Protecting Labour Rights as Human Rights: Present and Future of International Supervision

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on the Application of Conventions and Recommendations,
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«C'est l'Organisation internationale du Travail
qui dès sa création et sans cesse depuis a perfectionné
un contrôle de l'exécution des conventions,
et plus généralement des normes internationales du travail,
qui est encore aujourd'hui le modèle le plus accompli
en la matière»

Jean Charpentier, «Le contrôle par les organisations internationales de l'exécution des obligations des Etats», Recueil des cours de l'Académie de droit international, vol.182, 1983, p. 163

Foreword

In early 2006, the International Labour Standards Department of the International Labour Office took the initiative to organize an international event in order to celebrate the 80th anniversary from the establishment of the ILO Committee of Experts (1926-2006), the Organization's main supervisory organ for monitoring the application of ratified international labour Conventions. In consultation with the Committee members, it was decided that the event should not be ILO-centric but outward looking addressing topical issues such as human rights protection and institutional reform in a global context. It was further decided to associate the UN Committee on Economic and Social Rights as much as possible with this event as the two bodies not only share similarities in their mandates and functioning but also hold their respective annual sessions practically at the same time.

As finally scheduled, the two-day conference focused on current issues concerning the effectiveness of supervision in the international legal system. The aim was to put the Committee of Experts' work into broader perspective by bringing together practitioners from different international human rights bodies and scholars specialized in the problems of state compliance with binding norms in international law. Guest speakers' presentations were articulated around four thematic sessions: (i) the existing institutional framework for monitoring state compliance with social and economic rights, (ii) rethinking methods of supervision and evaluating their impact, (iii) international supervision at the time of institutional reform, and (iv) future approaches to international regulation and supervision. Two roundtable discussions on the effectiveness of international supervision and on the quest for new compliance tools completed the programme.

The Proceedings of the international colloquium *"Protecting Labour Rights as Human Rights: Present and Future of International Supervision"* do not merely reproduce what was actually said at the colloquium, but are based on papers submitted by numerous panelists and the verbatim transcriptions of the

various sessions. Oral interventions, remarks and discussions were edited to make a coherent record while space limitations required others to be shortened. Several colleagues offered a helping hand in preparing this volume, in particular Christine Bader, Elisabeth Fombuena, Martine Humblet, Kroum Markov, Shingo Miyake, Martin Oelz and Maria Travieso, without whose valuable assistance it would not have been possible to complete the task of publishing the proceedings on time.

The photos included in this volume as well as the cumulative list of all CEACR members are part of the photo and document exhibition *"A peerless heritage 1926-2006"* which was organized by the Communications and Files Section (DOSCOM) to mark the 80th anniversary of the ILO Committee of Experts. Special thanks go to Ms. Renée Berthon for her meticulous work in setting up this exhibition.

The International Labour Standards Department is particularly thankful to the Geneva office of the *Friedrich-Ebert-Stiftung (FES)* which kindly accepted to cover the full cost of the publication of the colloquium proceedings. The FES also hosted the official dinner on the first day of the colloquium in continuation of its initiative to organize a joint luncheon for the members of the ILO Committee of Experts and the UN Committee on Economic and Social Rights. A special word of thanks goes to the former director of the FES Geneva office, Mr. Erfried Adam, whose personal commitment and generous support is gratefully acknowledged.

Cleopatra Doumbia-Henry
Director
International Labour Standards Department
Geneva, March 2007

Contents

Welcome address

Juan Somavia *

Distinguished guests, distinguished members of the Committee of Experts, dear colleagues, dear friends,

The two-day symposium that you all honour with your presence offers the opportunity for a triple exercise: to pay tribute to a venerable institution, to look critically into its past record and give some constructive thought to its future evolution.

Let me first pay homage: the Committee of Experts is monitoring the application of nearly 200 binding international instruments that have given rise to more than 7,400 ratifications to date. To my knowledge, this is an unparalleled record, a truly Herculean (though perhaps sometimes Sisyphean) task, for any international supervisory body. Then there is the stature of its members; the Committee has been served by world-renowned academics and eminent legal practitioners. William Rappard, Arnold McNair, Georges Scelle, Earl Warren, Max Sorensen, Boutros Boutros Ghali, Roberto Ago, José Maria Ruda have all put their great intellect at some point in the service of this Committee. And then there is the output. The Committee's annual report runs for hundreds of pages and contains on the average some 2,200 comments addressing the strengths and weaknesses of the labour legislation of all 179 member States – true benchmark for the protection of social rights around the world and the implementation of the ILO's decent work agenda. By all means an outstanding achievement.

