ERROL P. MENDES

GLOBAL GOVERNANCE, HUMAN RIGHTS AND INTERNATIONAL LAW

COMBATING THE TRAGIC FLAW

ROUTLEDGE

Global Governance, Human Rights and International Law

This book offers a stimulating introduction to the links between areas of global governance, human rights, the global economy and international law. By drawing on a range of diverse subject areas, Errol P. Mendes argues that the foundations of global governance, human rights and international law are undermined by a conflict or 'tragic flaw', where insistence on absolute conceptions of state sovereignty are pitted against universally accepted principles of justice and human rights resulting in destructive self-interest for both the state and the global community. The book explores how human rights and international law are applied in some of the critical institutions of global governance and in the operations of the global private sector, and how states, institutions and global civil society struggle to fight this 'tragic flaw'.

The book is brought up to date by considering developments in the role of the IMF, the World Bank and bilateral trade and investment treaties, in the probable failure of the Doha Round of WTO negotiations, the legacy of the 2008 financial crisis, the role of the International Criminal Court and the evolving 'responsibility to protect' doctrine in international peace and security crises in the Middle East, Central and West Africa and other regions of the world. With its intensely interdisciplinary approach, this book motivates new thinking in the realm of global governance and international law, and promotes the development of new strategies for negotiating between conflicting leadership and organisational values within global institutions.

The book will be of great interest and use to students and researchers of public international law, international relations and political science, business and human rights, global governance and international trade and economic law.

Errol P. Mendes is a lawyer, author and law professor at the University of Ottawa and has been an adviser to governments, civil society groups, corporations and the United Nations in the areas of international law, human rights and global governance. He is the author and/or editor of eleven books dealing with subjects as diverse as global governance, international human rights labour standards, terrorism, the International Criminal Court and the Canadian Charter of Rights and Freedoms.

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However, given the subject matter of this book, I also want to acknowledge and dedicate this book to all the individual champions, civil society groups, governments and international organisations that understand the need to persevere in the struggle for human rights and dignity in the institutions of global governance and in the global private sector, even when the odds are against them, because they believe in the 'better angels' of humankind. This is especially critical at the time of handing in the final manuscript of the book on 21 August 2013 when the world was horrified by the scenes of men, women and scores of children dying from a chemical weapons attack in a suburb of Damascus which the US alleges was carried out by the Syrian Government. Military action was threatened by the US, Britain and France but withdrawn when it became clear that public and legislative sentiment was against it. Instead, with the involvement of Russia, a framework agreement was developed with the US to assist Syria in destroying its chemical weapons. It remains to be seen whether even this will be accomplished. Yet the atrocities against civilians continued with conventional weapons even though they have accounted for over 98 per cent of the civilian deaths. It will need the courage, imagination and persistence of all of humanity's 'better angels' to come to the effective and permanent rescue of the suffering civilians in Syria.

Finally, a personal dedication to my late father and mother who devoted their lives to their children in the hope that they could contribute to a better world.

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Introduction

The goal of this work is not to produce a technical and doctrinal text dealing with key issues of global governance, human rights and international law. The goal is to introduce a wider perspective on these subjects, which not only deals with the traditional foundations of international law, human rights and governance but also infuses the traditional and doctrinal approach with a historical and present-day critique. Underlying this critique is a metaphorical and an adapted philosophical thesis. This introduction serves to initiate the reader into these metaphorical and adapted philosophical themes. The substantive and historical critique of global governance, human rights and international law form the content of the individual chapters that follow.

The underlying metaphorical theme of this work is the ancient Greek and Shakespearian concept of the tragic flaw, which I will assert as a recurrent theme in global governance. I combine the concept of the tragic flaw with Hegel's dialectical methodology as it may be applied to the modern evolution of the institutions of global governance and, in particular, sovereignty as the fundamental principle in international law.

The metaphor of the tragic flaw that will be used in all of the following chapters of the book is an adaptation from ancient Greek and Shakespearean tragedy. Shakespeare,[1] adapting the theme from the ancient Greek tragedians,[2] used the metaphor in his timeless tragedies to show how a single character flaw, such as overwhelming pride, jealously, greed or ambition can undermine and potentially destroy any protagonist, from the highest to the lowest in society.

This work uses the same metaphor, but adapts it to demonstrate how conflicting or opposing leadership, national and organisational values within global institutions and enterprises can ultimately threaten their legitimacy and sometimes their very existence. In the context of global governance, human rights and international law, the tragic flaw is most often triggered when universal principles of justice and norms of human rights behind the key aspects of global human governance clash with unremitting parochialism on applications of absolute notions of state sovereignty, ideological or national aggrandisement, destructive self-interests, hypocrisy and outright deception. These conflicts can trigger questions about the legitimacy and durability of the most important initiatives in international law, human rights and global governance.

The following chapters will describe key examples of this adaptation of the tragic flaw: Chapter 1 surveys the historical grounding of the institutions of global governance in human rights, peace and security and subsequent conflicts with that grounding; Chapter 2 examines the presence or absence of human rights and fundamental principles of justice in the working of the rules and institutions of global trade and financial stability; and finally, Chapter 3 moves from discussion of the multilateral institutions to explore the conflicts over human rights and the environment that arise from the absence of international norms over the increasingly powerful multinational enterprises. The text concludes with a proposal to start addressing the tragic flaw in global governance by infusing the institutions of global governance, human rights and international law with the imperatives of global pluralism grounded in emerging universally accepted principles.

This text also borrows from Hegel's dialectic methodology, using the lessons of history to describe how some of the actors beyond or behind the institutions of global governance and international law perpetually seek new avenues to combat the tragic flaw and progress humanity to higher universal principles of justice and human rights. However, as in the case of the historical dialectic asserted by Hegel, this progress is not linear and there will be many setbacks and attacks on that progress. Therefore, this text promotes the view that history is a process of continuous emancipation from the tragic flaws that burden humanity.

While there is some agreement with the Hegelian view that human history has been shown to be a 'slaughter-bench' through the ages, the discussion in this book also aims to show that the grave suffering and injustice inflicted on many parts of the human family has also motivated individuals, groups, movements and the international community to work towards overcoming the tragic flaw. This thesis is slightly different from that argued by Hegel, who predicted the ultimate end of his historical dialectic as the rational self-determination of human beings and society.[3]

While this text is not in disagreement with Hegel's teleological perspective of history, this text will assert that the desire to progress out of the tragic flaws in global governance, human rights and international law is founded on a catalyst that is more universally acceptable. That catalyst, which will be expanded on throughout the following chapters and in the concluding discussion at the end of the text, is the concept of a globally pluralist conception of human dignity that incorporates the necessity for universal principles of justice and human rights.

Since the Second World War, the concept of human dignity has been recognised as the bedrock of both universal human rights and peace and security in the international community. Starting with the 1945 UN Charter, in the aftermath of the horrors of the Axis Powers' attempt to crush human dignity across the world, the international community in the preamble to the UN Charter asserted its 'faith . . . in the dignity and worth of the human person'.

This was followed by the Universal Declaration of Human Rights, which in its first Article stated: 'all human beings are born free and equal in dignity and rights'. The foundation of all the rights stated in the Declaration is the concept of human dignity. While the Declaration was passed unanimously by 48 nations, with no

negative votes and only eight abstentions in 1948, it was reaffirmed in 1993 unanimously by 171 nations with no abstentions at the Vienna World Conference on Human Rights. In addition, the two widely ratified UN treaties that gave legal support to the Declaration, namely the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in 1996 also asserted that all human rights 'derive from the inherent dignity of the human person'.

The idea that human rights – and I would venture to suggest the human quest for universal principles of justice – are derived from the moral value of human dignity is sufficient to rebut the claim by some that the most fundamental human rights are a neo-imperialist imposition on the rest of the world by Western cultural, religious and political traditions. It cannot be denied that many of the great non-Western civilisations of the world, from Asia, the Middle East, Africa and Eurasia, through many millennia have emphasised hierarchical and duty-based moral, social and political values and philosophies over human dignity or rights.

However, it is often forgotten that, from the earliest periods in Western civilisation, reaching its zenith in the long medieval period, there was also a profound emphasis on hierarchy, duty, class and religion-based moral, social and political values and philosophies, without respect for human dignity and rights. As Jack Donnelly has detailed, modernity has profoundly affected all cultures and societies, and with modernity the inherent dignity of the person has become a profound global value:

> Modernity, in other words, created new kinds of men and women, new families, and new communities, in need of new ways of organizing their relations with society, the economy and the state. Ripped out of traditional social, political, legal and economic relations and practices they needed new forms of life to provide security and a bit of dignity. Various alternatives were tried. Initially, monarchy, religion, and identification with new local and national communities were leading choices. Gradually, however, natural or human rights became the preferred mechanism for protecting new notions of dignity. . . . That this happened first in the West had nothing to do with any special cultural predisposition to human rights. Rather, it arose from the fact that the dangers and indignities of modern economic, political and social life happened to be first experienced there. . . . But just as Westerners remained Western after they chose human dignity over their traditional commitment to status-based conceptions of honor and dignity and chose human rights over traditional inegalitarian hierarchical politics, so Indians and Hindus who have chosen human rights remain Indian or Hindu; Confucians who in South Korea and Hong Kong have chosen human rights remain Confucian and Korean or Chinese; and although we did not consider the case here, Muslims across the world who have chosen human rights and democracy – perhaps most prominently in Turkey and Indonesia – remain Muslim. Ideas of human dignity and practices of human rights have made, for example, modern Indians and modern Muslims, not Westernized residents of Asia. Their

> culture is not the same as it was several generations ago. But neither is Western culture. . . .[4]

It is significant to note that Donnelly made these conclusions before the Arab Spring of 2012, when the rallying cry emanating from the Muslim-dominated countries of Tunisia, Egypt, Libya, Yemen, Bahrain and Syria called for the overthrow of dictatorship and the recognition of human dignity in their lives and in their societies. This is further described in Chapter 1. In these Muslim-dominated societies, thousands of men and women, young and old, were prepared to sacrifice their lives for a cause that now reverberates to the core of other authoritarian governments.

The driving force behind these non-Western citizens' revolutions seems to be based on the rage that the individual rebelling citizen felt because his or her inherent worth, as a human being, was not being respected by officials and others who imposed brutal, arbitrary and corrupt measures, as a means to maintaining their privileged and elite positions.

It is this global thirst for respect for human dignity, so recently exemplified by the Arab Spring rebellions, that seems to support the definition of human dignity proposed by Immanuel Kant, one of the leading moral philosophers of Western civilisation. Kant argued that a person is 'not to be valued merely as a means . . . he [or she] possesses a dignity by which he [or she] exacts respect for himself [or herself] from all other rational beings in the world'.[5] As this text will discuss, sovereign states, institutions of global governance and national governments can and often must develop policies, programmes and actions that treat the governed as means to legitimate social, economic, political and security ends. However, it is argued that the universal principle of human dignity can and must impose restraints on those means and ends.

The first chapter argues that the foundations of international law and the legitimate exercise of sovereign power requires that all human beings are treated 'not merely as a means' to maintain power or privilege. Instead, the legitimate exercise of sovereign power must respect the inherent dignity of all under its governance, through the observance and protection of fundamental human rights and the promotion of forms of justice that enhance a respect for the inherent worth of the individual human being.

The principle of human dignity must deny and reject the concept of absolute state sovereignty that is not subject to any higher norm of universal principles of justice and human rights. As will be described in this first chapter, an accurate history of the evolution of sovereign states, at least in the history of Europe and the Western hemisphere, demonstrates that the concept of absolute sovereignty has always been a fiction. Yet, the remaining authoritarian sovereigns still in existence continue ferociously to assert the concept of absolute sovereignty. These states are also the central antagonist of any effort to impose an international responsibility to protect populations from mass atrocities, as the discussion in Chapter 1 will reveal.

The respect for the inherent dignity of the individual human being must also trigger a prohibition against the unjust exploitation of the most vulnerable. The

discussion in Chapter 2 focuses on the global trade and financial architecture. It describes the high visions and ideals that were prescribed for these critical areas of global governance, in the aftermath of the most brutal assault on human dignity that the slaughter-bench of history had produced in the Second World War. The chapter describes how here too the tragic flaw has appeared and has the potential to wreak great harm on the most vulnerable in the global community.

The final substantive area is discussed in Chapter 3, which focuses on the global private sector. It describes the global private sector as one of the most important players in the global political economy, which is largely untouched by the restraints of international law and the institutions of global governance. The chapter further describes attempts at imposing both hard and soft versions of international law, for the promotion of universally accepted principles and norms of human rights and dignity, in response to the devastating impact that the irresponsible exercise of power by global corporate giants has had on the most vulnerable communities. In this context, the creation of the tragic flaw and the attempts to progress out of it seem to be arising simultaneously, a process that is ongoing even as this text is being written.

In summary, this text provides an underlying metaphorical and philosophical narrative on the evolution of global governance institutions, along with the growing global impact of private sector enterprises. This narrative attempts to explain how domestic and international versions of hard and soft laws attempt to curtail abuse of powers that undermine universal principles of justice and human dignity. At a deeper level, this text also attempts to understand the underlying drivers impelling humanity to demand more of its better nature, from the institutions and enterprises of global governance, as it engages in a fierce battle with its less progressive instincts, which could undermine human progress and ultimately seriously damage even its liveable environment.

The conclusion seeks to initiate the start of a conversation of a new global paradigm, that of global pluralism, which attempts to reconcile the interests of sovereign states with the interests of humanity as a global community with deep differences but also one imbued with deep unifying principles.

Notes

1 See e.g. A. C. Bradley, *Shakespearean Tragedy: Lectures on Hamlet, Othello* (London: Macmillan & Co Ltd, 1922).
2 See e.g. Humphrey Davy Findley Kitto, *Greek Tragedy* (London: Routledge, 2011); see also J. Jones, *On Aristotle and Greek Tragedy* (Stanford: Stanford University Press, 1980).
3 See G. W. F. Hegel, *Introduction to the Philosophy of History (1770–1831)* (translation and introduction by Leo Rauch, Indianapolis: Hackett Publishing Co Inc, 1988).
4 See Jack Donnelly, 'Human dignity and human rights' in *Protecting Human Dignity: An Agenda for Human Rights*, Swiss Initiative to Commemorate the 60th anniversary of the UDHR (June 2009) at 80, available at http://www.un.org/en/documents/udhr/index.shtml (last accessed 13 November 2013).
5 Immanuel Kant (1724–1804), 'The metaphysics of morals' in Mary J. Gregor, Allen Wood (eds) *Practical Philosophy* (New York: Cambridge University Press, 1996) 6 434–35.

1 Combating the tragic flaw in the UN

1.1 The contested history of sovereignty and the promise of the Atlantic Charter

The architects of international law have long been driven by the need to find a unifying element to the chaos of inter-state relations. To this end Hans Kelsen developed the concept of the *grundnorm*, a fundamental legal principle or basic norm against which all other legal duties could be assessed and validated, or not as the case may be. In international law, this would be regarded as the fundamental principle from which all subsequent international legal rules flow. Even though Kelsen himself doubted that sovereignty was the *grundnorm* of international law,[1] prevailing practice and scholarly opinion have long regarded sovereignty as the *grundnorm* of international law, purporting that it govern all aspects of relations between states and also foundational aspects of the institutions of global governance.

This understanding of sovereignty was made fashionable in an 18th century treatise on the laws of nations by Emerich de Vattel, who envisioned a rigid conception of sovereignty as freedom from interference in the internal matters of the state. The leading international law jurists that followed this early architect generally built upon the concept. Robert H. Jackson like H. J Morgenthau defined sovereignty as 'the basic norm, *grundnorm*, upon which a society of states ultimately rests'.[2] These opinions also find support in international case law. In the *Lotus Case*, the Permanent Court of International Justice ruled that restrictions on sovereignty could not be presumed. In the *Nicaragua Case*, its successor tribunal, the International Court of Justice, affirmed that a state's domestic policy falls within its exclusive jurisdiction.[3] Finally, as one scholar recently emphasised, the view of sovereignty as an international *grundnorm* can also be gleaned from the connection between sovereignty and the key norms found in the United Nations Charter (UN):

> The sovereignty norm affirms the territorial integrity of the state and the rule of non-intervention. While many scholars have traced its development to the Peace of Westphalia, the sovereignty norm did not enter the lexicon of international law until the 18th century, with the writings of Emerich de

> Vattel. Since then, the stature of the sovereignty norm has increased. In 1945, its primacy in international law was affirmed through codification in Article 2(4) of the United Nations Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .'. The International Court of Justice ('ICJ'), which is the principal judicial organ of the United Nations, has acknowledged the importance of the sovereignty norm on numerous occasions.[4]

However, it is not universally accepted among international jurists that sovereignty is the *grundnorm* of international law. Andrew Clapham has argued that sovereignty is a changing notion that adjusts to the developing nature of international law. Furthermore, Bruce Broomhall has argued that sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards.[5]

In this first chapter, the analysis will focus on the status of sovereignty, as the asserted *grundnorm* of international law and the institutions of global governance, and whether it has been undergoing an unprecedented and dramatic global transformation, despite the assertions of leading jurists and rulings from international courts that sovereignty is unfettered from any higher norm or principle. This thesis will be assessed through the events that occurred in the course of the past century, one of the most catastrophic and murderous periods in human history, which saw two global wars, a monstrous Holocaust and the proliferation of crimes against humanity, war crimes and genocide.

Powerful states such as China, Russia and India, along with leading international law jurists, cling tenaciously to the position that sovereignty and indeed international law are grounded substantially on notions of territorial independence and non-intervention. International jurists who support this view of sovereignty claim that its legitimacy can be traced back to the often evoked but less frequently understood Peace of Westphalia.

Leading historians specialising in the Peace of Westphalia have demonstrated that in creating the system that would end the religious wars of 1618–1648, none of the parties had envisaged the total impenetrability of territorial independence now enshrined in the UN Charter. Instead, the Treaties of Münster, Osnabrück and the Pyrenees, which constituted the Peace of Westphalia, envisaged the limitations and interdependence of the newly established sovereign powers. These new sovereigns realised that to prevent a Hobbesian state of perpetual brutal warfare, mutual recognition of each other's internal sovereignty had to be established, but with limitations. These limitations included the fact that the treaties constituting the Peace of Westphalia did not define sovereignty as being absolute within a given territory. On the contrary, the treaties provided for an increase in religious rights for individuals and groups against their princes, with the ultimate aim of securing religious peace. The Peace of Westphalia signalled the evolution of sovereignty, from the unipolar world of the Holy Roman Emperor and Papacy to the multipolar world of states.[6] Above all else, the rise of the Westphalian sovereign state was

supposed to be about the legitimisation of the exercise of power within an emerging international society built on the remnants of the medieval Christian empire. The attempts at the legitimisation of power by secular rulers against the Papacy had been going on for hundreds of years before the end of the Thirty Years' War. Until the Peace of Westphalia, these attempts were unsuccessful because the secular rulers resisted conferring religious rights on their citizens.

The Westphalian notion of sovereign states built on mutual recognition and non-interference (to a limited extent as long as religious rights were respected) would remain fragile in the centuries that followed. The rise of the pan-European empires and the resulting clashes between colonising powers exemplified that fragility. Two great world wars, genocide, mass atrocities and what proved to be one of the most savage periods in human history provide uncontested proof that if sovereignty is to be the *grundnorm* of international law, it will have to gain the acceptance of the broader international society, which demands that sovereign power must be exercised responsibly and legitimately. Ultimately, in the aftermath of the Second World War most states came to the recognition that the acceptance of its citizens' fundamental human rights was critical to the legitimate and responsible exercise of both internal and external power.

However, despite the questionable historical origins of the impenetrable state, the absolute view of territorial sovereignty as the *grundnorm* of international law continued into the early 20th century. The consequence of this view was that the sovereign's power could only be limited by consent, whether through treaties or other forms of interstate agreements. Eventually, the practice of sovereign states began to be treated as signifying the creation of legal obligations, thereby creating another limitation on state sovereignty in the form of international customary law. It was not until the 1940s, in one of the darkest periods of human history, amidst the development of international law and the emergence of global governance institutions, that the narrow view of territorial sovereignty, as the *grundnorm* of international law, began its dramatic transformation. Unfortunately, in the process of transformation, the legacy of the old *grundnorm* gave rise to a tragic flaw within the nature of global governance.

The concept of the tragic flaw is a metaphor adapted from ancient Greek and Shakespearean tragedy. It indicates how conflicting and opposing beliefs and natures, within both individuals and institutions, can ultimately threaten their legitimacy and sometimes even their very existence. The tragic flaw is manifest in the rules of international law and global governance through the perpetuation of the narrow conception of state sovereignty, which persists despite the evolution of a global society towards a more expansive definition of sovereignty, consisting in the legitimate exercise of state power through a respect of the fundamental rights of individuals and groups. This more expansive notion of sovereignty demands that the state exists to serve its people; the people do not exist to serve the state. In the course of the most catastrophic global war in human history, two of the leaders of the ultimately victorious side would lay down the foundations of this more expansive view of sovereignty and the need for the institutions of global governance to promote it.

In August of 1941, 'somewhere in the Atlantic', President Roosevelt agreed to meet with Winston Churchill and discuss the growing threat of aggression from Hitler's Nazi Germany, and the increasing desire for world dominance of the Axis Powers. The United States (US) was still not at war, but the pressure was building from within the US to assist the British in what increasingly looked like a desperate attempt to save Europe, and Britain itself, from the shadow of fascist totalitarianism.

The location of the naval force that brought the two world statesmen together should be of special interest to Canadians, for it was at Placentia Bay in the waters off Newfoundland. A leading historian of human rights, Paul Gordon Lauren, describes the meeting of the leaders as an almost desperate attempt to save the peoples of Europe and the rest of the world from a cataclysm of evil.[7] According to Lauren, the primary focus of the discussion between the two leaders concerned the role of the United States in the war. While the United States was still a non-belligerent, discussions took place on how it could assist in the fight for the survival of freedom and human dignity in Europe, North Africa and Asia. The plan needed foundational principles that could serve to inspire and lead their respective populations into action. If the period since the Treaty of Westphalia had not already made it clear that the *grundnorm* was not holding, the actions by the Axis Powers and Nazi regime would forever shatter the immutable permanence of sovereignty and territorial independence as foundational principles of international law.

On 14 August 1941, Winston Churchill and Franklin D. Roosevelt – the leaders of the two great democratic powers standing in opposition to the Axis assault on the territorial independence and fundamental freedoms of persons across Europe and the greater part of the populated world – concluded their conference in a joint declaration of principles in what became known as the Atlantic Charter. The principles in the Atlantic Charter reinforced the notion of sovereignty, the alleged *grundnorm* of international law, but also included additional principles that they hoped would lead to a better future for the world:

> FIRST, their countries seek no aggrandizement, territorial or otherwise;
> SECOND, they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned;
> THIRD, they respect the right of all peoples to choose the form of government under which they live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;
> FOURTH, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great and small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;
> FIFTH, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security;
> SIXTH, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in

> safety within their own boundaries, and which will afford assurance that all the men in the lands may live out their lives in freedom from fear and want;
> SEVENTH, such a peace should enable all men to traverse the high seas and oceans without hindrance;
> EIGHTH, they believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.
>
> Franklin D. Roosevelt
> Winston Churchill

The Charter would become the catalyst for the idea of the United Nations (UN). The Atlantic Charter, conceived in the midst of the greatest carnage ever seen in human history, was the first international document in which the most powerful world leaders had the courage to stress, while respecting the principle of sovereign independence and right to be free from external aggression, the right of all peoples to 'live out their lives in freedom from want and fear', and the need for 'a wider and permanent system of general security for the world'. It should also be noted that this early document, conceived before the creation of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), the International Monetary Fund (IMF) or the World Bank, contained principles that reconciled the imperative for a new global security institution, which would respect and uphold the territorial integrity and sovereignty of states, with a respect for human rights, including improved labour standards, economic advancement and social security.[8]

The Atlantic Charter was swiftly adopted at the first meeting of the Inter-Allied Council (which included the Soviet Union). It could be argued that the adoption of the Atlantic Council signalled the emergence of a new element of the asserted *grundnorm* of state sovereignty: the legitimate exercise of power. The legitimate exercise of power would encompass both the duties of the state and international law to promote and protect equal human dignity and rights for all peoples, while ensuring that political, economic and social institutions, both national and international, should permit all peoples to 'live out their lives in freedom from fear and want'.

The torpedoing of American isolationism at Pearl Harbor in December of 1941 galvanised the expansion of the Atlantic Charter's principles outside its founding nations, as a united front was needed to wage war against the Axis Powers in the Asian theatre of war. Lauren describes vividly how, in January of 1942, 26 nations at first, and later 46 nations, endorsed the Declaration of the United Nations. In doing so, these nations vowed to unite in the struggle against the Axis Powers and to adhere to the Atlantic Charter, and the creation of a global institution that

would defend the fundamental human rights of all persons and ensure international peace and security. All nations agreed that sovereignty and territorial integrity could not be secured at the expense of the fundamental rights of all human beings. The principles contained in the Atlantic Charter would be the rallying cry of the allies in the 'people's war', against the totalitarian militarism of the Axis Powers, whose brutality did not permit either human dignity or rights.[9] The allies needed to bend the absolutist conception of sovereignty as the *grundnorm* of international law so as to differentiate themselves from the Axis Powers – which seemed determined to create their own version of imperial global sovereignty, where brute force and power would sustain the illegitimate exercise of global power – and create a point around which they could rally themselves.

The rise of human rights and dignity as the new 'global justice' element of the *grundnorm* of international law seemed to promise a new beginning for humankind.

The notion of global justice as another aspect of the sovereignty *grundnorm* in international law had previously been advocated by natural law theorists and by philosophers including Immanuel Kant, who asserted that 'the great community of mankind' was the foundation of international legal obligations and perpetual global peace. In theory, with the establishment of the Atlantic Charter and a greater focus on the human dignity and rights of all citizens, sovereignty and territorial independence should have become situated within an evolving conception of justice in international law.[10] Such a conception would have posited a move away from the narrow reading of sovereignty as the exclusive *grundnorm* of international law, to one in which principles of global justice and human dignity permeate relations both between states and within states.

However, the tragic flaw in the character of humankind was determined to undermine the progression of history. Lauren reveals that in January 1942, when the Declaration of the United Nations was being promulgated, an unspeakable act of evil was also being planned. It was during this month, just outside of Berlin, that the Wannsee Conference was held. The genocide of entire races, and one in particular, was being planned with meticulous care and attention to detail. This plan was called the 'final solution of the Jewish Question'. What was planned at Wannsee translated into the extermination of over 11 million people, including 6 million Jews, whose lives were taken with the utmost cruelty on the basis of their race, ethnicity, religion, language, disability, sexual orientation, or simply because they were too young, too old, or too sick to be of any use to the Nazi forces.[11]

What is staggering about this dark period of human history is that Germany did not enter into this programme of genocide devoid of an intellectual, religious and moral history that would have proffered a myriad of reasons for not engaging in this barbaric plan. However, none of these traditions could overcome the instinct for dominance, oppression and territorial grandeur that seems hard-wired into the nature of humankind. This instinct creates a moral blind spot that centuries of intellectual, religious and moral learning have yet to overcome.

In the early millennia of human history, these human instincts battled against each other in small places on the planet, between and within tribes,

settlements, villages, fortified towns, cities and, ultimately, nations. In January 1942, humanity's tragic flaw became global, laid in the foundation of the modern institutions of global governance; it is manifest in the struggle between the desire for political and territorial conquest and the universal appeal of human dignity, conscience and fundamental human rights.

As soon as the end of the Second World War was in sight, those states that had originally promoted the legitimate exercise of sovereign and global power, as contained in the principles of the Atlantic Charter and the Declaration of the United Nations, succumbed to the temptation for dominance, self-interest and a reversion to the bare *grundnorm* of absolute sovereignty. As Lauren has stated:

> When pressed, most of those leaders who spoke so eloquently about human rights quickly noted that statements like the Atlantic Charter and the Declaration of the United Nations represented only goals rather than legal agreements that might jeopardize national interests or threaten national sovereignty. It is in this context that Churchill made his celebrated statements about not allowing stated principles such as that of the right of self-determination to precipitate the liquidation of the British Empire, and describing the Atlantic Charter as 'no more than a simple, rough and ready, war-time statement of a goal' toward which the supporting governments 'mean to make their way' instead of a binding treaty with firm commitments.[12]

Even in Churchill, the tragic flaw was beginning to take hold, as the old powers scrambled to retain sovereignty over their colonial holdings in the aftermath of the Second World War. However, despite this retrenchment by one of the authors of the Atlantic Charter, it was impossible to reverse the transformation of the sovereignty *grundnorm*. A rising tide of global consciousness had come to the realisation that there could be no sustainable peace without the imperatives of justice that included the protection of universally accepted human rights. However, a return to the principles of the Atlantic Charter would have to wait for the next intolerable iteration of human suffering to take effect, which would only take until the second half of the 20th century.

1.2 Birth of the United Nations: one step forward, two steps back

While many nations had joined the Great Powers in the war against the Axis Powers, they were excluded from the first deliberations at Dumbarton Oaks in the autumn of 1944. It was at Dumbarton Oaks that the United States, Britain, the Soviet Union and China met to sketch out the Charter of the new global security organisation that would come to be known as the United Nations. All but one Great Power agreed that the Charter would not contain any substantial provisions on human rights.[13]

It is an irony of history that the only participant at Dumbarton Oaks that wanted a reference to the right of all people to equality and non-discrimination

was China. China reflected the concern of many countries of the South, and Asian countries in particular, that the new institutions of global governance would allow the colonial powers to prevent decolonisation and self-determination of colonised peoples.

And so at Dumbarton Oaks in 1944, the struggle swung entirely in favour of dominance and self-interest. The Great Powers developed a post-war global security institution that was to be dominated by them. They were able to ensure their dominance by creating a new Security Council that gave them both permanent membership and the power of veto. Their entire design of the organisation, which involved the formation of a weaker General Assembly where the secondary powers could 'blow off steam' without endangering the interests of the Great Powers, was devised to assist in cementing their hegemony. At Dumbarton Oaks, and in the period that followed, the Great Powers emphasised national sovereignty, territorial integrity and political independence, which meant non-interference in the domestic affairs of the Great Powers. The only reference to human rights was in the context of general economic and social cooperation.[14] According to Lauren, then US Secretary of State Cordell Hull poured derision on the efforts of his own Under Secretary, Sumner Welles, to promote an International Bill of Rights, stating that universal human rights could not undermine the national sovereignty of the United States.[15]

In the pursuit of international law and governance, the history of the Second World War and its aftermath show that the enfeebled law-making that prioritises untrammelled sovereignty usually comes out stronger in the short term. Justice that tempers sovereignty with human dignity and rights takes much longer to establish.

The catalyst for justice often begins with an outcry against law-making that does not include it. This was the case with the creation of the United Nations Charter. There was a storm of criticism around the world when the Dumbarton Oaks proposals for the creation of the United Nations were made known. This criticism came from a wide range of dispossessed actors, citizens, non-governmental organisations (NGOs) and those countries that were left out of the Great Powers' self-interested power structures. There was particular anger over the omission of any substantial global protection of human rights and the right to self-determination. In 1945, with the end of the war in sight, the Great Powers eventually accepted that another conference, this time involving states from all parts of the world, should be held to hammer out the final version of the United Nations Charter. This conference would take place in San Francisco in April 1945.

While the gathering constituted the largest number of states assembled at that time to lay the foundations of the United Nations, these states were also mindful of the failure of the product of the last similar gathering at the end of the First World War, which had led to the ineffectual and ultimately doomed League of Nations.[16]

The rhetoric for the ideals of peace, global security, human dignity and human rights flew high at San Francisco, but the Great Powers stuck in large part to their Dumbarton Oaks proposals. Before the conference was over, the surrender of

Germany also saw the first stirring of the Cold War at the birth of the United Nations. This reinforced the non-human rights focus of the Great Powers. It was the representatives from the rest of the international community, such as India, South Africa, New Zealand, Australia, Egypt, the Philippines and the Latin American countries that pushed for amendments to the Dumbarton Oaks proposals.[17] In particular, these proposals called for the primacy and protection of human rights to be inserted into the Charter. These countries were joined in their efforts by an army of individuals and NGOs from around the world. Of particular concern to many of the smaller nations that were either former colonies or were fighting for independence, were the human rights of those in colonies and dependent territories. The opinion that absolute sovereignty should be the *grundnorm* of international law was starting to be challenged both by officials from less powerful states and by an emerging global civil society network that sought to create a new world order, as further discussed by Anne-Marie Slaughter.[18]

The Great Powers eventually succumbed to the pressure emanating from the rest of the world. They agreed to a substantial number of demands, inserting provisions for human rights in the Charter and creating specific mechanisms to lead in the promotion and protection of human rights, but without substantially altering the entrenched power structures agreed to at Dumbarton Oaks. The stage was being set for the insertion of the tragic flaw in the United Nations Charter. In particular, the drafters of the United Nations Charter seemed determined to underscore the supremacy of territorial integrity and political independence, while allowing weaker language on human rights.

On 26 June 1945, there was a signing ceremony for the world leaders assembled at San Francisco, two months after the work on the United Nations Charter had begun. Fresh from victory in the Second World War and with the chill of the Cold War starting to take effect, the Great Powers had managed to insert the two duelling concepts into the United Nations Charter at the signing ceremony in the Veterans' Building Auditorium in San Francisco.

One of the concepts, as noted above, was the supremacy of territorial integrity. The central purpose of the new world body as stated in Article 1 was to maintain international peace and security. The principal condition for such peace and security was territorial integrity and the concomitant principle of political independence of the nation state. The five permanent members of the new Security Council, whose primary responsibility would be to maintain international peace and security, could guarantee their own territorial integrity and political independence (and those of their allies) through the veto powers that the Charter bestowed on them.

The foundational principle of security in the United Nations Charter, based on territorial integrity and political independence, was that if one nation attacked the territorial integrity of another, the Security Council would have the means through Chapter VII enforcement powers to take effective collective measures. These powers allow for the prevention and removal of threats to the peace, and for suppression of acts of aggression and other breaches of the peace. Indeed, the principle of territorial integrity and political independence was so sacred that most

of the Great Powers at the San Francisco Conference were adamant that not even the United Nations itself could intervene within the domestic jurisdiction of the nation state. In theory, the new and powerful Security Council could conclude that serious human rights violations constituted a threat to international peace and security and follow up with its enforcement powers. However, as we shall see, until 1989 the Cold War and the power of veto effectively denied the application of this potentially powerful machinery for the enforcement of global justice.

In opposition to the concept of territorial integrity were human rights principles. The reinsertion of human rights principles into the Charter, at the strong and forceful demand of the other members of the international community and global civil society, set the stage for later conflicts between territorial integrity and human justice. However, the provisions relating to human rights, which the Great Powers allowed into the Charter, were never meant to be as strong as the provisions pertaining to territorial integrity and political independence. In many places, these provisions seemed more rhetorical than substantial. Justice waits for rhetoric to be hammered into reality. The opening lines of the Charter confirm 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .'. The same Article 1 that entrenches the supremacy of territorial integrity and political independence in the United Nations Charter goes on to state that the purpose of the UN is also:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . .

Other important provisions of the Charter that touch on human rights are Articles 55 and 56. The former tasks the United Nations to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. Article 56 requires that '[a]ll members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55'.[19]

These provisions seem to be the rhetorical foundation for the grudging permission given to the General Assembly to discuss, study and make recommendations concerning matters within the scope of the Charter, including human rights (Article 13). This set the stage for an unexpected victory for global justice. The Universal Declaration of Human Rights (UDHR), which, while not legally binding on member states, would establish the intangible power of moral authority in the area of universal human rights, tempering the narrow conception of sovereignty with the principle of human dignity. For the General Assembly to achieve even these limited goals, the Great Powers had to designate the Economic and

Social Council as a critical organ of the United Nations, capable of initiating the discussions, studies and recommendations in the area of human rights (Article 62).

In turn, the Council could establish commissions in the economic and social fields, including that of human rights, to assist in the performance of its functions and duties to the General Assembly (Article 68). The Charter also made provisions for the establishment of the International Court of Justice (ICJ), which could adjudicate on matters relating to the achievement and maintenance of the purposes and principles of the United Nations, including those relating to human rights. This function could be carried out either in an adjudicatory or advisory capacity. Each member state pledged to comply with the decisions of the ICJ in any case to which it was a party. However, the Statute of the ICJ annexed to the Charter made the compulsory jurisdiction of the ICJ voluntary to member states. A court that automatically had jurisdiction in all disputes involving member states would have been a powerful force for the global rule of law. However, this same court could also have been a powerful force against the assertion of the unimpeachable sovereignty claimed by the Great Powers and many other delegations.

Although the provisions of the Charter have been lauded by some as unprecedented in human history, it must never be forgotten that the primary goal of the Great Powers at San Francisco was, as described by Lauren, to protect their own dominance, self-interests and territorial integrity and concept of absolute sovereignty. This was done despite the higher vision first shown in the Atlantic Charter and the Declaration of the United Nations in the 1941–1942 period. The tragic flaw was deeply entrenched in the global constitution hammered out at San Francisco.

Indeed, the way in which the Trusteeship Council and the International Trusteeship System was set up under the United Nations Charter is a prime example of high-flying rhetoric concerning the goal of self-determination and human rights for all peoples. In reality, it became riddled with exceptions for the colonial powers of Europe and the United States.[20]

Even with these limited provisions on human rights, Lauren describes how attempts to insert language which would make the provisions more legally binding on member states was fiercely resisted by the Great Powers. Certain delegations at the San Francisco Conference argued that the most popular phrases concerning human rights, such as 'promoting respect for human rights', 'may discuss', 'initiate studies', 'consider' and 'make recommendations' were too weak legally. These delegations argued that these phrases should be substituted with stronger legal language, such as to 'enforce', 'guarantee', 'implement', 'assure', 'protect' or 'promote', or require the 'observance' of human rights. The Great Powers and some of the other delegations rejected this proposal.[21]

The imperatives of territorial integrity, self-interest and political independence led to the weakening of the human rights legal language in the United Nations Charter. Many of the nations opposing the stronger provisions on human rights in the Charter had concerns about whether the human rights abuses within their own territories would become open to world censure. In this regard, Russia under the Stalinist dictatorship, in addition to the fears of the United States over the civil rights situation in its southern states, would prevent any further strengthening of

the human rights provisions. Indeed, Article 2(7) of the Charter[22] was written specifically to prevent such intrusion into human rights abuses within the domestic jurisdictions of both the Great Powers and the other nations at the San Francisco Conference. The provision read: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement'.

Whether the suffocating of the human rights provisions in the United Nations Charter, by weak language and the primacy of territorial integrity and political non-interference, was deliberate or not, the tragic flaw was set that July in 1945. The legacy of the Atlantic Charter had almost evaporated. Indeed, the power structures of the United Nations and language relating to human rights would promote the rule of clashing ideologies, not law.

Many delegations and NGOs present at the San Francisco Conference felt that the provisions on human rights were so weak that the Charter would have to be followed with a stronger International Bill of Rights, a proposition that ultimately even President Truman accepted in the closing speech at the conference. His words seem to indicate that he knew that a post-war world that talked of human rights in the United Nations Charter but practised oppression would be a very troubled one:

> We have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is a part of our Constitution. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security.[23]

This statement by Truman could be regarded as one of the first admissions by the leader of a post-World War superpower that the *grundnorm* of absolute sovereignty in international law could not alone guarantee the essential criteria of territorial independence without the global justice imperative that protects and promotes the equal dignity of humanity everywhere.

1.3 The evolution of the International Bill of Rights: rekindling the age of hope

The emergence of the global justice imperative in the *grundnorm* of international law is based on the promotion and protection of human dignity as an end in itself. While there is room for legitimate debate on the meaning of human dignity, it can be agreed that its content, at a minimum, includes the universally recognised human rights discussed in this chapter.

As events have unfolded since the end of the Second World War, justice and human dignity in the institutions of global governance have often taken second

place to the quest for territorial integrity and self-interest. But justice and human dignity have also learned to be adept at grabbing at whatever is rationed out to its sphere, and at creating greater opportunities for the dignity of humankind to be promoted. This is the lesson we learn from the evolution of the International Bill of Rights.

The United Nations Charter came into force on 24 October 1945. In the autumn of the same year, a preparatory Commission of the Economic and Social Council chaired by one of the greatest champions of justice in modern history, Eleanor Roosevelt, the former First Lady of the United States, recommended that the Council set up a Human Rights Commission. It was also recommended that such a Commission be directed to begin work immediately on an International Bill of Rights. After fighting between the member states over the composition and membership of the proposed Commission subsided, the 18 members began, in 1947, to develop the process for the drafting of the first part of what would be a three-part International Bill of Rights.

The first part of such a Bill would be a UDHR, which was to be drafted by a nine-member team with the assistance of the director of the Human Rights Division of the UN Secretariat, Canadian law professor John Humphrey. Many, especially Canadian experts, have credited Professor Humphrey, a man of great humility, with being the author of the first draft of the text of the UDHR.[24] The final draft was submitted to the full Commission, which, after the final revisions were made, sent the draft to the Council, which eventually passed it to the Third Committee of the General Assembly, which made its own revisions before passing it on to the General Assembly for a vote on 10 December 1948.[25]

It should be noted that, despite the great energy given to each and every word of the UDHR, at least one of the Great Powers was determined that it would not take on any semblance of a legal obligation that would intrude on national sovereignty. Lauren reveals that:

> Right in the midst of these deliberations, Eleanor Roosevelt received most unwelcome instructions telling her to focus her efforts on a declaration of principles on human rights, where the United States government felt 'on safer ground,' and that any discussion about legal commitments and enforcement 'should be kept on a tentative level and should not involve any commitments by this Government'.[26]

It is perhaps because most nations realised that the Great Powers did not intend major legal consequences to flow from the Universal Declaration that the Declaration was adopted with no votes against it on 10 December 1948. While it has been stated that the Declaration received unanimous approval of the member states of the United Nations, there were eight abstentions: six from the Soviet bloc, as well as from both South Africa and Saudi Arabia. These abstaining votes could not be regarded as being merely neutral to the Declaration. Yet the mystique of the unanimity of the Universal Declaration took root, and has contributed to its evolution as the most potent moral force for justice in the community of

humankind. This evolution is testament to the ability of global justice to wait, but at the same time to spring onto any platform that will allow it to flourish against the towering edifice of territorial integrity and self-interest that is built into the institutions of global governance. Global justice is the greatest antidote to the tragic flaw within the nature of humankind.

The contents of the Universal Declaration were a huge advance on the tentative and vague wording of the human rights provisions of the Charter. The preamble dares to talk with vigour about the counterforce to territorial integrity and independence as the highest values of the global society of states. This includes: 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Referring specifically to the actualities and possibilities of evil without this counterforce, the preamble, in implicitly referring to the Holocaust that had just occurred, warns that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'.

The actual extent of such barbarous acts done in the name of racial dominance and superiority had been revealed with seemingly unending accounts of chilling horrors at the International Military Tribunal at Nuremberg, since the start of the tribunal's hearing in November of 1945.[27] The first Article of the Universal Declaration that 'all human beings are born free and equal in dignity and rights', must have seemed so hollow to those who saw their loved ones perish in the concentration camps of Nazi Germany without mercy, let alone without freedom, equality or dignity.

The rest of the content of the Universal Declaration affirmed, again with vigour and courage, without pandering to cultural relativism, that all members of the human family were entitled not only to the fundamental civil, political and legal rights so cherished by the West, but also to the fundamental economic, social and cultural rights. These latter sets of rights were equally cherished by the developing world and the emerging powerful communist bloc of countries on the other side of the Cold War's Iron Curtain.

What is stunning about the UDHR is not its content of rights, which in 1948 must have seemed unattainable to all member states of the United Nations, even the richest and most democratic. Rather, the surprise in the evolution of the modern history of humanity is the fact that even though the Universal Declaration was pushed through as a non-binding statement of principles, it began to develop a moral force and authority throughout the world during the latter half of the 20th century.

The provisions of Articles 2 to 21 of the Universal Declaration, dealing with the fundamental civil, political and legal rights has also come, in the view of many jurists, including this author, to have legal force through the evolution of customary international law on human rights.[28] It has also been the catalyst for much stronger and legally binding international and regional Conventions on Human Rights, and in particular the European Convention on Human Rights and Fundamental Freedoms. There is much to study and discuss as regards the reasons why the

Universal Declaration achieved such moral force. The lofty rhetoric by the high-profile supporters of the Declaration played a part.

Chief among these rhetorical champions was Eleanor Roosevelt, who proclaimed that the Declaration was 'first and foremost a declaration of the basic principles to serve as a common standard for all nations. It might well become the *Magna Carta* of all mankind'.[29] Some would argue her prediction has come true, but the reasons are unclear. There was no blanket coverage of the Universal Declaration deliberations and proclamation around the world. The ubiquitous presence of global television channels such as CNN and the BBC World Service were not there.

Perhaps the Declaration is the ultimate example of the power of a universal conception of justice that has, as its foundation, the promotion and protection of human dignity, assisted by the power of words used by champions of human dignity. It should also not be forgotten that while the high ideals of the Universal Declaration were being hammered out, the War Crimes Tribunals at Nuremberg[30] and Tokyo[31] acted as a reminder to the international community that there were limits to the conduct of war, which if broken would be such an affront to humanity that punishment would necessarily follow on the basis of universal jurisdiction. While such laws of war had existed in some form since the 15th century, the Geneva Conventions of 1949, which now have universal membership, consolidated the duty of all states to prosecute and punish individuals who had committed grave breaches of such humanitarian laws.[32] The 1977 Protocol to the Geneva Conventions extended the reach of such laws to internal conflicts.

The authority evoked by the UDHR, as well as the unlikely expansion of a human rights protection regime demonstrate that, in spite of the apparent hegemony of absolute sovereignty, justice is capable of taking advantage of any opportunity to weave its morality into the main institutions of global governance, compromised as they may be by the tragic flaw.

1.4 UN legal standard-setting in human rights: more law, but less moral force

The resolution of the General Assembly that approved the UDHR also approved the development of two other parts of the International Bill of Rights: first, a legally binding multilateral treaty, called a covenant, which would impose a legal obligation to promote and protect human rights; and, second, a legal document that would detail the implementation measures for the human rights obligations. The Human Rights Commission had already produced a draft 'International Covenant on Human Rights', so it was expected that the rest of the International Bill of Rights would evolve quickly.

This did not happen. Once again ingredients of the tragic flaw, self-interest and national sovereignty asserted themselves. In the Commission, the Council and the General Assembly member states promoted either the sections on civil and political rights, or economic, social and cultural rights, according to their perceived national self-interest. In the end, it was decided that there would be two separate

covenants on each of the two categories of rights, with the right to self-determination in both, at the insistence of the developing world. There was also considerable disagreement and tension concerning the implementation measures for the two covenants. These differences took between 1950 and 1966 to resolve. The covenants were finally unanimously approved by the General Assembly on 16 December 1966, with over 100 member states voting in favour.

The Optional Protocol, which permitted individual communications and petitions to the Human Rights Committee, was approved by a smaller margin of 66 votes in favour, 2 against and 38 abstentions.[33] A second Optional Protocol on the elimination of the death penalty was later added to the International Covenant on Civil and Political Rights.

However, even though the number of states approving legally binding obligations concerning human rights had risen dramatically from the number approving the Universal Declaration, there was something lacking. There was much less enthusiasm for the acceptance of legally binding obligations. The Cold War had intensified, making concerns about human dignity secondary to the reinforcement of hegemonic alliances on either side of the ideological Iron Curtain.

The moral authority of the Universal Declaration seemed lacking with these legal standard-setting instruments on human rights. The time frames for the drafting, approval and ratification of the two international covenants alone tell the story of the political vacuum. The drafting of what emerged as the two covenants began in 1948. It took 18 years for the covenants, which were continually amended and revised, finally to be approved on 16 December 1966. It took another 10 years before both covenants received the requisite 35 ratifications to come into force. By June 2013, there were 167 ratifications to the Civil and Political Rights Covenant (CPRC), with 114 acceding to Optional Protocol 1 permitting individual or group complaints to the oversight of the Human Rights Committee Treaty Body, and only 76 ratifications for the second Optional Protocol aiming for the abolition of the death penalty. By June 2013, there were 160 ratifications to the Economic, Social and Cultural Rights Covenant (ESCRC) but, as with the CPRC, these binding legal commitments to fundamental human rights were riddled with reservations. The present-day human rights records of many of these states show that such ratifications are nothing more than UN 'diplomatic decorations'.

The treaty bodies set up to oversee the implementation of these and other major human rights treaties are beginning to feel the impact of the less-than-honest adherence of the ratifying states to the spirit and letter of their commitment – to integrate human rights into the sovereignty *grundnorm* of international law. The first of these bodies, the Committee on the Elimination of Racial Discrimination, started early in 1970. By 2009 there were nine of the same monitoring bodies. The main mechanism to drive the human rights agenda into reality under these bodies was the compulsory review of periodic reports submitted by member states. While the bodies can, for the most part, issue general comments or recommendations on the reports and compliance with the treaties, many can also consider individual communications relating to alleged violations of the treaties by ratifying states or, in the case of the Sub-Committee on Torture, establish country missions.

There is widespread agreement that many if not most of these bodies are urgently in need of reform. In 2009, the UN High Commissioner for Human Rights, Navanethem Pillay, lamented that the lack of coherence in working procedures between the various treaty bodies, exacerbated by a lack of resources, often makes the entire system seem paralysed. Worse still, recommendations are often ignored or deemed unworkable or contradictory by the member states and other stakeholders.[34] Her predecessor, Louise Arbour, had expressed many of the same concerns, if not more, about the state of these critical human rights treaty bodies:

> – The extent to which States accept the human rights treaty system on a formal level, but do not engage with it, or do so in a superficial way, either as a result of lack of capacity or lack of political will;
> – The ad-hoc manner in which the treaty body system has grown, with an overlap of provisions and competencies, resulting in duplication;
> – The growth in the number of treaties and ratifications, resulting in a steep increase in the workload of the treaty bodies and their secretariat, backlogs in the consideration of reports and individual complaints, and increasing resource requirements;
> – The low levels of public awareness of the treaty body system outside specialist communities and the perception that it is an inaccessible and ineffective mechanism for bringing about change;
> – The uneven levels of expertise and independence of treaty body members, as well as problems of geographical distribution, representation of the principal legal systems and gender balance;
> – A lack of coordination and collaboration among the treaty bodies resulting in a risk of conflicting jurisprudence;
> – The variable quality of State party reports submitted to treaty bodies and the frequent failure of the reporting process to achieve its objective of providing regular opportunities for individual States to periodically conduct a comprehensive review of their treaty-compliance;
> – The fact that treaty bodies often have insufficient information to enable them to undertake a full analysis of country situations and, as a result, their recommendations may lack the precision, clarity and practical value required to enhance implementation; and
> – The absence of effective and comprehensive national level follow-up mechanisms for treaty body recommendations.[35]

However, while the system monitoring the human rights component of the expanding international law *grundnorm* is far from perfect at the institutional and state level, there are many individual champions within the United Nations system determined to make a difference. These individuals have fought, and continue to fight, for human dignity in the treaty bodies and other implementing mechanisms under the International Bill of Rights and other legal human rights standards. The wait and battle for justice is often a case of individuals struggling against overwhelming odds.

Such is the case of many of the past and present 18 members of the Human Rights Committee, serving in their individual capacities, who examine the countless reports by state parties to the international covenants on their compliance with the obligations contained in the covenants. The committee also manages the inter-state complaint mechanism and receives individual communications and petitions under the Optional Protocols for the Civil and Political Rights Covenant.[36] These individual champions have developed jurisprudence and advisory opinions that have contributed to the strengthening of the edifice of human dignity against that of territorial integrity and political independence.[37]

The model of inserting individual champions, albeit elected by ratifying states, into implementing treaty bodies and other monitoring mechanisms has spread from the International Bill of Rights to a host of other human rights legal standard-setting documents. These include the 1965 Convention on Elimination of All Forms of Discrimination, the 1981 Convention on Elimination of All Forms of Discrimination against Women, the 1987 International Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and, most recently, under the most diplomatically decorated treaty ever, the 1990 International Convention on the Rights of the Child, which with 193 ratifications is the most widely endorsed human rights treaty.[38]

However, the periodic reporting system, which is the most widely used method of implementing human rights legal standards, is increasingly coming under fire for being a way to keep the legal and political implications of ratification free of substance. In his Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System, Philip Alston, one of the best-known champions for human rights treaty bodies, stated that: '. . . the present system is unsustainable and . . . significant reforms will be required if the overall regime is to achieve its objectives'.[39]

This is a damning description of how flaws in the institutional structures of the United Nations can render illusory the work of those individuals who champion the cause of global justice and human dignity. There is a general consensus in the international human rights community that things have gone horribly wrong. Some would argue that deliberate ineptitude and ineffectiveness is part of the tragic flaw that characterises the United Nations mandate in the area of human rights.

In the Vienna Declaration at the 1993 World Conference on Human Rights, the participants expressed 'dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world'.[40] The Vienna World Conference on Human Rights is significant in the formal history of human rights. It was in Vienna that the UDHR, originally adopted by only 48 nations in 1948, received reaffirmation by 171 nations from all parts of the world, representing nearly the entire kaleidoscope of human culture, religion and tradition. The Vienna Declaration went further and proclaimed: 'all human rights are universal, indivisible and interdependent and interrelated'.[41]

The creation of the United Nations Office of the High Commissioner for Human Rights, as the highest champion for human dignity, was also agreed on at

Vienna. The second holder of the office, Mary Robinson, on the occasion of the 50th anniversary of the Universal Declaration in 1998, seemed frustrated at the lack of progress in the cause of human dignity:

> Just two months after taking office last year, I spoke of a worry that many in the United Nations appeared to have 'lost the plot' and allowed their work to answer to imperatives other than those set out in the UN Charter. I suggested that this distraction from the core principles of the Charter could be a root cause of much of the criticism that is levelled at the Organisation – couched in terms of complacency, of bureaucracy, of being out of touch, and, certainly, of being resistant to change.[42]

She stressed that she had hope that under the leadership of Secretary General Kofi Annan, 'the gap between the rhetoric and action on human rights' would narrow. She also stressed that this gap was not small:

> The record of the past fifty years does not encourage any 'business as usual' approach. Twice in this decade we have witnessed genocide. Rape has become a weapon of war. Torture, arbitrary detention, and disappearance remain commonplace. Hundreds of millions live in extreme poverty, suffering from malnutrition, disease, and a lack of hope. Many billions of dollars have been spent and much rhetoric expended for disturbingly little result. This massive failure of implementation shames us all.[43]

The current UN High Commissioner for Human Rights, Navi Pillay, in celebrating the 20th anniversary of the Vienna Declaration on 27 June 2013, acknowledged that some progress had been made. But she noted that while there had been significant achievements since the historic human rights document was adopted in Vienna 20 years ago, there have also been many setbacks and 'the magnificent construction is still only half built'. The High Commissioner added that:

> Time and again, the international community has promised to protect civilians from slaughter and gross violations of rights. And yet even as I speak to you now, women are being abducted and raped, hospitals are being targeted, and indiscriminate shelling and deliberate massacres stain the earth with the blood of innocents . . . All this is intolerable. And yet it continues to happen. Our progress along the path that we laid down in Vienna 20 years ago has been marked by constant setbacks as well as many achievements. Some promises have been half fulfilled – for example in the area of international justice, where we have an international court, to which some deserving situations are referred and others – including Syria – are not. But, 20 years ago, we had had no international courts at all since Nuremberg'.[44]

As for the body that crafted the UDHR, the UN Human Rights Commission, its evolution took a similar path before it was reformed out of existence. At its

six-week annual session in April 2001, a leading human rights activist, Reed Brody of Human Rights Watch, concluded that the foxes were guarding the chickens. Fourteen of the new members of the Commission included representatives from countries with very bad human rights records, such as the Democratic Republic of Congo (DRC), Kenya, Libya, Sierra Leone, Sudan, Syria and Vietnam. One of the ultimate affronts to the international human rights system was the election of Libya as the chair of the Commission in 2003.

A description by *The Economist* of the workings of the Commission at its annual session in 2001 illustrated the annual majority voting in the following manner: '. . . governments tend to club together to defend their mutual self-interest, especially when they have a record of brutality that is criticised by non-governmental organisations (NGOs) or by western governments'.[45] Predictably, resolutions sponsored by the United States or European countries concerning human rights abuses in China are voted down. In addition, it is often alleged that the Commission gives little help or resources to the special rapporteurs, special representatives, independent experts and working groups that it appoints to enquire into specific human rights situations and that, moreover, when they issue their reports, there is little follow-through, often with tragic results.[46] Warnings from one of the Commission's own experts on the planning of the genocide in Rwanda were given to and ignored by the Commission before the genocide actually occurred in 1994.[47]

The Commission, in the view of many, had failed to perform the critical implementation role envisaged for it by the founders of the United Nations. The members of the United Nations seemed determined to have the Commission slide into further ineffectiveness before it was itself terminated. On 3 May 2001, the United States, for the first time since it helped to establish the Commission in 1948, was voted off the 53-member Commission in a secret ballot at the UN Economic and Social Council. China, which continued to be a member, rejoiced in this result, accusing the United States of using human rights as a political weapon.[48] However, the United States was voted back onto the Commission early in 2002 after its allies on the Commission were embarrassed by its absence.

When the human rights hypocrisy at the Commission became intolerable, serious reform discussions took place. These discussions, which were also featured in the UN Secretary General's High-Level Panel on Threats, Challenges and Change,[49] which spanned from 2004 to 2006 and recommended serious changes at the Commission. Taking up the challenge, Secretary General Kofi Annan, in his landmark 2005 report 'Larger freedom: towards development, security and human rights for all',[50] finally called for the replacement of the Commission with a smaller Human Rights Council, if the world were to take human rights as seriously as national and international security and development. This could be taken as reinforcing the view that global justice, human rights and dignity cannot be separated from sovereignty. Annan had hoped that the smaller body would be a 'society of the committed', composed of states that would respect the primacy of human rights in the UN Charter.

When the Secretary General's wish list for the Human Rights Council was submitted to the 2005 World Summit of global leaders, the shape of the future

Council began to resemble the fate of the Commission. While the leaders agreed the Commission should be replaced, there was much disagreement on size and membership, along with its status within the UN. Ultimately, the World Summit's Outcome Document acknowledged human rights as a pillar of the UN system and submitted the creation of the Council to the General Assembly. There again, the states which were the worst abusers of human rights attempted vigorously to water down key reforms and the strengthening of the new Human Rights Council; again, they were to meet with the equally vigorous opposition by human rights champions, in the form of governments, NGOs and individuals. Ultimately, there was a compromise and the Council was voted into existence on 15 March 2005 in the General Assembly, with 170 voting in favour, 3 abstentions and 4 voting against, including the US and Israel.

The newly created Council clearly showed both the victories and the defeats of those who sought to have a true global champion for the human rights component of the expanding *grundnorm* of international law. While the body would now be a subsidiary body of the entire UN system, its membership was only reduced to 47 members still serving as representatives of their sovereign states. They would be elected by secret ballot on the basis of geographical distribution, and for a period of three years, by an absolute majority of the General Assembly. Thirteen seats are reserved for Africa, the same for Asia, six for Eastern Europe, eight for Latin America and the Caribbean and seven for Western Europe and other countries (US and Canada).

An aspect of the Commission that was not abolished, and which has come to haunt the Council, is the ability of regional groupings, in addition to individual states, to nominate particular states. This has allowed for certain blocs to nominate some of the worst human rights abusers in their regions, despite the requirement that all members elected 'shall uphold the highest standards in the promotion and protection of human rights'.[51] However, once on the Council, members are obliged to cooperate fully with the various mechanisms and procedures of the Council, which could include being forced to allow UN monitors to investigate allegations of abuses within their own sovereign state.

Perhaps the greatest victory for the human rights champions advocating for an improved Council was the new requirement that members be the first to submit to an objective Universal Periodic Review (UPR) of their own record while on the Council. This could include the permanent members of the Security Council, if they find themselves on the Council, and ultimately all members of the UN, which must also submit to the review when their turn comes.[52] Owing to the increased involvement of not only states but also civil society organisations there is hope that the UPR mechanism will provide greater monitoring and compliance with human rights obligations, taking a bottom-up and top-down approach to supporting the human rights component of the *grundnorm* of international law.[53]

The early assessments of the effectiveness of the UPR, which went into its second round by 2012, were less than laudatory. While most experts appreciate the need to move away from the overt politicisation of human rights reviews under the previous Commission, one writer has described the UPR's early progress as 'rhetorical action'.[54] The danger is that even this modest progress could easily

turn into 'rhetorical inaction'. This could occur because of the limited time and detail the review is able to dedicate to states, the commitment of states to cooperate and the relationship between delegates sent to review the selected state and the pressures on them from the state they represent. Such close examination warns against unrealistic hopes for a great transformation of the UN's ability to engender human rights compliance, even while the Human Rights Council becomes more 'amicable'.[55]

Indeed, it has been argued that such an amicable environment could lead to the Human Rights Council functioning no differently from the Commission – as a political institution that reflects the agendas and will of its membership, which still includes some of the worst human rights abusers in the world.[56] A prime example of the potential for the 'rhetorical inaction' under the new review procedures of the Council was the approval given to the human rights situation in Libya under the regime of Moammar Gaddafi, before his own people deposed him with the military assistance of NATO and some members of the Arab League.[57]

The only safety valve preventing the Human Rights Council from imploding is the ability of the General Assembly to remove incorrigible violators of human rights from the Human Rights Council by a two-thirds majority of the General Assembly. Even though this may be difficult to achieve, given the support of regional groups for some of the worst offenders, the diplomatic shame of being found wanting could be the best deterrence. Therefore, while wanting in many ways, the Human Rights Council represents an improvement over the hypocrisy that ran rampant in the former Human Rights Commission. A small but hopeful sign of this improvement came when Libya was suspended from the Human Rights Council in 2011, owing to the atrocities being committed by the Gaddafi regime.

What has helped the small improvements to keep growing is the renewed involvement of the United States and its democratic allies in the work of the Human Rights Council under the administration of President Barack Obama. The Council has helped trigger important investigations and reviews of grave human rights situations around the world, in part due to the pressure from the US and its allies on the Council. For example, at its opening session in 2012, the Human Rights Council called an urgent high-level debate on the situation in Syria, which led to the adoption of two resolutions on Syria: the first focused on humanitarian access and the second extended the International Commission of Inquiry on Syria.

Other examples of such progress included the Human Rights Council's Special Session on 25 February 2011, where it condemned the grave human rights violations committed by the Libyan Government, in addition to creating an independent Commission of Inquiry to investigate those violations, and recommended to the UN General Assembly that it suspend Libya's membership rights on the Human Rights Council. The UN General Assembly agreed with the Human Rights Council's recommendation and suspended Libya from the Council on 1 March 2011, which prompted the Arab League also to restrict Libya from its membership. These preliminary Human Rights Council findings eventually led to the UN Security Council's historic resolutions authorising intervention against the Gaddafi regime (described later in this chapter).

