

The impact of political globalization on human rights law

Claudia Cinelli¹

Abstract

In the current era of political globalization, States maintain their traditional role of protagonist in the international (human rights) system. At the same time, however, they are expected to devise instruments that will maximise their ability to adapt to the needs of an effective protection of human rights due to the 'present-day conditions.' Indeed, if one pauses to reflect on the increasing diversity of international actors and consider 'international law in her infinite variety,' the question is whether the international human rights regime of today is in fact different today from that of previous eras. In pondering the interplay between international (global) politics and international human rights law, the article suggests – in terms of challenges – a reconsideration of State (positive) obligations pursuant to the nature circulaire of international human rights protection.

Key words: globalisation, human rights, law, protection

Resumen

En la era actual de globalización política, los Gobiernos mantienen su función tradicional de protagonistas en el sistema internacional (de derechos humanos). Al mismo tiempo, sin embargo, se espera que conciben instrumentos que potencien al máximo su capacidad para adaptarse a las necesidades de una protección efectiva de los derechos humanos debido a las «condiciones actuales.» En verdad, si uno se para a reflexionar acerca de la cada vez mayor diversidad de actores internacionales y a considerar «la ley internacional en su variedad infinita», la cuestión es si el régimen internacional de derechos humanos de hoy en día es en realidad diferente hoy del de épocas anteriores. Al considerar la interacción entre la política (global) internacional y la ley internacional de derechos humanos, el artículo propone —en términos de desafíos— una reconsideración de las obligaciones (positivas) del Gobierno de conformidad con la naturaleza circular de la protección internacional de los derechos humanos.

Palabras clave: globalización, derechos humanos, ley, protección

¹ Doctoral Fellow at University of Seville. The author wishes to thank Professors William Schabas, James Crawford and Attila Tanzi for their availability during her stint abroad, respectively, at the Irish Centre for Human Rights (October- December, 2006), Lauterpacht Research Centre for International Law (January- May, 2007) and University of Bologna (December, 2007). Further, the author cordially thanks all the members of her De-

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Introduction

It cannot be denied, even today, that international law 'governs relations between independent States'² through their voluntary creation of 'conventions or by usages generally accepted as expressing principles of law'³ with the purpose of regulating 'the relations between these co-existing independent communities or with a view to the achievement of common aims.'⁴ As is well-known, this is the *ratio* behind traditional international law expressed in 1927 by the Permanent Court of International Justice (hereinafter 'PCIJ') in its judgement of the *Lotus* case.⁵

It is generally recognised, at the same time, that the United Nations Charter of 1945 (hereinafter 'UN Charter'), on the one hand confirmed the traditional co-existence of independent and sovereign States,⁶ while, on the other hand, simultaneously initiating a process of reinterpretation of the principles of co-operation between States.⁷ Further, it facilitated an advance beyond mere international relations between States through the gradual development of a system for the international protection of human rights⁸ based on a vertical relation between the individual and the State.

Therefore, the *United Nations Legal Order*⁹ (from 1945 onwards) – characterized by the Member States' assumption of the obligation to seek peaceful solutions to conflict,¹⁰ a prohibi-

tion on the use of force¹¹ (except in legitimate defence¹²) and the proclamation of human dignity¹³ – marked the evolution from an international society of co-existing independent sovereign States based on the principle of reciprocity – the *do ut des* – to an international community¹⁴ of co-operation established by interdependent States.¹⁵ Today, it indeed recognizes – beside (and without supplanting) the traditional principle of *do ut des* – the consensus regarding the existence of inviolable values – the *bonum commune* – which the States give top priority – e.g. the concepts of *jus cogens* (peremptory norms) and of obligations *erga omnes*¹⁶ (to the international community as a whole¹⁷). This is the contemporary *ratio* behind international order characterized by the equilibrium between co-existence and co-operation as basic (necessary) functions of international law.

With the end of the Cold War, the UN international order begins to undergo structural, but not functional transformations. These transformations to the international structure are the consequences of the fulfillment of national policies. By celebrating the triumph of economic liberalism, States increase the transfer of some of their functions not only to international organizations for the development of established international co-operation, but also to private entities for the realization of the politico-economic plan for an international free market.

² *Lotus*, 1927 PCIJ, Series A, No. 10, 18.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Article 2(1) (7).

⁷ Article 1(3) (4).

⁸ Preamble and Articles 1(3), 55 (c), 56.

⁹ SCHACHTER, O. and JOYNER, C. (eds.), *United Nations Legal Order*, Cambridge University Press, Cambridge, 1995.

¹⁰ Article 2(3).

¹¹ Article 2(4).

¹² Article 51.

¹³ See *supra* note 7.

¹⁴ The words 'international society' recall the traditional concept of international social group based on reciprocal relations. In contrast, the words 'international community' express the idea of interdependence and unity. See, CARRILLO SALCEDO, J.A. 'Prólogo', in J.M. PUREZA, *El patrimonio Común de la Humanidad. ¿Hacia un Derecho Internacional de la Solidaridad?* Trotta, Madrid, 2002, p. 16.

¹⁵ CARRILLO SALCEDO, J.A., *Curso de Derecho Internacional Público. Introducción a Su Estructura, Dinámica y Funciones*, Tecnos, Madrid, 1996, pp. 17-18.

¹⁶ Cf. main classical references of International Court of Justice (hereinafter 'ICJ'): *Corfu Channel*, ICJ Reports (1949); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951); *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports (1961); *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980); *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004).

¹⁷ It must be noticed that in Article 53 either of the Vienna Convention on the Law of the Treaties (hereinafter 'VCLT') – adopted in 1969 – or the Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations – adopted in 1986 – the wording 'the international community of States as a whole' is employed. However, according to J. Crawford, if that wording excludes 'non-States from the process of law-formation in the field of peremptory obligations, it no longer reflects the reality of the world.' Crawford, 'Responsibility to the International Community', 8 *Indian Journal of Global Legal Studies* (2000) 303. The notion of international community is a question which J.A. Carrillo Salcedo has been examining since 1963. Of his reflections, see his recent paper, Carrillo Salcedo, *Algunas Reflexiones sobre la Noción de Comunidad Internacional*, Real Academia de Ciencias Morales y Políticas, 2007.

The integration and fusion of national economies as a result of transnational activities, with the tumultuous development of communication technology,¹⁸ has come to be known by the currently fashionable term of globalization (economic). At the same time, however, the ever more common tendency to perceive problems as having a global importance also gave birth to the political dimension of globalization, i.e. political globalization.

