The International Council on Human Rights Policy

Whither the State of Human Rights Protection?
(New ways to hold non-state actors accountable)

by

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The purpose of this paper is to provoke a discussion. The title of this paper encapsulates a number of questions. We do not intend to answer these questions. We hope to analyze the questions from different viewpoints and conclude with suggestions for feasible research projects. Our focus is on those human rights issues which are currently seen as important for human rights organizations. The starting point for our discussion is a reexamination of the role of the State in the protection of human rights. Our title evokes the following questions: what sort of State will the future bring? What sort of protection will such a State be able to offer? Do we need to look beyond the State to find new methods of protection? Should we focus on the State as the primary source of human rights protection? or should we look at other forces, fora and actors as the world changes around us?

In order to begin to tackle some of the contemporary dimensions of the issue of the changing nature of the State in the context of human protection, the International Council on Human Rights Policy (Council) has identified four areas for exploration. We have grouped these areas under the titles: globalization, privatization, feminization, and fragmentation. Of course there are disadvantages to using such self-consciously fashionable terms, but the advantage is that it forces us to make the links with ongoing activity in other spheres, and it widens the horizons of human rights research beyond the dissection of legal texts, and descriptions of developments at the United Nations.

Each of the four areas will be examined in a separate chapter taking account of the some of the connections between them. As an annex to the paper we have included a bibliography divided according to the four themes. The purpose of this bibliography is not to show what literature has influenced our thinking (much of the bibliography has not been recognized in formulating the ideas in this paper) but rather to enable future researchers, working for the Council on these topics, to have a few reference points in order to situate themselves within the current debates

The Changing Role of the State and the Application of International Human Rights has to Non-State Actors

Governments today are acutely aware that the parameters of what the State is and is not expected to do are being re-evaluated both from within and from outside. Furthermore, the entities with which any government deals include a number of non-State actors many of whom have considerable power and influence. This has meant that certain presumptions concerning the State which have developed around the discussion and implementation of human rights protection now seem misleading, or even counter-productive. In the course of this paper we will demonstrate how a State-centred approach to human rights fails to deal with a number of contemporary problems facing human rights organizations. We suggest an alternative framework which meets some of these challenges. Paradoxically we will not suggest that the withering away of certain traditional State functions implies that the future role of the State is irrelevant. Rather we will show how the exertion of the forces of globalization, privatization, feminization and fragmentation demands new roles for the State to meet the demands for an acceptable State of human rights protection. But we go further. More radically, we suggest that international human rights law actually already binds certain non-State actors when these entities deny people their human rights. Furthermore we assert that international human rights law and procedures can also be used to ensure that non-State actors not only refrain from violating human rights, but also that non-State actors can be obliged to promote human rights. In other words international law can and does create negative and positive obligations for non-State actors.

We therefore conclude that in many instances what is really needed is a new way of thinking about human rights obligations rather than new standards, mechanisms and laws. In short we are calling for a *paradigm shift* so that the traditional vision of the State/non-State, public/private dichotomies gives way to the acceptance that, not only States, but every individual, association, multinational, transnational, regional and international organization, has certain human rights duties in law. Only when we accept this reality can we begin to effectively tackle some of the current challenges to the enjoyment of human rights and the protection of human dignity.

I. Globalization

Explaining what people mean by globalization would require a whole book, and would probably obscure rather than illuminate the forces which we are concerned with in the present context. Familiar aspects of globalization include the fact that: breaking news on one side of the globe is simultaneously broadcast to the rest of the world through global communications giants like CNN; the sense that law-making is conducted away from national parliaments and under the influence of powerful States; the realization that large multi-nationals control more resources than the smallest states - and that their global influence through their products is in some ways greater than any other cultural forces; a realization that national policies are sometimes dictated with deference to certain economic models which aim to provide the conditions for 'free markets' and direct foreign investment. Everyone seems to have their own pet hates and predilections within the globalization discussion. The importance of the term is that by thinking about the concept we can start to better understand some of the changes affecting the world today.

Suffice it to say that the process of globalization is a multidimensional phenomenon applicable to a variety of forms of social action, be they economic, political, legal or cultural. There is nothing particularly new about globalization. States and individuals have for a long time been subject to a sense that their future is governed by forces outside their territory. For centuries we have had networks of economic and cultural interaction that have never corresponded to the political space of States. Governments have always been constrained and have had to cope with extensive extra-territorial networks of cultural, economic and military power. What is however new about the contemporary processes described as globalization is the unprecedented speed at which they are taking place. Although globalization obviously presents a number of

[1] Anthony Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990), 63.

[2] There is an extensive list of literature written about globalization, however not always very convincing. For a good recent account about the debates surrounding this term, see: Beck, U. (1997) *Was ist Globalisierung?* (Frankfurt a. M. : Suhrkamp Verlag.) (translation in process) and Rodrik, D. (Summer 1997) « Sense and Nonsense in the Globalization Debate » in *Foreign Policy*.

[3] The terms globalisations (in plural) might be more appropriate in order to understand the processes at stake. See de Sousa

opportunities and advantages for the individual human being, we are going to concentrate here in this paper on some of the threats the process poses for internationally recognized human rights.

Rather than simply speculating on the state of globalization, we prefer to simply reproduce the dozen complaints that were presented in 1997 to the International Peoples' Tribunal on Human Rights and the Environment (1998:111). The excerpts include the interim comments attached to the cases by the Tribunal. The Tribunal is due to issue definitive statements on the cases once they have received comments from the various organizations and governments. These are concrete complaints rather than academic accounts of the effects of globalization on peoples' lives.

'- *The Gwich'in (People of the Caribou), Alaska,* affected by development of oil by multinational companies on caribou calving grounds, with the approval of Federal and State governments. Oil exploration and development in the Arctic National Wildlife Refuge will change the natural environment of the wilderness area forever.

- *The People of the Sovereign Dineh Nation, Arizona,* are being evicted and displaced to implement coal mining activities. Corporate unaccountability has created pollution, environmental degradation and unsuitable overuse of a pristine sole source aquifer.

- *National Youth Council of Ogoni People, Nigeria.* Royal Dutch Shell has created an alliance with military dictators to protect the company's oil and gas exploitation causing confiscation of lands, forced evictions and coercion, reckless discharge of petro-chemical pollutants, heat-pollution from flaring activities and dumping of refinery wastes.

- *The Innu People of Nitassinan, Canada.* This is an ecologically sensitive and diverse region subjected to increasing development and industrialization. Large-scale forestry, hydroelectric projects, extensive mining and minerals exploration are being undertaken

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Santos, B. (1997: 82).

by national and multinational corporations. The area is also being used for low-level military flight training by a number of NATO states with up to 18,000 sorties per year.

- *Farmers of the Tenasserim Region, Burma* face violence, intimidation, forced labour, women and girls being forced into sexual slavery and confiscation of property in the implementation of a gas pipeline project, a joint venture of the Burmese military government and multilateral corporations. Victims have no redress given the absence of a functioning judiciary in Burma.

- *Citizens of Tabasco, Mexico.* The Mexican citizens of Tabasco suffer from severe ecological degradation caused by intense exploitation of the State's petroleum reserves by PEMEX (Mexico's national oil company), occupying lands without permission from affected parties, and using threats of judicial or police action to drive peasants off their land. Their operations result in floods, salination of lakes, contamination of drinking water and poisoning of the food chain.

- *The people of the Essequibo Riverian Area of Guyana* are affected by a gold mining joint venture between two multinational corporations in North America and the government of Guyana. Environmentally unsound management practices have resulted in uncontrolled discharges. In August 1995 a disaster occurred when a wall of the tailing dam ruptured, releasing a large quantity of cyanide-laced wastes into the Essequibo river. The Essequibo sustains the livelihood and well-being of some 23,000 people.

- *The National Youth Association of Quinoa Growers of Bolivia and the Rural Advancement Foundation International, (RAFI).* The Quinoa growers of Bolivia are victims of the General Agreement on Tariffs and Trade (GATT) and new patent regulations are being drafted by all countries, and by the European Union. Patents on life, including human life, are treated as essential for promoting trade and commerce. Ethics, ecology and human rights are being systematically externalized in "intellectual property rights" legislation.

- *The International Coalition for Justice in Bhopal, India.* Every community is a potential victim of environmental disaster and human rights abuse similar to what took place in Bhopal, India. Because Union Carbide ignored warnings of a 1982 safety audit, hundreds of thousands of Indians were tragically exposed to Methyl Isocynate, resulting in widespread injury and death.

- *Garifuna Grassroots Movement - Iseri Lidawamari (New Dawn), Honduras.* Tourism development by the federal government of Honduras, its municipalities and private developers is causing Garifuman lands to be expropriated and reallocated "without any dialogue, relocation arrangements or indemnification agreements." The tourism development projects produce not only land loss and evictions but also poverty, marginalization, and rapid depletion of resources.

- *The International Campaign for Tibet.* Since its occupation of Tibet in 1950, the government of China has conducted unsustainable development resulting in land loss, marginalization of the rights of Tibetans to their land and its resources, impoverishment, displacement and serious environmental degradation.

- *International Mothers of Liberia Incorporated.* Liberia remains heavily infested with anti-personnel mines, standing as a tragic reminder of the utter failure of the UN and the Organization of African States in their peacekeeping and reconstruction roles. Anti personnel land mines are bringing death and disablement to innocent victims and severely ravage the environment.'

There are now more and more people and groups questioning the ability of States to regulate, on the national and international levels, the impact of the gathering global forces. Because question of evictions and environmental degradation are now reformulated as human rights challenges, applied policy research on the effects of globalization needs to link to these complaints as we reconsider the role of the State.

A dominant discourse within social science currently emphasizes the diminishing

importance of the nation state. These commentators and academics stress the fact that the State's traditional capabilities are being undermined; there is a suggestion that States are no longer in a position to function a the main actor on the international stage and in the world of international regulation. We are constantly reminded of the relative power of associations of States (such as the European Union or NAFTA), global corporations, and global non-governmental organizations. (Ramonet 1997). It is clear that there has been a profound transformation of the world economy over the last decade. Some of these changes are neatly captured by the concept of globalization. One need only mention the progressive elimination of barriers to trade and investment and the international mobility of capital. This implies, almost inevitably, that the State's role is being challenged by the growing presence and pressures of global forces.