Other notable actions taken by the Human Rights Council in the 2011–2012 period include debates, resolutions and calls for accountability for grave human rights abuses in Côte d'Ivoire, Guinea, Sri Lanka and Yemen. In addition, the Human Rights Council's renewal of the mandates for the special rapporteurs on Iran, North Korea and Burma (Myanmar) has produced significant progress, especially as regards the democratic reforms in Burma.[58]

Several Western countries, especially Canada and the US, continue to decry the over-emphasis by Council members on the human rights situation in Israel, and the occupied territories in Palestine, as an unnecessary politicisation of the organisation. However, the engagement of these Western countries, even with their geopolitical biases, remains crucial to prevent the destructive politicisation and human rights hypocrisy that doomed the predecessor to the Human Rights Council. Indeed, the US seems to be placing much hope on the UPR as the best hope for the Council, stating that:

> The United States believes the Universal Periodic Review (UPR) has the potential to effect real change in countries throughout the world. The UPR is not just something that occurs in Geneva every four and half years. It is an ongoing, daily tool to advance human rights. Our interventions to other countries are crafted with the goal of providing useful, targeted recommendations that, when implemented, will create positive change for society.[59]

It will take time, resources and determination before the UPR, the treaty bodies and monitoring mechanisms such as the special rapporteurs turn the UN diplomatic decorations of ratified human rights treaties, and the evolution of the relatively new Human Rights Council, into meaningful mechanisms for the protection for global human rights and dignity. Sadly, the longer the wait, the greater the effect of the tragic flaw will be.

However, the long-term perspective must not also be lost. As the eminent human rights jurist Henry Steiner has noted:

> In a world rich in human rights norms and ideals but wanting in political will and enforcement of those ideals, the universal institutions have played a modest role. . . . We are much better off having our institutions, whatever their inadequacies, than resting with declarations and law-making treaties that lack permanent human rights organs. They give us a start. We can exploit the politically possible to work towards a next half-century that will give international institutions and processes greater capacity to aid peoples.[60]

While Steiner's optimism is not unrealistic, if his hopes are to be accomplished then the fundamental principles behind the institutions of global governance will have to change. This will involve reversing the inertia and breaking down the barriers so as to provide the individual champions and institutions of human rights greater capacity to advance human rights globally. Human rights treaty bodies and mecha-

nisms, such as the Human Rights Council and its rapporteurs, must be empowered to act as quasi-judicial bodies that are a critical part of the international rule of law and global justice, rather than as instruments of those who view the body of international human rights law more as diplomatic decorations than binding obligations.

1.5 Genocide, the Cold War and complicity: the age of hypocrisy

The half-century following the end of the Second World War saw the emergence, in both greater frequency and intensity, of the most evil form of violation of human dignity: genocide. As discussed in the opening pages of this chapter, the horrific path that led to the genocide of over 11 million people at the hands of the Axis Powers was one of the driving forces for the creation of the United Nations. However, as we have seen, the motivation to secure the human rights of all humanity, which started with the Atlantic Charter and the Declaration of the United Nations in 1941, did not manifest into entrenched provisions in the United Nations Charter. Instead, it had to be manifested in separate human rights instruments, such as the UDHR. But while it is recognised as the paramount instrument of international human rights, the UDHR was not the first human rights instrument to be enacted by the newly formed United Nations.

In 1948, one day before the Universal Declaration of Human Rights was adopted, the General Assembly adopted a convention that, although not as celebrated as the Universal Declaration, has been deemed, owing to the fundamental nature of its principles, by the most eminent jurists to bind both signatories and non-signatories alike.[61] The treaty is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.[62]

The Genocide Convention came into force in a shorter time frame than the international covenants described above, after the 20 necessary ratifications in 1951. By July 2012, it had fewer ratifications than the international covenants: 142. Like the covenants, the Genocide Convention was riddled with reservations, even by the United States.[63] The Genocide Convention was intended to go beyond the principles of the Nuremberg Charter, which required the occurrence of an international conflict. The critical provisions of the Genocide Convention made it clear that genocide could be committed during a war or during peacetime:

> *Article I*
> The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent and punish.
>
> *Article II*
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article III
The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempts to commit genocide;
(e) Complicity in genocide.

Article IV
Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

These provisions of the Genocide Convention reach beyond the traditional ambit of international law, which usually focuses on juridical relations between states and only imposes individual responsibility for the most atrocious human rights abuses, even where such abuse is done in the interests of the state. Thus, the Convention should have been one of modern history's greatest instruments for breaking down the armour of territorial integrity and political independence, and for allowing human dignity and justice to prevail. It is no surprise that once again the wait for global justice was to be agonisingly long. As one eminent jurist in this area, William Schabas, has noted:

> Almost inevitably, the criminal conduct of individuals blazes a trail leading to the highest levels of government, with the result that this aspect of human rights law has been difficult to promote. While increasingly willing to subscribe to human rights standards, States are terrified by the prospect of prosecution of their own leaders and military personnel, either by international courts or by the courts of other countries, for breaches of these very norms.[64]

As described later in this chapter, the subsequent establishment of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda, followed by that of the International Criminal Court (ICC), has advanced the fight against impunity for the most egregious crimes, even when the highest levels of sovereign power commit them. However, the crime of genocide is limited in its scope. While not insurmountable, the requirement of specific intent to commit the crime of genocide, as required by Article II of the Convention, remains a persistent obstacle in the fight against impunity. As Professor Schabas correctly noted, until

1992, 'the Convention definition of genocide has seemed too restrictive, too narrow. It has failed to cover, in a clear and unambiguous manner, many of the major human rights violations and mass killings perpetrated by dictators and their accomplices'.[65]

This problem was hugely increased by the fact that during the Cold War the dictators were often the proxies of the two superpowers. The accomplices were not only individuals within these proxies but also the two superpowers themselves. The Soviet Union, whose state ideology was opposed to the very notion of human rights, acted with immense cruelty both within the Soviet bloc and elsewhere. The signatures of the Soviet bloc on human rights legal documents meant very little in light of the profound violations of human rights within the Gulag, the mass murders during Stalin's brutal rule, the torture chambers of the secret police and the mass persecution of religious and other minorities.[66] These horrible affronts to human dignity were extended and multiplied in the territories of their allies around the world.

The second major external accomplice was not infrequently the other superpower, which professed to be fighting the Cold War on behalf of liberty, freedom and human rights: the United States of America. The ultimate external accomplice was the Security Council of the United Nations.[67]

The *Oxford English Dictionary* defines hypocrisy as 'the assumption or postulation of moral standards to which one's own behaviour does not conform'. While the West claimed to have entered the Cold War for seemingly noble reasons, its actions initiated an age of human rights hypocrisy. President Truman declared the start of the Cold War after Churchill pronounced the fall of the Iron Curtain in March 1946, when the Russians tightened their grip on Eastern Europe and increased their armed forces to present a clear danger to the West, all while stoking communist insurrections elsewhere. In March 1947, in a speech that later came to define what is known as the 'Truman Doctrine', President Truman stated that the world had a choice between two forms of human governance:

> One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion and freedom from political oppression. The second way of life is based upon the will of a minority forcibly imposed on the majority. It relies upon terror and oppression, a controlled press, framed elections and the suppression of personal freedom.[68]

Just as the Atlantic Charter and the Declaration of the United Nations had based their call for action against evil on the value of human dignity, so too did the Truman Doctrine. It stated that the policy of the United States was 'to help free people to maintain their institutions and their integrity against aggressive movements that seek to impose upon them totalitarian regimes'. President Eisenhower would later push the rhetoric even further when he stated: 'Forces of good and evil are massed and armed and opposed as rarely before in history. Freedom is pitted against slavery, lightness against dark'.[69] President George W. Bush would use

similar words in the days following 11 September 2001, targeted this time at a worldwide network of terrorists.

Critics from the left have argued that when the forces of the West, called to arms by the Truman Doctrine, became enmeshed in the battle strategies of the Western military complex, reinforced by powerful economic interests, the means devoured the ends. Noam Chomsky and others have detailed this slide as regards the involvement of the United States in the gross human rights violations in Indochina, Central America, Argentina and Chile. All were done in the name of containing the forces of evil.[70]

The destruction of human dignity as a means to containing the Soviets had major implications for the main institution of global governance, which was effectively controlled by the two superpowers that manufactured the Cold War. Perhaps the greatest consequence of this strategy, not only for historical purposes, but also for the future evolution of the United Nations, is the genocide of East Timor.

On 7 December 1975, Indonesian troops invaded the former Portuguese Colony of East Timor. Before the invasion of East Timor, there was a population of approximately 688,000, which was growing at a rate of roughly two per cent a year. By 1981, the population had dropped to approximately 500,000. A third of the population, more if one takes into account the normal growth rate, had been slaughtered. In terms of the percentage of population killed, the slaughter in East Timor has been one of the worst since the Holocaust.[71]

The president of Indonesia, who had ordered the invasion of East Timor, had come to power with the assistance of the United States. Indonesia was a vital ally in the fight against communist expansionism in South East Asia, which had triggered the involvement of the United States in Vietnam, Cambodia and Laos. Others have described in some detail how the United States was involved in the overthrow of the former President Sukarno and the coup of General Suharto, which led to the slaughter of approximately half a million of his own people under the banner of an anti-communist crusade. On Suharto's coming to power, the ties between the United States and Indonesia grew closer. This included increased military aid and equipment, despite gross violations of human rights. While the degree to which the Americans participated in these events remains in dispute, one thing is certain: the taint of complicity hangs heavy on this period of American history.[72]

It is also alleged that President Suharto delayed the invasion of East Timor for a few days to avoid embarrassing President Gerald Ford and Secretary of State Henry Kissinger, who were in Jakarta at the time.[73] Some have argued that the United States condoned, or at least did not stop the invasion, because East Timor controlled the strategically important waters of the Ombai-Wetar straits, which linked the waters of the Indian and Pacific oceans, a vital passage for American naval forces.[74]

The invasion of East Timor also confirmed, yet again, that the main institution of global governance had failed in its most primary goal: the protection of territorial integrity and political independence under Article 2(4) of the United Nations

Charter. Resolutions passed by the Security Council and the General Assembly, calling for Indonesia to withdraw and to respect the territorial integrity of East Timor and its people's right to self-determination, failed to elicit any response from Indonesia. Resolution 384, which was passed unanimously in December 1975, called on all states to respect the territorial integrity of East Timor and for Indonesia to withdraw its troops without delay. Nothing happened.

In April 1976, the Security Council essentially repeated its earlier resolution. This time the United States and Japan abstained. Again, not surprisingly, nothing happened. Over time, the number of states opposed to these unheeded resolutions grew to the point that the importance of not offending Indonesia and its Western allies was of greater significance than the genocide of the East Timorese. As a result, the Security Council stopped discussing the unfolding genocide.[75]

Other bodies of the United Nations such as the Human Rights Commission proved equally ineffective, as did UN-sponsored talks.

While the West was rightly outraged over the mass atrocities in Cambodia by the Khmer Rouge, the genocide in East Timor, proportionately on a larger scale, was met with silence because of the exigencies of the Cold War.[76] (The failure to act during the mass atrocities in Cambodia was also a result of superpower rivalries as has been well discussed elsewhere.[77]) The history of the genocide in East Timor posed one of the most significant moral, political and legal challenges to the institutions of global governance and international law. These challenges were doomed to be repeated in the later genocides in Rwanda, the Balkans and, yet again, in East Timor in the last decades of the 20th century.

In the tragedy of East Timor, the main institution of global governance and international law was unable to meet the two main goals of protecting territorial integrity and human rights, the same goals that brought the institution into existence. In part, this was because the Cold War had driven the United States to partner with leaders and countries whose values were far removed from the ideals of the Atlantic Charter, the UDHR or even the Truman Doctrine. Such corrosion of the moral authority of key players in the United Nations and indeed the West, owing to conflicts not only in East Timor, but also in Indochina, Central America, Chile and Argentina,[78] would outlast the Cold War. It would set the stage for a moral coma in the post-Cold War period, which would last until the intervention in Kosovo.

History is a way of documenting the unfolding nature of humanity. The cruelty, moral blindness and hypocrisy of the history of humankind in the era of the Cold War describes with chilling clarity the tragic flaw within the nature of humanity and its institutions of global governance.

1.6 The regional human rights regime in Europe: is the wait for justice over for Europe and is it a model for the rest of the world?

Europe offers great hope for the linking of global justice and human rights with the *grundnorm* of sovereignty, but within that hope there is a sense of deep historical

dismay. Starting with the dismay: must it take two world wars, genocide and the threat of the terror of the Soviet Union on the doorstep before one of the most powerful groups of nations initiates a supranational system that accepts the inevitability that sovereign power must be exercised both responsibly and legitimately?

Given the horrors visited upon the people of Europe by the Nazi and fascist governments of the continent, post-war Europe did not have to be convinced that absolute sovereignty could not be the *grundnorm* of international law. Indeed, with post-war Europe facing another totalitarian threat in the form of the Soviet Union, pressure came not only from the US but also from most of the formerly occupied countries, as well as Germany itself, for the need to have a 20th-century form of Westphalian system. That system would see Europe agree to be a region of sovereign states predicated on democratic integration through a continent-wide human rights system, and later through an economic union. In the wake of perhaps the most savage acts of barbarity on the European continent, there needed little convincing that with sovereignty came the duty to act responsibly and legitimately to other sovereigns on the European continent and to one's own citizens.

In contrast to the short memories at Dumbarton Oaks and San Francisco a few years earlier, in May 1948, the Congress of Europe met at The Hague and decided to match sovereignty with justice, by stating at the end of their meeting:

> We desire a united Europe, throughout whose area the free movement of persons, ideas and goods is restored;
>
> We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;
>
> We desire a Court of Justice with adequate sanctions for the implementation of this Charter;
>
> We desire a European Assembly where the live forces of all our nations shall be represented.[79]

The Statutes of the Council of Europe of 5 May 1948 further established that its purpose was to be 'the defence of individual freedom, political freedom and the pre-eminence of law'. Article 3 made respect for human rights a precondition for membership. Later on, we shall see how this condition is seemingly ignored through the continued membership of the Russian Federation, thereby undermining the exemplary work of the European Council.

The Committee of the Ministers of the Council mandated the drafting of the treaty envisaged by the Congress of Europe and, on 4 November 1950, the Convention for the Safeguard of Human Rights and Fundamental Freedoms (ECHR) was signed in Rome. As the Congress of Europe had also envisaged, the Convention established what was hoped would be an effective system for the regional protection of human rights in Europe. This included a Commission of Human Rights and a European Court of Human Rights (ECtHR), to monitor and implement the respect for fundamental human rights and freedoms across Europe.

The force of the UDHR, which influenced the establishment of the ECHR, was further enhanced by the European Council's decision that a state could not be admitted unless it committed to upholding the principles in the Convention. While only coming into force on 3 September 1953, on the 10th ratification, the ECHR now binds all European nations except Belarus. The Committee of Ministers was made the final oversight body for cases not brought before the ECtHR, making it possible for justice to triumph in the court of European public opinion and through the imposition of political sanctions. The Convention came into force on 3 September 1953.[80]

The ECHR has become the talisman of commitment to the conception of the evolving *grundnorm* of sovereignty, which seeks to exercise power responsibly and legitimately. Most European states have incorporated the ECHR into domestic law, including the United Kingdom through the Human Rights Act 1998. However, given the ancient grasp of the untrammelled right to parliamentary supremacy in Britain, along with the antagonism felt towards some the rulings of the European Court of Human Rights, there is a sorry backlash against a fundamental rights document that stands on the same historic footing in Europe as the *Magna Carta* did in Britain.

The Convention is limited primarily to the area of civil and political rights and does not pretend to encompass the huge area covered by economic, social and cultural rights. Considering the lack of progress on the implementation of the United Nations Covenant on Economic, Social and Cultural Rights and the evolving nature of the European Union, perhaps the limited coverage of the European Convention was the right choice. One of the founding architects of the European regime of human rights, Pierre-Henri Teitgen, stated:

> Certainly, professional freedom and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalization of social democracy.[81]

While most accept that the European human rights regime was influenced by the UDHR, Europe, through the Council of Europe, was the first supranational institution of governance that set up an effective complaint and judicial system to protect human rights. The ECtHR, at first, and then the ECtDR, have been far more effective in protecting human rights and the rule of law than the various organs of the United Nations, although the European regime is not without its 'stains'.[82]

The European Commission of Human Rights and the ECtHR merged into a single and powerful institution for the protection of human rights through Protocol 11 to the Convention, which entered into force on 1 November 1998. There are now 47 contracting member states to the Convention. States that wish to join the Council of Europe must not only accede to the Convention but, since 1 November

1998, all acceding states must also sign the optional protocols for the right of individual petition, under Article 25, and agree to the jurisdiction of the European Court of Human Rights.

The caseload of this judicial infrastructure has dramatically increased since its establishment. In 1999, before being merged into the ECtHR, the European Commission on Human Rights received more than 3,000 cases every year. After the former Soviet bloc nations joined the Convention, the number of new cases grew tenfold. This increase precipitated the abolishment of the Commission and the restructuring of the Court into a full-time body with 47 judges, elected by the Parliamentary Assembly of the European Council, for a nine-year term, and sitting in five sections in which chambers are formed.

In 1999 the Court rendered 177 decisions after dealing with a caseload of 8,400.[83] Since then, there has been a dramatic increase in cases waiting to be heard. The situation reached crisis levels in 2009, with a record 120,000-case backlog that was ever increasing, resulting in an unacceptable wait time of approximately six years or more before a judgment by the Court could be rendered. As a result, in June 2010, reforms were introduced under Protocol 14 to reduce the number of judges required to make decisions and streamline the process for admissibility to the Court. These reforms have helped increase the efficiency of the Court, as the vast number of cases are from individual petitions, with few reaching the Court after all the criteria of admissibility are examined.

However, even these modest reforms had been stymied for years by one of the most troublesome members of the ECtHR, the Russian Federation, who protested what it deemed to be political decisions by the Court, relating to allegations of gross human rights abuses by the Russian military in Chechnya. The dramatic increase in the caseload of the Court is also a product of the recent membership of Russia, Central and Eastern European nations and Turkey in the Council and the Court. By 2012, nearly half of the judgments originated from Turkey (2,747), Italy (2,166), Russia (1,212) and Poland (945).[84]

There will have to be more reforms at the Court to ensure that Convention violations of a more serious nature are dealt with expeditiously and with greater clarity on the final result. The Court is a victim of the ineluctable need for its existence. If sovereignty is to be exercised responsibly and legitimately then the institutions that support human rights and the administration of justice must be adequately resourced and staffed, with jurists and other personnel of the highest quality.

Despite the growing complaints against the alleged 'political rulings' and the 'undemocratic' Court, compliance figures indicate that Europe has managed to establish, through the rule of law and the application of human rights principles, the essentials of sovereignty as the legitimate exercise of power for the over 800 million peoples living on the European continent. In very large measure, the Member States of the Union have complied with the large number of decisions handed down by the European Court in a wide array of human rights cases.[85] Landmark judgments have been handed down, amongst others, on freedom of expression and the press, the mistreatment and rights of prisoners, unfair trials,

abuse of police powers, discrimination, deportation and torture and, in the case of Russia, gross human rights abuses in Chechnya.

Indeed, that justice has become ascendant in Europe is affirmed by the fact that Great Britain has joined most other European nations in incorporating the European Convention into their domestic legal system, despite the numerous arguments against the Court and its rulings.[86] Many domestic courts in Europe regularly cite the European Convention in adjudicating disputes involving human rights. The impact of a major European Court of Human Rights decision against one country can thus be felt across all 47 members of the Council. There have been more than 15,000 decisions by the 47-member Court since 1959, covering virtually every aspect of the Convention, as well as thousands of Commission precedents on admissibility. One of the key factors effecting admissibility is the exhaustion of domestic remedies, which requires applicants to the European human rights machinery first to give their domestic legal systems a chance to provide adequate and effective remedies, before resorting to the European human rights system.[87]

Until the Court became seriously backlogged, some claimed that the principle of human rights subsidiarity, implicit in the requirement of exhaustion of domestic remedies, was one of the key factors in the success of the European system, as it allowed for a dialogue between domestic and supranational human rights judicial institutions, and went some way towards preventing the overloading of the system. Other factors that have contributed to the success of the European system have been the Court's ability to adapt to change and remedy shortcomings.[88] It remains to be seen if this is the case with the latest remedial reforms under Protocol 14. Finally, the presence of a common European political culture, informed by the establishment of a culture of rights and the rule of law, is cited as one of the major reasons for the system's success and for its members' compliance with the decisions of the European Court.

However, there is concern that the addition to the Council of Europe of the Russian Federation and other Eastern European states, where there is less of a tradition of respect for human rights and the rule of law, may negatively impact on a common European human rights culture.[89] Nevertheless, there could be a fundamental reason why even the new members of the Council may eventually fully participate in the evolving culture of human rights on the European continent, and it has everything to do with the desire to secure membership in one of the world's most powerful economic clubs, the European Union (EU).

The main judicial body of the EU, the European Court of Justice, while deciding in 1996 that the Union cannot accede to the ECtHR, also ruled that basic human rights such as those in the ECHR are general principles of Community law. This ruling was then confirmed by the EU in the 1992 Maastricht Treaty on the European Union, and codified in Article 6(2) of the Treaty on European Union (commonly known as the Amsterdam Treaty), which entered into force on 1 May 1999. The same Article also requires that the EU respect human rights in external relations, reinforcing the role of human rights as one of the five objectives of the Common Foreign and Security Policy of the EU.[90]

Article 6(1) of the Treaty on European Union proclaimed: 'The Union is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States'. With such a proclamation it was inevitable that the Treaty on European Union would also state in Article 49 that only a European state 'which respects the principles set out in Article 6(1) may apply to become a Member State of the Union'.

In June 1993 at Copenhagen, the European Council decided on 'political criteria' that must be met by candidates for accession to the Union. These criteria include: 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.[91] Many of the Central and Eastern European candidates for European Union accession had to improve their human rights records, particularly in the area of protection of minority rights, to fulfil the Copenhagen criteria.

Article 7 of the same treaty also establishes a procedure for suspension of certain fundamental rights of membership, such as withdrawal of financial benefits and voting in the Council, in the case of a 'serious and persistent breach by a Member State of principles mentioned in Article 6(1)'. The decision as to whether there is a serious and persistent breach is made by the heads of state or government on a proposal by one-third of the Member States, or by the Commission with the approval of a two-thirds majority of the votes cast in the European Parliament. The Council, on a qualified majority decision, can then decide to impose such sanctions on the Member State, including withdrawal of voting rights in the Council and financial benefits from European Union membership.[92]

The final linking of the economic union with the human rights system in Europe occurred on 1 June 2010, when the EU acceded to the European Convention on Human Rights with the coming into force of Protocol 14 to the Convention, and as permitted by Article 59(2) of the Convention. The accession had become a legal obligation under the EU's Treaty of Lisbon in 2009.[93] While all Member States of the EU are parties to the Convention and the EU's Court of Justice ensures that the EU is founded on respect for fundamental rights, the Convention did not formally apply to EU actions until the accession. The accession of the EU to the Convention will make the entirety of the EU's legal system subject to external oversight in the area of fundamental human rights, giving all EU citizens the same rights as regards the actions of EU officials and institutions.

Europe, after being the main oppressor of human dignity in the 20th century, has evolved a swifter path to justice than the other continents and hemispheres. But dangers still lurk. Since the fall of the Berlin Wall in 1989, several countries in Eastern and Central Europe have joined the Council of Europe, with the goal of demonstrating their determination to improve their human rights records, establish the rule of law within their national boundaries and perhaps ultimately become members of the EU.

The most controversial of the memberships has been the Russian Federation. This recent addition has the potential to bring the entire system into disrepute. The actions of the Russian Federation in the rebel republic of Chechnya could be

viewed as crimes against humanity. Yet faced with the need to build and keep an international coalition against terrorism in the aftermath of 11 September 2001, the actions of the Russian Federation in Chechnya were largely ignored in the capitals of Europe and America. Within Russia itself, under the Government of President Putin, abuses of civil and political rights, including limitations on freedom of expression, association and assembly, along with violent and deadly attacks on journalists and minorities are becoming the hallmarks of Russia's 'managed democracy'. These violations of the founding principles of the Council of Europe and the ECHR seem to continue unabated under the second term of Vladimir Putin as president of the Russian Federation.[94]

In 1999, a leading European human rights jurist, Manfred Nowak, gave an early warning about the accession of Russia and other Eastern European nations to the Council of Europe:

> . . . the recent admission practice of the Council of Europe in respect of countries such as Albania, Croatia, the Russian Federation, or the Ukraine, raises doubts about the seriousness of the Council of Europe in applying its own membership criteria. Membership of the Council of Europe, therefore, no longer necessarily means that the political admission criteria in Article 6(1) TEU [Treaty of the European Union] are met . . .[95]

This should have been a warning that the European system of human rights, a model to the rest of the world, should be vigilant against the stain of hypocrisy, if the Council of Europe disregards its own human rights membership criteria. Even when the tragic flaw is contained, there is always the potential for it to re-establish itself.

Since the establishment of the European human rights regime, there have been attempts to establish other similar regional systems for the protection of human rights and the rule of law. None has been as successful as the European system, in part because of the effects of colonisation and the anti-human rights environment of the Cold War.

1.7 The regional human rights system in the Americas

In Central and South America, the Organization of American States (OAS) succeeded in establishing the Inter-American Convention of Human Rights (Convention) in November 1969, despite the fact that the region had been a proxy battleground for the superpowers during the Cold War. It came into force in 1978 after 11 states had ratified it. Sadly, two of the most powerful states in the region, Canada and the United States, have yet to do so.

Ironically, some have suggested that the creation of a human rights system across the Americas was intended, in part, to offset the pervasive intrusion of the United States into the domestic politics of the sovereign nations of the Americas during the Cold War and the fight against communist ideology in the Western hemisphere. This could be achieved by creating a regional public order that would legitimise sovereign

power through an Americas-wide framework for the promotion and protection of human rights. The rationale of the OAS, the architect of the Convention, was to establish non-intervention as a fundamental organising principle of the Americas, but tempered by a legitimising human rights regime. In fact, the 1948 American Declaration of the Rights and Duties of Man (American Declaration) was the first supranational human rights document of the post-Second World War era.

In 2012, the Inter-American Commission celebrated its 53rd anniversary. The same year, the Convention and the Inter-American Court of Human Rights celebrated its 31st anniversary. While the European human rights regime has received the most attention, praise and criticism, the human rights system in the Americas has probably coped with longer and graver state and non-state violations of human rights.

The Convention established an Inter-American Commission of Human Rights with a limited mandate that has expanded over time to include the power to receive petitions or communications concerning violations of human rights, scrutinise member state reports and carry out on-site visits.[96] The Convention also established the Inter-American Court of Human Rights. Situated in Costa Rica, the Court has seven members who are elected by a General Assembly, but who sit in their personal capacities. As in the case of the International Court of Justice, the decisions of the Inter-American Court are binding only on the member states that have accepted the jurisdiction of the Court. Like the ECtHR, the Inter-American Court gives individuals the right to petition against rights violations. It could be argued that by giving individuals the right to petition the Court at the supranational level the Inter-American Court is granting these individuals juridical personality, thereby extending the sovereignty *grundnorm* of international law in a large part of the Americas to the protection of individual rights.[97]

While the Convention guaranteed most of the civil and political rights enshrined in the UDHR and the ECHR, its goals were severely retarded by the support the United States provided to brutal authoritarian states in the Americas, to combat the threat of communism at the height of the Cold War. When the Convention came into force in 1978, the authoritarian regimes of Argentina, Brazil, Bolivia, Chile, Peru and Uruguay, along with many of the Central American states, engaged in some of the most brutal post-Second World War violations of human rights and humanitarian law, to censor and suppress political parties, leftist civil society organisations and student groups. This included mass murder, torture and disappearances. Many of these violations of the Convention and national democratic movements were justified on the grounds of national security and public order. This would be echoed later in the United States and around the world after the terrorist attacks in America on 11 September 2001, as described later in this chapter.

Since the demise of the Soviet Union in 1989, the Commission has assisted the region in breaking from its authoritarian past by assisting with national human rights plans, the creation of special thematic rapporteurs and site visits to evaluate human rights progress. Some of the most challenging situations the Commission faces concerns the continuing fighting between the security forces of democratically elected governments and rebel groups, particularly in Colombia

and Peru, where there are allegations of severe human rights abuses on both sides. These continued challenges have meant that, while some democratically elected governments in the Americas have begun to accept the jurisdiction of the Court, others, like the former Fujimori Government of Peru, had engaged in a battle with both the Commission and the Court, even threatening to withdraw their previous acknowledgement of the Court's jurisdiction.[98]

Although imperfect, the OAS, the Commission and the Court have been crucial instruments in the transition to democracy in the region. They have undertaken to protect minorities and the unprivileged through landmark inquiries into key areas such as the freedom of expression and the media, state-organised disappearances as crimes against humanity and self-amnesty laws, requiring investigations, prosecutions and punishment for the most serious violations and ruling that victims have the right to 'truth'.[99]

The assaults on the legitimate exercise of sovereign power in the Americas include ongoing violations of fundamental human rights by security forces, both military and police, and far too many cases of torture and disappearances, censorship of the media, unfair trials and very serious allegations of discrimination against women, children, indigenous peoples and prisoners.[100]

These events have also led the OAS, some genuinely democratic governments in the OAS and the Commission to stress the supporting links between democracy and human rights. In the first decade of the 21st century, attempting to follow the precedent set by the EU, proponents of a Free Trade Area of the Americas (FTAA) began insisting that a free trade zone for the hemisphere must also have a foundation of effective democracies, the rule of law and respect for human rights. Endorsement of these foundational principles occurred at the Summit of the Americas in Quebec City on 21 April 2001, when the 34 leaders of the Americas linked member state participation in summit negotiations, leading to the eventually abandoned Free Trade Agreement for the Americas and to the maintenance of democratic order.

Later that same year, foreign ministers from across the hemisphere hammered out a Democratic Charter for the Americas. The Charter affirmed that toppling democratic governments by military coups would not be acceptable in the region and at the OAS. The Commission took advantage of these political developments to investigate and report on the 2002 attempted coup in Venezuela and to monitor the fragile political situations in Bolivia, Ecuador, Guatemala and Haiti.

Europe completed its human rights and rule of law catharsis through two world wars and a genocide that history will never forget. While the human rights regime in the Americas has the potential to follow the European model, with the end of the Cold War's hypocrisy and the transition to democracy, there will have to be considerable political will and civil-society pressure to ensure that the sovereign exercise of legitimate power and the wait for global justice does not take as long in the Americas as it did in Europe. This will require adequate human and financial resources for the Commission to fulfil its key functions, given the rapidly expanding number of cases it handles (with a 70 per cent increase over 10 years). It will also require a similar increase in resources for the Court, following reforms in 2001 under which all cases from the Commission are now presumptively referred to the Court.

In addition, the Americas human rights regional system has ongoing challenges regarding the execution of Court and Commission judgments, with some governments simply ignoring decisions. This was the case with Trinidad and Tobago, regarding the prohibition of the death penalty and the gross lawlessness of the Fujimori Government in Peru in the late 1990s.

It seems that another continent may slowly be starting down the path towards the inevitable inclusion of the legitimate exercise of power, through the respect for human rights and the rule of law, in the *grundnorm* of sovereignty in international law.[101] As recent history has shown, this path is uneven and littered with obstacles. The most recent obstacles, at the time of writing, are the 2012 attacks by the emerging anti-human rights coalition of countries in the Bolivarian Alliance for the Americas (ALBA). Led by Bolivia, Ecuador, Nicaragua and Venezuela, the governments of ALBA have railed against the Commission for condemning violations of the freedom of expression, and for expanding their focus from civil and political rights to labour rights, the rights of indigenous peoples and the rights of sexual minorities.

Another potential impediment is the recent opposition that Brazil mounted to a Commission ruling against a much-favoured giant dam project driven by the newly elected President Dilma Rousseff. The Commission ruling led the president to withdraw the Brazilian ambassador from the OAS and terminate the payment of dues to the organisation. Added to these criticisms, in January 2012, the OAS agreed to proposals that would weaken the Commission's ability to provide annual reports on states' freedom of expression record. States in the ALBA coalition had threatened to opt out of the jurisdiction of the Commission if the Commission is not reformed, with Brazil and Peru joining the chorus.

The OAS has promised to draft new reforms and present them to the OAS membership, without requiring the consent of the Commission. The chairman of the Commission, José de Jesús Orozco, has warned that the autonomy and independence of the Commission is both the source of its credibility and essential for its efficiency.[102] However, the weakening of the Commission was met with stiff resistance. In March 2013, a majority of states at the OAS decided to support the autonomy and independence of the Inter-American human rights system by accepting the proposals made by the Commission to strengthen its operations.

Present-day challenges to the American human rights system include the ongoing need for member states of the OAS, the Convention and those who have acceded to the jurisdiction of the Court, to pass domestic legislation that reinforces their obligations under the Convention and the decisions of the Commission and Court. This includes the need for all members of the OAS and the Convention to submit to the jurisdiction of the Court and abstain from denouncing the Convention in the wake of adverse rulings, as the countries in the ALBA coalition have been doing.

Finally, to strengthen the spirit of regional solidarity on human rights, justice and the rule of law, the ratification of the Convention and adherence to the jurisdiction of the Court by the United States and Canada is long overdue. This

absence is an unacceptable legacy of Cold War hypocrisy, which allows the two North American countries to preach to the world about human rights promotion and protection, but not fully to subscribe to the system that attempts to do precisely that in their own backyard. The Americas have gone some distance on the path to justice and the rule of law;[103] however, the potential for the tragic flaw to reassert itself is especially high in the early stages of that path, as the actions of the states in the ALBA coalition are proving.

1.8 Human rights regional mechanisms in the Asia-Pacific region

While Europe, the Americas and, as discussed below, Africa have established their respective human rights frameworks, with corresponding enforcement mechanisms, the Asia-Pacific region remains, along with the Middle East, the only major part of the international community without a regional human rights treaty and mechanism to facilitate both the promotion and protection of human rights. As will be discussed below, the region is seeing the emergence of a weak sub-regional human rights promotion mechanism in South East Asia with the establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009.

Some argue that in addition to the lack of political will in the Asia-Pacific region, the main reason for the absence of a regional human rights mechanism in the most populous part of the world is the authoritarian instincts and cultures of the governing elites, who prize social, political and economic stability above individual liberty and freedom. China represents the paradigm example in this, and is the major obstacle to any prospect of a region-wide human rights mechanism in Asia. Following this line of reasoning, elites often justify the suppression of their fellow citizens, in part, by asserting that human rights are Western neo-colonial ideologies that are in conflict with 'Asian values'.[104] However, such intellectual justification for trampling on the rights of their citizens becomes unconvincing, both domestically and internationally, as the globalisation of information, transportation and mobility demonstrates the superficiality of such defences to gross human rights abuses.

One leading Asian jurist, Vitit Muntarbhorn, has suggested that the lack of an effective regional system on human rights, as is present in Europe, is 'partly due to the lack of homogeneity in the region; it is perhaps too vast and eclectic for a comprehensive regional system'.[105] Given the slow but steady progress towards a regional system in the equally vast and non-homogeneous area of the Americas, this suggestion is not satisfactory. The same author goes on to point out that identifiable action is taking place within countries and at the regional level, pointing to the emergence of workshops and meetings, supported by the United Nations, to discuss the establishment of a regional system and the emergence of national plans on human rights and human rights education.

In the case of South East Asia, the Association of South East Asian Nations (ASEAN) launched the ASEAN Intergovernmental Commission on Human Rights (AICHR) on 23 October 2009. However, when the terms of reference were released, it became clear that intense political bargaining had compromised the

body. Instead of having independent commissioners supported by an independent judicial body capable of adjudicating human rights complaints, the AICHR is made up of a body of government-appointed representatives with no mandate to enforce human rights commitments or rules. The formal mandate of the Commission appears to be very limited and perhaps is in reality no more than a consultative inter-governmental body on human rights that, in the view of ASEAN officials themselves, was not intended to be an independent human rights watchdog.

The primary functions of the AICHR are the minimum that could be expected from any form of regional mechanism. They include the development of strategies for the promotion and protection of human rights, enhancing public awareness of human rights through education, research and the dissemination of information, and the provision of advisory services and technical assistance. The Commission relies primarily on peer pressure, lacking the ability to impose sanctions for any violations of the AICHR, a situation that mirrors the ASEAN Charter's impotence in the enforcement of its democracy and human rights requirements.[106]

Amazingly, while the AICHR terms of reference require the government-appointed commissioners to act impartially, they are also mandated to be accountable to the appointing government and to accept the subordination of the AICHR to the principles of 'non-inference' and 'sovereignty'.[107]

These restrictions are indications that the Asia-Pacific region will play host to the most challenging and drawn-out struggle between the tragic flaw in global governance and the acceptance that the core of sovereignty includes the legitimate exercise of power through the protection of fundamental human rights. It is not surprising that at the time of writing in 2013, human rights organisations in the region and internationally, including Amnesty International and Human Rights Watch, have criticised the AICHR as lacking teeth.[108] These organisations are also asserting that the non-transparent way in which the AICHR is drafting the ASEAN Human Rights Declaration is indicative of the AICHR's lack of accountability, transparency and willingness to consult with civil society in the area of promotion and protection of human rights.[109]

However, one Asian human rights expert, James Munro, has suggested that South East Asia has a history of growing its limited human rights institutions into formidable human rights bodies. Examples that are given by Munro and others include the Indonesian Human Rights Commission, Komnas HAM, which this author helped to develop, created in 1993 by the former dictator Suharto, with the understanding that it could be rescinded at will. This Commission has grown into a formidable body with a reputation for independence. It now allows citizens to present complaints that, if well founded, are investigated and mediated with striking results. The Commission has even taken on politically sensitive cases and, on occasion, challenged the government. Munro hopes that even though the terms of reference for the AICHR lack critical functions, such as the ability to receive complaints and conduct investigations, this will not necessarily preclude it from performing those functions.[110]

What is most encouraging, given the political realities in the region, is the emergence of strong civil society groups and human rights activists, not just in

South East Asia, but also in the most authoritarian countries, such as China. These individual champions of global justice are even willing to suffer harsh treatment and imprisonment in order to show that the Asian citizenry value their fundamental rights and freedoms as much as any other. A notable example includes the imprisoned and harshly treated Liu Xiaobo, who received the Nobel Peace Prize in absentia in 2010 for over two decades of advocacy for human rights and peaceful democratic change in China.

Other civil society groups and activists, in the more progressive Asian countries, focus on the effective promotion and protection of human rights through political, judicial and constitutional reform, and the establishment of national human rights institutions and ombudsmen with varying degrees of effectiveness and independence.[111] The Asia-Pacific region may well see the emergence of a wider and more effective regional system. This system is not being developed from the top down, as it was in Europe and the Americas, but from the bottom up, through the fierce tenacity of local civil society groups and the assistance of more effective and independent national human rights institutions and ombudsman offices.

1.9 The African human rights system

In Africa the wait will also be long. In June 1981, the Organization of African Unity (OAU), later renamed the African Union (AU), adopted the African Charter on Human and Peoples' Rights and established the African Commission on Human and Peoples' Rights under its provisions. It took 20 years to become a reality.[112] The Charter contains one of the most extensive lists of rights in any human rights document, including civil and political rights, economic social and cultural rights, and rights to peace, solidarity, development and a healthy environment. Duties to the family, society, the nation and the state are also included. However, the Charter has some severe drawbacks. One is the use of so-called claw-back clauses, which allow fundamental rights, such as the right to liberty and security of the person, to be limited for 'reasons and conditions previously laid down by law'.

The Commission was established under the Charter to assist in the implementation of the rights. Under Article 45 of the Charter, its mandate is to promote and protect the rights in the Charter and carry out other duties given to it by the Assembly of the heads of state. It has come as no surprise that the Commission has been lambasted as ineffective given the egregious record of the post-colonial states on the African continent. Some of these nations have made as much transitional progress to democracy as those in the Americas, such as South Africa, Ghana and Tanzania. However, the record of the continent has been stained with the genocide in Rwanda and atrocities in Sudan, Liberia, Sierra Leone, Burundi, the DRC, Ethiopia and Nigeria.

Most of these human rights crises occurred after the Commission was to start its promotional and protective functions in 1987. The ineffectiveness and timidity of the Commission, in both its promotional and protective functions, has been documented by leading African jurists. Some of these critiques have been tempered

with excellent suggestions for strengthening this relatively new, compared to its peers in Europe and the Americas, human rights body.[113]

It was only in June 1998 that the OAU adopted a protocol to establish an African Court of Human Rights to try to bring the rule of law to human rights claims on the African continent. The protocol, which came into force when 15 ratifications had been deposited on 25 January 2004, was supposed to provide the Court with the ability to hear complaints directly from individuals or NGOs, as well as from the African Commission, state parties and African inter-governmental organisations. Some experts hoped that the new Court would follow the rigorous example of the ECtHR, and thereby give credibility to the heavily criticised African human rights regime. Others promoted a more gradualist and promotional role for the Court, given the record of grave human rights violations on the continent, and the lack of an entrenched awareness and culture of human rights in the region.[114]

The 11 judges elected by the AU Assembly of heads of states and governments have a wide jurisdiction to hear disputes arising out of the African Charter, as well as other human rights documents ratified by the state party before it. However, this jurisdiction is narrowed by the limitation of access to states that have not accepted the jurisdiction of the Court. Adding to these limitations is the broad discretion of the Court to grant or deny access to individuals and NGOs. As one African jurist, Makua Mutua, has noted: '[t]he Court is not an institution for the protection of the rights of the states or OAU organs but primarily for the protection of citizens from the state and other governmental organizations'.[115] The same author has warned that if the mandate and jurisdiction of the Court is not interpreted broadly and liberally then it will be rendered substantially ineffective.

As if to demonstrate the veracity of these expert jurists, the Court handed down its first decision in 2009, in an application brought by an individual, Michelot Yogogombaye, against the Republic of Senegal. The applicant had asked the Court to rule against, and order the suspension of, the prosecution by the Government of Senegal against Hissène Habré, the former president of the Republic of Chad, who had claimed asylum in Senegal. The Court ruled the application was not admissible because Senegal had not recognised the jurisdiction of the Court to receive applications submitted directly by individuals or NGOs against it.

In addition, at the time of writing in mid 2013, only five states had granted standing for applications from individuals and NGOs, while only the DRC has brought a complaint against other states, namely Uganda, Rwanda and Burundi for invading its territory and causing gross human rights violations. One African jurist has concluded that, like the fate of the Commission, the Court is not likely to be embraced by African states, with the result that the Court may not have many cases to hear. Reflecting on the fact that no inter-state communication had been filed with the African Commission at that time, in 1998 Adama Dieng noted:

> In light of the grave human rights situation on the continent, the only reasonable explanation for this inaction is lack of public awareness of the Charter and its complaints procedures. It is, thus, difficult to see the African

> Charter as a fully effective weapon for the promotion and protection of human and peoples' rights. And yet did the African States not undertake to respect these rights when they signed the United Nations Charter?[116]

The answer is that regional Charters, just as the United Nations Charter, can become prisoners of the imperative of political independence and non-interference in domestic affairs. Even with the lessons learned from the depravities of the 'big man', who tortures his people across the African continent, the paradigm of non-interference in domestic affairs and political independence reigns. If the peoples of Africa are to break free from the tragic flaw, and finally obtain the justice that they have desired for so long, then the respect for human rights and dignity must be capable of breaking down the supremacy of national sovereignty and territorial integrity.

The leaders of Africa took a step in this direction when, on 9 July 2002, they replaced the OAU with the AU. The main goals of the new organisation include the promotion of democracy and human rights, as well as the development of regional peace-keeping forces to deal with the conflicts that continue to kill hundreds of thousands of civilians. On 15 February 2012, the AU's African Charter on Democracy, Elections and Governance came into force.[117] In addition at the 11th Summit of the AU in 2008, even while the African Court was struggling to become effective, the AU established a Protocol to merge the Court with a new Court to be called the African Court of Justice and Human Rights with new power to hear disputes relating to the AU and member states treaty obligations. The "Merger Protocol" has not yet been ratified by the requisite number of 15 states at the time of writting in 2013. Many observers have concluded that a lack of resources and lack of coherent strategies will inhibit the AU from achieving its ambitious democracy and human rights goals.[118]

1.10 After the Cold War: the era of television wars, genocides and virtual guilt

It was barely two years since the Berlin Wall had come down. The United States rejoiced in the new reality of a unipolar world, virtually unknown to previous history. President George Bush Sr had proclaimed a new world order of international peace and security, which would be enforced by the military might of the remaining superpower and its allies. He proceeded to prove it to Saddam Hussein, who had invaded Kuwait in August 1990. The cause was easy to justify; the vital national interests of the United States and her allies were at stake: the security of oil supplies and the possible threats that Saddam Hussein posed to Saudi Arabia and Israel, vital allies of the United States.[119]

A compliant Security Council backed the wishes of the huge coalition, put together by the United States, to use force to evict the Iraqis from Kuwait. When the overwhelming force was launched against Saddam Hussein, at the start of the Gulf War on 16 January 1991, the world witnessed what was almost a video-game-style war, with television screens around the world filled with Iraqi targets being destroyed by smart bombs shot from stealth bombers and other military aircraft. There was little

battlefield television reporting, as coalition forces tightly controlled the media. The United States had learned the lessons of Vietnam and the power of the battlefield image. As it turned out, the battle was won in a month, with the Iraqi withdrawal from Kuwait. There were very few coalition casualties and heavy Iraqi losses. The first post-Cold War television war seemed almost painless for the forces of the new world order. It also seemed to set the stage for the possibility of a *Pax Americana.*

With the global dominance of the West secure, the emergence of real human rights protection, sanctioned by the United Nations, seemed possible. It seemed that the two dominant criteria in international sovereign states relations theory, namely interests and values, were coming together to begin a new 21st-century global Westphalian-type society that would only promote the legitimate exercise of sovereign power. Even leading realists in international law, like Georg Schwarzenberger, would probably have accepted that 'interstate power as the true motor of history with international law as its disguise'[120] had the potential of extending the sovereignty *grundnorm* to include human rights, justice and the rule of law. The stage management of the televised Gulf War also helped in this regard. The 1991 Security Council resolution granting humanitarian intervention by the United States to protect the Kurds in Iraq seemed to reinforce this conclusion.[121]

These high hopes began to dim, and almost die, with the resurgence of ethnic conflict in the Balkans, the Achilles heel of Europe. When he came to power in 1993, President Bill Clinton was doomed to inherit the leadership of the democratic world that was governed more by the CNN factor than by the institutions of global governance or the rule of law.

In March 1992, after a Bosnian referendum that saw the Croat and Muslim population vote for independence from the Federal Republic of Yugoslavia (FRY), the evil hard-wired into human nature reappeared in Europe, in a way unseen since the end of the Second World War. Supported by soon-to-be-indicted war criminal President Slobodan Milošević of the FRY and his Bosnian Serb army, indicted war criminals Radovan Karadžić and General Ratko Mladić lay siege to Sarajevo, the Bosnian capital. Pictures of innocent civilians being slaughtered by the relentless barrage of heavy guns firing into apartment buildings, markets and streets shocked the conscience of the world, but produced little action from the Security Council, the United States or the assembled economic and military might of Europe. The cruelty of the Bosnian Serb forces that besieged Sarajevo and rampaged throughout Bosnia seemed to know no bounds.

The United Nations Commission of Experts' report on the war crimes in Bosnia revealed horrific details of systemic rape and sexual assaults, the destruction of cultural property and the precision execution of ethnic cleansing. The report revealed that even the massive shelling of residential sections of Sarajevo was made to coincide with political developments and events.[122] Over 200,000 people would die in Bosnia before the Dayton Peace Accords brought the fighting to an end. The Security Council imposed economic sanctions on Serbia and an arms embargo that included Bosnia, which some have argued contributed to the genocide that would later occur in Srebrenica. A United Nations peace-keeping force made up of Canadian, French, British and Dutch soldiers was sent to keep a non-existent peace. Unfortunately, they

had totally ineffective rules of engagement, were grossly undermanned and under-resourced, and lacked any backup and support from NATO or the United States.[123]

In July 1995, Bosnian Serb and FRY forces overran the supposed safe haven of Srebrenica, guarded by a small contingent of Dutch soldiers. It is estimated that more than 8,000 Muslim men and boys were herded away from the town and slaughtered. Human Rights Watch described the fall of Srebrenica and its environs to the murderous Bosnian Serb forces as

> a mockery of the international community's professed commitment to safeguard regions it declared as 'safe areas' and placed under United Nations protection in 1993. United Nations peacekeeping officials were unwilling to heed requests for support from their own forces stationed within the enclave, thus allowing Bosnian Serb forces to easily overrun it and – without interference from UN soldiers – to carry out systematic, mass executions of hundreds, possibly thousands, of civilian men and boys and to terrorize, rape, beat, execute, rob and otherwise abuse civilians being deported from the area.[124]

Televisions were flooded by images of emaciated Bosnians in Nazi-style concentration camps. There were pictures of the Dutch peace-keepers watching helplessly as the Bosnian Serb forces herded doomed men and boys from Srebrenica to their deaths. Pictures of men, women and children being blown to pieces in the streets and marketplaces of Sarajevo produced a paradigmatic virtual guilt that eventually drove the United States into action. Belated action is the overdue offspring of virtual guilt. In August 1995, at the instigation of the United States, NATO, with the authorisation of the Security Council, began air strikes against the Bosnian Serbs. This enabled the UN peace-keeping force eventually to break the siege of Sarajevo using the appropriate rules of engagement and military weaponry. With successes by the Croats and Bosnian Muslims in other parts of the country, President Milošević began to withdraw his military support for the genocidal action of his Bosnian Serb allies, leading to the eventual ceasefire and agreement, on the terms of relative peace, in the Dayton Accords of November 1995. NATO forces, initially at 60,000 military personnel including a strong United States contingent, would have to stay in Bosnia for many years to come to enforce the peace and protect human rights in this troubled corner of Europe, where the dark side of human nature is never far from the surface.[125]

The Balkan wars demonstrated that there are circumstances where the tragic flaw is so pervasive, when human rights and dignity are all but non-existent, that there is no alternative but to contain it through the muscle of its neighbouring region and, in some cases, only by the remaining superpower in the world.

The UN Commission of Experts on Bosnia lamented the failings of the international community and the United Nations in Bosnia's tragedy in language that is almost painful in its poignancy, given what was to transpire in Kosovo:

> The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have

> reviewed our own actions and the decisions in the face of the assault on Srebrenica. Through error, misjudgment and an inability to recognize the scope of evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder . . . Srebrenica crystallized a truth understood only too late by the United Nations and the world at large: that Bosnia was as much a moral cause as a military conflict. The tragedy of Srebrenica will haunt our history forever.
>
> In the end the only meaningful and lasting amends we can make to the citizens of Bosnia and Herzegovina who put their faith in the international community is to do our utmost not to allow such horrors to recur. When the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means.[126]

The then UN Secretary General, Kofi Annan, signed the report and, in November 1999, apologised deeply to the world for the UN's failing in Bosnia. It would not be the United Nation's last apology for incompetence in the face of genocide. Such failures would come to overshadow the successes of the United Nations in restoring peace, democratic rule and the establishment of a major human rights presence in Cambodia, Mozambique, Namibia, Guatemala, Georgia and El Salvador, among other countries.[127]

Before the virtual guilt from the Balkans began to haunt the living rooms of America and Europe, another form of virtual guilt was beginning to take shape in another troubled continent.

In mid-1991, the first photos of starving Somali children, moments away from death, hit the television screens and newspapers in the United States. By 1992, international relief agencies had assembled the needed food and medicine. When such relief arrived, despite the presence of UN peace-keepers, armed militiamen from various warring clans seized it. Up to 2,000 people were dying daily of starvation, while in Mogadishu and other major Somali urban centres the 'technicals' of General Mohammed Farah Aidid and his enemies were locked in battle.

The United Nations managed to secure a truce so that humanitarian aid could be directed to the population whose death throes from starvation were being piped into the living rooms in the United States and elsewhere. After being defeated in the November 1992 election, President George Bush Sr sent in American troops to protect relief workers in an operation called Restore Hope. The coalition consisted of 30,000 American soldiers and 10,000 soldiers from allied nations. When the US soldiers landed on the beach in Somalia, CNN accompanied them and took pictures of the night landing and sent them back to the living rooms of America and the world. The era of television wars, genocides and virtual guilt was in full effect.

When President Bill Clinton took office, the coalition had succeeded in curtailing the mass starvation of the Somali people as well as opening up the ports of Mogadishu and Kismayu and the crucial supply roads that linked the country together. In March 1993, the majority of the US military personnel left. The

television pictures reported an American humanitarian triumph. Only some 4,000 American logistical support personnel remained, supported by a US rapid reaction force of 800 heavy infantry and helicopter gun ships. Days after the pull-out, 24 Pakistani UN forces, who at the time were searching for hidden arms belonging to General Aidid, were killed in coordinated ambushes. The United Nations forces, led by the Americans, began a hunt for Aidid, which resulted in more deaths of UN military personnel and 73 of Aidid's followers.

The situation degenerated. On 3 October 1993, two US military helicopters crashed during an attempt by the US Army Rangers to capture General Aidid. In the fierce firefight that followed, 18 Americans, one Malaysian and about 300 Somalis were killed, with many more wounded. In addition to the capture of an American soldier, television screens in the United States and around the world were filled with scenes of Somalis rejoicing, as they dragged the dead body of one of the American soldiers through the streets. There was an instant outcry from the US Congress and American public to withdraw US forces and put an end to the risking of American soldiers' lives in savage far-off lands. President Clinton ordered the withdrawal of all American forces by 31 March 1994.[128]

The television pictures of the dead American soldier being dragged through the streets of Mogadishu also partially sealed the fate of 800,000 people soon to be massacred in Rwanda, including close to 77 per cent of the country's Tutsi population.[129] The only remaining superpower had not recovered from similar pictures of dead soldiers being brought back from Indochina. In the age of saturation television, there would be no more stomach either on the part of the American politicians or the public for American youth dying in far-off lands, where vital interests were not at stake. The CNN factor now had to be added to the tragic flaw that plagues the institutions of global governance and international law.[130]

In the age of television wars, genocide and virtual guilt, an image can trigger first virtual guilt, then action in defence of human life. Sadly, it can also produce overwhelming inaction, unless American citizens, especially on American territory, are attacked and killed, as was demonstrated in the days following 11 September 2001.

The consequences that the electronic image can have on the tragic flaw in global governance and law can also be profound. As discussed above, Article I of the Genocide Convention commits the contracting parties both to punish and to prevent genocide. Article VIII of the same Convention authorises state parties to 'call upon the competent organs of the United Nations to take such action under the United Nations Charter as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3'.

The key organ of the United Nations for the prevention of genocide should be the Security Council, which is charged with the ultimate responsibility to take action against threats to international peace and security, under Chapters VI and VII of the United Nations Charter. If genocide does not qualify as a threat to international peace and security, then the United Nations surely loses its moral authority. Perhaps knowing this, the Security Council and its permanent members

did almost everything they could to ignore the unfolding genocide in Rwanda, until it was too late.[131] Again, we see deliberate ineptitude and ineffectiveness reinforcing the tragic flaw within this global institution of governance.

On 6 April 1994, the man who was stirring ethnic hatred in Rwanda to stay in power, President Habyarimana, died when his plane was shot down. Within hours, the group that had planned the genocide for months, perhaps years, began the mass murder of Tutsis and moderate Hutus across the country. The late Alison Des Forges of Human Rights Watch gives a chilling account of the ample warning that the Security Council had of the pending genocide:

> A January 11, 1994 telegram from General Romeo Dallaire, commander of the U.N. Peacekeeping Force, to his superiors was only one, if now the most famous, warning of massive slaughter being prepared in Rwanda. From November 1993 to April 1994 there were dozens of other signals. . . . Foreign observers did not track every indicator, but representatives of Belgium, France, and the U.S. were well informed about most of them. In January, an analyst of the U.S. Central Intelligence Agency knew enough to predict that as many as half a million persons might die in case of renewed conflict and, in February, Belgian authorities already feared a genocide. France, the power most closely linked to Habyarimana, presumably knew at least as much as the other two.[132]

Both Des Forges and General Dallaire himself have recounted how the pleadings for more troops, resources and material, together with a stronger mandate and rules for engagement, seemed to fall on deaf ears. Des Forges has speculated on why the staff of the UN Secretariat, including the future Secretary General Kofi Annan, then in charge of peace-keeping, may have failed to pass on to the entire Security Council, including the non-permanent members, the gravity of warnings of crisis and the urgency of General Dallaire's requests. She asserts they did not pass these warnings on because they did not wish to displease the major powers in the Council, such as the United States.

The immensity of this omission is clear from the confirmation by US military experts that, if General Dallaire had received the 5,000 well-equipped troops that he had requested, perhaps most of the 800,000 lives lost would have been saved.[133] Could it be that the United States had no desire to see its military personnel back in Africa, so soon after the Somalia debacle, if there was the possibility of similar images of dead soldiers being sent home from a country where it did not have a vital national interest? If the Genocide Convention would trigger a legal duty on the part of the international community to prevent the slaughter in Rwanda, the only remaining superpower would have to get involved.

Another leading authority on genocide, William Schabas, has documented how some of the permanent members of the Security Council strenuously objected to the use of the word 'genocide' to describe the unravelling horror in Rwanda. This included both the United Kingdom and the United States. Schabas and others have surmised that this refusal to use the word 'genocide' was prompted by the

fear that its use would create a legal obligation for the United States and the other permanent members of the Security Council to take action under the Genocide Convention.[134] With the then concurrent genocidal situation worsening in Bosnia, there seemed to be no appetite on the part of most European nations or the United States to send their troops into what could well have been another Somalia-type disaster. The electronic image has had a profound impact on the workings of the international law of genocide, human rights and humanitarian intervention.

It was not until 8 June 1994, after much of the slaughter had already taken place, that the Security Council passed a resolution stating its grave concern that 'acts of genocide have occurred in Rwanda'. Following this pitifully late acknowledgement, the Council then authorised the humanitarian intervention force UNAMIR II on 17 May 1994. Ironically, the size of the force was projected to be around 5,500 troops, the number which General Dallaire had asked for to prevent the genocide.[135] A member of the permanent five of the Security Council, France, decided to deploy its own troops to create a 'safe humanitarian zone' in south-west Rwanda, but did little to stop the genocide.[136]

Given the hopes and the rationale behind the Security Council, and indeed the United Nations, from the time of the Atlantic Charter to the UDHR, the Rwandan genocide may be looked upon by historians in future centuries as a turning point in global governance and law. Unable to stop a preventable genocide, the Security Council would soon cede ground to other institutions of global or regional governance, allowing them to take the steering position in the combat against another potential genocide in the Balkans, this time in Kosovo. Des Forges gives a stark account of the Security Council's conflicted approach to the ongoing Rwandan genocide:

> Members of the Security Council gave more importance to maintaining diplomatic procedures than to condemning perpetrators of genocide. Rather than demand that the Rwandan representative resign from the Council, they continued collaborating with him, thus treating his government as an honorable member of the world community. They did not insist that he absent himself from discussions about Rwanda or even that he observe the usual custom of abstaining from such discussions. They thus afforded him the chance to know and communicate to his government all proposals for UN action in Rwanda.[137]

The report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda produced similar views, stating categorically: 'The United Nations failed the people of Rwanda during the genocide in 1994'.[138] The report also concluded that when faced with both the earlier risk and then the systematic implementation of genocide, traditional principles of peacekeeping had to be 'transcended', because there can be no neutrality in the face of genocide.

Finally, the independent inquiry, among other things, made a clear recommendation that the United Nations had to develop an action plan to prevent genocide.

The report urged that the obligation under the Genocide Convention, to 'prevent and punish' genocide, had to be made into a concrete reality in the United Nations. It asked that each part of the UN system, including the member states, determine the steps needed to counteract such horrific crimes. It is ironic that the specific steps needed by the United States and other NATO members to counteract the emergence of 'horrific crimes' in Kosovo could not have occurred without ignoring the Security Council and the United Nations Charter.

In December 1999, following the report of the independent inquiry, the Secretary General of the United Nations, Kofi Annan, apologised for the failure of the UN in Rwanda. On 14 April 2000, the Security Council also accepted its specific responsibility for having failed to stop the genocide. It vowed to do more to stop other such massacres in the future. Responding to the report of the independent inquiry and other investigations relating to the genocide, the Security Council members acknowledged that member governments had lacked the political will to stop the genocide, despite clear early warnings of the imminent massacre. They also acknowledged that the Council had deprived the UN peace-keeping mission, headed by Canadian General Romeo Dallaire, of both the mandate and resources needed to stop the killings. Presiding over the Council, Canadian foreign minister Lloyd Axworthy stated that the inaction of the United Nations 'made a mockery, once again of the pledge "never again"'.[139]

It seems it is easier for the institutions of global governance to create tribunals and courts for the indictment and punishment of war criminals, and those who have aided and abetted them, than to prevent them from committing the 'horrific crimes' in the first place. Even then, there are problems of limited jurisdiction or lack of resources, whether financial, political or military, for these tribunals to carry out their functions effectively. Professor Schabas makes the point that Article VI of the Genocide Convention of 1948, which mandates prosecution for genocide before 'such international penal tribunal as may have jurisdiction' should have been the mandate for the international community to create a permanent international criminal court. The Cold War killed such a possibility. Schabas gives a short history lesson about how long justice had to wait simply to create such tribunals:

> The first international tribunal giving effect to Article VI, the International Criminal Tribunal for the Former Yugoslavia (ICTY), was established in May 1993, with a mandate that was severely restricted in both time and space. Following the genocide in Rwanda in 1994, a second, similar body was created. The *ad hoc* tribunals of the former Yugoslavia and Rwanda proceeded to prosecute charges of genocide that were within their temporal and territorial jurisdiction. An initial conviction for genocide was recorded on 2 September 1998, just short of fifty years after the adoption of Article VI of the Convention. Meanwhile, preparations for a full-blown international court of general jurisdiction culminated in the 1998 adoption of the Rome Statute of the International Criminal Court. The Court will come into existence after the deposit of sixty accessions or ratifications.[140]

While the former state of Yugoslavia protested against the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a violation of its sovereignty and the UN Charter, the majority of states ignored this protest and supported the view that the horrific international crimes in the Balkans should not go unpunished. Despite the contrary view of the former Yugoslavia, the ability of the Security Council to establish such tribunals under its Chapter VII powers was fully in accordance with the UN Charter as agreed to by all the sovereign nations of the world in the aftermath of the Second World War. Yet, one could argue the exercise of the power by the Security Council in establishing the ICTY suggested to the community of nations that a historic precedent was being set, which would thenceforth demand the exercise of sovereignty be qualified by a prohibition against the most serious international crimes.

The wait for justice at the ICTY became compounded by the inability to bring two of the prime instigators of the Srebrenica genocide, Radovan Karadžić and Ratko Mladić, before the International Criminal Tribunal for the Former Yugoslavia at The Hague. Karadžić was not arrested until 2008,[141] and Mladić was not arrested until 2011.[142] The failure by NATO forces to bring the two war criminals to justice not only harmed the stature of the tribunal, but it also encouraged the then president of the FRY, Slobodan Milošević, to attempt even more horrific crimes in Kosovo. For these crimes, Milošević would eventually be indicted for crimes against humanity and brought before the tribunal at The Hague. Once there, the tribunal would also lay charges of war crimes and genocide against him and his leading co-conspirators. His trial began on 12 February 2002. Rather than face justice, Milošević engaged in numerous disruptive tactics until he died in his cell on 11 March 2006. His death robbed the peoples of the Balkans and history of justice, but his ignoble fate remains a lesson on the consequences of exercising sovereign power in an illegitimate and criminal way.[143]

The legacy of the tribunals that arose out of the ashes of the atrocities in the Balkans and Rwanda has proved significant for the development of international law and, particularly, the evolution of the norms set down at the Nuremberg trials. The Security Council's establishment of the tribunals under its powerful Chapter VII powers also laid the groundwork for further global initiatives on effective international responses to mass atrocity violations.[144] Effective global response would come in the form of a determination, by a majority of the world's states, to establish a permanent international criminal court in the summer of 1998.