The article deals with the interplay between political globalization and international human rights law. Without taking into account the theory of human rights, namely what they are, where they come from and whether they are universal, the study re-examines international human rights protection in the light of the XXI century.¹⁹

While a vast range of non-State actors (hereinafter 'NSAs') are inter-acting within the international community and, in so doing, they are changing its structure, international human rights law is still a State-based structure characterized by State (positive) obligations to ensure respect for, and protection of, human rights within international individual/State relations. This excludes other international entities from direct responsibility for any international human rights violation.²⁰

At this point, it would be useful to clarify that the present study does not point out in which way international actors are benefiting from the phenomenon of globalization for hijacking²¹ human rights – although it does not dismiss such important problems, as shall be shown in the course of the study. Instead, the article is primarily going to focus on the different ways in which international actors are inter-acting within global politics. Consequently, knowing that political processes mould legal systems gradually over time, the reflection moves to draw the attention to how the international human rights system is changing (or not) towards new forms and instruments of protection of human rights in the present era of political globalization.

Therefore, this study offers a brief approximation of the concept of political globalization through an analysis of the globalization processes, the interaction between NSAs and States in the field of human rights and the efforts of the UN to act as a global political forum.

This analysis does not suggest that the impact of political globalization on human rights law, as NSAs become relevant and powerful, results necessarily in the increasing irrelevance and powerlessness of States as such. Quite the contrary, the study tries to show that international human rights law is striving towards new ways and means to enforce policy within States and combine the voluntary energy and legitimacy of civil society with the financial interest of business.

Further to this aim, the doctrine of third-party effect of State (positive) obligations and the ongoing debates which inform the concerns of NSAs' responsibility/accountability when they are violating human rights themselves, are here considered. Building upon such background, the last paragraph focuses on the present need to return to national level when ensuring human rights pursuant to the *nature circulaire* of international human rights protection.

As a matter of fact, States – with no early guarantee of success – will be required to exhibit a high degree of collaboration with other international entities due a reconsideration of their human rights (positive) obligations.

1. Political Globalization and International Human Rights Law

'The great globalization debate'²² is still too heated to draw a commonly acceptable definition of the phenomenon. In the context of this study, the term 'globalization' is used as an all-embracing term which expresses a multi-dimensional phenom-

¹⁸ FALK, R., *Predatory Globalisation. A Critique*, Cambridge Polity Press, Cambridge, 1999, p. 130.

¹⁹ ALSTON, P. and CASSESE, A., *Ripensare ai Diritti Umani nel XXI Secolo*, EGA, Torino, 2003.

²⁰ CLAPHAM, A. *Human rights in the Private Sphere*, Clarendon, Oxford, 1993; *Human Rights Obligations of Non-States Actors*, Oxford University Press, Oxford, 2006.

²¹ ALSTON, P. 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *EJIL*, 2002, p. 815.

²² HELD, D. and McGREW, A. (eds.), *The Global Transformations Reader*, Cambridge Polity Press, Cambridge, 2004, at 1-45.

enon involving distinct – even though strictly interconnected – domains of interaction, e.g. economic, technological, political, legal, military, environmental and cultural.²³ The article looks only at the political dimension (political globalization) which refers to a continuing phenomenon of political (dis)coordination between different international agents characterized by the ongoing sequence of events and interactions which created the processes of globalization. These actually reflect the gradual and voluntary international dispersal of the traditional functions of nation-States in favor of NSAs, whose number is now exorbitant and whose interaction is of significant relevance in the contemporary international community.

A. *The Processes of Globalization: Decentralization*

The processes of globalization can be identified either in the decentralization process, such as the process of international dispersal of State-powers in the vertical sense; or in the processes of privatization and deregulation, which while distinct processes are still necessarily interconnected, of international dispersal of State power in the horizontal sense.

Decentralization reflects a State's choice – through the adoption of international treaties – to transfer certain of its own functions to the international organisations of cooperation/integration, or jointly assign powers to the international organisations which as single entities the States – *uti singuli* – cannot have. This initial dispersal shows the two principal characteristics of the international order created with the adoption of the UN charter:²⁴ the co-existence of independent States and the established cooperation of interdependent States.²⁵ This last function is cemented through the voluntary creation by the States of distinct and separate international entities – i.e. the international organisations. In fact, as ob-

served by the ICJ in the *Reparations* case, 'the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.'²⁶ As is commonly known, since 11th April 1949 States lost forever the prerogative of being the only legal subjects in the international system. The ICJ – once it had clarified that 'throughout its history, the development of international law has been influenced by the requirements of international life'²⁷ – assigned international legal personality to the Organisation of the United Nations (hereinafter 'UN'), which is an indispensable requirement for achieving the goals and stated principles of the founding treaty, the UN Charter.

Over the years, a further step of 'the requirements of international life'²⁸ steadily brought affirmation of the consensus of States to the existence of common inviolable values – *inter alia*, human dignity. Indeed, in the eighties, the ICJ used the occasion of the *Tehran* case to link such principles – set out in the UN Declaration of Human Rights (1948) – to the general principles of international law.²⁹

Consequently, the volume of international obligations assumed by the States has considerably increased over the last decades. Today, cooperation between States in matters of human rights protection has become the cornerstone of contemporary international law,³⁰ as demonstrated by the developments in the law affirming the briefly mentioned concepts of *ius cogens* and the obligations *erga omnes*.³¹

Even if it is true 'the right of entering into international engagements is an attribute of State sovereignty' – as the PCIJ declared in its first sentence³², it can be affirmed that today (re-stating once again the expression used by the ICJ in the *Reparations* case) 'the requirements of international life'³³ have created legal

²³ ARCHIBUGI, D., HELD D. and KÖHLER, M. (eds.), *Re-imagining Political Community. Studies in Cosmopolitan Democracy*, Cambridge Polity Press, Cambridge, 1998, at 12.

²⁴ See *supra* at 1-2.

²⁵ CARRILLO SALCEDO, J.A. *supra* note 14, at 70.

²⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), at 178.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports (1980), at 40.

³⁰ Allott *et al.*, 'Review Essay Symposium: Philip Allott's *Eunomia* and *The Health of Nations* Thinking Another World: 'This Cannot Be How the World Was Meant to Be'', 16 *EJIL* (2005) 262.

³¹ See *supra* note 15. See also, A. TANZI, 'Relazioni Diplomatiche,' in *XIII Digesto* (1998), 125.

³² *Wimbledon*, 1923 PCIJ, Serie A, No. 1, 25.

