratified. The World Summit for Children, held in New York in September 1990 at the invitation of UNICEF, noted that countless children around the world are exposed to dangers that hamper their growth and development. They suffer social dislocation caused by aggression, foreign occupation and annexation, and as casualties of war and violence and victims of racial discrimination. Furthermore, children suffer as refugees and displaced persons, forced to abandon their homes and their roots. They also suffer when disabled, or as victims of neglect, cruelty, and exploitation.

UNICEF has, over a number of years, made the realisation of the rights contained in the Convention on the Rights of the Child its principal aim. In collaboration with the Office of the High Commissioner for Human Rights, it has developed a special plan of action for the implementation of the CRC. Two optional protocols to the Convention on the Rights of the Child have recently been adopted, one concerned with the involvement of children in armed conflicts and the other with the prevention and prohibition of the sale of children, child prostitution and child pornography.

While much of the standard-setting is now complete, there will always be the need for further elaboration, to strengthen a particular right, provide better protection for a particular group, or improve mechanisms of control and supervision. Work is progressing on a draft declaration on the rights of indigenous peoples, prepared by the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It is currently under examination by a working group of the Commission on Human Rights.

Among pending recommendations for further instruments are two optional protocols. One, to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, would establish a preventive system of regular visits to places of detention. The other, to the International Covenant on Economic, Social and Cultural Rights, would allow individuals to file communications with the Committee on Economic, Social and Cultural Rights. An optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women, allowing individuals to file communications with the Committee on the Elimination of Discrimination against Women, was adopted in 1999.

### **Institutions and processes**

Within the United Nations, human rights activities are pursued by two different sets of institutions or bodies: the Charter-based commissions and the treaty bodies.<sup>16</sup> The main Charter-based commissions are the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. The Commission is the main policy-making body. It has prepared the initial drafts of many of the conventions and has established mechanisms and procedures to address serious human rights problems. These mechanisms include country and thematic rapporteurs. The country rapporteurs report to the Commission on the human rights situations in countries where gross and systematic violations are alleged to take place. At present the following countries are included: Afghanistan, Burundi, Democratic Republic of the Congo (former Zaire), former Yugoslavia, Iran, Iraq, Myanmar, the occupied Palestinian territories and the Sudan.

The thematic rapporteurs examine the situation in any part of the world regarding particular human rights issues. The thematic rapporteurs or working groups deal with the following human rights issues: children in armed conflict, racial discrimination and xenophobia, enforced or involuntary disappearances, threats to or violation of freedom of opinion and expression, threats to the independence of judges and lawyers, the human rights situation of migrant workers, religious intolerance, the sale of children, child prostitution and child pornography, torture and other cruel, inhuman and degrading treatment, the dumping of toxic waste, violence against women, and arbitrary detention. There are also rapporteurs on the human rights consequences of the debt crisis and of structural adjustment policies.

These procedures consist in fact-finding, analysis of the facts and presentation of findings, together with recommendations by way of a publicly available report to the Commission on Human Rights. Their impact lies in the creation of awareness of the situation or problems, which to some extent may cause embarrassment or shame for the country concerned and thus induce the

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<sup>16</sup> The most comprehensive examination of the human rights bodies of the United Nations is found in Philip Alston (ed.), *The United Nations and Human Rights. A Critical Appraisal*, Oxford: Clarendon Press, 1992.

government to change its policies. This ‘mobilisation of shame’ has some impact, but there are no other sanctions immediately available. A bad record may, however, lead to the withholding of aid or in other ways adversely affect the international relations of the criticised country.

The treaty bodies function in an entirely different way. Under the six main human rights conventions adopted by the United Nations, state parties to the convention are under an obligation to report periodically to a monitoring committee set up for each of the conventions. These committees are composed of independent experts. The reporting procedures lead to a dialogue between the Committee and every state party, conducted in full publicity. They end with the adoption of concluding observations by the Committee with respect to each of the countries concerned. In these concluding observations the Committee expresses its appreciation for positive development, reviews the matters giving reason for concern, and makes a set of recommendations for improving the human rights situation. When the next report of the country concerned is up for discussion, the representatives of that country will be asked whether and how the previous recommendations by the Committee were implemented.

Procedures have also been established for dealing with individual complaints, called ‘communications’ in UN language. An optional protocol to the Covenant on Civil and Political Rights was adopted in 1966 at the same time as the Covenant itself was adopted. It gives the Human Rights Committee the competence to receive and consider communications from individuals who claim to be the victim of a violation of one or more of the rights in the Covenant, but only if the state concerned is a party to that optional protocol. Some 94 states had ratified the optional protocol by 30 June 2000. A similar protocol has recently been adopted for the International Convention on the Elimination of Discrimination against Women, but it has not yet entered into force. State parties to the Convention on the Elimination of Racial Discrimination (CERD) can accept the competence of the Committee overseeing CERD to receive communications under Article 14 of that convention. Some 27 states have done so. A similar possibility exists under Article 22 of the Convention against Torture, and 41 countries have done so. Thus, there is a slow but growing acceptance of the consideration by the treaty bodies of individual complaints alleging violations. The outcome of the consideration, however, is not a binding judgement but a ‘view’ by the Committee as to whether a violation has occurred or not. Regrettably, no procedure exists for complaints of violation of economic, social and cultural rights, but efforts are under way to move towards an optional protocol to the International Covenant on Economic, Social and Cultural Rights as well.<sup>17</sup> So

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<sup>17</sup> See F. Coomans and F. van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights*. Utrecht: SIM Special 18, 1995, and the penetrating study by Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Antwerp/Groningen/Oxford: Intersentia-Hart, 1999.

far, state resistance has been strong enough to prevent the Commission from embarking on that task.

### **STEP 3: CLARIFYING THE RESPONSIBILITY OF THE STATE**

The world order as envisaged by the Charter of the United Nations is based on a spatial distribution of jurisdiction and responsibility between sovereign states, each being in charge of the maintenance of law and order and of the promotion of social development within its borders. The exercise of their respective jurisdictions should be based, however, on universal human rights. Consequently, states have the primary responsibility for human rights observance within their respective borders. The Universal Declaration listed the rights they should take into account. The subsequent standard-setting (see step 2) determined in broad outline the nature of state obligations, which have subsequently been further developed through the practice of the charter-based and treaty-based human rights bodies.

The responsibility is somewhat differently formulated in the treaties. Under Article 2 of the Covenant on Civil and Political Rights, every state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognised in that convention. Under the Covenant on Economic, Social and Cultural Rights, each state party undertakes in Article 2 to “take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised” in that covenant.

It should be noted that every state, including those which have not ratified one or more of the treaties, has a responsibility for human rights observance which flows directly from the UN Charter and the Universal Declaration, since the latter can be held to spell out the rights that were briefly referred to in the Charter, itself a binding international instrument. Ratification of the conventions adds specificity, however, to the responsibility of the states. By becoming parties to the conventions they submit themselves to detailed monitoring by the treaty bodies set up for each of the main conventions.

At the beginning of the new millennium, every state in the world has become a party to at least two of the main conventions. Both of the main covenants have been ratified by three-fourths of the existing states: the Covenant on Economic, Social and Cultural Rights (CESCR) had by March 2000 obtained 142 ratifications, and the Covenant on Civil and Political Rights (CCPR) had obtained 144. Most of non-ratifying states are small and relatively newly independent, many of them in Polynesia, Micronesia and the Caribbean. There are some significant states, however, which have ratified only one of the two conventions or neither of them. The United States has ratified CCPR, but not CESCR, nor has it become a party to the Convention on the Rights of the Child (CRC) or the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). South Africa has ratified CCPR but not yet CESCR. Among the states that have ratified neither of the two main

conventions (CESCR and CCPR) we find China, Cuba, Ghana, Indonesia, Kazakhstan, Laos, Malaysia, Mauritania, Myanmar, Pakistan, Singapore, Saudi Arabia and Turkey. It can be seen, therefore, that some major Asian states have been reluctant to ratify, but China and Indonesia have recently indicated their intention to do so. As regards the non-ratification by Turkey, it should be borne in mind that it is a party to the European Convention on Human Rights and Fundamental Freedoms, while the Asian states do not have any regional convention. All European states, except for Turkey, are parties to both CESCR and CCPR and generally to all main human rights instruments of the United Nations in addition to the European convention.

The Convention on the Rights of the Child is now practically universal. It has been ratified by 191 states, three more than there are members of the United Nations. Only two recognised sovereign states are missing among the state parties: Somalia and the United States. The Convention on the Elimination of All Forms of Racial Discrimination had by the end of March 2000 obtained 156 ratifications, and the Convention on the Elimination of All Forms of Discrimination against Women had reached 165. The Convention against Torture has 119 state parties. The greatest shortcoming so far concerns migrant workers: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families had by March 2000 only 12 state parties, not much more than half the number of ratifications necessary for it to enter into force (20). Nearly all ratifications so far are by the home states of the migrant workers, while the main problems are found in their country of residence and work.