One of the most important advancements to emerge from the ICTY was the determination that the most grave of international crimes, such as crimes against humanity, were now punishable outside of international conflicts. Those who have organised, perpetrated, aided or abetted such crimes during internal conflicts will be held accountable. While some have argued that the tribunals appeared to be motivated by the guilt of the international community for failing to stop the mass slaughter in the Balkans and Rwanda, the legacy of these tribunals will live on as a foundation for the rulings of the permanent ICC, and as a warning of the limits of sovereign power. The expected convictions and sentencing of both

Radovan Karadžić and Ratko Mladić will reinforce this warning to future potential perpetrators of mass atrocities in the satellite countries bordering on Europe.

However, it was clear that the two tribunals were designed to be time, country and region limited as regards allegations of gross impunity. They simply were not constituted as a substitute for a permanent criminal court, which was increasingly necessary given ongoing allegations of gross impunity around the world. Some of the experts who have studied the establishment and legacy of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are convinced that the ICC would not have been created without the two previous ad hoc tribunals. In particular, it is claimed that an extraordinary transformation in world opinion occurred largely as a result of the ICTY's operations.[145] It is also claimed that the ICC has learned from both the successes and the failures of the ad hoc tribunals, in terms of procedural and substantive legal issues, and that these lessons have even impacted on the interpretation of the crimes codified in the Rome Statute of the ICC.[146]

The legacies of the ICTY and ICTR ad hoc tribunals also provide a history lesson. Prosecutions of those most responsible for serious crimes can lead to their marginalisation, which itself could be a critical factor in stabilising the conflict and advancing peace negotiations. Human Rights Watch has given a compelling account of how the indictment of Radovan Karadžić by the ICTY, in the context of the Bosnian conflict, led to his marginalisation and prevented him from being a participant (and perhaps a spoiler) in the Dayton peace talks that ended the Bosnian conflict.[147]

Similarly, the arrest warrant for Charles Taylor, then sitting president of Liberia, at the start of the peace talks in that country, was also viewed as being conducive to the negotiations to end the conflict in Sierra Leone. Given his still substantial support in the country, the indictment led to 'delegitimizing' Taylor domestically and internationally. It is likely that the charges played a large part in forcing Taylor out of the country and out of office, in the months following his indictment.[148]

Perhaps the lasting legacy of the ICTY and the ICTR, like the Nuremberg trials, is the creation of a detailed historical record from the evidence presented at fair and neutral trials. As in the case of the Nuremberg trials, the evidence of the atrocities committed in the former Yugoslavia and Rwanda can act as a bulwark against the revisionism of unscrupulous leaders, who in the future may try to deny that the antithesis to the legitimate exercise of power has led to serious crimes in the past, and assert imagined humiliations to revive inter-communal conflict and human rights abuses.[149]

The success, partial or otherwise, of the ICTY and the ICTR has spawned other non-permanent hybrid international tribunals to seek justice once peace has been established, sometimes even long after the conflict has ended.

The Special Court for Sierra Leone was a hybrid tribunal set up jointly by the government of the country and the UN under Security Council Resolution 1315. It was given a mandate to prosecute those with the greatest responsibility for serious violations, not only of international humanitarian law, but also of the law of Sierra Leone, committed by various rebels and the army in the territory of the country since 30 November 1996.

As with other conflict situations in Africa, the civilian population of Sierra Leone suffered some of the most savage atrocities documented. These crimes occurred during the 11-year civil war that started in 1991, and were driven by the push to control the highly profitable trade in what came to be known as 'blood diamonds'. Thousands of civilians were abducted and used as slave labour for the mining of diamonds, a practice which was often accompanied by the widespread mutilation of limbs as an instrument of terror. Thousands more were killed in militia attacks, many burned alive in their homes after extensive looting of civilian property. There was also widespread enslavement of children under 15, as child soldiers. Worse still, approximately 275,000 women and girls became victims of mass and systemic sexual violence, some of whom were forced to become the 'bush wives' of the militia members.

The Government of Sierra Leone and the UN jointly appointed the Trial and Appeals Chamber judges of the Sierra Leone Special Court, with the international judges forming the majority in both chambers. While this hybrid tribunal has attempted to integrate the country's legal system into the work of the tribunal, it is still regarded in international law as an international court independent from the domestic legal system of Sierra Leone. This tribunal moved with relative speed and managed to obtain convictions in two of five cases before it completed its task. One case, completed on 20 June 2007, resulted in 45 to 50-year sentences for three accused from the Armed Forces Revolutionary Council. The other case, completed on 2 August 2007 involved two individuals from the Civil Defence Forces, who received sentences of 15 and 20 years respectively.

The Court also had to deal with the Charles Taylor prosecution, the first former African head of state to be indicted for aiding and abetting war crimes and crimes against humanity. Taylor was charged with providing weapons and supplies to rebels who engaged in mass murder, rape and the mutilation of thousands of men, women and children in Sierra Leone from 1991 to 2002, in order to obtain the proceeds of the illicit 'blood diamonds'. For security reasons, his prosecution was moved to The Hague, although he remained under the jurisdiction of the Special Court for Sierra Leone. Although the hearing of evidence started relatively late, on 7 January 2008, the case for the prosecution ended, after hearing the evidence of 91 witnesses, on 26 April 2012.

After five years of hearings, the Special Court convicted Charles Taylor of 11 counts of war crimes and crimes against humanity, which included murder and systemic rape. On 30 May 2012, the Court sentenced Taylor to 50 years, for what the Court called the aiding and abetting of horrific crimes by a person in a position of high authority. The former president of Liberia is the first former head of state to be convicted by an international criminal court since the Nuremberg Tribunal after the Second World War. The conviction and sentencing is a landmark ruling that can be regarded as a major warning to other leaders around the world at least those not protected by the veto holding powers at the UN Security Council: those who exercise sovereign power illegitimately can end up in the same position as the 64-year-old Charles Taylor, even if they did not directly commit the crimes.

Other ad hoc hybrid tribunals, such as those set up by the Government of Cambodia and the UN, and the East Timor mixed panels, have so far proved far less effective. As regards the Cambodia tribunal, the refusal of the Cambodian Government, and especially its authoritarian Prime Minister Hun Sen, whose own past is chequered, to accept a truly independent international tribunal has led to a weak hybrid mechanism. Created under Cambodian law, the tribunal was controlled to a large extent by Cambodian judges and prosecutors, with the presence of international judges and prosecutors to ensure international credibility. The tribunal is part of special chambers of the Cambodian court system, called the Extraordinary Chambers in the courts of Cambodia. The Cambodian National Assembly approved the law establishing the Extraordinary Chambers on 2 January 2001.

The subject-matter jurisdiction covers genocide, crimes against humanity, grave breaches of the Geneva Conventions, as well as a number of violations under the 1954 Hague Convention and the 1961 Vienna Convention on Diplomatic Relations. Homicide, torture and religious persecution are to be prosecuted under Cambodian law. The prosecutions are limited to the most senior leaders of the Democratic Kampuchea, those who are most responsible for the genocide and atrocities committed during the 1975–1979 period.[150] Even though the atrocities in Cambodia are unrivalled, in terms of proportional effect on the population, after 30 years, there had been no convictions. The Cold War legacy of hypocrisy has blocked all attempts at accountability for the crimes committed in Cambodia, with the complicity of both China and the United States.

The tribunal began on 17 February 2009, with the trial of Kaing Gech Eav (Duch), a Khmer Rouge leader responsible for the deaths of up to two million people. Duch, the commander of the infamous torture and execution centre at Tuol Sleng prison (S21), in Phnom Penh, is one of five former Khmer Rouge leaders currently facing prosecution before the Extraordinary Chambers. The tribunal convicted the chief of Centre S21 on 26 July 2010 for war crimes and crimes against humanity. After an eight-month trial, Duch admitted responsibility for committing some of the most horrific crimes to have occurred during the Cold War, as chief of a prison where more than 14,000 individuals were tortured and executed from 1975 to 1979. He was sentenced to 35 years in prison.

The conviction was a rare victory for the court, which has been dogged by serious allegations of political interference, low professional standards and corruption, since its establishment in 2001.[151] Improper pressures from the Cambodian Government have compromised the trials of three other indicted Khmer Rouge leaders who are alleged to be even more culpable than Duch. These government pressures created obstacles and additional legal complexities, relating to the calling of witnesses and the investigation of additional suspects, which sidelined the possibility of additional indictments. By March 2012, two of the international judges had resigned from the tribunal, claiming that even their Cambodian counterparts had thwarted attempts to investigate former members of the regime.[152]

The case for a permanent international tribunal, free from political interference, such as the ICC, is best illustrated by the challenges facing the Cambodian

hybrid tribunal. The demands of justice, for any international or hybrid criminal tribunal, to prosecute the most serious of international crimes, requires true independence. They also require external guarantees to ensure that the tribunal can meet its mandate, of ensuring that such crimes do not go unpunished, reinforcing the fact that sovereign power must be exercised legitimately, which excludes the gross abuse and torture of citizens. All these ad hoc international criminal tribunals will end at some stage within the second decade of the 21st century.

The judicial activities of the ICTY and the ICTR are scheduled to wind up by the end of 2014, although residual mechanisms are being developed to fulfil the tribunal's ongoing obligations.[153] None of the other international courts are permanent either. When their mandate ends there will be a vacuum that can only be filled by a permanent international criminal tribunal such as the ICC, unless regional human rights courts are provided with a new mandate, with primary jurisdiction for the most serious international crimes listed in the Rome Statute. As it presently stands, the ICC is the only permanent court of its kind. If it did not exist then it would have to be invented, as a warning that the sovereign exercise of power does not include impunity for the most serious international crimes, especially if the UN Security Council triggers its jurisdiction.

1.11 The Kosovo crisis, universal jurisdiction and the ICC: turning points in the hold of the tragic flaw?

In Kosovo, as in Rwanda, there were many early warning signs that atrocities were imminent, the main one being the revocation of autonomy for the Yugoslavian province in 1989.[154] The FRY Government in Belgrade unleashed a series of policies instituting officially sanctioned discrimination against the majority Albanian province, in its language policies, the media, educational institutions, public-sector employment and property ownership. There was also a dramatic increase in arbitrary arrests, detentions and the use of torture by the Serbian police and security forces; all of which was well documented by Human Rights Watch, Amnesty International and other NGOs.

The international community did not provide sufficient support for the non-violent resistance led by Dr Ibrahim Rugova. This led to violent resistance in the form of the Kosovo Liberation Army (KLA), which emerged as a major force, especially since the resolution of the Kosovo conflict was left out of the Dayton Accords, which ended the war in Bosnia. Because the international community did not assist the non-violent protests, the KLA began a plan to incite, through random acts of violence against Serbian targets in Kosovo, an ever-increasing spiral of violence by the Serb security forces, in the hope that the international community would eventually be forced to intervene. Their plan worked.[155]

The Serbian massacre of 58 people in the town of Prekazi, in February of 1998, turned the conflict into a full-scale civil war. The Independent Commission on Kosovo, led by Justice Richard J. Goldstone, the first chief prosecutor of the ICTY, and Carl Tham, estimated that by June 1999 somewhere in the

neighbourhood of 11,000 Kosovar Albanians were killed by FRY forces, and that approximately 863,000 civilians had sought refuge outside Kosovo, while 590,000 more were displaced internally. Rape, torture and other forms of human rights abuses were also widespread.

The political will and diplomatic efforts of the Europeans and Americans seem only to respond to escalations in the level of violence and horrific crimes, a strategy that is both confused and reactive. In Kosovo, this culminated in the emergence of so-called 'threat diplomacy', encapsulated in the Rambouillet discussions late in 1998, where NATO threatened a bombing campaign against the Serbs if the discussions on a peaceful settlement failed. The United States and NATO were in charge at Rambouillet. The United Nations had become relegated to a minor player in this last-ditch attempt to prevent genocide in Europe by diplomatic means. The discussions failed when Milošević refused to sign, primarily because he refused to accept a NATO-led military force, which would implement the Rambouillet peace terms on FRY territory.[156] In the end, and despite his resistance, NATO troops were sent to the FRY, irrespective of his wishes.

On 15 January 1999, Serb police and military forces massacred 45 civilians in the Kosovar village of Recak. The day after, an independent monitoring team of the Organization for Security and Co-operation in Europe (OSCE) visited the site, including the head of mission, Ambassador William Walker. Ambassador Walker's shock at the barbarity that he was seeing was shared with millions around the world through the electronic media. The CNN factor was being triggered once again. The Recak massacre and other incidents of escalating violence, especially after the pull-out of the OSCE-Kosovo Verification Mission (KVM) monitoring force, put the credibility of NATO into intense focus, given the threat of bombing behind the failed Rambouillet talks.

On 24 March 1999, NATO began what Michael Ignatieff has called the 'virtual war' against the FRY. There would be no ground troops sent in by NATO. The memories of Somalia still burned bright. Instead, NATO unleashed an aerial bombing campaign against Yugoslavia from above 15,000 feet to avoid the air defences. The virtual war was conducted between 24 March 1999 and 10 June 1999. Over 10,000 'strike sorties' were made against military targets, telecommunications installations and transportation links, including bridges, electricity production facilities and oil refineries.

Some civilian targets were also hit, including the Chinese embassy; however, most of these were claimed by NATO forces to be mistakes. There was not a single NATO casualty during the campaign. It may have been the first time in human history that a major military conflict produced absolutely no combat casualties for the victorious side. There were no pictures of dead NATO soldiers flashed back to their home countries. Human Rights Watch asserts that approximately 500 civilians, mostly Serbs, died in the NATO bombing campaign.[157]

The United Nations, theoretically the principal institution of global governance for international peace and security, was not in the picture. The NATO decision to start the bombing occurred without consultation or authorisation of the

Security Council or any other body of the United Nations. The aerial war seemed to be a clear violation of the strict prohibition on the use of force contained in Article 2(4) of the United Nations Charter, the only exceptions to which are Security Council authorisation or the right to self-defence. The right of self-defence is contained in Article 51 of the Charter, and is strictly limited to responses to a prior armed attack involving an international conflict, and even then, only until the Security Council can take measures itself. The actions have to be reported to the Council and do not affect the right of the Council to take the final measures to maintain or restore international peace and security.

As discussed above, the Great Powers were also insistent on the legal obligation of member states not to use human rights or humanitarian reasons as a basis for intrusion into the sovereignty of member states. Article 2(7) of the Charter specifically prohibits intervention into the domestic jurisdiction of member states. Finally, Article 53 of the United Nations Charter required any collective action taken under regional arrangements, such as NATO, to have the authorisation of the Security Council, except in the case of self-defence.[158]

It is therefore clear from the Charter and the decisions of the International Court of Justice that it is only the Security Council that can authorise the use of force under its Chapter VII powers. The aerial war unleashed by NATO was clearly illegal by the norms of the United Nations Charter and international law. However, we can sense that history reaches a turning point when universal norms are held up for questioning, not by madmen and ruthless dictators such as Pol Pot or Slobodan Milošević, but by leaders of the free and democratic world. That turning point was reached when many regarded the NATO intervention in Kosovo as 'illegal but legitimate'.[159]

The Independent Commission on Kosovo concluded that the NATO military intervention rested not only on the growing humanitarian catastrophe in Kosovo, right up to the intervention in 1999, but also on the 'weaving together of past experience and future concerns':

- the resolve not to allow a repetition of the 1998 scale of violence and displacement in Kosovo
- the related resolve to avert 'another Bosnia', giving a crucial political and symbolic influence to reports of the Recak massacre
- a post-Bosnia, post-Rwanda desire to demonstrate that the international community under US leadership was generally sincere about its resolve to prevent and punish severe patterns of human abuse
- NATO's need to maintain credibility by following through on its threats, and to show an altered relevance of the alliance for the security and wellbeing of Europe after the Cold War, especially in view of its upcoming 50th anniversary agenda
- concern among European states to avert the potential mass migrations that could result from an extended civil war in the region
- the underlying conviction, based on extensive experience throughout the 1990s, that Milošević could not be trusted

- the belief that only an armed presence in Kosovo that was not subject to vetoes in the United Nations Security Council (UNSC) could ensure a transition to restore substantial autonomy for Kosovo.[160]

Since 1998 the Security Council had issued resolutions that the human rights and humanitarian crisis in Kosovo was the result of the actions of the Yugoslavian Government in Belgrade. It had called for an arms embargo on both the Serbs and the KLA. It had urged the War Crimes Tribunal at The Hague to investigate the violence in Kosovo for possible indictments for war crimes. It had promoted the setting up of an independent monitoring presence in Kosovo, leading to the endorsement of the OSCE-KVM. It had condemned the displacement of refugees, called for an end to Serb violence that spurred such displacement, and urged the return of such refugees.

However, the Council also firmly confirmed Serbian sovereignty over Kosovo. These actions by the Security Council, while laudable for the most part, were not sufficient to put an end to the increasing cycle of violence set in motion by Milošević. Only the use of force remained. Russia and China made it clear that any authorisation of the use of force by the Council would be met with its veto. International law demanded inaction on the part of NATO, but international legitimacy, the ghosts of Rwanda and Bosnia, and the turning of history demanded action.[161]

Some jurists have tried to justify the legality of NATO's actions on the grounds of humanitarian intervention. The literature on humanitarian intervention is burgeoning, and enough has been written to try to squeeze the Kosovo intervention into previous patterns of humanitarian intervention that have lacked Security Council authorisation. These have included military interventions by India in Bangladesh in 1971, by Tanzania in Uganda in 1979 and by Vietnam in Cambodia in 1978. A cynical response to such arguments is given by Professor Schabas, who, after stating these interventions could not be justified by the Charter, argues that the international community is apt to 'look the other way' when humanitarian intervention occurs, 'much as cinema-goers cheer when an aggressive policeman tortures a brutal criminal, despite their general abhorrence of police brutality and recognition that it is fundamentally illegal'.[162]

Perhaps the best counter-response to the arguments that NATO's actions were justified on the basis of humanitarian intervention is the behaviour of NATO itself. As the Independent Commission on Kosovo has indicated, NATO did not give any legal justification for its intervention; most jurists who supported the NATO intervention, including this author, argued that although it was prohibited under international law, it was a legitimate exception.[163] The Kosovo 'exception', however, has major implications for global governance and law. Indeed, the 'exception' was further detailed in the way the conflict in Kosovo ended.

After the aerial bombardment began on 24 March 1999, the Serb forces initiated a vicious attempt at 'cleansing' Kosovo of its Albanian majority. While the Belgrade Government claimed that NATO had provoked the mass expulsion, others claim it was an attempt by Milošević to destabilise the neighbouring

countries and widen the conflict. Whatever the reason, the CNN factor again swung into action. The pictures of hundreds of thousands of refugees on foot, or herded into trains, including the very elderly, the infirm and the very young, resembled the nightmarish pictures of the Second World War. NATO promised that the bombing would continue and that the refugees would be returned.

The Independent Commission on Kosovo asserts that during the NATO bombing approximately 863,000 civilians became refugees outside Kosovo, while another 590,000 were internally displaced. Together, these figures represent 90 per cent of the Kosovar Albanian population. The Commission also claimed that Serb forces killed around 10,000 civilians during this period, and around 3,000 more went missing. Horrific crimes of sexual violence and rape were visited upon the fleeing Kosovar Albanian women, as well as the widespread use of torture and the wanton destruction of Kosovar property.

The European states (especially Germany), together with Russia, which strongly opposed the NATO intervention, were keen to find new methods to end the virtual war, given that Milošević had not been bombed back to the negotiating table.

It is significant that it was not the Security Council of the United Nations but the G8, a powerful body usually focused on global economic matters, which brokered the end to the war. In its meeting in Cologne in April 1999, Russia and the G7 agreed to a seven-point peace plan. The Russian foreign minister, Viktor Chernomyrdin, then took this plan to Milošević on 19 May 1999. By winter, with the threat of NATO forces preparing for a ground invasion, Milošević finally began to negotiate. An envoy from another organisation with its roots in economic cooperation, namely the European Union, finished the task and obtained a settlement to end the bombing. Martti Ahtisaari, the president of Finland, and Chernomyrdin negotiated an agreement on the G8 principles with Milošević. Finally, on 10 June 1999, after Milošević and the Serb Parliament formally accepted the agreement, the virtual war came to an end.[164]

The terms of the agreement would again further the impact of the 'Kosovo exception' on universally accepted norms. The G8 principles required a withdrawal of Yugoslavian military and police forces from what the Security Council of the United Nations resolutely stated was Yugoslavian territory. The agreement also required an immediate and verifiable end to the Serbian human rights abuses and violence in Kosovo. It called for the deployment of an effective international civil and security presence, and the return of all refugees. It also stated that Kosovo would enjoy substantial autonomy within the FRY. These concessions by Yugoslavia spoke to the very heart of what is supposed to be protected by Article 2(7) of the United Nations Charter, namely non-interference in the domestic affairs of member states.[165]

As if in great haste to recoup its own legitimacy, on 10 June 1999, the same day that the bombing stopped, the United Nations Security Council passed Resolution 1244, which sanctioned the G8 agreement and established the necessary structures for the creation of the 'interim' UN civil administration of the province, and the international military security presence led by NATO. Time would show that peace would be as hard to consolidate as it was to win.[166]

If one of the chief aims of the NATO intervention was to get around the blockages in the Security Council, with the purpose of stopping another Rwandan or Bosnian genocide, then how successful were the haunting ghosts of those pitiful reminders of the failure of the institutions of global governance? The Independent Commission on Kosovo concluded that the intervention was both a success and a failure:

> It forced the FRY government to withdraw its army and police from Kosovo and to sign an agreement closely modeled on the aborted Rambouillet accord. It stopped the systematic oppression of the Kosovar Albanians. NATO had demonstrated its military clout as well as its ability to maintain its political cohesion in the face of a challenge that could have torn the alliance apart.
>
> But, the intervention failed to achieve its avowed aim of preventing massive ethnic cleansing. More than a million Kosovar Albanians became refugees, around 10,000 lost their lives; many were wounded, raped or assaulted in other ways. The Kosovar Albanian population had to endure tremendous suffering before finally achieving their freedom. Milošević remained in power, however, as an indicted war criminal.[167]

While a fair accounting of the immediate post-conflict assessment of the 'Kosovo exception', this author believes that the intervention is far more significant, and perhaps will have far more positive impacts in the long term, for the following reasons.

First, until the geopolitics surrounding the Syrian crisis, it may have had an impact on the culture of inaction and denial in the Security Council of the United Nations, as regards unfolding humanitarian and human rights catastrophes. Emerging proof of this could have been the development of the doctrine of responsibility to protect (R2P), its endorsement by the Council, and the increasing focus on the protection of civilians by the Council, as will be discussed later in this chapter. The culmination of these piecemeal developments was the Council's sanctioned military interventions in Côte d'Ivoire and Libya, as will also be discussed below. However, as will also be discussed, the failure of the international community in Syria has also dampened the expectations arising out of the 'Kosovo exception'.

Second, the Kosovo exception cannot be defended on the legal grounds of a valid humanitarian intervention. But there should not be a need to do so. The Kosovo exception should be taken as a turning point in the tragic flaw in global governance and international law. This turning point is an urgent call, whether heeded or not, that the institutions of global governance, and in particular the UN Security Council, must either reform to protect civilians from mass atrocities or increasingly lose influence and legitimacy as guardians of international peace and security. The Council's failure to act in defence of the civilians in Syria is the most recent crisis of influence and legitimacy.

Similarly, states such as China and Russia, who regard national sovereignty as so absolute as to include the illegitimate exercise of power, as evidenced by their attitudes to the atrocities in the Syrian conflict at the time of writing, may

eventually realise that, even from the perspective of Westphalian sovereignty, they are on the wrong side of history. The victims of the atrocities committed in Syria could legitimately argue that history is not developing fast enough. However, despite the slow pace of history there is little doubt of the growing impact of a global community, made up not just of nations, but of individuals across the world, bound by a common desire to see their nations adhering to an evolving sense of global justice and human dignity.

The emerging reality of a global society, knit together by migration and mobility, along with instant and constant electronic and media communications, may actually be driving this as yet unheeded agenda, where justice, human rights and dignity are no longer the forgotten appendages of national sovereignty. That global community, despite tragic setbacks as we see in Syria, will keep demanding equality between justice, human rights, dignity and national sovereignty.

1.12 Universal jurisdiction: a success or failure in reducing the hold of the tragic flaw?

One of the more recent attempts to confront the tragic flaw in global governance came as a reinvigorated attempt at universal jurisdiction for the prosecution of war criminals, the establishment of the ICC and, more controversially, the establishment and implementation of the responsibility to protect doctrine. With regard to attempts to battle the tragic flaw, human history sometimes unfolds with perfect timing.

On 17 October 1998, while the United States and NATO were threatening soon-to-be-indicted war criminal President Milošević, a former president of Chile was being arrested on the basis of Spanish warrants. The warrants alleged the former president was responsible for systematic acts of murder (including the murder of Spanish citizens), torture, 'disappearance', illegal detention and forcible transfers in Chile and other countries. The former president was General Pinochet, who was also the subject of extradition requests for the kidnapping, murder or 'disappearance' of nationals from Switzerland and France. Other criminal proceedings had also begun against the former dictator in Belgium, Italy, Luxembourg, Norway, Sweden and the United States.[168]

Overturning the lower court decision on 25 November 1998, the House of Lords in a landmark decision, but with a narrow majority of three to two judges, held that a former head of state did not have sovereign immunity in cases regarding crimes against humanity, in a case which some say initiated the practicality of universal jurisdiction around the world.[169] However, on 17 December 1998, the House of Lords set aside its decision because one of the judges had links to Amnesty International, one of the interveners in the case, and scheduled a rehearing. In the rehearing, which has been heavily criticised, the highest court in Britain limited the scope of its earlier decision considerably, by stating that state immunity protected Pinochet for the charges related to murder and conspiracy to murder, but not for torture and conspiracy to commit torture. The Court held that Pinochet was subject to extradition to Spain if torture was a crime of universal

jurisdiction under UK law at the time the alleged acts took place. The international crime of torture was clearly established under the Convention against Torture, which Great Britain had implemented on 29 September 1988. Since it was alleged that there was evidence that Pinochet was implicated in at least two torture cases alleged by Spain, which had occurred after Britain's implementation of the Convention in 1988, the concept of universal jurisdiction permitted the extradition of Pinochet to Spain for such crimes. The extradition would be subject to the discretion of the Home Secretary.

In the decision, the House of Lords had stated that the *ius cogens* nature of torture, as an international crime, gives universal jurisdiction to all the courts within a jurisdiction that was party to the Torture Convention, regardless of where the torture occurs.[170] While the later decision of the House of Lords has been severely criticised for limiting the scope of the earlier decision by the same Court, it did not suffocate the revival of universal jurisdiction in international law. Rather, the decision prompted the initiation of universal jurisdiction prosecutions around the world. This has included the arrest, prosecution and conviction of a Rwandan mayor in Switzerland, for war crimes, and the prosecution of a Mauritanian military officer in France, on charges relating to torture in his country.

Adding to the legitimacy of universal jurisdiction, on 9 June 2001 a Belgian jury convicted four Rwandans, a politician, a professor and two Benedictine nuns, of war crimes in Rwanda. This was the first time a civilian jury in one country has convicted persons for war crimes or crimes against humanity committed in another country. The jury sentenced one nun to 15 years and the other to 12 years, for their role in the massacre of 7,000 people who had sought refuge in their convent in Southern Rwanda in 1994. The politician was sentenced to 20 years and the professor to 12 years.[171]

However, there are still many legal and political obstacles remaining in the revival of universal jurisdiction. On 14 February 2002, the International Court of Justice at The Hague dealt a setback to the development of the concept of universal jurisdiction. It ruled that Belgium had to cancel an arrest warrant for an incumbent foreign minister of the DRC, Abdulaye Yerodia Ndombasi, for alleged crimes committed during his term of office. The Court ruled that such ministers enjoyed full immunity under customary international law against any act of authority of another state that would hinder him or her in the performance of his or her duties.

According to the Court, this immunity would even extend to officials suspected of having committed genocide, war crimes or crimes against humanity under existing customary international law norms. However, in a confusing additional ruling, the Court emphasised that such officials could still have criminal responsibility for such crimes while they enjoyed jurisdictional immunity. Jurisdictional immunity could bar prosecution for a certain period or for certain offences, but it may not exonerate the person to whom it applies from all criminal responsibility. The timing of the exercise of universal jurisdiction over such officials becomes paramount in light of this ruling by the International Court of Justice. One critical

aid in the development of clear and sound principles of universal jurisdiction is the promulgation of the Princeton Principles on Universal Jurisdiction. Developed in 2001 at Princeton University by scholars and jurists from around the world, the principles are designed to avoid the improper exercise of universal jurisdiction and to give greater coherence and legitimacy to the exercise of such jurisdiction.[172]

As it turned out, Pinochet did not face his accusers in Spain. The British Home Secretary, Jack Straw, deemed him too frail to stand trial, and he was returned to Chile. On his return, on 1 December 2000, Pinochet was placed under house arrest and charged with crimes related to kidnapping, disappearances and homicide during his brutal rule from 1973 to 1990.[173] He sought to avoid these charges by the same tactics, relating to his unfitness to stand trial, which allowed him to evade the Spanish extradition request. He succeeded. The Santiago Court of Appeals on 9 July 2001 declared the former dictator mentally unfit to stand trial and incapable of understanding the charges against him. On 1 July 2002, Chile's highest court confirmed the earlier ruling. The Supreme Court in a 4 to 1 ruling concluded that the former dictator could never be put on trial owing to the irreversible condition of his dementia. Even though Pinochet went to his grave without being convicted by any court of law, his greatest legacy now lies in his contribution to the revival of universal jurisdiction for war crimes and crimes against humanity.

The hope of universal jurisdiction enthusiasts was that there was now a much greater possibility that courts anywhere in the world may claim universal jurisdiction over certain international crimes. As described by Amnesty International, these include crimes against humanity, including 'widespread or systematic murder, torture, forced disappearance, arbitrary detention, forcible transfer and persecution on political grounds'.[174] Human rights jurists also claim that as prohibitions, genocide, war crimes and crimes against humanity have become part of the most fundamental norms of international law (*ius cogens*), and impose a duty *ergo omnes*, that all states have a legal interest in ensuring these prohibitions are enforced. In the early stages of the revival of the universal jurisdiction legal norm, some countries around the world, but especially in Europe and the Americas, had enacted legislation that expressly gives their courts universal jurisdiction over crimes against humanity, war crimes and other international crimes such as torture.[175]

In its 2011 survey of universal jurisdiction legislation around the world, Amnesty International found that 164 (approximately 85 per cent) of the 193 UN member states have defined one or more of the four universal jurisdiction crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law.[176] However, many states had failed further to define all of these universal crimes in their national legislation. In many circumstances, where states had attempted to define universal crimes, the definitions were not consistent with the strictest requirements of international criminal law, potentially creating a serious impunity gap.[177]

Given some of the high-profile cases brought under universal jurisdiction norms against political leaders such as former President George W. Bush, Secretary of

Defense Donald Rumsfeld, former Israeli Prime Minister Ariel Sharon and former Israeli foreign minister Tzipi Livni, allegations arose that the universal jurisdiction was being abused and manipulated for radical political reasons.

Ultimately, under political pressure from the United States, Israel and other countries, legislative curtailment of the implementation of universal jurisdiction was enacted in the key jurisdictions that initially enthusiastically adopted it. These countries included Belgium, Spain, France and even Canada, one of the countries that most enthusiastically adopted the universal jurisdiction principle. Both Belgium and Spain have significantly limited the scope of universal jurisdiction by requiring a nexus or connection between the alleged crimes and the jurisdiction where universal jurisdiction is attempted.[178] This includes criteria that the victim is a national or that the alleged perpetrator is in the jurisdiction. In Belgium, the federal prosecutor also has the discretion to prevent jurisdiction being exercised under certain circumstances. France has focused on limiting universal jurisdiction to a stipulated list of alleged crimes that include torture, terrorism, nuclear smuggling, naval piracy and hijacking of planes.[179] Canada has legislation that implements the Statute of the ICC, but it requires, in addition to a national nexus, that all attempts to exercise universal jurisdiction must be sanctioned by the Attorney General or his deputy.[180]

The impact of the attempts to prosecute the highest-profile politicians from the US, Israel and Britain has resulted in legislative backlash from government and legislative officials and the academic community. One of the most vehement critics of universal jurisdiction, Luc Reydams, calls universal jurisdiction a post-Cold War project of overzealous 'discourse and self-feeding hype generated by NGOs, activist lawyers and judges, academic conferences and papers, and mass media'.[181] He claims that these champions not only lack an understanding of the historical sources of universal jurisdiction, but that their contemporary understanding of the doctrine, derived through the interpretation of modern treaties and the decisions of domestic and international courts, is distorted. His critique goes all the way back to the first analysis of universal jurisdiction by the earliest realist architects of international law, namely Covarruvias in the 16th century, Grotius in the 17th century and de Vattel in the 18th century. Reydams argues that proper application of the doctrine should have a territorial nexus, as the legislative backlash in many of the countries described above now require.[182]

Another critique is offered by the Chinese international law jurist, Sienho Yee, who acknowledges the downturn in enthusiasm for universal jurisdiction; however, instead of dismissing the case for universal jurisdiction, Yee puts forward the view, common among Chinese legal scholars, that it should be severely limited. Yee would limit the doctrin to piracy in the absence of treaty practice or universal concern about the character of the crime, along with a territorial nexus. Following the traditional Chinese perspective, she argues that there is no pure universal concern jurisdiction. Yee argues that there is a need to balance the necessity for accountability for the most serious crimes against the need to protect the sovereign equality of states. Yee concludes that, even

from a Chinese perspective, the doctrine is not dead. There is now wide agreement that certain crimes, including genocide, war crimes and crimes against humanity, are of universal concern. Insofar as this universal concern is met with a legal basis, a territorial nexus and the absence of a prohibition against universal jurisdiction, it can be said that a limited version of universal jurisdiction persists.[183]

Developments around the world continue to demonstrate that a modified form of universal jurisdiction persists. On 8 May 2012, the High Court of South Africa ordered the investigation and prosecution of the alleged torture of Zimbabwean political opponents by Zimbabwe authorities in Robert Mugabe's government. As with the exercise of universal jurisdiction in countries that have become state parties to the ICC, this South African exercise of universal jurisdiction was made pursuant to the domestic legislation implementing the Rome Statute of the ICC.

Another hope was raised by a different court as regards the application of another aspect of universal jurisdiction. On 20 July 2012, the International Court of Justice (ICJ) made a historic ruling on the action brought by Belgium against Senegal, requesting that Chad's former head of state Hissène Habré, resident in Senegal, should either be prosecuted or extradited to Belgium for the mass acts of torture committed during his presidency (1982–1990). The Court held that Senegal was in breach of its obligations under the Convention against Torture, which requires that torture allegations are immediately submitted for a preliminary inquiry into the facts, as well as the submission of the case to the competent authorities for the purpose of criminal prosecution, should the state in which the alleged torturer is found not extradite him or her. The ICJ further ruled that Senegal, as a state party to the Convention against Torture, was required to adopt appropriate legislation to criminalise torture and give its courts universal jurisdiction to conduct hearings on prosecutions brought against alleged torturers. The ICJ therefore ruled that Senegal 'must, without further delay, submit the case of Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him'.[184] On 30 June 2013, facing international pressure in light of the ICJ ruling, Senegal took the former dictator of Chad into police custody in Senegal to stand trial for his alleged participation in thousands of political killings and the systematic torture that occurred during his presidency.

The encirclement of the acts of illegitimate exercise of power constituting genocide, war crimes and crimes against humanity by the rule of law, and even a limited form of universal jurisdiction that gathered steam with the Pinochet rulings, are yet another turning point in the expansion of the *grundnorm* of sovereignty in international law as including the legitimate exercise of power. The designers and implementers of genocide, war crimes and crimes against humanity have fewer and fewer places to visit, or hide themselves or their ill-gotten gains. As regards the struggle for human rights, even in its modified form, universal jurisdiction must be seen as one of the many necessary steps in combating the tragic flaw in the institutions of global governance.[185]

1.13 The ICC: sovereign powers uniting in the fight against impunity for the most serious international crimes

The establishment of the ICC is one of the most historic examples of states uniting by the Rome Statute to promote the legitimate exercise of power as the foundation of the sovereignty *grundnorm* of international law. Again, its origins point to synchronicity in human history. In 1989, while the Cold War was in its death throes, the small Caribbean nation of Trinidad and Tobago proposed to the General Assembly the setting up of an international criminal court to assist in the fight against the global drug trafficking problem. The General Assembly sent the issue to the International Law Commission (ILC) for study.

In 1990, the ILC reported back suggesting the establishment of a court dealing with international crimes in general. The General Assembly approved of the proposition and asked the ILC to study the establishment of such a court. After reports by a working group of the ILC, on a draft statute for such a court, the creation of an Ad Hoc Committee of the General Assembly to review the draft, and an attempt at consolidation of a draft statute by a General Assembly Preparatory Committee, states finally called for a diplomatic conference to hammer out the final details of the statute, to be held in Rome during the month of June.[186]

In the summer of 1998, which coincided with the Pinochet rulings in Great Britain, civil society organisations from across the globe acted in concert with a group of 'like-minded' countries, led by Canada, to wage a ferocious battle for the consolidation of support around an international criminal court. At the Rome Conference, 160 sovereign states were joined by 17 inter-governmental organisations, 14 specialised UN agencies and 250 accredited NGOs for the formation of the Statute of the ICC.[187]

In contrast to what was about to unfold in Kosovo, the main opposition facing the resolve of the civil society groups and the coalition of like-minded states, to develop an effective treaty for the establishment of an international criminal court, came from the United States.

Before the Rome Conference, the Clinton administration had voiced support for the establishment of an international criminal court, if the right protections were built into its statute. The United States had taken the lead in pushing for the establishment of the Ad Hoc Tribunal for the FRY, and had assisted a year later in the establishment of the Ad Hoc Tribunal for Rwanda. Leading experts from the United States, including Professor Michael Scharf, have argued that the experience of these tribunals, despite slow starts and a lack of adequate resources (in the case of the Rwanda tribunal a lack of competent prosecutors) have shown the world that 'international indictment and arrest warrant[s] could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify international political will to impose economic sanctions and take more aggressive action if necessary'.[188]

This perspective was strengthened with the removal, on 28 June 2001, of the former president of the FRY, Slobodan Milošević, to the Ad Hoc International

War Crimes Tribunal for the former FRY in The Hague, to stand trial for war crimes, crimes against humanity and genocide. This had been the first time a former head of state had been brought before a war crimes tribunal. Human rights jurists and NGOs from around the world hailed the bringing of Milošević to justice as the beginning of the end of centuries of impunity, enjoyed by heads of state and senior political figures, for massive human rights violations.[189]

At the Rome Conference, the main goal of the United States was to have an ICC controlled by the Security Council of the United Nations. This was the same Council that the superpower would ignore in the Kosovo crisis. The justification the United States gave for its position was paradoxical, to say the least. As the sole superpower in the post-Cold War period, the largest burden of intervening in humanitarian crises would fall on American military personnel. Therefore, it wanted to have the comfort of its Security Council veto, should its personnel become subject to potential investigations by the independent ICC prosecutor or the jurisdiction of the ICC itself, in the course of its humanitarian role.[190]

Most of the other nations at the conference, led by the like-minded group of countries and the human rights NGOs, vehemently opposed the view that any country's citizens would be exempt from the jurisdiction of the ICC. Professor Scharf has suggested that the attitude of the US Government, in particular the defence department, reflected the residual mistrust of international courts arising from the decision of the International Court of Justice in *Nicaragua v United States*,[191] which led to the American withdrawal from the compulsory jurisdiction of the ICJ.

Fears about possible ICC investigations and prosecutions of American military actions in Vietnam, Panama, Libya and Grenada may also have been behind the US push for a Security Council-controlled ICC.[192] Such fears may be compounded by actions that the United States military forces have taken in special operations against the Taliban and al-Qaeda terrorist network in Afghanistan, after 11 September 2001. At the time, however, such fears were without basis, as the ICC Treaty clearly states, in Article 11, that the Court has jurisdiction only with respect to crimes committed after the entry into force of its constitutive statute.

On 16 July 2001, the Rome Diplomatic Conference voted in favour of a treaty to establish an international criminal court. After five weeks of gruelling negotiations, which had seen the remaining superpower isolated and sidelined by its own allies, the treaty was approved by a vote of 120 to 7 with 21 abstentions. In voting against the treaty, the United States joined in a most unusual alliance with China, Libya, Israel, Qatar, Yemen and, most ironically, Iraq. This will prove to be a tragic moment in the history of a superpower that had been at the forefront in the establishment of the Atlantic Charter, the Declaration of the United Nations, the Nuremberg and Tokyo War Crimes Tribunals, the United Nations Charter and the Universal Declaration of Human Rights.

Even more tragic is the realisation that many, and some would argue most, of the concerns expressed by the United States had been dealt with in the detailed provisions of the ICC's Rome Statute.[193] The ICC Statute established three forms

of jurisdiction exercisable by the Court under Article 13.[194] First, the Security Council could refer situations to the Court. This jurisdiction, in theory, should create binding obligations on state parties to the Rome Statute and, indeed, all states to comply with orders regarding the surrender of evidence or of indicted persons under Chapter VII of the United Nations Charter unless the obligations of non-state parties are otherwise stated in the resolution of the Council that triggers the jurisdiction of the Court.

Second, the independent prosecutor of the ICC seek the consent of the Court to start an investigation and prosecution. Third, a state party can refer situations where crimes appear to have been committed to the prosecutor. The exercise of jurisdiction under the second and third categories of jurisdiction is conditional on the state of nationality of the accused or the state where the crimes were committed being party to the statute or accepting the jurisdiction of the Court. In most cases, therefore, the second and third category of the exercise of jurisdiction would rely on the good faith of the parties to the ICC Statute for enforcement, rather than the Security Council.

It was obvious at the Rome Conference that the most effective jurisdiction of the ICC was the first type, which was supported by the United States. But it was equally obvious the second type of jurisdiction was also critical to global justice, given the abject loss of 'moral authority' of the Security Council after the debacles of Rwanda, Bosnia and Kosovo. Both the civil society groups from around the world and the like-minded group of states viewed the second type of jurisdiction as essential. Yet it was the second category of exercise of jurisdiction that the United States opposed.

With this in mind, the statute was constructed in such a way as to alleviate some of the concerns the Americans had over the second type of jurisdiction. For one, the second type of jurisdiction would be subject to 'complementarity'. This meant that under Article 17 of the statute, the Court would only have jurisdiction in the event that national authorities were unwilling or unable to prosecute. Similarly, at the suggestion of the United States, the complementarity principle was subject to the requirements in Article 18, whereby the independent prosecutor must give notice of the intention to investigate and must defer to a state that decides to investigate itself, unless the prosecutor can convince the Court that such state investigation is a sham.[195]

Other provisions of the ICC Statute designed to meet US concerns included limiting the jurisdiction of the ICC to only 'serious' crimes of concern to the international community as a whole, requiring the approval of the Pre-Trial Chamber of the ICC before the prosecutor can launch an investigation, and giving the Security Council the ability to postpone an investigation for up to 12 months on a renewable basis. These provisions, included for the benefit of the United States, were sufficiently persuasive to attract all the other permanent members of the Security Council, with the exception of China, to sign the Rome Treaty.[196]

With the Pentagon carrying the day against American approval of the ICC Treaty, the United States began to campaign against the ICC's jurisdiction over nationals of non-state parties, arguing that it was against the general rules of

international law. This was an astonishing position taken by the superpower that has led the world in the establishment of international human rights standards Since the signing of the Atlantic Charter. The 'serious crimes' that are covered by the Statute of the ICC, namely genocide, crimes against humanity, including rape, forced pregnancy and sterilisation, and war crimes are, as the Pinochet rulings have confirmed, crimes of universal jurisdiction constituting the fundamental norms of international law (*ius cogens*). As such, the commission of any of these crimes is of legal concern to any national court, let alone the ICC, and provides for the exercise of jurisdiction over persons alleged to have committed such serious crimes, even without the consent of the indicted person's national state. The United States' courts have themselves exercised such universal jurisdiction in the area of international crimes of universal jurisdiction, created under anti-terrorism treaties.[197]

Perhaps mindful of these inconsistencies, just hours before the deadline for signing the Rome Treaty expired, on 31 December 2000 President Clinton, in his last few days in office, sent his war crimes ambassador David Scheffer to sign the treaty. However, the president and his war crimes ambassador signalled that he could not submit the treaty for Senate approval, if it remained unchanged, and recommended that his successor should not do so either.[198] His successor, President George W. Bush went a step further and, as will be discussed below, renounced the United States' obligations as a signatory.

Even now, under the somewhat sympathetic leadership of President Barack H. Obama, the chances of United States Senate approval is slim, especially as the Senate Foreign Relations Committee has long resisted any attempt to allow the institutions of global governance to have binding authority over the United States. The irrational fear of US soldiers and peace-keepers being hauled before the ICC on trumped-up and politically motivated charges will keep such resistance high, and prevent ratification for a long time, despite the signature of the United States on the Rome Treaty.

However, the United States has attempted to lighten the ignominy of membership in the 'like-minded' group of human rights oppressors that opposes the ICC. Under the Clinton administration, the US participated in the work of the Preparatory Commission on the elements of crimes, rules of procedure, evidence and other issues.[199] The Obama Administration has actively participated in the various operations of the Court. This is a good sign that ultimately the entire leadership of all the democratic nations of the world will be fully behind this vital institution of global governance. Israel also signed the treaty the same day as the US accession. China was then isolated among the permanent membership of the Security Council in opposing the ICC. The implacable opposition of China to any incursion into its national sovereignty, by international human rights standards, will only be loosened with the democratic and political reforms that are inevitable in the emerging superpower. There is increasing evidence that the overwhelming majority of the nations in the world will accede to this permanent international criminal court.

On 11 April 2002, the 60th ratification of the ICC Treaty was received by the United Nations, thereby allowing the Rome Statute to come into force on 1 July 2002. Indeed, by 11 April 2002, 66 ratifications had been received. On this date,

without the participation of the then only superpower in the world, a major turning point in the wait for global justice occurred. The encirclement by the rule of law of the tragic flaw in global governance became a little tighter.

When the Rome Statute came into force, it was suggested that the contribution of this historical statute's provisions to the fight against impunity for the most serious of crimes would be demonstrated in the decade that would follow, by the actual investigations, prosecutions and decisions of the Court.[200]

The first 10 years were met, above all, with trenchant criticism of the ICC, on the basis that the vast majority of its investigations and prosecutions have been in Africa. These criticisms were coupled with allegations that the ICC is a Western court, with a bias against the southern hemisphere, and that it recklessly pursues prosecution at the expense of the peaceful settlement of conflicts, especially in ongoing violent conflicts in Africa. As will be discussed, these critiques are themselves substantially ignorant of the facts that have given rise to the first investigations and prosecutions by the ICC.

By July 2013, there had indeed been 24 cases, in eight situations, brought against Africans accused of perpetrating the most serious of crimes under the ICC Statute. What those who accuse the ICC of bias towards Africa consistently fail to acknowledge is that, of the 24 cases, all but three of the situations that gave rise to warrants and prosecutions were referred by African Governments, namely Uganda, the Democratic Republic of Congo (DRC), Mali and the Central African Republic. Of the remaining three, two of the situations, in Sudan and Libya, were referred by the UN Security Council, while the third, Côte d'Ivoire, was a referral by the first sovereign state to accept the jurisdiction of the Court without being a signatory to the Rome Statute.

The details of these first cases have been discussed and analysed in another book by the present author titled *Peace and Justice at the International Criminal Court*.[201] However, it is worth noting that the first conviction by the ICC of Thomas Lubanga Dyilo was the result of a referral by an African state, namely the DRC. On 30 May 2012, the Government of Mali made the fourth referral by an African state party to the ICC regarding the situation in the country since January 2012. This includes the instances of killings, abductions, rapes and the conscription of children on the territory of Mali. In addition, the ICC will be investigating the deliberate destruction of shrines dedicated to Muslim saints in the city of Timbuktu, which may constitute an international crime under Article 8 of the Rome Statute.

After the referral by the Government of the DRC to the ICC, the chief prosecutor started investigations of several militia leaders alleged to have committed crimes against humanity, including the conscription of child soldiers. On 12 January 2006, after 18 months of investigations in the DRC, the prosecutor sought a sealed warrant against Thomas Lubanga Dyilo, a brutal Congolese warlord. He was charged with enlisting and conscripting children under the age of 15, as well as using them in violent combat. While there has been criticism of the limited charges against this alleged perpetrator, who has also been accused of sexual violence and systemic rape constituting war crimes and crimes against humanity, the ICC has defended its position on the grounds that the content of

the charges were triggered by the possible imminent release of Lubanga by the DRC authorities.

On 10 February 2006, the ICC Pre-Trial Chamber issued a sealed arrest warrant against Lubanga and, on 17 March 2006, the DRC surrendered him to the ICC. It should be noted that this was the first arrest warrant ever executed by an African Government on behalf of the Court, again demonstrating cooperation, as opposed to antagonism, between the ICC, an African Government and the pursuit of peace and justice. On 23 January 2009, after several delays that almost derailed the prosecution of Lubanga owing to the non-disclosure of evidence by the office of the prosecutor, the ICC began its historic first trial of an indicted criminal.

The trial is regarded as important in the development of international criminal law, as it is the first case in which the use of child soldiers would be prosecuted as an international crime. In the 10-year-old Court's historic first conviction, the Trial Chamber, in a complex decision of 14 March 2012, found Lubanga guilty of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.[202] On 10 July 2012, the Trial Chamber sentenced Lubanga to 14 years in prison, with a reduced sentence for time already served in detention. Lubanga will be free in approximately eight years, which is a far shorter sentence than the 30 years proposed by the prosecution.

While there has been criticism, even from Judge Fulford, one of the sentencing judges, as regards the conduct of the hearing, and the prosecutor's decision not to charge and convict Lubanga for systemic rape and other forms of gender violence, there is also hope that the conviction will undermine the growing practice, in Africa and other countries, of recruiting children for military purposes and sexual slavery.[203] The muted satisfaction over the conviction of Lubanga was tempered by the trial chamber's acquittal on 8 December 2012 of Mathieu Ngudjolo Chui, another indicted militia leader from the DRC, of the charges of war crimes and crimes against humanity, as the prosecutor had failed to prove beyond a reasonable doubt that he was a commander of a DRC militia that committed those crimes.

In addition to the state referrals, it must be recognised that the only *proprio motu* investigations by the prosecutor for the ICC have been on the African continent. On 7 November 2009, the prosecutor announced that he would be requesting the authorisation of the Pre-Trial Chamber, under Article 15 of the ICC Statute, to open an investigation into the post-election violence in Kenya. At a meeting in the same week, the Kenyan Government, through the statements of President Mwai Kibaki and Prime Minister Raila Odinga, promised their full cooperation with the investigation.

On 31 March 2010, Pre-Trial Chamber II granted the prosecutor's request to open an investigation *proprio motu* into the situation in Kenya. On 8 March 2011, in contrast to the charges against Sudanese officials, six Kenyan citizens appeared voluntarily before the Pre-Trial Chamber. On 23 January, after according due process to those charged with the post-election violence, the Court confirmed the charges against four suspects: William Samoei Ruto, Joshua Arap Sang, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, and committed them to trial.

In August 2011, the Appeals Chamber confirmed the admissibility of the cases against the Kenyan individuals. In March 2013, the prosecutor asked to withdraw charges against Francis Kirimi Muthaura. The trials of Ruto, Sang and Kenyatta were scheduled to start in May and July 2013. However, on 4 March 2013, in a much-anticipated election, Kenyans elected Kenyatta as president and Ruto as vice president, creating challenges for the continuing *proprio motu* investigation. It is possible that the charges against the two men may have evoked nationalist sentiments among a segment of the electorate, and their choices at the ballot box. Initially, both men promised that they could still govern the country and contest the charges at the Court. However, lawyers for the men are arguing that the charges should now be dropped, especially after the withdrawal of charges against Muthaura owing to the intimidation and unreliability of witnesses.

Given the challenges facing the ICC prosecutor in obtaining sufficient evidence and the claims of the defence teams that they needed more time, the trial of President Uhuru Kenyatta was delayed until November 2013, while Vice President Ruto's trial was delayed until September of the same year. What initially appeared to be a promising first *proprio motu* investigation may have become bogged down in the ability, by those in power, to limit the ability of the prosecutor effectively to investigate and conduct the trial.[204]

The second *proprio motu* investigation in an African country was triggered by the acceptance of the Court's jurisdiction by Côte d'Ivoire, a non-member state, after a severe political crisis in that country, and a contested election that eventually led to UN Security Council military intervention, described below in the context of the discussion of the R2P.

Côte d'Ivoire, which is not a party to the Rome Statute, accepted the jurisdiction of the Court on 18 April 2003, and reconfirmed it again on 14 December 2010 and 3 May 2011, through the newly installed president. On 3 October 2011, the Pre-Trial Chamber granted the prosecutor's *proprio motu* investigation request for crimes committed since 28 November 2010, as well as with regard to crimes that may be committed in the future in the country. On 23 November 2011, the chamber issued a warrant of arrest against the former president Laurent Gbagbo, on four counts of crimes against humanity. The preliminary hearings began on 5 December 2011. Laurent Gbagbo became the first former head of state to be transferred to The Hague, less than 10 years after the Rome Statute came into effect. An arrest warrant was also issued on 29 February 2012 against the spouse of the president, Simone Gbagbo, as a co-perpetrator of the four counts of crimes against humanity.

Apart from the state referrals and the *proprio motu* investigations, which have all been undertaken with the cooperation of the states involved, the method of gaining jurisdiction that has caused the most problems is the method that the US took as the least problematic, the Security Council referral. On 31 March 2005, the Security Council took the historic decision to refer the situation in the Darfur region of Sudan to the ICC. Sudan is not a party to the ICC Statute, and therefore the only way in which the situation in Darfur could be brought before the ICC was through a referral by the UN Security Council, as discussed above. An

independent commission of the UN had already investigated the humanitarian and human rights crisis in Darfur, and had identified more than 50 individuals, linked to the Sudanese Government and the Janjaweed militias controlled by Khartoum, whom the commission suspected of committing crimes against humanity and war crimes. The same commission also recommended a further ICC investigation into the situation in Darfur, and that the suspects be investigated and potentially prosecuted in the ICC.

The decision of the most powerful members of the international community to allow the ICC to investigate allegations of crimes against humanity, war crimes and possible genocide in Darfur resulted from the sudden end to a stand-off in the Security Council. In March 2005, France had stated its intention to submit a resolution calling for a referral of the situation in Darfur to the ICC. Both China and the US had threatened to use the veto on any possible referral under the Rome Statute. The US put up strong resistance and instead proposed the setting up of yet another ad hoc UN/AU tribunal in Tanzania to investigate the allegation of serious international crimes in Darfur. This proposal drew little support from the members of the Council, who argued that only the ICC had the investigative staff ready to begin the work.[205] The sometimes irrational and ideological opposition by the Bush administration to the ICC and the possible referral of the Darfur situation to the ICC led one opinion writer in *The New York Times* to accuse that US administration of 'not knowing what it dislikes more: genocide or the International Criminal Court, which seeks to punish it'.[206]

Ultimately, with the 2008 Beijing Olympics quickly approaching, mindful of its own fragile human rights reputation and fearful of the international accusations that it was complicit in the actions of the Sudanese Government in Darfur, owing to its oil and gas interests in Sudan, China decided to abstain from using its veto. The necessity for face-saving would also force the US to abstain from using its veto, allowing the Security Council resolution referring the Darfur situation to the ICC to go through. In part, this abstention was due to the fact that both the US Congress and President Bush's own Secretary of State, Colin Powell, had recently used the word 'genocide' to describe what the UN called the world's worst humanitarian crisis.

However, along with China and other recalcitrant Security Council members, the US not only insisted that the ICC receive no additional funding for the heavy burden it had just received from the Security Council, but astonishingly also determined to exempt 'States not Party to the Rome Statute' from compliance. Given the high probability that the ICC may well find the highest officials in Sudan guilty of the crime of genocide, in effect the former Bush administration, along with their partners in crime in the Security Council, seemed to assert that that this highest body of the UN could exempt member states from one of the most universally accepted legal obligations they have, namely the prevention and punishment of the crime of genocide under the Genocide Convention 1948.

The unconscionably heavy price paid for the abstention of China and the US, under the former Bush administration, may well reveal itself in future attempts to ensure that the most serious crimes known to humanity do not go unpunished. If

the Security Council is able to exempt member states from their *erga omnes* legal obligations, then the international community faces the prospect that there are no universal legal obligations that apply to all nations! This would make a mockery of the promise of 'never again'.

On 2 May 2007, investigations by the ICC prosecutor, pursuant to the UN Security Council referral, led to the confirmation of arrest warrants by the Pre-Trial Chamber of the ICC against Ahmad Harun, a former Sudanese state minister of the interior, who was key to the planning and implementation of the humanitarian crisis in Darfur, and Janjaweed militia leader Ali Kushayb. They were both charged with dozens of counts of crimes against humanity and war crimes in Darfur.

On 14 July 2007, pursuant to his investigation into the situation in Darfur, the ICC prosecutor sought an arrest warrant against President Omar al-Bashir, on charges of genocide, crimes against humanity and war crimes. On 4 March 2009, the Pre-Trial Chamber confirmed five counts of crimes against humanity and two counts of war crimes against al-Bashir, but refused to confirm the charge of genocide, as the prosecutor had failed to provide evidence of the specific intent to commit genocide. The prosecutor appealed the chamber's refusal to confirm the genocide charge and was successful, on 12 July 2010, in getting the Trial Chamber to confirm the genocide charge after being directed to reconsider by the Appeals Chamber.[207]

In a development that demonstrated the neutrality of the ICC, the prosecutor announced that, following further investigations, he expected to provide the Pre-Trial Chamber with evidence that would lead to the indictment of several rebel leaders in Darfur, in connection with an attack on the eastern Darfur town of Haskanita in September 2007, which killed 10 African Union peace-keepers. On 18 May 2009, the Pre-Trial Chamber set 12 October 2009 as the confirmation date for the charges against Bahr Idriss Abu Garda, one of the rebel leaders suspected of having committed war crimes during the attack against the UN peace-keeping mission in September 2007. To the surprise of many, especially President al-Bashir and his two indicted officials, Abu Garda appeared voluntarily for his initial appearance before the chamber, on a summons rather than an arrest warrant, and accepted the jurisdiction of the Court, stating that he wished to prove his innocence. On 19 October 2009, Abu Garda appeared before the Pre-Trial Chamber for the confirmation of charges hearing. He is the first suspect to have appeared before the Court in the context of the situation in Darfur, and he appeared voluntarily. The offer of voluntary appearance with respect to the initial appearances before the Pre-Trial Chamber had also been made to al-Bashir, Harun and Kushayb.

Again demonstrating its independence from the chief prosecutor, the Pre-Trial Chamber, on 8 February 2010, refused to confirm the charges against Abu Garda and went further by refusing the prosecutor's application to appeal the decision. However, on 7 March 2011, determined to do justice where the evidence is convincing, the Pre-Trial Chamber confirmed charges of war crimes against two other Darfur rebel leaders, Abdallah Banda Abakaer Nourain (Abdallah Banda)

and Saleh Mohammed Jerbo Jamus (Saleh Jerbo), committing them to trial for war crimes committed in the attacks on the Haskanita peace-keepers.

Similarly, on 7 March 2011, undeterred by the challenges in enforcing the existing Sudanese arrest warrants, the Pre-Trial Chamber issued a warrant of arrest against Abdel Raheem Muhammad Hussein, who was the minister of national defence for the Sudanese Government, former minister of the interior and former special representative of the indicted President al-Bashir in Darfur. As a response to those who question why the Court would add to the list of unenforced arrest warrants against Sudanese officials, the chief prosecutor explains that ICC warrants are permanent and do not expire. From the date of issuance onward, the net of accountability begins to close, and the question of enforcement turns into a question of time.

The accusations that the ICC has shown bias in focusing investigations and prosecutions on Sudan is clearly without substance, given that, once the UN Security Council referred the situation to the Court, it had no choice but to follow the legal framework of the Rome Statute.

The ICC has been criticised for impeding any peaceful settlement of the conflicts in Sudan; however, the facts show that the real threat to sustainable peace in Darfur, and Sudan in general, does not come from the ICC and its justice mandate but by way of the duplicitous and Machiavellian tactics of President al-Bashir and his top officials. They have deliberately destabilised and then destroyed the minorities of Sudan in order to control the power and resources in this tragedy-filled country.

Another fact that counters the artificial justice-trumping peace critique against the ICC and its prosecutor is the fact that, while the latter was given the potentially powerful *proprio motu* power to initiate investigations leading to potential prosecutions, it has not been the primary source of the caseload of the ICC. Indeed, given the precedent of the situation in Libya, it seems likely that in the future the caseload of the Court would be triggered more by UN Security Council referrals than any other method of jurisdiction being exercised. This scenario may become a reality given the linking of the jurisdiction of the ICC with the implementation of the R2P principle, which will be discussed in greater detail below. The referral of the Libyan situation to the Court could well be paradigmatic of future cases.

On 27 June 2011, as a result of the historic unanimous adoption of Security Council Resolution 1970, referring the situation in Libya to the ICC, the Pre-Trial Chamber issued three warrants for the arrest of Muammar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi for alleged crimes against humanity, committed across Libya from 15 February 2011 until at least 28 February 2011, through the state apparatus and security forces. Even the great foes of the Court, China and Russia, voted for the referral. The resolution again recognised that states not party to the Rome Statute would have no obligations under the statute to assist in the referral to the ICC, but ironically urged all states and concerned regional and other international organisations to cooperate fully with the Court and the prosecutor.[208]

After rebels overthrew the Gaddafi regime, with assistance from a NATO-led military intervention, Saif al-Islam Gaddafi was captured and held by rebels. His father was not so lucky, having been killed in the capture of Tripoli. Subsequently, the transitional government in Libya indicated that it would attempt to try Saif al-Islam in Libya, instead of handing him over to the ICC. The Court is adamant that, in keeping with Resolution 1970, the Libyan authorities have the obligation to cooperate fully with the Court and surrender Saif al-Islam to the Court. If the Libyan Government wished legitimately to try Saif al-Islam, they had to succeed in their admissibility challenge before the Court, which at this time remains seised of the case.[209] On 31 May 2013 the Pre-Trial Chamber rejected Libya's admissibility challenge, owing to Libya's perceived inability to 'genuinely carry out investigations', and ordered Libya to surrender Saif al-Islam to the Court.

Apart from the UN Security Council referrals, the first chief prosecutor, Luis Moreno-Ocampo, adopted the policy of inviting and welcoming voluntary referrals by any state, including any African state, as the first step in the triggering of the jurisdiction of the Court. It was this policy, which specifically caters for sovereign states who wish to exercise their power legitimately, that led to the situations in Northern Uganda, the DRC, the Central African Republic and now Côte d'Ivoire being the major focus of the Court. This policy was also adopted because it increased the likelihood of receiving the critical cooperation and support that was needed between the countries involved and the Court. It is Africa itself that demands accountability as a precondition for sustainable peace on the troubled continent.

The prosecutor of the ICC is also carrying out preliminary examinations, which could lead to prosecutions, in countries outside Africa. These countries include Afghanistan, Colombia, Honduras, Georgia, Guinea and Korea. In a hotly contested decision of 3 April 2012, the office of the prosecutor concluded that his office did not have the ability to decide whether Palestine could qualify as a state, for the purposes of consenting to the jurisdiction of the ICC, as regards allegations of serious crimes in the Gaza conflict with Israel.