³³ See *supra* note 26.

obligations which are binding on States. Be bound to comply without asking: that is the very turning point of the principle of sovereignty as it is classically understood.

Unfortunately, these legal developments are not always accompanied by institutional developments of effective implementation and therefore, as a result, can be considered as merely a kind of compensation for an institutional deficit.³⁴

CONTINUED: PRIVATIZATION AND DEREGULATION

During eighties, the UN international order shows a strong structural transformation due to the end of the international polarization by the two Cold War superpowers – the USA and USSR. With the fall of the iron curtain, the American hegemonic theory of democratic politics and market capitalism facilitated the growth of a multipolar world of politics where States (and NSAs) increased their cooperative and collaborative international endeavors towards political globalization.³⁵ In this light, the United States – the unique current superpower– and a general category of States – by contrast called ‘middle powers’³⁶ – formed the post-Cold War international community structure.

The curtain on the nineties is raised, in fact, with the democratic vista of a world open to economic liberalism which favours a considerable increase in the presence of private actors in the international community. It is in this context that the globalization processes of privatization and deregulation are fostered.

Privatization is concerned with the divestiture in the horizontal sense of State power through the transfer of certain public services from public control to private control by NSAs. This process has usually been accompanied by that of deregulation whereby the State removes restrictions on trade and financial

operations, leaving the non-State entities (especially multinational companies) completely free of market interference.

The ever-growing amount and ever-greater relevance of the activity of NSAs on the international scene, such as their interaction with States, make it possible that, to the international State/State and individual/State relations, are added other types of relations such as between NSA/State (but not individual /NSA) which form a relevant part of the multipolar political dynamic of international relations.

B. *The Interaction of NSAs and States in the Field of Human Rights*

From the negative expression of non-State actor – all which is not a State and acts on international ground is an NSA – it is easy to imagine the huge variety which exists on the international scene.³⁷ For our purposes let us consider, on the one hand, the International Governmental Organizations (hereinafter ‘IGO’s) as legal entities in the international system distinct and independent of the States, even if created and constituted primarily by States.³⁸ On the other hand, Non-Governmental Organisations (hereinafter ‘NGOs’) and the transnational corporations (hereinafter ‘TNCs’), as legal entities in the internal system – private entities either non-profit or profit – which act freely within the international community outside of State control and with a legal status which is not clearly defined by the international legal system.

As for IGOs, one has to bear in mind that the human rights system is closely linked to the international organization *par excellence*, the UN. Indeed, the UN Charter and UN organs created or authorized the creation of the major bodies that are concerned with human rights issues, e.g. the Security Council and

³⁴ ALCAIDE FERNÁNDEZ, J. *Orden Público y Derecho Internacional: Desarrollo Normativo y Déficit Institucional*, Secretariado de Publicaciones, Universidad de Sevilla, 2005, p. 92.

³⁵ However, it seems correct that globalization is not an American phenomenon at all. Cf. D. Held, *Global Covenant. The Social Democratic Alternative to the Washington Consensus*, Cambridge Polity Press, Cambridge, 2004, pp. 3-11.

³⁶ COX, R. and SINCLAIR, J., *Approaches to World Order*, Cambridge Polity Press, Cambridge 2001, pp. 241.

³⁷ ALSTON, P., *Non-state Actors and Human Rights*, Oxford University Press, Oxford, 2005; Wallance, W. and Josselin, D. (eds.), *Non-State Actors in World Politics*, Palgrave, Basingstoke 2001.

³⁸ Article 2 of the Draft Articles on Responsibility of International Organization (hereinafter ‘Draft Articles’). *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*. For the commentary to this article, see *ibid*, *Fifty-eighth Session, Supplement No. 10 (A/58/10)*, at 34-37.

General Assembly (hereinafter 'GA'), the Human Right Council, related working groups and Rapporteurs, and the Office of the High Commissioner of Human Rights (hereinafter 'OHCHR'). In addition, many of the most important human rights standards have been incorporated into the core international human rights treaties. A separate supervisory body has been set up in relation to each of these treaties creating what is commonly termed UN treaty-based monitoring mechanisms.³⁹ Therefore, they are expected to advocate and promote human rights, campaign for human rights observance, supervise compliance and find violations. Unfortunately, they also are eventual perpetrators of human rights because they effectively act as surrogates for States and in any event their 'lords and masters' are States.⁴⁰ One cannot forget that States are in fact the original (and still the only formal) inventors and targets of international human rights system. Due to the *nature circulaire* of international human rights protection, as shall be shown below, the whole system is indeed only based on State international responsibility.

As to the NGOs, they have always been important in the creation, development, and enforcement of international human rights law. In 1945 Article 71 of the UN Charter confers the power on the Economic and Social Council (hereinafter 'ECOSOC') to consult with NGOs when making appropriate accords with international or national organisations. In 1950 this consultation procedure was codified by ECOSOC⁴¹ – modified and integrated in 1968⁴² and 1996⁴³ – through the assignment of consultative status on the NGOs allied with ECOSOC and the possibility for them to consult with the UN Secretary-General (hereinafter 'SG').

Moreover, in 1951 the Council of Europe started to promote the recognition of the legal personality of NGOs and in 1986 the European Convention on Recognition of the Legal Personality of International Non-Governmental Organizations (hereinafter 'CETS No 124') was adopted.⁴⁴

As a result of the civil society's lobbying activity, let us also consider the role, which was agreed in the ambit, of the World Trade Organization (hereinafter 'WTO') – established in 1995 – where it was provided for the General Council to make 'appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO'.⁴⁵

Lastly, the influence exerted by NGOs is also reflected in the Statute of the International Criminal Court itself (hereinafter 'ICC') – adopted in 1998 – which gives the power to the prosecutor to 'seek additional information from States, organs of the United Nations, inter-governmental organizations, or other reliable sources that he or she deems appropriate'.⁴⁶

As to TNCs, they are today at the centre of criticism for violation of human rights in favour of economic benefits. Their legal status in international law is ambiguous. While in fact the PCIJ directly denied⁴⁷ – and subsequently the ICJ indirectly did likewise⁴⁸ – the possibility of enforcing international law on contracts stipulated between a State and a TNC, the subsequent procedure brought a gradual internationalization of these contracts and an ever-increasing role to TNCs in international society. This is demonstrated by the gradual development of legal instruments, both binding and non-binding, e.g. the International Centre Settlement Investment Dispute (hereinafter 'ICSID') in 1965, and the UN Charter of Economic Rights and Duties of States in 1974,⁴⁹ respectively. In the same way the jurisprudential evolution – e.g. *Texaco Overseas Petroleum Company* award⁵⁰ recognised a certain legal personality for TNCs under international law. Today, in reality, TNCs are entitled to specific rights and binding legal duties in the area of international investment law but not in the area of human rights. In fact, in the area of human rights only certain non-binding international regulation instruments have been developed e.g., the Network of Global Compact – launched at UN Headquarters in New York

³⁹ For ongoing debate on the treaty body reform, *Official Records of General Assembly, Sixty-second Session Supplement No. 36 (A/62/36)*, paras. 76-81.

