



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/Sub.2/2003/14
25 June 2003

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-fifth session
Item 4 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Globalization and its impact on the full enjoyment of human rights

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in accordance with Sub-Commission decision 2000/105***

* This document was submitted after the deadline established by the Documents Management Section.

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I. INTRODUCTION AND BACKGROUND

1. By decision 2000/102, the Commission on Human Rights decided to approve the nomination of Mr. J. Oloka-Onyango and Ms. Deepika Udagama as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights, paying specific attention to the recommendations made by the Sub-Commission and the Commission as to refining the focus and methods of the study.¹ The decision was approved by the Economic and Social Council (decision 2000/282). The appointment of the two Special Rapporteurs followed their joint working paper entitled “Human rights as the primary objective of international trade, investment and finance policy and practice” (E/CN.4/Sub.2/1999/11) and the working paper by Mr. Oloka-Onyango entitled “Globalization in the context of increased incidents of racism, racial discrimination and xenophobia” (E/CN.4/Sub.2/1999/8).

2. The Special Rapporteurs presented their preliminary report to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-second session (E/CN.4/Sub.2/2000/13). That report drew particular attention to the institutional framework of the main agents of globalization with particular attention paid to conditions affecting women, and the various ways in which globalization has both enhanced and diminished their living conditions. At the next session, the Special Rapporteurs presented their progress report (E/CN.4/Sub.2/2001/10), which further developed the analysis. That report provided a synopsis of some of the unresolved tensions that persist between international economic law and international human rights - the two main regimes of law implicated in the debate about globalization.

3. At the fifty-fourth session, the Sub-Commission gave the Special Rapporteurs additional time in which to complete their study (decision 2002/105). Consequently, the present, final report develops the main themes of the earlier reports and provides some critical reflections on particularly important developments that have taken place since the progress report was submitted. It also offers a review of those areas considered essential for future study and action by the Sub-Commission. In particular, the present report provides some reflection on the manner in which the events of 11 September 2001 (“9-11”) have reshaped many concerns in the debate about globalization. It provides a synopsis of the implications of the continued drive towards increased trade liberalization at the World Trade Organization (WTO) and the current state of discussion about and within the multilateral lending institutions (MLIs). The report concludes with some reflections on outstanding issues concerning the necessary architecture for a new international legal and governance framework that would be necessary to make the processes of globalization more responsive to the better promotion and protection of human rights. These principles (presented in broad, outline form) are contained in the annex.

4. Our previous reports have emphasized that globalization is a process possessed of many attributes. In the main, globalization is characterized by a highly increased integration of national economies on a world scale. The mechanisms through which these processes are mediated include the contemporary legal and economic regimes governing international trade, investment and finance. The most prominent institutions and actors that motivate these processes are transnational corporations (TNCs) and MLIs such as the World Bank and the International Monetary Fund (IMF), as well as the WTO. The central tenets of globalization are

to reduce the role of the State, privatize public enterprise, and deregulate or liberalize the economy.² These processes are having far-reaching consequences for the realization and better promotion and protection of human rights based upon a well-established international framework that commences with the Universal Declaration of Human Rights.³

5. Increasingly, however, the processes and impacts of globalization are becoming even more varied and complex. It is our considered opinion that globalization processes are simultaneously pushing the world to move closer together, while it is also forcing it further apart. Globalization must thus be understood as both a force of inclusion and exclusion, of expansion and contraction, and of human rights promotion, as well as of their marginalization. Our consideration of the economic processes that principally motivate globalization therefore needs to be supplemented by a more extensive examination of the significant political, social and cultural developments that are occurring apace. In tandem with such consideration, attention must be given to the limitations of the institutions and mechanisms designed to deal with them. Moisé Naím has argued that globalization made available to the public the technologies, resources and possibilities that until the early 1990s were often only available to Governments.⁴ As a consequence, the telecommunication and logistics infrastructure of drug traffickers, counterfeiters, or smugglers of people is often superior to that of the regulatory and law enforcement agencies of most countries. Thus, even as globalization has opened up new horizons for the positive use of technology, it has also projected concern over drug abuse, money laundering, human trafficking and (especially) terrorism to new heights.

6. The reaction of States and international institutions to these developments, which have heightened attention to the issue of security, is thus quite understandable. However, the renewed focus on security is quite disturbing. In the first instance, it is security in an essentially militaristic and manifestly retrogressive sense, with reliance placed on the superiority of military firepower and the curtailment of civil liberties. Secondly, in many respects it is reductionist, in that virtually every international problem is now viewed through the prism of security concerns. Finally, it is a paradigm that appears to enjoy near-universal support among States, albeit for a variety of essentially opportunistic (and sometimes conflicting) reasons. This new “international security paradigm” (ISP) has come to play an inordinately prominent role in the contemporary international political economy. Our concern is that this paradigm has introduced a new lowest common denominator to the affairs of States and consequently to the relationship between States and individuals. Needless to say, the paradigm brings with it additional issues that require attention in the quest to achieve the improved observance and protection of human rights within the context of the processes of globalization.⁵ Nowhere is this need more dramatically demonstrated than in the reaction of States to the events of 9-11 - a reaction the effects of which resonate up to the present day.

II. GLOBALIZATION IN THE AFTERMATH OF 11 SEPTEMBER 2001: WHAT PLACE FOR HUMAN RIGHTS?

7. Few events in the post-cold war history of human society have had as significant and far-reaching an impact as the attacks on the World Trade Centre in New York and the Pentagon in Washington, DC. In the wake of those events, the United States Government declared a “war against terror”. Several measures were subsequently introduced to respond to what was identified as a new, elusive, but extremely malevolent and effective “enemy”. Among them were the reform of national legal regimes to accommodate the new threats represented by

terrorism in its most recent manifestation; the redesign of immigration law and the increased recourse to the mechanism of preventative detention (even in States where such action was previously illegal).⁶ These were supplemented by enhanced powers of surveillance and the further application of the death penalty. Other measures focused on the tightening of mechanisms to ensure that the flow of economic and financial resources to support terrorist activities could be curtailed, and eventually terminated.⁷ In short, the ramifications of this war have been felt globally - in both their geographic and conceptual dimensions.⁸ All have significant implications for the very shape and character of international law in the twenty-first century and for the enhanced observance and protection of human rights.⁹

8. Debate about the reasons behind 9-11 has raged. Popular among these accounts have been variations on the “clash of civilizations” thesis first given wide currency and articulation by the American scholar Samuel Huntington in the early 1990s.¹⁰ Writing in the aftermath of the end of the cold war, Huntington sought to elaborate on what he believed would be the main global flashpoints of tension that would characterize relations among States in the international system. His conclusion was that in the emerging (post-cold war) era, “... clashes of civilizations are the greatest threat to world peace ...”.¹¹ Since that time, “culture talk” - the notion that the roots of conflict between societies are principally rooted in cultural factors - has become a dominant theme in much of the discourse on international politics.¹²

9. Needless to say, the relationship between social, economic, political and cultural factors is much more complex and multifaceted. As observed by the International Council on Human Rights Policy:

“It is widely believed that levels of economic and political inequity in the world are related to globalization and that in turn is identified with Western, particularly American capitalism. There is a widespread perception that globalization exports (or imposes) particular cultural values without respect for other cultures or beliefs. There is a widespread perception, too, that Western Governments and companies sell to others their own forms of governance (democracy, the rule of law) not for disinterested reasons but because they benefit economically from doing so. Free trade helps rich countries more than poor ones; legal regulation allows international companies to operate with less risk; democracy is encouraged (but not if it leads to independent regimes). These perceptions may or may not be well-founded, but they certainly exist and influence behaviour.”¹³

The influence on that behaviour (particularly of States) has been manifold. In the immediate aftermath of 9-11, States around the world rallied in support of the United States Government in what was considered a justified reaction to a shadowy enemy (super-terrorism and its supporters) that posed a global threat. To borrow the words of World Bank President James Wolfensohn, these events (of 11 September 2001) “... helped drive home the message to people that there are not two worlds - rich and poor. There is only one. We are linked by finance, trade, migration, communications, environment, communicable diseases, crime, drugs and certainly by terror”.¹⁴

10. But if the war against the Taliban in Afghanistan appeared to herald a new (albeit still skewed) era of multilateralism within the context of international politics, parallel developments spoke to the exact opposite. Thus, over the last two years, the United States Government commenced upon (some would say “resumed”) a systematic and deliberate path of unilateral (and self-serving) action. This can be traced through the rejection of the Kyoto Protocol to the

United Nations Framework Convention on Climate Change, followed by the refusal to support the establishment of the International Criminal Court. The same can be seen in the United States Government's reneging on the Comprehensive Nuclear-Test-Ban Treaty, and its abrogation of the Treaty on the Limitation of Anti-Ballistic Missile Systems.¹⁵ In the economic arena, these developments were matched by the United States Government's decision to increase the tariffs on imported steel and to boost agricultural subsidies - actions that flew in the face of the same Government's rhetorical pronouncements in support of "free trade" and policies of economic liberalization.¹⁶

11. The more recent war against Iraq has illustrated in stark relief that the new multilateralism (to the extent that it ever existed) was stillborn. The actions of the United States Government in the build-up to the war illustrate a number of key indicators that can enable us better to appreciate the essential contours of the post-9-11 world and its implications for globalization and the full enjoyment of all human rights. The first is a belief in the optimal use of force, and particularly in the superiority of economic and military power, to achieve international policy objectives. Secondly, to the extent that multilateral institutions such as the United Nations are of any utility to the achievement of these objectives, this is only in a strategic, functional sense; they will be side-stepped or completely abandoned if necessary.