Theo van Boven (1995:5) has pointed to the consequences for the enjoyment of human rights in this context: 'As part of this process the interdependent and joint powers of national and international economic and financial actors, in particular transnational enterprises and financial institutions, are substantially gaining strength and influence at the expense of the position of the State with an ensuing weakening of the State's role to be in charge of social rights and social welfare. Due to the process of globalization, the imperatives of social justice aimed at promoting and protecting the rights of the weak and the marginalized are increasingly put in jeopardy. The division between the poor and the rich is growing more blatant, both in countries of the north and of the south.'

We suggest there are basically three approaches to addressing this problem from a human rights perspective. First, to reassert the fact that the State has international obligations under human rights law and that these obligations have to be respected and monitored. The whole human rights system is based on the responsibility of States and this remains the best medium through which to tackle the growing disparities and the threat to social welfare and social justice. According to this first approach: to change course now would be to allow the whole human rights project to unravel. The State is, at least in many cases, accountable, there are several ways in which popular participation can influence outcomes. Better to put our faith in the State we know than in the devil we don't.

A second approach would focus on the powerful players on the world scene. It might emphasize the fact that one German-based electronics firm can have annual sales that exceed the combined Gross Domestic Product of Chile, Costa Rica and Ecuador. It would seek to encourage a sense of responsibility for human rights issues amongst those corporations, financial institutions, and trade organizations. And it would seek to find new ways to hold these non-State actors accountable in law. It would dismiss the discussion in inter-State fora such as the UN as irrelevant for human lives It would argue that the nation State now has little influence in the "international community" and it might privilege the notions of responsibility an duty in an attempt to spread the values of respect for human dignity and freedom into life spheres which extend beyond the traditional state/individual nexus.

However, it seems to us, that a third approach is feasible. One could seek to find ways to bolster the role of the State and the participation of governments in decision-making, monitoring and enforcement; and, at the same time find ways to extend the human rights discourse and legal framework so that it envelops the particular non-State actors that currently threaten the enjoyment of human rights Of course those who favour a State-centred approach will accuse us of chipping away at the foundations of the human rights edifice and thereby accelerating the chances of its eventual disintegration and ruin. But we feel the strength of the human rights system has always been its ability to adapt to new demands and new needs. There are now demands for protection from the effects of big business, big finance, and the mass media. The human rights machinery and norms are pliant enough to be reorientated to cope with some of these new demands.

Furthermore, we feel that to romaticise the State as 'saviour', and to portray business as 'bad', is to overlook the extent of the their collusion. It is not really the case that States have absolutely no choice in the face of advancing rampant multinational corporations. In fact some governments are going out of their way to encourage foreign direct investment (FDI): 'The desire of governments to facilitate FDI is also reflected in the dramatic increase in the number of bilateral investment treaties (BITs) for the protection and promotion of investment throughout the 1990s. As of 1 January 1997, there were 1,330 such treaties in the world, involving 162 countries, a threefold increase in half a decade. Around 180 such treaties were concluded in 1996

alone - one every second day.' (UNCTAD 1997a: xvii). Although such treaties used to nearly always include one developed country this is changing and 'In 1996 alone, nearly a third of all BITs were concluded between developing countries, led by China, Chile, Algeria and the Republic of Korea.' (UNCTAD 1997b: 16). The top ten developing host countries for FDI in 1996 were: China, Brazil, Singapore, Indonesia, Mexico, Malaysia, Argentina, Peru, Chile and Colombia. (UNCTAD 1997a: 5). With the 48 least developed countries experiencing an increase of investment by 56% in the same year.

The legal framework for the liberalization of the investment sector, and for the eventual protection of investments and the settlement of disputes, remains in the hands of governments, even if those who drive the process are the private transnational corporations and the large institutional foreign portfolio investors from the United States and the United Kingdom.

Transnational Corporations and Human Rights

First, a word on terminology, we have chosen to favour the term 'transnational corporations' as it emphasizes the fact that there is usually a single legal corporation involved with a headquarters and a legal status incorporated in the national law of the home State. Its operations and network will be transnational but the corporation itself does not really have multinational personalities. 'The concept of *transnationality* comes into its own when it is applied to an autonomous corporate system and, in this sense, the transnational corporation is *one* single corporation even if it is composed of corporations with separate identities under the corporation law of the States in which they operate.' (Rigaux 1991: 124). On the other hand the term multinational corporation (MNC) is in current usage, and in some ways reflects the composite nature of the corporation with its subsidiaries and other entities spread across different nations. As legal systems become more comfortable with 'piercing the corporate veil' to reveal the true nature of the control by the parent over its offspring we may find that multinationality better expresses the characteristics of

[4] UNCTAD *Trade and Development Report 1997*. The Trade and Development Board of the UN Conference on Trade and Development reached the conclusion that income gaps have widened over the past two decades and acknowledged that economic globalization may have contributed to this tendency. (TD / B / 44 / 19 Vol. I, Agreed Conclusions).

the non-State actors to be held accountable. For present purposes we will use the terms interchangeably. We will be using the term 'home State' to refer to the national State of the controlling corporation. In other words the State where the non-State actors have been established under the national laws of that State. The expression 'host State' refers to the territorial state, which is not the home State, where the transnational corporation has its subsidiary controlled entities, or where the transnational corporation has foreign investment or other contracts.

Public international law has privileged transnational corporations in the sense that international wrongs committed against them were actionable by their home State against another State that committed the internationally wrongful act. These rules on State Responsibility and diplomatic protection ensured that transnational corporations enjoyed the protection of their home State. The rules do not however work the other way around. A wrongful act committed by a transnational corporation does not trigger State Responsibility either for the home State or for the host State. (Unless it can be shown that the State was somehow complicit in the wrongful act, or that the State failed to show due diligence, or that there was some wilful neglect of its international duties; and these are all rather high hurdles to overcome). Transnational corporations can use international law as a sword and as a shield. However international law failed to hold these corporations accountable. The fact that they did not have the same sort of international legal personality as States seemingly entitled them to escape responsibility. Of course none of this took place in a political vacuum. The diplomatic protection of transnationals by powerful States was part of the foreign policy of those States and an effective way to expand their influence and commercial links around the world. The concern of the Third World was that developing countries should retain the right to nationalize, determine their own social, political and economic systems, and that the transnational corporations should not intervene in their internal affairs to undermine a States' choice of economic objectives.

In a study prepared for the UN General Assembly on the 'Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order', Abi-Saab suggested that international law had to develop to create a duty on states to cooperate to control transnational corporations in this context. 'The Charter of Economic Rights and Duties,

coming twelve years after resolution 1803, adds another provision (article 2, paragraph 2(b)) in this respect dealing with a particular form of private foreign investment which drew much attention in the meantime, namely that of the transnational corporation. This provision, apart from affirming the legal power of the State to control and regulate activities of these entities with a view to ensuring their compliance with its laws and economic objectives and their non-intervention in its internal affairs (which is nothing but the reiteration of the power described above), prescribes a duty on all States to co-operate in rendering this control effective. Indeed as the activities of transnational corporations straddle several States, their effective control necessitates the co-operation of those States. But this is a different (positive) type of obligation than the ones usually attached to sovereign equality, and which are usually obligations of abstention or non-intervention with the exercise of the rights or powers of others.' (Abi-Saab 1984:50).

Although inter-State efforts to regulate transnational corporations have ground to a halt at the UN level, the point remains that States will inevitably have to co-operate to resolve issues relating to transnational corporations. The transnational corporation does not exist in the ether - in some sort of virtual extra-state reality. Disputes will need to rely on judges with jurisdiction. Choices about which law to apply will still need to be made. And States will still seize opportunities to ensure reciprocal benefits through treaties and international mechanisms for the resolution of disputes. However the focus has shifted from protecting Third World particularities - to the protection of investors by law.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) established an International Centre for the Settlement of Investment Disputes (ICSID) whose seat is at the World Bank in Washington. The facilities offered by this mechanism mean that in recent years investors have found a forum in which to assert that their investment contracts have been breached. The Convention operates not only to facilitate conciliation or arbitration for disputes, but also ensures that awards can be enforced through the national courts of the Contracting Parties to the Convention. The concern of developed States to protect the investments of their transnational corporations is now being somewhat satisfied. Developing States are increasing left little option but to promise this sort of internationalized dispute resolution. In any event the drive towards market liberalization has muted the voices of

those who sought to contain and control transnational corporations. In fact the system is further adapting to protect rather than prosecute them. The discussions around the Multilateral Agrement on Investment (MAI), negotiated in the context of the Organization for Economic Cooperation and Development (OECD) have highlighted the fact that the desire to invest in investors has further skewed the playing field in favour of the transnational. Under this proposed treaty, investors, including transnational corporations, will again enjoy certain privileges through international law, but take on no new responsibilities. Investors will be able to sue States for discriminatory practices in international fora but States can not sue transnational corporations at the international level for discrimination or any other kinds of wrongful act or even crime.

There is a tendency to simply explain these inconsistencies and imbalances through reference to the fact that only States are the subjects of international law - and therefore this legal system can not bind other non-State actors. In the context of oil companies in Colombia signing collaborative agreements with the Colombian Defence Ministry Human Rights Watch sought to recommend the insertion of human rights clauses in such agreements. However they stop short of holding the companies accountable under international human rights law: 'While these companies are private actors not bound by international human rights treaties, Human Rights Watch believes they nonetheless have a moral duty to avoid complicity in human rights violations by state agents.' (1998b:2). But such a traditional approach no longer seems appropriate, or even accurate.

International law has for some time served to create individual criminal responsibility for certain acts committed by individuals: slavery, piracy, genocide, crimes against humanity. International law attached to these non-State actors irrespective of their links to the State. Article IV of the Genocide Convention of 1948 reminds us that persons committing acts of genocide shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals.' With the advent of a future International Criminal Court we can foresee the international crime of genocide being tackled at the international level without the need for an individual State to assume jurisdiction. In other words international law has fixed obligations on the individual, and the violation of these obligations will be punishable at the international level. In fact, the new International Criminal Court may eventually be able to try corporations and

hold them accountable for international crimes. In any event, the Court will be able to try the individuals responsible within the corporation. The draft Statute for the International Criminal Court includes a paragraph in brackets which ensures the possibility of trying 'legal persons, with the exception of States, when the crimes were committed on behalf of such legal persons or by their agents or representatives'.[5] We should not ignore the fact that international treaties in other areas have obliged states to prevent and punish transnational corporate crimes such as the transboundary illegal traffic of hazardous waste (Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Basel, 1989, Art. 9(5)). In the same way that grave breaches of humanitarian law became international crimes we could foresee a similar process whereby international law attaches to the transnational corporation. Their crimes would become internationalized and eventually universal crimes. The important point here is not the extent to which international standards have already attached to transnational corporations - rather the fact that it is indeed legally possible - and that human rights policy studies ought to cross the Rubicon and start, in appropriate cases, to develop ways to hold such transnationals accountable for violations of international human rights law. We are asserting that corporations have international legal obligations and not only some sort of moral duty.