⁴⁰ AKANDE, D. 'International Organization', in M. EVANS, *International Law*, 2006, pp. 277-305.

⁴¹ ECOSOC Res. 288 (X), 27 February 1950.

⁴² ECOSOC Res. 1296 (XLIV), 23 May 1968.

⁴³ ECOSOC Res. 1996/31, 25 June 1996.

⁴⁴ Cf. Article 2.

⁴⁵ Article 5(2) of Agreement Establishing the World Trade Organization.

⁴⁶ Article 15(2).

⁴⁷ *Serbian Loans*, 1927 PCIJ, Series A, No. 20, 41.

⁴⁸ *Anglo-Iran Oil Co.*, ICJ Reports (1952), 112.

⁴⁹ GA Res. 3281 (XXIX), 1 May 1974.

⁵⁰ [1979] ILR 53.

on 26th July 2000. If a non-binding legal instrument is not respected it still holds a certain legal relevance, as will be shown below, the TNCs are called to respond politically (but not legally) before the UN, which is making an effort to establish itself as a political global forum for, *inter alia*, the facilitation of human rights integration in business management.

THE STRENGTH OF WEAK TIES

The complex interaction between NSAs and States can be described using the title of a book written by Mark Granovetter, *The Strength of Weak Ties*.⁵¹ Put in context this expression in the area of international relations, those between equal sovereign States can be defined as *strong ties* or *hard power*. They transform in legal terms in both international customary and conventional law – i.e. *hard law*. However, the existence of *strong ties* can in no way avoid the creation of parallel and distinct interaction between States and other international entities which, on the contrary, can be defined as *weak ties* or *soft power*.⁵² They then transform into rules commonly defined as *soft law*, i.e. ‘rules which are neither strictly binding nor completely void of any legal significance’.⁵³

The constancy, the persistence and intensity of the *weak ties* between NSAs and States influence *de facto* the States’ attitude resulting in an alteration in the balance of power within the international structure. This alteration is the particular evidence of the *strength of weak ties*. Unfortunately, the subsequent transformations are not immediately visible because conventional methods of implementation are not used for reasons of political expediency.⁵⁴

Indeed, the final result of a political negotiation carried out in a diplomatic conference remains formally, for example, an international treaty adopted, signed and ratified by the States. To pay attention, however, only to the final result without analysing the elaboration process will leave one in a position of negligent

ignorance of the politico-economic contest and the multipolar structure of the negotiation comprising of States and NSAs, these last having actively participated in shaping the final result in a decisive way.⁵⁵

As clear evidence of the existence of the *strength of weak ties*, the interaction between NSAs and States has attracted an increasing amount of attention of the UN over the years, as shall be addressed below. Going towards a new approach, the UN has in fact today recognized the interaction between NSAs and States as so important as to officially qualify as one of the central areas of the UN’s work pursuant to the idea that the collaboration between the public sector, the private sector and civil society might create regularity and predictability in the participants’ relations because they need each other, since each has a different influence on human rights discourse.

C. The UN’s Effort to Become a Global Political Forum

After the end of the Cold War, national governments, IGOs and a wide variety of private profit and non-profit entities – i.e. TNCs and NGOs – began to get involved in global governance frameworks as the cycle of the UN World Conference showed.

Beginning with the World Summit for Children (New York, 1990) and moving to the Earth Summit I (Rio de Janeiro, 1992), the Commission on Global Governance (hereinafter ‘CGG’) – not an official body of the UN – was established in 1992 in order to enforce global co-operation either between States or between States and NSAs. On the occasion of the 50th anniversary of the UN Charter, the CGG filed the 1995 Report, *Our Global Neighbourhood*,⁵⁶ which may be considered the vanguard of emerging global governance led by UN. The CGG released its recommendations in preparation for a World Conference on Global

⁵¹ GRANOVETTER, M., ‘The Strength of Weak Ties’, 78 *AJS* (1973) 1360.

⁵² J.S., Jr. Nye, *Understanding International Conflicts*, Pearson/Addison Wesley, London, 2006.

⁵³ BERNHARDT, ‘Customary International Law’, 7 *EPIL* (1984) 62.

⁵⁴ Cf., *inter alia*, Baxter, ‘International law in ‘her infinite variety’,” 29 *ILCQ* (1980) 549; A. Tanzi, *Introduzione al Diritto Internazionale Contemporaneo*, 2nd ed, Cedam, Padova, 2006, 172-203.

⁵⁵ See for some criticism, Sur, ‘Une Cour Pénale Internationale: La Convention de Rome entre les ONG et le Conseil de Sécurité’, 103 *RGDIP* (1999) 29.

⁵⁶ CGG, *Our Global Neighbourhood* (1995).

Governance, in principle scheduled for 1998, at which official world governance treaties had been expected to be adopted for implementation by the year 2000.

On 17th September 1999, fifty-six UN representative Member States gathered in Vienna where they wrote and signed the UN's Charter for Global Democracy (commonly known as Charter 99) which directly, with the support of the civil society, called for global governance. In March of 2000, the SG reflects on the need for 'better governance'⁵⁷ for the international community of the XXI century through 'greater participation, coupled with accountability'.⁵⁸ On 8th September 2000 the GA adopted the United Nation Millennium Declaration which recognized the changing international structure and started to proceed with implementing global governance. In order to translate common values into actions,⁵⁹ the GA identified key objectives to carry out regarding, e.g. peace, security, disarmament, protection of human rights, democracy and good governance. In June 2004 the UN Report of the Panel of Eminent Persons on *United Nations – Civil Society Relations* (hereinafter 'Panel Report')⁶⁰ identified groups of private entities with the border term 'constituencies'⁶¹ in order to empower a range of global policy networks to innovate and build political options. Embracing new constituencies, the Panel Report urged the UN to offer political space for constructive interactions no longer only between States, but also between States and NSAs. Moreover, also in 2004, the Report of the High-Level UN Panel on Threats, Challenges and Change reinforced the idea of an international community united in reaching the goal of the *bonum commune* affirming the principle of the responsibility of each State to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶²

After a year of preparation, on 16th September, 2005 heads of States and Governments gathered at UN Headquarters (New York) to review progress since the Millennium Declaration. The 2005 World Summit Outcome⁶³ showed the practical difficul-

ties for implementing the millennium goals. Unfortunately, the Outcome is indeed less specific than the draft⁶⁴ was and only a few answers to respond to some pressing questions were given. Generally speaking, the Outcome failed to achieve the main aims as previously proposed and, therefore, the UN is still far from providing comprehensive policy guidance for managing global provision and governance.