The monitoring of state compliance is conducted by the treaty bodies set up for each of the conventions (see previous section). The monitoring bodies further clarify the nature of their obligations, mainly through their general comments.<sup>18</sup> These are strictly not legally binding but must obviously be given considerable weight in the interpretation of the instruments – any state wanting to interpret the obligations differently from that of the Committee has the burden of proof that their interpretation is more correct than that of the Committee.

The Human Rights Committee has pointed out that Article 2 of the CCPR generally leaves it to the state parties concerned to choose their method of implementation in their territories within the framework set out in that article; and that implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not sufficient *per se*. The Committee has emphasised that the obligations under the Covenant are not confined to the *respect* of human rights, but that state parties have to *ensure* the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for

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<sup>18</sup> The General Comments of all treaty bodies have recently been compiled in one volume by the United Nations Secretariat, entitled 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', UN doc. HRI/GEN/1/Rev.4, 7 February 2000.

specific activities by the state parties to enable individuals to enjoy their rights. This relates to all rights in the Covenant. The Committee has also emphasised that it is very important that individuals know their rights under the Covenant (and the Optional Protocol, as the case may be), and that all administrative and judicial authorities are aware of the obligations that the state party has assumed under the Covenant. To this end, the Covenant should be publicised in all official languages of the state and steps should be taken to familiarise the authorities concerned with its contents as part of their training. It is also desirable to give publicity to the state party's co-operation with the Committee.<sup>19</sup>

The Committee on Economic, Social and Cultural Rights, in its interpretation of Article 2 of CESCR, has pointed out that it contains obligations both of conduct and of result.<sup>20</sup> While the CESCR provides for progressive realisation and acknowledges the constraints imposed by limitations on available resources, it also imposes various obligations of immediate fulfilment. Of these, two are of particular importance in understanding the precise nature of state party obligations. One is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination...”. The other is the undertaking in Article 2 (1) “to take steps”, which in itself is not qualified or limited by other considerations. Thus, while the full realisation 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 should be deliberate, concrete and targeted as clearly as possible on meeting the obligations recognised in the Covenant. The means to be used in order to satisfy the obligation to take steps are stated in Article 2 (1) as “all appropriate means, including particularly the adoption of legislative measures”. The Committee recognises that in many instances legislation is highly desirable and may even be indispensable in some cases. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in Articles 6–9, legislation may also be an indispensable element.

But the adoption of legislative measures by no means exhausts the obligations of state parties. Measures that might be appropriate, in addition to legislation, include the provision of judicial remedies with respect to rights, which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. The

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<sup>19</sup> HRI/GEN/1/rev.4, p. 83.

<sup>20</sup> General Comment No. 3, HRI/GEN/1/rev.4, p. 9–12.

Committee has also challenged the argument that all provisions of the CESC are inherently non-self-executing.

When specific policies aimed at the realisation of the rights recognised in the Covenant have been adopted in legislative form, the Committee wants to be informed whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realised, and whether these rights are considered to be justiciable (i.e. able to be invoked before the courts).

Other appropriate measures for the purposes of Article 2 (1) include, but are not limited to, administrative, financial, educational and social measures. The obligation in Article 2 (1) to take steps “with a view to achieving progressively the full realisation of the rights recognised” is, on the one hand, a necessary flexibility device. It reflects the realities of the world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, it does impose an obligation to move as expeditiously and effectively as possible towards that goal. A core obligation in order to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. Any assessment as to whether a state party has discharged its minimum core obligation must also take account of resource constraints obtaining within the country concerned. Article 2 (1) obligates each state party to take the necessary steps “to the maximum of its available resources”. In order for a state party to be able to attribute its failure to meet at least its core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.

Incorporation of the international conventions into national law is slowly progressing.<sup>21</sup> There is still a tendency in national law to adopt or incorporate mainly the civil and political rights, leaving out the economic and social rights. However, there is now a slow but discernible trend to extend the jurisdictional reach also to economic and social rights. In most cases where formal incorporation is used it is limited to the conventions on civil and political rights. One of the few exceptions is Norway, where both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, together with the European Convention on Human Rights and Fundamental Freedom, have been formally incorporated into Norwegian law and given priority status over ordinary national law. In legal systems where international treaty law has direct applicability in internal

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<sup>21</sup> See further Martin Scheinin, ‘Economic and Social Rights as Legal Rights’, in Eide, Krause and Rosas, 1995 and 1999, *op.cit.*

law, such as the German or the Dutch, the judicial practice of the courts is in most cases to consider whether the economic and social rights are non-self-executing and therefore without direct applicability.<sup>22</sup> There is nevertheless a slight trend in the direction of greater acceptance of a direct effect arising from economic and social rights. These trends would be strengthened if international complaint procedures were available in case of violations of economic and social rights.

Comprehensive national implementation of economic and social rights, however, would that human rights impose three types or probably require more detailed legislation. In its recent General Comments on the right to housing and the right to food, the Committee on Economic, Social and Cultural Rights has suggested that states adopt a framework law to meet the requirements of these rights.<sup>23</sup>

In light of evolving practice at the international level, there is now a broad consensus levels of obligation on state parties: the obligations to *respect*, to *protect* and to *fulfil*.<sup>24</sup> In turn, the obligation to *fulfil* incorporates an obligation both to *facilitate* and to *provide*.<sup>25</sup>

These obligations apply to all categories of human rights, but there is a difference of emphasis. For some of the civil rights, the main concern is with the obligation to respect, while for some economic and social rights, the elements of protection and provision become more important. Nevertheless, the three-fold set of obligations for states – to respect, protect and fulfil – applies to the whole system of human rights, and must be taken into account in our understanding of good governance from a human rights perspective.

States must, at the primary level, *respect* the resources owned by the individual, her or his freedom to find a job of preference, and the freedom to take the necessary actions and use the necessary resources – alone or in conjunction with others – to satisfy his or her own needs. With regard to the latter, *collective* or group rights can become important: the resources belonging to a collective of persons, such as indigenous populations, must be respected in order for them to be able to satisfy their needs. Consequently, as part of the obligation to respect

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<sup>22</sup> See, e.g. Birgit Toebes, *The Right to Health as a Human Right in International Law.*, Antwerp/Groningen/Oxford: Intersentia-Hart, 1999, pp. 194–197.

<sup>23</sup> General Comments no. 4, 7 and 12, see HRI/GEN/1/rev.4.

<sup>24</sup> This applies to all human rights, though most clearly in relation to economic, social and cultural rights. See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly*, vol. 9, 1987, pp.122–135, also published as UN doc. E/CN.4/1987/17 and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in Theo Boven et al., *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Utrecht: SIM Special 20, 1998 and in General Comments of the Economic, Social and Cultural Rights No. 12 (right to food) and 12 (right to education).

<sup>25</sup> See Committee on Economic, Social and Cultural Rights: General Comment No. 12 (May 1999) para 15.

these resources the state should take steps to recognise and register the land rights of indigenous peoples and the land tenure of smallholders whose title is uncertain.

State obligations consist, at a secondary level, of, for example, the protection of the freedom of action and the use of resources against other, more assertive or aggressive subjects – more powerful economic interests, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. This protective function of the state is also the most important aspect of state obligations with regard to economic, social and cultural rights, and it is similar to the role of the state as protector of civil and political rights.

Significant components of the obligation to *protect* are spelled out in existing law. Such legislation becomes manageable for judicial review, and therefore belies the argument that economic and social rights are inherently non-justiciable. Legislation of this kind must, of course, be contextual – that is, based on the specific requirements in the country concerned.

At the tertiary level, the state has the obligation to fulfil the economic, social and cultural rights of everyone by way of facilitation or direct provision. The obligation to fulfil by facilitation takes many forms, some of which are spelled out in the relevant instruments. For example, under the CESCR (Article 11(2)), the state shall take measures to improve the production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems. The obligation to fulfil by way of provision could consist of making available what is required to satisfy basic needs, such as food or resources that can be used for food (direct food aid or social security) when no other possibility exists. Examples of such situations are when unemployment sets in (such as in a recession); for the disadvantaged and the elderly; during sudden situations of crisis or disaster (see below); and for those who are marginalised (for example, due to structural transformations in the economy and production).<sup>26</sup>

Fully-fledged implementation of human rights requires a pluralistic, democratic political system, but democracy in its traditional sense is not enough. Even legislators elected through perfectly adequate processes are not free to adopt what laws they want; they are still bound by the substantive and procedural requirements of the international human rights system. The role of national legislatures is of particular importance. Under the relevant conventions, states agree to take steps, in particular the adoption of legislative measures, to achieve the full realisation of the rights embodied in the instrument concerned.<sup>27</sup> In September 1997, the Inter-Parliamentary Union

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<sup>26</sup> It will be seen that most of these situations were already envisaged in the Universal Declaration, Article 25(1): ... 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.