Despite the critiques, some less justified than others, against the record of the ICC in its first 10 years, its continued existence remains vital for the legitimate exercise of sovereign power and the fight against the absolutist vision of sovereignty, which has too often been synonymous with impunity for the most egregious crimes known to humankind. With 122 state parties to the Rome Statute and climbing, as of April 2013, the treaty will soon have the substantial majority of sovereign nations accepting fundamental limits on sovereignty in the global battle against impunity. The fact that the UN Security Council can refer situations from the remaining sovereign powers, who are not yet state parties to the ICC, indicates that the gates of impunity, despite current challenges such as those in Syria, will be closing on the individuals who seek to use unfettered sovereign power to inflict the most serious international crimes against their political opponents.

The Security Council referrals to the ICC of the situations in Sudan and Libya have hastened the closing of the gates of unfettered impunity. However, there will always be setbacks, as demonstrated by the slaughter of civilians in Syria, under

the regime of President Bashar Assad, as the next section of this chapter will discuss. The tragic flaw will triumph from time to time, but the pull of global justice that demands that sovereignty must encapsulate the legitimate exercise of power sees a partner in the ICC as the 'court of last resort'.

1.14 The responsibility to protect and the protection of civilians: the new normative core of sovereignty as the legitimate exercise of power?

Ever since the world's heads of state adopted the R2P at the 2005 UN World Summit, and its subsequent affirmation in the UN Security Council, a debate has raged on the degree that it has impacted on the concept and parameters of sovereignty.

The global dialogue that led to the 2005 endorsement of R2P was triggered by the failure to intervene in the Rwandan and Bosnian genocides, and the 'illegal but legitimate' intervention by NATO in Kosovo. Canada initiated the global dialogue in 2000 by setting up the International Commission on Intervention and State Sovereignty (ICISS). The Commission was chaired by a global group of experts, statesmen and stateswomen, who, after conducting a series of worldwide consultations, released what proved to be a game-changing report. Under the central concept of 'the responsibility to protect', the ICISS report stated that 'sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder, from large scale loss of life, rape and starvation. But when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states . . .'.[210]

The report also emphasised the responsibility to prevent situations giving rise to civilian catastrophes and the responsibility to rebuild if international intervention were to take place.[211] After a four-year delay, which to a large extent was the result of the 2001 9/11 attacks on the New York City World Trade Center towers, the essence of the ICISS report was included in two paragraphs of the 2005 World Summit outcome document.

The two historic paragraphs, constituting the R2P in the World Summit outcome document, which were agreed to by the heads of state and government, could be regarded as affirming the definition of sovereignty as the legitimate exercise of power:

> 138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to

> help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[212]

However, even before the responsibility to protect could be accepted in the General Assembly as an authoritative endorsement of the legitimate exercise of sovereignty, it was in serious danger of being undermined. The illegal 2003 invasion of Iraq by the US military under the Bush administration fuelled a fear of cooption from hawkish militaries. While several states in the General Assembly and the UN Security Council sought to undermine the high-level endorsement of R2P, UN Secretary General Ban Ki-moon managed first to get Security Council reaffirmation of R2P and then obtain the agreement of the General Assembly, on the basic principles of R2P, as derived from the 2005 outcome document, as outlined his 2009 report 'Implementing the Responsibility to Protect'. The 2009 report, while clarifying the 2005 statement, outlined how this globally endorsed form of the legitimate exercise of sovereignty can be implemented by states, regional organisations and the UN itself, under three pillars:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement.
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility.
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.[213]

Supporters of a stronger version of the emerging R2P norm, as promoted by the ICISS report, expressed concern that the three-pillar approach could lead to a watering down of R2P as an emerging albeit indeterminate norm, by states who were antagonistic to the principle. While some have hotly contested the charac-

terisation of R2P as a norm of international law,[214] others have argued that R2P reifies expectations about how states that are embedded in international humanitarian and human rights law must behave. Looked at as such, it is possible to view the first of the 2009 Secretary General's three pillars as reflecting the affirmation of existing international humanitarian law norms.[215] Given the indeterminacy of the second and third pillars, there is less strength to the 'compliance pull' of the three pillars together constituting an emerging legal norm.[216]

Based on how the R2P norm was applied in the interventions in Côte d'Ivoire and Libya, a strenuous debate has been triggered as to whether R2P could be evolving as a norm of customary international law. One argument that could be used in favour of such an evolution concerns the Security Council resolutions on the protection of civilians, which lies at the very core of all three pillars of the 2009 statement of R2P. The major arguments against R2P being an evolving norm of international law centre around the extremely dangerous misuse of the concept to undermine what countries such as Russia, China and India still regard as the *grundnorm* of international law, namely absolute sovereignty and territorial independence.

The spectre of the illegitimate use of the norm by a major military power reinforced the opposition to an expansive version of R2P, as was initially proposed by the Canadian-sponsored ICISS report. However, the survival of the norm has been vindicated by General Assembly resolutions supporting the 2009 three-pillar approach of the Secretary General. A general consensus has emerged in the General Assembly for a 'narrow but deep' approach to implementing R2P. To bolster that approach, Secretary General Ban Ki-moon proposed as part of the implementation of the 2009 plan the establishment of a joint office for R2P and the prevention of genocide.[217]

Since the 2005 World Summit R2P statement, even if one excludes the controversial applications of the norm to the situations in Côte d'Ivoire, Libya and the ongoing crisis in Syria, one expert, Alex J. Bellamy, was able to list nine references to R2P in situations of major civil conflict. These have included: the universal condemnation of the unilateral Russian invasion of Georgia, the urging by France to use the norm to bring aid to civilians during the Burmese cyclone Nargis, and the ongoing allegations of war crimes, mass atrocities and attacks on civilians in the DRC, Gaza, Kenya, North Korea, Sri Lanka and Darfur in Sudan. Bellamy also lists four additional situations – Afghanistan, Iraq, Somalia and the north–south conflict in Sudan – where the norm was not referred, and where serious crimes against civilians were committed or credibly threatened. While the invasion of Georgia was universally condemned as a misuse of the norm, there was also a consensus that the norm at its early stage of evolution should not be applicable to natural disasters, in opposition to the position taken by France.

As regards the other situations, with the exception of Kenya, discussed below, the indeterminacy of R2P has limited its robust application as an evolving norm of international law, along with 'competing judgments about the facts of the case

(for example, about the cause, existence, and scale of mass atrocities), and different assessment about the most prudent response'.[218]

The Kenyan crisis provides the best example of the successful and proper implementation of the R2P norm. The post-election violence in December 2007 left approximately 1,500 dead and up to 300,000 displaced. At the time, it appeared as though Kenya was on the edge of a Rwanda-like explosion of mass atrocities between rival tribal factions. The AU, supported by the UN, speedily set up a Panel of Eminent African Personalities, led by former Secretary General Kofi Annan, to mediate between the warring factions. The mediation succeeded in persuading the antagonist groups, led by President Mwai Kibaki and his main opposition Raila Odinga, to promise an end to the violence and agree to a power-sharing agreement.

Annan has confirmed that he 'saw the crisis in the R2P prism with a Kenyan Government unable to contain the situation or protect its people'. He went on to state: 'I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say "intervention" people think military, when in fact that's a last resort. Kenya is a successful example of R2P at work'.[219] The fact that the hotly contested election of 4 March 2013, which saw the election of Uhuru Kenyatta as president, has not produced similar post-election violence confirms the success of the earlier R2P intervention.

While much of the credit for the successful application of R2P to the post-election violence in Kenya can be attributed to the hard work of Kofi Annan and the AU, it should be recognised that there was also a great deal of support from the incumbent Secretary General, Ban Ki-moon. In addition, the UN Security Council assisted with this successful R2P intervention by issuing a presidential statement warning the Kenyan leaders that they had a responsibility to end the violence immediately.

Others have questioned whether the R2P norm would have created a desire in the AU or the UN Security Council to take further steps if the Annan mediation initiative had failed. This places the emphasis on the wrong facets of the intervention. Bellamy rightly points out that the success of R2P provides a critical lesson, not on *whether* international actors should intervene, but *how*. At the same time, he points out that Kenya may also have been an easier candidate for a successful R2P intervention, because there was host state consent to the mediation and that the engagement was limited to diplomacy.[220]

The critical question of *how* to implement the R2P norm has become one of the most important challenges facing both the global community and those who seek to have the concept evolve as part of customary international law, especially following the interventions in Côte d'Ivoire and Libya. Both situations have reaffirmed the importance of the first pillar of R2P, and the importance of the protection of civilians, as the strongest foundation of R2P.

A focus on the protection of civilians, a closely related concept affirmed in its own set of Security Council resolutions, will hopefully lessen the indeterminacy of the R2P norm over time, and as events unfold. Indeed, in Resolution 1265 in 1999 the Security Council came extremely close to defining what would

eventually be R2P, but on the basis of the protection of civilians. The resolution expressed the Council's willingness to consider appropriate measures where civilians were being targeted or humanitarian assistance was being deliberately obstructed. It also called on states to ratify key human rights treaties and combat impunity by prosecuting those responsible for the most serious crimes.

Finally, it signalled that it would improve the protection of civilians under its peace-keeping mandate.[221] Following Resolution 1265, the protection of civilians became the primary function of peace operations by the UN in several countries around the world, including Haiti, Burundi, Liberia, Sierra Leone, Sudan, the DRC and Côte d'Ivoire. In addition, the protection of civilians was also delegated by the Security Council to the AU Mission in Sudan in 2004, and the French-led Artemis operation in the DRC in 2003. However, these protection mandates were also governed by the principles of consent and impartiality. The centrality of consent and impartiality to peace operations has resulted in a desire for separation between the protection of civilians mandate and the responsibility to protect at the UN's Department of Peace-Keeping Operations. Recent developments in peace-keeping suggest that the distance between the protection of civilians and R2P may be shrinking. On 28 March 2013, the Security Council authorised the deployment of an 'intervention brigade' to address imminent threats to peace and security within the current UN peace-keeping mission in the DRC. It marked the first time that UN peace-keepers were given a mandate to conduct offensive operations – peace enforcement – and signalled a clear departure from the principles of impartiality and consent.

This suggests that the peace-keeping may be evolving in a manner that makes it compatible with principles such as R2P, which do not necessarily yield to consent and impartiality. Furthermore, the fact that R2P entered into the Security Council debates by way of Resolution 1674 of 20 April 2006 shows the link between the two and possible evolution of international law regarding both concepts.[222] Experts Alex J. Bellamy and Paul D. Williams argue that the Security Council's response to the crises in Côte d'Ivoire and Libya should be seen in the context of these prior decisions by the Council, to authorise peace operations to use all necessary means for human protection purposes. This trend should become a focus of the international debate on R2P and the Council's support of it. The interventions in Côte d'Ivoire and Libya attest to this.[223]

In Côte d'Ivoire the urgent need to protect civilians was heightened in the wake of the controversial election of 28 November 2010.[224] Armed conflict between then president Laurent Gbagbo and his opponent Alassane Ouattara spilled into murderous attacks on civilian supporters. While the regional organisation in the area, the Economic Community of West African States (ECOWAS), the AU, the UN Secretary General, the Security Council and most Western countries, including France and the US, had concluded that Ouattara had won the election, Gbagbo refused to accept the result and even managed to manipulate the Constitutional Council to declare that he had won.

Even prior to the disputed elections, the long history of civil and sectarian conflict in the country had given rise to a UN peace operation called MINUCI,

which had been authorised by the UN Security Council and involved ECOWAS and France, the former colonial power. Ultimately, these peace operations were merged into a UN force called UNOCI, under the Chapter VII mandate of the Security Council, and given a robust mandate to protect civilians. The French part of the force was even given the authorisation to use 'all necessary means' to support UNOCI in the mandate to protect civilians.[225]

There was grave concern for the potential of mass atrocities in Côte d'Ivoire on the part of ECOWAS and the AU, which were the key regional organisations. These concerns were shared by the UN Special Advisors on the Prevention of Genocide and R2P. By the start of 2011, the UN Security Council was ready to act. Forces supporting Gbagbo launched an attack in the capital, Abidjan, which killed 100 civilians, while combatants from both sides launched attacks in other towns, killing over 1,000 civilians.

These events led the Security Council, on 30 March 2011, to pass Resolution 1975 unanimously.[226] The resolution authorised UNOCI to 'use all necessary means to protect civilians'. It also recognised Ouattara as president, while condemning the refusal of Gbagbo to negotiate a peaceful settlement. On 4 April 2011, with the assistance of France, UNOCI attacked Gbagbo's forces and heavy armaments. This action eventually resulted in the defeat and subsequent arrest of Gbagbo, who was then transferred to the ICC to stand trial for war crimes and crimes against humanity. Although almost without precedent in the history of the UN Security Council, this was the second time in the space of a few weeks that military force had been used for the protection of civilians, *without* the consent of the host state.

After agreeing to Resolution 1975, the sovereign powers that have traditionally stuck to the absolutist conception of state sovereignty began to regret their decision. India, China, Russia and, more surprisingly, South Africa had expected a more restrained implementation of the authorisation 'to use all means necessary to protect civilians'. The critique by these Security Council members was targeted at the UN peace operations, along with the French military support, for taking the side of Ouattara against Gbagbo, which gave the appearance that the mission was undertaken with the goal of regime change. Russia in particular was the most critical of the use of force against Gbagbo. It was not swayed by UNOCI's argument that action had to focus on Gbagbo's forces owing to the fact that his forces were attacking civilians, and even the UN headquarters and peace-keepers, with those same heavy weapons.[227]

This Côte d'Ivoire mission was probably one of the factors (along with what transpired in Libya) motivating Russian intransigence in the face of the mass atrocities committed by the Assad regime in Syria, a few months later.

The implementation of some of the most robust action by the Security Council to protect civilians in Côte d'Ivoire presented key challenges for the international community, when faced with the threat of actual or imminent mass atrocities against civilians. First, taking quick and decisive military action to protect civilians from mass atrocities without a clear consent from the governing power clearly conflicts with the more absolutist conceptions of sovereign power, held by some of

the key permanent members of the UN Security Council, such as Russia and China, as well as non-permanent members including India and Brazil.

Second, in the face of actual or imminent mass atrocities, is it possible for UN-sanctioned operations to remain completely neutral where it is the sovereign power itself that is killing its own citizens, and refusing to comply with demands to stop the mass atrocities or negotiate a peaceful settlement? In other words, at what point does regime change become inevitable and possibly legitimate?

The military intervention in Libya raised all these key challenges, with a vengeance that still has a resounding impact on the international community's endorsement of both R2P and the Security Council's resolutions on protection of civilians.

Unlike the situation in Côte d'Ivoire, few had predicted that the risk of mass atrocities against civilians would arise so rapidly in Libya. The 'Arab Spring' that had also so suddenly ignited Tunisia and Egypt spread with unexpected alacrity to Libya in early 2011. The emerging risk of mass atrocities against civilians began to materialise after rebels took control of the major eastern towns of Benghazi and Tobruk, with great speed and ease. This led to the first attacks by the Gaddafi military, in western Libya, on civilians who were sympathetic to the cause of the rebels, or who simply wanted to live in a Libya that was free from dictatorship. In March 2011, Gaddafi turned his attention to the rebellious eastern towns, threatening to 'purify' them of the rebel 'cockroaches', and promising that any Libyan who took up arms against him would be executed.

The UN High Commissioner for Human Rights, among others, began to warn that Gaddafi's forces were committing crimes against humanity, while the Special Advisors on the prevention of genocide and R2P urged Libya to comply with its commitment to the principles of the 2005 R2P World Summit resolution. On 25 February 2011, the UN Human Rights Council established a Commission of Inquiry to investigate the alleged atrocities in Libya, and subsequently suspended the country on 1 March 2011.[228]

More important for the long-term value of the Libyan intervention as a precedent for R2P, on 22 February 2011, the Arab League suspended Libya's membership in the organisation until the violence stopped. The following day the AU would join the chorus condemning the violence. This show of support by regional organisations was key to the push by France and the UK to urge the UN Security Council to act on the atrocities.

On 26 February 2011, the Council *unanimously* passed Resolution 1970, which condemned widespread and systematic attacks on civilians, noting that the violence may amount to crimes against humanity. The resolution, with an eye to the precedent it was creating, made a point of emphasising the condemnation of the violence against civilians expressed by the Arab League, the AU and even the Organisation of the Islamic Conference (OIC). Before drawing a list of sanctions, Resolution 1970 also referred the situation in Libya to the prosecutor of the ICC and ordered Gaddafi to stop the violence immediately and allow safe passage for humanitarian aid. This referral was a historic one as it had the consenting votes of all the permanent members, including the supposed arch-enemies of the Court, namely China, Russia and, to a lesser extent, India. The sanctions included travel

bans and the freezing of assets for key Gaddafi officials, an arms embargo and the establishment of a sanctions committee.[229]

Bellamy and Williams have asserted that the consent of Russia, China, India and probably Brazil was obtained because it was hoped the resolution would result in a political settlement, and that the sanctions would only target those who were guilty of attacking the civilian population, leaving the Gaddafi regime in place and making any further, more coercive measures unlikely.[230] Their hopes were dashed when it became clear that Gaddafi had refused to stop the violence against his own people, and was about to launch a heavy armour attack on Benghazi. He summarily rejected the demands in the resolution and the pleadings of the UN Secretary General to abide by them. Gaddafi even froze the humanitarian aid going to the shattered towns of Misrata and Ajdabiya.

The refusal to stop the atrocities against civilians led France and the UK to demand a much harder response against the Gaddafi regime, including a no-fly zone. Another critical regional organisation came into the picture when, on 7 March 2011, the Gulf Cooperation Council (GCC) also called for the UN Security Council to 'take all necessary measures to protect civilians'. The OIC followed suit. The regional consent for more robust actions was topped off by the Arab League which, on 12 March 2011, called for, among other things, the UN Security Council to establish a no-fly zone for Libyan military aviation and establish safe areas for civilians against shelling by the Gaddafi military. The AU was more circumspect and somewhat in opposition to the other regional organisations. It condemned the indiscriminate use of force and lethal weapons, but stated its 'strong commitment to the unity and territorial integrity of Libya as well as the rejection of any foreign military intervention, whatever its form'.[231]

Finally, the influence of social media and the powerful Arab CNN, Al-Jazeera, which had played a large part in the Egyptian revolution, cannot be discounted. Both demonstrated a great capacity to mobilise mass opposition against the dictatorship and its violent suppression of fundamental rights. One can only hypothesise that the sovereign states in these regional organisations began to realise that media-driven mobilisation against the illegitimate exercise of sovereign power could also be the cause of their own rapid downfall, unless they changed course.

The buy-in of the regional organisations, for the initiation of robust action for the protection of civilians, persuaded the US to support the Europeans' calls for action, including the use of military force. In contrast to this view were the countries that supported the strongest view of state sovereignty as non-interference and independence, namely China, Russian, India and, on this occasion, Germany and Brazil, who debated against military action to protect the civilian areas under the control of the rebels. However, when faced with strong calls for action from the Arab League, the AU, the GCC and the OIC, these detractors decided to abstain, allowing Resolution 1973 to pass on 17 March 2011.[232]

Resolution 1973 established a no-fly zone over Libyan airspace, confirmed and refined the arms embargo and assets freeze in Resolution 1970, and called for an immediate ceasefire in Libya and a political solution. However, for the first time

in the Council's history, in paragraph 4 of the resolution, the Council authorised the use of all necessary means to protect civilians and civilian-populated areas under threat of attack, against the consent of the host state.[233] On 23 March 2011, NATO used the Security Council authorisation included in Resolution 1973 to launch Operation Unified Protector.

Almost immediately, the military tactics of NATO and its Arab partners, such as Qatar, were met with strident criticism. The allied coalition did not only target Libyan air defences; it targeted all of the Gaddafi forces on the ground, including command and control centres. The bombing campaign even went so far as to target what was known to be Gaddafi's presidential palaces and compounds. Having learned painful lessons from Somalia, Kosovo and Iraq, neither NATO nor the allied forces sent in ground troops to enforce the protection of civilians. This diminished the likelihood of allied casualties, but it would inevitably result in what is termed collateral damage to the civilian population.

As expected, Russia and China led the criticism, pointing to civilian casualties from the NATO bombing and asserting that the military intervention was going beyond the protection of civilians mandate under Resolution 1973. China went further and, in its concern about what it perceived as the arbitrary interpretation of the protection of civilians mandate, wanted an immediate ceasefire. South Africa even suggested that the referral of the situation in Libya to the ICC should include any actions undertaken by NATO and its allies in implementing the protection of civilians mandate.[234]

With the cover of NATO air strikes, the civil war between the rebel forces and the pro-Gaddafi military supported by their African mercenaries intensified. As rebels gained control, the Libyan Government forces retaliated with increasing attacks on rebel-held civilian areas, using tanks, heavy weapons and even cluster munitions. Across the heavily contested areas, faced with indiscriminate killings and severe shortages of food and medical supplies, increasing numbers of civilians fled into Tunisia, Egypt and Chad.

In August 2011, after severely attacking the pro-Gaddafi forces in the east of the country, the rebels finally managed to retake the Gaddafi stronghold of Tripoli, and most of the remaining loyalist areas. In the aftermath of the rebel victory in the west of the country, mass graves containing the bodies of executed rebels and civilians were discovered. On 20 October 2011, Muammar Gaddafi and his son were captured, both dying in custody under very questionable circumstances. There were also credible allegations of harsh treatment, torture and execution by the rebels of Gaddafi supporters and sub-Saharan Africans suspected of being mercenaries.[235] The fighting between the rebels and the pro-Gaddafi forces ended in late October 2011, with NATO confirming that it would end its military actions in Libya on 31 October 2011. The UN Security Council voted to end the mandate for military action in Libya on the same day.

These historic but controversial implementations of the protection of civilians mandate and R2P, in both Côte d'Ivoire and Libya, have raised very challenging questions as to the definition of sovereignty as the legitimate exercise of power in the 21st century.

First, while few would deny that sovereign power can rightfully take forceful measures to address insurrections or rebel movements, what are the limits between the legitimate use of force and the unacceptable slaughter of civilians? Where mass atrocities are being perpetrated against civilians, has the international responsibility to protect civilians become more than an international policy agenda that must eventually be accepted as an evolving legal norm *erga omnes*?

A related question is whether the resolutions that were passed under Chapter VII of the UN Charter, referring to specific situations regarding the protection of civilians, can be regarded as part of the move to the eventual acceptance of R2P as an evolving legal norm. Even those international lawyers who assert that the Council can establish 'legislative' resolutions, of an abstract and general nature, would *not* go so far as to claim that the Security Council resolutions referring to R2P in the specific context of Libya or Côte d'Ivoire could qualify as legislative actions.[236]

Therefore, the quest to designate the core of R2P as an evolving legal norm must rest on the *ius cogens* obligations in the first pillar of R2P. Those obligations include the responsibility of the host state to protect its populations from mass atrocities. The question is whether this is a sufficiently solid ground upon which to argue that the other two pillars support the evolution of R2P as an evolving legal norm. Given that *ius cogens* obligations bind all international actors, perhaps in a substantive context, even the UN Security Council, can the Council's Chapter VII resolutions on Côte d'Ivoire and Libya be regarded as being the enforcement of those *ius cogens* obligations in the first pillar of R2P? If not, are there other tools within the international legal system or the UN that can bridge the gap between the *ius cogens* obligations under the first pillar and the obligations under the second and third pillars? For example, can the link between R2P and the protection of civilians assist in the greater acceptance of the two concepts as an evolving legal norm?

Second, do key regional organisations, such as the AU and ECOWAS in the case of Côte d'Ivoire, and the Arab League, the GCC and the OIC in the case of Libya, have a primary role in making a determination as to when the attacks and killing of civilians have gone beyond the legitimate exercise of sovereign power, thereby legitimating international intervention? What if these regional organisations disagree on this issue, as was the case in Libya, where the AU and the Arab League held conflicting positions as to the legitimacy of the military intervention? Which regional gatekeepers should take priority?[237]

Third, if regional gatekeepers are expected to become the first responders to actual or potential mass atrocities against civilians then is there an obligation on the part of the international community, and more resourced organisations such as NATO, to assist with these first responders? What form of assistance should take place, both militarily and non-militarily?

Fourth, if the UN Security Council, acting for the peace and security of the wider international community, does authorise 'all necessary means' to protect civilians from mass atrocities, who decides what the legitimate means of implementing such mandates under Council resolutions are? The strongest supporters

of near-absolute state sovereignty, such as China, Russia and India, are likely to promote a very minimalist implementation of the mandate, which does not result in regime change. To what extent can the other major powers on the Security Council argue that, in some circumstances, such change is inevitable in order to have a sustainable environment for civilian protection? Some would argue that the only way to ensure the protection of civilians in Libya was to ensure that there was regime change.

In an attempt to defuse the negative impact on R2P, stemming from the criticism of NATO actions in Libya, Brazil proposed the addition of the responsibility while protecting (RwP) in 2011. In addition to RwP stressing that prevention is the most important pillar of R2P, the Brazilian initiative promotes the principle that any intervention should rigorously stick to the letter of the Security Council resolution that permits international intervention. RwP would include supervisory mechanisms to ensure non-politically motivated interpretations of Security Council mandates, including any form of regime change, unless explicitly permitted in the resolution permitting intervention.

RwP has found some favour with those states that have criticised the Libya intervention, such as Russia, China and India. However, several European supporters of R2P and even the US remain to be convinced of its usefulness. Criticisms of RwP include the potential for excessive micro-managing by the Security Council and the possibility of exacerbating and extending atrocities by excluding the possibility of regime change, where this may be the only way to end the mass atrocities.

The conflict and mass atrocities in Syria, ongoing for two years and with no end in sight in the middle of 2013, could well be an example where regime change is necessary to guarantee at least a diminishing level of atrocities against civilians. However, could such an argument in favour of regime change be a cover for other geopolitical or resource acquisition agendas? Another related question concerns why some of the strongest advocates for intervention in Libya, such as the US, were more restrained when their own allies inflicted serious harm and death on protesting civilians, as was the case in Bahrain and Yemen? Bellamy and Williams posed this critical question in relation to both the protection of civilians and R2P: 'who watches the guardians?'[238]

Fifth, military intervention, as a last resort for the protection of civilians against mass atrocities, is likely to take the form of air strikes by NATO or other allied forces. If such a form of intervention provides protection for the majority of civilians, to what extent are collateral deaths of civilians from these types of operations legitimate, considering that the use of ground forces may result in less harm to civilians, but greater military casualties?

Finally, do all these hugely complex and controversial questions on the protection of civilians and R2P, which inevitably arise from the interventions in Côte d'Ivoire and Libya, make it more difficult and sadly more improbable that similar interventions will take place in the future?

The tragedy in Syria, at the time of writing, seems to be answering this last question in the positive. The most influential regional organisation, the Arab

League, suspended Syria in November 2011 for its continued attacks on civilians. Later, at the initiation of the Arab League, in February 2012, a UN General Assembly backed a plan for President Bashar al-Assad to step down and stop the violence. However, the strongest critics of intervention in Libya, namely Russia and China, continue to threaten to use their veto powers against all attempts at passing a robust R2P response in the UN Security Council.[239] The actions of Russia and China in the UN Security Council seem to resist any initiative on the part of the international community that could result in the same type of regime change that occurred in Libya. The tragic flaw in the institutions of global governance seems to be in play again.

By June 2013, according to a study commissioned by UN Human Rights Commissioner Navi Pillay, the Assad regime had killed approximately 93,000 of its own citizens. Other international organisations have claimed that the slaughter in Syria has exceeded 100,000, with over 1.5 million refugees from the conflict. The ultimate consequence of the failure of the international community's duty to protect civilians in Syria could be a destabilised and failing state, with warring sectarian divides that could also be a breeding ground for extremist terrorist groups. The ultimate victims may not only be the innocent civilians, but indeed the entire region.

At the time of writing, in July 2013, there is mounting evidence that Iran and the Lebanese militia Hezbollah have joined forces with the Assad regime's attack on the rebel forces. At the same time, those same rebel forces, which are increasingly being bolstered by radical Islamist forces from around the world, are being aided by the financial and military resources of the Gulf states and, most recently, by the United States. Syria is becoming a 21st-century example of Hegel's slaughter-bench of history, while the international community wavers between feeble attempts to put pressure on the parties in conflict and, in the face of mounting civilian deaths, total inaction in stopping the slaughter.

In the absence of any clear international response to the continuing atrocities, which are occurring on a daily basis and which are already far more serious than those that happened in Côte d'Ivoire or Libya, two far less robust initiatives have been put into play. The first was the attempt by Arab League and UN Special Envoy, Kofi Annan, to attempt to mediate a Kenyan-style political settlement, by obtaining agreement from the Assad regime to allow UN monitors into the country and to promise the withdrawal of heavy weapons from civilian areas, while a ceasefire was imposed on the rebels. It did not take long for the Assad regime to render the Annan plan ineffective by continuing to commit mass atrocities in the cities, along with a less-than-substantial withdrawal of heavy weapons from civilian areas.[240] Not wanting to sit at the helm of yet another atrocity, Annan withdrew from his position. Lakhdar Brahimi replaced Annan, and attempted to broker a more modest ceasefire, although his attempts at a peaceful settlement were no more successful than his predecessor's.

Second, there was steadfast refusal by China and Russia to have the Security Council suggest anything that could lead to regime change. These veto-holding major powers also insisted on ensuring equal condemnation of the rebel forces,

who had also begun committing crimes against humanity, even though it was clear that the majority of the atrocities were committed by the Syrian military.

In frustration, the European Union, the US and other Western powers have resorted to unilateral sanctions against the Assad regime. This too has not stopped the mounting mass atrocities. NATO and the other countries that intervened in Libya have thus far ruled out unilateral military action. Their military strategists have asserted that, with a Syrian military far superior than that held by Colonel Gaddafi and with the presence of regional allies such as Iran and Hezbollah, a Libyan-style military intervention by NATO could ignite a regional conflict, which could spiral out of control. In the meantime, with massacres, including those committed by chemical weapons, occurring even against Syrian children,[241] the promise of R2P and robust enforcement of the protection of civilians mandate seems to many around the world like a fading hope for those desperate for the legitimate exercise of sovereign authority in that country.

The full horror of the tragic flaw in global governance and human nature, as exemplified in the illegitimate exercise of sovereign power by the Assad regime in Syria, will not, and should not, eclipse the bright potential of R2P and the robust implementation of the protection of civilians mandate, for all future time. In the words of one American expert, Stewart Patrick: '[j]ust because the international community can't or chooses not to act everywhere doesn't mean that it shouldn't act anywhere when there is sufficient political will to be mobilized'.[242]

Those who wish to persist in the promotion of R2P, whether as an evolving norm of international law or as an aspirational principle of global state practice must continue to seek answers to the challenges posed by the interventions in Côte d'Ivoire and Libya, while also seeking ways to counter the intransigence of Russia and China in the face of a savage sovereign that seems to mock the hopes of humanity with its illegitimate exercise of power. Given the moral coma of the international community to use the principles of R2P to stop the mass atrocities in Syria, perhaps it is only when those that have been involved in the mass slaughter in Syria stand before an international criminal tribunal to be held accountable for their crimes that the universal principles of justice and human rights behind the R2P norm will be very belatedly upheld. Progressing out of Hegel's 'slaughter-bench' of history is at times agonisingly cruel and slow.

1.15 Conclusion: a Hegelian dialectic on the road to global justice and human rights?

Anne-Marie Slaughter, the eminent international law and international relations practitioner and theorist, has presented the dilemma of the sovereignty *grundnorm* in international law in the following words:

> . . . The 17th and 18th century fathers of classical international law internalized deep assumptions about the incidence of war and peace and the nature of States. These scholars lived in a world in which war was endemic and domestic governance structures diverse; a world in which furthering the

> domestic consolidation of power under an all-powerful sovereign and simultaneously delimiting that power in the international sphere offered the most promising hope of reducing violent conflict in both spheres. The founding principle of the Westphalian system – *cujus region, ejus religo* (look only to the prince and no farther) – was a formula for peace. A prohibition on taking account of domestic differences among States thus converged with an argument about the foundations of international security. . . .
>
> Further, the record of bloodshed in the 20th century challenges the 18th century paradigm of the sources of international and domestic conflict. In many cases, strife appears to result more from the cause than the absence of sovereign power. Representative political institutions, protection of minority rights, and the furtherance of group autonomy short of Statehood appear more likely to further long-term domestic and international peace than the raising of new Leviathans. At the same time, the realm of peace and relative prosperity is no longer a condominium of all-powerful princes, but rather a domain of representative governments embedded in a dense network of transnational economic and social transactions. The perception of such seismic shifts, to the extent they hold, could lead to the adoption of a new model of the international system, normatively applicable to all states even if positively descriptive of only some. Alternatively, the values of universalism could be sacrificed to the realism of recognizing that States in the international system inhabit very different worlds . . .[243]

These words of wisdom concluded an excellent discussion on why it makes little sense to separate international law from international politics, along with a brilliant analysis on the impact of the realist and liberal approaches to international relations on the theory and practice of international law. While seeking valiantly to develop an integrated approach to the dominant features of the two disciplines, from both competing perspectives, the conclusions of Professor Slaughter also mirror much of the analysis in this first chapter, as well as its conclusion.

In particular, the tragic flaw arises first from those states, officials and institutions that still cling to the misunderstood notion of Westphalian sovereignty as near absolute territorial integrity and independence. In opposition are the states, institutions and a dense network of transnational 'transacters', from officials, jurists, courts, human rights organisations and activists, who see the true definition of the *grundnorm* of sovereignty as the legitimate exercise of power, which includes respecting the human dignity and rights of all peoples within the nation state. As discussed at the start of the chapter, a strong argument can be made that this should have been the actual conception of sovereignty since the Peace of Westphalia in 1648.

However, globalisation has had the effect of hastening a kind of Hegelian dialectic, which has seen the ascent of the tragic flaw in institutions of global governance and applicable rules of international law in the second half of the 20th century and the first part of the 21st century. The impact of global transportation, telecommunications, media and, most recently, social media greatly empowered

Anne-Marie Slaughter's dense network of transnational, economic and social 'transacters', for the promotion of sovereignty as the legitimate exercise of power.

We saw the start of the ascendance with the Universal Declaration of Human Rights, whose phenomenal moral authority has risen to the level of a global *Magna Carta*. In contrast to this, we saw state-fashioned international documents and institutions on human rights suffer the bite of the tragic flaw, first in the Charter of the UN itself, and later in other global peace and security institutions, including the UN Human Rights Commission, and its replacement the Human Rights Council. However, even within these institutions, which carry the tragic flaw in their constitutive documents and deliberations, individual champions of justice and human dignity are at work, diligently chipping away at the tragic flaw. Examples of such champions include the office of the UN Human Rights Commissioner, the office of the Special Advisors for the Prevention of Genocide and R2P, the human rights rapporteurs and the individuals on the treaty bodies that interpret and give guidance on the key international human rights treaties and hear individual complaints under the relevant optional protocols that allow for individual access to these oversight bodies.

The legacy of the Atlantic Charter, and later the UDHR, and its dense network of promoters were also seen in the establishment of the regional human rights systems, with the European Convention on Human Rights, and its link to the economic carrots in the European Union, leading the way. But even here the tragic flaw can be found, when the push for human rights and international justice starts to threaten the foundations of sovereign power, as is most evident with both the Inter-American human rights system and the newer African and Asian regional initiatives on human rights.

The hypocrisy during the Cold War saw paralysis in the face of mass slaughter in East Timor. After the Cold War this hypocrisy, and indeed the tragic flaw, increased to searing heights, as the supposed security apparatus of the international community lay sedentary in the face of the genocide in Rwanda and the Balkans. The introduction of the global news network's pervasive presence, through the CNN effect, became part of Slaughter's intense networks, bringing the horrors of Rwanda and Bosnia into the living rooms of the most powerful nations.

The 'CNN effect' was in part responsible for the inaction in Rwanda, after the debacle in Somalia, but it also played a part in finally triggering the conscience of the US and NATO to intervene in Bosnia, and later in Kosovo, which triggered the illegal but legitimate military intervention. The first major international criminal tribunals for the most serious international crimes since the Nuremberg and Tokyo Tribunals were established in this period of contrition. The lessons from these actions and inactions pushed states, led by Canada and other like-minded nations, and non-state actors to seek new foundations for the definition of sovereignty as the legitimate exercise of power. This included the implementation of universal jurisdiction, the establishment of the ICC and the initiation of the global dialogue on the responsibility to protect.

The advance of human progress is matched only by the magnitude of the challenges and setbacks met along the way, as clearly illustrated by the horrors of

the attacks on civilians in Syria. Along with these advances and setbacks in the expansion of the sovereignty *grundnorm* of international law, there has been one overarching threat to that expansion, which resulted from one of the most significant events in the first decade of the 21st century: the 11 September 2001 terrorist attacks on the US.

1.16 The 'war on terror' and a reinvigorated tragic flaw

The 11 September 2001 (9/11) terrorist attacks on the US once again exploded the universally acceptable standards of civilised human behaviour. The horror of suicide attacks, airline hijackings and the bombing of buildings was an affliction that had taken many lives long before 9/11 had happened. What was distinct about 9/11 was that it combined all three abominations in one unconscionable attack. Al-Qaeda operatives turned four fuel-laden commercial planes, filled to capacity with innocent civilians, into weapons and directed them at strategic military and economic targets in the US. The devastating attacks caused the deaths of close to 3,000 innocent civilians, representing the nationalities of 115 countries. The despicable 9/11 attacks were a gross violation of the most fundamental rights of human beings. On that day, countless innocent victims and their families had their right to life, liberty and security of the person stripped away. Indeed, the victims of 9/11 were not limited to the civilians killed on American soil. The terrorist attacks simultaneously affected the indirect violation of the same rights for all those who would subsequently suffer from the violent reaction to 9/11 by the US and its allies. This would include innocent civilians in the US, Iraq, Afghanistan and other countries not connected to the attacks.

The 9/11 attacks orchestrated by al-Qaeda severely damaged the progressive expansion of sovereignty as the *grundnorm* of international law by adding another justification for the use and abuse of sovereign power. The extent of such abuse rivals much of what occurred during the Cold War, triggering gross violations of human rights and humanitarian law, and yet another era of hypocrisy. The swift reaction of the US and its NATO allies to launch military action in Afghanistan was carried out under Article 5 of the NATO Treaty, on the basis of the inherent right of self-defence, as permitted under the Charter. It triggered an unprecedented and open-ended global 'war on terror'.

The military action launched in Afghanistan by the US and its NATO allies in October 2001, and later supported by the UN Security Council, shifted counter-terrorism from a law enforcement paradigm to a permanent war paradigm, by focusing on the complicity of the Taliban, who harboured al-Qaeda in Afghanistan, in the 9/11 attacks. This raised the possibility that counter-terrorism measures could become a new form of international armed conflict, which departs from the existing legal frameworks, impacting severely on established limits on derogations from human rights legal obligations and international humanitarian law.[244]

On 12 September 2001, the UN Security Council unanimously passed Resolution 1368,[245] thus recognising the 9/11 attacks as a threat to international peace

and security and the right of individual and collective self-defence. The Council declared its willingness to authorise military and other actions, as need be, against al-Qaeda, in regard to the 9/11 strikes. The late eminent international lawyer, Antonio Cassese, after having studied the 'ambiguous and contradictory' text of Resolution 1368, concluded that its effect was to assimilate an attack by a terrorist organisation into armed aggression by a state.

As the self-defence exception to the prohibition on the use of force is only legally justified against states, Cassese argued that the equivalence of a terrorist organisation to a state would have enormous ramifications in terms of the hugely open-ended targeting, timing and duration of actions against terrorist groups, along with the uncertainty as to what constituted legally admissible methods of self-defence operations. This would then open up the possibility of self-defence operations against any state harbouring terrorist organisations, or aiding and abetting them in significant ways. Given that terrorist cells inspired by al-Qaeda, the global network that planned and carried out the 9/11 attacks, had spawned some 60 countries, Cassese argues that any such alleged right of self-defence against planned or actual terrorist attacks must be subject to proportionate and limited objectives, and not subject only to the sweeping discretionary powers of the state that is the actual or potential victim of terrorism.[246]

However, another leading international lawyer, Christopher Greenwood, has argued that the US and its allies were entitled to respond, under both domestic and international law, to the 9/11 attacks and the threat of future attacks, by using military force against al-Qaeda and the Taliban regime in Afghanistan, which had sheltered al-Qaeda and permitted it to conduct operations from Afghan territory.[247]

As if to confirm the fears of the late Antonio Cassese, the war against terror has become a frighteningly permanent and truly global conflict, which has not only impacted on the legitimate exercise of sovereign power within nations, but has also given rise to the questionable exercise of sovereign powers against other sovereign nations. Examples include the actions of Israel in Lebanon, Turkey in Iraq and, most notably, the US in Pakistan, Somalia, Syria and Yemen, through both conventional military forces and the use of attack drones. This has emboldened others to follow suit, as Russia did in its unilateral invasion of Georgia, and as Colombia has done by attacking rebel groups in Ecuador.[248]

The aftermath of 9/11 has affected the tragic flaw in global governance in paradoxical and complex ways. While it has made the illegitimate use of sovereign power more defensible, as robust action to combat terrorist groups, it has also made the sovereign state more vulnerable to external assault, in the event that a state is believed to be aiding and abetting terrorist organisations, willingly or unwillingly, or even if it is accused of complicity in terrorist activity, with or without real evidence.

On 28 September 2001, the UN Security Council also adopted Resolution 1373. Acting as a global super legislature for all the sovereign powers in the world, the Security Council required all states to prevent, suppress and criminalise terrorist acts, to ratify the 12 conventions on terrorism-related activities and to enact a set of common counter-terrorism laws. This super legislative attack on

terrorism required measures against terrorist financing, recruitment, weapons acquisition and the international movements of terrorist organisations. Resolution 1373 also mandated cooperation between states in the investigation of terrorist acts. In addition, the Council created a reporting mechanism and a Counter-Terrorism Committee, which had the mandate of monitoring and assisting in the effective implementation of the resolution.[249]

Even though the global war on terror had no international legal foundation, before these UN Security Council resolutions, they became the 'domino like' basis for creating controversial international and domestic interpretations of the definition of terrorism, including who could be classified as a terrorist, both within and outside the limits of humanitarian law, and how they could be treated.[250] As one author has stated, the so-called war on terror 'illustrates the centrality of the rule of law to the protection of human rights, and its fragility even in liberal democracies'.[251]

Although the dangers were apparent from the unbridled use of counter-terrorism laws by the US and its allies, the dangers were predictably even greater with the potential condoning, and even legitimisation, of actions taken by oppressive regimes against alleged domestic terrorists; actions that, before 9/11, would have been regarded by the international community as violations of human rights and humanitarian law. The mandate given by the UN Security Council to criminalise hugely ill-defined acts of terrorism became linked with other expansive notions of necessity, and allegedly permissible derogations from human rights legal obligations, based on counter-terrorism measures. The 9/11 terrorist attacks have unquestionably battered some of the defences protecting populations against the undermining of justice and fundamental human rights.[252]

Counter-terrorism measures around the world have made severe human rights violations a seemingly defensible and legitimate exercise of sovereign power. In the wake of 9/11, the tragic flaw saw sovereign powers, including some Western liberal democracies, justifying the denial of the most fundamental rights of freedom of expression, association and assembly, and the derogation of fundamental aspects of due process in criminal proceedings.[253]

In some states the terrorism counter-measures were flagrant violations of non-derogable fundamental human rights, including arbitrary arrests, torture and executions. Religious and minority groups, along with asylum-seekers, allegedly became targets for the state to single out and strip of the most fundamental human rights, under the cover of legitimate counter-terrorism measures. This global re-emergence of the tragic flaw, in the wake of 9/11, seemed to give a considerable licence to the most authoritarian regimes to cloak the illegitimate use of sovereign power with the legitimacy of the right to fight the 'war on terror', labelling opponents of these regimes 'terrorists'.

Examples have included gross violations of human rights by Russia in Chechnya and the Caucasus, China in the Muslim region of Xinjiang and Tibet, suppression of other minorities in the Asia-Pacific region and, at the time of writing, the brutal suppression of political dissent in several Middle Eastern and North African countries. Perhaps the most searing example of abuse is the report that China is

labelling Buddhist monks, who are self-immolating to protest against the crackdown in Tibet, as 'terrorists', thereby justifying the increasing suppression of the Tibetan people.[254] The Assad regime in Syria also began using the label of 'terrorists' to justify the slaughter of innocent men, women and children during the civil war there.

Under the George W. Bush administration, the US set a globally regressive precedent in international law by insisting on the right to derogate from obligations under human rights and humanitarian law. This extended even to non-derogable rights, such as the prohibition of torture and rendition to torture. Suspected terrorists were stripped of the status of protected persons, placed within a 'legal black hole' and given the legally unrecognisable term of 'unlawful alien enemy combatants'. Under this non-status, they were not granted any protection under humanitarian or human rights law; this meant that they had no rights of due process, no rights as a prisoner of war, an interned civilian or an enemy alien.

This non-status has left alleged terrorists vulnerable to torture, rendition at 'Black Ops' sites around the world and indefinite detention at the offshore Guantanamo military prison facility. Individuals labelled as unlawful enemy combatants at Guantanamo had either to wait for a full release or be tried by military commissions, without the full due process rights under US law.[255] During his election campaign for the American presidency, Barack Obama severely criticised the Bush-Cheney approach to counter-terrorism, and the establishment of the human rights and humanitarian law 'black hole' at Guantanamo. One of his first executive decisions was to commit to closing this stain on America's reputation. However, the legacy handed down to him by the Bush-Cheney approach to the so-called war on terror, including the torture of the key 9/11 masterminds, had left some virtually insurmountable hurdles in effecting the closure of Guantanamo. With stiff opposition against the prosecution of top 9/11 masterminds in civilian courts, President Obama has also back-tracked. The architects of the 9/11 attacks face military tribunals that refuse to recognise their full due process rights, a circumstance made all the more consequential by the knowledge that some, if not all of them, will be handed the death penalty.

Critics of the Obama administration have also asserted that the president is adopting many of the approaches to counter-terrorism that he initially criticised as a candidate for White House.[256] Under the Obama administration the use of targeted killings and drone strikes against terrorist leaders in Pakistan, Afghanistan and Yemen has not only triggered major human rights concerns, but has been condemned as counter-productive, potentially adding more extremists bent on terrorist activities than reducing their numbers.[257] On 23 May 2013, the president promised to limit the targeting of drone strikes, in the wake of US and global pressure to do so.[258]

At the time of writing, the Obama administration is also embroiled in a worldwide controversy involving leaks by intelligence contractor, Edward Snowden, which reveal that the US National Security Agency has been vacuuming massive amounts of metadata relating to US and other countries' citizens' private communications into a global dragnet to catch actual and potential terrorists.[259]

Where the US has tried to justify the legal black hole of unlawful enemy combatants and the legality of indefinite detention in Afghanistan at 'Black Ops' sites or in Guantanamo, these attempts have been met with either silence or outright rejection even by allies of the United States.[260] In spite of this, these actions by the self-professed champion of liberty and human rights have become an irresistible precedent to be copied by other, much more repressive, countries around the world.

Even some of the most progressive Western liberal democracies, such as Australia, Canada and the United Kingdom have felt compelled to enact draconian counter-terrorism measures, which have impacted significantly on the human rights of individuals and minority groups in those countries.[261]

In response to the abuses of the war on terror, there have been growing calls by human rights organisations, both in civil society and at the UN, for an international response to ensure that the terrorism counter-measures taken by states around the world are in accordance with the universally accepted human rights obligations in the UN Charter, along with multilateral human rights and humanitarian law norms. The Security Council, which laid the foundation for the global counter-terrorism measures in Resolutions 1368 and 1373, seemed absent without leave on this score. While the resolutions were binding on all member states of the UN, there were no provisions in them indicating that states could derogate from their human rights obligations, when fulfilling the counter-terrorism measures mandated by the resolutions. Indeed, Resolution 1373 and some of the subsequent resolutions on counter-terrorism included a mandate to implement them in compliance with human rights obligations.[262]

Despite calls from former UN Secretary General Kofi Annan, former High Commissioner for Human Rights, Mary Robinson, the EU, the Council of Europe and the OAS, the Security Council and, until recently, its Counter-Terrorism Committee, had left the opposition to the tragic flaw to other UN bodies, governments and regional organisations.[263]

Indeed, the special rapporteur on human rights and counter-terrorism established in 2005 by the UN Human Rights Council has called the Security Council's Counter-Terrorism Committee insensitive to the impact on human rights flowing from its recommendations. On 1 March 2013, the special rapporteur, Ben Emmerson, in his report to the UN Human Rights Council drew attention to the lack of accountability for grave and systemic human rights violations in counter-terrorism actions globally and in particular condemned the failure of the international community to secure full accountability of the Bush administration in implementing a programme of torture, rendition and secret detention of terrorist suspects, as well as complicity of other countries' officials who colluded in those actions. He further urged the adoption by states of a principled framework to secure the right to truth and accountability for such gross human rights violations.[264]

In the face of such criticism, the Committee on Counter-Terrorism has only devoted part of its website to the promotion of its 'proactive approach', which sees its executive directorate taking regard for the human rights implications of its counter-

terrorism work.[265] Realising the dangers that the cover of counter-terrorism can give to states to engage in gross violations of human rights, on 4 May 2012, the president of the UN Security Council rather belatedly issued the following statement:

> [The] Security Council reaffirms that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law, underscores that effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism.[266]

As the number of years that distances the trauma of 9/11 increases, one can only hope that the concept of a war on terror will increasingly be recognised as a catalyst that triggers what another international lawyer, Sabine von Schorlemer, calls a repression strategy, which ignores the real ways to combat and deal with the causal factors of what is termed terrorism.[267] The same jurist argues that: '[T]here is good reason to believe that greater respect for human rights, along with democracy and social justice, will be the only true remedy for terrorism – even though there are undoubtedly some "hard core terrorists" whose minds are beyond our reach'.[268] Sadly, the increasing phenomenon of the lone wolf terrorists who may be permanent residents or citizens, like the two responsible for the Boston Marathon bombing on 15 April 2013, illustrates the danger that the war approach could turn inwards towards a country's own immigrants and naturalised citizens.[269]

Indeed, it may be that the region at the source of the 9/11 trauma, namely the Middle East, will provide the proof that democracy, human rights and respect for human dignity is the only way to ensure that the exercise of sovereign power is both legitimate and sustainable. The Arab Spring, which emerged in Tunisia, Egypt and Libya and which is still struggling in Bahrain and Syria, has demonstrated that the thirst for dignity, freedom and democracy is not alien to the people of that region. It also should put to rest the view, held even by elites in Western liberal democracies, that the people of the region were accustomed and satisfied with dictatorships that had little concern for the legitimate exercise of sovereign power.

Western allies of countries in the region had become complacent, and indeed complicit, in dealing with some of the most ruthless and corrupt regimes in the Arab region. But the citizens of these countries demanded the return of their rights and dignity, after decades of not being regarded as equal citizens. What set off the protests and rebellions of the Arab Spring were decades and decades of repressive rule by regimes that imposed a myriad of indignities and serious human rights violations on their citizens. Ken Roth, the executive director of Human Rights Watch, gives an excellent summary of the acts that trampled on the dignity and rights of the citizens of Tunisia, Egypt, Libya and Syria and that sparked the human rights revolutions:[270]

> In Tunisia, the catalyst was the self-immolation of fruit vendor Mohamed Bouazizi after a routine case of humiliation by the police. In Egypt, it was photos of the deformed face of Khaled Said, a young man beaten to death by the police. In Syria, it was the torture of teenagers for scribbling anti-regime graffiti. In Libya, it was the arrest of Fathi Terbil, the lawyer for the victims of the 1996 Abu Salim prison massacre. These quotidian examples of abuse, among countless others, sparked what in essence became a series of human rights revolutions—driven by demands for governments that, finally, would be elected by their people, respectful of their rights, and subject to the rule of law.

As Ken Roth points out, part of the blame for the illegitimate exercise of sovereign power in the region was the West's embrace of the Arab autocrats, along with the fact that other Western governments '. . . proceeded as if the usual convenient mischaracterizations of Arab society were true – that it was politically passive and underdeveloped, that deference to authority was inherent in Arab culture, that some combination of Arab tradition and Islam made the people of the region uninterested in or unsuited for democracy. The uprisings that have shaken the Arab world belie these convenient excuses for accommodating the region's despots'.[271]

There will inevitably be an internal dialectic within these countries of the Arab Spring. This may propel new forms of authoritarian governance that claim legitimacy based on religious traditions, such as the Muslim Brotherhood party that gave rise to the presidency of Mohamed Morsi in Egypt;[272] however, the democratic and human rights genie has been let out of the bottle in the countries of the Arab Spring, and will fiercely resist being forced back in again. The ouster of the increasingly authoritarian President Morsi by the military on 3 July 2013 at the urging of 22 million signatures on a petition and some 30 million people protesting in the streets of Egypt could be classified as a military coup that undermined a legitimately elected government. However, some argued that it was also a people's coup, given the massive support for the military ouster of President Morsi and the widely supported handover of power to a transitional government headed by the head of the Supreme Constitutional Court.[273] The UN is urging the military behind the so-called 'people's coup' not to return to human rights abuses and shootings of supporters of the Muslim Brotherhood, even while professing quickly to return Egypt to a fully democratic government.[274]

The rise of the tragic flaw in the aftermath of the 9/11 terrorist attacks may finally be starting to be tempered by the strong demonstration of oppressed peoples, not only in the Arab world, but also in the Asia-Pacific region, Africa and even in the 'managed democracy' that is Russia. Citizens around the world have demonstrated that, even when faced with decades of suppression, they will fight and, if necessary, die for their dignity and rights.

As a conclusion to this chapter, it is proposed that international law could be understood in terms of a Hegelian dialectic in which the absolute or orthodox view of sovereignty as the only *grundnorm* of international law must come to terms

with the tragic flaw in the institutions of global governance and produce a synthesis of an expanded definition of sovereignty, as discussed in this chapter.[275] Without an appreciation of these historic dialectical roles of sovereignty, rights and justice, the understanding and practice of international law will be much the poorer.

Indeed, given the horrors of the Second World War, as well as the genocides and mass atrocities that have taken place since then and still do in Syria at the time of writing, the legitimacy of international law and the institutions of global governance could start collapsing unless universally accepted human rights and principles of justice are injected into the core of what is understood as state sovereignty.

Notes

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2 Robert H. Jackson, 'Sovereignty in world politics: a glance at the conceptual and historical landscape' (1999) 47 *Political Studies* 431 at 432; H.J. Morgenthau, 'The problem of sovereignty reconsidered' (1948) 48 *Colum L Rev* 341 at 344.
3 *Lotus Case (France v Turkey)* (1927) PCIJ (Ser A) No 10 at 18–19; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits [1986] ICJ Rep 131.
4 William J. Aceves, 'Relative normativity: challenging the sovereignty norm through human rights litigation' (2002) 25 *Hastings Int'l & Comp L Rev* 261.
5 For the early writings on international law see Emerich de Vattel, 'The law of nations or principles of the law of nature applied to the conduct and affairs of nations and sovereigns' in J. Chitty (ed) *Affairs of Nations and Sovereigns* (London: Sweet & Maxwell, 1834) at xiii; in contrast see Andrew Clapham, 'National action challenged sovereignty, immunity and universal jurisdiction before the International Court of Justice' in Mark Latimer, Philippe Sands (eds) *Justice for Crimes Against Humanity* (Portland: Hart Publishing, 2006) 305 and Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) 43.
6 Wouter Werner, Jaap de Wilde, 'The endurance of sovereignty' (2001) 7 *European Journal of International Relations* 283; see also Derek Croxton, 'The Peace of Westphalia of 1648 and the origins of sovereignty' (1999) 21 *International History Review* 569. International relations academics Stephen D. Krasner, Michael Ross Fowler and Julie Marie Bunck have argued that sovereignty from Westphalia to today has never been absolute but was always severely limited, violated and curtailed; see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999) and Michael Ross Fowler, Julie Marie Bunck, *Law, Power, and the Sovereign State: the Evolution and Application of the Concept of Sovereignty* (University Park: Pennsylvania State University Press, 1995). However, other academics contest this view and propose a constitutive definition of sovereignty from the time of Westphalia to the present as 'notions of sovereignty, translated into norms and institutions, that define authority across entire international systems during entire historical eras'. See Daniel Philpott, 'Usurping the sovereignty of sovereignty?' (2009) 53 *World Politics* 297. See also Rodney Bruce Hall, *National Collective Identity: Social Constructs and International Systems* (New York, NY: Columbia University Press, 1999).
7 Paul Gordon Lauren, *The Evolution of Human Rights, Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998) 141–42.
8 Ibid 142. The Atlantic Charter is also discussed in T. Wilson, *The First Summit* (Boston: Houghton Mifflin, 1969).
9 Ibid 150. The Declaration is further discussed in Louise W. Holborn (ed) *War and Peace Aims of the United Nations* (Boston: World Peace Foundation, 1943).

10 David Armstrong, 'Evolving conceptions of justice in international law' (2011) 37 *Review of International Studies* 2121.
11 See Lauren (n 7) 146. See also *Trials of Major War Criminals* (in 42 volumes, Nuremberg Military Tribunal 1947–1949). For interesting extracts dealing with the Nuremberg Tribunal see H. J. Steiner, P. Alston, *International Human Rights in Context* (2nd edn, Oxford: Oxford University Press, 2000) 112–26.
12 Lauren (n 7) 160.
13 ibid 166.
14 ibid 170.
15 ibid 165.
16 For a detailed history of this predecessor to the United Nations see F. P. Walters, *A History of the League of Nations* (London: Oxford University Press, 1952).
17 Lauren (n 7) 175.
18 See the more recent discussion of this networked 'new world order' by Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton, 2004).
19 *Charter of the United Nations* (26 June 1945) Can TS 1945 No 7, available at http://www.un.org/en/documents/charter/ (last accessed 30 June 2012). For an analysis of the legal nature of these provisions see R. B. Lillich, *International Human Rights: Problems of Law, Policy and Practice* (2nd edn, Boston: Little Brown and Company, 1991).
20 Lauren (n 7) 197.
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23 Quoted in A. H. Robertson, *Human Rights in the World* (Manchester: Manchester University Press, 1972) 25.
24 Lauren (n 7) 231.
25 ibid 26.
26 ibid 231–32.
27 See *Trials of Major War Criminals* (n 11). See also Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, The Hague: London, Boston, Kluwer Law International, 1999) 1–276; T. Meron, *War Crimes Come of Age: Essays* (Oxford & New York: Oxford University Press, 1998) 190, 198–203, 239–40; C. M. Bassiouni, *Nuremberg: Forty Years After* (Proceedings of the Annual Meeting of the American Society of International Law, 1985) 59–65.
28 For the views of one of the principal architects of the Universal Declaration in this regard see John Humphrey, 'The Universal Declaration of Human Rights: its history, impact and juridical character' in B. G. Ramcharan (ed) *Human Rights Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff, 1979) 21.
29 Cited by Louis B. Sohn, 'A short history of the United Nations documents on human rights' in Robertson (n 23) 27.
30 See *Trials of Major War Criminals* (n 11).
31 For discussion of the impact of both the Nuremberg and Tokyo Tribunals see R. Falk, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of War Crime Trials on International and National Law* (Proceedings of the Annual Meeting of the American Society of International Law, 1986) 65.
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1981); T. Meron, *Human Rights Law-making in the United Nations: a Critique of Instruments and Process* (Oxford: Clarendon Press, 1986); M. Craven, *The International Covenant on Economic, Social and Cultural Rights: a Perspective on its Development* (New York: Oxford University Press, 1981); E. Asbjorn, C. Krause and A. Rosas, *Economic, Social and Cultural Rights* (The Hague: Martinus Nijhoff, 1995).

34 Michael O'Flaherty, 'Reform of the UN human rights treaty body system; locating the Dublin Statement' (2010) 10 *Human Rights Law Review* 319–20.

35 O'Flaherty (n 34).

36 See L. Henkin (n 33) 259. See also D. Fischer, 'Reporting under the Covenant on Civil and political rights' (1982) 76 *American Journal of International Law* 145; see also D. Kretzmer, 'Commentary on the complaint process by the Human Rights Committee and Torture Committee members' in Anne F. Bayefsky (ed) *The U.N. Human Rights System in the 21st Century* (The Hague: Kluwer Law International, 2000) 163.

37 See D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991); see also the annual reports of the committee, United Nations Office of the High Commissioner for Human Rights, 'Annual Reports', available at http://tb.ohchr.org/default.aspx?ConvType=12&docType=36 (last accessed 10 July 2012).

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39 P. Alston, *Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*, UN Doc E/CN4/1997/74 (27 March 1997) para 10.

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54 Mathew Davies, 'Rhetorical inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 *Alternatives* 449–68.

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2 Seeking justice in global trade and economy

2.1 The evolution of the world trade regime: another area of global governance, another tragic flaw

The Doha Round of global trade talks were launched in November 2001 in Doha, Qatar, when the world was still recovering from the shock of the 9/11 terrorist attacks in the United States. At the time, there seemed to be a consensus that the global framework of international trade had to be reformed to meet the challenges of the 21st century. In particular, developing nations and global civil society were demanding that the legal framework for international trade should benefit all members of the international community, not merely the richest nations.

The call for a new round of multilateral trade talks was also motivated by a desire to address the needs of the most under developed parts of the globe, where rampant poverty, under-development, corruption and lack of fairness or justice were believed to be providing fertile soil for the seeds of social instability and even terrorism. Moreover, the debacle of the 1999 WTO Ministerial Conference in Seattle, which was abandoned amidst riots and tear gas, also spurred the need for the international community to work in pursuit of a renewal of global trade rules for the mutual benefit of all nations.

In retrospect, the Doha Round's substantial focus on development – addressing topics ranging from the improving of market access for key agricultural products in the developing world to the issues dealing with farm subsidies, anti-dumping, intellectual property rights, the environmental aspects of trade and trade in service – may have been too ambitious. On 29 April 2011, Pascal Lamy, the director general of the World Trade Organization (WTO), announced to the WTO Trade Negotiations Committee that the round was once more on the brink of failure. It took less than 10 years for the tragic flaw to undermine the new round of multilateral trade talks, obliterating the promise made in November 2001 finally to focus on the just demands of the poorest parts of the world. The analysis in this chapter focuses not only on the emergence and expansion of the tragic flaw within those 10 years, but also the roots of the tragic flaw in the governance of international trade law that can be traced back to an earlier time, during the promising post-Second World War period.

We discussed in Chapter 1 how the promise of the Atlantic Charter was undermined by conflict between adherence to absolute state sovereignty and the pull of

universally accepted human rights. Indeed, the Atlantic Charter can again be viewed as the starting point for the introduction of the tragic flaw in the world trade regime. Contained within this document, which was signed by both Roosevelt and Churchill, was the famous declaration which stated that while freedom of trade would be supported by the two Great Powers, they would also recognise the right of all peoples to have 'improved labour standards, economic advancement, and social security' and to 'live out their lives in freedom from want and fear'.[1]

In the final stages of the Second World War, the allies began a series of conferences to discuss how to prevent the reoccurrence of the economic conditions that led to the worldwide depression of the 1920s and the rise of the Nazis in Germany. The most significant of these conferences was held at Bretton Woods in New Hampshire in 1944. At this stage, it was evident that trade, economic stability, peace, international security and human rights were clearly linked.