Notwithstanding the few practical results obtained to date, the UN has constantly demonstrated its efforts to assume leadership of a global governance as a political forum for States and NSAs as shown in the 2006⁶⁵ and 2007⁶⁶ Reports on the work of Organization of the UN by the SG.

GOING TOWARDS A NEW APPROACH

In the context of global politics, the 2006 and 2007 SG Reports really began to show how all of the international actors should be trying to collaborate so as to achieve what none of them is able to achieve on its own. They can take advantage of the fact that each participant sector brings different resources to the global *fora*, combining the States' and NSAs' enforcement and political power and capacity for building skills.

In 2006, the former SG Koffi A. Annan added a fifth section on 'Global Constituencies' to the four sections of the 2005 World Summit Outcome, to cover, for the first time, the area regarding civil society and the business community that has not previously be classified as central to the UN's work. The idea is not new as the attempt of CGG showed. What is new is the official UN recognition.

Indeed, pursuant to the suggestion of the 2004 Report Panel to become more of an outward or networking organization, the work of the UN in 2006 focused particularly on how to strengthen the ties to civil society and to engage the business community.⁶⁷ Firstly, regarding strengthening ties to civil society, the SG considered the UN as a 'unique convening power

⁵⁷ SG Report A/54/2000, at 8.

⁵⁸ *Ibid.*

⁵⁹ GA Res. 55/2, 8 September 2000.

⁶⁰ UN Doc. A/58/817.

⁶¹ *Ibid.*

⁶² UN Doc. A/59/565+Corr.1.

⁶³ GA Res. 60/1, 24 October 2005.

⁶⁴ SG Report A/59/2005.

⁶⁵ *Official Records of General Assembly, Sixty-first Session Supplement No.1 (A/61/1).*

⁶⁶ *Official Records of General Assembly, Sixty-second Session Supplement No.1 (A/62/1).*

⁶⁷ *Official Records of General Assembly, supra note 64, at 1 and 40-46.*

to reach out to diverse constituencies, especially where actors command great expertise or recourses relevant to a particular issue.⁶⁸ Secondly, regarding engaging the business community, the SG referred to the Global Compact.⁶⁹

One year later, the current SG Ban Ki-moon, reiterated what had been stated by his predecessor pointing to some important results achieved such as the creation of 3,050 NGOs with consultative status in ECOSOC.⁷⁰ With regard to the business sector, meanwhile, he reiterated the UN's efforts to 'explore how to maximize engagement with business, while safeguarding the organization's integrity and improving its accountability.'⁷¹

Obviously, the UN's desire to become a global political forum for State actors and NSAs is an very ambitious project. At the same time it is still absolutely essential to reach a coordination between the different actors and, therefore, forging a multilayered system of global governance.⁷² Today, however, a global government remains, unfortunately, in the words of Sabino Cassese 'a reality that does not exist and may never exist.'⁷³

2. The Nature Circulaire of Human Rights Protection and Current Gaps

As is well-known, the international law meant as *lex specialis* of human rights shows an essential distinction from international law meant as *lex generalis*. This consists of the absence of the principle of *do ut des* which is the main characteristic of traditional international law⁷⁴ created *by* States and *for* States.⁷⁵ On the contrary, the international law of human rights has been

created *by* States (and therefore is identified as a State-centric system) but not *for* States, rather *for the individual* through the international vertical relation individual/State pursuant to the human rights system protection of *nature circulaire*. In fact, as was stated by the General Secretary of the Council of Europe during the 2000 Ministerial Conference (Roma), 'la protection des droits de l'homme commende et s'achève au niveau national.'⁷⁶

The international law of human rights created a *world order*⁷⁷ characterized by a wide range of State obligations conventionally classified as positive and negative obligations. The terminology departs from the traditional distinction between the so-called classic or first generation human rights – i.e. civil and political rights – and the second generation rights – i.e. economic, social and cultural rights.⁷⁸ The former rights have been transformed into State obligations to respect, such as the negative obligation not to interfere in the free exercise of these rights. The latter, meanwhile are transformed into positive obligations to protect, which means, positive actions by a State to ensure the rights' effective protection. Transgression of the first category is caused by the State's action while transgression of the second category is caused by an omission of the State.

However, no clear-cut criteria⁷⁹ exist in the human rights instruments to determine if and when there is effective protection. Indeed, the concept of positive obligation has steadily developed through the jurisprudence of the jurisdictional and quasi-jurisdictional organs of the systems of human rights protection system.

Suffice it to bear in mind that, on the one hand, the European Convention for the Protection of Human Rights and

⁶⁸ *Ibid*, at 43.

⁶⁹ *Ibid*, at 45-46.

⁷⁰ *Official Records of General Assembly, supra* note 65, at 29.

⁷¹ *Ibid*, at 30.

⁷² KU, C. 'Forging a Multilayered System of Global Governance', in RMACDONALD, R. St. and JOHNSTON, D.M. (eds.), *Towards World Constitutionalism*, 2005, pp. 631- 651.

⁷³ CASSESE, 'The Globalization of the Law', 37 *International Law and Politics*, 2005, p. 992.

⁷⁴ Cf. main classical references, *Mavrommatis Palestine Concessions*, 1924 PCIJ, Series A, No. 2, 12; *Jurisdiction of the Courts of Danzig*, 1928 PCIJ, Series B, No.15, 17-18.

⁷⁵ CARRILLO SALCEDO, J.A, *supra* note 14, at 35.

⁷⁶ Cf. Conseil de Europe, *Mise en œuvre institutionnelle et fonctionnelle de la protection des droits de l'homme aux niveaux national et européen. Protocole n. 14, Rapport explicatif* (2004) 17. See, J. ALCAIDE FERNANDEZ, 'Reforma Institucional de los Sistemas Regionales de Protección de Derechos Humanos', in de ASIS, R., BONDIA D. and MAZA, E. (coord.), *Los Desafíos de los Derechos Humanos Hoy*, Dykinson, 2007, pp. 305-338.