<sup>27</sup> The relationship between democracy and human rights, with special reference to economic and social rights, is examined in Beetham, 1998, *op.cit.*

adopted a resolution calling on all parliaments and their members to strengthen the impact of international human rights law on the domestic legal order. The resolution urges parliaments to ensure that: (a) international and regional human rights treaties are ratified and reservations withdrawn; (b) national legislation is consistent with international human rights; (c) independent national human rights institutions are established; and (d) necessary resources are provided for action to promote and protect human rights, especially through human rights education.

Governance must therefore be so constructed as to obtain the optimal realisation of human rights for all under the jurisdiction of the state. Additionally, governance should also be such that it facilitates co-operation between states in respecting, promoting and protecting human rights in other countries and thus in the world community as a whole, though this is less strongly founded in international human rights law.<sup>28</sup>

#### **STEP 4: DEMANDING EFFECTIVE REMEDIES**

A fully-fledged right requires effective remedies when violated. The Universal Declaration provides in Article 8 that “everyone has the right to an effective remedy by the competent tribunals for acts violating the fundamental rights granted him by the constitution of law.”<sup>29</sup> This has been a major concern in subsequent international standard-setting. General provisions are found in the Declaration (Article 8) and the ICCPR (Article 2.3). Comparable provisions are found in the American Convention on Human Rights (Article 26), the European Convention on Human Rights and Fundamental Freedoms (Article 13), and the somewhat less precise formulation in the African Charter on Human and Peoples’ Rights (Article 7). Others deal specifically with remedies regarding racial discrimination (ICERD Article 6) or with remedies for vulnerable groups (indigenous peoples, refugees, asylum seekers, migrants and other aliens).

The most elaborate provision is found in ICCPR Article 2.3, in terms of which the state parties to the Covenant have undertaken to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding whether the violation has been committed by persons acting in an official capacity. 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. States are to develop the possibilities of judicial remedy. Finally, the competent authorities shall enforce such remedies when granted.

Reality, however, falls considerably short of the legal promises. Where there is general rule of law in a stable democracy, the prospects for effective remedies are considerably higher than in volatile or abnormal situations, such

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<sup>28</sup> UN Charter Articles 1(3) and 66.

<sup>29</sup> Erik Møse provides a detailed analysis of the requirement to effective remedies in the Universal Declaration, in Alfredsson and Eide, 1999, *op.cit.*, Article 8.

as when the normal legal order is suspended by military regimes (Chile under Pinochet, Argentina during the ‘dirty war’) or made ineffective due to serious racial or ethnic tensions and ethnicised conflicts (former Yugoslavia, Rwanda or Burundi). Massive refugee flows and the internal displacement of persons make remedies even less available.

Access to effective remedies depends greatly on the resources of the victims in terms of knowledge and information about the availability of remedies, or their physical or economic (lack of) security. A key issue is also whether the judiciary, the police and other law enforcement agencies, and – where they exist – ombudspersons, human rights commissions and other bodies, are genuinely impartial and able to take the necessary remedial measures of affirmative action required to ensure equality in fact. The record is rather mixed, at best. A pervasive problem is that the police and other security forces are often biased against the vulnerable groups. Members of many vulnerable groups face great difficulties in getting access to effective remedies even where these do exist on paper. This applies in particular to non-dominant indigenous peoples that have been marginalised by the dominant society; and to the migrants, the national or ethnic and linguistic minorities, refugees, asylum seekers and other non-citizens (‘aliens’). We are dealing here with the most serious fault-lines of human rights protection.

*Indigenous peoples* are often in vulnerable positions due to a lower level of literacy and education and weaker economic positions in society, in part due to present or past discrimination. The ILO adopted in 1989 Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which sets out important land rights and autonomy, education, and general policy towards the indigenous peoples. Under Article 12 of the Convention, the indigenous peoples shall be safeguarded against the abuse of their rights and shall be able to take legal action, either individually or through their representative bodies, for the effective protection of these rights. Unfortunately, until now only a small number of states have ratified this ILO Convention.

While persons belonging to national, ethnic or linguistic *minorities* have the same rights in terms of law as others to remedies in case of violation of their individual human rights, in practice their remedies are often not as effective as those of the members of the majority. Special efforts are required to provide them with adequate remedies. In some countries, special bodies or mechanisms have been set up for this purpose. A pioneer in this respect was the establishment in Sweden of the Ombudsman against Ethnic Discrimination. In Norway, a somewhat similar mechanism was set up by a parliamentary decision in 1998 establishing the Centre for Combating Ethnic Discrimination. Its task is to improve the effectiveness of remedies by improving the legal assistance available to persons who suffer from ethnic discrimination and to monitor the situation with respect to the nature and scope of discrimination. The Centre is governed by a board, half of whose members are recruited from ethnic minorities. For remedies to be effective, it is indeed very important that

minorities are represented in the institutions responsible for administering them.

*Migrant workers and their families*, who are usually not citizens of the country in which they live, are often exposed to exploitation, xenophobia, racism and expulsion. A distinction must be made between 'regularised' and 'unaccounted' migrants ('sans papier' in French). Migrants who are 'regularised' and therefore lawfully residing within the country are governed by domestic legislation or regulations which contain the conditions for employment in the country concerned and establish the rights that the migrants shall enjoy. The UN human rights bodies, especially the ILO, have been concerned over many years with the elaboration of standards to be implemented and applied by states in their protection of migrant workers, including access to remedial action in case of violation. In some countries, migrant workers suffer *de facto* discrimination even when appropriate legislation is in place. Governments have been requested repeatedly to make arrangements for information and reception facilities and to put into effect policies relating to training, health, housing and educational and cultural development for migrant workers.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the UN Migrant Workers Convention), which was adopted by the General Assembly in 1990 but is not yet in force, provides for more extensive rights than the ILO standards. Unfortunately, it has been ratified by only 12 states and these are all mainly sending states, rather than those states receiving migrant workers. Under Article 83 of the UN Migrant Workers Convention, state parties to it undertake to ensure effective remedies to any person whose rights or freedoms as set out in the Convention are violated. Those who seek remedy shall have the claim reviewed and decided upon by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the state. Judicial remedies should be developed. When remedies are granted, competent authorities shall enforce the remedy.

Under the Social Charter of the Council of Europe, Article 19 provides protection for migrant workers and members of their families, but it is limited in scope to migrants who are citizens of other contracting states, i.e. those European states which have become party to the Social Charter. Such migrants have a relatively strong position under the Charter. In terms of Article 19 para. 7, they are entitled to treatment no less favourable than that accorded nationals of the country concerned regarding legal proceedings respecting Article 19. Comparable provisions are found as well in the European Convention on the Legal Status of Migrant Workers (1977), which is also limited to nationals of a contracting state party authorised by another contracting state party to reside in its territory to take up paid employment. Migrant workers coming from third states, i.e. states not party to these conventions, cannot avail themselves of their

protection, but the states in which they reside are of course free to extend such protection to other migrant workers.

In 1997, the United Nations Commission on Human Rights established a working group of intergovernmental experts on the human rights of migrants. In 1999, it was replaced by a Special Rapporteur.

Special difficulties in establishing effective remedies arise for persons who have arrived clandestinely or been smuggled into a country and, hence, are not lawfully resident there. They face grave risks to their human rights and fundamental freedoms when they are recruited, transported and employed in defiance of the law. Article 68 of the UN Migrant Workers Convention requires state parties to collaborate with a view to preventing and eliminating illegal or clandestine movements and the employment of migrant workers in an irregular situation. Some irregular migrants have been brought there under false promises of employment in respectable jobs, but after arrival they discover that they are subject to exploitation and, particularly for women, to prostitution. In many countries, large numbers of prostitutes are illegal immigrants. Women and children become vulnerable to trafficking because of social inequality and the vast economic disparity between rich and poor states and within states.

The problem is to find appropriate remedies for this tragic and slavery-like phenomenon. Such persons are in a particularly difficult situation: if they complain to the authorities of the illegal exploitation to which they are subjected, they risk being expelled as illegal entrants. Expulsion may place them in very difficult circumstances in their home country. This is particularly true for those who have been forced into prostitution or criminal activities.

A two-pronged approach is called for: measures to combat exploitative smuggling and trafficking of persons; and measures to help those victims who in spite of countermeasures have been smuggled into the country and have stayed there for some time, making it inappropriate to return them to their country of origin. The task should be to bring them out of their condition of prostitution or other criminal or degrading circumstances, and to assist them to obtain education and jobs by which they can enjoy an adequate standard of living.