12. This increasing tendency towards unilateralism results from the vast, primarily economic interests, combined with the technological superiority that the United States today enjoys. These factors give strength to the view that the deployment of sufficient force against terrorists (real, potential or imagined) or against "axis of evil" Governments is rationalized in classic Machiavellian fashion: the end justifies the means. How does this link up to the processes of globalization? In many respects a similar kind of fundamentalism is at play with regard to the arguments about market liberalization and economic reform, namely that the causes of economic failure and regression are not the result of market failure, or the policies of deregulation or liberalization, as such. Instead, they are the consequence of the failure to apply the law of the market and the related policies of adjustment and restructuring more rigorously. It is in this regard particularly that the war against terror intersects with the growth of unilateralism to impact on the processes of globalization and consequently to affect in largely adverse ways the full enjoyment of all categories of human rights. In such a context, harm to human beings is treated simply as "collateral damage", to borrow another euphemism that has come into vogue in the wake of recent global developments. This obviously raises significant questions about the role and place of the State, an institution which before the events of 9-11 was believed to be in a condition of terminal decline.¹⁷

13. Given the above, it is of only incidental consequence whether the measures adopted in the all-encompassing war against terror will in fact in the long run be successful.¹⁸ The more important question is whether they will be sustainable. It is clear that the war has wider ramifications beyond the "enemy" against which it is directed, whether that enemy is the shadowy Osama bin Laden and his al-Qa'idah network, the Taliban, or even the Saddam Hussein regime in Iraq. Indeed, it is a unilateralism that threatens to both undermine the essential *raison d'être* of the United Nations, as well as to increasingly alienate whole regions of the world.¹⁹ Of course, the implications for key multilateral institutions like the WTO, the World Bank and the IMF are of considerable significance, and we can now turn to an examination of the specific ways in which these debates are important for these institutions and for sustainable human development as a whole.

III. HUMAN RIGHTS, TRADE LIBERALIZATION AND THE TRAVAILS OF CONTEMPORARY INTERNATIONAL DEVELOPMENT

14. The most prominent facets of globalization are those manifested in the arenas of enhanced trade liberalization, improved regimes of investment and the better operation of the mechanisms of international finance. To the extent that one of the main targets of 9-11 was the capitalist face of the American system, these regimes were badly affected by the consequential effects on the finance, banking, insurance and other related global industries. At the same time, although the developments within these sectors relate principally to the international economy, as we have pointed out before, they are motivated essentially by forces in the arena of politics - domestic and global. Understanding the politics of globalization is thus essential to an appreciation of its implications for the full enjoyment of human rights. To do this, one must examine the processes of policy formulation by which the principal actors in the processes of globalization have been informed over the last two years. Thus, it is necessary to review the main issues that have been under consideration within the framework of the continuing negotiations on trade liberalization under the WTO and the question of poverty eradication at the Bretton Woods institutions, i.e. the World Bank and the IMF.

A. After Doha and towards Cancún

15. The Doha Declaration of November 2001 emerged from the fourth meeting of the WTO Council of Ministers.²⁰ The meeting that took place in the Qatari capital of Doha was a fairly marked contrast to the debacle that afflicted the meeting of the same Council in Seattle in 1999. Prior to Doha, growing tension had been registered over a number of questions that had similarly dogged the Seattle discussions. These included both substantive and processual issues, with the former encompassing arguments over labour standards, agriculture (particularly the issue of subsidies) and the Special and Differential Treatment (SDT) provisions of the Uruguay Round Agreements. Issues of process concerned questions of transparency, participation and equity, and, particularly, the place of developing and less developed countries within the organization.²¹

16. To cap it all, over the years following Seattle, considerable attention had come to focus on the issue of intellectual property rights (IPRs) and the question of access to essential drugs.²² In the run-up to Doha, this issue assumed a distinctly North/South dimension relating to the interpretation of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and specifically the issue of whether various mechanisms such as compulsory licensing were appropriate methods to use in addressing the health crisis brought about by the HIV/AIDS pandemic.²³ The United States was the strongest voice in opposition to this position, augmenting its argument with bilateral action designed to force several countries to comply with so-called TRIPS-plus measures.²⁴ Court action brought by several international pharmaceutical companies (and supported by the United States Government) against legislation on patents proposed by the Government of South Africa, and a complaint filed by the United States Government against Brazil in the TRIPS Council, galvanized international civil society into action.²⁵ Reeling from the negative publicity generated by these actions, the companies tactfully withdrew from the suit, while the United States Government suspended action on its complaint.²⁶ The stakes in the run-up to Doha were thus "very high indeed".²⁷

17. It is not trite to argue that the events of 11 September contributed in certain key respects to a better result from Doha than had been the case with Seattle.²⁸ The United States Government was itself placed in a serious quandary when the anthrax scare put into bold relief precisely what developing countries had been arguing about with respect to access to drugs in medical emergencies.²⁹ The above developments fostered considerably more goodwill at Doha than had otherwise been predicted in the run-up to the meeting and led to fairly substantial progress on a number of issues that had previously faced bottlenecks.³⁰ Needless to say, and as events were subsequently to demonstrate, there was also cause for caution.³¹

18. In the declaration that emerged from the meeting, the members reasserted the importance of trade for economic growth, development and employment and, more specifically, they stated that trade had a major role to play in the alleviation of poverty. The declaration also recognized the need for all peoples to benefit from the increased opportunities and welfare gains generated by the multilateral system. In so doing, the members decided that the needs and interests of developing countries should be at the heart of the Work Programme adopted in the Declaration. The issue of members' commitment to sustainable development also came through in many of the provisions of the agreement. In particular, paragraph 6 of the Declaration stated that,

“... under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.”

The meeting elaborated on this theme with respect to the specific issue of access to drugs through the Declaration on the TRIPS Agreement and Public Health.³² Among the other “victories” that emanated from Doha included the adjustment of the compliance periods under TRIPS for least developed countries (LDCs)³³ and some compromise language on the issue of export subsidies and on “non-trade concerns”, and with respect to SDT in the Agreement on Agriculture.

19. Despite the above largely positive developments, the Doha agreement also suffered several important limitations - limitations that became more apparent as the ink began to dry on the document, and “business” returned to normal. Thus, despite dealing with human rights issues (especially with respect to the right to life and the right to health), the Declaration was bereft of human rights language. Serious questions have also been raised as to the binding character of the Declaration. Even the one issue over which the Doha consensus seems to have registered a success - the issue of access to essential drugs - appears to have been only a symbolic victory. The question of what measures to take to assist countries that did not have a manufacturing capacity - a particular problem for many less developed countries that face the brunt of the pandemic - was also left unresolved.