The Bretton Woods Conference was successful in developing the institutions and agreements that dealt with the financial aspects of the post-war global reconstruction. This was achieved through the establishment of the International Bank for Reconstruction and Development, later to become known as the World Bank and the International Monetary Fund (IMF). The IMF was created to re-establish the international monetary and exchange rate system that had disintegrated and caused the economic and social upheavals in Europe and North America. In the post-war period, the World Bank was less concerned with development than with encouraging foreign investment primarily in Europe, which had fallen victim to the pre-war economic collapse.[2]

In addition to the International Bank for Reconstruction and Development, the Bretton Woods system also envisaged a world trade regime. Movement towards this goal began with a series of conferences, running from 1946 to 1948, that established the General Agreements on Tariffs and Trade (GATT). The introduction of the discussions on the global trade regime was supposed to bring coherence and integration to the Bretton Woods system. The IMF, the World Bank and the International Trade Organization (ITO) were to collaborate on monetary, investment and trade policies, to ensure that Europe, North America and Japan would rebuild their economies for the benefit of all citizens. This, it was believed, would be achieved through full employment, greater investment, stable exchange rates and the political stability that such conditions bring about. As many have pointed out, the ambitious programme of the Bretton Woods system had many contradictions that upset the grand plan for post-war economic reconstruction.[3]

The leaders of the industrialised world had not envisaged the GATT as the centrepiece of the world trade regime. The original plan was to create an institutional infrastructure around the GATT to collaborate with the other Bretton Woods institutions. It is ironic that the idea for an institutional framework, labelled the ITO, came principally from the United States (US), who saw the need for oversight of the international monetary and trade systems as crucial for global peace and security.[4]

In 1945, the United States introduced a resolution at the newly formed Economic and Social Council of the United Nations (ECOSOC) calling for a UN Conference on Trade and Employment. The objective of this conference was to begin the task of initiating multilateral tariff negotiations and to draft the charter for the ITO. After meetings in London, New York and Geneva, from 1946 to 1947, in addition to the negotiations on tariffs, a draft of the ITO Charter was prepared, which was set to be finalised in Havana, Cuba in 1948. In the meantime, the GATT was being drafted in Geneva.

The function of the GATT was intended to be limited: it was to encapsulate the negotiated tariff reductions as well as some restrictions and protective clauses to ensure that the tariff commitments were respected. The ITO was to have the power to oversee and enforce the GATT, which was to be an integral part of the ITO. The draft charter of the ITO was completed at the Havana Conference in 1948, less than a month after the signing of the GATT. The highest order of priority was to have the United States, as the most important economy in the post-war world, ratify the ITO Charter. This did not happen.[5]

Just as with the cooling-off over the high vision of the Atlantic Charter and the human rights and human dignity proclamations it contained, it became clear that the US Senate would not ratify the ITO Charter. The United States Congress was turning inward, and was more concerned with American self-interest than it had been during the Second World War or immediately after it. In December 1950, the US administration announced that it would not resubmit the ITO Charter to Congress for approval. The ITO was dead.[6]

As with the development of the United Nations Charter, which was discussed in Chapter 1, the tragic flaw had begun to creep into the world trade regime. It took hold at the point when self-interest won out over the original high aspirations of the Bretton Woods institutions which, in turn, were derived from the original vision of the Atlantic Charter. In the annals of modern history, grand visions seem so often dashed by parochial politicians sitting in powerful places.

The death of the ITO was to have serious consequences for the development of one of the most important features of global governance today, the global trade regime. By default, the GATT, a minimal code for trade reciprocal relations, became the main game for the organisation and coordination of international trade rules. Unfortunately, unlike the ITO Charter, the GATT was not infused with considerations for the social dimensions of trade or universal values of justice and human rights. For example, the Havana Charter explicitly referenced the need to link the world trade regime with fair labour standards, as both a principle of justice and the underlying rationale for a rules-based trading regime:

> [A]ll countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and accordingly each Member shall

> take whatever action may be appropriate and feasible to eliminate such conditions within the territory.[7]

As will be discussed later in this chapter it is a moral, legal and indeed economic imperative that the world trade regime should return to the original vision of the Havana Charter, insofar as the exploitation of labour needs to be prevented and the demands of the developing world for justice and fairness are to be met.

Devoid of its institutional framework, the GATT proceeded to develop over several rounds of multilateral trade negotiations (MTNs). The major values underlying these negotiations were non-discrimination and reciprocity. To date, there have been eight rounds of multilateral negotiations since the original GATT of 1947.

The Uruguay Round (UR) was the last of the MTNs, and was the most comprehensive of them all. The UR was established at Marrakesh, Morocco on 15 April 1994 with the signing by 124 nations and the EU of the Final Act, which incorporated all the multilateral and plurilateral agreements of the previous MTNs since the first round in Geneva. The UR thereby consolidated and strengthened existing multilateral rules and disciplines, including trading rules relating to textiles and agriculture, a general agreement in trade in services (GATS), trade-related intellectual property rights (TRIPs) and trade-related investment measures (TRIMs).

The Final Act also contained what is arguably the most important part of the UR, the establishment of a weaker successor to the ITO, namely the WTO, which sought 'to provide the common institutional framework for the conduct of trade relations among its members in matters related to the [Uruguay Round] agreements'.[8] Considering the recent death of the Doha Development Round, it is somewhat ironic that the negotiating parties at the time announced that 'the establishment of the World Trade Organization (WTO) . . . [would usher] in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples'.[9]

The previous rounds of the GATT had already become progressively technical in nature, focusing on tariff reductions and rules to prevent the subverting of negotiated tariff concessions. When institutions of global governance develop from highly technical foundations, there is a tendency for such institutions to treat their technical objectives as ends in themselves. There is also the tendency for such institutional development, led by technical experts, to become isolated from other institutions of global governance. Experts tend to focus only on their area of expertise and talk only in their language. Some have argued that this is what occurred with the successive rounds of the GATT negotiations.[10]

The technical responsiveness to the changing picture of global trade, shown in the establishment of the WTO, is not matched by a sensitivity to existing and emerging trends in the social dimensions of trade, including labour, the environment and human rights. Indeed, many have argued that the impressive responsiveness to the growing importance of services and intellectual property by trade experts has ignored the possible conflict between the rules of these new trade areas

and certain categories of human rights. In part, these new areas of trade rules developed rapidly because of national and international lobbies linked to multinational corporations (MNEs) from the developed world.[11]

In Chapter 1 the discussion focused on how the insistence on absolute sovereignty and national self-interest was the driving factor behind the tragic flaw within the United Nations. This chapter will focus on how the national self-interest of developed countries and some of the emerging economies, together with the self-interest of multinational corporate lobbies from these same countries, has been the driving force behind the development of the present world trade regime. If the interests of the poor of the planet are left out of the development of the world trade regime, the consequences of the tragic flaw within the WTO will run parallel to that of the United Nations.

In relation to the social dimensions of trade, the various rounds of the GATT negotiations have produced only a passing reference to 'raising living standards' (in the preamble to the GATT) and the important exception to the most favoured nation (MFN) and national treatment (NT) norms under Article XX(e). This exception permits WTO members to ban the import of goods made with prison labour. Similarly, Article XX permits trade restrictions on certain public purpose grounds. However, any measures taken under the Article XX exceptions are to be as 'least trade restrictive' as possible. This GATT mandate, reinforced by GATT/WTO panel decisions, has narrowed, in some of the most important cases, rather than preserved the public purpose exceptions contained in Article XX in the area of the environment and public health and safety, as will be discussed in greater detail below.

The WTO was one of the last major institutions of global governance to become widely known to the ultimate clientele that it is supposed to serve, namely the entire global population; however, it is unlikely that the architects of the global trading regime will remember this infamous introduction with fondness. It occurred through television screens and newspapers filled with pictures of the 'Battle in Seattle'. This 'battle' occurred at the Third WTO Ministerial Conference in December 1999, when ineffective and inadequately prepared police and security forces clashed with thousands of rioting demonstrators and anarchists. The demonstrators, many of whom were protesting against the absence of social considerations from the multilateral trade negotiations in Seattle, may not have had a democratic mandate to stop such critical talks. Nevertheless, they did manage to ring the global alarm and raise awareness of the fact that the justice and human rights agenda in global trade was still very much alive, even though the ITO was dead.[12]

Subsequent protests at the major international conferences of the World Bank, the IMF, the G8 and the G20 have reinforced this conclusion. Many experts have no doubts that the participation by developing nations in the global trade regime had resulted in substantial economic growth in those countries.[13] However, there remains disagreement as to whether this integration has had a positive impact on the alleviation of inequality and total aggregate levels of poverty in these countries. Some argue that trade has had a substantial impact on global poverty

reduction.[14] However, others suggest that there is no conclusive evidence on the positive relationship between trade liberalisation and poverty.[15]

While few would deny there have been significant worldwide benefits from the establishment of the international legal framework of global trade, just as in the establishment of the United Nations, there have been winners and losers. A World Bank research project undertaken by three global experts concluded that that the need for undertaking poverty and inequality analysis of world trade remains strong, notwithstanding the impact of the various MTN policy reforms arising over the past 25 years. They stated:

> Partly as a result of those policy reforms and the consequent growth of incomes in many developing countries, the number of people living on less than $1 a day nearly halved over the 1981–2005 period, and their share of the global population fell from 42 to 16 percent (Table 1). Yet that number of extremely poor people was still almost 900 million in 2005, and it may have risen above that following the eruption of the global financial crisis that began in 2008. Moreover, most of the improvement has been in Asia (especially China), while in sub-Saharan Africa the incidence of poverty was little lower in 2005 than in 1981, at around 40 percent (amounting to 300 million people in 2005). Despite the success of China, it still had over 100 million people on less than $1 a day in 2005, 90 percent of whom were rural. And in India the number of extreme poor remains stubbornly close to 300 million – and 74 percent rural, even with large subsidies to their farmers.[16]

This is one of the many admissions concerning the development of systems of global governance that, as documented in Chapter 1, demonstrate a bias in favour of the economically and politically powerful both between and, for example in China, within countries. The Doha Round was intended to alleviate the burden of the losers in global trade.

2.2 Who and what killed the Doha Development Round?

The Doha Development Round was motivated by a number of significant factors, including the failure of the Seattle trade talks, the identification of systematic inequalities as a factor in social instability and the promises made in the UN Millennium Development Goals (MDG). The development focus was also a result of the omissions of the UR. In the UR the key concerns of the developed world were included in the Final Act. These included trade in services and intellectual property protection. The key concerns of the developing world were not included. This was especially true for their concerns over import surge safeguards, textiles and trade-distorting agricultural subsidies in the EU and the US. While on the surface developed countries appeared to accept that the developing world needed fairness in global trade, this was undermined by an underlying hypocrisy

and a fracturing of the developing world's common front with the emergence of China, India and Brazil as rivals to the industrialised world.

The focus of the Doha Development Round was supposed to be on giving the poorest nations greater market access for their agricultural products. However, previous MTNs were focused on bargaining for trade agreements based on reciprocal concessions that would then be universalised through the MFN principle. The negotiations in the Doha Round were supposed to focus on ways to right the injustice that tilted the UR in favour of the developed world, rather than a continuation of the hard mercantile negotiations on the issues of agricultural tariffs and subsidies of the EU and the US that have penalised the poorest nations. Instead, these key developing country issues were regarded as part of other issues to be the subject of quid quo pro negotiating. These issues included industrial subsidies, intellectual property rights and trade in services that would trigger resistance from the emerging economies of China, India and Brazil.

The MTN that was supposed to focus on providing justice and fairness to the developing world turned into a commercial bargaining round, set against a backdrop of emerging trading power blocs that wanted to challenge the established blocs of the EU and the United States. The vision that was first enunciated in the Atlantic Charter, which saw the global trade regime as a common good for the international community as a whole, was abandoned.

The G20 group of emerging economic powers, which included Brazil, China, India and Argentina, had ended the dominance of the 'quad' countries, namely the United States, the European Union, Japan and Canada. At the start of the Doha negotiations in Cancún, Mexico, the tension between the competing blocs had turned the negotiations into a stand-off that was described as a 'disgraceful tumult of infuriation and finger pointing'.[17] The G20 regarded trade-distorting measures such as the agricultural tariffs and subsidies of the EU and the US as deal breakers that needed to be rolled back if negotiations were to continue. For their part, the targets of the G20 demands insisted on expanded negotiations on investment, competition, government procurement and reductions in industrial tariffs. Positions became hardened on demands in specific areas of negotiations, which often were backed up by powerful domestic lobbies that could determine the political futures of some of the negotiating governments.[18]

As the tragic flaw set into the negotiations, the search for the collective good was lost. Also lost were the pleas from West African countries for the Doha negotiations at least to salvage their critical cotton production from the unfair US cotton subsidies. These pleas went unheard.

In light of these actions, in the view of one observer, the Doha Development Round went into terminal decline. In the following years, valiant attempts to revive the dying negotiations were made. A July 2004 framework agreement included pathways to reach 'modalities' and 'reduction formulas' for tariffs and agricultural subsidies, with some states being asked to do more than others while the developing nations were being asked to also do their share in reducing industrial tariffs on a longer timescale. However, there was still failure on the part of the main trading blocs to narrow their differences on the most critical issues,

especially those involving agricultural subsidies and tariffs. The only confirmed agreement was to have another MTN round in Hong Kong in 2005, but with much lowered expectations. At that meeting there was some progress on the deadlines for the abolition of agricultural export subsidies, as well as differential treatment for the least developed nations (LDCs) regarding free access for their exports. However, attempts to agree on the critical modalities for the agricultural and non-agricultural market access were again met with failure. Deadlines to deal with this impasse came and went without resolution and, on 28 July 2006, negotiations on the main items of the Doha rounds – agricultural subsidies, farm tariffs and industrial tariffs – were suspended.[19]

The death spiral of the Doha Round continued with the EU's entrenchment of the view that it had offered significant reductions in its agricultural subsidies but that the developing countries had not shown similar movement on their industrial tariffs. In the US the politically powerful farm lobby had successfully stopped the government from offering any concessions without securing improved access for agricultural products to the markets of the G20 nations. This was exacerbated by the US Congress' growing resentment of China's alleged unfair 'currency manipulation' and the outsourcing of jobs there and elsewhere in the emerging economies.

In the meantime, there was growing dissent even within the emerging economies, with Brazil and India wary that any reduction of industrial tariffs would result in their becoming less competitive than China. India was also keen to protect its legions of subsistence farmers from import competition, not only from the EU and the US, but also from Brazil.[20]

These domestic politics and powerful sectoral lobbies ensured that the next Doha Round, to be held in Geneva in July 2008, would fail. There was some significant progress in Geneva with the presentation of the 'Lamy Draft' on significant reductions in agricultural tariffs by the EU and the US and enhanced market access by developing countries for their exports. However, any hope of possible progress on these items evaporated when parties came to an impasse on the special safeguard mechanism (SSM), which would have allowed developing nations to increase tariffs during import surges and price declines. The main culprits for the breakdown on this issue were China, India and the United States. In addition, China had refused to give sufficient ground on tariffs in limited industrial sectors, a concession that may have allowed US negotiators to satisfy their own domestic critics, who at that point had started to insist that 'no deal is better than a bad deal'.[21]

The Doha Round of talks was effectively buried by the global financial meltdown in 2008, along with dramatically rising unemployment in the EU and the US and the resulting rise in protectionism. While world leaders at subsequent G20 meetings made empty promises to resurrect and complete talks by 2011, this did not happen. The Doha Round demise marks another episode of the tragic flaw in global governance. The vision and promise of a fairer global trade regime was doomed to fall victim to the unremitting mercantile self-interest of domestic politics and lobby groups in the most powerful of the industrialised and emerging nations.

One of the most eminent trade experts, Jagdish Bhagwati, attributed the role of 'central spoiler' in the Doha negotiations to the United States. He claims that while the US was uncompromising in its position on trade-distorting farm subsidies, under the then newly passed Farm Bill, it simultaneously attacked India for requesting enhanced safeguards for its mostly subsistent rural farmers.[22] However, a factor in the hard bargaining of the US was the lapsing of the Trade Promotion Authority (TPA), formerly known as the 'fast track authority' of the American Government. Without the TPA, any ability to get the US Congress to go along with a compromise Doha agreement would probably have been virtually impossible.

The failure of the Doha MTN coincided with one of the most severe global economic crises since the Great Depression. The same developing nations that should have been the beneficiaries of the Doha Round were also some of the hardest hit. One report calculated that the income of developing countries decreased by US$750 billion by the end of 2009, putting another 50 million people into 'abject poverty'.[23]

On a larger scale, the failure of the most powerful nations to meet the demands for fairness and justice in the Doha MTN has triggered a crisis in the legitimacy and sustainability of the WTO process. Signs of a crisis at the WTO include a resort to protectionism, which is expected to last at least as long as the remnants of the 2008 financial crisis facing the world continues, and the increased reliance on the negotiation of bilateral and regional trade agreements by powerful nations seeking to protect their interests. These key areas of concern about the legitimacy and sustainability of the WTO process will be further discussed at the end of the chapter.

2.3 The global trade regime: can it assist in promoting human rights and justice for the global labour force?

2.3.1 Debating the duty to promote justice and fairness for the global labour force between the WTO and the ILO

Without the ITO's focus on justice and fairness, the GATT remained a narrowly focused agreement that, with the exception of the prohibition of goods made with prison labour in Article XX(e), ultimately did not include any labour standards. During the 1953 negotiations, the US had tried to incorporate labour rights into the GATT, but history bears witness to its failure. Had the US succeeded, it would have permitted GATT member states to take measures under the provisions of GATT Article XXIII, the nullification and impairment provisions against trade-distorting unfair labour practices.[24] The failure of the US was followed by other similarly unsuccessful attempts during the Tokyo MTN in the 1970s and, most recently, during the Uruguay MTNs. In these cases, the main parties opposing incorporation of the ITO principles of labour rights and justice into the GATT were the developing nations.

At the First Ministerial Conference of the WTO in Singapore in 1996, the developing world was successful in blocking the WTO from adopting a fair

labour standards agenda. Instead, these LDCs succeeded in having the final communiqué dress up the status quo in flowing rhetoric, which affirmed that WTO members would:

> . . . renew their commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariats will continue their existing collaboration.[25]

In essence, the developing world redirected the issue of fair labour standards to the international organisation that was created to deal with it, namely the ILO. Some would argue that this was done because of the track record of the ILO, to which we now turn.

The ILO was created in 1919, at the end of the First World War, and is the world's oldest surviving international organisation. Its mandate was to ensure the improvement of labour standards. The improvement of labour standards was thought to be a necessary condition of sustainable peace. The ILO was fairly successful in the inter-war years, exercising global leadership for the elimination of practices such as slave trading. The Declaration of Philadelphia in 1944, passed concurrently with the establishment of the Bretton Woods institutions, updated and expanded the mandate of the ILO to cover the promotion of labour standards, economic advancement and social security, without adopting a particular bias towards these issues, for example a trade union perspective. As has been argued elsewhere, this unique mandate has been both a strength and a weakness for the ILO.[26] In the post-Second World War era, the ILO has been sidelined by the tremendous growth of international trade and the financial markets and institutions that oversee them, such as the WTO, the World Bank and the IMF. This has occurred to the extent that even the ILO's own leadership had questioned its survival.

In the post-war years, the ILO seems to have embarked on a mission of 'assembly line' standard-setting outside the realm of trade. At present the ILO has adopted 188 international labour standards and 199 recommendations, covering health and safety in the workplace, social security, minimum wages, collective bargaining, freedom of association, employment promotion, training, migrant workers, women and child workers, as well as many sectoral standards. Unfortunately, without an effective incentive system, to ensure that the plethora of labour standards being promulgated by the ILO is in fact implemented, the enforcement of these standards has been unimpressive. The organisation had until relatively recently continued to make the focus of its tripartite structure, described below,

the churning out of labour standards, which remain largely unrelated to the growing trade and financial markets agenda, thus making its isolation greater and, until the late 1990s, increasingly bringing its relevance into question.[27]

The three key structures of the ILO are the International Labour Conference (ILC), the International Labour Office (the Office) and the Governing Body (GB). The ILC was developed on a unique tripartite structure where government, employers and workers and representatives of the 185 members meet annually for three weeks to set the broad policy orientations of the ILO, including the adoption and monitoring of the conventions. The Office implements the policies and other directions of the GB, and is headed by a director general who is elected by the GB every five years. The GB itself is elected every three years by the ILC, with 28 government representatives and 14 representatives for both workers and employers. Ten seats are specifically reserved for 'states of chief industrial importance' as determined by the GB.

It was only in the late 1990s that the ILO turned its attention to other critical functions, such as technical assistance in employment, labour force planning and labour market development. Another critical function recently taken on by the ILO is the development of core labour standards that are binding on all 185 member states.[28] While many commentators have suggested that the ILO implementation and compliance processes are weak,[29] others have suggested that the organisation's practices are more sophisticated and nuanced than they appear.

The strongest sanction that the ILO can enact is expulsion, and the pariah status that comes with it, but sanction is only to be used as an extreme last resort. While the compliance system relies more on member countries reporting on implementation, along with the director general's global report and those of the Committee on Freedom of Association, the power to name and shame violators of ILO standards has caused significant changes in behaviours by some states. In addition, those who are part of the tripartite structure can also make representations concerning violations of the conventions, which can then be examined by a relevant committee. The decisions of the relevant committee can then be published in an official ILO publication, which goes to the ILO Conference and ultimately triggers naming and shaming.

Finally, some of the most serious complaints may end with a Commission of Inquiry, the ultimate conclusion of which can result in recommendations for remedial action against persistent violators under Article 33 of the ILO constitution, including expulsion from ILO meetings and calling on other international institutions to withdraw their assistance to the violators.[30] Myanmar faced some of these harsh forms of ILO compliance measures after resisting calls from the ILO Commission of Inquiry and the conference to desist from forced labour practices.[31] While its critics claim that the ILO compliance mechanisms do not have the 'teeth', its focus on transparency and naming and shaming can nonetheless effect improvements in labour standards under certain conditions, giving it the characteristics of a 'soft regulatory' model.[32]

In keeping with this soft regulatory approach, at the time of writing, the ILO has been focusing its efforts on the 2008 Declaration on Social Justice for a Fair

Globalization, which promotes the universality of the so-called 'decent work' agenda. The agenda strongly urges ILO members to 'pursue policies based on the strategic objectives – employment, social protection, social dialogue, and rights at work. At the same time, it stresses a holistic and integrated approach by recognizing that these objectives are "inseparable, interrelated and mutually supportive", ensuring the role of international labour standards as a useful means of achieving all of them'.[33]

The primarily reporting, supervisory and technical assistance compliance structures of the ILO stand in contrast to the more powerful structure of the WTO.[34] The highest body of the WTO is the Ministerial Conference, which meets every two years and is comprised of representatives of all the member states, with the trade minister of each member state usually being the official representative. The Ministerial Conference is the highest authority in all WTO matters. The General Council holds its sessions between Ministerial Conference meetings and is comprised of member state trade delegates. It is the main operational body of the WTO and has the authority of the Ministerial Conference between its meetings. The General Council is also mandated to function as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB).

The Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-related Aspects of Intellectual Property are subsidiary bodies to the General Council, and oversee their respective agreements established under the UR, namely the GATT, the GATS and the TRIPs.

While all members of the WTO have an equal vote, initial voting is usually done by consensus under Article IX of the WTO Charter. However, if a decision cannot be arrived at by consensus, voting takes place and decisions are made by a majority vote. It has been alleged that the initial decision-making by consensus is a form of weighted voting because the mood of the Ministerial Conference and the General Council are often dominated by the powerful economic powers, especially the United States and the European Union. The emerging economies of China, India, Brazil and South Africa are also joining the ranks of the dominant WTO players. In addition, because the voting is by a show of hands, there is considerable influence exerted by the United States and Europe in terms of how other nations, especially aid-dependent nations, will vote.

The DSB is responsible for the crucial dispute settlement system under the WTO Charter. This includes the critical functions of establishing subsidiary Dispute Settlement Bodies (DSBs), adopting Panel and Appellate Body reports, authorising the use of sanctions by members pursuant to panel rulings, and monitoring the implementation of the panels' rulings and recommendations.

Under the WTO Charter, the adjudicatory model of hard rules and remedies as a means of enforcing the global trading regime was chosen over the softer and more diplomatic model of reducing trade tensions and resolving trade disputes through diplomatic talks and compromise.[35] The previous GATT system had imposed a consensus model for the approval of trade dispute rulings before they could be implemented. This led to long, and sometimes permanent, delays in the resolution of such disputes.

Under the WTO Charter, DSB decisions are automatically adopted unless there is a consensus to reject them, which is the opposite of the old GATT system. The imposition of strict time limits in regard to the dispute settlement process and the availability of recourse to the Appellate Body where there are disagreements on issues of trade law further hardens the world trade regime into a global quasi-legal system. The decisions of the Appellate Body are binding on all parties and are monitored by the DSB as described above. Under the WTO Charter, cross-retaliation is permitted, and an aggrieved member state can use tariffs to retaliate against trade practices that have been ruled contrary to the WTO Code.

What is evident in the structure of the WTO, compared with the structure of the previous GATT, is a move from somewhat soft law to increasingly harder law. A growing number of WTO member states accept the discipline of the WTO Charter as a prerequisite for being a member in good standing of the global economy. Optimists believe that unilateral trade-distorting practices are likely to be used by fewer member states, given the possibility of recourse to the dispute settlement system by aggrieved member states.

It must be emphasised that the WTO does not in itself have the power to sanction member states that violate the WTO Charter. The legacy of the former soft law regime of global trade still lingers in that, after the WTO DSBs have ruled, the preferred option is that the member in violation of the WTO rules ceases the impugned practice. The second option is that the member state in violation pays compensation or, failing that, as a last resort the aggrieved state may take WTO-sanctioned retaliatory measures. In this sense, just as in soft law regimes, the WTO system could be said to rely on self-help. However, unlike the ILO, which has no enforcement or deterrent powers to make member states adhere to adopted conventions, the WTO dispute settlement system can impose economic costs on members who are in violation of the WTO rules, and this may have a deterrent effect. In the first eight years of the dispute settlement panels, the WTO revealed the following record of relative success:

> The DSB established 110 panels between January 1995 and June 2003, which shows that consultations are often able to settle the disputes. In the same period, the DSB adopted 71 panel reports and 47 Appellate Body reports. While the parties appealed nearly every single panel report in the early years of the dispute settlement system, the appeal rate has significantly decreased over the past few years.
>
> There have been 14 compliance disputes under Article 21.5 of the DSU. Only seven times has the DSB granted authorization to a complainant to suspend obligations, and in all seven cases, arbitration took place because the respondent disagreed with the complainant's proposal for the suspension.[36]

Such an impressive record of implementation of the WTO Code stands in marked contrast to the lack of implementation of ILO conventions by its member states. It is obvious, then, that the call by the 1996 WTO Ministerial Conference in Singapore to have the ILO as the competent body to deal with labour standards

was a successful bid to maintain the unsatisfactory status quo concerning the link between trade and labour standards. From the declaration of the Singapore Ministerial Conference, one can assume that the ILO and the WTO secretariats are collaborating, perhaps with a view to changing this unsatisfactory status quo.

However, as will be discussed, the WTO has not been as energised as the ILO in developing fairer labour standards in the global labour market. All that the WTO reveals is that it maintains technical exchanges with the ILO including compiling statistics, research and technical assistance and training. It also admits that the relationship between the two organisations has been debated sometimes intensively. It also cryptically says that there is a body of legal opinion that the two institutions of global governance cannot be examined in isolation because countries have to comply with all their international obligations.[37]

2.3.2 The ILO's attempts to strengthen justice and fairness for the global labour force

As noted above, since 1919 the ILO has promulgated some 188 conventions, covering a huge variety of labour matters, sectors and categories. As also discussed, this productivity, without an effective compliance component, has also been the source of the ILO's ineffectiveness in having any impact on the world trade regime.

However, the ILO may well have surprised everybody by taking the lead in changing the status quo by developing core labour standards that are binding on all member states of the WTO. Since the membership of the ILO overlaps substantially with that of the WTO, the emergence of new possibilities for change is on the horizon.

In 1994, at the 81st Session of the ILO, its orientation and organisational reforms were high on the agenda. Various parts of the ILO, including the International Labour Office, were tasked with developing strategies to increase organisational effectiveness. A number of ILO working groups and committees revealed a desire to draw a link between social and economic development. This came with the recognition that developing countries had the right to progress at a different pace from the developed world. There was also an acceptance that lower labour costs in developing countries were a legitimate comparative advantage. However, there seemed to be a growing consensus in the ILO that three fundamental labour rights were required to counterbalance this legitimate comparative advantage. These included: (i) freedom of association (ILO Convention 87), (ii) the right to bargain collectively (ILO Convention 98) and (iii) the absence of forced or compulsory labour (ILO Conventions 29, 35 and 105).

The ILO discussions on balancing social with economic development concluded that, within the context of trade, these core labour standards were a minimum threshold requirement for establishing the legitimacy of lower labour costs as a comparative trade advantage. In essence, with these three fundamental labour rights as a minimum threshold requirement, there would be symmetry between freedom of trade and the freedom of workers to trade their labour.

Outside the direct parameters of fair trade and fair labour standards, the ILO discussions in 1994 added two more core labour standards: (i) the prohibition of exploitative child labour, and (ii) freedom from discrimination in employment (particularly with respect to gender discrimination). At the 268th Session of the GB of the ILO in 1997, the organisation appeared to be galvanised by the recognition given to its strengthened role in the protection of fundamental labour rights, by the declaration made at the 1995 Copenhagen World Summit on Social Development and, ironically, by the 1996 WTO Ministerial Conference in Singapore (as discussed above).

The urgency of finding a new focus for the ILO through such discussions, as well as studies on the link between social and economic development, eventually led to action. The GB decided to formulate a declaration that would confirm the existing obligations of all member states regarding certain fundamental labour standards. Both the GB and the director general were keen to emphasise that such a declaration would not modify the constitution of the ILO, but would clarify its meaning in relation to the fundamental principles of labour rights. The GB finally authorised the director general to prepare a draft declaration of principles concerning fundamental labour rights as well as a follow-up mechanism. The ILO distributed the draft declaration and consulted with its tripartite constituents (government, employer and worker representatives) on the contents in May 1998.

Such careful preparation proved successful when the ILC, at its 86th Session in June 1998, voted to adopt the Declaration on Fundamental Principles and Rights at Work, which set down the five principles outlined above as the 'core labour standards'. The relevant part of the declaration states:

> [A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.[38]

The declaration specifically mentions that these fundamental rights should not be used for protectionist trade purposes, or to call into question the comparative advantage of any country. Unfortunately, the follow-up provisions to the declaration, in keeping with the generally weak supervisory mechanisms of the ILO, essentially involve little more than annual reports by member states and the review of these reports.

It is inevitable that those who oppose any link between trade and labour standards will claim that even these core fundamental labour rights are too vague to be

effectively enforced through the WTO dispute settlement system. It could be argued, for example, that freedom of association has proved to be a very complex concept, even within the context of a domestic legal system as developed as Canada's.[39] The counter-argument is, as others have pointed out, that the WTO Charter and affiliated agreements are replete with far more ambiguous and complex matters than the core labour standards outlined in the ILO Declaration on Fundamental Principles and Rights at Work. In particular, the relatively new WTO agenda on the GATS and the TRIPs agreements presents much greater challenges in terms of ambiguity and complexity than those raised by the core labour standards as promulgated by the ILO.

However, those who seek to regain the vision of the ITO should concentrate on one particular link between trade and labour standards based on the principles of human rights and dignity of those who are part of the global labour force. This link and principle is based on the fact that all 185 members of the ILO have accepted the legal obligation 'to respect, to promote and to realize' the fundamental labour rights detailed above. The link then is manifested for countries that have *existing legislation* that, in theory, obliges actors within those nations to respect such fundamental labour rights. There should be no counter-argument of reliance on the comparative advantage of countries ignoring their own domestic laws. The problem arises when there is a lack of enforcement of such domestic laws or when the state is complicit in the lax enforcement of those laws, as is demonstrated by the proliferation of abuses in export processing zones (EPZs) around the world.

In the last 35 years there has been a rapid increase in the number, size and importance of EPZs. The ILO estimates that by April 2013 there were more than 3,500 EPZs around the world employing 68 million people in 135 countries and more than US$500 billion of direct trade-related value being added within these EPZs, a dramatic increase compared with the 75 that existed in 1975. According to 2008 statistics, of those who laboured in EPZs an estimated 40 million were located in China. More than 90 per cent of workers in EPZs were women.[40]

Such zones are often characterised by unfair labour practices, such as labour contracting in order to avoid employment contracts, suspension of social security laws, intimidation against unionisation, and lax enforcement of health and safety laws. Often, existing laws on freedom of association, collective bargaining, non-discrimination and child labour are either ignored or coercive measures are used to discourage unionisation. The World Bank and other researchers have confirmed that such unfair (and sometimes illegal) labour practices have a particularly negative impact on women, who make up a substantial majority of the workforce in EPZs. While there are exceptions to this general description of EPZs, the grave exploitation of workers in many EPZs may be leading to a new form of 21st-century slavery.[41]

Increasingly, countries in which EPZs are located are putting in place, if they have not already done so, laws and regulatory systems that protect the fundamental labour rights mandated by the ILO Declaration on the Fundamental Principles and Rights at Work. Unfortunately, for the vast majority, conditions in the workplace remain unchanged, suggesting that these laws are mere 'legal

decorations', designed for the purpose of proclaiming compliance with the ILO obligations.[42]

While most EPZs are located in developing countries, developed countries also play a direct role in their existence. Significant and growing amounts of foreign direct investment (FDI) are already in, or going to EPZs in the developing world. As the 19th-century industrialised world had its slave labour, its sweatshops and child labourers, the 21st-century globalised world has its EPZs. There is growing evidence that many of these EPZs attract FDI not only because of the tax holidays, free rent and other governmental incentives but also because existing labour laws on unions, freedom of association, non-discrimination, child labour and health and safety are deliberately not applied.[43]

There is clearly a moral and legal inconsistency of the highest order in the system of global governance if a WTO member can deliberately not apply fundamental labour rights laws mandated by its own legislature in an EPZ, with the intent of attracting foreign investment and the manufacturing of products for export, without attracting the same degree of scrutiny as would result from a specific export subsidy programme for products manufactured in other parts of the country. To state otherwise would be to condemn the millions of workers around the world who are, or will be, working in the EPZs as mere factors of production devoid of human dignity and rights, with no stake in the sustainable development upon which the WTO Charter is built. It would be to regard the foundation of goods, services, intellectual property and investment markets on which the GATT, and subsequently the WTO, were built, as ends in themselves, rather than as a means to serve the cause of humanity. Again, this would reinforce the tragic flaw within the world trade regime much to the same extent as the hypocrisy and inaction in the face of gross human rights abuses reinforced the tragic flaw within the United Nations, as discussed in Chapter 1.[44]

In such circumstances, it cannot be argued that the above amounts to an attack on the comparative advantage of lower labour costs. Under attack here are trade-distorting practices that are impermissible according to both domestic and international standards. In addition, there is compelling evidence from the Organisation for Economic Co-operation and Development (OECD) that the abuse of core labour standards does not result in any long-term competitive advantage.[45] Such abuse essentially only provides short-term advantage to a minority of firms and the domestic elites who profit from such firms.

Trade unions around the world, including the International Confederation of Free Trade Unions (ICFTU), as well as many human rights experts, are advocating for the insertion of a social clause into the WTO Charter that would make trade privileges conditional on compliance with fundamental labour rights, such as those set out in the ILO Declaration. These groups envisage this social clause as imposing a loss of trade benefits, or as a trade sanction of last resort, for the consistent breach of fundamental labour rights.

To avoid the use of a social clause for protectionist purposes, some, including the ICFTU, advocate that the ILO and the WTO jointly administer any such clause. The ILO would use its expertise, and its somewhat ineffective supervisory

mechanisms and committees, to gather evidence of non-compliance with core labour standards and to monitor abuses of core labour rights. The WTO would provide enforcement mechanisms through its dispute-settlement system. Such an approach might also utilise a phased method of enforcement. Initially, there could be a censure of the offending member, leading eventually to the withdrawal of the member's right of access to WTO bodies and negotiations. Recourse to sanctions could be a last resort and implemented only after an agreed period for compliance has passed, and only after technical and financial assistance has been offered.[46]

However, it is not only the governments of developing countries that are strongly opposed to such suggestions concerning the introduction of a social clause. There are some NGOs from developing countries, and even some international human rights and development organisations, who are also fiercely critical of any such clause. They fear that the introduction of a social clause into the WTO Charter would lead to protectionism, the loss of comparative advantage and the imposition of a northern perspective of fundamental rights.[47] Beyond the concerns of interest groups, there are also a number of structural challenges that may prevent the establishment of a social clause.[48]

The current WTO rules seem to indicate, and this is supported by the jurisprudence from the WTO panels, that there is a central principle of trade law that prohibits member states from imposing their domestic process and production standards on foreign suppliers. An importing country can only treat 'like products' differently if the physical properties of the products differ; they cannot treat products differently solely on the method of processing or production. (There is the one exception, mentioned above, of forced labour.) Thus, carpets imported from factories using child labour cannot be treated differently from carpets made in factories without the use of such labour.

The structure of the WTO makes it very difficult for any part of the organisation, including the dispute-settlement panels, to enforce policies that are outside the scope of the contractual regime underlying the agreed-upon rules of multilateral trade. Trade sanctions are extremely ill-suited to changing production or process methods abroad.[49] Child labour activists, including the United Nations Children's Fund (UNICEF), have warned against the imposition of tariffs or other sanctions against the importation of products made with child labour. The manufacturers of these products may react to the imposition of such sanctions by lowering even further the working conditions in their factories to compensate for the sanctions, or may switch to other more welcoming markets. There may also be worse fates awaiting children who lose their jobs owing to the imposition of sanctions; some children may be forced into prostitution. Good intentions can bring disastrous and unintended consequences if not backed by sound strategies.

In a previous co-authored text, this author argued that sanctions against exploitative child labour will not be effective unless children are gradually moved into formal and non-formal education systems. Moreover, foreign and international donors must assist affected communities through financial incentives and specifically tailored human resource development strategies, to help off-set the lost income that will result when children transition from work to school.[50]

Essentially, the sanctions system of the WTO is still based on the contractual rights and duties of each member. Members cannot collectively act to impose multilateral trade sanctions against persistent violators of fundamental worker rights. They also cannot act individually without taking it to a WTO dispute settlement panel. If an individual member did act unilaterally, it would raise the spectre of protectionist or politically motivated actions in the name of worker rights.

The above discussion should not stop debate on the link between trade and fundamental worker rights. Indeed, the counter-arguments to the introduction of a social clause contain the possible foundations for a proper link between trade and fundamental worker rights. The first steps in that direction may actually be occurring outside the WTO, in the burgeoning bilateral regional trade agreements that have filled the vacuum created by the demise of the Doha MTN. Between January 2004 and February 2005, the WTO was notified of 43 regional trade agreements (RTAs), the largest amount of any year to date.

By 2009 there were approximately 170 more RTAs in force, with another 90 about to enter into force or under negotiation. By January 2013, the WTO had asserted that it had received some 546 notifications of RTAs and, of these, 354 were in force. The trend appears to be increasing across all regions of the world, especially in the Western hemisphere and the Asia-Pacific region,[51] suggesting that RTAs, also known as free trade agreements (FTAs), could be a critical means of benefiting the global labour force and decreasing the effects of the tragic flaw in the global trade regime. This will only be the case if those FTAs and RTAs contain binding and effective clauses on fundamental labour rights, as will be discussed below.

2.3.3 Searching for the original vision of justice and human rights for global labour in the ITO: can labour standards provisions in bilateral free trade agreements play a part?

Even before the demise of the Doha Round, the US, Europe and middle powers such as Canada have engaged in a raft of bilateral FTAs, with the majority containing labour standards agreements. The labour provisions in the various FTAs have been effective to varying degrees. However, they can still be considered a small step in the right direction, with plenty of room for improvement.

In response to the intense opposition with which developing nations and emerging economies have responded to the incorporation of core labour standards in multilateral treaties, the US has resorted to bilateral FTAs to incorporate the labour standards vision of the failed ITO. The assumption is that developing nations and emerging economies may be more willing to accept such labour standards in an agreement they negotiate, in contrast to the standards that are imposed on them in a WTO framework, even if there is inequality of bargaining power.

Human Rights Watch (HRW) has focused on the record of the US in using FTAs to promote justice for the global labour force. In a 2008 study, HRW

examined 13 FTAs with labour rights provisions, 10 of which had already been ratified and 8 of which were currently in force. Of those FTAs, four of them (dealing with Peru, Panama, Colombia and Korea) had included labour standards provisions based on a 2007 trade policy template. The incorporation of core labour standards was a key part of the trade policy template, which outlined the range of such provisions to be incorporated into pending and future FTAs.

HRW noted that the nine FTAs that were concluded prior to the 2007 trade policy template had serious shortcomings.[52] There was no requirement to meet international standards, no penalties, no requirements to enforce existing domestic laws and no effective 'enforcement parity with commercial breaches', except for the US-Jordan FTA.[53] Further, the North American Free Trade Agreement (NAFTA) seemed to emphasise the downgrading of labour standards by the US putting minimal labour protections in a side accord rather than in the text. It was a situation that became programmed for failure and did fail.[54] Finally, the HRW study found that, with the exception of NAFTA, the FTAs prior to 2008 had gaping loopholes to allow lax enforcement of labour laws or the resources needed to enforce them if it was a reasonable exercise of discretion.[55]

The FTAs that followed the establishment of the 2007 trade policy template, including the Peru-US FTA, have tried to address the deficiencies of the previous labour provisions. These include the duty effectively to enforce fundamental domestic labour standards, establishing enforcement parity with commercial disputes using the same Dispute Settlement Bodies, eliminating state discretion as a justification for ineffective labour law enforcement and the allocation of resources devoted to it.

Perhaps what is most reflective of the attempt to return to the vision of the ITO and the late 1990s work of the ILO is the requirement in the newer FTAs that parties 'adopt and maintain' the core workers' rights 'as stated' in the ILO Declaration on Fundamental Principles and Rights at Work in their domestic law and practice.[56] Because some of the newer FTAs have watered down some of the enhanced labour provisions since 2007, HRW holds the position that even these advances are insufficient and proposes an even more rigorous framework for the protection of labour standards in the global trade regime.[57]

HRW insists that all US trading partners incorporate the ILO core labour standards into their domestic law, protect workers in all trade and investment-related areas, implement accountability for corporate complicity in violations of core labour standards and improve the negotiating, monitoring, compliance and enforcement of labour standards provisions in FTAs. If a future American administration ever implemented these HRW-proposed additional protections along with the core ILO standards, it would result in a major step forward in the fulfilment of the goal of the defunct ITO in integrating fair labour standards with fair global trade. The US has also utilised the generalised schemes of preferences (GSPs) approach to provide tariff incentives for its trading partners to improve labour standards. However, it has applied these to only a few countries and this limits its scope.[58]

Canada is an example of a middle economic and trading power that has adopted a less rigorous approach to labour standards in FTAs. In addition to

acceding to NAFTA in 1994, Canada has entered into six bilateral FTAs: with Israel and Chile in 1997, Costa Rica in 2002, Colombia in 2008, Jordan in 2009 and Panama in 2010. These FTAs have side agreements dealing with labour standards referred to as 'labour cooperation agreements' (LCAs). The Government of Canada claims that these LCAs are parallel to the FTAs and seek to improve working conditions and living standards in the partner country and to protect and enhance basic worker rights. In contrast to the post-2007 US FTAs, the Canadian LCAs focus on commitments by the partner country to enforce their laws effectively, not to derogate from them and to promote core labour rights and principles, including the ILO designated core rights.

This is far from enforcement parity with commercial disputes under the FTAs. Concerns over implementation of the LCAs are limited to ministerial consultations. As a last resort review panels can decide on limited monetary assessments to a cooperation fund in the country deemed to be in conflict with the LCA, to be spent on programmes to help ensure that the identified problems are rectified.[59] While these Canadian LCAs represent tiny steps towards the ITO's failed vision of justice and fairness for the global labour force, they are nevertheless an improvement over the failure of the GATT in this vital area of global governance.

According to the ILO, the EU's approach to trade and labour standards in its RTAs and FTAs tends to focus more on the general promotion of social rights, development and cooperation, which in turn include references to labour standards. The opposite approach to the US is taken as regards eschewing a trade sanctions-based approach to trade and labour standards. Some of their most important FTAs, such as the EU-Mexico FTA and the EU-South Africa FTA, do not even have any labour standards provisions. The EU-Chile FTA includes the ILO core standards but does not require their incorporation into domestic law.[60]

The preferred approach to promote core labour standards by the EU is through the GSP. This approach offers additional tariff preferences to FTA partners that have signed and effectively implemented the core UN and ILO human and labour rights international conventions, in addition to those regarding environmental protection, drug trafficking and good governance. The ILO has surveyed the vast number of EU and European Free Trade Association (EFTA) RTAs that contain the EU and EFTA incentive-based approach to trade and labour standards, rather than the US sanctions-based approach to ensuring justice and fairness in the global labour force.[61] The research by the ILO experts claims that the EU's incentive-based approach towards bilateral relations with third countries has been able to make significant progress in the promotion of social and labour rights.[62]

However, academic research has raised questions about how effective the EU's GSP system is, when it comes to sanctioning countries that violate core labour standards. Research conducted on the impact of the GSP regime of the EU on the labour practices in Belarus and Myanmar showed that, in spite of slightly affecting some exports, the total exports of both countries experienced a steady increase after the withdrawal of the GSP regime. This research also shows that where sanctioned countries have strong political and economic ties with other world powers

such as Russia and China, economic sanctions under either the GSP regime or penalties imposed by dispute resolution panels under American-style FTAs may have minimal effectiveness.[63] However, even with the minimal effectiveness of the GSP regime of the EU, the imposition of sanctions can still be an effective method of showing the EU's commitment to the core labour standards and may thus deter other countries from enjoying GSPs, which do not have the backing of a major world power, from undermining the core labour standards.[64]

Lessons are being learned from the approaches taken by the US, EU, Canada and other nations, on how to regain the spirit of the lost ITO, as regards the imperative of integrating a just and fair global labour market into the global trade regime. It is critical that over time there is a global upward harmonisation of the most effective methods of promoting labour standards around the world. This may involve new approaches that integrate both the sanctions and incentive-based approaches to the integration of trade and labour standards. It is only when this happens that the great promise of the failed ITO will overcome the tragic flaw of this area of global governance.

A reminder of unfinished work of global governance on trade, human rights and labour standards occurred on 24 April 2013. On that day, Bangladesh experienced the worst labour standards disaster when Rana Plaza, a structurally unsafe building containing several textile factories, collapsed and killed 1,129 female textile workers. In the wake of global media and consumer concern about the scale of the disaster, it was barely mentioned that it was not the first and probably not the last disaster to hit the textile industry in the country. In November 2012, a devastating fire in another facility killed more than 100 individuals, again mostly female workers. It seemed that few lessons had been learned from the previous horrors visited upon the textile workers of Bangladesh. Attempts by those foreign corporations who sourced their textiles in Bangladesh to prevent a repeat of the Rana Plaza horror will be discussed in the next chapter.

2.4 In the long term do we survive? Trading off the environment

As a species, *Homo sapiens* is relatively young: it has been barely 200,000 years since the evolution of the first hominids. If we vanish within the blink of an eye, relatively speaking in terms of the history of the earth's biosphere, will the end of the anthropocene record that the demise of the habitable environment, which is the ultimate destroyer of human rights, was a result of our short-term memories and short-term interests?

Concerns over globalisation, including trade and its impact on the environment and human health suggest that we should be pessimistic about the fate of the planet. The first decade of the 21st century saw the warning bell toll with increasing urgency: the rapid melting of the ice caps in the Arctic and Antarctic; uncontrollable wildfires in the forests of the US, Australia, Canada and other countries; and the increased frequency of devastating floods and hurricanes such as Katrina. To

these one could add: rapid desertification and drought in Africa; the thinning and consequent piercing of the ozone layer; global warming and climate change; the loss of large tracts of rainforest (which act as the lungs of the earth) in Asia, Africa and Latin America; the contamination of the food chain through pesticides, pollution and toxic waste; and the emergence of 'globalized diseases' such as HIV/AIDS.[65]

We tend to deal with these warnings by establishing grand commissions headed by eminent persons, or by holding global conferences to stimulate our short-term memories and interests. However, we are not really internalising the seriousness of these warnings and prioritising them in our short and long-term memories. In 1987, the world saw the warnings on environmental threats produced by the World Commission on Environment and Development (the Brundtland Report),[66] and in 1992 the world community came together at the so-called 'Earth Summit', also known as the Rio UN Conference on Environment and Development (UNCED).[67]

Both of these events emphasised that for the planet to remain habitable, economic development and environmental protection could not be regarded as a win–lose game. In response, both events championed the concept of sustainable development as a means to achieve a balance between growth and the preservation of the environment. Both economic growth and environmental sustainability were regarded as mutually supportive if the right approach and technologies were utilised.[68] The Rio+20 Conference in 2012 reiterated the commitment to sustainable development, but produced very little in terms of concrete steps to achieve the much-needed progress, which had been absent since the 1992 Earth Summit.[69]

There are those who question whether these two paradigms are in fact compatible, and whether the international legal approach to curbing environmental degradation, proposed by UNCED, is too 'neo-liberal' and 'state-centric'.[70] While there are many who would disagree with the reconciliation of the environment and global economic development contained in both the Brundtland and UNCED reports, and would dismiss them as disguised 'neo-liberal' attempts to prioritise liberalised trade over the environment, there is at least one thing that all could agree upon. By 1992, the overwhelming majority of the world had agreed that there was indeed a link between trade, economic development and the environment.

By 1992, even the most ardent champion of liberalised trade would have accepted that there was no question that externalising the environmental costs of production and trade would eventually mean more costs incurred by society, both nationally and globally in terms of climate change adaptation and environmental remediation. Also by this time, most environmentalists had modified their stance somewhat, and moved away from the more radical environmentalist perspectives, such as the claim that any form of global trade would inevitably damage the environment. Moderate environmental perspectives began to accept trade as long as it was compatible with sustainable development. This debate may seem abstract but, as one author has vividly demonstrated, it can affect the everyday life of the human family:

> Barriers to markets created by environmental regulations include pesticide residues in foods, BST in milk, Chernobyl-originating radiation in agricultural products, recyclable boxes for the sale of cut flowers, regulations aimed at the way fish are caught, animals trapped or simply trade in endangered species, trade in ozone-depleting substances or hazardous waste, the labelling of products to give consumers information on environmental performance, the energy content of goods, trade in intellectual property rights based on genetic materials; all this in addition to the environmental effects of the increased volume of international trade which could be measured and internalized to account for transportation costs. This is a live, 'food in the shops' debate that also brings in some fundamental concerns about international governance.[71]

Similarly, there was also a realisation that non-trade-distorting environmental regulation could have a major positive impact on global trade, which has the potential to increase the living standards of millions of people around the world. Champions of global free trade have often also argued that poverty in the developing world is one of the major causes of environmental degradation in the south.[72] By 1992, the stage seemed to have been set for some form of integration of trade and environmental issues in the lead up to the establishment of the WTO.

However, the integration of these issues did not happen, at least not in any substantial form. Again, as with the link between trade and labour standards, opposition to the linking of trade with the environment came from the developing nations during the GATT rounds and in the lead up to the establishment of the WTO. Once again, the south's main fear was that environmental issues would be used for protectionist purposes against exports from the developing world.[73]

Before the establishment of the WTO, fears of protectionism from the developed world disguised as environmental concerns resonated with the pure 'free traders' from the south, who strongly argued that the GATT had neither the competence nor the mandate to deal with environmental issues. These fears led to the exclusion of any provisions dealing expressly with the environment during the UR.[74] Those who saw the vital need for a link between trade and the environment had to place their hopes on Article XX of the GATT, which allows for exceptions to the GATT treaty.[75] The GATT's core principles are that of non-discrimination and national treatment. This means that a country cannot prohibit or discriminate against imported products based on where they come from or the process and production methods (PPMs) used in producing those products. This also means that imported 'like products' must receive the same 'national treatment' in the importing country as domestically produced goods. However, these core principles are subject to the general exceptions set out in Article XX:

> *Article XX: General Exceptions*
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction

on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . . (b) necessary to protect human, animal or plant life or health;
(or)
. . . (g) relating to the conservation of exhaustible resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article XX, including its *chapeau* that prevents the use of the exceptions 'as a means of arbitrary or unjustified discrimination between countries', has become the focal point of the attempt to link environmental and trade issues in the absence of any express provisions. However, as discussed further below, panel decisions under the GATT that have involved Article XX and environmental issues have initially turned out to be extremely disappointing for the supporters of sustainable development, who expected so much from the Brundtland Report and UNCED. The UR, which led to the establishment of the WTO, although overlapping in its seven-year history with both the Brundtland Commission and UNCED, had no multilateral negotiations on trade and the environment.

It could be argued that the WTO Charter contains so little on the environment that it has done the equivalent of 'killing the area with faint praise'. Nevertheless, the preamble to the WTO does make reference to sustainable development and the protection and preservation of the environment, consistent with the needs of economic development. While some may dismiss this as merely hortatory language, as examined above in the context of fundamental labour rights, there is always a possibility, slight as it may be, that life may be breathed into such language.

In addition, some experts have pointed to progress in the identification of non-actionable subsidies related to environmental retrofitting, the recognition of the environmental services sector and the creation of the WTO Trade and the Environment Committee (TEC), as positive indications of the responsiveness of the WTO to the link between trade and the environment.[76] The TEC has been given a wide mandate to study many of the environmental issues related to the global trading regime and has also been given the task of establishing relationships with NGOs. Regardless, the TEC is no substitute for the multilateral negotiations on the environmental issues relating to global trade which should have taken place in the UR.

Many critics would argue that the weak institutional structures that the WTO has for addressing environmental concerns, added to the paltry concessions mentioned above, are further examples of the fact that we are a species with short-term memories and short-term interests. The consequences of these characteristics of the tragic flaw within the WTO parallels those within the United Nations discussed in Chapter 1.

The lifeline linking the environment to global trade remains Article XX of the GATT, which was subsequently incorporated into the WTO. However, many have condemned the interpretation that the dispute settlement panels subsequently

gave to this article, in the context of environmental concerns, as undermining this fragile lifeline. Furthermore, it is inevitable that the focus on key concepts such as 'national treatment' and 'most favoured nation' in the international trade law framework under the WTO will conflict with attempts by member states to protect various aspects of their environment that could conflict with their obligations under the WTO.

One example of such a conflict was the 1994 *United States – Restrictions on the Importation of Tuna*[77] (*Tuna/Dolphin I*) dispute between Mexico and the United States. This dispute arose out of a ban by the United States on the importation of yellowfin tuna caught with 'purse seine' nets. These nets had been found to cause the death or injury of dolphins in numbers that were in violation of the standards established by the US Marine Mammal Protection Act. The GATT panel ruled that the US ban was a violation of the GATT, which could not be saved by the Article XX exceptions owing to three main reasons.

First, the ban constituted a trade measure whose objective was to preserve resources outside the jurisdiction of the US. Second, the US failed to prove that the ban was aimed primarily at conservation. Third, the ban was discriminatory because it related to the manner in which the imported goods were produced, rather than to any characteristics inherent in the goods themselves. For these reasons the ban was determined to be a quantitative restriction, which is prohibited by Article XI of the GATT. One leading authority, James Cameron, gives a harsh critique of the panel ruling:

> First, how does a state deal with preserving resources, perhaps migratory, outside of its jurisdiction short of a multilateral agreement? How does the reality of somebody else's methods, perhaps even enterprises taking advantage of lower standards, get addressed in a way that survives tests of national treatment?
>
> . . . Second, how did the 'primarily aimed at' test get to (a) exist and (b) be so restrictively applied? . . . Despite the reality of industry capture and unholy alliances (such is ordinary political life) the idea that the Marine Mammal Protection Act was really a front for protecting the US tuna industry came as a surprise to the conservationists who fought for it for many years.
>
> Third . . . the issue of production and process methods (PPMs) and Article XI (the 'like product' debate) remains unresolved. Of course, environmentalists don't have a thing against tuna itself, they are concerned with method. They are, more than that, concerned about fishing method and fisheries collapse, at least as much as whales, dolphins, turtles and sea birds. Frankly these are vital economic arguments, missing from the very formulaic reasoning of the panel.[78]

Echoed in such a critique are the frustrations of those who wished to see the GATT and the WTO deal effectively with labour standards.

The WTO claims that its rules do not necessarily mandate conflicts with domestic attempts to protect the environment, biodiversity or the implementation

of multilateral environmental agreements (MEAs), and points to another Appellate Body ruling to reinforce its position.[79] The ruling in question is the *United States – Import Prohibition of Certain Shrimp and Shrimp Products* decision in 1998. The following is an edited account of the ruling that was given by the WTO itself on its website.[80]

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against the United States to the WTO DSB. Their complaint involved an import ban that the US imposed against certain shrimp and shrimp products. At the heart of the US ban was the goal of protecting sea turtles. The US Endangered Species Act of 1973 listed the five species of sea turtles that inhabit US waters as endangered or threatened, and therefore prohibited their 'take' within US jurisdictional waters or on the high seas. 'Take' included harassment, hunting, capture, killing or attempting to do any of the foregoing. The US law required American shrimp trawlers to use 'turtle excluder devices' (TEDs) in their nets when fishing in areas where sea turtles were likely to be located.

Another provision of US law, section 609 of the Endangered Species Act, provided that shrimp harvested with technology that had an adverse impact on sea turtles could not be imported into the United States. An exception to this rule would be made only when the harvesting nation was certified as having a regulatory programme and an incidental take-rate comparable with that of the United States, or when the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

The combined effect of the two laws was that any shrimp-harvesting nation where any of the five endangered sea turtle species were found had to have in place a similar sea turtle protection regime for shrimp fishing as that of the United States, if they wanted to have their shrimp and shrimp products imported into the United States. This meant, in particular, that shrimp from the exporting country was required to be caught with the use of TEDs.

The WTO claims that many have missed the importance of the Appellate Body's ruling in this case in a number of important aspects.

First, the Appellate Body clearly ruled that under the WTO members could take trade action to protect the environment (in particular, human, animal or plant life and health) or endangered species and exhaustible resources. Second, measures to protect sea turtles could be legitimate under GATT Article XX, provided certain criteria such as non-discrimination were met. Third, the US lost the case because it discriminated *between* WTO members, *not* because it sought to protect the environment. The Appellate Body found that the US had provided countries in the Western hemisphere, mainly in the Caribbean, with technical and financial assistance, and longer transition periods for their fishermen to start using TEDs. It had not given these same advantages to the four complainants. Therefore, the Appellate Body found that, while the US measures instituting the ban for the protection of sea turtles did qualify for provisional justification under Article XX(g) of the GATT, it failed to meet the requirements of the *chapeau* or introductory paragraph of Article XX, which prohibits such measures from being applied in an arbitrary or unjustifiably discriminatory fashion.

Finally, the WTO was keen to point out that the Appellate Body ruling stated that dispute settlement panels may receive '*amicus* briefs' from environmental or other NGOs, as well as other interested parties.[81] It could be argued that such a ruling was largely symbolic and was designed to counter criticism that the WTO dispute panels were non-transparent and closed to input from those with environmental expertise.

It should also be noted that this ruling, as well as others by the panel, seemed to recognise the WTO Charter as coming within the interpretative framework of international law, as mandated by Article 3 of the Dispute Settlement Understanding (DSU). Referring to international environmental law and its development since the beginning of the GATT, the Appellate Body in *Shrimp-Turtle* ruled that such international norms could be used as an appropriate benchmark for the interpretation of 'conservation of exhaustible resources' as found in Article XX(g).[82]

There is some irony to certain aspects of the ruling. The decision could be supported by the argument that the US import ban amounted to a form of eco-imperialism; a rich developed country was forcing other countries to accept its own sea turtle protection regime, and placing the burden of compliance on developing countries such as India. Interestingly, India, Malaysia and Pakistan have all signed the Biodiversity Convention, but the US has not. Similarly, the impact of the Appellate Body's ruling would seem to be the opposite of the 'polluter pays' principle. What was decisive to the case, according to the WTO's own rendition of the facts and according to the ruling, was the fact that the United States had not given resources and technical assistance to India and the other complaining countries, in contrast to the Caribbean nations. This amounts to turning the environmental protection principle of the 'polluter pays' on its head, by suggesting that to fit within the Article XX exception, the United States had to pay the polluters.

Another Appellate Body ruling also suggests that the WTO rules could be applied in a way that balances trade, social and environmental concerns, at least where there is a threat to human health. On 12 March 2001, in *European Communities v Canada* (the *Asbestos* case) the Appellate Body handed down a ruling dismissing Canada's complaint against France's ban on asbestos.[83] Canada had claimed that the French ban was inconsistent with a number of provisions in the agreement on sanitary and phytosanitary measures (SPS), the agreement on Technical Barriers to Trade (TBT), as well as Article III of the GATT (dealing with the 'national treatment' principle). Brazil, the United States and Zimbabwe joined as interested third parties to the dispute.

The lower dispute settlement panel had ruled that the import ban instituted by France was justified under Article XX, even though France had violated Article III, by discriminating against the importation of Canadian asbestos. This finding of discrimination was a result of the panel's conclusion that asbestos, which was banned, and asbestos substitutes, which were permitted, were in fact 'like products' for the purpose of Article III of the GATT. This aspect of the lower panel's ruling was heavily criticised by environmental groups for coming to the right deci-

sion for the wrong reasons. They argued that such reasoning set a dangerous precedent because it failed to distinguish between toxic (asbestos) and non-toxic (asbestos substitute) products, in determining what 'like products' were.

The Appellate Body reversed this and other controversial aspects of the dispute settlement panel's decision. The Appellate Body held that carcinogenic asbestos is not a 'like product' to safer substitute products, and that the French ban on imports of asbestos-containing products was not in violation of Article III of the GATT.

Leading environmental and anti-asbestos NGOs praised the Appellate Body's decision in the *Asbestos* ruling for going even further than was necessary: because the Appellate Body had found that there was no violation of Article III, any consideration of the exceptions to the GATT rules contained in Article XX was strictly unwarranted. Nevertheless, the Appellate Body did go on to consider these exceptions. In doing so, the Appellate Body upheld the lower panel's application of the health exception (under Article XX(g)), stating that it was up to each member government to decide the level of protection that it desires for its citizens. When France decided that it wanted absolute protection from cancer-causing asbestos, it was entitled to decide that there was no reasonable alternative other than to implement the import ban.

In setting such a health policy, the Appellate Body ruled that member governments did not have to follow the majority scientific opinion as to what may constitute the appropriate level of health protection for its citizens. Some environmentalists have praised this ruling as an endorsement of the integration of the precautionary principle, as promoted by the Brundtland Report and UNCED, into trade-related disputes.[84] The same NGOs remained critical as to the Appellate Body's rejection of their non-party submissions, which had been invited but ultimately rejected for unexplained reasons. These civil society groups remained adamant that such non-party *amicus* submissions are a vital aspect of ensuring transparency and due process in the dispute-settlement process of the WTO and the capacity of developing countries and their civil society groups to be engaged in these critical global trade rules.[85]

The clash between the core principles of the WTO global trade rules and the environment, especially where it also involved threats to human health, continued with the Appellate Body's ruling in *Brazil-Retreaded Tyres* in 2007. The case concerned the various measures taken by Brazil to limit the number of retreaded tyres imported, sold and stored in the country. Brazil tried to defend these environmentally driven measures by relying on Article XX(b) exemptions for trade impacting measures 'necessary to protect human, animal or plant life or health'.