The vulnerable situation of *refugees* requires specific standards for their protection. The main instruments are the Convention Relating to the Status of Refugees (1951) in conjunction with the Protocol relating to the Status of Refugees (1966). The Convention prohibits discrimination based on race, religion or country of origin, and sets standards regarding juridical status that include access to the courts, which implies a right to remedy. Among the other standards are provisions on gainful employment and on administrative measures. The interpretation of the definition in Article 1 of the International Convention Relating to the Status of Refugees is subject to much controversy and has been narrowly interpreted in recent years by European states in order to stem the flow of asylum seekers. The Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa

contains less explicit standards of treatment but has a broader definition of the term refugee.

As soon as a person is recognised as a refugee and allowed to enter a country which is not his or her own, the refugee is entitled to most of the rights contained in several of the international human rights instruments such as the ICCPR and the ECHR. Thus, the right to remedy in case of violation extends, in principle, also to refugees. But the receiving state is entitled to set conditions for entry, and some of those conditions may constitute significant limitations on the rights of refugees.

Among the many problems faced in practice by refugees, two are particularly serious: their situation while in refugee camps; and the threat of expulsion. Refugee camps are an unavoidable device in cases of mass refugee flows, and are mainly set up in countries bordering the state from where the refugees come. Among the many tragic aspects of refugee camps, which include inadequate food and housing, the breakdown of familial and social structures, and the loss of meaningful occupation, is also a high rate of sexual and domestic violence against women and girls.

The other major problem facing the refugees is the danger of expulsion. Under Article 32 of the Refugee Convention, a refugee residing lawfully in the country shall not be expelled save on grounds of national security or public order. A decision to expel requires due process of law, and the refugee should normally be allowed to submit evidence to substantiate his or her case and to appeal to a competent authority designated for that purpose. The notions of 'national security' and 'public order' may leave wide discretion to the host government.

In respect of *asylum seekers*, admission to a foreign country is required as the first step for a refugee to enjoy and exercise fundamental rights and freedoms. The Universal Declaration proclaimed the right to seek and to enjoy asylum, but not a right to obtain it. No corresponding provision has been included in the ICCPR. The only legal obligation is found in the Refugee Convention of 1951, which requires states not to return or expel ('refouler' in French) a refugee to a country where his life and freedom may be threatened. With regard to asylum seekers and refugees arriving in countries that are parties to the European Convention of Human Rights and Fundamental Freedoms, Article 3 requires that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". The Article has been interpreted to imply that governments of the receiving country cannot send a person sent back to a country where he/she might be at risk of torture.

The right to seek asylum, proclaimed in the Universal Declaration, would in practice require that the asylum seeker is able at least to reach the country where he or she seeks asylum. Many countries, including most of the West European states and the United States, have in recent years implemented what amounts to a 'non-admission' policy. This takes many forms: visa requirements combined with carrier sanctions, the creation of international zones in airports,

or isolation of applicants and processing of applications for asylum at military bases abroad. This has led to a very significant decrease in the number of asylum seekers reaching these countries, in spite of the fact that the number of refugees in Europe and throughout the world increased substantially during the same period. The consequence is that asylum seekers can often reach only the countries bordering their own, which are placed under an enormous burden. Neighbouring countries, therefore, often take the precaution of tightening up border controls so as to deny admission to persons without a valid passport and visa for a third country. The net outcome is that would-be refugees are prevented from leaving their home countries and have to face their persecutors at home. The lack of available remedies for asylum seekers should therefore be seen as one of the major problems in the international protection of human rights.

Considering *aliens in general*, international human rights standards have at the normative level significantly reduced the difference in rights between citizens and non-citizens, but important differences remain. Aliens do not have the right to enter a country without the consent of the authorities concerned. Normally, however, permanent residents have a right to re-enter their country of residence even if they are not citizens. Aliens can be expelled from their country of residence. Aliens do not have political rights to vote and to be elected, or to obtain and hold public office (ICCPR Article 25). These differences can have serious consequences for the individual and for groups of resident aliens.

Under Article 15 of the Universal Declaration, everyone has the right to a nationality, but this provision has not been followed up with binding international standards. Special problems arise in cases of state succession and state restoration, when part of the population is denied citizenship. The problem has arisen mainly in the context of decolonisation and dissolution of larger entities, but has occurred also under other circumstances. Denial of citizenship can at its extreme lead to forced removal, mass expulsion, or ethnic cleansing. At minimum, it causes difficulties for the non-enfranchised resident in obtaining a public position and in becoming an active partner in the political processes of the country of residence. The International Law Commission has recently adopted a set of Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States (1997), providing guidelines for the allocation of citizenship. The European Convention on Nationality adopted in 1997 also contains important guidelines.

There has in recent years been a steep increase within industrialised countries in the percentage of aliens under detention or imprisonment. A large part of that increase consists of persons coming from ethnic or racial groups different from the majority in the country where they are detained. Two different circumstances need to be addressed in this connection.

One set of problems concerns persons who are detained as asylum seekers or who, while not being asylum seekers, have made or have attempted to make an

illegal entry into the country. In some places, such persons are detained, sometimes for prolonged periods, pending the determination of their status under applicable law. That determination may lead either to permission to reside in the country or to deportation. In some cases the person is detained because the authorities do not believe that the information given by the detained person as to his or her identity is correct, or because the person refuses to reveal his or her identity. This set of issues is now under consideration by the UN Working Group on Arbitrary Detention, which has expressed concern about the lack of adequate remedies during such detentions, and which has addressed a number of issues aimed at improving the effectiveness of remedies.<sup>30</sup>

The second category among the growing number of detained aliens comprises those who have been convicted of crimes and who are serving prison terms. Undoubtedly, in many cases there are objective reasons for this. Many are involved in drug trafficking or other criminal activities, sometimes as part of expanding international mafia networks. But there may also be other and more worrisome factors at work. Visible aliens are more easily singled out for suspicion. They may have fewer resources to defend themselves against unjustified prosecution. Furthermore, it is conceivable that continuous social discrimination and degrading treatment generates anger and hatred, which eventually leads to criminal acts. This is an indication that respectful treatment by public authorities and law enforcement agencies may in itself be a crime-preventing measure, and underlines the need for effective remedies whenever public authorities behave in a discriminatory and derogatory fashion.

## **STEP 5: FACING STRUCTURAL OBSTACLES**

Article 28 of the Universal Declaration requires that social and international conditions be structured so as to make possible the enjoyment by everyone throughout the world of all its listed rights. This would necessitate adjustments of political and economic relations, both within states ('social order') and between states ('international order'), and would be impossible without a corresponding modification of cultural traditions so that these give priority to the values of the human rights system as a whole. Obviously, such changes could not be brought about over a short period of time. Some might say that Article 28 is a utopian aspiration. It is preferable, however, to see it as a vision to be pursued with determination, while acknowledging that it will only be gradually and partially achieved in practice. Over the years the United Nations has sought to relate human rights to major global issues in its effort to find solutions for human rights concerns affecting millions of deprived, dispossessed, victimised and marginalised people. The approach started with the Proclamation of Teheran (1968) and is reflected in many subsequent documents. It is known as the 'structural approach' and proposes to link human

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<sup>30</sup> E/CN: 4/1998/44.

rights to major worldwide patterns and issues, to identify the root causes of human rights violations, and to assess human rights in the light of concrete contexts and situations. The origin of such efforts can be traced to Article 28 of the Universal Declaration. The approach is further developed in instruments which are examined in this chapter, including the Declaration on Social Progress and Development of 1969 and the Declaration on the Right to Development of 1986, as well as in the declarations and programmes of action of various world conferences over recent decades.

The two most important challenges to human rights today are the increasing income inequality and widespread extreme poverty in a world which is richer than ever before, and the proliferation of local armed conflicts with devastating consequences for the enjoyment of economic and social rights. These processes are also affected by cultural differences – not only differences between different ethnic groups or peoples, but also the cultural differences between those who live in abundance and those who live in abject poverty. If culture is understood as the sum total of the distinguishing material and spiritual activities and products of a given social group, increasing inequality generates separate cultures within the different social groups with a declining capacity for empathy and solidarity.

The most dramatic obstacle to the enjoyment of economic and social rights is the steep increase in income inequality both among nations and within nations, and the spreading of poverty in the midst of plenty.

The United Nations Development Programme (UNDP) in its Human Development Report 1999 presents figures showing that the gap between rich and poor countries has been continuously widening since the early 19th century, which is about the time when the so-called globalisation started. While the gap between the richest and poorest country was about 3 to 1 in 1820, it has continuously grown to reach a staggering 72 to 1 in 1992. Statistics show that one-fifth of the developing world's population goes to sleep hungry every night, a quarter lacks access to even a basic necessity like safe drinking water, and a third lives in abject poverty at the margin of human existence. Some 500 million children do not have access to even primary education, and approximately one billion adults remain illiterate. Equally staggering at the other side of the divide is the accumulation of wealth in the hands of a few individuals. Among the 200 richest persons in the world, 65 or nearly one-third live in one single country, the United States, 55 live in Europe, while only one such person is found in sub-Saharan Africa. The magnitude of the resources controlled by these individuals defies imagination. The assets of the three richest persons are more than the combined GNP of all least developed countries, and the assets of the 200 richest persons are more than the combined income of 41 per cent of all the world's people. It is also stated that a yearly

contribution of only 1 per cent of the wealth of the 200 richest persons could provide universal access to primary education for all.<sup>31</sup>

People are poor largely because of those who are not poor. The main obstacle facing the realisation of economic, social and cultural rights is the accumulation of wealth in few hands and few countries, combined with their control over or dominance in the fields of technology, patents and communications and their ownership of a relatively small number of major corporations, most of them transnational. To be aware of these facts does not bring us far, however, towards a more appropriate distribution that would allow human rights to be enjoyed by all.