As we shall see when we look at the issue of failed or fragmenting States, international humanitarian law has fixed international obligations on non-State actors through Common Article 3 to the Four Geneva Conventions of 1949. The traditionalists see these individualized international obligations as exceptions to the rule that international law creates obligations for States alone. It is argued that this criminal/humanitarian regime is a limited exception encouraged by States and accepted by the human rights community as useful universal standards for holding non-State actors accountable. But we want to go further. We are arguing that international law can attach non-criminal obligations to individuals and corporations.

The clearest example of international law creating binding enforceable obligations on non-State actors outside the humanitarian/criminal field is the Treaty of Rome establishing the European Economic Community of 1957. This treaty created binding legal obligations on

[5] Article 23(5), UN Doc. A/CONF.183/2/Add.1, 14 April 1998.

individuals and other non-State actors in areas such as equal pay for men and women. Other duties, not always explicitly directed at the private sphere, have also been held to have been created through the treaty. (Clapham 1993: 248). The fact that these rights have proven enforceable in courts only goes to re-enforce the argument that international treaties can create obligations for private individuals and corporations. We think it is important to consider carefully the value of applying international human rights law to non-State actors. Of course not all provisions of all treaties apply to all non-State actors in the way that all provisions apply to all States. But we can liberate ourselves from the blinkered approach which demanded that transnational corporations be seen as somehow dipped in Teflon so that the yolk of international human rights law could never attach to them. Indeed there are signs that international human rights organizations which have traditionally taken a State-centred approach, such as Amnesty International, are emphasizing the obligations which transnationals and the international financial institutions have, with regard to obligations found in the Universal Declaration of Human Rights. So that, within the scope of their activities, transnationals should ensure for their staff and clients respect for the right not to be discriminated against, the rights not to be held in slavery, the rights to life and security, and freedom of association (including the right to form trade unions), as well as reasonable conditions for work. (Sané 1998) .

The admission that international human rights law can be directly applied to non-State actors will help us to develop some of our suggestions in the other three chapters on privatization, fragmentation and feminization. For present purposes it is enough to suggest that transnational corporations could be treated in a similar way to the way that States are dealt with by traditional human rights monitoring techniques. First, inter-governmental and non-governmental organizations could detail practices and incidents which would traditionally have been considered human rights violations if carried out by the State apparatus. The violation of the norm is just as egregious for the victim in both cases; and the international obligation will be similar, regardless of whether the corporation was completely private, the State has some shares, or is a State enterprise. Second, when States are participating in the inter-state human rights monitoring procedures there could be greater attention to human rights violations committed by transnational corporations - both in the home State and in the host State. It is now accepted law that human rights treaties create positive obligations for States to ensure that everyone within their

jurisdiction enjoys protection - both from violations by State agents committed in the public sphere and from violations committed by non-State actors in the private sphere (Clapham 1993, Leckie 1998:108). Greater scrutiny of States' obligations regarding violations committed by non-State actors could go some way to creating a better human rights regime with regard to the actions of transnational corporations. Lastly, the realization that human rights law attaches to transnational corporations could help to reorientate the traditional concentration on civil and political rights towards the protection and promotion of economic, social and cultural rights. However, the burden for pursuing this strategy remains with non-governmental organizations at both the local and the international level, with the intergovernmental mechanisms and experts charged with examining States' records and developing human rights through thematic reports, and with the civil society groups that are concerned with issues of social welfare and social justice. We do not see or expect important short-term developments at the inter-State level. It is for this reason that our first proposed project concentrates more on the political and economic impact of human rights codes adopted for transnational corporations than on the development of international legal procedures by States. The State of human rights protection in this field is inevitably rather weak. It is just not in the perceived interest of either home states or host states to create layers of human rights scrutiny to cover transnational corporations. Strength appears to come from the consumer and other groups that are producing the pressure for change within the transnational corporations.

Research Project # 1 - An Impact Analysis of Corporate Human Rights Codes

This project could examine the impact of different types of human rights code. There are currently a number of codes of conduct being used in various sectors and devised by different actors. Our proposal involves a comparison of the codes in four different spheres. Starting with a State centred approach we could mention the Model Business Principles promoted by President Clinton, the various codes emanating from some of the States of the United States, as well as the codes of conduct or guidelines adopted in this context by the European Union and the OECD. At the universal level we have to mention the standards developed in the context of the International Standards Organization and the International Labour Organization. With regard to self-imposed codes developed by business, there are too many to list, but the project could select a few

representative case studies, preferably within the same sector (say Timberland, Gap, and Levi Strauss, (and see the studies listed in ILO 1997b). Furthermore the tactic of devising codes for overseas investment in one particular area could be analyzed: the Sullivan and MacBride principles were developed in the context of overseas investment in South Africa and Northern Ireland respectively. Lastly, comparison could be made with a non-governmental initiative, such as the work done by the Council on Economic Priorities (with their attempt to develop a standard/code called Social Accountability [SA] 8000) and their development of a 'World Headquarters Questionnaire' which focuses primarily on the transnational company's headquarters operations within the home country across five areas: charitable giving/community outreach, nuclear power/weapons contracts, natural resource stewardship, stakeholder issues, workplace and labour issues. Although not primarily organized around international human rights law standards some of the methodological issues involved in this project could prove informative in designing a best practice for ensuring that human rights corporate codes are effective.

Each of these spheres: governmental, intergovernmental, commercial, and non-governmental have developed their own approach. The Council's research could compare these approaches and draw some conclusions about which approach was producing the most exacting standards, which approach was producing the highest levels of compliance, which approach was resulting is greatest levels of specificity, and draw some preliminary conclusions about which models have proved most successful and why.

In the light of the intergovernmental debate on these issues in might be worth ensuring that special attention is paid to the four core principles and objectives that flow from the ILO Constitution and which bind each Member 'to strive in good faith and to the best of the means at its disposal, towards the progressive realization of the fundamental principles and objectives that flow from the Constitution: (i) by ensuring the promotion of freedom of association and the effective recognition of the right to collective bargaining; (ii) by constantly seeking to suppress all forms of forced or compulsory labour, exacted under the menace of any penalty and for which workers have not yet offered themselves voluntarily; (iii) by pursuing its efforts towards the effective abolition of child labour, progressively raising the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of

young persons; and (iv) by bringing about the conditions for true equality of opportunity among all workers, especially male and female workers, through the elimination of discrimination in respect of employment and occupation in all its forms.' ILO (1998). Furthermore, it seems likely that progress on this issue will, in the short term, be focussed on the ILO, and the core labour standards, rather than at the OECD or the WTO. (Charnovitz 1997).

Whether corporate human rights codes should refer to wage levels is a difficult question. At the intergovernmental level there seems to be agreement that questions of wages are too intermingled with the threat of protectionism and the comparative advantage of developing countries. Even if some non-governmental codes have included this dimension (the Interfaith Centre's draft set of Principles for Corporate Responsibility: Benchmarks for Measuring Business Performance call for a 'sustainable community salary' (Cassel: 1996)) it is suggested that the Council's research project concentrate on the above so-called 'core labour standards'.

The starting point for the research ought to be that the promotion of human rights is the responsibility of everyone and that some businesses already feel bound to adopt a human rights policy. Therefore there is no need to try to determine whether multinationals should be encouraged, or whether corporations have a legal responsibility to promote or respect international human rights standards. We have already argued above that human rights norms can bind the corporations directly. Pierre Sané (1998) has recently reminded us that the Universal Declaration of Human Rights proclaims in its introductory paragraph that 'every individual and organ of society' is called on to promote respect for the rights in the Declaration and to secure their recognition and observance.

The Council's research should aim to answer some of the following questions: who is best situated to formulate corporate codes? what, from an international perspective, are the key elements for inclusion in such codes? what sort of complicity does there have to be before human rights organizations to hold corporations responsible for violations committed by the host Government? (Dicker 1997) who should monitor the corporations? and how to encourage the adoption of human rights codes? Rather than a legal approach, what is needed is a review of some of the empirical studies and the formulations of conclusions and recommendations which

can be aimed at the human rights world. The recommendations should be carefully directed at: local human rights groups, international human rights groups, the businesses themselves, employers groups, trade union federations, certain regional organizations, governments, and the international agencies and organizations such as the Office of the High Commissioner for Human Rights, the International Labour Organization, and the World Trade Organization.

Research Project # 2 - A transnational consultation on the human rights implications and opportunities presented by the Multilateral Agreement on Investment.

The current threat posed by corporations to the human rights system has been identified by some activists as the key issue facing the movement: 'The entire human rights regime painstakingly built over 50 years, is now under threat and is faced with impending irrelevance. We stand at a decisive and perhaps historic juncture - whereby international and state governance will be driven by either corporate rights or human rights.' (Kothari and Krause 1998a:1) For Kothari and Krause the typification of this threat comes in the proposed Multilateral Agreement on Investment, negotiated in the OECD. For them not only is this typical of a new trend in corporate globalization 'that routinely brushes aside the existing obligations of nations to international law (particularly human rights and environmental law)' but it is another example of human rights groups failing to react in time to crucial developments concerning international economic issues. They conclude with a call for human rights groups at all levels to 'join in the call to expose the spread of such a global regime that will force nations, in order to attract trade and investment, to relax or abrogate the obligations they have to protect human rights, environmental and labour standards.'

This Multilateral Agreement on Investment has been described as the 'constitution of a single global economy' or a 'bill or rights and freedoms for transnational corporations'. The negotiations in the OECD have not resulted in the adoption of a text for signature as of June 1998. However, the issue is likely to be negotiated for some time to come. Indeed it is quite likely that the whole drafting process will be extended beyond the OECD countries (and the handful of observer states from the developing world) to the more inclusive setting of the World

Trade Organization. It is suggested that the International Council on Human Rights Policy could take the first steps to adding a human rights dimension to this debate by convening a consultation of various non-governmental organizations. In May 1998 Geneva saw large demonstrations organized by the coalition Association Mondiale des Peuples (AMP) against the WTO and the MAI treaty proposals. But this popular protest has not yet been linked to any concrete proposals for safeguarding human rights within the context of a future treaty. Of course this may not be possible. But it seems the debate has not really happened amongst some of the human rights groups that traditionally lobby in the context of treaty-making.