20. These prima facie limitations have been exacerbated by the United States Government's blockage of final agreement on the issue on account of a fear that even illnesses that are not infectious or do not present a public health emergency (such as diabetes and asthma) could be treated with cheap, generic drugs once the door had been opened.³⁴ The continued impasse over the issue reflects not only the fundamental problem of United States unilateralism that we have

already adverted to, but, more importantly, also the failure to draw upon human rights principles within the context of the negotiations. An additional problem resides in the use of bilateral means of pressuring countries to adopt provisions that far exceed the obligations contained in the TRIPS Agreement - the use of so-called "TRIPS-plus" standards.³⁵ In sum, the Doha agreement was not only problematic with respect to its legal status, but also because of the complete absence of human rights language in its formulation.³⁶ Since the Doha meeting, talks on trade liberalization continue to be embroiled in several of the same contentious issues that have afflicted the WTO almost since its inception.³⁷

21. Considerable concern remains over the schedule of issues (and the attempt to introduce new ones) on the agenda at Cancún, Mexico, where the Council of Ministers will hold their 5th meeting. Since coming to office in August 2002, the new Director-General of WTO, former Deputy Premier and Minister of Trade of Thailand, Supachai Panitchpakdi, has made his views quite manifest on the direction in which he seeks to see the negotiations proceed. For example, he has expressed the wish to shape the Doha round as a real "development round".³⁸ Dr. Supachai considers that a broad consensus exists on the view that trade policy is an important component in promoting development and reducing poverty, and that an emphasis on these plus a coherent domestic agenda would produce positive results.³⁹ During his tenure as Director-General, Dr. Supachai has pledged to strengthen four pillars of the international trading system, namely: (i) the legal framework that binds the multilateral trading system together; (ii) assistance to developing and least developed countries; (iii) coherence in international economic policy-making; and (iv) making the WTO better able to serve its membership.⁴⁰ Unfortunately, none of Dr. Supachai's several other statements on trade liberalization and its links to development appear to give much hope for a revised approach to the subject of human rights by the organization. Moreover, given that the so-called Doha "development round" is encountering so many obstacles, future prospects do not look bright.⁴¹

22. The run-up to Cancún is made all the more conflictual on account of the continuing pressure (emanating especially from developed industrialized countries) to introduce new issues into the negotiations.⁴² Among those issues are investment, competition, transparency in government procurement and trade facilitation.⁴³ The effort to introduce the topic of investment in particular echoes the attempt by the Organization for Economic Cooperation and Development (OECD) to draft a Multilateral Agreement on Investment (MAI) in the late 1990s. Given the processual and substantive problems that were experienced with the MAI, it is particularly important to ensure that the quest for heightened regimes of protection of investment is not executed at the expense of the healthy growth and protection of the human being or of sustainable human development.⁴⁴

23. As an international organization, the WTO thus finds itself in something of a bind, caught between the pressure of industrialized countries to retain a focus on trade liberalization and to push for the introduction of new issues into the negotiations, and activists who seek more decisive action on human rights. Of course, resistance to a more comprehensive approach to human rights by the WTO also comes from developing and underdeveloped countries.⁴⁵ A key question remains as to how these competing interests can be reconciled, while ensuring that the WTO plays its essential role in promoting global development.⁴⁶

24. One of the main issues about which we expressed concern in our progress report was the system of dispute settlement at the WTO. Among those concerns are issues of access, cost and structural impediments.⁴⁷ According to Gabriel Marceau, the limited domain of the WTO (i.e. trade law) "... does not mean that the WTO Agreement exists in an hermetically sealed system, closed off from general international law and human rights law. On the contrary, States must implement all their obligations in good faith, including human rights and WTO obligations."⁴⁸ In this respect, the Doha agreement on the access to drugs is often cited as an instance in which issues of trade liberalization were mediated through the prism of human rights concerns. Similar creative and good faith interpretation of other provisions of the international trade regime can likewise produce more positive results. As Caroline Dommen has pointed out, "... if a conflict between a WTO rule and a human rights provision were brought to the DSM [dispute settlement mechanism], the DSM would clearly have to take international human rights law into account".⁴⁹

25. But the argument that the WTO is indeed more permeable to the concerns of human rights law needs further and more critical consideration. While it is quite true that what can be termed human rights considerations do find their way into the negotiations as well as into dispute settlement, this is not necessarily done in a systematic or deliberate manner. Neither are the mechanisms designed in such a way as to ensure that human rights concerns are taken into account as a matter of course. This is how, for example, there can be decisions such as those in the *Beef-Hormone* and *Asbestos* disputes⁵⁰ that have serious human rights implications.⁵¹ In this regard, the Doha process was exceptional in that considerations other than the letter of the law were given serious attention within the framework of the WTO. But what distinguished the Doha process was the engagement of actors other than States, plus the issue at stake. Unfortunately, those actors are not always guaranteed a presence within the framework of either the negotiations, or the DSM. Neither may the issue at stake render itself amenable to the same kind of mobilization and action as the access to drugs question. Furthermore, if what appears to have been a process that was both inclusive and sensitive to human rights concerns can in the end be scuttled by the omnipotence of a single member, then quite clearly much more needs to be done in ensuring that international law in general, and human rights law in particular, is more firmly applied within the WTO framework. At present, there is no guarantee that the imperative of trade concerns does not get superior treatment. In sum, it is necessary to move away from approaches that are ad hoc and contingent.

26. In order to ensure that human rights concerns do indeed gain a wider audience at the WTO, a two-pronged strategy is necessary. In the first instance, there is a need for a more concerted engagement with the WTO and to ensure that there is greater complementarity between the basic tenets of international trade law as administered by the WTO and international human rights law, while also combating some of the recent theorizing that seeks to privilege trade law.⁵² However, there is also a need to re-engage the States members of the organization who, in the final analysis, will be key (as they were with respect to the issue of access to essential drugs) to a determination of the extent to which human rights concerns are taken into account.

B. The debate on and within the MLIs

27. While the Bretton Woods institutions are often referred to as "twins", their operations, structure and approach to the issues that presently confront the international economy are by no

means identical. This is especially true with respect to the manner in which the two have responded to the call that they should pay more attention to the impact of their policies on the promotion and protection of human rights.⁵³ Considerable pressure on and criticism of their operations, constitutions and governance have been brought to bear by a plethora of organizations in the human rights, environment and women's movement. Although in the wake of 9-11 some of the pressure has tapered off, the central issue of the extent to which MLIs are responsive to non-economic social and other concerns is still a prominent one.

28. Among the many criticisms made are that the MLIs focus inordinately on macroeconomic policy, that their strategies favour growth over equitable and sustainable development, and that they are too strongly committed to the "fundamentals" of liberalization of the economy, rapid privatization and deregulation.⁵⁴ For many critics of the institutions, it is particularly disheartening that these fundamentals have been at the core of their operations since inception and have undergone only minimal adjustment, even though their programmes on debt (such as the Heavily Indebted Poor Countries (HIPC) initiative) and poverty (the Poverty Reduction Growth Facility (PRGF)) have been recognized as an important advance. There are also problems insofar as the two institutions have been quite resistant to arguments about their obligations with respect to the promotion and protection of human rights.⁵⁵

29. Indeed, it is precisely as a result of the increasing complexity of the arena of international development represented in part by these developments that, according to Abdel-Fatau Musah, the MLIs have become "... a case study of contradiction".⁵⁶

"On the one hand, they have incorporated pro-active roles in conflict prevention in their dealings with conflict-prone societies by demanding 'good governance' and 'human rights' as yardsticks for engagement. On the other hand, through cure-all structural adjustment programmes they have put excessive pressure on the already anorexic state to further slim down by selling off state assets, and cutting down on military expenditures and subsidies on essential social services."

Aside from the manner in which policies are designed, implemented and audited, other criticism has focused on the modes of governance and operation of the MLIs. The central charge here is that while MLIs urge methods of transparency, enhanced participation and good governance on member States, they have failed to adapt these precise principles to their operations and policies. In the words of the United Nations Development Programme, these institutions suffer a "crisis of legitimacy".⁵⁷

30. To what extent have the two institutions been responsive to the charges, especially with respect to those that concern the better promotion and protection of human rights? Although the two operate in tandem much more attention has focused on the Bank than on the Fund. On the face of it the Bank appears much more responsive to the pressures than does the Fund. In terms of issues such as the situation of women, child labour, the HIV/AIDS pandemic, "governance", increased transparency and the consequences of forced (environmental or developmental) displacement, the Bank has in many respects moved beyond what it used to argue was its essential mandate. The Bank has thus recently held a series of workshops at which an attempt has been made to find ways and means of making its operations more sensitive to the claims by activists that it lacks sensitivity, transparency and accountability. In particular, at an "in-house" meeting held on 2 May 2002, the Bank sought to "... increase staff awareness of human rights

issues and legal frameworks, their implications for Bank operations and the extent to which human rights issues are being, or should be, addressed in World Bank operations".⁵⁸ A joint staff learning seminar on human rights and development was held together with the Office of the High Commissioner for Human Rights on 10 and 11 June 2002.⁵⁹

31. What is immediately clear from a reading of the deliberations of these meetings is that there is a division of opinion among the senior Bank staff over the most appropriate place and role for human rights within Bank operations. On the one hand, the "traditionalists" conform to a line of argument that asserts that the Bank is principally bound by its Articles of Agreement and that this instrument specifies its specialized functions, which do not include human rights. The promotion of human rights is only an oblique objective, which may or may not find its way into Bank projects.⁶⁰ But, according to this argument, in the main, this is an obligation that the Bank can only carry out through its support for States, which remain the primary actors and obligors on the human rights scene. A second, converse opinion argues that there is a compelling need for the development of a more comprehensive approach to human rights that recognizes that economic policies do not "have a neutral impact on individual or collective rights"⁶¹ As yet, the Bank has not taken any further measures beyond the discussions. But the Special Rapporteurs believe that such discussions provide a useful point of departure for further dialogue and exchange about how to address the issue more comprehensively, both within the Bank and with important external actors.