In a study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities on human rights and extreme poverty, it was noted that patterns of extreme poverty lead to a generalised situation of basic insecurity, preventing individuals and families from assuming basic responsibilities and enjoying fundamental rights.<sup>32</sup> In many places the poverty situation has become widespread and has resulted in serious and permanent impacts. The lack of basic security leads to chronic poverty when it simultaneously affects several aspects of people's lives, when it is prolonged, and when it severely compromises people's chances of regaining their rights and of exercising their responsibilities in the foreseeable future.

Poverty is a reflection of and results in malnutrition, lack of education, low life expectation, and sub-standard housing. These factors impede efforts to move out of poverty: a malnourished child living in sub-standard housing has poor prospects for success in school, even when accessible. Chronic family poverty affects the child from birth, if not before: they experience severe deficiencies in health, education, in cultural skills, and in social relations. For the individual it is extremely difficult to break out of this vicious circle. To do so would take very determined efforts by the society at large, but there appears to be a declining interest among the more fortunate parts of the population in making such efforts.<sup>33</sup>

Gross inequalities profoundly affect economic and social rights, as demonstrated in the above-mentioned study for the United Nations Sub-Commission on Promotion and Protection of Human Rights on the impact of income distribution on the enjoyment of economic and social rights.<sup>34</sup> Based on a thorough review of the indicators of income inequality, the conclusion was drawn that the consequences of the type of globalised development that has

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<sup>31</sup> UNDP: Human Development Report 1999, p. 38.

<sup>32</sup> The final report, by Mr. Leandro Despouy, was presented in 1996 under document number E/CN.4/Sub.2/1996/13.

<sup>33</sup> On the challenge to human rights of extreme poverty see also Louis Edmond Petiti and Patrice Meyer-Bisch, 'Human Rights and Extreme Poverty', in Janus Symonidesz (ed.), *Human Rights: New Dimensions and Challenges*, Dartmouth: Ashgate, 1998.

<sup>34</sup> Until 1999 the body was called the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

been seen over recent decades have been very serious for poor countries and for poor people in general. It was stated in the study that all reports of the UN system agree that the number of poor people in the Third World has risen in recent years and that poverty is acquiring an increasingly permanent quality.

Efforts to redress the situation must take into account the different forms of poverty and the structural factors that cause it. Poverty intensifies in situations of crisis, such as famines. Properly directed, interventions to assist vulnerable persons and families to cope with the crisis can enable them to emerge with sufficient strength to manage their own needs under more normal conditions. Pockets of poverty in rich countries can be eliminated through appropriate, targeted interventions, sometimes by affirmative action if the cause is social discrimination. Endemic mass poverty in poor countries requires entirely different measures. However, it is important to determine not only who the poor are, but also who are the rich or well off, and the nature of the relationship between these groups.

When poverty becomes a near-permanent feature it generates its own cultural patterns. In efforts to eradicate poverty, different categories of the poor have to be considered. Some who previously belonged to the lower middle class and who have only recently become poor due to transient phenomena such as a general economic depression, drought or flood may be able to regain their self-reliant income generation capabilities if temporary and targeted interventions are made. Groups that are chronically marginalised tend to end up in a situation of hard poverty where people adopt what is called a 'survival culture', eking out a living as best they can on the edge of all commonly accepted systems and norms. The requirements of subsistence mean that they must adapt to very difficult conditions of exclusion, extreme poverty and mendicancy, if not delinquency.<sup>35</sup> Under these circumstances they devote all their energy to fighting for survival at all costs, very often in conflict with the agencies of order of the surrounding society. They lack the ability to bring themselves out of the situation, nor is the surrounding society willing to help them do so. A child born into this cultural setting has few prospects ever to enjoy proper human rights, in spite of the fact that 191 states have committed themselves, under Article 27 of the Convention on the Rights of the Child, to ensure to every child within their jurisdiction an adequate standard of living.

At the top end of the income ladder, among the rich, the cultural orientation often includes a general indifference to the poverty of others. For the rich people in the richest countries, the neo-liberal ideology harnesses a set of assertions and assumptions deployed to justify the priority of market principles over human rights, in particular favouring unrestrained market operations over economic and social human rights. This ideology includes some vague and unverifiable claims that it will ultimately, over a period of time, benefit also

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<sup>35</sup> Doc. E/CN.4/Sub.2/1998/8 paragraphs 10 and 11. The study was prepared by José Bengoa, member of Sub-Commission, from Chile.

those who are presently poor. There is no empirical support for that proposition.

Thus, there is a dual task to perform: to develop approaches which can penetrate the culture of marginalised groups in order to create conditions which can give realistic hope of escape from the vicious circle of poverty. In industrialised countries, this can be achieved through properly organised social security, provided it is of a nature that does not cause unnecessary dependency. In the least developed countries, targeted interventions of support directed particularly towards young women of child-bearing age and to children, at both the pre-school and primary school stages, could help many to break out of the vicious circle. At the same time, it is necessary also to challenge the hardcore neo-liberal ideology of the rich in favour of socially responsible liberalism, by which a combination of redistribution and self-reliance can be obtained while ensuring respect for civil and political rights.

Another major obstacle is the numerous armed conflicts, mainly internal, which have marred the last decade of the 20th century and which are likely to continue unless their root causes are addressed. While the causes are numerous and diverse, two factors stand out as particularly important. One is the serious weakening of the role of the state as a consequence of the current processes of globalisation. The second is the space given to various kinds of conflict entrepreneurs by the receding state. Societies in the least fortunate part of this globalising world are increasingly insecure. When government is bad and irresponsible, when states can no longer deliver the goods, and when people are insecure, conflict entrepreneurs mobilise on grounds of tribal identity, ethnicity or religion, with ensuing armed conflicts. With the contemporary flow of small but devastatingly effective arms, the conflicts become extremely cruel and economically destructive. The international response should be to increase the capacity to help prevent violent conflicts and to advance social and cultural integration while ensuring space for appropriate attention to the recognition of cultural diversity.

### **Global conferences**

The World Summit for Children, held in New York in September 1990 at the invitation of UNICEF, placed the rights of the child close to the top of the human rights agenda and contributed to the unprecedented speed with which states ratified the Convention on the Rights of the Child. Of great importance was also the decision by UNICEF, when renewing its institutional mission in 1996, to adopt the CRC as the guideline of all UNICEF activities.

The United Nations Conference on Environment and Development (the Rio Conference) in 1992 adopted Agenda 21, which contains a comprehensive programme for global action in all areas of sustainable development.

The World Summit for Social Development held in Copenhagen in 1995 focused on the eradication of poverty, the expansion of productive employment and the promotion of social integration. It emphasised the need to eradicate

poverty in the world through decisive national action and international co-operation, as an ethical, social and economic imperative of humankind. It called for the focusing of policies to address the root causes of poverty, giving special priority to the rights and needs of women and children and of vulnerable and disadvantaged groups.

The Fourth World Conference on Women, held in Beijing in 1995, in its Declaration and Platform for Action, further advanced concerns that had been initiated with the Nairobi Forward-looking Strategies for the Advancement of Women by the Year 2000, adopted in Nairobi in 1985. The empowerment of women, which has become a major concern of the international community during the last two decades, can have a substantial impact on the elimination of poverty.

The second United Nations Conference on Human Settlements (Habitat II) met in Istanbul in 1996 to examine the housing situation and to develop commitments for the future. It helped to increase awareness of the fact that not only had the world population increased from about 4.2 billion to about 5.7 billion during the last two decades, but also an increasing number of people live in cities and, by the year 2000, over 50 per cent in urban areas. This situation presents new challenges, not least when it comes to supplying food to huge groups of people with very limited sources of income. There is also a need to address the root causes of these phenomena, including rural to urban migration.

The World Food Summit, convened in Rome at the invitation of the FAO in November 1996, turned out to be a milestone in the efforts to draw attention to the right to food and nutrition as a human right. The world leaders present not only formally renewed their commitment to the right to food, but also specifically reaffirmed the right of everyone to have access to safe and nutritious food. These commitments are consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.