⁷⁷ MASKOWITZ, M. *Human Rights and World Order*, Ocean Publications, New York, 1958.

⁷⁸ BOBBIO, N., *L'Età dei Diritti*, Einaudi, Torino, 1990; Henkin, L. *The Age of the Rights*, Columbia University Press, New York, 1990.

⁷⁹ Cf. one of the main classical references, *Abdulaziz, Cobales and Balkandali v. the United Kingdom*, ECHR (1985), Series A, No. 94, 78.

Fundamental Freedoms (hereinafter 'European Convention') – adopted in 1950 – explicitly asserted only the State (negative) obligation to respect civil and political rights⁸⁰ – the only category of human rights formally recognized by the European Convention. On the other hand, nevertheless, the European Court of Human Rights (hereinafter 'ECHR') developed the concept of positive obligation during one of its first contentious cases between States asserting that the Member-States 'must prevent or remedy any breach at subordinate levels.'⁸¹

So one State, in non-interference with the exercise of civil or political rights and, therefore, theoretically respecting its negative obligations in human rights issues can nonetheless fail to meet its responsibility by not interfering enough. To be more precise, for not having acted *a priori* with positive actions which could have created the necessary conditions for the vindication of this right, or with positive actions *a posteriori* which, if possible, could have conferred the *restitutio in integrum* or guaranteed the non-repetition of the violation.

Moreover, since the law is in constant evolution adapting itself to society's progressive transformation of itself, today people speak of a fourth generation of human rights – *inter alia*, the right to the human genome and the individual's genetic patrimony, – having passed through a third generation e.g. collective rights.

Consequently, in practice it has become ever-more difficult to define the boundaries between negative and positive, and therefore, it is all the more difficult to determine in which case a State can be considered responsible or not. Depending on the circumstances of particular cases, a negative obligation can actually be transformed into a positive and the responsibility of acting may be transformed into one of omission.

A. Reconsidering State (Positive) Obligation due to the Third-Party Effect

The previously illustrated problem is exacerbated by the impact of globalization processes on the international community

structure. These have actually destabilized the Nation-State by the redistribution of the classic public functions traditionally attributed to the State in favour of international organizations or private international entities.

The question that arises from this is how to define at what point the lack of effective human rights protection in the face of unlawful conduct by NSAs is attributable to the unlawful omission of conduct of the State.

One has to bear in mind that international conventional human rights law, – like treaty law – is governed by the VCLT where it is stated that 'a treaty shall be interpreted in good faith ... and in the light of its object and purposes.'⁸² Further, bear in mind that an instrument of human rights protection is a 'living instrument'⁸³ and must be interpreted 'in the light of the present-day conditions',⁸⁴ nothing prohibits that the classic negative obligation of non-interference by the State should be reconsidered simultaneously with the advance of the globalization phenomenon in terms of positive State obligations to act to indirectly apply norms of human rights in controversies arising in the area of horizontal relations between private parties.

On first inspection, it seems impossible to reconcile an individual's claim for a violation of their fundamental right caused by the unlawful conduct of an NSA considering that only a State which is party to a human rights treaty can be charged before competent organs provided for by the treaty in question. In reality, the jurisprudence of the ECHR⁸⁵ and of the Inter-American Court of Human Rights (hereinafter 'IACHR')⁸⁶ since their first years of working have elaborated a concept of positive State obligation addressed to its application in the private sphere, the so-called 'doctrine of third party effect.'

The expression 'third party effect' (or 'horizontal effect') finds its origin in the reference in German to the term *Drittwirkung*, whose meaning seems to have been manifest in the words which go together, *dritte* and *wirkung*, in English 'third' and 'effect,' respectively. In certain States' domestic law, the doctrine of third party effect refers to the possible application of constitutional law

⁸⁰ Article 1 of European Convention; Cf. also Articles 1 and 2 of American Convention on Human Rights (hereinafter 'American Convention').

⁸¹ *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, 239.

⁸² Article 31(1).

⁸³ *Tyrer v. United Kingdom*, ECHR (1978) Series A, No. 26, 31.

⁸⁴ *Airey v. Ireland*, ECHR (1979), Series A, No. 32, 26.

⁸⁵ See *supra* note 80.

⁸⁶ *Velásquez Rodríguez c. Honduras*, IACHR (1988), Series C, No. 4, 166, 167, 172.

in cases where both parties are private entities, and where 'third party' obviously refers to any party outside of the classic individual/State relation affirmed in the constitutional law.⁸⁷

Returning to international law, the doctrine of 'third party effect' is relevant because it permits enlargement of the perception of human rights as an inherent protection of the relation *stricto sensu* individual/State.⁸⁸ In fact, applying the 'doctrine of third party effect', the State can be held responsible for not having adopted positive measures – for example, national legislation – to avoid in some way a violation of human rights, committed in its jurisdiction, by the unlawful conduct of private entities. In these cases, the State responsibility finds its foundation in the non-existence of national legislation and not in the link between the State and the action from which the legal claim by the individual arises.

AN APPROACH FOR THE FUTURE

Thus, a good approach to the future enforcement of human rights would hold a State responsible for a private action as it relates to its failure to legislate or take preventive action. However, in the current context of national decentralization, privatization and deregulation, is such an approach feasible?

In reality, if on the one hand the assertion of the socio-economic and political interdependence between States and NSAs has gone beyond the confines of nation-States, on the other hand, those changes cannot be addressed through a reassertion of nation-States' behaviour, but only through a regulation of an emergent 'global- State'.⁸⁹

The State in XXI century is in fact global because it possesses to 'some degree, global reach and legitimacy',⁹⁰ but, at the same time, it acquires a greater relevancy while that society becomes

ever more complex. This in fact 'constitutes a more or less coherent raft of State institutions'⁹¹ and exercises its traditional functions 'in regulating economy, society and politics' although no longer on a national level, but rather 'on a global scale'.⁹²

As a consequence, to guarantee effective human rights protection in XXI century, it is necessary to reinterpret the positive obligations in order to adapt to the emerging global State. That may be feasible only through a coherent jurisprudence of judicial or quasi-judicial human rights bodies due to such an approach.