Secondly, a word of caution. There is no doubt that the Committee of Experts gained prominence due to the highest standards of objectivity and impartiality in discharging its task. The Committee of Experts dispelled all doubts that might have been raised at the outset by strictly clinging to its mandate. "You appoint innocuous experts" – warned the Belgian government delegate, Professor Mahaim, in 1926 – "and they become inspectors. I would

* ILO Director-General.

consider it extremely dangerous to organize an improvised tribunal, a council of war". The Mussolini government long considered the Committee of Experts "unconstitutional" – suffice to take a look at some documents displayed in the exhibition outside this room. The Committee's consistency and unfailing faith in the value of its activities defeated bad prophecies and brought it the recognition and respect that it still enjoys today. However, the Committee has been at the crossroads for the past few years. Its workload is reaching an alarming weight; this could be prejudicial to its ability to make its comments easily understandable – despite their frequent technicality – and its aim of achieving tangible progress through dialogue with Governments rather than through the condemnation of shortcomings. In prefacing a book published two years ago by the Standards Department in honour of Nicolas Valticos, I referred to standards as a source of responsibility – responsibility to manage this impressive normative wealth effectively, work energetically for their promotion, strengthen their impact and add muscle to the organs responsible for the supervision of their application. In fact, the ongoing effort to mainstream international labour standards needs to go in parallel with an effort to improve the working methods of the supervisory machinery. Reforms must of course be well-thought of and mature and must carry a certain unanimity. They also need, however, to be timely, far-sighted and audacious to have their chance of success.

Thirdly, what does the future hold in store? Writing in 1969 on the occasion of yet another anniversary, my predecessor Wilfred Jenks referred to the "continued vitality of the ILO tradition of bold but cautious innovation" as attested by the new arrangements for direct contacts with governments first introduced by the Committee of Experts in 1968. Well, the recipe, I think, still holds good, perhaps we just need a more generous dose of boldness in the caution. After all, let us not forget how pioneering this Committee looked and was at the time of its inception. Let us not forget other pioneering steps, such as the Committee on Freedom of Association, which have made not only the reputation of this House but also landmark contributions to the evolution of the law of international organizations. May our action be driven not only by past experience but also by future exploration. How can our Organization make the best use of this institution – this precious asset which is not possessed by any other organization? Strengthening the synergy with the Conference Committee, using the Committee of Experts' comments in a more focused way and integrating them into a country-specific decent work action plan, bringing the Committee's work closer to peoples' realities and linking it with technical cooperation as part of the assistance package offered to our constituents: these are all ideas to be explored. More then ever before, strengthening our system of supervision is a genuine concern and the Committee of Experts can count on Office support to put in place all necessary changes to accompany its work for the years to come.

I am confident that this two-day event will give enough food for thought, I warmly welcome you all, and I wholeheartedly wish you every success in your discussions.

Opening remarks

Robyn A. Layton *

Distinguished guests, contributors, participants, colleagues and also ILO officials,

On this splendid occasion of the colloquium to mark 80 years of the work of the Committee of Experts, it is indeed an honour that as the current chairperson of the Committee, I have the privilege of giving an opening address. I do so with considerable humility, on behalf of highly esteemed colleagues, present and past and I especially mention four past colleagues who are able to be present with us over these next two days. In order of retirement from the Committee, they are Professor Verdier from France, Professor von Maydell from Germany, Vice-President Alburquerque from Dominican Republic and Professor Mesquita Barros from Brazil. Each of those colleagues has made an impressive contribution to our work. This colloquium is an ideal way in which to acknowledge the inspirational decision made by the Governing Body 80 years ago to create this Committee. The colloquium provides an invaluable opportunity to reflect on the unique supervisory aspects of the ILO of which this Committee is a vital part. It enables us to reflect on past, present and future, a luxury which we, as current working members of the Committee do not usually have. It will enable us to consider new ways in which we, as current members may contribute to the contribution of the work of the Committee, both during our terms and for the colleagues that follow. And as part of this reflection, it's worth remembering that at the time of its creation in 1926, it was specifically stated that the persons appointed to sit at the Committee in what was otherwise a tripartite organization, were to be appointed not as representatives of states or particular interests but because of their expert knowledge. It was stated that the persons should be of independent standing and it was also stated that it should be an impartial body

* Chairperson of the ILO Committee of Experts on the Application of Conventions and Recommendations.