### **Agency interest and commitment**

UNICEF has for many years been at the forefront in promoting a global perspective on the implementation and monitoring of the Convention on the Rights of the Child, which is of worldwide importance due to its nearly universal ratification. The FAO's present engagement is closely tied to its role in organising the World Food Summit and the follow-up to objective 7.4, i.e. to clarify the right to food as a human right and to take steps to implement that right. The FAO has listed a set of activities for this part of the follow-up process within the organisation and has entered into co-operation with the High Commissioner for Human Rights regarding its implementation.

A particularly significant milestone for the evolving policy discussions and the concretisation of human rights in development was reached with the policy document finalised by the UNDP in December 1997: "Integrating human rights with sustainable human development". The UNDP is a development agency

and, therefore, its main human rights contributions will be through its development activities. Hence, it is crucial that UNDP develop a human rights-based approach to sustainable human development programming, thereby ensuring that human rights will be mainstreamed in UNDP activities and not relegated to specific human rights projects alone. Special attention is paid to economic, social and cultural rights and to the human right to development, e.g. by developing indicators to measure progressive realisation. The UNDP's human rights-based approach to poverty alleviation emphasises empowerment, participation and non-discrimination and addresses issues of vulnerability, marginalisation and exclusion. The human rights approach of the UNDP is universal and holistic, stressing the indivisibility and inter-relatedness of all human rights – economic, social, cultural, civil and political. Special attention will also be paid to ensuring that civil and political rights are fully respected in the processes involved in the UNDP's programming and implementation of sustainable human development.

The UNDP is committed to the better integration of human rights follow-up from the major UN global conferences of the 1990s – especially from the World Summit for Children, the Earth Summit, the Social Development Summit, the Fourth World Conference on Women, the Education for All Conference, the World Conference on Human Rights, the Population and Development Conference, Habitat II and the World Food Summit. This integration of follow-up activities will provide valuable insights and benchmarks for the UNDP's current and future human rights programming. It is thus clear that an accelerating recognition of the concerns with economic, social and cultural rights occurred during the 1996–98 period. The UN reform package proposed by the Secretary-General in July 1997, with its emphasis on human rights as a guide to all activities of the United Nations family, and the coinciding preparations for the fiftieth anniversary of the Universal Declaration of Human Rights, have made their imprint on the receptivity and interest of several agencies in reviewing their own mandates and performance in relation to human rights.

## **STEP 6: PROMOTING INTERNATIONAL RESPONSIBILITY IN THE AGE OF GLOBALISATION**

As stated in the introduction, the human rights project must be seen within the wider objectives of the United Nations and its visions of world order. Article 1(3) of the UN Charter refers to one of these objectives as the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character, including the promotion and encouragement of respect for human rights and fundamental freedoms.

The Committee on Economic, Social and Cultural Rights noted in its General Comment No. 3 (1990) that in accordance with Articles 55 and 56 of the UN Charter, with well-established principles of international law, and the provisions of the Covenant itself, international co-operation for development

and thus for the realisation of economic, social and cultural rights is an obligation of all states.<sup>36</sup> It is particularly incumbent upon those states that are in a position to assist others in this regard to honour their commitment. The Committee noted in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for state parties to take full account of all of the principles recognised therein. It emphasises that in the absence of an active programme of international assistance and co-operation on the part of all those states that are in a position to launch one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.

Article 2 (1) of CESCR requires all state parties “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources...”. The Committee has observed that the phrase ‘available resources’ refers to both the resources existing within a state and those available from the international community through international co-operation and assistance. Moreover, it has noted that the essential role of such co-operation in facilitating the full realisation of the relevant rights is further underlined by the specific provisions contained in Articles 11, 15, 22 and 23. With respect to Article 22 the Committee has already drawn attention, by way of General Comment No. 2 (1990), to some of the opportunities and responsibilities regarding international co-operation. Article 23 specifically identifies “the furnishing of technical assistance”, as well as other activities, as being among the means of “international action for the achievement of the rights recognised ...”.

The Declaration on the Right to Development sets both national and international levels of responsibility for implementation. Its operative Article 3 declares that states have the primary responsibility for creating national and international conditions favourable to the realisation of the right to development. States also have the duty to co-operate with each other in ensuring development and eliminating obstacles to it. States should realise 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.<sup>37</sup>

Development is described by the Declaration as an economic, social, cultural and political process aiming at a constant improvement in the well-being of the population as a whole and of each individual. Its basis should be the

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<sup>36</sup> HRI/GEN/1/rev.4, general comment 3, p. 12, paras 13 and 14.

<sup>37</sup> On the significance of the Declaration on the Right to Development, see Arjun Sengupta, ‘Realizing the Right to Development’, *Development and Change*, vol. 31, no. 3, 1999, pp. 554–578. (Sengupta is the independent expert on the Right to Development of the UN Commission on Human Rights) and Upendra Baxi, ‘The Development of the Right to Development’, in: Symonidesz, 1998, *op.cit.*

individual's active, free and meaningful participation in development and in the fair distribution of its benefits.

With regard to the quest for a social order which assures everyone enjoyment of the rights and freedoms set forth in the Universal Declaration, the Declaration on the Right to Development provides in its Article 8(1) that states shall undertake, at the national level, all necessary measures for the realisation of the right to development. They should 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.

Furthermore, with regard to the requirement foreseen in Article 28 of the Universal Declaration for an international order in which human rights for all can be realised, the Declaration on the Right to Development provides in its Article 3(3) that states have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. Under Article 4, states have a duty to take steps, individually and collectively, to formulate international development policies with a view to the full realisation of the right to development.

An increasing number of UN agencies and other bodies have recognised the necessity of using a human rights framework in guiding their work. This has gone hand in hand with increasing attention to economic and social rights as being of equal value to civil and political rights.

All of these efforts, however, have to take cognisance of the contemporary processes of globalisation, which in fundamental ways change the framework for the implementation of human rights.<sup>38</sup> The main features of globalisation are an increasing reliance on a deregulated global market, free trade, an uncontrolled flow of investment, and the paramount role of the international financial market, with the International Monetary Fund (IMF) and the World Bank moving to the centre stage as guardians of the global order. In a wider perspective, the nature of globalisation is also affected by developments in science and technology, communications and, in particular, information processing, which has substantially changed the structure of the global system.

Beneficial aspects of globalisation include advances in communication and information and much greater openness. There is, however, a serious downside to globalisation. Imposed requirements of structural adjustment and the debt burden are both part and parcel of the globalisation process. The policies of structural adjustment pursued in the 1980s probably contributed in many places to intensified tension between the different ethnic, racial or social groups in society. They may have been very costly in terms of lost development opportunities, and may have hampered many groups in their enjoyment of the

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<sup>38</sup> The impact of globalisation on the efforts to universalise human rights has been discussed in Asbjørn Eide, 'Universalizing Human Rights. The Processes and Challenges in the Age of Universalization', in Wilhelm Krull (ed.): *Debates on Issues of our Common Future*, Weilerswist: Velnrück Wissenschaft, 2000 and by Virginia Leary, 'Globalization and Human Rights', in Symonidesz, 1998, *op.cit.*

right to food. In recent years, the policies of structural adjustment have been modified but continue to carry risks for the economic and social rights of the most vulnerable part of the population.

The Committee on Economic, Social and Cultural Rights on 11 May 1998 adopted a statement on globalisation. In it, the Committee, reflecting on the downside of globalisation, argued that its adverse risks can be mitigated, or compensated for, if appropriate policies are put in place. However, insufficient efforts are currently being made to devise new or complementary approaches that could facilitate the compatibility of structural adjustment with full respect for economic, social and cultural rights.<sup>39</sup> As noted by the Committee, governments and intergovernmental and international organisations have a strong and continuous responsibility for taking whatever measures they can to act in ways compatible with their human rights obligations. The areas of trade, finance and investment are not exempted from such responsibilities.

The Committee warned that competitiveness, efficiency and economic rationalism must not be permitted to become the primary or exclusive criteria against which governmental and inter-governmental policies are evaluated.

This issue has also been raised by the main policy-making body of the United Nations in this field, the Commission on Human Rights. Its resolution 1999/59 pointed out that globalisation affects all countries differently and makes them more susceptible to external developments, positive and negative, including in the field of human rights. Since globalisation in its many dimensions has an impact on the full enjoyment of all human rights, it called for a study on that impact. Two steps have been taken to follow up the call. A study has been initiated by its expert think-tank, the Sub-Commission on Promotion and Protection of Human Rights, and will be completed in 2002. The theme of the study is “human rights as the primary objective of international trade, investment and finance policy.”<sup>40</sup> In the preliminary report presented in 1999, the authors address the failed effort to adopt a Multilateral Agreement on Investment (MAI), which was promoted by the Organisation of Economic Co-operation and Development (OECD) and strongly supported by transnational corporations. The authors of the study claim that if the MAI had been adopted as drafted in 1998, it would have had serious adverse consequences for a wide range of human rights.