32. For its part, the IMF remains much less sensitive to the specific issue of the applicability of human rights issues to its operations, but has certainly responded to other criticisms. In a recent evaluation, the Fund pointed to six measures of reform in which it had been engaged for the last several years, including the following:

- Strengthening surveillance and crisis prevention;
- Helping member countries strengthen their institutional capacity;
- Improving IMF lending;
- Enhancing the framework for crisis resolution;
- Strengthening support for low income countries; and
- Ensuring that the IMF is an open and learning institution.⁶²

This list certainly demonstrates a growing concern with the negative consequences of the operations of the Fund. The last two measures in particular could be said to derive from some basic principles of human rights. At the same time, it is evident that the list is not long enough, and omits several matters that of necessity require attention within the context of achieving the objectives of poverty eradication that the Fund now claims is central to its operations.⁶³

33. As already noted, one of the main charges levelled against the Bank and the Fund has focused on their failure to deal with the problems of transparency, participation and the enhanced inclusion of both marginalized groups and countries.⁶⁴ At a recent meeting of the Development Committee, a technical note on improving developing and transition country participation in

decision-making at the two institutions was considered.⁶⁵ The note covered issues such as the voting strength and structure (the “voice”) of countries within the two institutions, increased transparency, and the development of a “learning and listening” culture.⁶⁶ The note claimed that there was a broad measure of agreement on the system of representation of members in the Bank and the Fund, and that the principle underlying the distribution of quotas, shares and voting rights remains appropriate for the two institutions. These issues were consequently not discussed in the note.

34. Initial responses to the note argue that it is unlikely to result in fundamental changes either in relation to the main problems faced by developing and transition countries (poverty and debt), or with regard to the twin issues of governance and participation at the MLIs.⁶⁷ Furthermore, the note was completely silent on the question of the top leadership and accountability of the institutions. Thus, questions like the mode of selection of the institutions’ presidents, and the response and accountability of the institutions to crises in countries like Argentina and Uruguay were not touched upon. It is indeed telling that the note failed to discuss issues that many argue are at the core of the “legitimacy crisis” faced by the Bretton Woods twins. As UNDP has pointed out, “The adverse symbolism of a closed, secretive selection process based on privilege in institutions committed to accountability and transparency is obvious.”⁶⁸

35. Much of the reform action in the MLIs has focused on the poverty reduction strategy.⁶⁹ Our progress report provided an analysis of the Poverty Reduction Strategy Papers (PRSPs) and criticized their basic assumptions and aspects of their implementation. While our main criticisms remain, there is no doubt that a greater awareness of the nature, the causes and the ramifications of poverty has come about as a result of the activities undertaken with respect to the PRSP processes in various countries around the world.⁷⁰ However, as we pointed out in our progress report, the fundamental problem with the PRSP process is that the basic assumptions of economic growth that have informed the Bank’s macroeconomic stipulations since it devised structural adjustment programmes in the 1980s remain intact.

36. Civil society and other non-State actors were indeed invited to give inputs on the development of poverty reduction goals in virtually all of the countries where PRSPs have been implemented. However, even in those regarded as a success, such actors were excluded from a discussion of the nature of the macroeconomic policies that the MLIs have designed to achieve the goals of poverty eradication. Such an approach certainly requires review, particularly since macroeconomic policy will critically affect poverty levels and the problems faced by the poor.⁷¹ Unless this is done, the much touted “participation” that is at the core of the PRSPs remains perfunctory.⁷² The conclusion that we come away with is that while there has certainly been some attempt at reform, those efforts clearly need more work. In this respect, the Special Rapporteurs note the efforts by the two institutions to engage in closer dialogue with civil society,⁷³ but this can only be viewed as a necessary starting point of a process that clearly requires further and more precise articulation.⁷⁴ A number of issues require fundamental attention. First is a review of the basic macroeconomic frameworks upon which MLI interventions are based. It is also necessary to conduct a critical assessment of the current form and character of the methods of “participation” in use, whether in the PRSPs or with respect to other MLI interventions. Finally, it is essential to conduct a critical review of the accountability and governance issues relating to the MLIs themselves.

V. RETHINKING GLOBALIZATION UNDER A NEW INTERNATIONAL LEGAL AND GOVERNANCE FRAMEWORK

A. Revisiting the obligations of the MLIs

37. In our preliminary and progress reports, we described how not only States but also multilateral institutions such as the WTO and the Bretton Woods twins fall within the purview and operation of international human rights law. No entity that claims international legal personality can claim exemption from that regime. In particular, it was pointed out that the claim of multilateral institutions such as the WTO that only individual member States are obliged and not the institution itself - since the institution deals with relations between States rather than that between individuals and States - are untenable in international law. If such a claim were to be considered legitimate, it would seriously erode the international rule of law. It is our considered opinion that the rules governing inter-State relations cannot themselves be formulated in such a way as to defeat the fundamental tenets of international law, including human rights norms. Secondly, the WTO regime and those governing the Bretton Woods institutions have direct impacts on the lives and human rights of peoples living everywhere, given the all-encompassing and broad reach of those institutions. This is especially so given that international law envisages the development process to be centred around the achievement of sustainable human development - a goal that is common to the founding instruments of all the institutions under examination.

38. In light of the above, it is incorrect to hold only States accountable for the failure to respect, protect, promote and fulfil human rights stemming from the implementation of WTO rules and the policies and operations of the Bretton Woods institutions, because that gives rise to the anomalous situation of the implementing entities being held responsible while the principal institutions that preside over the adoption of such policies enjoy impunity. The Committee on Economic, Social and Cultural Rights has recognized this anomaly, urging international organizations “to take whatever measures they can to assist Governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights”.⁷⁵ Furthermore, as the High Commissioner for Human Rights noted in 2002, “the norms and standards of human rights provide the legal framework for the protection of the social dimensions of trade liberalization as a complement of trade rules”.⁷⁶

39. Our reiteration of the legal obligation of international organizations such as the WTO, the World Bank and the IMF is deemed necessary in order to emphasize the point that these institutions must, at a minimum, *recognize, respect, and protect* human rights. Left out of this formulation are the obligations to promote and fulfil, which we believe are obligations that properly belong to the State. At the same time, given previous prevarication on the obligations of these institutions vis-à-vis the human rights regime, we consider the obligation to *recognize* as essential. We also reiterate that these obligations apply whether in the formulation of their policies, or in the implementation of their fundamental objectives. This is a point taken up and reaffirmed in both the Monterrey Consensus⁷⁷ and the Johannesburg Declaration on Sustainable Development.⁷⁸ In order to consolidate these obligations, the Special Rapporteurs propose that

the Sub-Commission enter into further dialogue with these institutions around the draft framework outlined in the annex to this report. In particular, that framework would elaborate upon the following three areas: general human rights obligations; core principles; and the normative framework.

B. Towards a new meaning of statehood within the context of globalization

40. Discussions about the impacts of globalization on the State have focused inordinately on the way that so many of the policies pursued in the desire to achieve economic growth have rendered the State incapable of fulfilling many of its human rights obligations.⁷⁹ As Skogly and Gibney have remarked, “it is recognized that the forces of globalization in their present form may reduce the strength of the State”.⁸⁰ Christopher Clapham goes further and argues that “the mythology of unfettered State sovereignty may thus be safely consigned to the past”.⁸¹

41. While it is true that globalization has in many respects affected the regulatory and other powers of the State, the Special Rapporteurs wish to move away from the notion of the “powerless” State - a State that has been rendered incapacitated (and thus unable to meet its human rights obligations) on account of the processes of globalization. In our view, there is another side to the story. If 9-11 demonstrated anything, it was the continued viability and the pivotal necessity of the State in taking action designed to achieve the enhanced promotion and protection of human rights.⁸² 9-11 demonstrated that States can take resolute and decisive action in order to address a serious problem. The more appropriate question to be asked then, is whether States actually have the political will to confront the various pressures and problems that globalization has thrown up. States must, of necessity, demonstrate a heightened commitment to ensuring that human rights are promoted and protected with as much vigilance and zeal as was manifested in the wake of the terrorist attacks.⁸³

42. The Special Rapporteurs are convinced of the need for a new framework of governance and the articulation of greater responsibility for actors who operate at the international level. Nevertheless, States cannot shirk their basic undertaking to ensure that they respect, protect, promote and fulfil their human rights obligations to their citizenry. Moreover, these obligations are not necessarily contingent upon a State having the resources to effect action. With regard to the policies of MLIs that States adopt and which may have adverse consequences, the Committee on Economic, Social and Cultural Rights has urged States to ensure that they take steps to protect economic, social and cultural rights when pursuing programmes of adjustment. Thus, States must ensure that “such protection is, to the maximum extent possible, built in to programmes and policies designed to promote adjustment”.⁸⁴

C. Reinvigorating the debate on human responsibilities and duties

43. In concluding this section of the report, we are compelled to draw attention to the issue of human duties, obligations and responsibilities. Given the many concerns expressed about the different facets of the processes of globalization and their potential and actual impact on the observance of human rights, the issue merits serious attention. Furthermore, recent economic crises in Argentina, and its repercussions in other Latin American countries like Uruguay and Brazil, bring into bold relief the issue of the obligations, responsibility and accountability of international financial institutions such as the IMF. The corporate scandals involving Enron and

other large companies raise afresh the issue of corporate responsibility, an issue addressed in the Sub-Commission's draft norms. States themselves must also be reminded of their many obligations and responsibilities as outlined in a host of international instruments.