At present, unfortunately, the procedure shows incoherence. Bear in mind the contradictory jurisprudence not only within the ECHR itself, but also when the ECHR is compared to that of the I/ACHR. For example, in 2000 the ECHR applied the doctrine of third party effect in the *Fuentes Bobo*⁹³ case, whereas in 2003 the ECHR did not apply the same doctrine in the *Appleby* case even though recognising that 'demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other'.⁹⁴ On the other side of the ocean, in the same year (2003), the I/ACHR expresses the consultative opinion affirming the existence of (positive) State duties regarding the prevention of discrimination in the workplace by private employers.⁹⁵ Moreover, in 2006, the I/ACHR condemns Paraguay for not having adopted legislation to prevent violation by private companies of the indigenous peoples' collective right to the propriety of their traditional land.⁹⁶

B. The Accountability/Responsibility Gap for Human Rights Violations by NSAs

The growing influence of IOGs, TNCs and NGOs as international actors who act independently of States on the interna-

⁸⁷ E.g., Art. 35(3) Federal Constitution of Swiss Confederations (1999).

⁸⁸ CARRILLO SALCEDO, J.A, *El Convenio Europeo de los Derechos Humanos*, Tecnos, Madrid, 2003, pp. 100-101.

⁸⁹ Quoted in M. SHAW, *The State of Globalization. Towards a theory of State transformation*, version re-printed in Sinclair, *Global Governance. Critical Concepts in political science*, Routledge, London, 2004, pp. 210-225.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Fuentes Bobo v. Spain*, ECHR (2000), *Application no. 39293/98*.

⁹⁴ *Appleby and Others v. the United Kingdom*, ECHR (2003), *Application no. 44306/98*, 47.

⁹⁵ *Juridical Condition and Rights of the Undocumented Migrants*, I/ACHR (2003) Series A, No. 18. See also the Concurring Opinion of the then President of the I/ACHR, Judge Antonio Cançado Trindade, paras. 77 -78.

⁹⁶ *Comunidad Sawhoyamaya v. Paraguay*, I/ACHR (2006) Series C, No. 146. This is a subsequent decision of the leading case *Comunidad Mayagna (Sumo) Awast Tingni v. Nicaragua*, I/ACHR (2001) Series C, No. 79, together with other subsequent cases, i.e. *Comunidad Moiwana v. Suriname*, I/ACHR (2005) Series C, No.124; *Comunidad Yakye Axa c. Paraguay*, I/ACHR (2005) Series C, No. 125.

tional scene, have caused considerable concern through internationally wrongful acts and, in particular, through violations of human rights.

Generally speaking, the use of the term international responsibility is commonly accepted to point out the legal consequences that arise from non-observance of an international obligation caused by conduct attributable to an international legal subject, i.e. States and IGOs.⁹⁷

Instead the use of the English term 'accountability' is not generally accepted for expressing the wide and vague legal concept of which the notion of responsibility is a part. The lack of a precise legal connotation is evident in the fact that an equivalent expression cannot be found in other languages, *inter alia*, French, Spanish, Italian and German.⁹⁸ However, in Anglo-Saxon legal language the word 'accountability' is used frequently to attach a kind of politico-legal responsibility to NSAs, or more accurately, their duty to make account in the ambit of a global political forum for violating chiefly rules which, though legally non-binding, still have a definite legal relevance, i.e. *soft law*.⁹⁹

THE INTERNATIONAL RESPONSIBILITY GAP ON HUMAN RIGHTS VIOLATIONS BY IGOs

The gap in the international responsibility of IGOs was addressed by the International Law Commission (hereinafter 'ILC') in 2002¹⁰⁰ and is still in progress.¹⁰¹

The Draft Articles on the Responsibility of International Organizations – modelled on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter

'DARS') which was approved by the ILC on 9 August 2001¹⁰² – focuses on *lex generalis*, leaving the issues of human rights to *lex specialis*.

It must be pointed out that no international organization is currently part of any international treaty on human rights.¹⁰³ Moreover, it must also be highlighted that no international organization has yet adopted any foundation treaty which deals with the potential responsibility for human rights violations by an organization and which sets out the consequences.

Despite this, as international legal persons IGOs are obliged to respect the customary international law, and in particular *jus cogens*. This has been addressed in *lege ferenda* in Chapter III of the Draft Articles¹⁰⁴ which substantially reprised Article 40 of DARS.¹⁰⁵ On top of this, it must be noted that in the project by the international organizations a duty of cooperation between States and international organizations is foreseen 'to bring the breach to an end.'¹⁰⁶

Leaving the *lege ferenda* and going to current international practice, it is quite interesting to look at the jurisprudence of the ECHR concerning the relations of Member States with the European Community (EC), in which the question of responsibility for breaches of human rights recognized by the European Convention is addressed. Beyond a few exceptions – such as the significant cases of *Matthews*¹⁰⁷ and *Bosphorus*¹⁰⁸-, the ECHR dismissed the cases concerned because of a lack of jurisdiction.¹⁰⁹ At the same time, however, the ECHR often reiterated that a State can be held responsible when it has granted competences to an international organization and has subsequently failed to

⁹⁷ CRAWFORD, J. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, pp. 77-80.

⁹⁸ HAFNER, G. 'Accountability of International Organizations – A Critical View', in R. St. Macdonald and D.M. Johnston (eds.), *supra* note 71, at 585-630.

⁹⁹ See *supra* note 53.

¹⁰⁰ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10 and Corr.1)*, paras. 461-463.

¹⁰¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*.

¹⁰² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*.

¹⁰³ Taking full account of the specifics of EU law, one cannot forget the pending (and contested) process for the EU accession to the ECHR and future development with the signing of the Lisbon Treaty and its Protocols on 13th December 2007.

¹⁰⁴ See *supra* note 100, at 217-220.

¹⁰⁵ See *supra* note 101.

¹⁰⁶ See *supra* note 100, at 218.

¹⁰⁷ *Matthews v. United Kingdom*, ECHR (1999), *Application no. 24833/94*.

¹⁰⁸ *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland* case, ECHR (2005), *Application no. 45036/98*.

¹⁰⁹ For example, *Banckovic v. Belgium and 16 other contracting States*, ECHR (2001), *Application no. 52207/99*.

ensure an 'equivalent protection' of the rights recognized by the European Convention.¹¹⁰

According to Browline – current member of ILC –, 'whilst the context is that of human rights, it would seem to be general in its application.'¹¹¹ Indeed, the ILC is taking ECHR case law into account in order to draft the text of the Draft Articles. At present, we cannot foresee if any of the various solutions under consideration by the ILC will be adopted and in which combinations.