Bearing in mind the possible effects of the MAI treaty and its impact on certain sectors it is suggested that the consultations include representatives from indigenous peoples organizations, women's organizations, environmental groups, representatives of labour, and those working to protect cultures. The consultation could take as its starting point a review of how investment disputes have been settled and how human rights or environmental issues have been dealt with. By looking at how this has been dealt with under other treaties (such as NAFTA for example) one might be able to begin to draw up policy guidelines, or even legal restrictions, for future investment treaties. The consultation could concentrate on how investment disputes are settled, and also examine some of the mechanisms which might enable governments and others to hold transnational corporations or other investors to account for breaches of norms contained in the treaties or other relevant instruments (Such as the 1976 OECD Declaration on International Investment and Multinational Enterprises or the 1977 ILO Declaration of Principles Concerning Multinational Enterprises and Social Policy). Again if we revise up the traditional approach, which sees multinational agreements as exclusively giving rise to obligations for States, and start to apply some of the appropriate norms to transnational corporations, one could start to devise ways to hold transnational corporations and governments accountable for violations of customary international law in the context of the latest proposals for international investment agreements.

Research Project # 3 - Models for the Transnational Participation of Non-State Actors in Decision-Making in International Financial Institutions.

The question of the role of international financial institution's role and influence on the promotion and protection of human rights is not new. What has brought this issue to the fore is the reliance which is developing on the international financial institutions and some of the ways in which the environmental groups have succeeded in getting their concerns addressed. The international financial institutions that are the focus of this attention are: the World Bank, the International Monetary Fund (IMF), and the four major regional development banks - The African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.

Two opposing views are sometimes seen as irreconcilable in this context . On the one hand some argue that it is legitimate and important for international financial institutions to compel borrowers to adhere to conditions involving human rights as well as the environmental, military, anti-corruption and information disclosure policies. The considerable financial resources, technical assets and global presence of international financial institutions puts them in a position to assist in encouraging and creating the necessary conditions for the respect of international human rights standards. On the other hand, it has been argued that human rights are not included in the Articles of Agreement of institutions such as the World Bank (Shihata 1988) and in the context of the IMF that 'Conditionality based on fundamental reforms is incompatible with the role of a lender of last resort' (Feldstein 1998).

But these poles do not really encompass the complexity of the situation. We need a third way. It is quite clear that the objectives of an institution such as the World Bank include the realization of economic, social and cultural rights. It is just that the aims are rarely expressed in these terms or organized through a rights based approach. Furthermore, Ibrahim Shihata (1997a:3), the Senior Vice President and General Counsel of the World Bank has conceded that: 'It should be noted that in extreme cases, where the violations of political human rights in a country are pervasive, there will inevitably be economic repercussions to these political events which the Bank may have no choice but to take into account as relevant economic considerations in its decisions. Also, the Bank is bound to pay due regard to the binding decisions of the Security Council taken under Articles 41 and 42 of the UN Charter (to maintain peace and security).' He suggests that the Bank can best respond to a 'despotic government' by improving

the elements of governance that the Bank takes into account at present (i.e., the rule of law, accountability and transparency, in particular through support of legal, judicial and civil service reform)'. (1997b: 198). Shihata's fear is that the Bank might get dragged into questions of conditionality and the 'plain intervention in the domestic affairs of a country' and that 'further politicization of the Bank's work, even for a moral purpose, could undermine its ability to play the roles for which it was created and for which no other institution is nearly so well qualified.' (1997b: 199) Our proposed third way could accommodate some of these concerns while increasing the integration of a human rights approach into the work of the World Bank. Few human rights organizations or advocates wish to see the politicized majority voting system used in the Bretton Woods institutions used to selectively punish people for the violations committed by their rulers. On the other hand, the logic which admits that environmental protection should be a central tenet of the Banks policies and practices can be extended to human rights protection. Similarly, the boast that 'NGOs are now directly involved in half of all Bank-supported projects' (Shihata 1997a: 2) ought to go hand in hand with an approach which protects those parts of civil society that are working for the promotion and protection of human rights. The World Bank's draft 'Handbook on Good Practices for laws Relating to Non-Governmental Organizations' has met with serious criticism, due to its failure to absorb an approach based on international human rights law, rather than the application of concepts used in the governance discussions such as 'transparency and accountability'. (Lawyers Committee for Human Rights 1997). Our suggestion is that the International Council on Human Rights Policy consider a project which looks at different models for the participation of non-state actors in the decision-making of the different international financial institutions.

Despite considerable interest in the role of non-State actors in the UN system (SIM 1997), and some analysis of the role of non-governmental organizations in the work of the World Bank, (Cleary 1996), there is still much to be done on a number of questions. We will highlight just two. First, there is a need to show that international financial institutions have, like other non-State actors, international legal obligations to respect and protect human rights. And second, there is a need to elaborate what sort of working relationship could be fruitfully established between human rights organizations and the various international financial institutions. The research could concentrate on how NGOs were involved in the decision making process for

actual projects. One might look at three phases of the project (before, during and after) and see what sorts of arrangements were made in different contexts. The project would have to lay bare the fact that, on the one hand, the representatives of indigenous peoples or other groups may be in the best position to advise the Bank on an effective use of its funds, while, on the other hand, many NGOs now look to these projects as important sources of funding as they will be implementing partners. Similarly, other NGOs have organized themselves to counteract the perceived globalized influence of the international financial institutions by counter positioning themselves as a new interconnected globalized civil society. The research project could build on some of the research done on differentiating non-state actors in the field of participation in the UN system and present recommendations on certain best practices as they have developed in recent years.

Widening the debate on Globalization and the State of Human Rights Protection

As we have seen there are important challenges facing the human right Community. First, how to address the transnational corporations and international financial institutions, which increasingly enjoy the protection of international law but are often assured to have no international legal responsibilities with regard to human rights norms. But a second issue involves the question: who sets the international and national agendas? If the peoples' will is represented mainly through the State's institutions, this seems to be left aside with the apparent decline of the State. For one author it is the bankers, lawyers, business people, public-interest activists and criminals who are at the centre of decision-making processes. (Slaughter 1997:185). This implies a move away from arenas of relative transparency into the back rooms, the bypassing of the national political arenas. However, as Alston remarks, there are multiple strata of decision-makers, including a variety of public, private and 'transgovernmental' fora with many interactions between them. 'While ease of travel and communications have enhanced and facilitated their functioning, it is far from clear that the result has involved such a fundamental shift in the locus of power that one can conclude that the state is "desaggregating".' (Alston 1997:441)

The planned 'burial' of the State as the central player in the international context is still premature. As Held claims 'it is reasonable to assert that states today do face a more complex array of international or global problems than hitherto; (in addition,) they are more deeply enmeshed in global networks of interaction; crucially, they have seen their own expansion in size and absolute power diminished by the relatively greater increases in the direct power, exit options, and collective structural power available to foreign actors and global networks.' (Held 1997:283). From a human rights perspective, this issue is not so much about increasing complexity in decision-making at the international level, but rather: what can be done to adopt our thinking and procedures to ensure the best protection of human rights. Alston reminds us, the question should still be raised as 'whether existing doctrines and institutional arrangements are adequate to deal with the complexities and realities of a globalised world.' (1997:448).

Third, there is also what could be called a 'bottom up' globalization (as opposed to a 'top

down' globalization, implied principally by the globalization of trading systems). These bottom up demands relate to general objectives such a 'better living standards,' the 'good life' and the universal respect for all human rights. A growing mobilization against the perceived dangers posed by the global economic forces and actors has created a network of civil society movements and groups which are trying to act with regard to new challenges. And indeed, accompanying the development of global actors and forces, there is a global spread of ideas, which include debates over the advantages of respecting human rights and fundamental freedoms as well as different democratic forms of governance. An important consequence of this interdependence of civil responses to 'top down' globalization is that the global peoples networks, by their common action, are defining what are the universal rights that need to be protected from threats emanating from mostly by economic forces. This international movement is a continuation and a reinforcement of already existing networks of non-governmental organizations which have been influencing and advancing the agenda for the protection of human rights. International institutions are beginning to acknowledge the importance of civil society actors helping to better understand current trends, These actors are increasingly integrated in partnership projects with the governmental and private sectors.[6] Fourth, as a consequence of this last point, there is a 'globalization of standards' meaning that local communities are aware of the ideas of justice and equity that are being intercommunicated throughout the world. Globalization is thus also a cultural phenomena that is bringing different national and local communities closer. Higher expectations for standards of living and work are also a consequence of the world's increasing interconnectedness.

If we can start to see globalization in terms of the top down effects of more open markets for transnational actors, as well as the opportunities created by a bottom up network of global demands one could start to exploit the dynamics to ensure better respect for human rights. To demonize globalization per se is to let those with international responsibilities off the hook. Globalization forces us to refocus on the State of human rights protection - and devise new ways

[6] UNCTAD has for example launched a meeting between NGOs, governments and the private sector on the theme « Partners for Development » to be held end of 1998 and which objective is to envisage projects related to trade and development.

[7] Final Report prepared by Mr. José Bengoa (E / CN.4 / Sub. 2 / 1997 / 9: 13-14).

to ensure respect for established rights.

II Privatization

The changing role of the State as a player at the international level has been the subject of the first chapter in this report. As indicated, this question has received considerable attention from researchers and is likely to remain at the heart of contemporary discussions related to human rights and international relations. However, there is another dimension to the changing State of human rights protection. We have to address the shrinking nature of State functions at the national level. As Alston (1997:436) notes: 'insufficient attention has been given to the implications for international law of the changing internal role of the state, as opposed to the implications of the changing international context for the state's external relations.'

The end of the Cold War and the collapse of the Soviet Union have paved the way for a yen for privatization in many former communist countries. At the same time global trade liberalization, an ideological predilection for privatization in a number of Western countries, and the convergence criteria demanded for entry into European Monetary Union, have ensured a shift in many fields from the public to the private sector. In addition, international financial institutions and other lenders have increasing imposed conditions on debtors that include accelerated privatization of State concerns. Often the transition to a market economy, or the rush to privatize, is at the expense of established economic and social State provided benefits. Little attention has been paid to how to ensure that such transitions do not lead to violations of the international obligations which the State has undertaken in the economic and social rights sphere. Furthermore, the privatization of functions such as law enforcement, health care, education, telecommunications, and broadcasting has meant that controls which were placed on these sectors to ensure respect for civil and political rights may no longer be applicable. Similarly it is even more difficult to apply the benchmarks and procedures for 'achieving progressively the rights recognized' in the International Covenant on Economic, Social and Cultural Rights. At the international level the problem is exacerbated by the fact most procedures for ensuring the protection of human rights and accountability for violations are designed to bring State actors to account. These international procedures are ill-equipped to tackle violations committed in these

'new private spheres.'