44. Article 28 of the Universal Declaration of Human Rights stipulates the entitlement of every person to a social and international order in which the rights and freedoms of the Declaration can be realized.⁸⁵ Article 29 stipulates that "everyone has duties to the community in which alone the free and full development of his personality is possible". Building upon the same theme, article 30 of the Declaration is even more explicit in stipulating that nothing in the Declaration may be "interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein". In 1999, the United Nations adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms which gave focused attention to the issue. The Millennium Declaration and the millennium development goals derived therefrom form another important reference point in discussing this issue.

45. The most developed attempt to place the issue on the international scene was produced by the Inter-Action Council (IAC). Its 1997 draft Universal Declaration of Human Responsibilities⁸⁶ sought to address the very serious concern that insufficient attention had been paid to the issue of responsibilities.⁸⁷ Numerous analyses of the draft have been made, with many of these focusing on what was perceived to be the dangers of introducing such an instrument in a context where it could seriously weaken existing human rights protections. According to Ben Saul, such an instrument, "though well-intentioned, is neither necessary nor desirable".⁸⁸ In contrast, Andrew Clapham has argued that the declaration did not go far enough because it failed to point out and elaborate the increasing power and consequent responsibility of key international and financial actors such as TNCs and the multilateral financial institutions in the protection of human rights.⁸⁹

46. There is a need for a more concise engagement with the issue of duties or responsibilities in seeking to find better ways of tackling the peculiar nature of human rights violations that have marked out the era of globalization. Regional and international human rights mechanisms must confront the abuses committed by non-State actors in a more direct manner, without maintaining a rigid and unchanging focus on the traditional actors in the international arena - States. Such mechanisms need to consider the provisions within the instruments they administer that speak to the issue of responsibility and duty, and forge an appropriate balance between State liability and the responsibility of non-State actors. Recent decisions by the African Commission on Human and Peoples' Rights,⁹⁰ and the Inter-American Court of Human Rights⁹¹ may help shed some light in this direction.

47. It goes without saying that within the framework of a new debate about duties and responsibilities, civil society organizations - local and international - must rededicate themselves to addressing the socio-economic and political inequities that continue to pervade the global arena. They need to move away from the abstract attention to economic, social and cultural rights and to begin developing concrete programmes for their realization.⁹² There is still much conceptual confusion over the terms "participation" and "empowerment" with regard to the

planning, implementation and evaluation of programmes. Secondly, there is a limit to how much civil society actors can actually influence the work of global institutions in a continuous and sustainable manner.⁹³ Finally, States need to see civil society actors as allies and not enemies in a struggle that affects all peoples.

V. CONCLUSIONS AND RECOMMENDATIONS

48. **This report is final only in the sense that it marks the termination of the mandate of the Special Rapporteurs. However, what has become clear throughout the course of our examination of these issues is that the processes of globalization will only grow in magnitude and bearing on the observance and protection of human rights. The form may differ; the substantive content of the concerns raised in our study will remain. The Sub-Commission should remain seized of the issue and maintain oversight of the major institutional actors and of the manner in which the varied processes of globalization develop. Such oversight is particularly important because from a position of aloofness and disdain (even hostility), the main actors in the processes of globalization have at least begun to engage in a meaningful dialogue about the possible consequences that their policies and operations may have on the full realization of all categories of human rights. The Sub-Commission needs to pursue this dialogue further in an effort to find a more sustainable, enduring and collective approach to the multifaceted challenges presented by the processes of globalization.**

49. **Since embarking on this study, the topic of globalization and its impact on human rights has been taken up by intergovernmental agencies, Governments and non-State actors of various kinds. In particular, the Special Rapporteurs take note of the several reports issued by the Office of the High Commissioner for Human Rights, and of the process of making and refining the draft guidelines on human rights within the PRSP process, not to mention the work by the Sub-Commission on draft norms for transnational corporations. Such efforts require critical support, with particular attention to ensuring that the processes of globalization are ultimately made to become more sensitive to the concerns we have expressed in our studies. To the extent that the processes of globalization are many and varied and there is now a proliferation of actors tracking their development, the Sub-Commission needs to review the interventions that can be made with a view to determining which are most strategic and enduring.**

50. **The annex to this report provides only an initial outline of what the Special Rapporteurs consider key to the extension of the dialogue between the Sub-Commission and the principal actors involved in the processes of globalization. It serves to draw attention to both the context and the obligations that such actors have. Our earnest hope is that such a dialogue will eventually ensure that the processes of globalization will begin to have a more positive impact on the full enjoyment of human rights than has hitherto been the case.**

Notes

¹ The Special Rapporteurs would like to express their gratitude to the following individuals who provided research assistance for this report: Adam Branch, Alice Farmer, Damien Gerard, Vivien Labaton and Roopa Madhav.

² E/CN.4/Sub.2/2001/10, chap. I.

³ For an elaboration of the framework within which the Special Rapporteurs consider the processes of globalization and its impact on the full enjoyment of human rights, see *ibid.*, para. 5.

⁴ Moisés Naím, The Fourth Annual Grotius Lecture: Five Wars of Globalization, *American University International Law Review*, vol. 18, No. 1, 2002, p. 14.

⁵ As George Soros cautions: “No regime can survive by military force alone, and the world certainly cannot be ruled by military superiority. I believe our superiority is great enough to allow us to think of other things than trying to increase it further.” George Soros, *Globalization*, Public Affairs Perseus Books, New York, 2002, p. 176.

⁶ See Richard Carver, Human Rights After 11 September: Civil Liberties, Refugees, Intolerance and Discrimination, paper presented to the International Meeting on Global Trends and Human Rights - Before and After September 11 (Geneva, 10-12 January 2002).

⁷ See Joseph E. Stiglitz, *Globalization and Its Discontents*, W.W. Norton & Co., New York/London, 2002, p. 228.

⁸ With regard to the latter, the most prominent development has been witnessed in the application of several hitherto unknown concepts. These include the idea of “pre-emptive strikes”, the categorization of prisoners of war (POWs) as “illegal combatants”, and the notion of “regime change”, initially effected in Afghanistan and latterly extended to Iraq. For an examination of the measures taken by the United States Government, see Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to US Law & Policy Since 9/11 Erode Human Rights and Civil Liberties*, New York, 11 March 2003, available at: http://www.lchr.org/us_laws/loss/imbalance/powers.pdf. On the case of measures taken by States in Africa, for example, see Rotimi Sankore, September 11 And Its Implications For Africa, Pambazuka Electronic Newsletter, vol. 79, 12 September 2002, available at: <http://www.pambazuka.org//newsletter.php>.

⁹ See “For Whom the Liberty Bell Tolls”, *The Economist*, 29 August 2002.

¹⁰ See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996.

¹¹ *Ibid.* p. 321.

¹² For a critique of the idea of “culture talk”, see Mahmood Mamdani, Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism, available at: <http://www.sidint.org/journal/TOCdeve452.htm>.

¹³ International Council on Human Rights, *Human Rights After September 11*, Versoix, Switzerland, 2002, p. 44.

¹⁴ James Wolfensohn, *Bridging the Gap Between Human Rights and Development*, December 2001.

¹⁵ B. Boutros-Ghali, "Why the US Won't Succeed in Fighting Global Terrorism", *The EastAfrican*, 21-27 April 2003, p. 10.

¹⁶ Daniel Altman, "Global Trade Looking Glass: Can US Have It Both Ways?", *New York Times*, 9 November 2002, p. B1.