In a similar fashion to the *Dolphin-Tuna* and *Shrimp-Turtle* rulings, on 3 December 2007 the Appellate Body confirmed an earlier panel ruling that Brazil's import ban violated WTO rules as it was applied in a discriminatory manner.[86] However, it also reversed some of the panel's ruling regarding its finding that the import ban could be necessary on health grounds, as the discarded tyres accumulated stagnant waters and thereby became breeding grounds for the pervasive dengue fever carried by mosquitoes. Even with this justification, the application of the ban was deemed discriminatory, in part because Brazil had continued to allow large

quantities of used tyre casings to be imported for retreading, undermining the purpose of the ban. In the dispute with the EU, Brazil had argued that retreaded tyres had a shorter life span, which meant that they would produce more waste tyres overall, which would accumulate beyond the point where the country could dispose of them in an environmentally responsible manner.

In response, the EU had argued that the real motivation behind Brazil's import ban was to protect local tyre manufacturers, as evidenced by a number of court injunctions permitting the importation of large quantities of used tyre casings, which could be made into retreaded tyres. Moreover, the EU pointed out that there was an exemption for Brazil's Mercosur partners. These arguments were accepted by the Appellate Body, which ruled that the import ban was discriminatory and therefore unjustifiable under the WTO rules.

The Appellate Body confirmed the panel's ruling that the import ban could be justified for public health reasons. However, it ruled that the import ban's discriminatory exception for Brazil's Mercosur partners meant that the bar to devise a WTO-compliant ban on the importation of retreaded tyres for health and environmental reasons would be higher. The earlier panel had found that the exemption for Mercosur was consistent with the requirements of the Article XX(b) *chapeau*, since the 'volumes . . . of imports of retreaded tyres under the exemption appear not to have been significant'. The Appellate Body reversed the panel's low bar on the Mercosur exemption and instead ruled that, no matter how small the impacts of the exemption, discrimination cannot be justified if there is no rational connection to the objective or when the exemption even goes against the objective.[87]

The narrowing of the earlier panel's ruling has been severely criticised by Schefer, who has concluded that '. . . [b]y rejecting a broader scope for GATT Article XX(b), the panel dealt a severe blow to the incorporation of an environmentally friendly perspective to the trading system'.[88]

Those who disagree with the Appellate Body's ruling in the *Tuna-Dolphin* and *Shrimp-Turtle* cases would probably agree that the best way to deal with problems raised by migratory species, such as sea turtles, is to protect them through an MEA whose signatories roughly correspond to the membership of the WTO. Leading experts including James Cameron suggest that comprehensive MEAs encourage global commitment through 'a carrot and stick approach, by restricting trade in a relevant area and extending those restrictions to non-parties, and by providing financing to meet the objectives of the MEA'.[89]

Examples of MEAs include the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The WTO estimates that there are approximately 250 MEAs dealing with environmental issues, which are of sufficient concern to the entire human family that they can rightly be regarded as giving rise to fundamental environmental legal norms.[90]

Approximately 20 of these MEAs have provisions that impact on trade, either by banning trade in certain products or allowing restrictions on trade in certain

circumstances.[91] The examples outlined above are the best-known MEAs that contain trade-restricting provisions. Most MEAs have multiple mechanisms relating to implementation and compliance, which include information transparency obligations, environmental impact assessments and consultation and detailed reporting obligations. The most effective MEAs include both the *stick* of trade restrictions, which deal with the problem of free riders, and the *carrot* of financial assistance. In addition, they should have a mechanism by which the conference of member states may monitor compliance. However, just as in the case of the ILO, the contrast with the WTO leaves MEAs, in the words of one expert, as 'a more fragmented form of governance that lacks the coherence, reach, financial backing and organizational structure of the WTO'.[92]

The WTO claims that the basic principles of non-discrimination and transparency under the WTO Charter do not necessarily conflict with MEAs. Indeed, the WTO's Trade and Environment Committee accepts that the most effective way to deal with the trade and environment link may well be through the use of MEAs. According to the WTO, the MEAs complement its work by seeking internationally agreed upon solutions, rather than sanctioning the use of unilateral measures, to solve transboundary environmental problems.[93] However, the WTO may also be motivated by a desire not to create an unnecessary confrontation with the growing body of MEAs.

The WTO asserts that, to date, no trade action under an MEA has been challenged in the GATT-WTO system. It has also acknowledged the complexity of the relationship between environmental and trade rules. The WTO is also promoting closer cooperation between its own committees along with the TEC and MEA secretariats, to ensure trade and environment regimes develop coherently.

The WTO also notes that there is 'a widely held view that actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the agreement, although the issue is not settled completely'. The WTO recognises that the controversy lies where one country takes a trade-related action pursuant to an MEA, which it considers permissible under Article XX, against another country that has not signed the MEA.[94] This is a dispute waiting to happen. Some MEAs stipulate that signatory countries must apply the agreement (including any trade-related measures contained in such an agreement) to goods and services from countries that have not signed the MEA.

A global climate change MEA will probably present the greatest challenge for compatibility with the global WTO trade rules. The UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol (KP), which was negotiated in 1997 and barely came into force in 2005, after the 55th ratification, is a warning of the trouble ahead for such a global climate change treaty. While the KP did not include specific trade measures, some of the measures that were anticipated could have impacted on trade.

In a speech given to the European Parliament in 2008, Pascal Lamy implicitly outlined some of the possible measures that could fall foul of WTO rules. This included 'border adjustment measures' that would impose a carbon tax on imports

from countries that are outside a global climate change treaty, or the establishment of an emissions cap-and-trade system with an obligation on importers to participate in the system.[95] Indeed, a WTO-United Nations Environment Programme (UNEP) report in 2009 stated that, insofar as climate change was concerned: '[t]he general approach under WTO rules has been to acknowledge that some degree of trade restriction may be necessary to achieve certain policy objectives, as long as a number of carefully crafted conditions are respected'.[96]

The report examined several WTO trade restriction dispute rulings that were deemed permissible under Article XX of the GATT, for environmental and health reasons.[97] The analysis of these cases by the WTO-UNEP report seem to suggest that border measures related to climate change could be justified under Article XX, even if they are inconsistent with the fundamental GATT principles of national treatment.

It is also clear from the WTO-UNEP report, and from speeches made by Pascal Lamy, that the preferred approach to deal with climate change measures is to have a truly global climate change framework that includes trade measures. If this was the approach taken, then the WTO rules would be able to adapt. The enormous problem with this position is that on 31 December 2012 the Kyoto Protocol's first emissions reduction commitment period expired. Unless states agree to a second commitment period, which would impose concrete emission reduction commitments, the KP will lose the ability to impose limits on greenhouse gas emissions. While the KP will technically still be in force, it will be devoid of any substance.

Following the outcomes of the 2009 and 2010 Conference of the Parties (COP), held at Copenhagen and Cancún respectively, the likelihood of securing a global agreement on a binding second commitment period under a revived KP is diminishing rapidly.[98] Over the long term, the negative effect of the tragic flaw in this area of global governance threatens the wellbeing of the habitable environment of the human species itself.

As suggested by Cameron, the WTO needs to go much further than it has gone to date, and make sure that it is extremely difficult for any non-signatory of an MEA to challenge actions taken pursuant to the MEA within the WTO.[99] WTO member states should have the right to implement policies mandated by MEAs even if they affect trade with non-parties. The counter-argument to this would be that MEAs that allow the use of Trade-related Environmental Measures (TREMs) could be used as a disguise for unilateral protectionist measures. If it turns out to be the case that measures taken to deal with common global environmental problems can be disguised forms of protectionism, then perhaps there are some forms of protectionism that should be regarded as tolerable in both a moral and legal sense! The incorporation of MEAs into the WTO regime can also be an effective counter balance to the increasing desire on the part of the developed world to take unilateral measures, such as ecolabelling, to protect the environment.[100]

Indeed, there is something to be said for Cameron's suggestion that the main MEAs should be incorporated by multilateral agreement into the WTO, and that MEA and WTO concerns should be placed on an equal footing within the dispute

settlement panels.[101] Here, a parallel can be drawn with the discussion in Chapter 1, where it was argued that human rights should be placed on an equal footing with territorial integrity and political independence.

In this area, as with labour standards, it is suggested that the *existing* WTO Charter may provide not only a moral but also a legal basis for placing MEAs on an equal footing within the rules of the WTO. An example of this is contained in the preamble to the Marrakesh Agreement, which established the WTO, where it is recognised that the WTO must '[allow] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'. Moreover, the preamble to the WTO Agreement could persuade a dispute panel to dispense with the narrow focus of the *Tuna-Dolphin* decision, build upon the *Shrimp-Turtle* decision and regard any TREMs related to MEAs as coming within the scope of Article XX, even as regards actions against non-parties to the MEA in question.

These suggestions may seem unrealistic to some but, as Cameron points out, the European Union has already shown the way by demonstrating how to balance trade, social and environmental interests in an effective regional trade liberalisation regime.[102] There is now a need for 'principled negotiations' on how to balance trade against the environment outside the context of the EU. Such negotiations will have to come to terms with the need to bring the long-term interests of the human species and the planet into line with the more immediate objectives of trade liberalisation and economic growth. Such an approach is key to combating the tragic flaw within the world trade regime.

2.5 Conclusion: solving the democratic deficit: a critical part of the long-term solution

Behind the anger that many parts of global civil society have expressed towards the institutions of global governance in this area, represented in its lowest form in the Battle of Seattle, is the pursuit of greater protections for human rights, labour rights and the environment in the global trade regime. There is little doubt that some of their critics would argue they are driven by misinformation and misguidance. Yet, such anger may be also driven by a feeling that institutions such as the WTO are handing over human governance to remote technocrats who usurp the democratic institutions of nations. There is no doubt that the counter-argument is that the reality of the WTO is that it is seriously under-staffed, under-budgeted and that it has a much leaner bureaucratic structure than other institutions of global governance.[103]

Indeed, according to many experts, one of the more serious threats facing the universality of the WTO regime is the lack of resources, both financial and human, to assist capacity building in the developing world, so that these nations may participate meaningfully in WTO negotiations, especially in the critical areas of agriculture and services.[104] For example, according to the WTO, in 2012 only about one-third of the 30 or so least developed countries in the WTO had permanent offices in Geneva; if they did have offices, they would generally cover

all United Nations activities, as well as the WTO.[105] Given that the WTO is a 'member driven' organisation, this suggests that the most vulnerable nations in the human family continue to be marginalised in both the operation and development of the global trade regime.

Additionally, the structure of the WTO has been criticised for creating and exacerbating the democratic deficits within and between member nations and civil society groups in the global trade regime. It has been alleged that the undemocratic structure of the WTO is creating an informal and undemocratic 'security council' within the global trade regime. The plenary ministerial conference only meets every two years and there is no effective representative executive body that is accountable for implementation actions and overall management in the interim. This vacuum was initially filled by the 'quad' countries, namely the United States, the European Union, Japan and Canada. These countries made critical decisions, such as the agreement for quick Chinese accession to the WTO, without much consultation from the other 150 (or more) members of the WTO. This has changed, given the growing power of many of the emerging economies of the global south.[106] As a result, this informal WTO 'security council' has expanded to include other powerful emerging economies, such as Brazil, China and India.

This inter-member democratic deficit is compounded by the asserted lack of effective access to WTO decision-making processes by NGOs and other civil society actors. The WTO strongly denies this and points to recent initiatives that are expanding dialogue with civil society groups. It points out that the Marrakesh Agreement includes a specific reference to NGOs in Article V(ii), which permits appropriate arrangements for consultations and cooperation with NGOs. It also refers to guidelines adopted by the WTO General Council, which recognise the role NGOs can play in increasing the awareness of the public in respect of the WTO's activities.

Since 1996, these forms of consultation and cooperation have essentially entailed attendance at ministerial conferences, participation in WTO symposia and online discussions, as well as day-to-day contact between the WTO secretariat and NGOs. Additionally, there have been a number of new initiatives designed to improve dialogue with civil society, such as regular briefings for NGOs, a special NGO section on the WTO website and the publication and circulation of NGO position papers received by the secretariat.[107]

If the WTO is to go beyond the occasional harvesting of civil society input it needs to consider opening up the dispute settlement and Appellate Body processes to the public, as well as giving greater consideration to briefs given by NGOs with relevant expertise. Similarly, if civil society input is to be meaningful, access to information and working documents must be provided before meetings are held and decisions made.

Another potential solution to the challenge posed by the democratic deficit in the international trade regime, on the part of both the WTO and the NGOs interested in its work, is to reinforce the role of democratically elected institutions in the work of the WTO. At the time of writing, national legislatures around the world play a very small role in the global trade regime. Yet the work of the WTO and

the operation of the global trade regime impacts heavily on the mandate, mission and functioning of national legislatures around the world. Adverse rulings on government subsidies from WTO dispute settlement panels can throw thousands out of work in local constituencies. Decisions on sanitary and phytosanitary measures can devastate local farming and agricultural practices. The impact of the global trade regime on the mandate of members of national legislatures is becoming increasingly serious. There is a need to strengthen the role of national legislatures in the development of the global trade regime, both at the national and international level.

At the national level, there is a need for legislatures to permit truly democratic consultations with citizens, through standing committees, before national positions in MTNs are formed. Again, such consultations must not be the mere harvesting of opinions. One study of the democratic deficit on global trade issues, at both the national level and the level of the WTO, revealed that '[P]arliament is often informed only at the end of negotiations, and is not seriously involved throughout the process'.[108]

This deficit is compounded by the fact that, when called upon to ratify the results of multilateral trade negotiations, legislatures (including the US Congress under the fast-track authority regime) can only accept or reject the agreement as a whole. Thus, there is the danger that the real power lies in the hands of the executive of national governments and trade ministers in particular, with the domestic legislatures acting as nothing more than a rubber stamp in the implementation of global trade commitments. This may be especially true where national legislatures are not elected, or in a parliamentary system of government where the executive effectively controls the legislative body through party discipline. Thus, the gap between the technical experts and trade negotiators, on the one hand, and the citizenry on the other, grows even wider. The wider this gap grows, the more likely it is that the frustration of the activist component of the citizenry will spill over into street protests against the remote workings of the WTO at ministerial conferences.

It is suggested that at some time, perhaps in the distant future, multilateral discussions should take place at the WTO on the need to develop a 'standing parliamentary assembly' to fill in the growing democratic deficit at the WTO *and within member states*.[109] Although not perfect, the European Parliament, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe, and the Parliamentary Assembly of the Council of Europe are acceptable role models for such a body. The fundamental purpose of such a WTO standing parliamentary assembly would be to act as a highly credible advisory body to the WTO, and bring the concerns of the citizens of the member countries to the WTO. Such a body could ensure that trade negotiators pay heed to the concerns of global civil society, and it could promote the democratisation of the WTO's work internationally and within the member states.

Finally, a WTO standing parliamentary assembly could also assist in the crucial task of 'principled negotiations' between the developed and developing world. Such negotiations are vital in areas involving links to fundamental labour rights,

environmental protection, access to pharmaceutical products by the sick and impoverished of the human family, as well as in other critical areas that need discussing in relation to the fundamental values behind the global trade regime and its social dimensions. The WTO standing parliamentary assembly could also be a catalyst for ensuring that the WTO works closely with the ILO and international financial institutions to deal with the problems arising out of the social dimensions of trade. This could be accomplished by the standing parliamentary assembly being given the power to conduct hearings on the social dimensions of trade. It could also order key decision-makers from all the relevant organisations to reveal how problems relating to the social dimensions of trade are being dealt with.

Some may argue that the reasons why the social dimensions of trade have been largely omitted from, first, the GATT, and subsequently the WTO, is because at a fundamental level there is a clash about the human values behind trade and its social dimensions. On one hand, some social activists, and those on the left of the political spectrum, denounce the fundamental values behind the 'neo-liberal' trade liberalisation agenda, as representing the maximisation of profit at the expense of workers, the poor and other vulnerable groups, as well as the environment. These sectors of global civil society also claim that the global trade system is profoundly anti-democratic, unaccountable and non-transparent. It thrives on secrecy and private hegemony with the MNEs who are the main beneficiaries of the whole regime.

On the other hand, the ardent supporters of global trade liberalisation regard such perspectives as ill-informed, ideologically driven and just plain wrong. They argue that global trade liberalisation is particularly good for the poor and the environment. Global trade, they argue, is a rising tide that will lift all boats, and rather, it is poverty that causes poor farming methods and other environmentally degrading practices, and which gives governments little incentive to put resources into the protection of the environment.

There are misconceptions on both ends of this spectrum of opinion, regarding the global trade regime. As with most areas, the reality, if there is one to be found, is somewhere in the middle of the spectrum. It is in the middle zone that the common human values that the vast majority of humanity can identify with and promote must be found. This will only happen if we can accept that globalisation and global trade are not ends in themselves but are there to serve the cause of all human beings. As such, global trade must support universally accepted human rights as a fundamental requirement of justice. Universal human rights are not supported by trade liberalisation that involves the massive exploitation of workers in EPZs, nor is it supported by liberalised trade in goods that are toxic or harmful to sustainable life on earth.

There is also little to support blindness to the reality that the poorest nations of the human family may not be able to reap the benefits of global trade without massive assistance from the developed world. However, the WTO cannot be overburdened with environmental, labour and human rights mandates, when it is barely able to find the resources to fulfil its present, much narrower, mandate. This is also a critical reason why other institutions of global governance such as the ILO need to become more integrated into the work of the WTO.

The death of the Doha Round has also triggered other challenges to the legitimacy of the WTO, particularly in the proliferation of FTAs. The US, for example has gone from just four FTAs in 2000 to 12 FTAs in 2012.[110] In the same period, Japan has increased its FTAs from one to 11. Major regional FTAs are also increasing, such as the ASEAN FTA with China, Japan, South Korea, India, Australia and New Zealand. The largest regional FTA under negotiation will be the Trans-Pacific Partnership led by the US,[111] which will rival the EU in its economic power.

These FTAs will reduce the amount of capital, as well as economic and political incentives, to engage in future multilateral Doha type MTNs under the WTO. There is also the worry that some of these FTAs will not enable smaller and less developed nations to act in concert with other like-minded states, nor will they have bodies such as the WTO secretariat to promote fair outcomes on key areas, such as agricultural subsidies, which was the hope of the Doha Round. The more powerful economic powers will most probably promote and obtain their own key interests in FTA negotiations. The real danger for the developing nations is that once these FTA outcomes become entrenched they may be carried over into future WTO negotiations, which would further erode the legitimacy of the global trade regime.[112]

The ultimate danger is that if global trade is carved up into competing economic regions, then preferential market access under regional FTAs could seriously hurt global welfare, especially for the poorest nations outside the protection of the FTA, even if they are the most efficient producers. As the number of FTAs increases over the next few years and decades, the countries that find themselves outside the preferential access protection of those agreements will face greater obstacles and lack of competitiveness for their exports. On December 7, 2013, as a consolation for the death of the Doha Round, the WTO announced the Bali package agreement on trade facilitation designed to streamline trade processes that would facilitate the exports of developing countries, supporting food security and supporting development generally. It is unlikely to be more beneficial than if the promises to the same developing countries in the Doha Round had been fulfilled. Ironically, while the comparative advantage for being within the WTO will be significant for the smallest and poorest nations, it will be the opposite for the most powerful nations, who will have secured their interests through bilateral and regional FTAs.[113]

When that happens, the legitimacy of the WTO, as an institution of global governance that not only caters for the most powerful nations but is also supposed to be committed to international trade, justice and fairness for the smallest and poorest nations on the planet, will start diminishing. This would be another manifestation of the tragic flaw in global governance and international law. To start eradicating the tragic flaw at the heart of the world trade regime, human progress and flourishing must become the foundation of the global trade regime, as much as human security must become the foundation of any reform of the United Nations, as discussed in Chapter 1. World trade must be for the benefit of all humanity. The cause of universal human rights and dignity must show that entrenched economic and political power is never sustainable through exploitation and a disregard for the insecurity of others.

2.6 The evolution and failures of the global financial system: a growing tragic flaw that undermines fundamental principles of justice and human rights

> *'. . . [T]he human race already consists of reliable, rational, decent people, influenced by truth and objective standards . . .. We were not aware that civilisation was a thin and precarious crust . . . only maintained by rules and conventions skilfully put across and guilefully preserved'.*
>
> J.M.Keynes, one of the architects of the Bretton Woods system[114]

2.6.1 The Bretton Woods system: the global financial system counterpart of the Atlantic Charter

As briefly described in Chapter 1, after the end of the Second World War, the US and Great Britain along with other allied powers, in keeping with the vision of the Atlantic Charter, began to focus on one of the financial and economic root causes that triggered the global war. As others have detailed, the post-First World War period saw a rapid decline in European and global trade and capital flows, along with increasing protectionist forces. These were among the main causes of the Great Depression of the late 1920s and early 1930s.[115] The consequent decline in living standards and employment were most pronounced in Germany. That country was heavily burdened with the reparations and it spurred the growth of extremist forces, including the rise of Hitler and the Nazi Party.

The allied victors were therefore keen to develop a post-war financial system that, while ensuring their own interests were protected, would focus on developing the institutions and processes that would promote international cooperation on the most important financial and trade matters. These were the motivations that led the allied powers to meet at Bretton Woods to propose the creation of what they considered three vital and interlinked institutions for the post-war global economy, namely the International Monetary Fund, the World Bank and the International Trade Organization.

There was a consensus that these institutions would develop a rules-based system of economic relations between all nations, which would ensure the peace of economic prosperity and justice. The IMF, established in 1945, would focus on re-establishing a stable global currency exchange regime, based on fixing individual currencies to the US dollar, which would in turn be fixed to gold. The World Bank, also established in 1944, would focus on reconstruction and development, first of the devastated European economy and later the developing world. Finally, as discussed above, the ill-fated ITO would focus on trade liberalisation and the social dimensions of trade and investment. The stability of the exchange rate was crucial to the desired outcome of the work of all three organisations, which was also meant to be backed up by a global agreement to control capital movements that would be monitored by the IMF.[116]

As discussed in this chapter, the high vision of the Atlantic Charter, which lay behind the establishment of the post-war global economic and financial institutions, began to flounder almost immediately with the demise of the ITO. Until the 1970s, the IMF managed to secure the stability of the global fixed exchange

rate system tied to the US dollar and its link to gold. Nations' exchange rates could be adjusted, but only in exceptional circumstances, such as if keeping the value of their currency within 1 per cent of par value became very difficult. These measures were critical to the stability of the global trade regime, as manipulation of currencies to obtain trade advantages could trigger the protectionism that had, in the past, led to the Great Depression. The IMF was also mandated to assist with balance of payment imbalances, and to provide loans for countries facing such difficulties. The quota system was developed not only to provide resources for the IMF, but also to establish the governance and voting structure of this global financial safety valve.

It was therefore not surprising that the US and Britain obtained more than 40 per cent of the total vote. While the fixed exchange system appeared to be working well until the 1970s, even during these quiet decades pressures were beginning to mount that would ultimately create great challenges for the IMF. First, the increase in capital flows around the world from petrodollars, in addition to the loopholes in capital controls, had begun to attack the fixed exchange rate system. Second, the Cold War led the Soviet Union and other communist bloc countries to cease participation in the critical economic cooperation initiatives of the IMF. Decolonisation also led to the creation of new Asian and African countries, which meant a large increase in the membership of the IMF, in part because of their need for capital for economic development.[117]

During the same period, between the end of the Second World War and the 1970s, the sister institution of the IMF, the World Bank, whose first incarnation as the International Bank for Reconstruction and Development was supposed to focus on rebuilding Europe, was surpassed in effectiveness in many respects by the US Marshall Plan and related mechanisms such as the European Payments Union. The World Bank therefore turned to focus on providing loans to countries in economic difficulties and assisting in social development and poverty alleviation. The loans were designed in collaboration with the IMF to be conditional on structural economic and social reforms aimed at facilitating private investment and longer-term economic development.[118] The structural adjustment demands exacerbated inequality and undermined the social justice foundations of the developing world, drawing a severe backlash from global civil society.

2.6.2 The financial tragic flaw undermines the Bretton Woods vision

The foundations of the Bretton Woods vision of fixed exchange rates and currency stability, already under severe strain in the 1960s, started to fracture when US trading partners in Europe and elsewhere started to face deflationary pressures to keep current account convertibility, and were forced to sell their gold reserves to support the dollar. The situation at this time was especially dire as the US itself was draining its financial resources in spending on the Vietnam War. The flood of money needed to fund the Vietnam War caused a rapid and dramatic increase in the inflation rate of the US, causing an outward flight from the dollar to the

German deutsche mark. In 1972, with its own currency under pressure, the British abandoned the Bretton Woods fixed-rate system. As other European nations started to abandon the fixed exchange rate system, it was clear that the foundations of the Bretton Woods systems had started to disintegrate. Faced with mounting inflationary pressures, President Nixon decided to suspend the convertibility standard that had, at least temporarily, kept the global exchange rate stable.

At this most fragile time, an embargo by the Organization of Petroleum Exporting Countries (OPEC) caused oil prices to quadruple, striking yet another devastating blow to the global economy. At the same time, the flood of petrodollars in the global capital markets created the incentive for increased capital flows and reckless lending in the banking and other financial sectors.[119] This unleashed the exact dangers that the architects of the Bretton Woods system had feared: unregulated and uncontrollable capital flows that would fuel global inflation, which itself would fuel inevitable financial crises.[120]

In response to the changes that were happening in the global financial system, the IMF amended its articles of agreement to endorse a floating exchange rate and created a new synthetic currency, the special drawing rights (SDR), which the quota holders in the organisation would use to fund its new roles. In order to keep its legitimacy, the IMF also amended its articles to oversee the emerging international monetary system and to focus on lending support to countries in various forms of economic crisis, but with the imposition of 'conditionality' requirements. Conditionality requirements focused on the reduction of social services expenditure, the promotion of capital liberalisation, privatisation and deregulation, including of the financial sector, and trade liberalisation in the developing countries and economies in transition.

These policies promoted by the IMF, the World Bank and the US became known as the 'Washington Consensus'. The shift from overseeing the global fixed exchange rate to promoting structural adjustment, technical assistance and economic development overlapped with the role of the World Bank, causing another form of global governance structural duplication and confusion.

Worse than the confusion, the *modus operandi* of the IMF, in dealing with financial crises, in some cases deepened the economic troubles of the countries they were meant to help. In return for providing financial and technical assistance to economies that were already in deep financial and governance turmoil, the IMF exacted structural adjustments and reforms. The imposed policies and close supervision of the IMF often entailed severe austerity cuts to social welfare programmes, a strategy designed to reduce public debt. Worse still, failure to agree to the IMF's proposed structural adjustment policies would result in a refusal of assistance from the World Bank. Given their desperate circumstances, the governments of those seeking IMF assistance had little choice but to agree. In effect, the IMF was acting as a super legislature on the countries in economic distress.

One of the most prominent former insiders in the Bretton Woods institutions, Joseph Stiglitz, a former chief economist and senior vice president at the World Bank, has described how this approach by the IMF and the World Bank Group actually contributed to financial ruin in the countries that the organisation was

supposed to help. According to Stiglitz, the Washington Consensus approach, taken by the IMF in its dealings with countries and regions in financial crisis, was focused more on facilitating a free market economy than on attempting to address root causes.

These root causes were different from country to country, and so the IMF's ideological one-size-fits-all approach was a disaster in the making for countries and regions such as East Asia, which were in the depths of financial crisis. For example, the IMF policies and supervision in Indonesia, as well as some of the other countries where assistance was being provided, failed to provide domestic banking and financial stability, while exacerbating the level of poverty, underdevelopment, government corruption and mismanagement. This in turn triggered a new form of moral hazard for future financial crises. Irresponsible lending and financing between global banking institutions and corrupt governments would perpetuate the same behaviour that triggered the original state of financial crisis, since there was always the possibility of a future bailout by the Bretton Woods institutions.[121]

The World Bank may have shared in the past failures of the IMF but, even according to staunch critics such as Joseph Stiglitz, it is attempting to learn from them. After digesting how much of its past lending and projects have been either ineffective or susceptible to corruption, the World Bank has reappraised its activities and changed its philosophy, from a single-minded focus on the Washington Consensus approach, to a more effective development-based approach, including an emphasis on poverty reduction and improving its relationship with its developing country clients and stakeholders. However, leading human rights organisations such as Human Rights Watch have rightly insisted that the World Bank must strengthen presently weak human rights protections in its safeguard policies.[122]

The rapid increase in private sector flows to the developing world, albeit temporarily diminished with the 2008 global financial crisis, has challenged the original mandate of the World Bank, as the central organisation responsible for realising the Atlantic Charter's vision of promoting freedom from fear and want. In addition, since the establishment of the World Bank, developed countries and economies in transition have been creating their own development banks and foreign aid agencies, to address their special regional or national interests in development assistance. This new phenomenon has the potential to render some aspects of the World Bank's work redundant.[123]

The weakening of the foundations of the high visions of the Atlantic Accord for the post-war global financial system was setting up the world for a series of global financial crises that was still reverberating across the world at the time of writing.

2.6.3 The tragic flaws in the Bretton Woods system trigger recurrent global financial crises and the urgent reforms to combat the tragic flaws

The first major series of financial crises occurred in 1982, when many African and Latin American countries experienced severe balance of payments deficits and were

forced to seek assistance from the IMF. Given the failures of the safeguards envisaged for the global financial system at Bretton Woods, it was inevitable that financial and currency crises would follow in Mexico (1994–1995), Asia (1997–1998), Russia (1998), Brazil (1999), Turkey and Argentina (2001–2002) and the Eurozone (2008–present).

What these financial crises, including the 2008 global financial crisis and the ongoing Eurozone crisis have in common is the failure to put free capital flows to a productive use, thereby increasing the general welfare of the international community in a sustainable manner. The massive flows of capital that went to Latin America in the 1970s were consumed by equally massive levels of corruption in the public and private sectors, leading to the debt crisis of the 1980s. Similar flows in the 1990s to the Asian tigers of Thailand, Malaysia and Indonesia created asset-inflated bubbles in the real estate and stock markets, which were made all the more dangerous in the economies where the local currency was pegged to the US dollar, as in Thailand. These factors led to the Asian financial crisis of 1997. Similar patterns of irresponsible lending in the 1990s led to Argentina's financial meltdown in 2002.

Ironically, the US, a substantial source of irresponsible capital flows, eventually fell victim to the same poor practices that had previously wreaked havoc on developing economies around the world. This happened through the irresponsible and, in many respects, fraudulent promotion of sub-prime mortgages, and the global marketing of their securitised form, in the early years of the millennium. When the 'housing bubble' inevitably collapsed in 2008, so did the US economy, which put the global economy on the precipice of another Great Depression. The weak banking and financial regulatory structures in the US, especially as regards the systemic risks posed by derivatives and hedge funds, was also a major contributor to the global financial crisis. Not to be forgotten in terms of culpability was the cooption of the ratings agencies, which were supposed to give accurate assessments of the risks inherent in the increasingly complex financial instruments that were feeding the global capital markets.[124]

The ongoing crisis in the 2011–2013 period in the Eurozone can also be traced back to the capital flows to those countries, a substantial amount of which was done within the European banking institutions through loans between banks and sovereigns, especially in the southern periphery in Greece, Italy, Portugal and Spain. The recklessness of the loans may also have been facilitated by the moral hazard underlying the knowledge that those countries would be protected by EU institutions operating under a common currency that was supposed to rival the American dollar as the world's reserve currency. This moral hazard was made all the worse by the assumption that the stronger economies of Germany and France would not allow the break-up of the Eurozone. The result was capital flows in the Eurozone that promoted profligate government spending, structural inefficiencies in the labour market and yet more speculative bubbles in real estate and stocks.[125]

Leading international financial experts Steven Radelet and Jeffrey Sachs have outlined a number of key factors that are common to the massive financial crises that have swept whole countries and regions, and that have the potential to do the

same to the entire global financial system.[126] In their analysis of the 1997 Asian financial crisis, the factors they outlined as the root causes also played a substantial role in the 2002 Argentinean financial crisis. With the addition of a few additional facets, the Radelet and Sachs factors can also be traced through the global financial crisis of 2008, which threatened the viability of the Eurozone, as will be briefly described below.

The factors that Radelet and Sachs claim led to the Asian crisis included the following:

- weakness within economies, especially poor financial, industrial and exchange rate policies
- over-investment in dubious activities resulting from the moral hazard of implicit guarantees, corruption and anticipated bailouts
- financial panic; more precisely, what began as moderate capital withdrawals gathered momentum with great speed and evolved into a full-fledged panic, because of weakness in the structure of capital markets and early mismanagement of the crisis
- exchange rate devaluations (e.g., Thailand in mid-1997 and later in the same year, Korea) that plunged the economy into crisis
- the ineptitude of the IMF response, especially in Indonesia, which may have actually exacerbated the financial crisis in that country.

Other experts, such as Joseph Daniels, gave the following additional factors:[127]

- transmission of shocks and contagion due to integrated financial markets as shown by both the US stock market crash of the 1980s, and the 2008 global financial crisis. Currency crises can easily give rise to regional contagion as the Asian financial crisis has shown
- increased risk from complex financial instruments, as illustrated by the 1995 Barings Bank derivatives fiasco and the long-term capital hedge fund bailout
- regulatory arbitrage, where financial institutions set up foreign offices to avoid domestic regulation and where the mega banks increasingly are able to avoid or even undermine the attempts of sovereign governments to regulate and skirt around the supervision of national banking regulators.

Radelet and Sachs argued that while most of these factors contribute to financial crises, the main culprits in the Asian financial crises were creditor panic and pegged exchange rates *preceding* devaluations.[128] There is a link between the two: when pegged rates become overvalued, countries are forced to deplete foreign exchange reserves to defend the peg. Ultimately, this strategy proves useless and forced devaluation occurs. When you combine the faulty peg rates with depleted reserves then the economy becomes vulnerable to creditor panic.

While structural vulnerabilities are certainly culpable, the greatest damage, in the view of Radelet and Sachs, occurs through the creditor panic that flows from situations where there is a high level of short-term foreign liabilities relative to the

short-term foreign assets available – the so-called impact of 'hot money'.[129] The short-term creditor knows that, in the event of a sudden and massive withdrawal of foreign capital, it must flee the country before other similar creditors do so, since there will not be enough liquid assets to pay off all creditors on short notice. The combination of recklessness, irresponsible government regulation and lending, which precipitated the Asian financial crisis, would reappear in the 2008 US financial crisis, with the securitisation of the sub-prime mortgages, and then spread to the rest of the world

Radelet and Sachs gave critical recommendations to reform the international financial architecture to deal with financial crises in economies, such as the one in Asia, that are increasingly relying on private funds rather than IMF bailouts.[130]

First, they recommended processes drawn from domestic bankruptcy proceedings in industrialised countries and international workout mechanisms for developing country sovereign debt. These could include a number of elements.

First, like the Chapter 11 Bankruptcy process in the US and sovereign debt workout mechanisms under the Paris and London Club committees, a new international mechanism should be evolved to impose a generalised standstill on the failing economies' debt-servicing obligations while bringing debtors and creditors, both private and public, for collective rollovers and debt renegotiation, while public sector funds also stabilise the banking system and prevent bank failures that could threaten the entire payments system. Radelet and Sachs pointed to the successful use of this process by Korea. Of necessity, such a generalised system of debt standstill has to be coordinated at the international level.[131]

Second, if the debtors are a large number of private firms, as was the case in Indonesia, the paucity of accurate information on the firms, especially if they are private and plagued with corruption and cronyism, will work with the weakness of the regulatory and judicial system to complicate any such generalised standstill. Reforms of corporate governance, accounting regulatory systems and judicial systems have to be dealt with on a national level, before international cooperation can become effective.[132]

Third, effective mechanisms must be put in place to stop international financial panics in emerging markets. Industrialised countries have developed domestic mechanisms to prevent such panics in domestic economies, such as lender of last resort, effective banking supervision and regulation, deposit insurance and bankruptcy laws. There is, according to Radelet and Sachs, a need for such institutions at the international level to provide a more solid foundation for the vulnerable capital markets. They claim that the IMF is not suited to be this lender of last resort in its present structure. They and others suggested that the IMF open a new facility that would be available only to countries that fulfil strict requirements, just as central banks allow banks to operate only if they meet certain standards, such as an effective regulatory and supervisory system for the banking sector.

Outside of crisis times, eligibility for such a facility could then lower a country's risk premium in international capital markets, creating incentives for vulnerable economies to set up effective national regulatory and supervisory institutions, especially in the banking sector. If a crisis were to occur, interim financing could

be obtained from the IMF without the controversial conditionalities, as these would probably already be met. Such a facility should not be used to prop up an overvalued currency and private lenders should be bailed in, rather than bailed out in such a process. Radelet and Sachs argued that such a facility would act proactively to prevent financial crises, rather than react to them ineffectually.[133]

Finally, national governments should consider restrictions of short-term capital inflows without reducing the total capital inflow. Radelet and Sachs seem to approve of Chile's taxation of short-term capital inflows during the Latin American crisis (by requiring a partial deposit of the foreign investment in a non-interest earning account for one year). They suggested that Chile's ability to avoid financial crisis in the wake of the panics in Mexico, Argentina and Asia can be attributed to these restrictions, as well as Chile's overall small stock of foreign short-term debt.[134]

If there can be said to be an upside to the reoccurring crises that have been engulfing the global financial system at an increasing rate over the last 15 years, it is that it has motivated reforms that have been long overdue. The extremely complex nature of these recurrent crises means that the IMF and the World Bank Group are recognised as relevant once again, and now have to prove their worth by helping to manage these crises and prevent their reoccurrence.

Global forums have been developed to assist them in this task. These include the Basel Committee of Banking Supervision, the Bank for International Settlements, various grouping of states, including the G8, which is made up of the most powerful industrialised democratic nations, the larger G20 group of industrialised and emerging economies and the even more inclusive G24, which meets periodically to coordinate its responses and interests as regards international financial stability. Indeed, past failures of the exclusive G8 to deal with the recurrence of financial crises in the global economy triggered the creation of a broader and more inclusive, Canadian inspired, G20. The results of the deliberations in these various forums led to the creation of the Financial Stability Board, where the most important financial regulators from the G20 countries work together to strengthen the stability of the global financial system.[135]

The IMF is also taking steps to strengthen its ability to stave off recurrent financial crises. This includes reducing the imposition of the infamous structural adjustment conditionalities, with the promise to make them more targeted and relevant to different forms of financial crises in the future.[136] However, the jury is still out as to whether the IMF is indeed talking the talk, given its full support for the severe austerity cuts to the budgets of the countries such as Greece and Spain, which are both well in the throes of the Eurozone debt crisis. Indeed, on 30 May 2013, once again the IMF acknowledged that it made mistakes in handling the Greek debt crisis and bailout, including miscalculating the immense damage the severe austerity cuts it demanded would cause to the Eurozone economy.[137]

The memberships of the IMF and the World Bank Group have both grown significantly since their establishment in 1945, with each having 186 members. However, the dominance of the US and Europe has continued, owing to their share of the governance quotas. This has led emerging economies and the developing world to demand greater power in the decision-making, if they are to

participate in improving the stability of the global financial system in a meaningful way. In 2006, the IMF annual meeting agreed to reform the governance of the IMF and increase the quotas for China and other emerging economies, along with the provision of additional support for the African executive director.

There have also been agreements to set up high-level commissions to study further governance reforms for both the IMF and the World Bank Group.[138] The severity of the 2008 global financial crisis and the Eurozone crisis has made all parties dealing with the global financial system acutely aware that any and all governance reforms directed at the Bretton Woods organisations and the large banks that can trigger systemic risks must have, as their primary focus, the deterrence of future financial crisis. The dangers of a truly global depression that the world narrowly escaped from after the 2008 global financial meltdown must be avoided at all costs.

There are signs that the IMF is even paying attention to some of the recommendations of experts such as Radelet and Sachs.[139] In 2008 the IMF established the flexible credit facility (FCF) and the exogenous shocks facility (ESF), which are accessible to member states that meet recommended macroeconomic standards. Together with the World Bank, they have been able to raise the limits on the financial assistance available to member states. The EU Member States have had to devise similar emergency funding mechanisms to deal with the spreading debt crisis in the Eurozone. These included the establishment of the European financial stability facility (EFSF) and the European stability mechanism (ESM), which have been designed specifically to bail out the imploding economies of Ireland, Portugal, Greece and Spain, while also coordinating efforts to recapitalise banks in the most troubled economies and provide financing conditioned on budgetary reforms and fiscal discipline. The European Central Bank is also supporting these efforts by making long-term liquidity available to banks.

By June 2012, 37 IMF member states had succeeded in raising US$456 billion in possible emergency funds to deter the spread of financial contagion in the Eurozone, and to assist the organisation in helping countries in severe financial crises. This emergency fund may be adequate to deal with the Eurozone crises in Greece, Spain and other countries. As a warning for the future, the IMF had stated that it may have needed additional global financing, of up to a stunning US$1 trillion, to save the global financial system if the downward economic spiral that had persisted following the 2008 global financial crisis and the ongoing Eurozone crisis had continued.[140]

2.7 Conclusion: massive winners that thrive on the tragic flaws drive massive inequality and instability in the global trade and financial systems

Globalisation has dramatically changed the global financial and governance system since the Bretton Woods multilateral organisations were created in 1945. In the 1970s, the total monetary value of global trade in goods and services exceeded the total amount of capital that flowed around the world in 1970. At the

time of writing in the middle of 2013, capital flows exceed 100 times the value of trade in goods and services.

As we have seen throughout the discussion of the Bretton Woods institutions and the WTO, there have been massive winners and massive losers from the deepening markets in goods, services and especially capital, across national boundaries. The wealthiest 20 per cent in the world cornered almost 75 per cent of the world's income in 2010. This has allowed capital to be deployed to areas where labour is relatively cheap and, in many cases, going beyond fair labour market competitive advantage and into the realm of exploitation. This is especially clear in the export processing zones of the developing world, as discussed above.[141]

The astonishing revolutions in high technology, transportation and telecommunications have facilitated the dramatic increase in the movement of goods, services and capital but not labour. Such development does not seem to have produced the benefits promised by the global free market, namely the optimal fair distribution of incomes and opportunities. While the dramatic increase in the liberalisation of global trade under the WTO and GATT has lifted hundreds of millions out of abject poverty and raised the living standards of millions of others, there is evidence of growing social and income inequalities within many nations across the developed and developing world. The frameworks and rules of global governance seem to be unable to address this major 21st-century challenge. Almost half the people in the world, approximately 3 billion, live on less than US$2.50 a day (or 1.4 billion on less than US$1.25 a day), 1 billion children live in poverty (with approximately 10.6 million dying before the age of 5), 640 million people are without adequate shelter, 400 million are without access to safe water and over a billion people are illiterate.[142]

Urgent capital is needed to free these billions from 'fear and want' if the promises contained in the original high visions of the Bretton Woods system and indeed those in the Atlantic Accord are to be achieved. Instead, hundreds of billions of dollars and other forms of capital are flowing around the world looking for easy and quick profits, often in risky assets in the developing and transitional economies. These assets are just as easily and quickly abandoned, causing devastating financial destruction and dramatic increases in poverty. While the most powerful examples of this originated in countries such as Thailand, Indonesia and Mexico, it would appear as though the chickens have come home to roost. The same capital flows were created in the US to support the ultra-risky sub-prime mortgages and their subsequent securitisation, which triggered the financial crisis in the US, and subsequently in much of the rest of the world.

A similar pattern of irresponsible financing in Greece, Spain and other Eurozone countries triggered the biggest financial crisis in Europe since the Great Depression, from which Europe is still struggling to recover at the time of writing. The austerity budget cuts and government spending restraints in both the US and Europe has impoverished and affected the futures of hundreds of millions of people in two of the richest parts of the world. At the same time, according to one

report, 25 of the wealthiest Wall Street financial traders took home US$25 billion in 2009 in compensation for their previous year's work.[143]

If ever there was a symbol of the tragic flaw in global governance, it would be the relative poverty of the world's most vulnerable people while there is growing surfeit of wealth of the world's most privileged. Some would even apply the description 'neo-feudal' to the present architecture of the global financial system.[144]

As globalisation produces massive winners while also producing massive inequalities both in developed and developing nations, there is evidence of growing social unrest and large-scale protests of those who are not benefiting from globalisation as demonstrated in Brazil,[145] Greece, Spain and other parts of Europe[146] at the time of writing. This will make combating the tragic flaws in this vital area of global governance a matter of global economic stability, along with economic sustainability and political survival of national governments.

The resistance to reforms from those who benefit the most from the present systems that create the systemic risks described in this chapter will be fierce and sustained as so well articulated by Professor John C. Coffee of Columbia University, a leading expert in this area.[147] However, those that see the dangers to the entire system if the tragic flaws in the system are not addressed will ensure the dialectic involving the fundamental principles of justice and human rights in these areas of global governance will also continue. The alternative is too depressing to contemplate.

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129 ibid 6.
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131 ibid 311.
132 ibid 303–304.
133 ibid 312–13.
134 ibid 308.

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139 For the list of the IMF efforts to deal with the global economic crisis see their website at http://www.imf.org/external/np/exr/facts/changing.htm (last accessed 22 July 2012).
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3 Corporate power and human rights

3.1 The transformation of global economic power: in search of power with responsibility

In Chapters 1 and 2 the development of international peace and security global institutions along with the global trade and financial institutions were examined in the aftermath of the Second World War. The lessons of history provide evidence that without carefully planned and fully developed institutions of global governance that are founded on universally accepted principles of justice and human rights, the international community would fall prey to the tragic flaw in global governance.

We have discussed how, in the case of both the UN and the regulation of the global economy and trade, there is a negative impact on the legitimacy of these institutions of global governance if these universally accepted principles of justice and human rights were absent or not respected in their operations. Yet the narrow, self-interested and ultimately self-destructive exercise of sovereign power alone or within these institutions of global governance continues to deny these lessons of history. In this fashion the tragic flaw persists, and from time to time even flourishes.

As we begin the third millennium, another area of vital concern to the global community is governance, even though the main players do not involve multilateral institutions of global governance. It is in the area of global commerce and industry that the main players are in some cases more powerful than nation states. Those players are multinational corporations (MNEs).

MNEs are corporations that conduct business in more than one country, either directly or through subsidiaries. They have enjoyed a meteoritic rise over the last decade. In 1993 there were only 37,000 MNEs, with 170,000 foreign affiliates. In 2012 there are more than 100,000 MNEs, with more than 900,000 foreign affiliates. According to *The Economist*, in 2012 their assets were estimated to be more than US$82 trillion, close to 15 times the same figure in 1990. These MNEs employ nearly 70 million people, a number that has tripled over the past three decades. Other benefits of MNEs include the adoption of capital, technology and innovation to the global economy and an ever-deepening integration of the global economy through trade and investment.

The global sales of these MNEs amounted to US$28 trillion in 2011, while exports of affiliates amounted to US$6 trillion, or one-third of the global trade

total, according to the United Nations Conference on Trade and Development's (UNCTAD) 2011 World Investment Report. Approximately one-third of world commerce involves intra-firm trade and the majority of technology transfers occur within the global production system. The foreign direct investment (FDI) of MNEs has become key to the global economy and growth, while also being vital to the emerging economies of the developing world. The global recession of 2008 had a serious effect on the activities of MNEs, causing a sharp drop in global FDI.

Paradoxically, in 2010, for the first time developing and transition economies received more than half of global FDI growth, even though approximately 73 per cent of MNEs are headquartered in the developed economies of Europe, Japan and America. China, Brazil, India, Malaysia and Mexico, along with other emerging economies, are also developing substantial MNEs, many of which have legal status as national commercial or trading companies.[1]

While the world's largest corporations are very powerful economic global players, there is a growing controversy as to the extent that they dominate the global economic, social and political power structures. Research done by an American organisation, the Institute for Policy Studies (IPS), found that in 1996 the top 200 of approximately 40,000 global firms rule over a huge share of the global economic activity. Most of these MNEs are more economically significant than the majority of developing countries, and control over a quarter of the world's economic activity.[2] The IPS claimed that of the largest economies in the world in 1995, 51 were corporations, while only 49 were national economies. In 1995, Wal-Mart, the 12th-largest corporation, was bigger than 161 national economies, including Israel, Poland and Greece; Mitsubishi was larger than Indonesia, the fourth most populous country; General Motors was bigger than Denmark; Ford was bigger than South Africa; and Toyota was bigger than Norway. Another civil society organisation has also pointed out that, despite employing less than one per cent of the global work force, 200 of the largest MNEs have sales equivalent to almost 30 per cent of the world's GDP.[3]

Such comparisons are done by comparing the GDP of national economies with the annual sales figures of the top 200 corporations. With the rapid decline of the US, and the global economy since the 2008 global financial crisis, the figures may be different today. Many economists would argue that comparing GDP figures with the sales revenues of corporations is like comparing apples with oranges, especially as GDP figures take into account the value of imports. Moreover, revenues often do not take into account the amounts paid for inputs from other corporations.

There is little doubt that if corporations are to be properly compared with the GDP of states, the economic power of corporations should be measured in terms of value added. Even with the more rigorous method, the results are staggering. Professor Brian Roach of Tufts University calculated that, in 2007, 29 of the world's largest 100 economies were MNEs.[4] In 2000, the world's largest MNE by value added was ExxonMobil, with a value added of US$63 billion. Roach asserts that this would make ExxonMobil's economy larger than the GDP of countries such as Pakistan, New Zealand, Hungary and Vietnam.[5] Others will no doubt contest the value added metric, but while the yardsticks may not be perfect, the

figures, at minimum, present an incontrovertible picture of the growing power of the global private sector.

Just as with sovereign states, with such enormous power there must be responsibility, not only in reality but also in perception. The responsible exercise of power by *de jure* or de facto organisations of global governance lay the foundation for their legitimacy. As has been discussed in Chapters 1 and 2, the legitimacy of the institutions of global governance is of crucial importance to their effectiveness and, indeed, existence. In Chapters 1 and 2, we saw that when institutions of global governance, such as the United Nations and the WTO, are not seen as responsibly carrying out the high visions originally cast for them, there is an inevitable backlash from many quarters, and in particular from civil society.

Whether the major MNEs, with their concentration of economic power wish it or not, they are significant players that have a major impact on the global governance agenda. It thus becomes crucial that they exercise such power with responsibility, unless they believe they have grown so powerful that legitimacy ceases to be an issue. Anti-corporate critics claim that this is already the case. This sentiment has motivated the massive street protests in recent years against the increasing power of the global private sector and its influence on major global governance entities from the IMF to the G8 and G20. The analysis of anti-globalisation theorists, such as that contained in the IPS study, is hotly contested by the supporters of the global private sector, who claim that the extent of the power of MNEs is vastly overstated and that most MNEs can be, and still are, highly regulated by the countries in which they operate, especially in the developed world.

Globalisation scholar Alan M. Rugman argues that it is a common mistake to associate the large economic size of MNEs with political power. While accepting that the largest MNEs have a greater economic impact than many medium and small countries, he argues that they remain bound by, and observe, the parameters of regulations and rules, set by governments and international organisations. He further argues that their political power is overstated because the main preoccupation of MNEs is with survival, profitability and growth.[6]

Supporters of the global private sector can also point to the vulnerability that even the giants of the corporate world are susceptible to, such as the vagaries of the capital markets, which can wipe trillions of dollars off share values and sales revenues, as occurred in the so-called great recession that started in 2008. During this period some of the largest global MNEs were teetering on the edge of potential bankruptcy, including the giant automobile corporations such as General Motors and Chrysler, which were only saved by a US Government bailout. Critics argued that this only reaffirmed their concerns about the power of MNEs, many of which were considered 'too big to fail'.

3.2 Case studies where corporate power is exercised without responsibility

What cannot be contested is the reality that the global private sector does have the power profoundly to corrupt the global political, social, economic and ecological

environment if it chooses to do so, or is negligent or reckless as to whether it does so. We will focus briefly on four areas to illustrate the link between the power of the global private sector and the attendant issues of responsibility.

3.2.1 Corruption

In 2013, the World Bank is still asserting that an estimated US$1 trillion is being paid in bribes every year.[7] This is equivalent to 3 per cent of gross world product. While various forms of corruption take place domestically and internationally, there is little doubt that a substantial part of this astounding sum involves MNEs, often in collusion with public officials, their families or corrupt agents, intermediaries or brokers. While the sums involved in corruption seem insurmountable, a turning point may have been reached at the end of the 21st century's first decade. In 2011, corruption was at the root of massive protests and revolutions around the world.

As discussed in Chapter 1, the Arab Spring in Tunisia, Egypt and Libya was triggered by the decades of rampant corruption by the ruling elites there, much of which involved domestic and foreign corporations. Even in the authoritarian states of Russia and China, daring and courageous mass protests have provided increasing evidence that, in the face of rampant corruption, citizens can no longer be cowed into silence. It must also be noted that Canada, Europe, Latin America (as witnessed by the massive demonstrations against corruption in Brazil in the summer of 2013) and the United States are not immune from growing public anger at corruption among local and national elites. Increasing anger by civil society has been fuelled by the perception that corporate fraud, greed and the cooption of the regulatory process by major corporations has resulted in mass unemployment and growing inequality.

One writer, Sue Hawley, citing OECD sources, claimed that as early as 2000 bribes by Western businesses were conservatively estimated to run to US$80 billion a year, which she asserted was twice the amount that the UN believes is needed to alleviate global poverty on an annual basis. The effect of corrupt activities by MNEs in the developing world is particularly devastating. Hawley succinctly puts it in the following words:

> They undermine development and exacerbate inequality and poverty. They disadvantage smaller domestic firms. They transfer money that could be put towards poverty eradication into the hands of the rich. They distort decision-making in favour of projects that benefit the few rather than the many. They also increase debt; benefit the company, not the country; bypass local democratic processes; damage the environment; circumvent legislation; and promote weapons sales.[8]

Hawley then proceeds to give compelling evidence of corporate complicity in each category of devastation wrought by corruption in the developing world. As a paradigmatic example of the corrupt activities of MNEs undermining the

economies and societies of developing countries, she gives the conduct of Westinghouse Electric Corporation in the Philippines in the early 1970s. The company won the contract to build a nuclear power plant in the country after allegedly giving the then dictator, President Ferdinand Marcos, US$80 million in kickbacks. The plant cost US$2.3 billion, three times as much to build as a comparable plant by the same company in Korea. The plant never went into operation because it was poorly constructed, at the base of a volcano and near a number of potential fault lines.

Hawley asserts the Philippine Government will be paying US$170,000 a day in interest on the loans taken to finance the construction of the plant until 2018, drawing desperately needed money in a poor country away from basic services such as schools and hospitals.[9]

The Iraq oil-for-food fiasco illustrates the devastation that MNE corruption can reap even on the right to life. In 1996 an exception was made to the UN sanctions placed on Iraq, following the invasion of Kuwait, to allow for the sale of oil to purchase food and humanitarian goods for Iraqi citizens, including the growing number of starving children. By the time the programme ended in 2003, after the illegal US-led military action, it was discovered that only US$39 billion of the US$64 billion worth of oil sales had been used to purchase food and humanitarian goods. After allegations of corruption and kickbacks surfaced, a UN investigation found that US$1.8 billion was diverted into corrupt payments, with more than 2,200 companies involved in kickbacks and illicit surcharges paid to the Saddam Hussein regime. What was even more staggering was that much of the food purchased was unfit for human consumption.[10]

The poorest countries in the world seem to be especially susceptible to the corrupt activities of foreign MNEs. Even countries such as Canada, which prides itself as a champion of the most vulnerable in the world, have been found guilty of exporting predatory MNEs. In 2002, Canadian company Acres International was convicted by the courts in Lesotho for bribing one of the key officials responsible for the establishment of the US$8 billion Lesotho Highlands Water Project. In 2004, this resulted in Acres International being blacklisted from World Bank projects for a period of three years. A German company had used the same intermediary in 2003, and was also found guilty of bribery. South African, French and Italian companies have also been charged with bribery in Lesotho, which is one of the poorest countries on the planet.[11]

A leading research organisation in South Africa found that the Philippines lost some 20 per cent of its internal revenues through corruption in the 1970s, while Nigeria and Zaire (now the Democratic Republic of Congo) respectively lost 10 per cent and 20 per cent in the same period.[12] Another 2008 study found that corruption reduces the effectiveness of industrial policies in developing countries and encourages business to operate in violation of tax and regulatory laws, while also discouraging FDI, as it acts as a tax on such capital inflows. The study claims that an increase in corruption levels from the relatively clean Singapore to the relatively corrupt Mexico is equivalent to a 20 per cent increase in the tax rate.[13]

There can be no doubt that the potential for immense damage to millions, perhaps billions, of people around the world, from corporate complicity in corruption, should be of serious concern for global governance. We will see further below how the failure to live up to ethical parameters in this area eventually triggered the evolution of international and domestic legal rules that imposed indirect legal obligations on the global private sector.

3.2.2 The health and safety of local communities: Bhopal almost 30 years later as a case study

On 3 December 1984, the need for the global private sector to be responsible for the health and safety of the local communities in which they operate was seared into the collective memory of humankind. That day, an accident at the Union Carbide pesticide plant in Bhopal, India, released a deadly cloud of methyl isocyanate, a poisonous gas made up of hydrogen cyanide, monomethyl amine, carbon monoxide and about 20 other toxic gases. This deadly concoction killed approximately 8,000 people within 48 hours, according to local reports. This figure does not take into account the spontaneous abortions and stillbirths that took place immediately after the accident.

Even in 2012, reports suggested that more than 120,000 residents were still suffering from illnesses related to the gas exposure. The true number of victims may be far greater, as more than 500,000 persons lived within the area exposed to the poison cloud. Local organisations claim that, as late as 1999, 10 to 15 people were dying every month due to the injuries and illness caused by diseases stemming from exposure to the gases. One organisation, the Bhopal Medical Appeal, has asserted that, at the time of writing, the death toll from the disaster was over 25,000. They also claim that Union Carbide, recently taken over by Dow Chemicals, continues to withhold information on the exact composition of the gases that escaped from the plant and their effects on humans, information which is vital for proper diagnosis and care. In addition to the leak, Union Carbide chemicals from the abandoned factory continue to contaminate local drinking water sources in Bhopal.[14]

Local clinics claim that diseases affecting the immune system and almost all major organs of the body continue to ravage the lives of local residents. However, a company official for Union Carbide pointed to 'studies by the World Health Organization and other institutions', which found that 'permanent damage is limited to a very small percentage of the exposed population and that the lungs, and to a lesser extent the eyes, are the only organs that sustained permanent damage'.[15]

While local organisations and residents were trying to hold the company responsible, through the courts and elsewhere, the company was trying to evade responsibility by claiming that the disaster was a result of sabotage by a disgruntled employee. In the end, the residents did not receive much in the way of redress. In 1989, under the terms of a US$470-million settlement worked out between the company and the Indian Government, each victim was to receive about US$600

in the case of injuries, and a maximum of US$3,000 in the case of death. This settlement fell far short of the claims by the victims and their families, which amounted to approximately US$3 billion. Local organisations protested that the sum was not even paid to all of those who had suffered, and that the US$470 million would not be enough to cover the years of medical expenses already incurred. Moreover, the accident had not only robbed the local residents of their physical strength, but had also robbed them of their sole source of income, physical labour. At the time of the settlement, provisions in the settlement granted company officials immunity from prosecution. The Supreme Court of India later struck down the immunity clause, but allowed the settlement to stand.

On 31 October 1991, the Supreme Court of India reinstated the criminal charges of homicide and other offences against Union Carbide and its officials, including its former chairman at the time of the accident, Mr Warren Anderson. Mr Anderson went into hiding early in 2000 to avoid a summons to appear in a US federal court, as part of a civil compensation suit against himself and the company. The Indian Government has also issued an arrest warrant to bring Mr Anderson and the company to face charges of 'culpable homicide' in the Indian courts. He and the company have refused to accept the jurisdiction of the Indian courts on these charges, in spite of a written decision by a United States District Court judge ordering that Union Carbide shall consent to submit to the jurisdiction of the courts of India. In the end, nine senior Indian officials from the Bhopal subsidiary of Union Carbide were held in custody for trial on the same charges, in the Bhopal District Court.[16]

On 31 August 2000, the federal court in New York dismissed a suit by activist organisations, seeking further compensation from Union Carbide on behalf of seven of the victims of the Bhopal disaster, as well as five survivors. The federal court accepted the pleadings of Union Carbide that these additional claims for compensation should be tried in the Indian courts.

On 6 February 2001, Union Carbide merged with Dow Chemical Company. Indian organisations urged Dow to accept the potential criminal and civil liabilities of Union Carbide and make adequate payments for medical care, as well as research and monitoring of the victims. They also called for the release of information on the leaked poison gas, compensation for the economic rehabilitation of those affected by the disaster and a clean-up of the contaminated soil and groundwater around the abandoned Bhopal Union Carbide factory. These local organisations claim that the early response from Dow Chemicals was to deny its responsibility for Union Carbide's activities in India, claiming that it was 'a different company'. An India-wide and international network of trade unions, student organisations, women's groups and human rights groups have formed a network in an effort to make Dow Chemicals assume responsibility for Union Carbide's liabilities in Bhopal. The anti-globalisation movement in India, and around the world, is also using the situation to support arguments protesting the lack of corporate accountability.[17]

In 2010, a committee of senior Indian Government officials urged their government to intensify its efforts to extradite Warren Anderson to India, and called for

more compensation for the families of those who had died in the disaster. Astonishingly, it was not until 7 June 2010 that a district court in Bhopal finally decided on who was responsible for the chemical disaster. The court convicted seven former Union Carbide executives of criminal negligence causing death, and sentenced them to two years in jail. Both the actions of the committee of ministers and the court decision resulted from the three-decades-long crusade waged by activists groups dismayed by both the inadequacy of the original settlement and the slow process of justice in the Indian judicial system.

As late as 2010, a study by the Indian Centre for Science and the Environment found that groundwater as far away as two miles from the factory contained levels of toxic chemicals 40 times higher than the permissible national limit.[18] On 23 March 2011, an Indian Court in New Delhi allowed the Indian authorities to seek the extradition of Warren Anderson, then 90 years old, from the United States.[19] Anderson has still not faced any criminal or civil trial for his role in what remains the world's worst industrial disaster almost three decades later. It is highly unlikely that, given his age and the passage of time, the American courts will permit Anderson's extradition.

The Bhopal tragedy is one of several 20th-century disasters that have shown the power of the global private sector to wreak havoc on the health and safety of neighbouring communities, triggering an outcry for the imposition of corporate responsibilities. One of the earliest global incidences of a similar nature was the poisoning of the population in the village of Minamata in Japan. Chisso manufactured acetaldehyde in 1932, which was used in the production of plastics. The manufacturing of acetaldehyde required mercury, which spilled into the bay where most of the villagers' seafood diet came from. In the 1950s, dead fish could be seen floating in Minamata Bay; local residents and animal life began showing widespread physiological signs of mercury poisoning.

In 1959, although there was clear evidence that the mercury from the Chisso plant's acetaldehyde wastewater was causing the poisoning, it was concealed from public knowledge. Instead, the company installed emissions controls and made consolation payments to victims. However, children began to be born with birth defects related to mercury poisoning, and the number of victims began to widen. It was not until 1970 that compensation was made to the majority of victims, and it took until 1977 before the clean-up of the contamination commenced.[20]

The pattern of immediate denials, downplaying or withholding vital information betrays a strategy of irresponsible activity by MNEs, which has had devastating impacts on local communities. Such an irresponsible exercise of power illustrates the tragic flaw in the institutions of global governance.