However, we have to admit that the move to privatize is tied to the move to deregulate and free-up global markets. To start to impose new restrictions (albeit for the protection of fundamental human rights) runs counter to the *Zeitgeist* for less law and more market 'freedom'. The ideology of privatization has captured the imagination of the public and of decision makers in government and opposition. The controversial approach taken by Robert Nozick in his 1974 book *Anarchy, State and Utopia* no longer seems to attract the sort of dismissive attitude he himself expected. The opening page of his book contains the following passage:

> 'Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their own good or protection.
>
> Despite the fact that it is only the coercive routes towards these goals that are excluded, while voluntary ones remain, many persons will reject our conclusions instantly, knowing that they don't *want* to believe anything so apparently callous towards the needs and suffering of others. I know that reaction; it was mine when I first began to consider such views.'

Alston (1997:442) has highlighted the fact that 'the means which are always assumed to be an indispensable part of the globalization process, have in fact acquired the status of values in and of themselves. Those means/values include, for example: privatization of as many functions as possible; deregulation, particularly of private power, at both national and international levels; reliance upon the free market as the most efficient and appropriate value-allocating mechanism; minimal government except in relation to law and order functions narrowly defined; and minimal international regulation except in relation to the 'new' international agenda items.' According to Alston the supreme value of respect for the free market has been introduced 'as an element which

is capable of trumping other values. Thus, even some human rights norms are increasingly subject to an assessment of their market friendliness in order to determine what, if any, weight will be accorded to them.... In at least some respects the burden of proof has been shifted - in order to be validated, a purported human right must justify its contribution to a broader, market-based "vision" of the good society.' (1997:442)

The World Bank's 1997 report, *The State in a Changing World*, shows that over the last century the size and scope of government have expanded enormously, and even today, State spending constitutes almost half of total income in the established industrial countries, and around a quarter in developing countries. (1997:2). However, following the collapse of the Soviet Union, 'government failure, including the failure of publicly owned firms, seemed everywhere glaringly evident. Governments began to adopt policies designed to reduce the scope of the state's intervention in the economy.' (1997:23) The report goes on to conclude that this 'overzealous rejection of government' has led in some cases to outright collapse of the State and that: 'State-dominated development has failed, but so will stateless development. Development without an effective state is impossible.' (1997:25). But the report takes the opportunity to reaffirm the advantages of liberalization and privatization. 'With economic liberalization, many areas of regulation have been recognized as counterproductive, and wisely abandoned. Yet in some areas the traditional rationales for regulation remain, and market liberalization and privatization have brought new regulatory issues to the fore. The challenge ... is not to abandon regulation altogether. Instead it is to find regulatory approaches in each country that match both its needs and its capabilities.' (1997:65) This ambivalent approach goes some way to sugaring the privatization pills that States were being asked to swallow. But fundamental questions remain: Can the economic logic, based on the search of efficiency, be reconciled with the social logic, based on the desire for equity? (Bourdieu 1998:3). What are the implications for the State of human rights protection of this redefinition of the role of the State?

The argument often heard is that States are powerless in the face of these changes. However, when the international and national economies do not provide equity to all persons, but result in increased poverty and income disparities, the human rights established and proclaimed by the international community are clearly violated, especially social and economic rights. It is a

question of seeing not only policy choices for governments, but also legal obligations to ensure respect for human rights. When considering the relation between global economic liberalization and 'state capacity' we really need to analyze, in each case, 'the nature of the state; the political coalitions supporting various attempts to increase participation in global markets; the extent to which certain elements of national economic policy have become the preserve of transnational actors; and how much room is left for political debate and relatively democratic control over decision making. This would provide concrete elements for judging the degree to which the economy is indeed breaking loose from social and political control.' (UNRISD 1997:8-9).

Project # 4: An examination of transitional arrangements for privatization and the possibility of using human rights impact assessments.

This suggested project takes as its starting point the idea that demands for privatization and deregulation will continue (sometimes with good reason); and that one opportunity for the State to ensure the protection of human rights in this context is through certain transitional arrangements. The *World Development Report* (1997:63) highlights the acceleration of Mexico's reforms through the work of a deregulation czar:

> In 1988 the president of Mexico appointed a "deregulation czar". Each month this official reported directly to the president and his economic council of ministers. Every business in Mexico, large or small, had equal access to the czar's office to complain about burdensome rules and regulations. When the office received a complaint, it was obliged to find out why the rule existed, how it interacted with other regulations, and whether it should continue in effect. The office operated under a strict timetable: if it did not act to maintain, revise, or abolish the disputed rule within forty-five days, the rule was annulled automatically.

So far it seems that little thought has been given to how to ensure that deregulation not only ensures maximum participation but also conformity with international human rights obligations. The Council's project could attempt to couple the worlds of deregulation and human rights monitoring. If it was felt that particular focus was needed, the project could concentrate on a few

sectors such as: the privatization of prisons (this topic is still the subject of a study in the UN Sub-Commission, Palley 1993), the regulation of private security services, and the deregulation and privatization of health and education.

Project # 5 An examination of the functioning of post-privatization regulatory boards

A second phenomenon in the context of privatization is the creation of regulatory boards to oversee various sectors. The fact remains that the State is not usually ready to divest itself of all control and wants to keep at least a light land on the tiller. Whether the government creates a regulatory board, an agency, or leaves supervision in the hands of a government department, this intermediate interface between the public and the private can become less accountable and transparent than any of the actors in either the public or the private spheres. Such boards may be the appropriate place to start to ensure that there is some form of accountability for human rights violations by the newly created private actors in the relevant sector. At the national level the privatized body may or may not be covered by the protections offered by the national Bill of Rights or Constitution. This will depend on the wording of the national Bill and the interpretation of the Bill by the national judges. (Clapham 1998). At the international level there is some room to believe that the international law of state responsibility is currently in a state of flux. There is no agreement on what constitutes an organ of the State, and whether the absence of internal law designating a body an organ of the State should prevent international law from determining that such a body is in fact an organ of the State. (ILC 1998:36). In the 1930s the German Government suggested to a preparatory committee for a codification conference that the principles of State responsibility could apply exceptionally to situations where the State authorizes private organizations to carry out certain sovereign rights. The example they gave at that time was the situation where a private railway company is permitted to maintain a police force.The International Law Commission cited this example in 1974 (ILC 1974:282), in the context of their own work on State responsibility, but in our age of privatized detention centres, prison transfers, airports, housing associations, and even water, the image now seems rather quaint. In any event this debate refers to how to directly fix the State with the international responsibility towards other States for the actions of such a private organization. But respect for human rights by privatized sectors or industries is very unlikely to be achieved through inter-state

claims under the current or evolving law of State responsibility. First, States are just not interested in bringing this sort of human rights claim unless it affects some vital national interest. Second, many of the human rights violations we are seeking to address would not reach the level of 'an internationally wrongful act' which is a condition for even considering the application of the law of State responsibility. Rather than concentrating on the law of State responsibility we need to look at how international human rights law can be made to work more effectively in this sphere by seeking new ways to apply this law to non-State actor or quasi-State actors.

We suggest that effective improvements in this area could be brought about through 'mainstreaming' human rights into the work of the regulatory bodies. Having already boldly suggested that all bodies are subject to certain international human rights obligations it seems clear to us that the regulatory bodies (at the interface between the State and the private sector) certainly have human rights obligations under the international law of human rights. In addition to finding ways to ensure that they report on their activities in the context of State reporting to human rights treaty bodies, a study could be made of the extent to which such boards are making efforts to ensure respect for internationally protected rights within their relevant sectors. Where a State is Party to a human rights treaty the State will have the obligation to inform the regulatory body of the relevant obligations for that body and to report on progress. It might be useful to restrict an initial study to one sector. Even within such a sectoral study one could further limit the scope of the research by concentrating on a few rights such as the right not to be discriminated against on grounds of sex, religion, class, language, race or other status. Even if one found that the private sector was already bound in national and international law to respect these rights, the issue would remain as to how to use the regulatory body to ensure respect for such rights across the private sector.

Research Project # 6 Examining the impact of privatization on respect for human rights in certain sectors.

This project would seek to look at the effect of privatization on the enjoyment of human rights. One might take a sector such as education and examine the implications. This would mean not

only looking at abuses which became harder to address due to the private nature of the perpetrator, it would also mean looking at the structural effects in society. For example, if education becomes rationed through a voucher or fee system, what have been the implications for the enjoyment of the right to education for the girl-child, where families have chosen to pay for boys to be educated, but not their girls. Such a research project would have to look not only at the different types of children enjoying education but also at the quality of the education itself. There will probably be cases where 'contracting out' the management of schools could result in 'the exceptional esprit de corps' found in Bolivia in the schools run by the NGO, Fe y Alegría, described by the World Development Report (1997:90). The point is not that privatization and respect for human rights are somehow incompatible, but rather that too little examination has been given to the values at the heart of the human rights message in the context of 'using competitive markets to improve delivery' of government services. (World Development Report 1997:87). The World Bank's Report (1997: 89) refers to the criticism by some analysts that the use of school vouchers in a context such as the former Soviet Union will 'exacerbate tensions in rapidly polarizing societies. The underlying concern is that, in the absence of national controls, school curriculums will become divisive and parochial, and an essential role of the state - that of ensuring social cohesion - will be undermined.'

III Fragmentation

Fragmentation is another way of describing new quests for identity, perhaps in some ways such quests can be linked to a sense of alienation in the face of the globalization of many sectors and markets. This new consciousness about the role of identity raises issues about the universal acceptance of the international human rights standards and procedures as well as again recasting the role of the nation-State as the building block of international human rights law. It has also enabled some states to again undermine the foundations of human rights law for their own purposes. By fostering national debates on the imperialism of the human rights message governments have been able to denude much human rights criticism of its normative qualities.