¹⁷ For a critical comment, see Saskia Sassen, "The State and Economic Globalization: Any Implications for International Law?", *Chicago Journal of International Law*, vol. 1, No. 1, 2000, pp. 110-111.

¹⁸ Benedetto Della Vedova, "Will the War Make America, EU Less Selfish in World Trade?", *The EastAfrican*, 14 April 2003, p. 8.

¹⁹ See Mary Robinson, *Shaping Globalization: The Role of Human Rights*, The Fifth Annual Grotius Lecture, American Society of International Law, 97th Annual Meeting, Washington DC, 2 April 2003.

²⁰ Ministerial Declaration adopted at Doha, Qatar, on 14 November 2001 at the Fourth WTO Ministerial Conference (WT/MIN(01)DEC/1), dated 20 November 2001.

²¹ See Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies", *Human Rights Quarterly*, vol. 24, No. 1, 2002, pp. 27-30.

²² See G.A. Cornia, "Globalization and Health: Results and Options", *Bulletin of the World Health Organization*, vol. 79, No. 9, 2001, pp. 834-841.

²³ See report of the High Commissioner for Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights (E/CN.4/Sub.2/2001/13).

²⁴ Dommen, *op. cit.*, pp. 41 ff.

²⁵ For an account of these developments, see E/CN.4/Sub.2/2001/10, paras. 21-25.

²⁶ *Ibid.*, paras. 26 and 27.

²⁷ See Diana Bronsen, *Assessing Doha: What Does the Qatar Meeting of the World Trade Organization Mean for Human Rights?*, available at: <http://www.ichrdd.ca/english/prog/globalization/wtoMeetingDoha.html>.

²⁸ See, for example, Martin Khor, “The WTO post-Doha Agenda: Squeezing the South under an Inequitable Work Programme”, *Third World Resurgence*, No. 141/142, 2002, pp. 24-30.

²⁹ Grace K. Avedissian, “Global Implications of a Potential U.S. Policy Shift Toward Compulsory Licensing of Medical Inventions in a New Era of ‘Super-Terrorism’”, *American University International Law Review*, vol. 18, No. 1, pp. 258-259.

³⁰ Bronsen, op. cit.

³¹ The caution was aptly captured in a *Newsweek* article that stated, “Finally, at long last, will come the hard part. Again the Uruguay Round offers a clue. After agreeing upon what they were to negotiate, the dealmakers took an additional five years to hammer out a deal lowering tariffs and opening up global markets. It was an undeniably important step, however arduous. But Doha’s issues are no less complex - and will no doubt take as long, or longer.” See “Smiles Now, Struggles to Come”, *Newsweek*, 26 November 2001, p. 2.

³² See Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), dated 20 November 2001.

³³ Ellen’t Hoen, “The Declaration on TRIPS and Public Health: A Step in the Right Direction”, *BRIDGES* (post-Doha Ministerial Issue), Year 5, No. 9, November/December 2001.

³⁴ See US Blocks Cheap Drugs Agreement, BBC News, 21 December 2002.

³⁵ See the report of the United Kingdom Commission on Intellectual Property, *Integrating Intellectual Property Rights and Development Policy*, August 2002, pp. 162-164, available at: <http://www.iprcommission.org/text/documents/final.report.htm> .

³⁶ See “Doha Declaration’s Meaning Depends on the Reader”, *BRIDGES*, Year 5, No. 9, November/December 2001.

³⁷ The liberalization in the trade in services, and particularly the issue of the privatization of essential services such as water, is attracting considerable attention. For example, see John Mbaria, “Private Investors to Supply Water in Kenya”, *The EastAfrican*, 14-20 April, p. 6.

³⁸ Andrew Walker, New WTO Boss Backs Poor, BBC World Service, 3 September 2002, available at: www.bbc.co.uk .

³⁹ See Supachai Panitchpakdi, The Doha Development Agenda: Challenges and Opportunities for the Arab World, speech before the World Economic Forum, 9 September 2002, available at www.wto.org .

⁴⁰ Supachai Panitchpakdi, From Doha to Cancún and Beyond, speech before the General Assembly of the Swiss Bankers Association, 20 September 2002, available at www.wto.org .

⁴¹ See “Stalemate in Agriculture Casts Pall over Doha Round”, *BRIDGES*, Year 7, No. 2, 2003.

⁴² The views extend from the popular to the scholarly. See, for example, Tina Rosenberg, “The Free-Trade Fix”, *New York Times Magazine* (sect. 6), 18 August 2002, p. 28 and Oxfam International, *Rigged Rules and Double Standards: Trade, Globalization and the Fight against Poverty*, Oxford, 2002.

⁴³ Arthur Okwemba, “Poor Countries Cry Foul Over New Trade Plan by the West”, *The EastAfrican*, 14-20 April 2003, p. 23.

⁴⁴ We have previously tackled this issue in our working paper on international trade, investment and finance (E/CN.4/Sub.2/1999/11).

⁴⁵ Pradeep S. Mehta and Sandeep Singh, “Current Issues in Human Rights, Development and International Trade in the WTO”, *INTERIGHTS Bulletin*, vol. 13, No. 4, 2001, p. 143.

⁴⁶ See Padideh Ala’I, “A Human Rights Critique of the WTO: Some Preliminary Observations”, *George Washington International Law Review*, vol. 33, Nos. 3 and 4, 2001.

⁴⁷ Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, in *Towards a Development-Supportive Dispute Settlement System in the WTO*, International Centre for Trade and Sustainable Development (ICTSD), Resource Paper No. 5, Geneva, 2003.

⁴⁸ Gabrielle Marceau, “WTO Dispute Settlement and Human Rights”, *European Journal of International Law*, vol. 13, No. 4, 2002, p. 779.

⁴⁹ Dommen, *op. cit.*, p. 49.

⁵⁰ For an analysis of the human rights implications of these cases, see Caroline Dommen, Balancing Global Trade with Social Need: A Role for Human Rights Norms and Mechanisms?, in Roskam and Loos (eds.), *Balancing Global Trade with Social Need*, 2002.

⁵¹ Anne Orford, Contesting Globalization: A Feminist Perspective on the Future of Human Rights, in Burns H. Weston & Stephen P. Marks (eds.), *The Future of International Human Rights*, Transnational Publishers, Ardsley, 2000, pp. 169-175.

⁵² See, for example, Ernst-Ulrich Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights Law into the Law of Worldwide Organization: Lessons from European Integration”, *European Journal of International Law*, vol. 13, No. 3, 2002, p. 621. For a response to Petersmann, see Philip Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, *European Journal of International Law*, vol. 13, No. 4, 2002, p. 815.

⁵³ See Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund*, Cavendish Publishing House, London, 2001.

⁵⁴ Orford, *op. cit.*, p. 167.

⁵⁵ Likewise, given that so many of the countries that these institutions deal with have experienced violent conflicts, the point has been made that there is also a compelling need for MLIs to better acquaint themselves with international humanitarian law. Daniel Bradlow argues that while the MLIs do not have the expertise or an obvious role in this regard, it may be impossible for them to avoid it. Daniel Bradlow, “Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?”, *University of Kansas Law Review*, vol. 50, No. 4, 2002, p. 696.

⁵⁶ Abdel-Fatau Musah, “Privatization of Security, Arms Proliferation and the Process of State Collapse in Africa, *Development and Change*, vol. 33, No. 5, 2002, pp. 911-934.

⁵⁷ UNDP, *Human Development Report: Deepening Democracy in a Fragmented World*, New York, Oxford, 2002, esp. pp. 112-117.

⁵⁸ See Human Rights and Sustainable Development: What Role for the Bank?, available at: <http://inweb18.worldbank.org/essd/essd.nst/SocialDevelopment/HR&SD-ExecSum> .

⁵⁹ Joint Staff Learning Seminar on Human Rights and Development at the World Bank Headquarters, available at: <http://inweb18.worldbank.org/essd/essd.nst/ed184c367402e19e8525604f00766cac> .

⁶⁰ This argument (which we would call the “mandate and structure” position) is mainly articulated by the legal officials of the Bank, specifically the Vice-President/Lead Counsel and the General Counsel. See summary of the 2 May 2002 meeting. As noted in our progress report, this was a viewpoint strongly articulated by the Bank’s previous Lead Counsel, Ibrahim Shihata. See E/CN.4/Sub. 2/2001/10, paras. 54-56.

⁶¹ This is the viewpoint articulated by the Bank’s institutional focal point on human rights.

⁶² International Monetary Fund, *Reforming the IMF: Progress Since Prague 2000*, December 2002, available at: <http://www.imf.org/external/np/exr/ib/2002/120502.htm>.

⁶³ See Daniel Bradlow, “Stuffing new wine into old bottles: The Troubling Case of the IMF,” *Journal of International Banking Regulation*, vol. 3, No. 1, 2001. p. 9.