The Sub-Commission on Promotion and Protection of Human Rights established in 1999 a working group on the role of transnational corporations. The group was to examine the effects of their activities on the enjoyment of human rights. It would also prepare recommendations on how the United

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<sup>39</sup> UN doc. E/1999/22, paras 515-516.

<sup>40</sup> The practice of the Sub-Commission is to entrust such studies to one or two of its members. The study on the relation between human rights and international trade, investment and finance policy is undertaken by its members Professor Joe Oloka-Onyanga, Dean of the Faculty of Law at the University of Makerere, and Dr. Deepika Udagama of the University of Colombo.

Nations can ensure the compatibility of the activities of such corporations with human rights, including the right to development and the right to a healthy environment. The terms of reference require the working group to recommend mechanisms by which host and home governments could elaborate internal legal monitoring standards in respect of these corporations, and to analyse the possible liability of states and transnational corporations when failing to meet their obligations.<sup>41</sup>

Globalisation requires global responsibility to assist in the creation of conditions for the full enjoyment of human rights. It is in this context that the right to development has its main significance, with its dual emphasis on domestic implementation of all human rights and international co-operation to make that possible. While on the one hand every government should remove obstacles blocking development within its jurisdiction, such as a failure to observe civil, political, economic, social and cultural rights, effective international co-operation is essential in providing developing countries with appropriate means and facilities to foster their comprehensive development, in accordance with the Declaration on the Right to Development.

Globalisation of the market should be regulated through application of environmental standards and universal human rights, through determined action both by the United Nations and by its member states. While the World Trade Organisation (WTO), the IMF and the World Bank are institutional agents of globalisation, the United Nations, in particular its human rights bodies but also other agencies such as the UNDP, are now agents of the universalisation of rights. A constructive and corrective relationship between the forces of the market and the powers of the state requires good governance, structured in such a way as to implement human rights optimally. It requires the rule of law, transparency, responsiveness and accountability at the national and international levels alike. The responsibility of the World Bank and the IMF for human rights is a matter of some controversy, but recent research shows that such responsibility does exist, at least in the sense that these bodies must respect human rights in their activities.<sup>42</sup>

In recent years, the role of transnational corporations (TNCs) has come under increasing scrutiny.<sup>43</sup> There is an emerging debate on the accountability

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<sup>41</sup> The report of the first session of the working group is found in UN doc. E/CN.4/Sub.2/1999/9.

<sup>42</sup> For a thorough examination of the human rights obligations of the World Bank and the International Monetary Funds, see Sigrun Skogly, 'The position of the World Bank and the International Monetary Fund in the Human Rights Field', in Hanski, Raija and Markku Suksi: *An introduction to the International Protection of Human Rights*. Second edition, Åbo: Institute for Human Rights, Åbo Akademi 2000.

<sup>43</sup> Important contributions have been made by Sir Geoffrey Chandler (the chair of Amnesty International's Business Group, *Crafting a Human Rights agenda for Business*, in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, The Hague/London/Boston: Kluwer Law International, 1999; Lance A. Compa and Stephen F. Diamond (eds.), *Human Rights, Labour Rights and International*

of TNCs for human rights abuses or neglect. The abuses can be divided in two broad categories: those committed in collusion with the home state and those committed in collusion with the host state. The former seems to be less common now; the TNCs are more likely to be in collusion with the host state regarding human rights abuses.<sup>44</sup>

Under the present system, the primary responsibility for human rights continues to rest with the host government. States are obliged to take steps to the maximum of their available resources in furtherance of the progressive realisation of all of those rights. Governments should at all times abstain from corruption, since this diverts resources from their primary task. Priority in resource allocation, including income derived from royalties from or tax on transnational corporations should be given to the realisation of human rights. This requires, in turn, full transparency in budgetary matters. Governments should regulate the activities of the corporations, including the transnationals operating on their territory, to make sure that their activities conform to human rights requirements. States are never entitled to abdicate from their human rights obligations, be it in the context of international trade regulations, international investment agreements, or in any other way. Human rights should hold priority in all such relations.

Problems arise when the authorities of the host state are unwilling to implement all aspects of the internationally recognised human rights and to adopt the necessary regulations concerning the activities of transnational corporations. When they are unwilling, it means that they prefer to make political choices which deviate from human rights requirements. The authorities sometimes seek to enrich themselves ('kleptocratic governance'), or to benefit only a section of the society over other and more vulnerable groups. For these purposes they seek to please transnational corporations, enticing them to invest by providing conditions that violate human rights, including tax-free havens, prohibition of trade union activities, and in other ways. Corruption and complicity is unfortunately all too frequent. An international non-governmental organisation, Transparency International, has recently been set up to monitor and publicise practices of corruption, whether by the host government or the TNC or other actors. Effective monitoring of corruption would reduce the likelihood that TNCs become complicit in diverting resources away from a primary concern: to ensure the enjoyment of all human rights for all living within the state.

In some cases, host states are willing but not able to make the proper decisions for the implementation of human rights, in particular the economic, social and cultural rights, due to pressure from the outside. This pressure may

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*Trade*, Philadelphia: University of Pennsylvania Press 1996; Menno Kamminga, 'Accountability of Multinational Corporations', in Alston (ed.): *The EU and Human Rights*, Oxford: Oxford University Press, 1999, and Sigrun Skogly, 'Economic and Social Human Rights, Private Actors and International Obligations', in Addo, 1999, *op.cit.*

<sup>44</sup> Kamminga, 1999, *op.cit.*, p. 554.

come from transnational corporations, from home governments of the TNC concerned, or from international financial institutions in the context of structural adjustment. Where this is the case, the international monitoring agencies and other human rights bodies must develop an appropriate normative defence against such illegitimate pressures. This has to some extent happened, but so far to a very limited degree.

At the level of the international community, a paradoxical development has taken place during the last decades. On the one hand, the obligations of states have become increasingly detailed, mainly through international human rights law. On the other hand, international standards of relevance to transnational corporations have moved in the opposite direction: states provide benefits to the transnationals but no duties to reciprocate. It is in this latter respect that changes are warranted. If globalisation is to continue without leading to destructive backlashes and impoverishment of the weaker and vulnerable groups, rights and benefits have to be combined with duties. The Universal Declaration's Article 29 states that everyone has a duty to the community. For corporations, this must imply that they have duties both to the local community in the area of their operation and to the national society in which they function. The nature and scope of such duties need to be spelled out as part of any future international agreement on investment.

During the 1980s and 1990s, the process of globalisation and the project to universalise human rights seemed to be running on two different tracks, partly in different directions, and driven by different actors. At the end of the 20th century a dialogue on human rights and economic activities appears to be emerging. Non-governmental organisations now focus on the social responsibility of corporations, and on means to alter corporate behaviour through public exposure. They have been helped in this endeavour by effective use of communications technology. The international media has responded by running stories about corporate involvement in human rights violations. This has drawn public attention to the activities of the corporations.

Other factors are also at work. Major corporations are increasingly aware of the need for stability in the countries where they operate. This stability has to be a dynamic because developments have to be managed in ways flexible enough to accommodate the substantial changes in host countries due in part to the operations of the TNCs and to increased expectations arising from the revolution in mass communication. Such flexible and adaptable management is possible only when there is transparency and equitable distribution in society of the benefits of economic development. Corrupt, repressive and kleptocratic governments are, in the long run, a threat also to the TNCs, even if some of them believe they can make hefty short-term profits when colluding with such governments.

A new page was turned by the United Nations at the World Economic Forum in Davos on 31 January 1999 when UN Secretary-General Kofi Annan challenged world business leaders to "embrace and enact", both in their

individual corporate practices and by supporting appropriate public policies, a set of universally agreed values and principles.<sup>45</sup> In his address, Annan acknowledged that globalisation is a fact of life and that it has benefits to offer but also problems. Rather than challenging globalisation as such, which has often been done in UN fora, he stated that there is a need to address the dangers and to seek redress for them.

The Secretary-General therefore asked the business leaders present to build on three sets of instruments: the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work (1997) and the Rio Declaration of the UN Conference on Environment and Development (1992). He called on world business to support and respect the protection of international human rights within their sphere of influence and to make sure their own corporations are not complicit in human right abuses. He also asked them to uphold freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Furthermore, he asked world business to support a precautionary approach to environmental challenges; to undertake initiatives to promote greater environmental responsibility; and to encourage the development and diffusion of environmentally friendly technologies.

He noted that traditionally national markets have been held together by shared values. In the face of economic transition and insecurity, people have known that if the worst comes to the worst, they could rely on the expectation that certain minimum standards would prevail. But in the global market, he said, people do not yet have that confidence.