More and more internal armed conflicts are recognized as either being fueled by appeals to ethnic identity or even triggered by ethnic tension due to unequal access to resources and decision-making. The humanitarian crises which these conflicts generate leave whole segments of the population in danger. Fragmentation along ethnic lines sometimes results in governments denying the population at risk their rights and freedoms, and justifying this on the grounds that they are 'the other' or part of the insurgency problem. This has created a range of problems for humanitarian organizations such as the International Committee of the Red Cross and the UN High Commissioner for Refugees. Assistance becomes, if not actually strategic and political, perceived as partial and tactical. Notions of sovereignty are used and abused in such a way as to prevent these and other humanitarian organizations from fulfilling the humanitarian imperative of providing assistance to people in need. Some international lawyers, such as Francis Deng (1997) have suggested that sovereignty needs to be re-orientated. He suggests that we think about sovereignty in terms of the duty to cooperate with international organizations rather than the privilege of excluding the United Nations from sovereign territory.

We now look at three issues within the context of fragmentation

A. The construction and protection of group identity

National governments now sometimes face the difficult task of retaining and asserting enough sense of shared nationhood to be able to maintain their legitimacy while adjusting to a world in which the role of the State is perceived as less and less relevant. Religious, ethnic and cultural communities are in some cases challenging the hegemony of the State, especially its monopoly on law-making and its supposed role as sole protector of individual or group rights. (Das 1995, 1997:7)

The response of States has sometimes been to escalate enmities. Asma Jahangir, the Chair of the non-governmental Human Rights Commission in Pakistan tellingly made the point as the UN High Commissioner for Human Rights moved to Palais Wilson in Geneva in June 1998: 'I come from a threatened region where a state of conflict haunts the lives of millions. Armed conflicts, intolerance and poverty have long since robbed us of our peace of mind. Now, we face the greater threat of a nuclear race and possible confrontation. The would-be big powers are using deterrence as the justification for their newly acquired weapons of mass destruction. This age-old excuse has proved hollow. Peace and nuclear proliferation can not coexist. For these countries nuclear power is akin to grandeur. The greatness of a country is not and should not be measured by the size of its nuclear arsenal; but rather by its commitment to addressing the needs of its citizens and ensuring their well being and prosperity.'

Again it is the nation State which is at the heart of this fragmentation dynamic. As people start to stress their differences, encouraged by the emphasis on nationalism the State is forced to admit fragmentation or reassert reinvented nationalisms. Ignatieff (1998:51) has suggested that, extrapolating from Freud, we think of nationalism as a kind of narcissism: 'A nationalist takes the neutral facts about a people - their language, habitat, culture, tradition, and history - and turns these facts into a narrative, whose purpose is to illuminate the self-consciousness of a group, to enable them to think of themselves as a nation with a claim to self-determination. A nationalist, in other words, takes "minor differences" - indifferent in themselves - and transforms them into major differences. For this purpose, traditions are

invented, a glorious past is gilded and refurbished for public consumption, and a people who might not have thought of themselves as a people at all suddenly begin to dream of themselves as a nation.' On its own this sort of nationalism is actually part of the realization of cultural rights, or in some cases even the right to self-determination, which could find expression through Statehood. But these identities tend to built in contradistinction to others. The State should have the duty to provide protection for the non-discriminatory treatment of all and for protection for the vulnerable groups within the State. However, the State is no abstraction and is more realistically understood as the ruling group and therefore in many cases part of the problem rather than the saviour. (Okwudiba 1998).

Some analysts see the resurgence in ethnic identities as the mirror of the sorts of global changes described at the start of this paper. As economic markets, the exchange of knowledge, and international communication shrink the world, groups and individuals are said to feel the need to make their own space and reassert their differences. 'As cultures open up to knowledge and exchanges often on a world-wide scale, reaction is occurring with the strengthening of individual identities..... The resurgence of identities is a phenomenon concomitant with that of globalization. As in all aspects, it has brought a salutary affirmation of cultural identities, together with a tendency to exacerbation of ethnic/nationalist forces and discourse, with the dramatic consequence that we have seen in diverse parts of the world in recent years.' (Bengoa 1997:21). Whether or not the globalization dynamic can seen as the cause of increasing fragmentation and a recourse to ethnic nationalism and antagonism, it seems clear that there are significant challenges to the various State's perceived monopolies over certain cultural issues. The Shah Bano case is India has been used by Vena Das as an illustration of this phenomenon. The case (in which the Supreme Court had to decide whether the Criminal Procedure Code applied to Muslims so that Shah Bano could be awarded maintenance by her husband) raised the relationship between, on the one hand secular law, as formulated and implemented by institutions of State, and on the other the rights of religious minorities as well as the rights of women. 'In challenging the state as the only giver of values, the community may be seen from one point of view as claiming authority over its private life.'(1997:19) But for Das: 'the real issue in this case is not secularism versus communalism or national integration versus disruption. It is rather a question of whether powers of the state should be extended to encroach into the sphere of the

family.' (1997:22) Human rights law has to grapple with hard questions in this context: what are the limits of State intervention? Should the state intervene in order to correct injustices against women in institutional structures such as the family? 'We know the family to be a site of conflict. So, when a community claims that the right to its own culture includes the right to legally govern its members in the sphere of the family, where do women or children who may be oppressed by the pathologies of the family and the community go for redress?' (Das 1997:23)

Project # 7 Examining the role of the 'community' as human rights protector and human rights violator.

Das asks us to consider how a community portrays its own culture and how such constructions are formed. For her the development of the rights of groups and individuals depends on the extent to which individuals can achieve their voice and experiment with their collective traditions 'both in the realm of the state and in the public culture of civil society.' (1997:36) By transcending the divide between the private sphere of life and public sphere of dominant culture, we may redefine how the culture of the community is seen and understood. The Council could bring together a group of scholars to explore some of the tensions between cultural rights and the protection of individual dignity. By reexamining the accepted definition of the culture in particular contexts one might find ways to ensure the sort of participation in collective cultural life which resolves rather than highlights differences within communities. Such a project would obviously have an anthropological bias rather than a legal one, but could take us beyond the assumptions that community cultural rights, women's rights, and the interests of the State are destined to remain in a state of perpetual antagonism.

B. Resorting to responsibilities and the retreat from universality

As Yash Ghai (1997) has shown, the assertion of Asian values and the new emphasis on duties can hardly be said to undermine the human rights framework or demand a reorientation of human rights law so that it re-emphasizes responsibilities over rights. The relevance of responsibilities and duties does not reinforce the argument put forward by Singapore and Malaysia that rights can be considered divisive, egoistic, anti-communitarian and somehow 'Western'. For Ghai (1997:16) we are dealing with two essentially different regimes. 'With rights, we deal essentially

with the State; with obligations, we deal with fellow human beings and the society they constitute.'

However there remains considerable interest on the part of some governments and others to 'complete' the human rights discourse through a new enumeration of human responsibilities. We should refer briefly to the latest concerted attempt to reinforce the notion of human responsibilities in this context. On the 1st of September 1997 the InterAction Council launched a 'Universal Declaration of Human Responsibilities.' The InterAction Council under the Chairmanship of Helmut Schmidt, has achieved endorsement from a number of former heads of State or government for the text and hopes to have the document adopted at the 1998 regular session of the UN General Assembly (at the time of the commemoration of the 50th anniversary of the adoption and proclamation of the Universal Declaration of Human Rights). Instead of setting out rights, duties, rules, and principles which would be binding in international law, the drafters have sought to enumerate 'global ethical standards.' They assert that the Universal Declaration of Human Rights reflects the philosophical and cultural background of the victorious Western powers at the end of the Second World War. The new Declaration of Human Responsibilities is supposed to rescue notions of responsibility and community which are said to have prevailed in the East. But the emphasis on responsibility and community does not mirror the approach taken to international human rights law - whereby the State owes the individual certain rights which are to be respected within the jurisdiction of the State. The new notions contained in the InterAction document stress transnational solidarity and the injection of an ethical dimension into international relations.

> The InterAction Council believes that globalization of the world economy is matched by globalization of the world's problems. Because global interdependence demands that we must live with each other in harmon[y], human beings need rules and constraints. Ethics are the minimum standards that make a collective life possible. Without ethics and self-restraint that are their result, humankind would revert to survival of the fittest. The world is in need of an ethical base on which to stand.[8]

[8] Report on the Conclusions and Recommendations by a High level Group on A Universal Declaration of Human

Responsibilities, 20-22 April 1997 Vienna Austria at p. 36.

In drafting the Declaration the InterAction Council sought to represent the major religions of the world. An earlier draft Article 3 states: 'No human being, no social class, group, or corporation, no state, no army or police stands above good and evil; all are subject to moral judgement. Everyone should strive to do good and avoid evil at all times.' The final draft has replaced the idea of moral judgement with a more secular appeal to ethical standards.[9] So that the phrase in the middle of the article now reads 'all are subject to ethical standards'. There is a further reminder in Article 13 that: 'No politicians, public servants, business leaders, scientists, writers or artists are exempt from general ethical standards, nor are physicians, lawyers and other professionals who have special duties to clients. Professional and other codes of ethics should reflect the priority of general standards such as those of truthfulness and fairness.'

Project # 8 An examination of the appeal of ethics for the implementation of human rights protection

Rather than undertaking a review of the legal implications of any future Declaration of Human Responsibilities we propose a project which would explore whether the human rights regime and the parallel regime of human responsibilities could benefit from greater interaction. This means bringing together some of the proponents of a more communitarian approach based on the articulation of specific responsibilities and ethical duties with those who have some reservations about the wisdom of associating ethical non-binding codes with the world of enforceable human rights obligations.

C. Extreme fragmentation: failed and collapsing states

An additional debate at the international level concerns the attempt to adapt the human rights discourse and machinery to cover the acts of terrorists and transnational criminals. International human rights initiatives are now challenged by States and others who ask why this or that human rights programme, or human rights organization is not tackling the human rights violators that

[9] Representing a shift between what Daniel Warner has called 'ideal morality or just morality' to 'social morality or ethics' 'An Ethics of Human Rights: Two Interrelated Misunderstandings' *Denver Journal of International law and Policy* (1996) 395-415 at 399.

are undermining both human rights and the international order: terrorists, drug traffickers and transnational criminal networks. (Schmid 1997) These violators with a special emphasis 'on those engaged in organizing prostitution and trafficking in women and children' are now newly labeled as 'uncivil elements' and 'uncivil society' by UN Secretary-General Kofi Annan in his 1997 reform programme (paras 3 and 209). The UN (secretariat and political bodies) has started issuing more and more statements condemning violations committed by terrorists and adopting texts to address the problem. The latest text adopted by the UN Commission on Human Rights in 1998 expresses serious concern at 'the gross violations of human rights perpetrated by terrorist groups.' This reiterates the language of UN General Assembly resolutions. Other bodies such as the European Parliament have stated unambiguously that acts of terrorism violate numerous fundamental rights of the individual.