C. The Accountability ... (continued): by TNCs and NGOs

Regarding TNCs' human rights violations, universal tort jurisdiction has undergone something of a renaissance in recent years. Universal tort jurisdiction would be defined here as a trend under which civil proceedings – in accordance with national law – may be brought forth in a domestic court on the grounds that the TNC's unlawful conduct is a matter of international concern. Indeed, recent US case law lends support to such an emerging trend of universal civil jurisdiction pursuant to the Alien Tort Claim Act of 1879 (hereinafter 'ATCA'), while at the same time suggesting limits to its application.¹¹² This is because universal civil jurisdiction may be applicable in the national common law system and only in a very reduced portion of cases in which TNCs commit wrongful acts so harmful – *delicta juris gentium* – that they affect the shared core values of the international community as a whole. Furthermore, in light of the differences in legal cultures – especially with the national civil law system – serious doubts arise about the usefulness of ATCA type remedies in many other countries.

Having said that, it is important to underline that there are still no international human rights obligations upon TNCs and,

therefore, they are not internationally responsible for any human rights violations. Moreover, no international *hard law* making process is actually in progress to achieve that aim.

However, there has been some progress in the development of *soft law* which make TNCs politically accountable within multiple-constituencies' political processes. Indeed, TNCs may be internationally accountable for human rights infringements when not respecting human rights codes of conduct in the context, for example, of Global Compact.

The international accountability of TNCs may be considered today as just a sort of international political responsibility in the light of UN aspiration to build coalitions of international actors with diverse but complementary capacities towards the implementation of minimum standards in international basic human rights.

By NGOs

As we have already mentioned, NGOs' have an indirect but powerful role in international human rights law. They often play an essential role in more informal ways, by bringing relevant information to the attention of human rights monitoring bodies. The influence of these developments is substantial because it may be specially provided for in the relevant treaty or resolution, or it may be contained in the monitoring body's rules of procedure, or it may not be based on any formal rule at all.¹¹³

Even though pure 'do-gooders,' NGOs may pursue ends that clash with other human rights interests, and, in such a case, they could not be held responsible under international (human rights) law – simply because no international obligation is incumbent upon them.

¹¹⁰ *Cantoni v. France*, ECHR (1996), *Application no. 17862/91*; *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, ECHR (2004), *Application no. 56672/00*.

¹¹¹ I. BROWNIE, 'The responsibility of the States for Acts of International Organizations', in M. RAGAZZI, *International Responsibility Today. Essay in memory of Oscar Schachter* (2005) 361.

¹¹² There is no agreement to what really universal jurisdiction stands for. As Professor Schabas wrote: 'The exercise of universal jurisdiction reminds us of Mark Twain's famous comment about the weather: everybody talks

about it, but nobody does anything about it,' W. SCHABAS, 'Foreword', in L. REYDAMS, *Universal Jurisdiction. International and Municipal Legal Perspectives* (2003) 1. As far as universal jurisdiction, cf. main classical references of US case-law, *Filartiga v. Pena-Irala*, 630 F 2d 876 (2d Cir 1980), *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995), *Doe v. Unocal Corporation* 2002 (9th Cir 2002); *Sosa v. Alvarez-Machain*, 124S.Ct 2739 (2004).

¹¹³ Over recent decades, a practice has developed of informal involvement by NGOs in the discussion of State reports. Taking as example the Human Rights Committee sessions, NGOs may prepare and present an 'alternative report' to the State's.

As a result of public scandals or exaggerated claims of performance, NGOs have begun to adopt self-regulatory rules – *i.e.* codes of conduct, partially in an effort to redeem the image of the civil sector and partly to enhance performance-establishing common positions, and strategic alliances in order to effectively influence international policy.

Accordingly, following the logic adopted in the previous section about TNCs, NGOs may be internationally accountable as a sort of political response due to the *ratio* of engaging NGOs as a key constituency for partnership within the UN global political forum.

Concluding Reflections

In pondering the political globalization phenomenon and the *nature circulaire* of international human rights protection, the international human rights requirements of XXI century cannot apparently be satisfied by their theoretical classification either as belonging to the public or private sphere nor by positive or negative obligations in terms of a State's international responsibility through action or omission.

The requirements of international human rights life of XXI century seems to be to clarify the extent of human rights (positive) obligation of (global) States in order to facilitate a coherent jurisprudence by the human rights courts when deciding whether a State is responsible for not having effectively protected human rights from the unlawful conduct of NSAs.

At this point it is necessary to make a distinction between human rights infringements by IGOs and other NSAs.

With regards to the gap in responsibility of IGOs for human rights violations, even though – not surprisingly – the ILC is leaving the matter to *lex specialis*, the present situation gives us the impression that a general regime of international responsibility of IGOs will be put in place. Unfortunately, as of today it is hard to foresee which specific solutions within the participating regimes of international responsibility between States and IGOs for internationally wrongful acts and what combination between *lex generalis* and human rights *lex specialis* will be adopted.

With regards to private entities, they will not become responsible for human rights violations under international law as long as States do not want private entities to do so.

In contrast, the alternative challenge to States will be to enforce responsibility for human rights violations before national civil courts. The States, on behalf of the UN, are beginning to compensate for the dispersal of their functions by opening a dialogue with the NSAs. In this way, they are attempting to regulate their conduct in respect of human rights in conformity with the international customary law and conventions.

Pursuant to the UN Global Constituencies approach, it might indeed be feasible to bring all common principles of miscellaneous human rights codes of conduct together into a universal code of conduct for private entities. At the same time, it might provide general clauses enabling the settlement of conflicts arising from two or more civil domestic courts¹¹⁴ having concurrent jurisdiction (*forum shopping*) over the unlawful conduct of international private entities. In so doing, the discussion of national jurisdiction in pursuit of human rights completes the *nature circulaire* of international human rights protection.

However, criticism to this approach is centred on the prediction that States will be unable or unwilling to enforce their policies. Another strand of scepticism projects that, instead of the expansion of domestic (civil) jurisdiction over the conduct of international (profit and non-profit) private entities, arbitration procedures will be facilitated even when the conflicts between private parties deal with fundamental rights.

As a final result of pondering the political globalization phenomenon and the *nature circulaire* of international human rights protection, a strong sense of fluidity and opportunity emerges, but it is hardly possible to predict to what extent the international human rights protection system of today will 'safeguard the individual in a real and practical way,¹¹⁵ and not in an illusory and theoretical way.¹¹⁶

¹¹⁴ AKEHURST, 'Jurisdiction in International law', 46 *BYIL* (1972) 145.

¹¹⁵ See *supra* note 83.

¹¹⁶ CARRILLO SALCEDO, *supra* note 87, at 103.

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