3.2.3 The environmental impact of corporate activities: the US$18-billion claim for damages against Texaco/Chevron for environmental damage in Ecuador

The involvement of Texaco with Ecuador – 30 years of oil production and environmental damage, followed by 20 years and counting of largely unsuccessful

transnational litigation – demonstrates the gap in global governance over the most powerful MNEs and their national partners. While much has been written about the environmental damage caused by Texaco's oil production in Ecuador, which is alleged to have affected sensitive environmental areas and vulnerable indigenous populations, much of the information is still contested.

What follows is an account of the most salient facts. In the late 1960s, before Texaco merged with Chevron in 2001, it had become the first energy company to enter into a partnership with the Government of Ecuador's national oil company Petroecuador, to develop oil production in the ecologically sensitive northern Amazon region of the country. It had agreed to take all reasonable measures, consistent with US and global standards, to protect what was considered to be a very fragile ecosystem and the living environment of five out of Ecuador's nine indigenous groups. According to one report, before oil production began, the five indigenous groups had lived and prospered for centuries in the rainforest, but owing to the impacts of the oil production, their numbers have plummeted from 15,000 in 1970 to approximately 800 in 2010.[21]

When Texaco stopped drilling after 30 years of production in 1992, it was estimated that some 19.3 billion gallons of highly toxic and potentially carcinogenic wastewater from the oil production facilities had been deposited in some 627 open pit ponds with no protective lining. The highly toxic wastewaters found their way into the numerous streams and rivers in the region, which were the main drinking source of the indigenous groups.[22] It is claimed that this was done to save the estimated US$4.5 billion that it would have been necessary to spend in order properly to secure the wastewater over the decades of production.

In subsequent lawsuits it was alleged that, at the peak of the oil production, some 4.3 million gallons of toxic water was dumped into the fragile rainforest every day. Reported levels of cancer rates and spontaneous abortions in the region increased dramatically, a result that indigenous claimants asserted was the consequence of drinking water that contained contaminants potentially hundreds or thousands of times higher than the levels considered safe by the American and European authorities.[23]

It is also estimated that approximately 16.8 million gallons of crude oil had been spilled in the same period, while a daily average of approximately 49 million cubic feet of natural gas was flared without any emissions controls. The oil production was operated by a consortium led by the Texaco subsidiary TexPet, in partnership with the state oil company Petroecuador. Evidence suggests that Ecuador essentially gave TexPet a free hand to manage the environmental consequences of oil production based on the professed expertise of the US parent company in oil production and environmental management.[24]

On 14 February 2011, after nearly 18 years of transnational litigation in Ecuador and the US, an Ecuadorian judge in Lago Agrio handed down a landmark decision on the environmental damage claims of the indigenous peoples and other affected individuals against Texaco/Chevron. After another eight-year trial, Ecuadorian judge Nicolas Zambrano ruled that Chevron was responsible for the devastating environmental damage caused by Texaco and issued a US$18-billion

award of damages against the company. It is the largest environmental damage award against any MNE in history.

According to current reports,[25] Chevron has hired an army of lawyers to contest the enforcement of the award in the US federal courts and other markets outside Ecuador, where its global operations bring in approximately US$200 billion a year, four times as much as Ecuador's output. The company has almost no assets left in Ecuador. Chevron insists that it has no responsibility for the environmental impacts in the Ecuadorian Amazon. The company claims that Texaco's operations were completely in line with the standards of the day, while also contesting the veracity of the devastating health effects on the indigenous peoples and blaming trial lawyers for perpetuating false information.[26]

On 30 May 2012, the successful claimants filed a lawsuit in the Superior Court of Justice in Ontario Canada, seeking enforcement of the US$18 billion award against Chevron's significant Canadian assets. However, on 1 May 2013, Ontario Superior Court Justice David Brown ruled that as the Texaco/Chevron company against whom the controversial award handed down by the Ecuadorian court had no assets in Canada, the courts have no jurisdiction to enforce such an award. The claimants plan to appeal, arguing that it is untenable that a multinational company that operates entirely through subsidiaries is immune from enforcement of a judgment in Canada.

3.2.4 The human rights impact of global private sector activities: a case study of Shell in Nigeria

1995 was a nightmare year for another giant oil company, the Royal Dutch/Shell group. In addition to being accused of damaging the marine ecosystem in the North Sea through the sinking of the *Brent Spar*, it also faced accusations of complicity in the executions of nine environmental activists in Nigeria. Their trials, judged as gross violations of the rights of the activists by Amnesty International, the British Commonwealth and most of the international community, and subsequently their executions, brought human rights to the forefront of discussions on the corporate social responsibilities of MNEs. The trials and executions were prompted by accusations by the Government of Nigeria that Saro-Wiwa, a well-known writer and opponent of the military dictatorship in Nigeria, had conspired to murder four pro-government Ogoni chiefs killed in political violence a year earlier. The fighting between the government and the Ogoni, the Ogoni and other tribal groups, as well as intra-Ogoni conflicts, had been fuelled by allegations concerning environmental degradation of the Ogoni lands in the River State, resulting from the oil production and distribution systems.

Other factors contributing to the violence were concerns that the Ogoni had over the distribution of oil production revenues. Saro-Wiwa had become a leader in the Movement for the Survival of the Ogoni People (MOSOP), which campaigned vigorously against the environmental damage being caused by oil production. Shell was the largest oil producer in the region, and indeed in the

whole country, and the activists blamed it for much of the environmental degradation affecting the food and water supplies of the Ogoni people.

In addition, Saro-Wiwa and other activists felt that more of the revenues earned by Shell and the other oil companies should have been returned to the Ogoni people, who were impoverished and suffering from the consequences of oil production without reaping any of the benefits from resources they considered their own.[27] Amnesty International and other groups asserted that General Sani Abacha ordered the executions to go ahead after a grossly unfair trial, in an attempt to crush MOSOP's campaign and remove the threat that Saro-Wiwa's growing popularity posed to the military dictatorship.[28]

Saro-Wiwa and the other eight activists were executed in November 1995, despite appeals from world leaders such as Nelson Mandela and other heads of state in the British Commonwealth. Protests around the world erupted against Shell for its complicity in the human rights violations perpetrated by Nigerian security forces, and for failing to use its power and influence to stop the executions of the MOSOP activists.

Some of these protests against Shell included attacks on Shell stations and condemnation from the press and civil society for Shell's lack of corporate social responsibility. The level of outrage was such that even employees and their families felt the sting of the criticism levelled against the company. At the time, Shell officials responded by claiming they had done everything they could to stop the executions through quiet diplomacy. Indeed, even after the executions Shell continued to assert that it was using quiet diplomacy to make its concerns known about the prospective trials of a further 19 Ogoni prisoners. Eventually, Shell retracted its position and, on 15 May 1996, issued a public statement calling for a fair trial and the humane treatment of the 19 Ogoni prisoners.[29]

Amnesty International revealed that Shell had also been at the forefront of other confrontations between local communities and security forces. In November 1990, a massacre of around 80 Etche tribespeople occurred at Umwechem after Shell had called in the paramilitary mobile police force in order to protect its oil facilities and employees. In October 1993, soldiers allegedly killed an Ogoni youth in the presence of a Shell employee, at a flow station. According to Amnesty International, even before the MOSOP activists' executions, Shell had expressed shock at these killings, and in 1994 developed a policy of refusing all offers of police or military protection in the Niger Delta. However, in 1996, Shell also admitted that it had in the past paid for imported firearms for the Nigerian police so that they could better protect Shell property and the homes of its executives. This was also the practice of many other oil companies in Nigeria at the time.[30]

The mining sector is also plagued with allegations of complicity in human rights abuses. For example, in February 2011 Human Rights Watch accused Canadian company Barrick Gold, the world's largest gold producer, of complicity in the alleged brutal gang rapes by private security personnel employed at the company's gold mine in Papua New Guinea. In a detailed report entitled 'God's costly dividend: human rights impacts of Papua New Guinea's Porgera gold mine',[31] Human Rights Watch identified the company's systemic failure to recognise the

potential risk of human rights abuses and, when these risks materialised, to respond adequately. The report also extends its analysis to record the failure of Canada to regulate the overseas activities of its companies, especially in the extractive industries, and urged Barrick Gold and other companies to address key environmental and health concerns with greater transparency and fulfilment of corporate social responsibility.

3.3 The abuse of corporate power: a direct or indirect role for international law?

From these case studies, it is clear that while MNEs can be of great benefit to the economic and social development of peoples around the world, they can also bring about devastating consequences to economic, social, environmental and human rights.

The rules of international law have been evolving in many areas of global governance, centred primarily on both the legitimate and sometimes illegitimate and irresponsible exercise of power by sovereign states. Given the growing economic, social and political power of MNEs, as described above, what role does international law play in dealing with the illegitimate and irresponsible exercise of corporate power?

The prevailing view of jurists and practitioners alike is that MNEs are not subjects of international law. This may surprise many non-international lawyers given the analysis in Chapter 1, which demonstrated how the evolution of international human rights law since the Second World War has established the responsibility of sovereign powers to respect and protect the universally accepted human rights of its citizens. Yet despite the increasing power and impact, both positive and negative, of the global private sector, the prevailing view is that legal duties can only be imposed on MNEs indirectly through domestic laws and legal systems. Since only states can be the subject of legal duties, the wrongful acts of MNEs can only be addressed through the positive obligation of states to prevent corporate wrongdoing.

However, the real-world impacts of corporate wrongdoing clearly demonstrate a significant gap in the attempts to regulate MNEs internationally. While the legal responsibility for corporate wrongdoing may rest with the territorial state, or the home state of MNEs, the sheer economic, social and political power of such corporations may hinder any preventive or remedial actions by the relevant state. The pull of massive potential revenues, allied with the weak regulatory and institutional capacities of some territorial states, can often lead to partial or total inaction on the part of the territorial state.

In authoritarian or oppressive states, the national government may be complicit in the wrongdoing. In some of the case studies described above, these factors played a significant role. Conversely, in some of the worst cases described above, the home state is either unable, under its own domestic law, or unwilling, for a host of economic and political reasons, to impose legal duties on MNEs who are engaged in wrongdoing outside their territorial jurisdiction.

For these compelling reasons, there are a few jurists who assert that corporations should be direct subjects of international law, even though the primary duty to impose those obligations rests with the state.[32] However, there is considerable opposition to this perspective. John Ruggie, the UN Special Representative (UNSR) of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, has strenuously argued that the main international human rights treaties do not impose direct obligations on corporations. Christopher Greenwood likewise argues that existing international law does not provide liability for corporations and consequently international law does not offer any rules regarding corporate wrongdoing.

Carlos M. Vasquez also argues that states would strongly resist direct duties on corporations under international law. He continues that international law could only be applicable to corporations if there is an international mechanism for enforcing the international norm against a non-state actor. He also argues that if such duties were backed by effective international enforcement measures, states would lose control over compliance with the norm and probably disregard it.

There are several multilateral conventions that seem to provide for the indirect imposition of duties on corporations. These include conventions dealing with bribery, nuclear liability, oil pollution and transportation of hazardous waste. However, these conventions still require states to implement them and enforce them through domestic mechanisms. The question that remains is whether there is any substantive reason why international law does not have the capacity to impose direct legal obligations on corporations, even if at present there does not seem to be any appetite on the part of sovereign states or the UN to go down that road.

3.4 Moving from the absence of hard law to soft law: the Ruggie framework

There had been high hopes that the reference in the preamble to the Universal Declaration of Human Rights (UDHR), which states that 'every organ of society' has a duty to respect the rights of others and refrain from acts aimed at the destruction of the rights and freedoms in the UDHR, could at least provide the foundation for soft law duties on corporations. It could be cogently argued that the reference in the UDHR to 'every organ' includes juridical persons such as corporations. Some would argue that the UDHR would impose soft law obligations on corporations not only to do no harm but to also take measures to ensure that their business partners should prohibit and prevent human rights abuses. While the UDHR has become part of customary international law, there is still debate as to whether it provides sufficient legal guidance to impose direct legal duties on non-state actors. However, it has become the foundation for other forms of soft law, at a variety of levels, including corporate, sectoral, national and global levels, discussed later in this chapter.

John Ruggie's 'three-pillar' framework is the most recent and most high-level attempt at a soft law framework for MNEs. It was established in his capacity as the

UN Secretary General's Special Representative in the aftermath of yet another failed attempt, in August 2003, to establish direct duties on corporations. At the time, the Sub-Commission on the Promotion of Human Rights, of the UN Commission on Human Rights, approved the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the norms). This document stated that the primary obligation of corporations was to promote, secure the fulfilment of, respect, ensure respect of and protect human rights as recognised in international as well as national law.[33] While promoted as a restatement of existing international norms related to corporations it was hoped that it would serve as a foundation for a binding treaty on the legal duties of corporations or become part of customary international law.

The norms met with fierce criticism from the global private sector, which claimed that they would represent a fundamental shift in the international framework for the protection of human rights, effectively removing the enforcement of human rights from the state and privatising it. Owing, in part, to such criticisms from the global business lobby, the norms were not adopted by the UN Commission on Human Rights. As a method of alleviating the backlash from supporters of the norms, the Commission asked the UN Secretary General to appoint a special representative to examine the relationship and duties of states and corporations in the promotion and protection of universally accepted human rights. John Ruggie was appointed as the UNSR for business and human rights.

In 2008 Ruggie proposed a three-pillar framework for the promotion of corporate social responsibility and human rights, known as the 'Protect, Respect and Remedy framework' (the Ruggie framework).[34] The approach taken by the UNSR is to focus on the state's duty to protect human rights, the corporate responsibility to respect human rights and the need for access to an effective remedy for those who are victims of corporate wrongdoing.

3.4.1 The state's duty to protect

In his April 2008 report to the UN Human Rights Council, Ruggie asserted that international law imposes a duty on states 'to protect against human rights abuses by non-state actors, including business, affecting persons within their territory or jurisdiction'.[35] In his 2009 report, Ruggie insisted that it is international human rights law that imposes this duty on states to protect individuals against abuses by non-state actors. In his final report of 21 March 2011, after the Council requested that he operationalise the framework, Ruggie presented a report entitled 'Guiding Principles on Business and Human Rights; Implementing the United Nations "Protect, Respect and Remedy" framework' (the guiding principles). These principles stressed that states must protect against human rights abuses, including those committed by business enterprises. This requires appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. These duties should include policies and laws relating to commercial transactions, investment treaties and contracts, and membership in multilateral institutions.

Initially, the first pillar of the Ruggie framework appears to provide a convincing theoretical response to the inability of global governance institutions to make corporations the direct subjects of international law. However, as the case studies above have demonstrated, the state's responsibility to protect as regards corporate complicity in human rights abuses can be illusory in practice. This includes where the weakness of the institutional capacity of the territorial state to protect human rights is combined with the enormous economic and even political power of the MNE. This unsavoury combination may not only forestall any ability by the state to protect the rights of its citizens, but the state may even be complicit in the corporate abuses, having been enticed by the profits from the MNE operation which may also involve bribery and corruption of the state's officials. There is a need for a much stronger first pillar of the Ruggie framework in the real world of the increasing global power of MNEs.

3.4.2 The corporate responsibility to respect

Under this pillar, John Ruggie seems to go out of his way to assert in the guiding principles that while corporations are included in the UDHR's concept of 'organs of society', they are not states and should not have the duties of states. In terms of international law Ruggie asserts that they do not have duties, but have responsibilities under international law. Ruggie insists that there is no general legal requirement for corporations to observe human rights under international human rights law. He argues that it is states that must impose those obligations indirectly through domestic legislation.

In the guiding principles, Ruggie argues that, in order to satisfy the responsibility to respect, corporations should 'avoid infringing on the human rights of others and should address adverse human rights impacts on communities with which they are involved'.[36] In his 2010 report, Ruggie suggested that MNEs can meet this responsibility by living up to the expectations on human rights as contained in soft law and voluntary corporate social responsibility (CSR) initiatives. In other words, the responsibility to respect is defined by the actual and potential human rights impacts that flow from the operations of MNEs, including those of its state, non-state, business and supply chain partners. The positive actions needed to fulfil the responsibility to respect include the incorporation and demonstration of due diligence for actual and potential adverse impacts on human rights from the corporation's operations and those of its partners.

While not imposing direct legal obligations on MNEs, Ruggie would argue that the responsibility to respect constitutes a universally applicable human rights framework for MNEs in all situations.[37] The guiding principles ambiguously refer to the content of this framework as being made up of 'core internationally recognised human rights', while also cautioning that corporations may need to consider additional human rights standards not contained in those core documents.

As the first pillar did, the second pillar of the Ruggie framework supports the status quo and it resists the direct imposition of duties on MNEs, the largest of which rival the power of most states. As demonstrated by the case studies above,

some of the most severe abuses arose as a result of the conscious complicity of MNEs in bribery and corruption, the devastation of local environments and the undermining of core universally recognised human rights and international criminal law standards. The consequences of these actions extend far beyond the operations of the MNEs and their partners, and can even infiltrate the political, social and economic rights of entire nations. What may ultimately be required is that the responsibility to respect must be backed up by the threat of effective judicial or other forms of sanctions which can provide a powerful economic and reputational disincentive against abuses of corporate power by the most powerful MNEs. Ruggie attempted to discuss that missing link in the last of the three pillars, the access to an effective remedy.

3.4.3 Access to an effective remedy

In this third pillar, Ruggie proposes that existing forms of remedies should be strengthened and made accessible. This includes domestic state remedies, internal and external corporate mechanisms for stakeholder grievances and the strengthening of national human rights institutions and complaints mechanisms under national and international soft law corporate responsibility guidelines.

In his 2010 report, Ruggie acknowledges that domestic state remedies are few in number, which tends to motivate alleged victims of corporate abuse to seek redress through the courts in the home states of MNEs, so far without much success. Ruggie also calls for more clarity around corporate group liability and the exercise of extraterritorial jurisdiction, which can create legal obstacles to the access of effective remedies. The guiding principles also allude to the legal, financial, social and political challenges of using the courts to seek effective remedies for corporate abuse.

It is clear that the last pillar of Ruggie's framework does not provide many substantial disincentives against abuse of corporate power that can result in grave human rights abuses as evidenced by the case studies described above in this chapter. It is also clear that the tragic flaw could be prevalent in the presence or absence of effective legal frameworks and institutions governing the global private sector. Initially there was hope, owing to the dramatic increase in the economic and political power of MNEs, that these new players would not be left outside the growing field of international human rights law, and would have to respect the fundamental rights of all peoples whose communities and lives they can impact on both with very good, but also with very bad consequences.

However, the work of John Ruggie has helped to cement the view of the UN, and most who work in international law, that corporations are not subject to direct duties under international human rights law, and that they can only be indirectly subject to such laws when the relevant state implements them. Instead of looking to law, Ruggie puts all his hope in the voluntary measures and soft law initiatives that have, since the end of the Second World War, been multiplying at a staggering rate. But the question remains: how effectively do these long-standing initiatives curtail the worst aspects of the tragic flaw in the global governance of

the private sector? The next section will assess the efficacy of these initiatives in curtailing the worst aspects of the corporate tragic flaw in global governance.

3.5 Human rights and corporate social responsibility in the global economy

Global economic power is now being shared between the nation state and the MNEs described above. When power is shared, the sharing of responsibility must eventually follow. Some of the most powerful MNEs refuse to accept this. Eventually, they will either be pulled along by other MNEs who do accept this responsibility or they will face the fate of empires, corporations and individuals who have failed to respond to history's call.

Writers whose views are influential among the business community, such as Charles Handy, have begun to argue that, to be sustainable, the role of business in global governance must go beyond mere profit-seeking:

> The principal purpose of a company is not to make a profit, full stop. It is to make a profit in order to continue to do things or make things, and to do so even better and more abundantly. To say that profit is a means to an end and not an end in itself is not a semantic quibble, it is a serious moral point.[38]

The evolving nature of the global economy combined with the growing societal expectations on the corporate world has created a new environment of corporate social responsibility risk that MNEs ignore at their peril. This environment of corporate social responsibility risk demands that the global private sector fulfil fundamental responsibilities to 'five generations of stakeholders' (described below), from shareholders to the local communities and the environment. Such responsibilities are not only ethical or social, but if the Ruggie framework is to have any effectiveness, they must become an integral part of the operations of MNEs and their partners. If neglected or undermined, as the case studies above demonstrate, the very survival and brand equity of the relevant corporations could be at stake.

There are now compelling public-opinion surveys that show that an overwhelming majority of citizens in Europe and North America want corporations to take corporate integrity into account, rather than simply the pursuit of profits.[39] Some writers, such as Michael J. Mazarr of the US-based Center for Strategic and International Studies, in advocating for the ethical and social responsibility duties of corporations, give the following reasons why corporations should be vitally concerned about the health of societies in which they operate:

- The need for a well-trained workforce to compete with foreign companies . . .
- The importance of relationships in a tribal world . . . [where] a firm's network of social and business relationships can provide it with a competitive advantage over other companies.

- Competition to attract mobile, talented knowledge workers. [Which means firms must] pay rigorous attention to employees' family issues . . .
- Retention and productivity [which] rise when workers are better treated, better educated and more in control of their own lives.
- Public image and trust. Increasingly, companies will compete for customer loyalty . . . As the knowledge era places more emphasis on values, businesses will increasingly be judged by their reliability as a civic partner.[40]

Recognising the impact of these factors on the global economy, the actors of the global private sector, states and multilateral organisations have responded by developing a cornucopia of codes of ethics, guidelines, statements of principles, reporting standards and, in some cases, the necessary implementation and verification systems. These codes can be divided into five categories:

- corporate codes and compliance systems
- sectoral and industry-wide initiatives (involving coalitions from civil society and the private sector).
- multi-stakeholder national and transnational guidelines and principles
- global standards and guidelines
- initiatives by multilateral organisations.

These codes, guidelines and standards all strive to create a shared set of voluntary standards, principles or guidelines, to fill the vacuum of responsibility created by the absence of direct legal duties in the global private sector. The following sections will explore the content of such voluntary measures and soft law initiatives by briefly examining each category outlined above.

3.5.1 Corporate codes

Through research based on extensive confidential interviews of dozens of officials from MNEs in Canada and around the world, Errol Mendes and Jeffrey Clark[41] have found that corporate codes of conduct tend to relate to corporate social responsibility risk issues derived from five generations of stakeholder expectation. The five generations, as adapted to subsequent developments, are also reflective of a move from the world view of corporations as players in a domestic shareholder economy to one where corporations are players in a global multi-stakeholder economy. The five generations of stakeholder expectations are as follows.

The first generation is focused on protecting the assets, business opportunities, legal compliance and intellectual property or confidential information of the corporation. This generation of issues, found in most codes, will refer to rules dealing with conflicts of interest, insider dealing, intellectual property, confidential information, use of corporate property, appropriate use of computers, the Internet, etc.

Found in most corporate codes, the majority of first-generation issues preceded the surge of interest in corporate ethics or social responsibility. This reflects the

view that all corporate activity should primarily serve the benefit of the corporation's shareholders. There was obviously great interest in these issues from shareholders and senior officials, as well as the boards of corporations, but relatively little from the general public, whose interest was limited to ensuring the survival of companies for employment and other macroeconomic concerns. Since these interests were so strongly linked to the corporate structure, strict compliance with these groups of issues became a key goal for most MNEs. However, strict compliance was directed primarily at employees, until Enron, Arthur Andersen, WorldCom, Lehman Brothers and other corporate disasters in the early years of the 21st century, which were primarily caused by the greed and malfeasance of senior corporate officials.

Many of these corporate implosions, characterised by the astonishing betrayal of employees, shareholders and the millions of people who rely on pension and mutual funds, involved senior officials who seemed blind to the conflicts of interest caused by huge self-granted compensation packages and stock options. These compensation excesses caused a virus of greed to infect all others involved in fraudulent financial statements, dishonest auditing, insider dealing and the cruel manipulation of investors. Ultimately, the greed, unethical practices and, in some cases, outright illegality in the global financial sector caused the entire global economy to teeter on the edge of another great depression at the outset of the 2008 global financial crisis.

The change of focus from conflicts of interests by employees to those in the senior ranks of the corporate structure and corporate boards is an example of the evolution of the corporate social responsibility risk issues, as the activities and societal impact of corporations evolve.

The second generation of issues that began to expand MNEs' understanding of the corporate social responsibility risk environment involves corruption, and the role that MNEs play in subverting the rule of law and integrity of public institutions around the world. The drive to insert rules on bribery and corruption in corporate codes increased dramatically in the late 1970s. This drive was precipitated by the Lockheed aircraft scandal, which swept through the consciousness of MNEs in Japan and the United States, and the Northrop bribery scandal, which led to the extraterritorial reach of the Foreign Corrupt Practices Act (FCPA), passed by the US Congress in 1977.[42]

The United States federal sentencing guidelines (FSG) also spurred corporate action in this area.[43] Eager not to be investigated by the US Justice Department for violation of the FCPA, or if they were implicated, to obtain a lighter punishment under the FSG, many MNEs started inserting anti-bribery and corruption rules, as well as strict compliance systems into their corporate structures.[44] It remains open to debate the extent to which strict compliance is a reality, despite the development of such compliance systems, considering competitive pressures and the lack of a level playing field owing to rampant corruption by some national resource companies.[45]

The third category of issues found in the codes of most MNEs relates to what some have called the voluntary stakeholders of the company, namely its employees,

its customers and its suppliers. As regards employees, the highly regulated jurisdictions that most MNEs in industrialised countries are subject to has prompted the insertion of employee-related provisions into the corporate codes of MNEs, as preventive measures against regulatory risk. These provisions concern such things as the health and safety of employees, non-discrimination and harassment, as well as provisions that relate to other employment and human resources issues and that promote teamwork, trust and the retention of valuable employees. Similarly, many MNEs have provisions relating to trust, loyalty and service or product quality guarantees (and more recently privacy guarantees) for customers. Similar commitments of trust and straight dealing are extended to suppliers.[46]

While these groups of responsibilities were of special interest to the voluntary stakeholders concerned, public interest in this area surged when the debate was launched over whether MNEs had the ethical responsibility to extend internationally recognised labour standards extraterritorially, to their employees or those employed by their sub-contractors in the developing world. Such interest reached its zenith in 1996, when Nike was stung with criticisms that its Asian factories and sub-contractors were brutal sweatshops where workers were underpaid and mistreated. Similar allegations swept across the clothing and retail sectors in the industrialised world.[47]

Consumer boycotts of goods allegedly made with sweatshop labour, in combination with labelling schemes attracting the attention of the so-called ethical consumer, began affecting the corporate risk environment of many of these MNEs. In addition to working standards, consumer boycotts have also proved effective in the context of unsafe products, as witnessed by the boycotts of Nestlé over its promotion of breast milk substitutes.[48] While regulatory and legal constraints encourage strict compliance of codes relating to domestic voluntary stakeholder issues, there has not been effective compliance, except in the case of a few leadership corporations, with codes relating to the interests of voluntary stakeholders in the operations of MNEs outside their domestic jurisdictions.[49]

This is particularly true of Asian MNEs and Western MNEs who source their goods from Asia and elsewhere without proper safeguards against exploitative and dangerous working conditions. The collapse of the building in Bangladesh in April 2013, causing the deaths of 1,129 textile workers discussed below is the prime example of this form of corporate tragic flaw. Voluntary stakeholders, whether they are employees, customers or suppliers, are the generators of market sustainability. If MNEs are interested in long-term viability, they must accept the fundamental ethical and social responsibility not to use their bargaining or market power to exploit their voluntary stakeholders.

The fourth group of issues that began to find its way into the codes of MNEs concerns the impact of corporations on two major sets of involuntary stakeholders: local communities and the environment. This group of issues became a central point of interest after the horrific tragedy in Bhopal and the allegations of environmental devastation in Ecuador by Texaco. In part, owing to the potential damage to brand equity and huge damages awards, MNEs in Europe and North America are increasingly beginning to give greater importance to these issues in their

corporate codes. This includes issues relating to environmental protection and conservation, sustainable development and meaningful consultation, as well as the fair sharing of benefits with communities.

This is one area where special interests within the narrower range of corporate stakeholders and the wider public may coincide to make the corporate social responsibility risk environment relevant to the formerly neglected two major sets of involuntary stakeholders. One group of corporate ethics practitioners claim that the fundamental duty of the global private sector, as regards the involuntary stakeholder group is to

> . . . not ignore nor externalize stakeholder impacts for which it has a primary responsibility . . .. An involuntary stake is created whenever a decision-making process exposes people to direct and significant risks which they would not willingly assume or about which they have no knowledge. When significant risks or impacts are treated as externalities and ignored unless otherwise required by law, the result with a few exceptions is the creation of involuntary stakeholders. Externalizing risks and costs transfers them to involuntary stakeholders who may have little to gain by way of benefits in return.[50]

As with voluntary stakeholders, externalising risks to the ecosystem or local communities can become exploitation or a violation of fundamental human rights, as some of the case studies above demonstrate.

Finally, the fifth generation of stakeholder expectations emerged amidst worldwide debate over the role of corporations in countries with oppressive regimes and in countries where there are gross abuses of human rights by governments and those acting in complicity with those governments. Notable examples were the role of MNEs during the apartheid regime in South Africa or the role of Shell and other MNEs during the military dictatorships in Nigeria, as described above, and in other parts of Africa. To this one could add the role of corporations in totalitarian regimes such as during the reign of the repressive military junta in Myanmar, as well as in Indonesia during the former dictatorships in those countries.

Much in the same way as the fourth-generation issues, the private interest of corporations in fifth-generation issues is starting to approximate to that of the public interest. This is due to the growing risks to brand equity, loss of property, security threats, violence and sabotage, threats of lawsuits and ultimately the loss of the investment, if a corporation is perceived to be complicit in human rights abuses. The public interest in this area is intense and growing, especially on the part of the activist civil society and human rights groups around the world.

There are increasing demands that MNEs live up to minimum internationally recognised standards of human rights wherever they operate.[51] The outcry by human rights activists and organisations has been the main engine driving this generation of issues, starting with the attempt to create the norms, which itself triggered the appointment of UNSR John Ruggie and the approval by the UN Human Rights Council of his three-pillar framework. While most MNEs are hesitant and cautious in approaching this fifth generation of stakeholder expectations

in corporate codes, some leadership corporations are showing the way, as we shall discuss below.

The five generations of corporate ethical and social responsibilities can be regarded as the voluntary measures framework for the corporate social responsibility risk environment of the global private sector. Most of the major MNEs around the world have developed codes, policies and practices in the areas of the first, second and third-generation rights. Leadership corporations have also tackled the fourth generation.[52] Studies have shown that implementation of the five generations of corporate responsibility has been disappointing in practice.[53] Other research has indicated that compliance seems strongest when it corresponds to the self-interest of the corporation, both in the short term and the long term.[54]

For this reason, it is primarily in the first-generation corporate integrity issues, namely conflict of interest and protection of corporate assets, where words in the corporate codes match actions. Even with the first three generations, where compliance only affects the vital long-term interests of MNEs, such as in the area of bribery and corruption, the words in codes are frequently only empty rhetoric, as the above discussion on corporate corruption reveals. All too frequently, corporations succumb to the short-term incentive to win a contract, at the expense of the integrity of the business environment. The destruction in early 2002 of the Enron Corporation, formerly the 7th-largest company in the United States, due to corporate fraud triggered by the highest level of insiders, is testament to the failure of MNEs to walk the talk on conflict of interest issues.

Too few MNEs have developed adequate corporate values and compliance integrity systems based on all five generations of ethical and social responsibilities in the corporate social responsibility integrity risk environment. Even those corporations that are in a leadership position and that have attempted to develop comprehensive provisions in these areas have only done so in reaction to environmental, social or human rights disasters in which they have found themselves. Paradoxically, this may not be a bad thing. The paradigm shift towards the notion of a corporate social responsibility risk environment may only occur when the largest and most powerful MNEs realise that *even they* are susceptible to ruin, should a discipline of ethical behaviour and social responsibility fail to govern their actions. The response of the Royal Dutch/Shell group to the human rights disaster in Nigeria is paradigmatic of such a shift.

When the 1995 crises in Nigeria and the North Sea hit Shell, together with the attendant protests and consumer boycotts, a senior Shell official was quoted as saying that the company suddenly realised 'how out of tune we were with the world around us'.[55] Two authors, Peter Schwartz and Blair Gibb (the former was a senior Shell insider), give an account of how the company resisted the instinct to become completely defensive on the environmental and human rights disasters in which it was implicated. Instead, it embarked on worldwide consultations and dialogue with stakeholders interested in all five generations of the corporate social responsibility risk environment, but with a special emphasis on the environmental and human rights experts and groups.[56]

In the spring of 1997, these consultations resulted in a revised worldwide corporate code of conduct binding on all Shell companies. The revised code, entitled

the Statement of General Business Principles (SGBP), was one of the few corporate codes that contain all five generations of ethical and social responsibilities, including specific references to a commitment to 'express support for fundamental human rights in line with the legitimate role of business'. Many NGOs have expressed dissatisfaction with the vagueness and limited extent of this wording, claiming that it amounts to nothing more than a public relations exercise. Schwartz and Gibb disagree. They argue that Shell's code represents a critical change in the core identity of this giant MNE, and by long-standing practice the code will become part of major contractual undertakings by Shell:

> A commitment to supporting human rights, in whatever form the company may define them, that becomes an equal or higher part of Shell's identity than its present values are could mean great changes indeed in the way the company operates. Shell's contracts with indigenous NGOs to provide independent monitoring of its operation in Camisea, Peru, and its newly promulgated Rules of Engagement for security forces may be early indicators of such changes.[57]

While Shell has taken steps to redeem itself, and trumpets the paradigm shift of its total acceptance of the full range of corporate social responsibility issues in its sustainability reports, the ghosts of the executed Ogoni activists still haunt Shell. This happens through the continuing condemnation from many anti-globalisation activists and relatives of the executed Ken Saro-Wiwa. It is easier to shape the future than it is to erase the past.

Other companies that have developed more comprehensive and effective codes and compliance systems following environmental, human rights or labour standards controversies include Rio Tinto, Nike and the Gap. Perhaps the real champions of the evolving paradigm shift in the corporate social responsibility risk environment are the corporations who incorporated all five generations of the ethical and social responsibility categories without being implicated in an ethical or social responsibility disaster. These champions, who were certainly ahead of their time, include Reebok, Levi Strauss, The Body Shop and the former independent Canadian energy company Nexen Inc. Many of these companies were at the forefront of corporate social responsibility and integrity in the 1990s, beyond the five generations discussed above, and became catalysts in this area.

In 1991, Levi Strauss adopted its 'Global Sourcing & Operating Guidelines', which extended its ethical standards to its business partners. It also pulled out of Myanmar in 1992 when it felt it could no longer do business there without being complicit in the abuse of human rights by the military dictatorship.[58] Likewise, through its 1992 'Human Rights Production Standards', as well as other activities, Reebok has made the fifth generation of human rights compliance and promotion the hallmark of its corporate culture, within its own operations and within those of its business partners.[59] In a similar fashion, through programmes such as its 1994 'Trading Charter' The Body Shop made the environment, protection of indigenous and minority cultures, and human rights part of its own trademark.[60]

Finally, Nexen Inc, a formerly major independent Canadian oil and gas company (subsequently taken over by a Chinese state energy company, CNOOC), took a leadership role in drafting (together with 14 other corporations and the assistance of this author) an International Code of Ethics for Canadian Business, which was the first national code that incorporated all five generations discussed above. Adopting the code within its own corporate structures, Nexen had also promoted the code as a template for adoption by other corporations across Canada and internationally within the global oil and gas sector.[61] The human rights principles in the code were also incorporated into the Global Compact (GC) by the office of the Secretary General of the United Nations, as will be discussed below.

Most of these leadership companies had also developed the most effective independent monitoring and verification systems, which include public reporting to ensure that the words in their codes match reality. Indeed, some of these companies such as The Body Shop, Reebok and Levi Strauss have taken criticism from activist groups when the results of such independent monitoring have been made public. However, these companies have also been praised for having the courage and integrity to subject themselves to effective independent monitoring, verification and reporting.[62] Other MNEs, including Nike and the Gap who have developed comprehensive codes after painfully learning first-hand that corporations must assume greater social responsibilities, are also developing independent monitoring and verification systems.

In contrast to these examples of positive reinforcement of corporate integrity, most of the research done in this area indicates that a substantial number of corporations with codes that deal with human rights issues, which often do not match the comprehensiveness of the codes of the leadership MNEs, have very ineffective compliance mechanisms and virtually non-existent monitoring and verification systems.[63] Such public relations exercises, more aptly described as charades, are the antithesis of power with responsibility in the global private sector

The combination of proactive private sector champions of corporate integrity and giant MNEs who came to espouse the full range of corporate integrity issues after painful episodes has led to a dramatic burgeoning of activity within the field of corporate ethics and social responsibility.[64] This has also spurred an increasing interest in sectoral codes of conduct.

3.5.2 Sectoral and industry-wide initiatives (involving coalitions from civil society, states and the private sector)

In part, because of the lack of effective monitoring and verification systems, an increasing number of sectoral codes with their own monitoring and verification systems are emerging. The following few examples will suffice to illustrate.

In 1996, at the instigation and urging of former President Clinton, the Apparel Industry Partnership (AIP), a coalition of clothing and footwear MNEs such as Nike, Reebok and Liz Claiborne, together with labour and human rights NGOs, developed a Workplace Code of Conduct and Principles of Monitoring. After the initial coalition splintered into two over disagreements about how far to go, the

AIP transformed into the Fair Labour Association (FLA), which was tasked with certifying the independent monitors and, if necessary, expelling any MNE that fails to live up to the standards of the FLA Workplace Code of Conduct. The code is based on ILO labour standards and those of its member companies.

Electronic giant Apple has also committed to the independent monitoring of its worldwide operations and supply chains. This included independent and spot audits to ensure code and international compliance. The FLA claims that in 2011 alone, an estimated 5.5 million workers were impacted by the combined efforts of the civil society organisations, universities and companies that are working together as part of the FLA.[65]

Another sectoral initiative worth mentioning is the Chemical Industry Association of Canada's (CIAC) Responsible Care (RC) initiative. Asserting that the initiative aims at the betterment of society, the environment and the economy, the RC initiative claims that its ethics, principles, stewardship and sustainability mandate focus on innovation to produce safer, environmentally friendly products and health and safety processes that eliminate harm throughout the life cycle of the industry's products. Launched in 1985 by the CIAC (formerly the Canadian Chemical Producers' Association (CCPA)), many of its member companies were recognised as global leaders in business responsibility.[66] The International Council of Chemical Associations (ICCA) manages RC at the global level and through its work aims to extend RC to all chemical-producing countries.[67]

Reinforcing the inevitability that most sectors will come to accept the reality of the corporate risk environment, the RC initiative was developed in the wake of the Bhopal disaster. The programme was developed by industry associations first in Canada and then in the 50 sectoral associations in 60 countries around the world. The focus of the RC programme is ethics and principles for sustainability along with codes of practice aimed at the safe production, handling and transportation and environmental management and protection of chemicals throughout their life cycle. The corporate responsibility mandate of the sector takes on a collective character under the RC programme. For example, in Canada, the RC programme is managed by the CIAC, a pioneer of the global RC initiative. Membership of the CIAC is contingent on member corporations complying with the RC principles and its codes of practice, within a time limit of three years of joining the sector association.

In addition, there is a requirement to file an annual report on compliance with the CIAC, which is then shared with the public in the form of aggregate compliance data. An additional beneficial feature of the CIAC programme is that in one of the most decentralised federations in the world, with Canadian provinces and the federal government having different regulatory standards for the chemical industry, the RC programme has in effect created a single national programme and standards for the sector as regards the subject matter of the RC programme. Moreover, the programme provides a more effective single governance system than the various regulatory systems of the different levels of government in Canada.

Compliance verification is mandatory under the RC programme in Canada, which includes on-site visits by four external verifiers. These verifiers must consist of two industry representatives who are not affiliated with the corporation being

audited, and two other representatives, one of whom must be a community representative. Environmental NGO representatives have been part of many verifying teams. The corporation being inspected shoulders the cost of the verification and compliance investigation. In Canada, the RC programme is overseen by a national advisory panel (NAP), whose membership consists of 12–16 external and independent experts or members of civil society groups. The present NAP consists of academics (including this author), independent consultants and members of environmental NGOs. So far, the RC programme in Canada is receiving widespread acclaim both domestically and internationally.

The Forest Stewardship Council (FSC) provides a third example of attempted sectoral regulation within a particular industry. The origin of the FSC ironically lies in the failure of governments to agree to regulate the rapid deforestation of the most fragile ecosystems in the world, at the 1992 UN Earth Summit in Rio. When this was not achieved, environmentalists, labour unions, industry representatives and first nations came together to organise a voluntary market-based forest certification mechanism, to ensure healthy forests and strong communities. Through Canadian leadership, the FSC was established in Toronto, Canada in 1993. In 2012, there were 140 million hectares of FSC-certified forests in 80 countries worldwide, 20,000 suppliers of FSC-certified products and a dedicated market worth more than US$20 billion. It is the fastest-growing forest certification system in the world.[68]

The FSC has evolved into a global sectoral coalition that includes leading environmental groups such as Greenpeace International and major retailers of forest products including American-based Home Depot. The focus of this sectoral initiative is to monitor and ensure effective and sustainable forest management practices globally through voluntary third-party certification and auditing. The certification process provides both carrots and sticks, as those who meet the FSC principles, criteria and standards are entitled to market their forest products under the FSC logo. Those who do not or who are not involved in the FSC sectoral initiative may face boycotts or other consumer choice measures. These sectoral initiatives demonstrate that the promises of corporate social responsibilities can be turned into reality by collective action.

Other sector initiatives that may not have independent monitoring and verification components include the global financial sector's Equator principles. This initiative was first developed by 10 major banks in collaboration with civil society groups. The principles attempt to set a global financial set of benchmarks and screening mechanisms to assess and manage the social and environmental risks in major project financing, for loans of US$10 million or more or to project financing advisory services. The principles are based on the World Bank's International Financial Corporation's Guidelines and Performance Standards for this industry. However, the principles lack the effectiveness of the FSC or the FLA, given that they are non-binding. Their effectiveness is triggered when incorporated into covenants in major financing agreements. Such covenants could include the Equator principles' requirement for continuous monitoring and reporting by qualified and experienced external experts.

The dramatic increase in so-called ethical consumer product labelling marks another area where a range of sectoral and industry-wide corporate social responsibilities involving private sector standards is growing. Corporations and civil society collaborate in designating products in compliance with agreed-upon ethical or environmental standards relating to whether production was organic (without synthetic inputs, irradiation, food additives or genetic modification), fair trade (sharing of benefits with producers and fair labour standards), sustainable (food miles, sustainable management of fisheries) and non-toxic or environmental responsibility (green cleaning, eco-friendly cosmetics, etc.).[69]

It is beyond the limited scope of this chapter to detail the cooperative process by which these very diverse labels are established, but they bear similarities to the process that was engaged by the FSC. Research in such private sector standards and labelling has concluded that the growing proliferation of such initiatives is a result of significant changes in the structure of markets, governments, the private sector and civil society.[70] Some of these changes have resulted in the privatisation of regulation arising from the decreasing ability of governments to monitor and supervise a vast range of consumer products and a concomitant increase in the power of the private sector owing to globalisation, and the liberalisation and integration of markets.[71] In addition, the foundational principles of the global trade regime, such as the national treatment norm, may prevent governments from regulating many imported consumer products relating to production methods, as discussed in Chapter 2.[72]

Private sector standards may also be more attractive to governments committed to neo-liberal free markets, where such certification and labelling is seen as being more flexible, innovative and pragmatic than the legislative command and control.[73] There are, however, many challenges and limitations in the use of such private sector standards. Of particular concern are:

- the dependence of certification and labelling schemes on the interest and choice of consumers
- the difficulty in achieving sufficient commitment from producers and retailers along the supply chain, to become associated with a particular labelling or certification scheme such that the usage becomes standardised and necessary
- supply and demand constraints
- limitations of financial resources for the funding of independent assurance processes
- potential power imbalances between relevant stakeholders[74] and
- the potential of misrepresentation, for example through what is known as 'green-washing'.

3.5.3 Multi-stakeholder transnational initiatives

Multi-stakeholder transnational guidelines and principles are a variation of the sectoral codes and the inverse of the country-focused codes. These types of voluntary initiatives or attempts at soft law aim to encompass the moral authority of a

coalition of willing states, corporations and civil society organisations, to promote corporate due diligence and the avoidance of adverse-impacts approaches to the fulfilment of key social responsibilities.

The voluntary principles on security and human rights (VPSHR) are one example of this approach. The VPSHR are an example of what Ruggie calls the corporate responsibility to respect's focus on due diligence and avoiding adverse impacts.

The VPSHR were established in 2000 after the US and the UK led a multi-stakeholder dialogue with six MNEs, primarily in the extractive industries, human rights organisations, trade unions and an assortment of business and government officials. The goals of the VPSHR were to establish voluntary guidelines and due diligence processes to prevent MNE complicity in human rights abuses committed by military, police, or other private security forces that provide security for corporate operations, primarily in developing countries. The case study of Royal Dutch/Shell's troubles in Nigeria provides an indication of the degree to which security forces employed by MNEs can be complicit in grave human rights abuses. The company was one of the founding members of the VPSHR.

Since 2000 there has been an expansion of entities involved in the VPSHR, which in 2013 includes seven states, 12 NGOs, 21 companies and 6 organisations with observer status. The VPSHR set out broad guidelines relating to the use of these security forces, and suggest due diligence processes to avoid adverse impacts on the human rights of those who are affected by the use of these security arrangements. These include human rights risk assessments, regular consultations with relevant stakeholders, due diligence vetting of security contractors and the establishment of a process for voicing allegations of human rights violations, along with the monitoring of investigations of such violations. MNEs can also commit to abiding by voluntary international standards regarding proportionality in the use of force.[75]

While there is no independent verification or sanctioning process for the VPSHR, it was hoped that the VPSHR could be implemented by incorporating the due diligence commitments into binding contractual arrangements with the security forces used by MNEs. However, in most cases such private arrangements would not provide for realistic and effective access to remedial measures for victims of human rights abuses.

There have also been criticisms of the VPSHR in terms of the transparency and accountability of the participants in this voluntary initiative, owing to the confidential nature of much of the dialogue that takes place among the multi-stakeholders. In 2009, concerns about the record of some of the MNE participants led to a greater focus on local implementation, minimum requirements for participation, an emerging form of dispute resolution, accountability mechanisms and a form of public reporting.[76] The jury is still out as to whether these improvements to the VPSHR will fulfil the aspirations of John Ruggie's corporate responsibility to respect, at least in terms of the impact of MNE security arrangements on the human rights of people impacted by their global operations.

Until recently, one of the most effective multi-stakeholder transnational initiatives was the Kimberley Process certification scheme (KP), which attempted

to curtail the massive human rights abuses resulting from the sale of so-called 'conflict or blood diamonds'. The KP was an international governmental certification scheme established in 2003. The focus was on requiring governments to certify that shipments of rough diamonds were conflict free. The KP was initiated by one of the most effective civil society organisations, Global Witness,[77] in collaboration with experts from the Canadian organisation Partnership Africa, led by Ian Smillie. They initiated a global campaign to expose the role that diamonds played in fuelling nightmarish conflicts in countries such as Sierra Leone.

In 1998, pressure from the aforementioned civil society organisations led the key diamond-trading countries, MNEs in the diamond industry and key civil society organisations, such as Global Witness, to meet in Kimberley, South Africa. The goal was to establish a process to curtail the conflict that diamond certification triggers. After a three-year negotiation process, an international diamond certification process was established and endorsed by the UN, including the Security Council, at its launch in January 2003. Through an import-export certification process, participating governments are required to certify the origin of rough diamonds and establish controls to keep conflict diamonds out of the supply chain. Participating governments are expected to enact domestic legislation to implement the scheme, which includes provisions relating to packaging requirements, supply-chain custody warranties and the restriction of trade in rough diamonds to members of the scheme to the exclusion of all others.

In 2011, there were 75 governments who were participating in the KP. While the KP is focused on duties imposed on governments, the multi-stakeholder involvement of the diamond-producing MNEs and civil society organisations have official observer status at meetings and take part with member states in working groups and decision-making processes.

The KP has helped curtail the conflict diamond trade in some of the countries most affected by the resource conflicts. However, Global Witness, one of the key architects of the KP, has accused certain members of the process of repeatedly failing to address the trespasses of intransigent states, including Zimbabwe, Côte d'Ivoire and Venezuela. Therefore, in spite of the KP's successes, Global Witness still claims that diamonds are fuelling violence and human rights abuses.[78]

To remedy this, the NGO is calling for far-reaching reforms and the strengthening of political will; specifically, it would like to see a commitment to protecting human rights in member states, the establishment of an independent technical secretariat to provide critical support systems and the elimination of the consensus decision-making process, which presently acts to prevent member states from being held accountable for violations of the scheme. With reforms still not forthcoming, Global Witness became unwilling to stand by as its formerly successful initiative was turning into a talking shop. The NGO decided to leave the scheme it helped to create in December 2011.[79]

Another similar multi-stakeholder transnational initiative with a focus on a specific area of corporate social responsibility is the Extractive Industries Transparency Initiative (EITI).[80] Its goal is to support anti-corruption and good governance in resource-rich countries, through the verification and full publication of

company payments to governments and associated government revenues from the oil, gas and mining operations of corporations. The EITI was established by a multi-stakeholder coalition of governments, companies, civil society groups, investors and international organisations. All members of this multi-stakeholder group take part in the governance and decision-making processes of the EITI. The multi-stakeholder initiative can be seen as an attempt to link Ruggie's responsibility of states to protect human rights fight corruption with the MNE responsibility to respect and to prevent adverse impacts on human rights from corruption. The main weakness of this initiative is that it relies on the states that have the highest incidence of official corruption to sign up to EITI. It is only then that the MNEs are under a legal obligation to disclose payments to those governments.

If the viability of John Ruggie's corporate responsibility to respect framework is dependent on such multi-stakeholder initiatives then it is likely that a much stronger international legally binding framework for such multi-stakeholder transnational initiatives is required; otherwise, like the KP, these critical attempts to match MNE power with responsibility will prove ineffective.

3.5.4 Global guidelines, standards and initiatives for corporate social responsibilities

The first major attempt by the United Nations to develop a code of practice for what were termed transnational corporations (TNCs) began in 1977, with a draft code being completed in 1990. Within two years, it was dead. The TNCs and Western governments fiercely opposed to the code had killed it.[81] In the vacuum left by the inability of the institutions of global governance to act, a plethora of attempts by NGOs and business groups have endeavoured to develop codes of conduct, benchmarks and verification systems applicable to the global private sector. These codes all share a common weakness: they have been formulated by a limited number of participants, whether businesses or NGOs. They are also criticised for being too vague, too detailed or too rigorous for the global private sector to adopt and implement. There are a number of such codes, including the following:

- the SA 8000
- the Global Reporting Initiative (GRI)
- the Caux Round Table (CRT) Principles for Business.

The SA 8000 standard was established by Social Accountability International (SAI).[82] It claims to be one of the earliest world auditable social certification standards for decent workplaces worldwide and across all industrial sectors. The standard is based on the ILO labour standards and other key international and national laws in order to create a common standard for measuring social compliance. The goal of this worldwide certification standard is to encourage companies worldwide to adopt policies and procedures to protect the basic human rights of workers, which are then assessed by SAI-certified auditors.

The GRI is one of the world's most comprehensive and widely used sustainability reporting systems.[83] The GRI Sustainability Reporting Framework (GRI framework) is a tool that enables corporations around the world to measure and report on their economic, environmental, social and governance performance in four key areas of sustainability. Thousands of corporations around the world use the GRI framework to assess their own performance in these areas. The GRI itself is a multi-stakeholder organisation based in the Netherlands and has a global network of more than 600 organisational stakeholders and core supporters, including some 30,000 individuals representing different sectors and constituencies. The GRI also has strategic partnerships with the UN agencies and initiatives, the OECD and many other international organisations. While it can be regarded as one of the fastest-growing corporate social responsibility and sustainability reporting standards adopted by MNEs around the world, the weakness of the GRI framework is that it is entirely voluntary.

The Caux Round Table (CRT) Principles for Business are an attempt by a coalition of US, European and Japanese business leaders, with assistance from academics in Minnesota, to develop general principles of ethical behaviour and corporate social responsibility. Developed in 1995, the CRT principles are significant in that they demonstrate that there can be consensus on fundamental principles of corporate integrity across widely differing cultural traditions.[84] Given the importance of Japanese and indeed other Asian MNEs in global trade, the CRT principles are key to demonstrating that the global corporate social responsibility risk environment is not a mechanism of cultural imperialism imposed by Western societies.

While some critics have argued that the growing list of codes, principles, guidelines, reporting and verification systems by NGOs, business groups and multi-stakeholder initiatives have the potential to create a system overload, one could also present a more positive picture of all this activity. This plethora of initiatives, fuelled by the MNEs who comply with them, assisted by an army of firms and consultants, points to a growing global consensus that an increase in corporate social responsibility must accompany the increase in corporate power. One can see these initiatives as ripples coalescing in the pond of social responsibility consciousness of the global human family that should, indeed must, include MNEs.[85]

3.5.5 Initiatives by multilateral organisations

In the wake of the failure of the United Nations to promote a universal code, other multilateral organisations have attempted to develop their own. We have already discussed in Chapter 2 the positive development at the ILO in terms of the focus on core labour standards, which has led to the tripartite consensus on the 1998 Declaration on Fundamental Principles and Rights at Work. This declaration was preceded by the non-binding 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, aimed at encouraging the positive contribution of MNEs to the improvement of labour standards and in particular in areas covered by the ILO conventions to which, in theory if not in

practice, ILO members are bound. The tripartite declaration has been criticised as a weak and ineffective instrument for achieving change.[86]

Not willing to be left out of multilateral attempts to promote corporate responsibilities, the OECD Guidelines for Multinational Enterprises, first adopted in 1976, also attempt to set ethical, social, economic and, most recently, human rights standards for MNEs. The 34 members (as at 2012) of the OECD, together with Argentina, Brazil, Chile and Slovakia, adopted a revised version of the guidelines in June 2000. The standards apply to worker rights and industrial relations, environmental protection, bribery, consumer protection, competition, taxation, disclosure of information and, since 2000, a provision relating to respect for the human rights of those affected by corporate activities. The guidelines are voluntary standards that MNEs can incorporate into their compliance and management structures. The guidelines are accompanied by detailed but rather weak complaints procedures, involving national contact points (NCPs).

These NCPs can receive complaints, including from civil society groups, to investigate and seek to facilitate a resolution between the relevant parties. If there is no resolution, the NCPs can issue statements and recommendations. These recommendations can include suggestions for different sorts of remedies or reparations, but are non-binding on the MNEs or the relevant OECD member states. NCPs can seek assistance from the OECD Investment Committee regarding clarifications on the application of the guidelines. According to one study, since 2000, only 114 of the 146 complaints taken up for consideration by NCPs had been concluded or closed by 2009.[87] Given the weight of the OECD countries, which are home to some of the most powerful MNEs in the world, this multilateral effort to promote the responsibility of MNEs to respect the most important social responsibilities has not proved very effective.

Finally, UN Secretary General Kofi Annan, in a dramatic address to the global private sector at the World Economic Forum in Davos in January 1999, proposed that the world's most powerful MNEs enter into a GC with the United Nations and global civil society. The goal of this GC is to promote universal values in the area of human rights, labour standards and the environment. The global fight against corruption was later added. The acceptance of these principles is crucial if MNEs wish to see the benefits of globalisation sustained.

The Secretary General chose these areas for reasons that are fundamental to the evolving nature of global governance. The first reason is because he and others believe that in these four areas the global private sector can make a real difference. The second reason is because these are four areas in which universal values, according to the Secretary General, have already been defined by international agreements, including the UDHR, the ILO's Declaration on Fundamental Principles and Rights at Work and the Rio Declaration of the United Nations on Environment and Development in 1992.[88]

These critical foundational documents of global governance have been discussed in Chapters 1 and 2. The GC binds the discussions in those areas to the analysis in this chapter. The final reason given by Kofi Annan also binds the discussion and analysis in these first three chapters. He stated that the final reason

why these four areas of the GC were also chosen was that they are the ones that, in the absence of positive action, could pose a threat to the open global market, and especially to the multilateral trade regime.[89]

These words seemed prophetic, in light of what was to occur in Seattle and other cities and places around the world when individuals and civil society organisations have staged mass demonstrations against multilateral high-profile meetings of the G8, the G20, the World Bank, the WTO and the IMF. There is rising anger among these protesters about the deleterious effects of global trade, finance and the growing inequality within and among the nations of the world. The Secretary General pointed out that there is a need to 'humanise' the global market though effective promotion of human rights, labour standards and the environment, while enhancing the fight against corruption.

In light of these fundamental reasons for humanising the emerging features of global economic governance, the Secretary General outlined nine principles that the global private sector should embrace, through advocating a stronger United Nations charged with the principal responsibility for these three areas. Additionally, the Secretary General urged the global private sector to implement the principles within their corporate management practices and within their sphere of influence, and to work with UN agencies to aid in their implementation. In addition to the original nine principles, a tenth principle on corruption was later added after the establishment of the UN Convention against Corruption in December 2000. The 10 principles are as follows:

Human rights

- Business should support and respect the protection of international human rights within their sphere of influence and
- make sure their own corporations are not complicit in human rights abuses.

Labour

- Business should uphold the freedom of association and the effective recognition of the right to collective bargaining
- the elimination of all forms of forced and compulsory labour
- the effective abolition of child labour
- the elimination of discrimination in respect of employment and occupation.

Environment

- Business should support a precautionary approach to environmental challenges
- undertake initiatives to promote greater environmental responsibility
- encourage the development and diffusion of environmentally friendly technologies.

Anti-corruption

- Business should work against all forms of corruption, including extortion and bribery.[90]

The GC partnership was launched at a high-level meeting at the United Nations on 26 July 2000, which was attended by leaders and senior executives from over

50 corporations, representatives of labour, human rights, environmental, development organisations and academics (including this author).[91] By 2013, the GC had over 10,000 participants, including over 7,000 small and medium corporations and some of the largest MNEs in 145 countries. It now claims to be the world's largest voluntary corporate sustainability initiative. What drives such hope in the GC for sustainability is that 'putting a human face' on globalisation through the integration of the 10 principles will ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere and thereby contribute to a more sustainable and inclusive global economy.

There is no binding instrument or provision for an independent monitoring or verification system, similar to the FLA in the clothing sector or the FSC in the forestry sector, to ensure that MNEs stay true to the goals of the GC. Rather, the GC professes to be above all a 'values-based platform' to promote institutional learning and implementation of best practices based on the 10 universal principles outlined in the compact.[92]

The GC signatories committed to internalising the 10 principles into their corporate management practices and align the operations and strategies of its signatories with the 10 principles. It was intended to be a voluntary initiative that depends on its signatories to promote public accountability and transparency, as regards the 10 principles, and act as a complement to any legal duties and regulations on the global private sector. The GC also encourages its signatories to catalyse actions in support of the broader UN goals, including the Millennium Development Goals (MDG).

The signatories are to accomplish these high ambitions by engaging inter alia in the following practices:

- adopting established and globally recognised frameworks on the implementation of the 10 principles
- sharing best and emerging practices, partnering for sustainability solutions with a range of stakeholders, including the UN agencies
- linking across the value chain with local Global Compact networks
- accessing the United Nations knowledge of and experience with sustainability and development issues
- utilising UN Global Compact management tools and resources and specialised work streams in the environmental, social and governance realms.

In addition, the GC is establishing a learning bank of best practices in the 10 areas, as well as promoting partnership projects between the global private sector and other partners that reflect and advance the 10 principles.[93]

The human rights principles of the GC could appear to present the greatest challenges to the global private sector. These principles were based on the International Code of Ethics for Canadian Business, established by a group of Canadian private sector companies led by Nexen Inc. The author of this work was one of the principal drafters of the code, and assisted the office of the Secretary General in the formulation of the human rights principles in the GC. The

intellectual foundations of the human rights principles in the GC are based on the following premise.

There are few who would expect MNEs to duplicate the role of Amnesty International or Human Rights Watch. What is expected of MNEs, however, is that they appreciate the role they can play in promoting universally recognised human rights norms, and that they lead by example within their respective spheres of influence. The Secretary General gave some sound examples at the Davos Forum in 1999:

> Don't wait for every country to introduce laws protecting freedom of association and the right to collective bargaining. You can at least make sure your own employees, and those of your sub-contractors, enjoy those rights. You can at least make sure that you yourselves are not employing under-age children or forced labour, either directly or indirectly. And you can make sure that, in your own hiring and firing policies, you do not discriminate on grounds of race, creed, gender or ethnic origin.[94]

However, more difficult is the notion of non-complicity in human rights abuses. Here, there is a need for the global private sector to begin a dialogue on what constitutes both the worst and best-case practices. The international legal dimensions of complicity must also be taken into account, as will be further discussed below.

In 2005, a number of integrity measures were introduced to the GC to increase transparency and strengthen the compliance of signatories to the 10 principles. These measures were instituted to respond to criticism from civil society groups that the GC was weak and 'blue-washing' of irresponsible companies by the association with the UN. As a basic requirement of membership, signatories now have to submit annual communication on progress (CoP) reports, which are then made available to all relevant parties and publicly displayed on the GC website.

The consequence of failing to abide by the CoP requirements can range from being listed as 'non-communicating' and 'inactive' to eventually being delisted from the GC website. By March 2012, close to 4,000 companies had been delisted for not fulfilling this most basic of requirements and substantial numbers have been labelled as non-communicating. This process of penalising signatory non-compliance was regarded as crucial to the integrity, efficacy and advancement of the 10 principles. The integrity measures also include a complaints mechanism that allows for 'credible complaints of systemic or egregious abuse of the GC's overall aims and principles. The aim of this mechanism is to engage with the company involved and to work to align the company with its commitments to the 10 principles.

The ultimate sanction under this mechanism is to declare the company 'inactive'. Finally, the integrity measures also outlined what constitutes misuse of association with the UN and the GC, especially as regards the use of the UN emblem, and the possible sanctions that could flow from potential abuse, including the recourse to legal action for such misuse.[95] Even with the integrity measures, there

is still substantial criticism from academics and civil society groups that the effectiveness of the GC has not improved and that it remains nothing more than a public relations mask to provide MNEs with a human face.[96]

The fundamental monitoring and verification systems of the GC, and indeed of all the other variations of codes, principles, guidelines and multi-stakeholder initiatives described above, come from the realisation that with corporate power comes responsibility. If this does not happen, the backlash against this denial of responsibility, even among the MNEs who have endorsed the GC, will undermine the very sources of corporate power.[97] Before that happens, it is likely that there will be increasing attempts to impose greater legal duties on the global private sector directly, by domestic law, and indirectly, by international law, an area which the final part of this chapter will focus on.

3.6 The international legal duties of corporate officials and the global MNEs

As discussed in the context of the establishment at the UN of the Ruggie framework, the orthodox conception of international law is that it governs relations between sovereign states, with minor exceptions such as the rules governing international institutions. At the time these rules were developed, states were virtually the exclusive subjects of international law, with rights, duties, privileges and immunities given primarily to states and their representatives.[98]

However, as we saw in Chapter 1, this classical notion of international law is retreating under the onslaught of developments in international human rights law, and in particular with developments in international criminal law. As discussed in Chapter 1, the evolution of universal jurisdiction for international crimes and the establishment of the Ad Hoc International War Crimes Tribunals and the International Criminal Court (ICC), act as resistors against the narrow conception of territorial integrity and national sovereignty as the primordial *grundnorm* of international law. Some would argue that one of the main goals of international law is to regulate objects and behaviours that international society regards as harmful, destructive to peace and security, or beyond the norms of acceptable behaviour.