In some cases there is a fear that governments are prepared to use the terrorism issue to evade their responsibilities with regard to the protection for genuine refugees and asylum seekers.[10] There is a fear that incorporating action against terrorism into the human rights programme will dilute attention on the responsibility of States and allow States to distract attention by invoking the violations committed by terrorists as a priority issue. Non-governmental organizations seeking to take on governments over these issues are tarred with the 'terrorist' brush or stripped of their status as members of 'civil society'. This issue is set to be studied in detail by Ms Koufa of the UN Sub-Commission. Her working paper considered by the 1998 Commission on Human Rights hints that we are heading for a 'modification of the traditional position that private individuals or groups are not capable of violating human rights.'[11] Human rights law and procedures look likely to attach to terrorists and terrorist acts. This development would fit within the general thrust of this paper which argues that international human rights law is already binding to some extent on non-state actors. However, the admission by governments and international organizations that terrorists violate human rights has further implications for how we attempt to prevent, investigate and punish human rights violations committed in times of armed conflict, and more specifically in fragmenting, disintegrating, or

[10] See the 1995 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, GA RES 51/210 Annex.

[11] UN Doc. E/CN.4/Sub.2/1997/28, 26 June 1997, para. 15.

collapsing States. The issue for human rights protection in these extreme situations is threefold: first, how to prevent a state and its institutions and structures from collapsing; second, how to ensure human rights protection within such "failed states"; last how to 'restore' State institutions so that the sort of structures are put in place which are sustainable, respect human rights, and operate according to the rule of law.

The forces of nationalism which have been unleashed by the end of the cold war, and the resurgence of a search for identity, are sometimes at the heart of inter-State tension and sometimes operating outside the inter-state framework. Humanitarian law has adapted in the last few decades to some extent to encompass the behaviour of armed opposition groups and national liberation armies, but the framework for ensuring compliance (the International Committee of the Red Cross, the International Criminal Tribunals, training programmes in military academies) is not yet well suited to really ensuring that armed groups have an incentive to comply with principles of humanitarian law. States are still often unwilling to admit the applicability of the Geneva Conventions for fear of giving 'terrorists' a special status and the kudos of prisoner of war status. States use the fact of fragmentation and the nature of the crimes being committed to introduce anti-terrorist measures which clearly breach their international human rights obligations. Yet the sense of chaos and catastrophe is actually used by the government to successfully garner inter-state support for measures which often undermine some of the core human rights principles.

Turning to extreme cases of fragmentation we should look at some of the problems encountered by the International Committee of the Red Cross (ICRC) in seeking to promote respect for international humanitarian law. The ICRC have held a number or meetings to discuss the latest challenges. One recent background document details the essential characteristics of what the ICRC calls 'anarchic' conflicts. 'The disintegration of the organs of central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population; the presence of many armed factions; divided control of the national territory; the breakdown of the chain of command within the various factions and their militias.' ICRC (1998:4) The problems for the promotion of international humanitarian law are clear: 'The extreme individualization of the factions has made contacts and negotiations very uncertain.

Every soldier - adult or child - virtually becomes a spokesperson, or in any case someone with whom to negotiate.' (ICRC 1998:5). Furthermore the 'concept of a "war ethic" becomes a delusion', it becomes necessary to reach the population at large rather than members of a military hierarchy, and the loose structure of the factions 'makes it more and more difficult, if not impossible, to distinguish between combatants and civilians.' ICRC (1998:6). These contemporary aspects of armed conflict and internal violence threaten to undermine the whole humanitarian logic. Ignatieff (1998:157) spent time in Afghanistan and was dismayed to see that humanitarian notions seem suddenly quaint when confronted with today's realities of diminished State involvement in the business of war.

> 'The Red Cross acknowledges that a warrior's honor is a slender hope, but it may be all there is to separate war from savagery. And a corollary hope is that men can be trained to fight with honor. Armies train people to kill, but they also teach restraint and discipline; they channel aggression into ritual. War is redeemed only by moral rules, and, as Holleufer says, "the Red Cross is the guardian of the rules". The problem, he concedes, is that more and more warriors no longer play by the rules. Modern technology has steadily increased the distance, both moral and geographic, between the warrior and his prey. What sense of honor can possibly link the technician who targets the Tomahawk cruise missile and the civilians of Baghdad a thousand miles away? At the other end of the scale, the global market in small arms is breaking up the modern state's monopoly on the means of violence. The disintegrating states of the world are literally flooded with junk weapons, old Kalashnikovs for the most part, which can be bought in the marketplace for the cost of a loaf of bread. With weapons this cheap, violence becomes impossible for the state to contain. The history of war has been about the state's confiscating violence from society and vesting it in a specialized warrior caste. But if the state loses control of war, as it has in so many of the world's red zones of insurgency and rebellion - if war becomes the preserve of private armies, gangsters, and paramilitaries - then the distinction between battle and barbarism may disappear.'

In such situations where the state is collapsing or has already collapsed, it is clearly impractical to cling to the idea that human rights law is only relevant when one has a State

structure to address. First, it is not always possible to identify precisely who is the de facto government (as opposed to the de jure one which might still represent the state in international fora). Effective control of governmental power may change depending on the ebb and flow of the war. Second, there are situations where a group may exercise effective control over a territory and its population and is indeed in position to apply international humanitarian and human rights law. Whether or not that entity is actually a government or not, is not only an unnecessary question from our point of view, but also may not actually be answerable in law. This sort of indeterminacy is not easily admitted by law (or by lawyers) but has to be faced if we are serious about preventing and ending human rights violations in times of collapsing States. Of course the lack of government will make it harder to carry out systematic work on certain issues, but some local programmes can be launched even in a situation as collapsed as Somalia (Rishmawi 1998).

There are of course situations where the so called non-State actor (or non-governmental entity) themselves have agreed agree to respect or follow certain international human rights and humanitarian norms, principles or conventions. But this fact alone can not lead to the conclusion that: in the absence of such consent or agreement the actor is not bound to abide by basic human rights law or humanitarian law. Human rights and humanitarian law is not now something one can opt in or out of. The sorts of rights at issue in this context are binding customary international law and not really dependent on signatures, ratifications or reservations. Several projects are currently underway to clarify the exact scope of these customary rules. We will mention three. Firstly, Meron (1983, 1987) has drawn attention to the legal problems associated with the protection of human rights in times of armed conflict and proposed a new Declaration to fill a number of gaps. The Turku Declaration on Minimum Humanitarian Standards was adopted by a group of experts in 1990 and slightly modified in 1994. (Eide, Rosas, Meron 1995). Now the topic has been retitled as concerning the 'fundamental standards of humanity' in the light of a declaration submitted to the UN Sub-Commission in 1991, and is progressing through the inter-governmental system and attracting comments from States and UN bodies[12], as well as from experts and NGOs (Svensson-McCarthy 1997). Secondly, the International Committee of the Red Cross has launched its own research in to the content of customary international humanitarian law. This independent study will be completed in the coming years and will

[12] UN Doc. E/CN.4/1998/87/Add1, 12 January 1998.

represent an important restatement of customary international humanitarian law. Thirdly, the June 1998 Rome Conference on Establishment of an International Criminal Court will most likely define which war crimes will be justiciable at the international level, and will further define certain crimes against humanity. It will therefore confirm that there is potential international criminal jurisdiction over individuals (whether acting on behalf of a State, a non-State actor, or indeed simply on their own) for certain crimes against humanity involving systematic attacks against the civilian population involving murder, extermination, enslavement, deportation, torture, rape or other sexual abuse, enforced disappearance, and other inhumane acts.

Of these three developments it seems most appropriate to concentrate here on the fundamental standards of humanity. The analytical report of the UN Secretary-General on this topic starts by outlining various reasons why fundamental standards of humanity need to be identified. The report asserts that internal violence within States has posed the greatest threat to human dignity and freedom, yet, according to the report 'there are disagreements and doubts regarding the applicable norms of both human rights and humanitarian law.' Not only is there disagreement about the point at which international humanitarian law becomes applicable, but human rights law, apart from only providing the bare minimum of protection, is inadequate in three further respects. First, the report reminds us that 'until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situations of internal violence it is also important to address the behaviour of non-State armed groups.' Second, the report states that 'it is also argued that some human rights norms lack the specificity required to be effective in situations of violent armed conflict.' Third, the report addresses the concern that Governments can derogate from 'certain obligations under human rights law in these situations.' The report has covered in detail some of the legal and political issues in these contexts and has concluded by suggesting, among other things, that there should be an examination of 'how relevant provisions of human rights law could be made more specific so as to ensure respect for them in situations of internal violence, and whether this could be accomplished through a statement of fundamental standards of humanity.'[13]

[13] Secretary-General report on minimum humanitarian standards (E / CN.4 / 1998 / 87: 27).

Project # 9 Defining the necessary specificity to ensure better protection during periods of internal violence or collapsing States

We propose that the Council concentrate on attempting the definition and analysis of some principles or standards which might be eventually included either in a future Declaration of Fundamental Standards of Humanity, or in training programmes for security forces, or even non-State armed groups, to ensure the best possible protection of human rights. We suggest that the problems of applicability of the various legal regimes (the first two reasons given for the inadequacy of the legal protection in this context) are not as susceptible to applied policy research, as the question of defining which norms ought to be applicable to all sides to an armed conflict. Again we would suggest that once one accepts that human rights law can attach to non-State actors, and we have already rehearsed some of the reasons above, one can start to do the hard work of adapting some of the norms so as to make sense in the private sphere.

Of course the existing Declaration is already addressed to non-State actors, and new Declarations, such as the Principles on the Internally Displaced (elaborated by Deng as the UN Special Representative on the Internally Displaced) are also deliberately targeted at non-State actors including international organizations. What the Council project could seek to achieve would be a sort of commentary to those standards and principles that are applicable in times of internal violence and seek to explain how they have been applied in practice. That human rights law is quite inadequate to deal with killings in the context of internal violence was recently illustrated by the Inter-American Commission on Human Rights when they chose to apply directly rules of international humanitarian law to an attack by members of the Argentine armed forces on the La Tablada barracks which had been entered by members of the Movimento Todos por la Patria. 'Although their purpose is to prevent warfare, none of these human rights instruments was designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare.'[14] It is this area which presents some of the greatest challenges to the further development of human rights law and protection.