⁶⁴ See Monterrey Consensus, *Human Development Report 2002*.

⁶⁵ IMF/IBRD Staff for the Development Committee, *Enhancing the Voice and Participation of Developing and Transition Countries in Decision-Making at the World Bank and IMF (DC2003-0002)*, dated 27 March 2003, available at: <http://wb1n0018.worldbank.org/DCS/devcom.nsf>.

⁶⁶ *Ibid.*, pp. 2-3.

⁶⁷ See Emad Mekay, “IMF, WB: No Room at the Table for Poor Nations”, *The EastAfrican*, 21-27 April 2003, p. 16.

⁶⁸ *Human Development Report 2002*, p.114. The report continues: “The selection process needs to be opened and perhaps made somewhat more substantive regarding the candidates’ views on the vision for the organizations.”

⁶⁹ See, for example, the International Community Consultation on the PRSP, Sarajevo, 7 February 2003, available at:
<http://www.bih.prsp.info/konsultacije/donatori/Consolidated%20eng.pdf>.

⁷⁰ The Panos Institute, *Reducing Poverty: Is the World Bank’s Strategy Working?*, London, 2002, p. 2.

⁷¹ See Jennie Richmond and Paul Ladd, *Proving the Impact: A User’s Guide to Poverty and Social Impact (Draft)*, World Bank, Christian Aid, August 2002.

⁷² A recent assessment of the case of Uganda - one of the earliest, and reportedly more successful PRSPs - concludes that because the policy prescriptions of the new loans are informed by the ideological disposition of the IMF and the World Bank, the goals of poverty eradication are not reachable. See Warren Nyamugasira and Rick Rowden, *Poverty Reduction Strategies and Coherency of Loan Conditions: Do the new World Bank and IMF Loans Support Countries’ Poverty-Reduction Goals? The Case of Uganda*, April 2002.

⁷³ See, for example, the account of a “Q & A” session between civil society representatives and the IMF Managing Director and the World Bank President. *Peering into the Minds of the IMF and the World Bank (Q & A at Washington, DC on 17 January 2002)*, Uganda National NGO Forum, Kampala, 2002.

⁷⁴ A more comprehensive meeting between civil society and Bank officials took place later in 2002. See *Promoting, Respecting and Fulfilling Human Rights: The Challenges Before Intergovernmental Agencies* (report of a seminar held on 24 September 2002 in Washington, DC).

⁷⁵ Committee on Economic, Social and Cultural Rights statement on globalization and its impact on the enjoyment of economic, social and cultural rights adopted at its eighteenth session in 1998. See E/1999/22-E/C.12/1998/26, para. 515.

⁷⁶ Report of the High Commissioner for Human Rights on Globalization and its impact on the full enjoyment of human rights. (E/CN.4/2002/54), para. 45.

⁷⁷ See the Monterrey Consensus of the International Conference on Financing for Development, March 2002, available at: <http://www.un.org/esa/ffd>.

⁷⁸ 4 September 2002, available at:
http://www.johannesburgsummit.org/html/docs/summit_docs/political_declaration_final.pdf.

⁷⁹ See Vincent Cable, “The Diminished Nation-State: A Study of the Loss of Economic Power”, *Daedalus*, vol. 124, No. 2, Spring 1995.

⁸⁰ Sigrun Skogly and Mark Gibney, “Transnational Human Rights Obligations”, *Human Rights Quarterly*, vol. 24, No. 4, 2002, p. 784.

⁸¹ Christopher Clapham, “The Challenge to the State in a Globalized World”, *Development and Change*, vol. 33, No. 5, 2002, pp. 775-795.

⁸² “A globalized polity is complex - there are many actors and nations involved. Sovereignty may be intact in one sense, but only when it relies upon the conditional compliance with transnational regulations.” See Daniel Petit, “Sovereignty and Globalization: Fallacies, Truth and Perception”, *New York Law School Journal of Human Rights*, vol. 17, No. 4, 2001, p. 1151.

⁸³ See Emma Bonino, “Dear Anti-Globalists, You’re Full of Paradoxes”, *The EastAfrican*, 20-26 January 2003, p. 27.

⁸⁴ General comment No. 2, on international technical assistance measures, 1990, para. 9.

⁸⁵ See Asbjørn Eide, Article 28, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights*, Kluwer Law International, The Hague, 1999, p. 597.

⁸⁶ Available at: <http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm>.

⁸⁷ For a more detailed examination of this issue, see J. Oloka-Onyango, “Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa”, *American University International Law Review*, vol. 18, No. 4, 2003.

⁸⁸ See Ben Saul, “In the Shadow of Human Rights; Human Duties, Obligations and Responsibilities”, *Columbia Human Rights Law Review*, vol. 32, No. 3, 2001, p. 572.

⁸⁹ Andrew Clapham, “Globalization and the Rule of Law”, “*Review of the International Commission of Jurists*”, vol. 61, 1999, available at <http://www.business-humanrights.org/Globalization-and-the-Rule-of-Law.htm>.

⁹⁰ See *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria* (communication No. 155/96), available at: <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>. The decision concerned the violation by the Government of Nigeria of a variety of rights of the Ogoni peoples of the Niger delta region of Nigeria.

⁹¹ See *The Mayagna (Sumo) Indian Community of Awas Tigni v. Nicaragua*, judgement of the Inter-American Court of Human Rights dated 31 August 2001 (Series C) No. 79 of 2001, available at: <http://www1.umn.edu/humanrights/iachr/AwasTignicase.html>.

⁹² International Council on Human Rights, op. cit., p. 52.

⁹³ Gita Sen, *Engendering Poverty Alleviation: Challenges and Opportunities*, in Shahra Razavi (ed.) *Gendered Poverty and Well-Being*, Blackwell, Oxford/Malden, 2000, p. 274.

Annex

TOWARDS A RESTATEMENT OF THE HUMAN RIGHTS OBLIGATIONS OF THE PRINCIPAL ACTORS IN THE GLOBALIZATION PROCESS: A PROPOSAL

I. GENERAL HUMAN RIGHTS OBLIGATIONS

1. Based on the legal premises articulated in the Special Rapporteurs' three reports, it is proposed that a framework be developed outlining the core universal human rights principles and norms governing the principal actors^a in the globalization process. Those principles should apply:

- (a) In the formulation of policies;
- (b) In the implementation of such policies; and
- (c) In evaluating/auditing the impact of such policies.

2. Obligations under international human rights law entail both positive and negative undertakings. Generally, negative obligations are often articulated in the context of civil and political rights, while positive obligations arise within the context of the realization of economic, social and cultural rights. Today, however, there is recognition that all human rights entail both positive and negative obligations.

3. While negative obligations denote the obligation to refrain from unduly interfering with the enjoyment of human rights, positive obligations require proactive action including the obligation to take steps to prevent violations by private non-State actors. Given the current importance of non-State actors in the globalization process, such positive obligations assume added significance.

4. The obligations that are set out are not contingent on whether or not the parent document (charter, articles of agreement or such other instrument) setting up each one of the institutions spells out such obligations. Rather, they are premised on general principles of international law.

II. CORE HUMAN RIGHTS PRINCIPLES

5. The fundamental principles of human rights set out below are based on the Charter of the United Nations and other international human rights treaties, customary international law and the Vienna Declaration and Programme of Action. Among others, they include the following:

- (a) Human rights are the inherent entitlement of all human beings;
- (b) Human rights are of universal value;
- (c) All human rights are interdependent, interconnected and indivisible;
- (d) Every person has the right to enjoy all human rights on the basis of non-discrimination;

(e) Certain human rights are non-derogable, as specified in article 4 of the International Covenant on Civil and Political Rights;

(f) Violation of certain human rights under specified circumstances amounts to crimes against humanity over which universal jurisdiction could be exercised.

III. THE NORMATIVE FRAMEWORK ON HUMAN RIGHTS

6. The suggested human rights framework is based on international human rights norms contained in international treaties, including those adopted by the specialized agencies of the United Nations, and as recognized by well-established principles of customary international law and *jus cogens*. It must be emphasized that the framework presented here recognizes the relevance of the entire corpus of international human rights norms to the globalization process, on the assumption that these processes are targeted at the realization of sustainable human development.^b The human development process involves the entire corpus of human rights as recognized by article 1 of the 1986 Declaration on the Right to Development. The imperatives of the liberalized trading system, or the quest for the deregulation of financial markets and improved investment regimes, cannot override respect for and attention to human rights. As international law presently stands, human rights must be given primacy of consideration.