As discussed in Chapter 1, the international community is no longer seen as being limited to opaque territorial units. There has been a gradual realisation that beyond territoriality, sovereignty of nations must take into account individuals linking up across national boundaries, who see themselves as members of a global human family and who share common reactions to what is excessively harmful, destructive to peace and security, and beyond the norms of globally acceptable behaviour. This realisation is the result of the dramatic decrease in virtual space and time facilitated by technological advances such as the information revolution, among others, which have enabled the piercing of the territorial unit. However, while international law may not place direct duties on corporations, increasingly it will place indirect duties on key officials within the corporation or on the corporation itself, through the incorporation of legal obligations in multilateral treaties or agreements through domestic legislation.

Under the evolving rules of international criminal law, if employees or officers of a corporation are directly linked to war crimes, crimes against humanity, genocide, torture or other international crimes under customary international law, they could be prosecuted in their home country or potentially any country, under the principles of universal jurisdiction. As we have seen, a backlash followed attempts to prosecute some of the highest-profile political leaders for crimes under universal jurisdiction, leading national legislations to impose a substantial nexus between the prosecuting state and the alleged international crime. They could also now be prosecuted under the Rome Statute of the ICC, if the threshold of complementarity is satisfied.

Under Article 25 of the Rome Statute of the ICC, a corporation as an entity cannot be prosecuted for a crime under the statute. However, when an employee or officer of a corporation knowingly 'aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission' or 'in any other way, contributes to the commission or attempted commission of such a crime', those individuals can be subject to prosecution.

Examples include the allegations that some coffee companies in Rwanda aided in the genocide by storing arms and equipment used in the massacre, and that individuals at a local radio station, Radio-Television Libre des Milles Collines, helped create the environment that precipitated the genocide by broadcasting hate propaganda. In December 2003, the International Criminal Tribunal for Rwanda convicted three former media executives of the radio station for being key individuals in the radio campaign to incite ethnic Hutus to kill Tutsis in 1994. This included the broadcasting of lists of people to be killed and where to find them.[99]

These provisions should be taken very seriously by MNEs, in their decisions on where and how to invest in conflict zones around the world. For example, an oil and gas MNE invests in a conflict zone. As part of its operations it builds an airstrip, which is then used, with the knowledge and consent of the corporation, as a military staging post for bombing campaigns on civilians, as part of the genocidal strategy of those in power. There could be international criminal liability attaching to the officers of such a company, which would destroy the reputation of the corporation in its worldwide activities. This highlights the need for a corporation to engage in a comprehensive risk assessment before investing in conflict zones, as it is often too late to do anything about such a situation after a corporation has invested in the operations and built the airstrip.[100] The possibility of such complicity in international crimes should be a key factor in the decision of MNEs to invest in conflict zones around the world.

Other forms of complicity that could engage the international criminal liability of corporations include the following scenarios.

First, corporations could exert pressure on governments to crack down on certain parts of society that may be opposed to some of the corporation's activities, which could lead to executions, torture and other forms of human rights abuses. There have been many allegations of such corporate complicity in developing countries with authoritarian governments.[101]

Second, corporations could contract or agree with governments and local officials to authorise army or police personnel to use deadly force against civilians for site and personnel security, or to encourage forced labour on corporate projects. Again, there have been allegations of corporate complicity in such situations in developing countries with authoritarian governments.[102]

Third, corporations could encourage rebel groups to use child soldiers and to inflict heavy civilian casualties to gain access to mineral wealth. Tragically, allegations of such corporate complicity are frequent in the many conflict zones in the African continent, where there also happens to be abundant mineral wealth. The human rights disaster in Sierra Leone that culminated in the trial and conviction of Charles Taylor described in Chapter 1 is just one sad example.[103]

The next tier of indirect international legal duties of the global private sector comes from what some may term the commercial or white collar crimes of MNEs, such as bribery and corruption, money laundering and complicity in organised criminal activities. As discussed above, such crimes should not only be viewed as commercial or white collar crimes, but should be regarded as a cancer of the International Bill of Rights, profoundly affecting both the civil and political rights and the economic, social and cultural rights of billions around the world.[104]

The emergence of major corporate complicity in bribery and corruption as described above led the Government of the US to strike back in the form of the 1977 Foreign Corrupt Practices Act, with its extraterritorial reach to most of the major MNEs in the world through their links with US capital markets. Since then, the United States has led a ferocious campaign[105] to ensure that most of the major industrialised countries in the world develop anti-bribery and corruption treaties, and then to agree to implement their provisions in their respective private sectors.

The focus of attention in this regard was not the United Nations, where treaty obligations have become diplomatic decorations as discussed in Chapter 1. Instead, the industrialised world gave the mandate to the OECD, the club of rich industrialised nations of the world, together with some aspiring developing nations. The United States and others leading the anti-corruption fight knew that multilateral norms stood a greater chance of being implemented domestically, at least in the industrialised world, in the home jurisdictions of the vast majority of MNEs, through the OECD rather than the United Nations.

In 1997, based on the initial recommendations of the OECD and on discussions with its members since 1995, OECD members and several non-members successfully concluded negotiations on the creation of a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Bribery Convention), which came into force on 15 February 1999. All 34 members of the OECD, comprising the vast majority of the most industrialised nations, have signed the Convention together with five non-members: Argentina, Brazil, Bulgaria, Russia and South Africa.[106]

More importantly, as at 25 June 2012, all 39 of the signatories to the Convention have passed implementing legislation that is now in force.[107] The OECD describes the Bribery Convention as targeting the offering side of the bribery transaction, to eliminate the 'supply' of bribes to foreign officials. Each signatory

accepts responsibility for the actions of its own MNEs, if they engage in corrupt activities anywhere in the world. This is done by legislating a clear definition for the bribery of foreign public officials and imposing deterrent sentences on officials and employees of corporations, as well as the corporation itself, who violate such provisions.

The Convention also provides for mutual legal assistance to make compliance with the Bribery Convention more effective. In addition, the Convention has a mechanism for regular coordination through a working group on bribery, and requires signatories to initiate programmes to follow up and monitor effective compliance with the provisions of the Bribery Convention.[108] The OECD working group is also tasked with monitoring the performance of each signatory to the Convention.

The Convention is a prototype of how international legal duties on MNEs will increasingly be created in areas where the global private sector has either failed or not shown sufficient progress in self-regulation through the development of ethical and social responsibility regimes described above. There may not be a direct imposition of international legal duties on MNEs, as in the case of direct involvement or complicity in serious international crimes by MNEs; however, the indirect imposition of international legal duties on MNEs through effective multilateral treaties, promoted by multilateral organisations with political clout such as the OECD, is potentially the most effective form of legislating corporate responsibilities which promote the exercise of power with responsibility.

Indeed, the OECD itself has followed up its success with the Bribery Convention with other recommendations that place an expectation on member countries to take steps to ensure that corporations have adequate accounting and other internal controls and audit systems to deter corrupt activities. There are also OECD recommendations for combating corruption in the area of public procurement, including aid-funded procurement, the disallowance of tax deductibility of bribes and money laundering.[109]

The United Nations has followed suit with declarations, in 1996 and 1998, against the bribery and corruption of public office holders. In December 2004, the UN General Assembly also adopted the wide-ranging but as yet unproved Convention against Corruption.[110] By 2013, 167 nations had signed and ratified this global anti-corruption treaty. UN-affiliated agencies have also developed anti-corruption programmes that would directly or indirectly penalise MNEs and include criminal charges against corporate officials that are involved in programmes for corrupt activities. These agencies include the World Bank and the United Nations Development Programme.

There have also been several regional initiatives along the same lines. Noteworthy in this regard are the increasing efforts in the Americas to combat this evil, which has afflicted too many of the nations in the Americas. In 1996, the Organization of American States (OAS) established the Inter-American Convention against Corruption, which came into force in March 1997.[111] Like the OECD, the OAS has developed a 'mechanism for follow-up' that supports the implementation of the Convention through a process of reciprocal evaluation by member states.[112]

A similar imposition of indirect international legal obligations is being placed on MNEs and culpable corporate officials in an ever-increasing number of areas, from the environment to the implementation of the multilateral environmental agreements discussed in Chapter 2 and, more recently, money laundering.

In response to the growing influence and power of global organised crime, and a critical need to launder money derived from illegal activities, the G7 finally developed a framework to ensure that MNEs in the financial sector of their home jurisdictions were joined in the battle against this growing global criminal activity. The Financial Action Task Force (FATF) was established at the G7 Summit in Paris in 1989. In April 1990, the FATF produced a set of 40 recommendations for the establishment of a comprehensive framework to combat money laundering. Since then, membership of the FATF has expanded to 36 countries and two regional organisations. The recommendations were revised in 1996, 2001, 2003 and, most recently, in 2012 to ensure that they remain relevant and are universally applicable.

The focus of these FATF recommendations is to develop standards and countermeasures against money laundering, and more recently terrorist financing, corruption, the proliferation of weapons of mass destruction and other related threats to the integrity of the international financial system. The FATF monitors the progress of its members in key areas covering the criminal justice system, law enforcement and the legal regulation of the financial system. It also contains mechanisms for multilateral monitoring, self-assessment and peer review.[113]

The enforcement regime developed by the FATF provides another evolving paradigm for the indirect enforcement of legal obligations of MNEs. Where the financial institutions of member countries are not in compliance with the FATF recommendations, a graduated approach aimed at enhancing peer pressure on member governments is taken, with the aim of tightening anti-money-laundering systems of the member state in question. As a final sanction, if violations of the recommendations are ongoing, membership in the FATF is suspended. The suspension then becomes a signal to the international community that the suspended country and its financial institutions are unfit to undertake legitimate financial transactions. Therefore, there are substantial legal and economic incentives for member states and their financial institutions to comply with the FATF recommendations.[114]

In contrast to these forms of indirect international legal obligations of MNEs, there is a growing trend towards advocacy and jurisprudence that supports the imposition of direct international legal obligations on MNEs, through decisions of regional human rights tribunals and the treaty bodies of multilateral conventions.

As discussed in Chapter 1, there is a strong argument that the principles of the UDHR have become binding on all member states as a matter of customary international law. As was also discussed in Chapter 1, the rights in the UDHR were translated into binding treaty obligations for signatories to the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. In addition, the preambles to both these covenants state that the individual is under a responsibility to strive for the promotion and observance of the rights recognised in both documents.

As further discussed in Chapter 1, in legal terms, regional human rights treaties have further entrenched these rights. The African Charter on Human and Peoples' Rights imposes duties on individuals to respect fundamental rights. Similarly, the American Declaration of the Rights and Duties of Man includes an entire chapter on individual duties. Provisions in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Elimination on All Forms of Racial Discrimination also direct states to prevent violations by a range of entities and individuals, including corporations.

One could also make a strong argument that any references to the duties or responsibilities of individuals in human rights documents can be translated to legal persons such as corporations, and must at the very least apply to the individual employees and officers of such artificial persons. While many, if not most, of the signatories to these binding treaty obligations treat their ratifications as diplomatic decorations (as discussed in Chapter 1), these international legal obligations could, and in specific instances do, extend to MNEs indirectly under the decisions of regional human rights tribunals or by treaty bodies under international conventions or under domestic legal rules.[115]

These last categories of direct and indirect legal obligations are subject to less stringent enforcement and compliance systems[116] than those put in place by the ad hoc international criminal tribunals of the Former Yugoslavia and Rwanda or potentially the international criminal law regime presided over by the ICC, as described in Chapter 1. They are also subject to less powerful regimes than have been created by the OECD in the area of bribery and corruption, or by the G7/8 in the area of money laundering. However, the forms of indirect international legal obligations on MNEs and culpable corporate officials are rapidly growing as evidence mounts that a global free market without mechanisms for corporate accountability can lead to profound abuses of power by those who can deploy more influence and resources than many sovereign nations. MNEs that are in a position to wield such power and that fail to understand the imperatives of the corporate social and ethical responsibility environment become free riders on those who do. Therefore, international legal duties, both direct and indirect, will be backed by increasingly effective enforcement and compliance systems.

Until a controversial decision of the US Supreme Court of 17 April 2013, human rights activists asserted that an example of this tendency at the national level was the growing efforts by those who see themselves as victimised by MNEs with major assets in the United States to initiate civil actions under the elderly Alien Tort Claims Act 1789 (ATCA).[117] Initially passed to prosecute acts of privacy, the relevant provisions of ATCA state that: '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Since the start of the landmark 1997 litigation in *Doe v Unocal*,[118] which eventually ended in a settlement in 2002, actions brought under ATCA had allowed, under certain conditions, foreign claimants to sue American and foreign corporations in the United States for damages for aiding and abetting violations of fundamental customary international laws in the area of human rights.

Since 1997, there have been more than 50 civil actions brought against corporations under the ATCA, which have alleged various degrees of corporate involvement in human rights abuses by actions of foreign state actors. Virtually all of them have either been dismissed or settled prior to being allowed to go to trial. By 2010, there had only been three cases that had gone to trial by jury. These cases resulted in two judgments against the corporate defendants. Only one of the two judgments was a full jury trial, the other was a default judgment. The settlements provide something of a mixed bag. While the dozen or more settlements reached in the ATCA litigation are confidential, it has emerged that, considering the amounts originally claimed by the claimants, a number of them favour the defendant corporation.

It is beyond the scope of this chapter to describe and analyse the often conflicting and controversial decisions and settlements that arose out of the civil actions against MNEs under the ATCA. There are sufficient and authoritative scholarly works that accomplish that task.[119] However, the hopes of the growing number of claimants using the ATCA against MNEs may have been dashed by the 17 April 2013 ruling of the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co*.[120] In this ruling the Court held that the presumption against extraterritoriality applies to claims under the ATCA and there was nothing in the Act to suggest it could be rebutted. The Court therefore decided that US federal courts did not have jurisdiction to hear the cases of Nigerian claimants alleging that Shell had assisted the Nigerian Government in grave human rights abuses against individuals who were protesting against the environmental practices of the company.

The Court made a point of noting that the allegations took place outside the US, but added that even where allegations concerned the territory of the US, they had to do so with sufficient force to displace the presumption against extraterritorial application. Even the partly dissenting opinion of Justice Breyer joined by Justices Ginsburg and Sotomayor would not allow jurisdiction under the ATCA based on only the presence of the corporation in the jurisdiction in which the alleged human rights abuse took place with very limited links to the US.

The Supreme Court ruling in *Kiobel* may well put an end to one of the most hopeful mechanisms at a national level anywhere in the world to create a civil law deterrent to the irresponsible exercise of corporate power. It can only be hoped that despite the outcome of the *Kiobel* decision in the US Supreme Court, there will be increasing pressures at the international level and the domestic level to create, enhance or revitalise legal mechanisms that deter MNEs and their culpable corporate officials from engaging in or being complicit in human rights abuses of state actors in the jurisdictions where they are operating.

The key factor that will determine whether the John Ruggie three-pillar framework stands or falls as an effective framework to protect against corporate involvement in human rights abuses globally is whether the relevant state actually has effective power over corporations in its jurisdiction in practice, as is often claimed in theory. If the state is so weak that it has little institutional capacity to protect its citizens against serious violations of their rights by corporations or other state or non-state actors who are coperpetrators with the corporation, there is little value in the theoretical state responsibility to protect. While state responsibility may be

incurred, that provides little comfort to the citizens who helplessly watch while corporations act with impunity to the peril of whole groups and societies, as the case studies in this chapter have illustrated.

It is not an exaggeration to state that in many weak states, corporations in collusion with non-state actors such as militias or renegade army or police units can be more powerful than the state itself. It is particularly in such situations that it could be argued that there should be some form of direct or indirect international legal obligation imposed on such non-state actors. That already occurs in situations where individuals belonging to these non-state organisations trigger individual criminal liability by committing the most serious international crimes.

However, beyond the threshold of serious criminality, it could be argued that new international mechanisms should be developed or existing ones refashioned, in order to make all three pillars of the Ruggie framework effective. Where the John Ruggie framework is found most wanting is in situations where corporations have more power than a weak or potentially failing state, or power that rivals that of the state. This gap could also exist where the corporate power does not rival the state but where the state is unable to show any responsibility to protect its citizens owing to corruption or joint complicity by the state itself in abuses of the human rights of its own citizens. In such a situation, the international community must go further than the Ruggie framework.

A practical solution could be for the UN Human Rights Council to appoint a special rapporteur to act as a fact finder on allegations of corporate complicity in serious human rights abuses in weak or failing states that may be incapable or unwilling to fulfil their duty to protect against such abuses. Special rapporteurs are appointed by the UN Human Rights Council and their mandates are determined by the Council, even though they exercise their powers under the UN Charter. The rapporteurs are usually appointed to investigate a particular situation involving UN member countries where there are allegations of serious violations of human rights or humanitarian law and to seek possible solutions with the governments concerned and then report to the Council. In addition to country mandate rapporteurs, there are an increasing number of thematic mandate rapporteurs who have been appointed to investigate, fact find, monitor, advise and report on a wide range of human rights issues, including arbitrary detention, torture, indigenous peoples and violence against women and children.[121]

One leading international law jurist, Tom Buergenthal, has stated that the establishment of these special rapporteurs was an attempt by the UN to 'pierce the veil of [the] national sovereignty' of states to handle serious cases of human rights violations. Where powerful MNEs are taking advantage of weak states seriously to violate the rights of individuals impacted by their operations, the veil of sovereignty may be more illusory than real.[122]

The Human Rights Council could appoint a special rapporteur to investigate the most serious allegations of corporate complicity in human rights abuses to fill the gap where these alleged abuses take place in weak or failing states. A possible rapporteur with the title of 'business and human rights' could liaise with other relevant thematic mandate rapporteurs if there is an overlap with their own mandate.

For example, where there are allegations of corporate complicity in violations of the rights of indigenous peoples as in the case of Chevron in Ecuador described above, the business and human rights rapporteur could liaise with the rapporteur on indigenous peoples to investigate and fact find. If there is no effective remedy offered by the corporation, the rapporteur could report back to the Council with recommendations for other measures to be taken by both the governments involved and the MNE.

There has been criticism that there has been a failure on the part of the UN Human Rights Council and other UN agencies to follow up on many of the recommendations of country and thematic mandate rapporteurs.[123] However, a UN business and human rights rapporteur could have a powerful independent naming and shaming function. This function when combined with recommendations to the UN Council and relevant governments for effective redress for corporate complicity in human rights abuses could be one of the ways to filling the substantial gap in the third pillar of the John Ruggie framework for access to an effective remedy for victims of corporate human rights abuses.

A possible solution that will take more time and effort to establish that has been canvassed is whether some of the more effective regional human rights systems, such as the European and Latin American systems discussed in Chapter 1, could be refashioned, to bring the three-pillar Ruggie framework into real-world effectiveness. An improved African human rights system could be a much later addition, while the wait will probably be decades more in the case of Asia.

As regards the first pillar, the state's duty to protect, both the European and Americas systems are based on the exhaustion of local remedies, which fits the goal of the first pillar of the Ruggie framework. These regional systems could evolve over time to allow the imposition of direct legal obligations on MNEs to respect the rights guaranteed under the regional human rights convention. Failure by the corporation to do so and failure by the state to regulate and police the corporations' human rights responsibilities could then lead to the effective remedy by the respective regional human rights court, such as the European Convention on Human Rights and the Inter-American Court of Human Rights. Where a weak state has been unable to restrain a much more powerful MNE, the regional human rights court could devise non-pecuniary remedies such as effective mandatory remediation of toxic pollution and/or the apportionment of damages between the state and the MNE.

In addition, the UN Working Group on the Guiding Principles and organizations working in the field should also work towards establishing a multilateral treaty on corporate criminal liability and establishing a model law on how nations implementing the treaty can pass domestic legislation implementing the treaty.

Those who suggest such a remedy to the global governance gap regarding the social responsibilities of MNEs should have no illusions that there would not be ferocious opposition to these proposed reforms.[124] The seemingly almost separate universes of international trade and investment laws, treaties, bilateral investment agreements and their respective adjudicative bodies would have to be integrated into the expanded mandates of the regional human rights systems. These obstacles alone would make many in those separate universes join in opposition.

There would also need to be years, perhaps decades, of careful study and research into the substantive, procedural and jurisdictional challenges that such strengthening of the Ruggie three-pillar framework, the UN Guiding Principles and reform of the regional human rights systems would face. The oversight of regional organisations such as the European Council, the OAS and the AU would have to evolve their own constitutions and governance structures. Given these huge obstacles, many would say that these possible paths to make the three-pillar Ruggie framework a more effective reality is an unrealistic dream.

However, unrealistic dreams have often changed the world:

> Some believe there is nothing one man or one woman can do against the enormous array of the world's ills – against misery, against ignorance, or injustice and violence. Yet many of the world's great movements, of thought and action, have flowed from the work of a single man. A young monk began the Protestant reformation, a young general extended an empire from Macedonia to the borders of the earth, and a young woman reclaimed the territory of France. It was a young Italian explorer who discovered the New World, and 32 year old Thomas Jefferson who proclaimed that all men are created equal. 'Give me a place to stand,' said Archimedes, 'and I will move the world.' These men moved the world, and so can we all.
>
> Robert F. Kennedy[125]

3.7 Conclusion: the MNE as the main beneficiary of globalisation and global governance: why the gap between power and responsibility must be bridged

The global governance system cannot be complete without engaging the global private sector effectively and constructively. With the fall of the Berlin Wall in 1989, the environment in which the global private sector operates in has, essentially, come to dominate the planet. That environment is one of free markets backed and secured by two other global governance regimes. The first of these is the international peace and security regime constructed in the aftermath of the Second World War, as described in Chapter 1; the second, and perhaps more importantly in a multi-polar world that is still dominated by the United States, is the global business environment which is also backed and secured by the institutions and laws of international trade and finance, as described in Chapter 2.

The success of free markets worldwide has led to dramatic increases in the power of MNEs. We have seen how this increase in power has also resulted in increasing expectations of corporate social and ethical responsibilities and the legal parameters that set out the responsibilities of these major players in the realm of global governance. This chapter has taken stock of the plethora of activity being undertaken to implement indirect international legal duties and social responsibility regimes for the exercise of responsible corporate power. In part, these activities have been undertaken by the leadership MNEs because they understand that there is a corporate social and ethical responsibility to the global environment that is ignored at their peril. In part, these activities have also been undertaken because there is a general consensus among the MNE community that self-regulation is immensely preferable to legal regulation.

However, as we have discussed above, self-regulation can often take the form of a public relations exercise, when actions do not match the rhetoric of corporate ethics and social responsibility. There is also the problem of the free rider, which, as illustrated in at least one of the case studies above, can be the largest MNE in a sector.

The exercise of power without responsibility will eventually attract the imposition of both direct and indirect legal duties on MNEs. The direct imposition is most evident as regards international criminal law rules as described above. It will not stop there, however. While classical conceptions of international law are concerned primarily with relations between states, it must not be forgotten that the goal of international law is to meet the needs of the global family. In the past, this meant the global family of nations. With the exponential increase in interaction between individuals, groups and private entities across borders, the global family is as much a family of individuals as nations.

The development of international law has responded to this evolution of the human family through the development of international human rights law, as discussed in Chapters 1 and 2, which challenges traditional notions of territorial integrity and national sovereignty. There is now mounting evidence that international law is also responding by imposing directly, or indirectly, international legal duties on MNEs.

Chapter 2 also argued that the rules of international trade and the institutions of global governance that oversee them, established by sovereign nations, must also take into account the fundamental rights of workers and the protection of the biosphere on which all life depends. This chapter reinforces a principled approach to global governance, through the recognition that regardless of its locus, whether in the state or in MNEs, where power is exercised without responsibility the legitimacy of both the players and the institutions that govern them can become fractured, perhaps beyond repair. The failures of the global financial and banking MNEs to exercise their ethical and social responsibilities led the world to the edge of another devastating global depression during the global financial meltdown in 2008. They should have learned the critical necessity of corporate power being exercised responsibly from the prior financial and corporate ethics scandals in the United States, Europe and Canada, as exemplified by the Enron, Arthur Andersen and WorldCom examples.

At the time of writing in the middle of 2013, governments in Europe and the IMF are still working to prevent any possibility of a spiralling financial meltdown in the Eurozone, caused by the mounting public and private debt crisis in Greece, Spain and Italy. Again the financial and banking MNEs in Europe aided by other financial MNEs in other parts of the world had acted recklessly to create property and other financial bubbles that inevitably burst and brought disaster to the citizens of their countries. Everywhere in the world, there seems to be a battle to regain trust and confidence in the capital markets of the world as financial markets become severely threatened by the fear of more corporate dishonesty and fraud. In addition, the allegations of corporate complicity in corruption, environmental degradation, social dislocation and human rights abuses are not abating but increasing in some parts of the world.

The disaster at the Rana Plaza in Bangladesh that killed 1,129 textile workers on 24 April 2013, could have been avoided if the lessons from the previous horrors visited upon the primarily women workers in that country had been learned by the major foreign corporations sourcing their textiles there in sweatshops that were unsafe and violating the most basic labour standards. In light of the world's deadliest textile factory disaster, on 15 May 2013 72 European companies sourcing in Bangladesh agreed that they would enter into an accord on factory and building safety in Bangladesh.

The accord constitutes what is hoped will be a more effective and binding cooperation pact between the Bangladeshi Government, local and foreign sourcing corporations and labour unions to improve building safety and labour standards. The accord will commit its signatories to binding financial contributions to building safety and safe working conditions in their sourcing factories in Bangladesh. Sadly, in a micro example of the tragic flaw, some of the largest US corporations such as Wal-Mart, Sears and Gap have refused to join the accord, claiming it would be too expensive and potentially making the companies liable to costly litigation and giving unions too much control over the workplace.[126]

To make the US position more suspect, on 27 June 2013 the US suspended preferential GSP trade status with Bangladesh, which ironically did not really affect US textile imports from that country after the EU threatened to do so in the wake of the Rana Plaza disaster.[127] Subsequently, a group of 17 American and Canadian companies signed an 'alliance for Bangladesh worker safety', aimed at advancing voluntary financial contributions for training and upgrading textile factories while improving factory inspections and sharing inspection reports. The main difference with the European initiative is that worker participation committees will be involved rather than trade unions, and the alliance, while willing voluntarily to contribute about US$40 million towards the goals of the alliance, puts more onus on the Bangladeshi Government to improve worker safety and upgrade national and fire standards.[128] This North American effort to assuage corporate guilt over the death of 1,129 workers is unlikely to be as effective as the European-led initiative.

It remains to be seen whether even the European initiative in reaction to the Rana Plaza disaster will be sustainable in the long term. It is beyond the scope of this text to describe and analyse how the global MNEs react to these types of catastrophic events and whether their reactions are sufficient to remedy the grave acts of omission or commission that created them in the first place. However, it is hoped that while the three-pillar framework established by John Ruggie is a necessary start to begin addressing the tragic flaw in these areas, more courageous and innovative initiatives by the global private sector, governments, the UN and civil society organisations will be established to restore the efficiency and equity of global governance, human rights and international law in this area also. Combating the tragic flaw in this area of global governance will require the utmost courage, wisdom and creativity that leaders in the global private sector, civil society and the institutions of global governance can bring to overcome the inevitable opposition that they will face that insists on maintaining the status quo.

Notes

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13 Edward Fokuoh Ampratwum, 'The fight against corruption and its implications for development in developing and transition economies' (2008) 11 *Journal of Money Laundering Control* 76–87.
14 There are many sources online that give updates on the victims and ongoing controversies of the Bhopal disaster. See 'the Bhopal Medical Appeal', available at http://www.bhopal.org (last accessed 8 September 2013) (the Bhopal Appeal). These sites contain information on developments in the ongoing litigation and NGO activity against Union Carbide and now Dow Chemicals. A more scholarly, but now dated, analysis of the disaster and the litigation in India and the United States can be found in Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1993).
15 Quotes taken from the Bhopal Appeal (n 14).
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17 ibid. See also Dan Kurzman, *A Killing Wind: Inside Union Carbide and the Bhopal Catastrophe* (New York: McGraw Hill, 1987); D. Lapierre, J. Moro, *Five Past Midnight in Bhopal* (Warner Books, 2002); 'The ghosts of Bhopal' (18 February 1989) *The Economist.*
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23 Donziger (n 21) 1–2.
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25 See e.g. the report by Patrick Radden Keefe, 'Reversal of fortune' *The New Yorker* (9 January 2012).
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4 The foundations of global pluralism

It is hoped that the preceding chapters have demonstrated the need for a new vision of global governance, human rights and international law. That vision must counteract the assertion that the *grundnorm* of international law is absolute territorial sovereignty and that it has no higher norms or principles. That vision must promote human dignity, and actualise justice in all areas of global governance, so as to avoid the consequences of illegitimate or irresponsible exercise of power and a global trade and financial architecture regime that disadvantages the most vulnerable.

Without such a vision, states and populations around the world will inevitably succumb to the deleterious effects of the tragic flaws within the institutions of global governance and international law which have been detailed in the previous chapters of this book: increasing victims of humanitarian crises, devastating financial crises, calamitous environmental degradation and ruinous trade practices.

As discussed in the Introduction, the metaphor of the tragic flaw is an adaptation of the concept in Greek and Shakespearean tragedy that indicates how conflicting and opposing visions and beliefs within individuals and institutions can ultimately threaten their legitimacy and sometimes even their very existence. The preceding chapters have attempted to show how the tragic flaw has arisen in many areas of global governance, from human rights and the rules of global trade and finance to the global private sector, in a manner that undermines universal principles of justice and human rights.

While the manifestations of the tragic flaw may differ from area to area they share a common root cause: the exercise of power and sovereignty that fails to respect fundamental principles of justice and human dignity. However, if these universal values are truly to have global effect and apply to the full diversity of peoples, then there is a need for a practical framework to address the tragic flaw metaphor that underlies the analysis in the previous chapters. That framework is global pluralism.

Some of the leading intellectuals in the world are already focusing on building a new vision of global pluralism that could, in this author's view, address the worst excesses of the tragic flaw. One of the most convincing enunciations of global pluralism is that of Nobel prize winner and economist Amartya Sen. Starting with

John Rawls' notion of justice as fairness, Sen seeks to discover what the global principles of justice would look like from the 'original position'.[1]

The original position is a philosophical abstraction used as the starting point for Rawls' conception of justice that equates 'justice' as 'fairness'. In his landmark text *A Theory of Justice* to explain the concept of the original position, Rawls posits the result of a situation when people are asked to imagine themselves as totally free and equal citizens who are committed to the pursuit of social and political justice. To ensure that the citizens start from that committed position, they are placed in a 'veil of ignorance', behind which they have no knowledge of their personal, social and historical contexts. From this position they are then asked to choose the conception of justice that best advances their interests. Rawls argued that from the original position there would be two principles that a free and rational person would choose for a citizen's theory of justice.

The first is the *principle of equal liberty*, which guarantees basic rights and liberties for everyone as free and equal citizens who are free to choose what conception of the good life they desire. The second principle is the *difference principle*, which would permit inequalities in the distribution of societal goods only if those inequalities benefit the poorest members of society. This has been interpreted to mean that:

> . . . the second principle provides fair equality of educational and employment opportunities enabling all to fairly compete for powers and prerogatives of office; and it secures for all a guaranteed minimum of the all-purpose means (including income and wealth) that individuals need to pursue their interests and to maintain their self-respect as free and equal persons.[2]

Both principles equate justice as fairness. The challenge for global governance, human rights and international law is the question of what is the equivalent framework for global justice that demonstrates fairness for all peoples across the world. Rawls had attempted this mammoth task, which Amartya Sen proceeded to analyse.

Sen examined Rawls' theory of global justice by assessing what the great liberal philosopher claimed was two possible conceptualisations of the 'original position' in the global context:

- *Grand universalism*. The domain of the exercise of fairness is all people everywhere taken together, and the device of the original position is applied to a hypothetical exercise in the selection of rules and principles of justice for all, seen without distinction of nationality and other classification.
- *National particularism*. The domain of the exercise of fairness involves each nation taken separately, to which the device of the original position is correspondingly applied, and the relations between nations are governed by a supplementary exercise involving international equity.[3]

Ultimately, Sen rejects both of these conceptions in favour of a third conception that provides 'an adequate recognition of the plurality of relations involved across

the globe'.[4] Sen argued that the historical record does not support the grand universalism thesis.[5] This text attempts to confirm that conclusion. As demonstrated in the preceding chapters, following the end of the Second World War, neither the United Nations, the WTO, the IMF nor the World Bank have proven themselves capable of living up to the principles of justice and human dignity in the institutions of global governance. This is in spite of the fact that the principles of the Atlantic Charter, drafted as the solution for a world dedicated to peace, security and human dignity on the brink of catastrophe, were a manifestation of what the principles of justice may look like if they were drafted according to 'grand universalism'; that is, they could be seen as similar to principles of justice hypothetically arrived at from the original position by the peoples of the world for the peoples of the world.

However, as we have seen, those principles have been gravely undermined by a successive series of regressive events, from the impact of the Cold War, which saw the Security Council veto used as a block against both human rights and humanitarian action, to the narrow parochialism seen in all the major institutions of global governance, from the WTO to the Bretton Woods institutions. These failures in global governance, which have been decried in the previous chapters, suggest that what is needed now is a continuous search for more practical frameworks of global pluralism, that while containing elements of both grand universalism and even national particularism, can nevertheless repair the damage in the institutions of global governance discussed in earlier chapters.

Equally, the historical record also supports Sen's reason for rejecting nation-based particularist conceptions of global justice, even though this is the conception that Rawls himself has indicated he would endorse in cross societal and national links producing 'the law of the peoples'.[6] While this remains the establishment's favoured conception of international law, human rights and justice, analysis in every chapter of this book points to the fact that the limitation of international law and justice to interactions between nations is breaking down. Indeed, this particularist conception of global justice has failed time and time again to take into account international equity. Instead, there is a predilection of 'winner takes all or almost all' on the part of sovereign states in the institutions of global governance. It is somewhat ironic that some of the strongest drivers of international equity come not from sovereign states but civil society groups that organise across national boundaries, as discussed in the previous chapters.

Rather than the silos of grand universalism or national particularism, what should be encouraged is the rise of global plural affiliations that cut across lines of sovereignty and nationality. This essential feature of global pluralism reaches into the relentless desire of individuals and groups, to create new principles of global governance, human rights and international law.

In Chapter 1 we witnessed how the solidarity of groups around the world, in coalition with like-minded governments, has played a critical role in developing international human rights law and justice. These activities included naming and shaming sovereign states for their human rights hypocrisy, and helping to shape key human rights protection mechanisms, such as the oversight treaty bodies of

the international human rights conventions and the individual rapporteurs focused on key areas of human rights.

Civil society has also been key in shaping the evolution of emerging principles of international society, such as the responsibility to protect (R2P), and in seeking to enforce compliance of existing norms such as the doctrine of universal jurisdiction. Similarly, the global community has seen how critical this same solidarity, which transcends societies and nations, has been in the establishment of the International Criminal Court and the banning of landmines and cluster munitions. As discussed in the preceding chapters, civil society groups have been at the forefront of promoting international equity rather than sovereign states.

In Chapter 2, the discussion centred on how the 'grand universalism' principles of economic justice envisaged in the Havana Charter of the ITO died in the US Congress, thereby increasing the predominance of the increasingly technical and remote realm of the GATT, and solidifying the stranglehold of the dominant economic players within the global trade framework of the WTO. While there is no doubt that the rules of global trade have lifted hundreds of millions out of abject poverty, it is also clear that hundreds of millions have been left in abject poverty owing to unjust practices such as, among other things, unfair subsidies that discriminate against the exports of some of the poorest countries. When it was time in the Doha Development Round for the winners to acknowledge their unfairness and revive the principles of global trade justice, parochialism prevailed again and the promise of justice as fairness in global trade died.

Instead of seeking global economic justice, the winners moved to entrench their gains through bilateral and regional free trade agreements. Again, it was a coalition of global civil society, working with like-minded governments, that created sufficient protest at the growing inequities, as witnessed at the 1999 Seattle multilateral trade talks, one of the catalysts for the doomed Doha Development Round in the first place. The rising protests of the masses in both developed and emerging economies in the global economic and trade sweepstakes will ultimately make the status quo untenable and demand greater efforts to promote universal principles of justice and human rights, which should be at the heart of both grand universalism and national particularism.

In similar vein, we have also seen the promise to integrate the protection of the environment and sustainable development into a global trade framework rise skywards with winged rhetoric, as it did at the Earth Summit in 1992. However, the world then watched those same promises plummet to earth with even greater rapidity on the failure to negotiate global climate change multilateral environmental agreements (MEAs) in the wake of the Kyoto Protocol compliance period.

In some areas of trade and the environment, key MEAs have been advanced through the realists' carrot and stick approach, keeping hopes alive that perhaps the environment will not simply be steamrollered by global trade rules. The faint hope that the Dispute Settlement Body (DSB) panels of the WTO could yet integrate vital environmental concerns into the workings of the global trade framework has barely stayed alive, owing to panel rulings such as the *Shrimp-Turtle* and *EC-Asbestos* cases. Again, it is the growing chorus of individuals and civil society

groups, along with like-minded governments, who are giving voice to the fact that the fragile biosphere is a shared necessity for all species, and therefore cannot be divorced from the global principles of fairness and justice. This chorus is becoming even more critical as droughts, devastating storms, wildfires and creeping desertification threaten to imperil the most vulnerable peoples and species to an ever greater extent.

In a similar fashion, the constitutions of the global financial institutions of the IMF and the World Bank Group were designed to prevent the rampant unfairness and injustice associated with financial collapse, which was a major contributing factor to the rise of the Nazi Party in Germany and the start of the Second World War. The focus on finding mechanisms to establish stable global currency regimes and the promotion of development, first in Europe and then in the developing world, collapsed when sovereign self-interest was placed above the global collective good.

The collapse of the stable currency exchange and capital controls regimes facilitated one of the most powerful forces in globalisation, the rapid capital flows of trillions of dollars of private capital, which also holds the potential to devastate nations and economies overnight. When rampant speculation, easy money and astounding avarice was combined with shortsighted, incompetent and often corrupt sovereigns the era of the contagious financial crisis was born. At the outbreak of the 2008 global economic meltdown, these crises were threatening the entire global financial system, including the most powerful countries. Yet it is the most vulnerable who are suffering the greatest losses in terms of employment, income and futures. Across the world, the inequities laid bare by the 2008 global financial meltdown would be the antithesis of the principles of grand universalism or national particularism.

In Chapter 3, the discussion focused on the emergence of a relatively new set of supranational global players, namely multinational enterprises, who now rival national states in power and influence, and the impact that they are having on global governance and the pursuit of justice and human rights in international law. The chapter argued that the irresponsible exercise of corporate power, in the absence of any rules of global justice, has had, in some situations, devastating impact on communities, entire nations, and on the environment. Despite this, the UN waited until the first years of the 21st century before it attempted, through the work of the Secretary General's special representative John Ruggie, to propose principles, not rules, addressing the impact of these increasingly powerful players on the world stage.

Yet, as discussed in Chapter 3, the principles in the three-pillar framework offered by John Ruggie may not provide adequate guarantees of global justice and human rights, especially when faced with the collusion of irresponsible corporate power with incompetent or powerless governments. In light of this, it is necessary to pursue more robust mechanisms to achieve global justice for the people who have been impacted by the irresponsible exercise of corporate power around the world. In particular, those who have been victimised by the irresponsible practices of multinational enterprises must be given access to independent avenues that can adjudicate their allegations and hand down adequate remedial rulings.

One of the recommendations in Chapter 3 was for the establishment of a UN special rapporteur on business and human rights to act as an independent fact finder and mediator and at a later stage the adaptation of the regional human rights systems for the provision of this crucial aspect of global justice. These mechanisms may be hard to implement owing to possible backlash by the powerful corporate sector. There may be other mechanisms not yet advanced, but one thing is clear: the present state of restraints on MNEs' irresponsible exercise of corporate power, primarily by soft law principles, is largely inadequate. Again, it is the constant pressure of global civil society that is focusing on the need for greater international equity in this critical area where global governance, human rights and international law seems wanting.

Sen suggested that to address these failings and gaps in global governance and international law, there is a need for a conception of justice that does not suffer from the unattainability of 'grand universalism' or the relativism of national particularism supplemented by international equity and relations. That needed conception is what Sen has termed 'plural affiliation'.[7]

As discussed, the core of what Sen terms 'plural affiliation' is the recognition that all global players, whether sovereign states, organisations or individuals, can have multiple identities, which can 'yield concerns and demands that can significantly supplement, or seriously compete with, other concerns and demands arising from other identities'. Sen states that: '. . . with plural affiliation the exercise of fairness can be applied to different groups (including – but not uniquely – nations), and the respective demands related to our multiple identities can be taken seriously'.[8] Sen's foundation of plural affiliation translates well to a vision of global pluralism for international governance in the 21st century.

At the core of this evolving concept of global pluralism should be the emerging frameworks of global constitutional law and global administrative law. Given the limited space parameters of this text, the following is an all-too-brief description and analysis of these two emerging global systems of law that could provide the practical framework for this global pluralism vision. However, it is hoped that this overview will whet the appetite of the reader to explore and develop these emerging fields further.

Global constitutionalism is driven by the fact that, as the previous chapters have demonstrated, globalisation has effected deep and dynamic changes in the international institutions of governance and the private sector. The legal, economic and political aspects of the narrow Westphalian concept of sovereignty have changed, and in many areas they have even been supplanted by evolving supranational and international law regimes.

A citizen of an EU Member State is affected by both domestic laws and supranational EU directives, policies and laws. She and her fellow citizens may be indirectly affected by WTO panel rulings, and perhaps even have her rights modified by the rulings of UN human rights treaty bodies. As witnessed by the 2007–2009 global financial crisis and the ongoing Eurozone crisis, her economic wellbeing and livelihood may be gravely impacted by the action or inaction of a host of financial institutions and regulators around the world. Her consumer and spending

habits may be subjected to a bevy of private regulatory codes, labels and certification processes, operating as soft laws and often developed by coalitions of institutions, civil society groups and governments, as discussed in Chapter 3.

These hard and soft laws reflect an increasing diversity of political, cultural, economic and legal perspectives, which are increasingly affecting people around the world with each passing day. These plural legal affiliations are what global constitutional law is centred upon. The emergence of global constitutional law is a reality; but for pluralism to be nurtured, global constitutional law needs meta-frameworks of convergence for the prevention of centrifugal forces that can undermine the benefits of the non-hegemonic aspects of globalisation.

However, as discussed in the preceding chapters, history has shown that in global governance, when the tragic flaw threatens to pull apart the ties that hold peoples together new forces of convergence inevitably emerge. To illustrate, one proponent of global constitutional pluralism, Michel Rosenfeld, states:

> The contemporary multilayered and segmented pluralist legal universe is extremely complex. For example, the layers of international law, transnational law, and national law may be impervious to any possible unification or thorough harmonization; nonetheless, they may be linked by strong patterns of convergence, as in the case of the EU and its member state constitutions, as discussed above. More generally, if we add the claims that international law has become constitutionalized and constitutional law internationalized; that private or nongovernmental networks, carving out distinct spheres of self-regulation have generated their own internal constitutional framework; that these various individually adopted frameworks have much in common; and that formal and informal international networks among professionals in the same field, be it private (such as physicians or climate experts) or governmental (such as ministers of the economy or of the environment of various nation states or, even more importantly, judges across the world) share many values and objectives based on common professional interests, it seems inevitable that these developments will lead to the consolidation of important paths of convergence.[9]

Rosenfeld points out that there will be points of divergence relating to what is termed the layering of national and other constitutions that cannot be seamlessly integrated into supranational constitutional orders, like the EU. There will also be many points of divergence according to Rosenfeld in the 'segmented' legal regimes that are stacked alongside one another in a horizontal sequence, like the privatised legal regime of the *lex mercatoria*.

Perhaps the most major points of divergence that Rosenfeld identifies, which has been touched on in the preceding chapters, are the disputes over the content of universally applicable human rights. Accepting that there is not a single prescription for global constitutional pluralism, the approach that is suggested by both Rosenfeld and this author would first promote difference and plurality within constitutionally relevant intracommunal settings. Second, Rosenfeld and this

author would promote the forging of principles of common identity or convergence among the separate spheres, which would prevent further expansion of the growing perception of insurmountable incompatibilities in plural legal affiliations coming out of globalisation.[10]

For example, pluralistic approaches to global constitutional law that seek principles of common identity or convergence would include the promotion of the principle of subsidiarity, which is the foundation of the EU pluralist legal system. The foundation of this principle is that those closest to the matters being regulated and governed should be in control of their own destiny. While efficiency may dictate governance and regulation from afar, justice and fairness may necessitate accepting the principle of subsidiarity.[11]

While the principle of subsidiarity is most common in federations and supranational organisations such as the EU, it is time to consider whether it should be applied in the institutions of global governance, whether in the financial institutions of the World Bank and the IMF or in worldwide operations of the global private sector. Allowing more scope to the principle of subsidiarity may have lessened the disastrous impact that austerity imposed by the IMF and supported by the World Bank has had on national economies in the successive economic crises the world has witnessed, from the Asian economic crisis in 1997 to the one that is ongoing in the Eurozone, especially in countries such as Greece.

Another principle of common identity or convergence that is vital to global constitutional pluralism is proportionality. In practice, this concept is most commonly used by domestic judiciaries in deciding upon the extent to which rights and freedoms are to be limited by governments in the interest of a pressing and substantial societal objective. It could play the same role globally whether in the context of WTO dispute panel decisions or in the decisions of human rights treaty bodies. The application of proportionality could promote what Rosenfeld calls the 'pluralist ethos', by harmonising and adapting convergences and divergencies in challenging areas of global governance. Given that the use of the principle of proportionality is so widespread across diverse domestic constitutions, it could provide a common procedural currency for the promotion of global constitutional pluralism, allowing the outcomes of decisions to differ slightly, from place to place, to reflect different legal and cultural traditions.[12]

A key area that must be part and parcel of global constitutional plurality, along with the principles of subsidiarity and proportionality, is the promotion of substantive equality for minorities within the constitutions of multi-ethnic and multinational nations. This area must be reinforced by progressive interpretations of the rights of minorities in international law and in the institutions of global governance. This author has written extensively on how this can be achieved elsewhere.[13]

These principles and other related aspects of global constitutional pluralism are not guarantees that political, racial or religious extremists will not attempt to inflict their extremist worldview on whosoever they can exert power over in an attempt to derail genuine non-hierarchical pluralism. The extremists who produced the insanity and terror of the September 2001 attacks in the US, and those like them, are prime examples.

But the principles of global constitutional pluralism can limit the ability of such extremism to undermine shared objectives and drive societies around the world apart. By betraying the principle of proportionality in carrying out the illegal war in Iraq or committing the most serious human rights violations in the so-called 'war on terror', the Bush administration in the US undermined the fundamental principles of global constitutional pluralism and thereby became culpable in part for triggering the *jihadist* and other extremists' plans to undermine much of the progress made in justice and human rights, not only in North Africa and the Middle East, but globally as well.

In addition to the evolution of pluralism in global constitutional law, there is the parallel evolution of pluralism in global administrative law. As institutions of global governance are increasingly demanding the regulation, adaption and mitigation of impacts across nations, involving a myriad of legal issues, cultures and disciplines, there is a parallel demand for the development of a pluralistic *nomos* to deal with the increasing differences and interdependencies. To satisfy this need, it is necessary to develop a pluralist approach to procedural, adjudicative and administrative standards that can be seen as respecting difference, while at the same time preventing the centrifugal forces from undercutting the benefits of globalisation. Kingsbury, Krisch and Stewart define the scope of this embryonic global administrative law in the following manner:

> These practices lead us to define global administrative law as comprising the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks, to regulatory decisions of national governments where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private or private transnational bodies. In proposing such a definition, we are also proposing that much of global governance can be understood and analyzed as administrative action: rule making, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management.[14]

A truly pluralistic vision of global administrative law must go beyond the mere adoption of Western domestic approaches to administrative justice, otherwise it risks entrenching the economic and political positions that already impede cooperation in global governance. Pluralism in global administrative law demands administrative accountability in global governance bodies. This would require the implementation at the global level of administrative law principles that are recognised and accepted by a variety of cultural and national perspectives.

Inevitably, some of these approaches will be familiar to Western legal systems, including transparency, participation rights, procedural fairness, the necessity for reasoned decisions in accordance with applicable laws and the right to review final decisions.[15] However, more is needed to meet the standards of global

administrative law pluralism. This is because many of the institutions of global governance have established administrative and adjudicative panels that affect governments, societies and individuals around the world by imposing or proposing global standards.

These standards should apply, inter alia, equally to WTO Dispute Settlement Bodies, the treaty bodies overseeing the international human rights conventions, and the World Bank inspection panel. Kingsbury, Krisch and Stewart argue that the scope of global administrative law is expanding as a result of the expanding global economic and security regulation involving a very wide range of bodies:

> The densest regulatory regimes have arisen in the sphere of economic regulation: the OECD, the administration and the committees of the WTO, the committees of the G7/G8, structures of antitrust cooperation, and financial regulation performed by, among others, the IMF, the Basle Committee and the OECD's Financial Action Task Force. Environmental regulation is partly the work of non-environmental administrative bodies such as the World Bank, and the OECD, and the WTO, but increasingly far-reaching regulatory structures are being established in specialized regimes such as the prospective emissions trading scheme and the Clean Development Mechanism in the Kyoto Protocol. Administrative action is visible in international security, including in the work of the UN Security Council and its committees, and in related fields such as nuclear energy regulation (the IAEA) or the supervision mechanism of the Chemical Weapons Convention. Reflection on these illustrations immediately indicates that the extraordinarily varied landscape of global administration results not simply from the highly varied regulatory subject areas and correlative functional differentiations among institutions, but also from the multi-layered character of the administration of global governance. In this section we seek to provide some conceptual tools for organizing these diverse phenomena by identifying the different structures and subjects of global administration and positing the notion of a global administrative space.[16]

These same authors identify five main types of administrative regulation; the first being conducted by international organisations, the second by transnational networks of government officials, the third by national regulators under treaty regimes, the fourth by hybrid intergovernmental–private arrangements and, finally, those by private institutions with regulatory functions. Under this framework the subjects of global administrative law are not only states, but also individuals, corporations, NGOs and other collectives.[17]

The key factor in implementing global administrative law pluralistically is the integration of the pluralistic principles, many of them also relevant to global constitutional law. These include the favouring of the principle of subsidiarity and proportionality (discussed above). Proportionality could act as a key principle of adjudication in any of the human rights complaints processes formed under

the various optional protocols to international and regional human rights conventions.[18]

Proportionality could also be relevant where the principles of WTO trade liberalisation come against the pressing and substantial health and environmental objectives of nations operating in different social, economic and political conditions. The same is true for the principle of subsidiarity, which could equally emphasise the priorities of local communities, in addition to national, regional or global priorities in the operations of the global private sector and the decisions of the various UN agencies, the IMF and the World Bank.

Francesca Spagnuolo adds mutual recognition regimes as another pluralistic principle in global administrative law. This approach encourages all parties involved in global governance to promote mutual recognition of domestic laws, regulations and certification procedures, even if the most powerful members of the international community did not impose them. This acceptance would be conditional on a genuinely pluralistic administrative process based on mutual equality and benefit, which would result in greater acceptance and tolerance of difference.[19] The decision of the WTO panels in the *EC-Asbestos* ruling discussed in Chapter 2 should be regarded as a template for this approach. There, the decision of the French authorities to prohibit the importation of what they considered a toxic product was deemed a legitimate exercise of the precautionary principle as it related to the health of its citizens.

Another proposed approach to implementing a pluralistic vision of global administrative law could be evidenced by what is termed 'hybrid participation'.[20] This approach is most widely exemplified by hybrid international criminal tribunals, such as the Sierra Leone tribunal discussed in Chapter 1, which are made up of both international and local judges. Other non-judicial examples include the growing number of sectoral and multi-stakeholder corporate social responsibility initiatives that have corporate, civil society and, in some cases, governmental participants working together to determine whether agreement upon standards have been complied with.

The examples of the Forest Stewardship Council, the Responsible Care oversight system of the global chemical sector and the less successful Kimberley Process, discussed in Chapter 3, are examples of this growing use of pluralistic hybrid participation. A variation of hybrid participation is also to allow domestic courts to act as checks on global administrative regulatory systems where there are possible violations of individuals' or organisations' procedural or substantive rights.[21]

The 21st century will present great challenges to the institutions of global governance and international law, regarding the need to incorporate these evolving pluralist approaches to global constitutional and administrative law. While the principles of international law and the workings of the institutions of global governance hold the potential to integrate communities around the world through globalisation, there is hope that the important richness of the world's differences will not be harmonised out of existence, and that those who wield the greatest power will not impose their vision of the world on others.

Kingsbury, Krisch and Stewart have offered more modest objectives for the development of global administrative law in the following manner:

> Perhaps, then, it would be advisable for global administrative law to pursue a less ambitious and more pragmatic approach. It could, for example, recognize that under current circumstances, no satisfactory democratic basis for global administration is available but that global administrative structures are nevertheless required to deal with problems national democracies are unable to solve on their own . . .
>
> Under a still more limited approach, global administrative law should set itself altogether more modest goals than democratizing global administration. A focus on the other justificatory roles discussed previously – controlling the periphery to ensure the integral function of a regime, protecting rights – could achieve real progress by building meaningful and effective mechanisms of accountability to control abuses of power and secure rule of law values.[22]

This text concludes with a more ambitious hope for both global constitutional law and administrative law. To succeed where previous frameworks have failed, pluralistic conceptions of global constitutional and administrative law must be grounded in a universal conception of human dignity that requires equal concern and respect for our multiple global identities, as both citizens of nation states and as global citizens. Global pluralism requires that the respective demands of our multiple global identities are taken seriously by attaching concomitant responsibilities.

To adapt from the work of Ronald Dworkin, it is not only universally accepted human rights that must be taken seriously; it is also the demand of our multiple global identities, as members of national and supranational societies and as members of both national and supranational identity groups, i.e. race, ethnicity, sex and religion.[23] If we accept that the demands of our multiple global identities are at the core of the concept of global pluralism then we must accept that we have rights and responsibilities in multiple contexts. The idea that justice as fairness cuts across the grand collectivity of all peoples in the world, and even across the more insular collectivity of the national society, is embraced by Sen. Indeed, he even sees its application to the newest realm of global governance, the ethical duties of MNEs, the subject of our discussion in Chapter 3:

> How should a transnational corporation treat the local labour force, other businesses, regional customers or – for that matter – national governments or local administration? If there are issues of fairness involved, how should these issues be formulated – over what domain? If the spread of business ethics (generating rules of conduct, fostering mutual trust or keeping corruption in check) is a 'global public good', then we have to ask how the cogency and merits of particular business ethics are to be evaluated . . . All this calls for extensive use of the perspectives of plural affiliations and the application of the discipline of justice and fairness within these respective groups.[24]

It is clear from this example of Sen's that it is not only individuals, but also organisations such as corporations and institutions that have responsibilities to multiple stakeholders within the context of plural affiliation or global pluralism. While this is nothing new to the leadership MNEs, who have already accepted that their obligations extend beyond their shareholders to a variety of legitimate stakeholders, it is a relatively new concept to the institutions of global governance. Institutions including the WTO, the IMF and the World Bank must come to accept, over and above their responsibilities to their member states or shareholders, that they have deep social, ethical and human rights responsibilities that extend to the exploited peoples in the export processing zones or to the millions of people who see their livelihoods wiped out in financial crises. The legitimacy of the institutions of global governance depends on the recognition of fundamental aspects of global pluralism described above. Failure to bestow such recognition is one of the causes of the malaise and criticisms of many of our institutions of global governance.

A vision of global pluralism that respects human dignity would also demand that the peoples of the 21st century incorporate the original vision of the global trade and financial regime envisaged in the aftermath of the Second World War. The original vision of the Bretton Woods institutions was, in many respects, an attempt at global pluralism. If it was clear in the aftermath of the Second World War that trade, economic stability, peace, human rights and international security were integrally linked then why have we lost that perspective today?

As discussed in Chapter 2, it is in the controversial areas of links between labour standards, the environment and trade that the WTO and its member states must realise that global pluralism will demand that human rights, together with social and environmental justice be integrated into the trade regime for the sake of its own sustainability. In particular, as argued in Chapter 2, the enforcement of existing trade rules to combat the exploitation of the most vulnerable populations, in areas such as export processing zones, is essential not only to keep a 'moral' level playing field in world trade, but also to facilitate competitive economic practices.

In a similar vein, the governance and functioning of the WTO must become more pluralistic and democratic to ensure that it is accountable to the peoples of the world. Already, the 'rule by the quad' is becoming more a thing of the past, in terms of setting the agenda of the world trade regime. This was demonstrated by the refusal of some of the emerging powers from the south to accept the agenda of the north in the failed Doha Development Round of multilateral trade talks. In the future we can expect many more demands for global pluralism from countries such as India, Brazil and China, as well as from the Islamic world. However, these emerging economies must also recognise that they have responsibilities to the poorest nations of the world, in particular not to let the bottom billions, some within their own countries, become worse off while they do battle with the privileged Western world.

As discussed in Chapter 3, the global private sector is becoming one of the most potent forces of global pluralism. As argued above, global pluralism encompasses not only rights but also responsibilities. One way of fulfilling these responsibilities

is through effective self-imposed ethical and moral codes. This is the approach favoured by John Ruggie's responsibility to respect framework. In Chapter 3, the evolution of a huge array of corporate, sectoral, national and ultimately global codes was discussed. It was argued that a failure to live up to the responsibilities entailed in those voluntary codes, especially by free riders, has led to disastrous consequences for entire communities and nations.

It is not only for the sake of these communities and nations, but for their own long-term sustainability and for the sake of their corporate social, ethical and human rights risks environments, that MNEs should regard themselves as major stakeholders in a global pluralism framework of global justice. As discussed in Chapter 3, if MNEs ignore their fundamental responsibilities as stakeholders in global pluralism, their conduct will ultimately be regulated through the imposition of legal duties and civil liability. This is already occurring in the areas of environmental damage, health and safety of employees and local communities, corruption, money laundering and gross human rights abuses.

However, given the analysis in Chapter 1, the greatest challenges to meet the demands of global pluralism will be faced by the global institutions that were tasked with ensuring global peace and security and the promotion and protection of human rights. Emerging from the discussion concerning the evolution of the United Nations from the high ideals and vision of the Atlantic Charter and international human rights declarations and laws in Chapter 1, a vision of global pluralism that respects human dignity would require that major reforms be made to the United Nations.

In particular, there is an urgent need to democratise the Security Council of the United Nations to reflect a pluralistic vision of global governance. Global pluralism would demand an expansion of the permanent members of the Security Council to include the major 'civilisations' and regions of the world. Similarly, global pluralism should not support the exclusive availability of the veto power to a handful of nation states, who use it to advance their national interests instead of addressing human rights, peace and security issues, such as the timely prevention of human rights and humanitarian disasters.

The veto power in the Security Council should be replaced with a system of weighted voting, which could give major powers greater voting power, but not the power to block action unilaterally. At the time of writing, the veto power is being used in a morally disgraceful manner to prevent the facilitation of much needed timely and decisive action to curtail the massacre of more than 100,000 civilians in Syria in the middle of 2013. The human dignity of all peoples suffer because of this tragic flaw that lies at the heart of the most important institution of global governance.

All institutions and organisations concerned with global political and socio-economic challenges must face the necessity of adopting the values of global pluralism and human dignity. The systems of world governance and finance must promote social justice as a fundamental tenet of a universal human dignity. It is an affront to universal human dignity to pursue efficiency in global governance at the expense of global equity. In his controversial book *Globalization and its Discontents*, discussed in Chapter 2, Joseph Stiglitz delivered a stinging attack on the failures of

the institutions of global governance. Echoing much of the views in the preceding chapters, this former insider in the institutions of global governance seems to confirm what this author describes as the tragic flaw. He begins his closing chapter with the following statements:

> Globalization today is not working for many of the world's poor. It is not working for much of the environment. It is not working for the stability of the global economy . . . To some there is an easy answer: Abandon globalization. That is neither feasible nor desirable . . . Globalization has brought better health, as well as an active global civil society fighting for more democracy and greater social justice. The problem is not with globalization, but with how it has been managed. Part of the problem lies with the international economic institutions, with the IMF, the World Bank, and WTO, which help set the rules of the game. They have done so in ways that all too often have served the interests of the more advanced industrialised countries – and particular interests within those countries – rather than those of the developing world. But it is not just that they have served those interests; too often, they have approached globalization from particular narrow mind-sets, shaped by a particular vision of the economy and society.[25]

Finally, in a time dominated by global political and financial crises, many of the proposals in this book may be regarded as utopian. But it is precisely these crises that illustrate the effects of the tragic flaw in global governance, human rights and international law, and also demonstrate the accompanying imperative for change. There is no denying that some of the proposals in the preceding chapters may not be feasible, either today or tomorrow, but these proposals are made in the belief in the ineluctable dialectic of human progress and that at this time progress is desperately needed.

The mark of how far we have progressed as a species is how we treat our most vulnerable sectors of humanity. This book is completed in the conviction that the evolving nature of global governance, human rights and international law must be accompanied by the globalisation of solidarity and dignity for all members of the human family. This is not only necessary for the sustainability of the present system of global governance and international law, but for the ultimate wellbeing of our common humanity and, indeed, our planet.

Notes

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3 Amartya Sen, 'Global justice, beyond international equity' in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds) *Global Public Goods, International Cooperation in the 21st Century* (New York: Oxford University Press, 1999) 116 at 118.

4 ibid.
5 ibid 119.
6 ibid.
7 ibid 120.
8 ibid.
9 Michel Rosenfeld, 'The challenges of constitutional ordering in a multilevel legally pluralistic and ideologically divided globalized polity' in Sam Muller et al. (eds) *The Law of the Future and the Future of Law* (Oslo: Torkel Opsahl Academic EPublisher, 2011) 109 at 114, available at http://www.lawofthefuture.org/ul/cms/odoc/1/1/6/116/116.pdf (last accessed 6 August 2012).
10 Rosenfeld (n 9).
11 ibid.
12 ibid.
13 E. Mendes, 'The dialectic of international law and the contested approaches to minority rights' in Mark S. Ellis, Anver M. Emon and Benjamin Glahn (eds) *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012).
14 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The emergence of global administrative law' (2005) 68(3) *Law and Contemporary Problems* 5, available at http://www.iilj.org/gal/documents/TheEmergenceofGlobalAdministrativeLaw.pdf (last accessed 6 August 2012). Other academic writers also claim that 'earth system governance' will need a body of global administrative law that is not only relevant to states and global governance institutions, but also for all types of organisations and corporations operating globally, to promote their accountability and legitimacy. See for example Frank Biermann et al., 'Earth system governance: people, places and the planet: science and implementation plan of the Earth System Governance Project' (IHDP: The Earth System Governance Project, 2009), available at http://www.sea-user.org/download_pubdoc.php?doc=4980 (last accessed 6 August 2012). Francesca Spagnuolo, 'Diversity and pluralism in earth system governance: contemplating the role for global administrative law' (2011) 70(11) *Ecological Economics* 1875.
15 Kinsgbury et al. (n 14) 24–27.
16 ibid 7.
17 ibid 10–12.
18 ibid 26–28.
19 Spagnuolo (n 14).
20 ibid.
21 See Kingsbury et al. (n 14) 14–20.
22 ibid 36–37.
23 Ronald Dworkin, *Taking Rights Seriously* (Massachusetts: Harvard University Press, 1978).
24 Sen (n 3) 122–23.
25 Joseph E. Stiglitz, *Globalization and its Discontents* (London & New York: W. W. Norton & Co, 2003) 214–15.

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