[14] Report No. 55/97, Case No. 11.137, Argentina, report approved by the Commission 30 October 1997, OEA/Ser/L/v/II.97, Doc 38, para 158.

IV. Feminization

More than any of the other three topics this issue permeates all the above dynamics. The series of global conferences held in the first half of the 1990s has activated an impressive network of women's groups that has succeeded in making women's rights a global issue. 'Notwithstanding efforts at the non-discriminatory application of human rights to all without distinction, it has been increasingly recognized that the vision of human rights and the mechanisms that exist to concretize this vision, although supposedly available to women and men on an equal basis, have profited women less than men. As a result, significant efforts have been applied to redefine the meaning of human rights to encompass the specific experiences of women at all stages of their lives'[15]

As the human rights movement has become increasingly feminized, gender-based considerations are becoming integrated in the domestic and international human rights agenda. The 1995 Beijing Declaration and Platform of Action refers to this incorporation of a gender perspective into all human rights activities as mainstreaming women's rights, and it establishes that governments have the primary responsibility for implementing the Platform of Action. However, it also allocates responsibility for implementation to other actors, including the private sector and multilateral financial institutions and calls the integration of a gender perspective into all policies and structural adjustment programmes.[16] All these changes are due to the success of the women's movement in mobilizing opinion, inside and outside government. Decision-makers have been forced to recognize that the gender perspective has been ignored for too long and to do

[15] Report of the Secretary-General (E / CN.4 / 1998 / 22 - E / CN. 6 / 1998 / 11 : 4).

[16] Report of the Fourth World Conference on Women (1995: para 293).

something about it.

The three previous sections (on the impact of globalization, privatization and fragmentation on the protection of human rights) have addressed the question of human rights with a few specific references to women's human rights. However, for the development of these suggested projects a gender-based approach has to properly inform the research, analysis and conclusions. Firstly, the 'feminization' of poverty is a now becoming more and more serious in most of the countries of the world. A human rights agenda that attaches importance to violations of human rights in the private sphere has to start to address the fundamental inequality it finds here. More women than men are found in the poorest sections of the population, and, at the same time, greater demands are made on women in a 'flexible' and deregulated labour market while they are paid less. While poverty is affecting households as a whole, because of the gender division of labour and responsibilities, women bear a disproportionate burden, the situation being even worse for women in rural areas. As the gender-related development index and the gender empowerment measure have shown, the achievements of States with regard to human development - that is, whether people lead long and healthy lives, are educated and knowledgeable, and enjoy a decent standard of living - have to be re-evaluated when inequality in achievement between women and men is taken into account.[17] 'An important conclusion of the Human Development Report, 1997 is that gender inequality is strongly associated with human poverty, but not always associated with income poverty. In other words, even when a country is poor in terms of income poverty, it can still achieve a relative level of gender equality in basic indicators of human development. Progress in gender equality can be achieved at different income levels and stages of development.'[18]

[17] Human Development Report (1997: 41, 41, 149-151, 152-154).

[18] Report of the Secretary-General (E / CN.4 / 1998 / 22 - E / CN. 6 / 1998 / 11 : 4).

Secondly, when we consider the question of discrimination within the national economic and social spheres we have seen that pressures to adapt to the new economic models of minimal public spending have meant that states have cut back on education and health care facilities paid for out of the public purse. This in turn has meant that families have had to make choices about which children they can afford to educate or insure for privatized health care. As mentioned by Philip Alston in the Cairo meeting of the International Council on Human Rights Policy, there is a disproportionate disadvantage for women and the girl-child as tradition dictates preference for boys. There is here a double privatization. The dynamic of privatizing state functions has led to a new set of private actors (families) as violators of human rights due to the choices they are now forced to take. As with all the other examples touched on, this represents a new challenge for human rights lawyers as they grapple with new forms of accountability and human rights education. Although the use of private police or security forces is not really a global phenomenon, the possibility serves to remind us of the fact that international human rights law demands that the State not only refrains from disproportionate violence through its agents, but also prevents and investigates violence by private individuals inflicted on others. (Shelton 1990, Clapham 1993, Cook 1993, Sullivan 1995).

The issue of violence against women in the home is clearly part of international human rights law and the State has legal obligations to prevent, prosecute, punish, and protect in this domestic/private sphere. But the questions facing human rights organizations are no longer one concerning the need to fix a legal duty on the State, but rather the failure of the State to take rights in this sphere seriously. 'A police chief in Rio de Janeiro told Americas Watch that to her knowledge, of more than 2,000 battery and sexual assault cases registered at the station in 1990, not a single one had ended in punishment of the accused.' (HRW 1991:5). Should policing become even more orientated to ensuring a minimal State of law and order, rather than an a State function with multiple responsibilities within society, it seems likely that the home may remain assimilated with the sphere of competitive commerce - a zone which is better left unregulated and unpoliced. the familiar mantra that there must be 'no interference in domestic affairs' often seems to have been absorbed at the national level as some sort of excuse for inaction. To generate a greater State of obligation to deal with violence in the private sphere seems to go against the grain. But that is precisely what women's human rights groups are suggesting, and

this is precisely what the current state of international human rights law demands.

Thirdly, violence occurring during war and armed conflict situations in some ways represents the extension of violence against women which occurs on a daily basis. (Sajor 1998:357). Women's human rights advocates have managed to highlight the ways in which women have been targeted for rape and sexual abuse in recent armed conflicts and have made a serious of suggestions for tackling the issue. One could cite the success in getting the issue of rape in times of internal and international armed conflict to be treated as an international crime. In the cases of the former Yugoslavia and Rwanda this has resulted in international trials. However, these advances are creating their own tensions within the human rights movement. Strict adherence to traditional rules of evidence and rules against anonymous witnesses are seen as undermining the chances of pursuing the perpetrators of rape and other sexual crimes. Current understanding of international human rights law to ensure fair trials may be seen as the obstacle to accountability and justice for the victims of rape. The proposed International Criminal Court has now to confront these issues. These are practical rather than theoretical issues, as rape is increasingly recognized as a weapon of war and oppression in today's world, and because rape is likely to figure as an element in the charges brought against future defendants who come before the International Criminal Court.

In situations of armed conflict not only are societies fragmented, but people are set against each other in a cycle of violence where civilians, and women and children in particular, are often the primary targets. The fact that most refugees are women is fairly well known but new issues of claims for refugee status because of sexual oppression are taxing national and international lawyers around the world. Women and girl-children who claim asylum due to fear of a general level of violence against women are still unlikely to receive refugee status. Refugee law requires a degree of individual persecution. Women who flee internal armed conflict for fear of being raped remain unprotected for the most part by refugee law.

We have stressed the importance of integrating the gender dimension into the proposed projects. And this remains our main recommendation in this chapter. However, it seems worth also very briefly outlining one possible project under this chapter heading.

Project # 10 An examination of the effect on women's human rights of the operation of Free Trade Zones.

Free Trade Zones (FTZs) continue to be developed by host countries as areas with little or no social regulation or respect for the right to form trade unions or other associations. In fact States often advertise abroad the fact that no unions are allowed in such areas and redefine the area so that it exists in a sort of legal limbo where constitutional and other rights do not apply. The idea is to achieve a comparative advantage by driving down wages and attracting transnational corporations that are offered tax breaks and reduced customs duties. 'The workforce is mostly composed of unmarried women between the ages of seventeen and twenty-three. In Mexican FTZs, these women account for about 50 per cent of the workforce. They are the preferred workers, as their wages tend to be lower (often less than $1 per day), and they are considered better suited to repetitive tasks that require nimble fingers.' (Goldsmith 1996: 268)

The lack of environmental control in some cases has led to horrific violations of human rights. 'In March 1993, twenty seven Brownsville families filed a lawsuit against eighty-eight different *maquillas* in Matamoros [Mexico]. They claimed that an airborne cocktail of solvents, acids, and heavy metals, blown over the Rio Grande by prevailing winds, was responsible for the high incidence of children with spina bifida and anencephaly. Among those accused were companies twinned with such international household names as General Motors, Union Carbide, Fisher Price, and Zenith Electronics. All of them deny responsibility. Also in Matamoros, social workers identified 110 children who shared certain deformity symptoms: mongoloid features and a range of physical and mental defects. The worst-affected boys have only one testicle, and the girls have only partially developed vaginas. All seventy-six mothers had worked while pregnant at Mallory Capacitors, a *maquilla* that produces electronic components. Workers there, almost entirely young women, said they had handled highly toxic polychlorinated biphenyls without proper safety equipment or clothing.' (Goldsmith 1996:269)

The research project could examine ways to hold both the host State and the relevant transnationals accountable for the various human rights violations being committed in the Free

Trade Zones. Starting from the point that human rights are truly universal and can not be excluded from certain Zones through legal deregulation, there may be recommendations that could be made in order to get better protection for women's rights in this context.

Concluding remarks

By grouping some of our thoughts around these four forces we have sought to link the Council to some of the dynamics currently changing the world. Instead of seeing sterile distinctions, such as the difference between economic and social rights on the one hand and civil and political rights on the other, we want to ensure that the Council's output can not only contribute to the ongoing discussion over the future role of the State, but also find ways to hold non-State actors accountable. We have suggested that even if the State is seen to be shrinking, its relevance for the future protection of human rights remains crucial. But we also see great scope for a radical reappraisal of how we think about international human rights law. We suggest that international human rights law already applies generally in the private sphere and more particularly to non-State actors. The challenge now is developing a workable approach to holding everyone accountable for violations of human rights without neglecting to nurture the essential role of the State. We are not predicting the withering away of the State but rather the need to contribute to a world wide response to some of the profound changes affecting the lives of billions around the globe. We end by recalling a passage, written one hundred and fifty years ago, which seems to encapsulate some of the challenges and opportunities we have tried to allude to in this agenda for the International Council.

> All old-established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries, whose introduction becomes a life and death question for all civilized nations, by industries that no longer work up indigenous raw material, but raw material drawn from the remotest zones; industries whose products are consumed, not only at home, but in every quarter of the globe. In place of the old wants, satisfied by the productions of the country, we find new wants, requiring for their satisfaction the products of distant lands and climes. In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations. And as in material, so in intellectual production. The intellectual creations of individual nations become common property. National one-sidedness and narrow-mindedness become more and more impossible, and from the numerous national and local literatures, there arises a world literature. (Marx and Engels, 1848).

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