Until they do have it, the global economy will be fragile and vulnerable – vulnerable to backlash from all the ‘isms’ of our post-cold-war world: protectionism, populism, nationalism, ethnic chauvinism, fanaticism and terrorism. What all those ‘isms’ have in common is that they exploit the insecurity and misery of people who feel threatened or victimised by the global market. The more wretched and insecure people there are, the more those ‘isms’ will continue to gain ground. What we have to do is find a way of embedding the global market in a network of shared values. I hope I have suggested some practical ways for us to set about doing just that.

Annan referred to a threat which needs to be taken seriously both by TNCs and governments: if states lose their capacity to govern and to provide social, economic and physical security to their inhabitants, societies are likely to

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<sup>45</sup> The text of the Secretary-General's statement, those of the High Commissioner for Human Rights and the joint statement with the International Chamber of Congress discussed below, can all be found on the new website of the United Nations, the United Nations and Business, <http://www.un.org/partners/business/sgstate.htm>.

disintegrate, and conflict entrepreneurs will have an easy play in manipulating the ensuing insecurity. This will also seriously jeopardise the operations of the TNCs. To be in collusion with governments that violate these human rights ultimately undermines the future of the TNCs themselves.

## **CONCLUSIONS: ACHIEVEMENTS AND PROSPECTS**

The purpose of this paper has been to explore the steps taken so far to universalise human rights and to examine the major obstacles presently encountered. Many issues have been left out of the discussion, such as the debate about 'Asian values' and generally about universalism versus cultural relativism. Those are important issues in themselves, but they have been extensively discussed elsewhere and limitations of space required some issues to be left out.

It is a major, almost revolutionary, achievement that human rights have not only entered international law and relations but moved to the very forefront of it. The project which was started in 1945 with the UN Charter and pushed forward with the adoption of the Universal Declaration of Human Rights has profoundly influenced law and policy to a degree that could hardly have been envisaged when it was started.

A comprehensive and detailed international regime of human rights has been established at both the global and the regional levels, covering civil, political, economic, social and cultural aspects of societal relations, including the relation between the state and the human being within the territory and jurisdiction of the state. Remedies are being required for those whose rights are violated.

International monitoring and supervisory bodies are keeping track of human rights performance. Every state on the globe has accepted legally binding obligations under at least two of the main human rights instruments. The two most important among them, covering practically all the rights contained in the Universal Declaration, have been ratified by some 75 per cent of all states.

The obligations of states towards their own inhabitants have been spelled out in general terms in the conventions and in greater detail by the treaty bodies set up to monitor implementation of them. More and more states are incorporating human rights into their domestic legal system.

The international community is still having great difficulty, however, in dealing with the structural factors that influence the possibility, particularly for the less developed countries, of implementing the human rights agenda fully. In recent times the process of globalisation has profoundly and in numerous ways affected the conditions for the realisation of human rights.

Crucial in this regard is the attitude of the Bretton Woods institutions, whose relative power in the international system has grown enormously and which have been major advocates for liberalisation and market orientation. There is growing attention drawn to the human rights responsibility of these institutions. Even more important is the role of the transnational corporations. Foreign

direct investment has grown dramatically over the last two decades, largely through the increasing role of the TNCs. In the effort to universalise human rights, defining the responsibility of the TNCs will be a major challenge in the future.

Driven by powerful forces on the international markets the globalisation process is likely to continue. It can bring some positive gains for many, while it causes great harm to others.

Universalisation should be seen as a corrective process. Its function is to try to prevent or to redress the negative aspects of globalisation, while putting the possible benefits from an expanding market to good use through redistribution and the pursuit of social justice.

Some positive steps can now be observed, indicating that there is an awareness of the need to ensure some corrections to the process of globalisation. Some additional suggestions, derived from recent discussions within the United Nations, include the following:

1. The human rights of women, the rights of the child, and the situation of marginalised or vulnerable groups should always be of the highest priority on all human rights agendas.
2. States should adopt legislative and constitutional changes designed to guarantee that treaty law takes precedence over internal law and that treaty provisions are directly applicable in the internal legal order. They should adopt economic and social measures in order to avoid the exclusion of groups marginalised by extreme poverty. They should also adopt measures to ensure that poor and vulnerable groups, including landless farmers, indigenous people and the unemployed, have access to productive assets such as land, credit and the means for self-employment.
3. States should more actively involve civil society organisations in the economic, social and political life of their countries, with particular involvement being sought from spokespersons of vulnerable groups (such as the poor, homeless, unemployed, farmers and working people) and of organisations representing the public interest (for example, consumer, environmental, human rights and women's organisations). This is of particular importance because of the expanding influence of financial and market forces at the national as well as international levels. NGOs and other civil society organisations can play a countervailing role by representing the public interest. This might mitigate some of the adverse social effects of the market-driven process of globalisation.
4. Civil society organisations should be encouraged and supported in their monitoring of the activities of transnational corporations and financial institutions and the effect these have on human rights, including economic

and social rights. In the pursuit of the 'compact for the new century' between business and the United Nations proposed by the Secretary-General (see above), a number of issues have to be tackled. At least four actors or partners are involved whose responsibility has to be addressed: the host government, the transnational corporation, the home government, and the international community. The responsibility of TNCs could operate on four different levels. The first is towards the workers and other employees of the TNC concerned and to the local community. This includes the responsibility to prevent any health and environmental risks from their activities and to ensure at least basic workers' rights for their own employees. The second is the responsibility to ensure that their sub-contractors conform to the same aspects of human rights. The third is to make sure that the government does not resort to illegitimate use of force with regard to demonstrators and striking workers in the locality of TNC operations. The fourth is responsibility for the general human rights policies of the government concerned. There is growing support for asserting TNC responsibility with respect to the first level, and it is primarily at this level that current codes of conduct are being drafted. At the second level, it is more difficult to determine the TNCs' responsibilities because the more general legislation or policies concerning economic activities in the host country are affected. At the fourth level, the difficulties are even greater in defining the responsibility of the corporation to exert positive influence over the general human rights policies of the host government and to react against gross violations or neglect. Nevertheless, the issue could be subdivided and made manageable in some respects. The TNCs should at least encourage transparency in their own links with the government, making it publicly known what is being paid in royalties and taxes. This information would enable the general public to assess whether those resources accruing to the government are made full use of in the realisation of economic, social and cultural rights, as required under Article 2 of the International Covenant on Economic, Social and Cultural Rights.

5. The World Bank has for some time been reviewing the effects of structural adjustment programmes, partly in co-operation with NGOs. More resolute action is required, however, to review and change the nature and procedures of structural adjustment programmes and to implement policies to mitigate any adverse effects on the realisation of economic and social rights. Amelioration of the external debt problem of developing countries is urgently required. A comprehensive resolution of this problem is necessary, and should cover commercial, bilateral and multilateral debt. The High Commissioner for Human Rights should also endeavour to highlight the fact that multilateral and bilateral creditors need to reach agreement on the burden-sharing issue of debt relief as a matter of urgency.

6. Macro-economic policies at the global level should be restructured to ensure that states have the possibility to honour their obligations in regard to all human rights, including economic and social rights. The modes of operation of international financial markets should be reviewed, in particular the functioning of certain speculative financial transactions, including the use of so-called hedge funds.
7. Aid flowing from developed to developing countries should be increased, targeting a larger share on the eradication of poverty and the promotion of economic and social rights in general. This should go hand in hand with more deliberate efforts by receiving states to allocate a larger share of their public expenditure to health, education and welfare services for the poor.
8. The High Commissioner for Human Rights should provide high-level co-ordination to ensure that all rights are given appropriate consideration throughout the UN system, and co-operate closely with the UNDP in ensuring that human rights form the main guidance to development.
9. Treaty bodies should amend their guidelines for national reports so that governments address their position on structural obstacles to ensuring full enjoyment of economic and social rights, including the effect of unregulated globalisation. Specialised agencies and non-governmental organisations should be involved in a constructive and open dialogue to help formulate appropriate country-specific recommendations and enhance international co-operation to facilitate their implementation.
10. The present efforts by the CESCR to improve the protection of economic, social and cultural rights by developing an optional protocol should be continued. The recent initiatives of the UN human rights programme to incorporate economic, social and cultural rights into technical co-operation programmes, in collaboration with the specialised agencies, should be further strengthened and given a much better resource basis.
11. A dialogue by the human rights bodies with the World Bank, the IMF and other financial institutions is urgently needed to ensure that they take full account of the protection of economic and social rights in their activities. The High Commissioner should pursue this item on her agenda with greater determination.
12. The ILO must be given the opportunity to promote and protect the rights of all categories of working people, including organised and unorganised labour, farmers and the unemployed.

13. The WTO and some of the other international organisations are now expanding the space for NGOs to participate in their meetings. Concrete measures include the establishment and active role of NGOs' liaison and collaboration units within every UN agency and international organisation, and the provision of resources to facilitate NGO participation in conferences, conventions and other meetings of international institutions. An equitable representation of civil society organisations from developing countries should be ensured.