A. Equity and Non-discrimination

Commentary

7. International trade rules recognize the principle of non-discrimination in the form of “national treatment”, i.e. all players must be treated equally according to national standards whether they be giant multinationals or small local business enterprises. This principle has been put in place to defeat the perceived ills of protectionism. However, as we have pointed out in our previous reports, extant international trade rules have impacted on different players and different sections of societies in very disparate ways. In many parts of the world those rules have increased the gap between the rich and the poor and further marginalized already marginalized groups such as women, minorities and indigenous peoples.

8. Multilateral organizations and States must recognize that the international trade regime is not being played out on a level playing field. There must be recognition of the need to proactively recognize policies or elements of policies that will have a discriminatory impact either among peoples living in different countries or among those living in one country. It is also essential to take into consideration the impact of seemingly neutral policies. Consequently, priority must be given to the adoption of remedial action, including the adoption of affirmative action policies in favour of adversely affected groups. Such action must necessarily include putting in place social safety nets, the provision of subsidies and similar measures designed to protect those who are unable to benefit from the “invisible hand” of the market.

B. Participation rights

Commentary

9. Respecting and ensuring the right of every person and groups of persons to participate in the deliberative and decision-making processes that lead to economic policy formulation is an

essential ingredient of democratic governance. In our progress report we discussed civil society interventions in the globalization processes and the increasing demand for transparency of and access to those processes. A regime of rules that has such a profound impact on human life cannot be formulated behind closed doors either at the international or the national level.

10. In this context MLIs and States must respect in particular the following rights:

- (a) Freedom of expression;
- (b) The right to information;
- (c) The right to participate in public affairs;
- (d) Freedom of association; and
- (e) Freedom of assembly.

Participation rights intersect with all other rights, especially in the realization of economic and social rights. Without doubt they form a crucial component of the human rights framework and must be given attention and respect at all times.

C. Economic and social rights

Commentary

11. These rights can be divided broadly into two categories: those rights that contribute to an adequate standard of living and those that constitute just and favourable conditions of work, or labour rights.

12. It is widely accepted that economic and social rights too, just like civil and political rights, impose obligations to recognize, respect, fulfil and protect those rights. It is equally recognized that discharging obligations with regard to core minimum rights is mandatory and not contingent on the availability of resources.^c While States are directly so obliged, MLIs should not adopt policies that jeopardize the fulfilment by States of those obligations. Indeed, MLIs should assist States to the greatest extent possible in discharging those obligations.^d

1. Right to an adequate standard of living

13. Into this category fall the rights to adequate food, clothing, housing or shelter, the highest attainable standard of physical and mental health and education. These are rights delineated by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and elaborated upon by the Committee on Economic, Social and Cultural Rights. Access to water has been recognized most recently as a human right that is linked to a host of other rights.^e Most of those rights are linked to the right to life. As the Human Rights Committee has elaborated, the right to life entails positive measures, for example to reduce infant mortality, increase life expectancy, and to eliminate malnutrition and epidemics.^f Central to the enjoyment of this cluster of rights is the protection and assistance to be afforded to the family unit. Provision of social safety nets that was referred to in section A on “Equity and non-discrimination” has a direct bearing on ensuring adequate standards of living.

2. Labour rights

14. Facilitating the right to work and ensuring just and favourable conditions of work, including the right to unionize and strike, are fundamental obligations relating to the realization of economic and social rights. Articles 6-8 of the ICESCR spell out the minimum obligations in this regard. The obligation to ensure equality between the sexes in employment, the provision of maternity leave and the protection of children from exploitation are also strictly delineated. Core ILO labour standards provide the substance of what constitutes just and favourable conditions of work.

15. At a minimum, the following rights must be ensured:

- (a) Fair wages that can sustain an adequate standard of living;
- (b) Non-discrimination in employment;
- (c) Freedom from forced labour;
- (d) Protection of children from exploitation;
- (e) Equal pay for equal work;
- (f) Safe and healthy working conditions;
- (g) Reasonable working hours;
- (h) Adequate rest and leisure, including paid holidays;
- (i) The right to form and join trade unions;
- (j) The right to strike;
- (k) Maternity leave; and
- (l) Social security.

16. Deregulation of the labour sector and the expansion of the informal sector are the direct result of processes of globalization and have had very negative consequences on labour conditions. It is imperative to take steps that provide the necessary security for persons who might be affected by such measures.

D. Right to life, liberty and personal security

Commentary

17. Implementation of the free trade regime may at times directly violate the physical integrity and liberty of persons and also their rights of participation as discussed above. These violations can vary from extrajudicial executions, involuntary disappearances, torture and other forms of cruel, inhuman and degrading treatment or punishment, arbitrary detention and deprivation of the right to a fair trial.

18. Such situations may arise, and have arisen in the past, when States use excessive force in dealing with opposition to the globalization process itself or to local implementation of free trade rules, or in the quest to enhance the protection of investment regimes. For example, the privatization of essential services such as the supply of potable water, or the handing over of land and other natural resources to large businesses has resulted in expressions of resistance and opposition by various civil society actors. The response of some States to such opposition fails to adequately allow for the expression of these democratic rights. Systemic suppression of these rights may be perpetrated as a strategy by the State in order to implement unpopular economic measures. Such strategies may be favoured by business entities that are seeking access to natural and other resources in poor developing countries.

19. MLIs may argue that the obligation to respect and protect such rights lies squarely with States and that no obligations lie with such institutions. Responsibility for human rights violations arises not only for direct violations but also for indirect violations. As in the case of economic and social rights, in the case of civil and political rights too MLIs are responsible for ensuring that their policies do not directly or indirectly result in violations of rights. They must take remedial measures to address violations of such rights. It must be noted that the prohibition on violating the right to life and freedom from torture constitute principles of *jus cogens*.

E. Group and cultural rights

Commentary

20. Many group and cultural rights recognized by international law acknowledge and seek to address the specific challenges and impediments faced by marginalized groups in the enjoyment of human rights. In our previous reports we pointed to the negative impact of the free trade regime especially on these marginalized groups, which include women, children, minorities, indigenous groups, the elderly and the disabled. Deregulation of the labour sector and the rolling back of government expenditure on social safety nets has contributed in no small measure to this situation.

21. A common feature of group rights is the goal of eliminating discriminatory and other harmful practices against individuals belonging to such groups and ensuring their full enjoyment of all human rights. The International Convention on the Elimination on All Forms of Racial Discrimination, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries all share this objective.

22. A further factor that must be taken into consideration is that certain group rights are central to the group's identity. Cultural practices that reinforce human rights such as those relating to natural resources and the environment, food habits, and food security and agriculture have deep significance to groups such as indigenous and tribal peoples. It is important that not only States but also the relevant MLIs respect these rights in policy formulation and implementation and to ensure that they do not come into conflict with the cultural rights of such groups.

23. The right to development as a collective right, needless to say, is central to the debate on the relevance of human rights to the globalization process. Similarly, the right of peoples to self-determination over natural resources is of fundamental importance. The obligation lies squarely on the international community and international organizations to respect the right.^g

F. Environment and human rights

Commentary

24. Although no concrete international norm on the right to an adequate environment has been recognized, the need for a clean and healthy environment is increasingly being articulated in terms of the linkages to recognized international human rights standards such as the right to life, the right to an adequate standard of health, the right to privacy, non-discrimination and the right to self-determination.

25. Significantly, the preamble to the Marrakesh Agreement establishing the WTO recognizes that trade and economic relations among member States should be directed towards raising the standards of living "... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ...".

26. The obligations of States and MLIs in this respect could be said to flow from the obligations vis-à-vis associated human rights. At the same time, it could be stated that the principle of "sustainable development" has gained currency to such a degree that it must be given due recognition and attention by all actors in the globalization process.

Notes

^a By main actors, we refer in the first instance to States, and especially to the obligation emanating from the Vienna Declaration and Programme of Action stipulating that human rights are their "first obligation". We also refer to institutions such as the WTO, the IMF and the World Bank, while recognizing that each of these institutions have different establishing charters, modes of operation and relationship to States, on the one hand, and to the United Nations, on the other. A third species of actor in the globalization process are TNCs. With regard to these actors, the Sub-Commission has already set in motion a process for achieving their enhanced accountability via the mechanism of the draft norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2002/13).

^b Cf. statement by the WTO representative to the Working Group on the Right to Development at its second session (Geneva, 29 January-2 February, 2001).

^c See general comment No. 3 of the Committee on Economic, Social and Cultural Rights and also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997.

^d See text at note ^a supra.

^e General comment No. 15, 2002.

^f General comment No. 6, 1982.

^g In paragraph 7 of resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources the General Assembly declared that:

“violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace”.

Paragraph 8 states thus:

“... States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.”