with as wide a representation of experience in different countries as possible. It was also indicated that its creation would be authorized as an experiment and that is the wording that was used. This experiment has lasted quite a long time and these features remain the hallmark of the Committee, the independence, impartiality, expertise and geographic spread. The initial members of the Committee were eight, they met for three days to examine 180 reports from 26 States, the number of member States at the time were 55. There were 23 Conventions and 28 Recommendations. Now we have 18 members who meet for three weeks to examine some 2,500 reports from 179 member States with nearly 200 binding instruments. The sheer number matters that we need to consider and the volume of work is of itself one of the greatest challenges of the future. Again, returning to the past, in 1947 after the war, which of course significantly impaired the work of ILO generally, the Committee of Experts requested the Governing Body to enlarge the Committee to its pre-war size, 13 members. And also said, it would be of particular assistance to have and this is a quotation, "a woman member, with specialized knowledge in the field of protective legislation for women and children". At the time this request was probably viewed as radical indeed. And of course, stereotyping was not a notion which had currency at the time. One can see from the representation of photographs outside as to the gender representation. And even when I joined the Committee 13 years ago, there were only three female members. Today, 6 of the 18 members on our Committee are women which is an unprecedented proportion and we now have a woman as a Chairperson. I wonder whether in the future, the numbers will be reversed and what might be the consequence. The Committee is indeed at a crossroads as indicated in the Director-General's speech. For the last few years, we have developed a subcommittee on working methods to give preliminary consideration to issues of improvement to our work as well as major issues about our direction for the future. We have made important decisions concerning the length of time we are prepared to offer ourselves for appointment as members so that there is a balance between the need to retain continuity but still keep refreshed by new input. This means that sadly, we must say farewell to some members at the same time as welcoming others. We have also discussed improved ways of dealing with our work. All members share a common commitment and passion for the tasks required of the Committee, which given our now exhausting levels of work is just as well. In the same breath, I also pay tribute to the dedicated work of the Office which unstintingly support us. Another of the major challenges is continuing to foster relationships with other bodies in the house. Notably, the Committee on the Application of Standards at the International Labour Conference. Whilst we each have our respective mandates, there is a clear linkage and complimentarity between our Committees and we are continuing to increase our dialogue with positive results. Notwithstanding our intense workload, we still have very spirited discussions, particularly on important matters of principle and of course including one of our major outputs which is the General Survey this year, on forced labour, which I thought was actually quite apt.

In conclusion, on behalf on my colleagues, I thank the Office and the ILO as a whole for the wonderful opportunity to listen to erudite papers from eminent people, to hear discussions and exchanges both during and after the sessions, and to be refreshed in my thinking, at least, as a consequence.

I. Monitoring state compliance with social and economic rights – The institutional framework

Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights

Eibe Riedel *

I. Introduction

It is a very happy occasion, indeed, for holding an international colloquium. The Committee on Economic, Social and Cultural Rights (CESCR) wholeheartedly congratulates the Committee of Experts on the Application of Conventions and Recommendations (CEACR) for its impressive achievements in 80 years of practice, and our praise goes, of course, also to the parent organisation, the International Labour Organization (ILO), that has made this success story possible.[1] The fact that the ILO has by now adopted 186 Conventions and 192 Recommendations – all geared to harmonising and improving national labour rights situations – and the fact that the CEACR at its last session mustered a total of about 1,900 country reports, already speaks for itself. The painstaking work undertaken has had an enormous effect on labour law in all Member States, and is a cause for lasting pride and satisfaction. It must be remembered that the ILO began its standard-setting work on formulating and later monitoring labour rights well before any other human rights bodies under conditions of participation of non-governmental actors, in the context of the unique tripartite structure of the Organisation, and this deserves special mention. The human rights treaty bodies established after the Second World War, particularly under the International Covenants on Civil and Political Rights (ICCPR)

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* Professor of Law, University of Mannheim; Vice-Chairperson, UN Committee on Economic, Social and Cultural Rights.

[1] On the impressive work of the CEACR, see Isabelle Boivin and Alberto Odero, "The Committee of Experts on the Application of Conventions and Recommendations: Progress achieved in national labour legislation", *International Labour Review*, vol. 145, 2006, pp. 1-14.

and Economic, Social and Cultural Rights (ICESCR) and under regional social rights charters, all draw heavily on the experience and practice of the ILO mechanisms. The fact that our two Committees, the CEACR and the CESCR, now regularly meet once a year to exchange experiences and to learn about the most recent developments in our respective bodies, bears witness to this.

II. Monitoring of Covenant Provisions

At the outset, I wish to briefly summarize the monitoring experience of the CESCR, placing particular emphasis on those rights of the International Covenant on Economic, Social and Cultural Rights (hereinafter the Covenant) where the ILO has regularly provided us with extensive and useful information, i.e. particularly articles 6 (right to work), 7 (just and favourable conditions of work), 8 (trade union rights, including the right to strike) and 9 (right to social security, including social insurance), but also on articles 10 (rights of the family), 11 (provision of an adequate standard of living), 12 (health) and 15 (culture). Other relevant articles which are interrelated and co-variant are not addressed here. Needless to say, when the Covenant was adopted in 1966, almost exactly 50 years ago, the labour rights were drafted, based almost entirely on the experience of the ILO. Ever since, the International Labour Organisation has faithfully contributed to the effective work of the eighteen members of the CESCR by providing us for each of our two annual sessions of three weeks each, plus two pre-sessional working groups of an extra two weeks, with extensive background material without which we could not do our monitoring work adequately. The ILO faithfully fulfils the philosophy laid down in article 22 of the Covenant which provides, inter alia, that "organs of the UN, their subsidiary organs and specialized agencies concerned with furnishing technical assistance may bring to the attention of other organs any matters arising out of the reports referred to in Part IV of the Covenant, which may assist such bodies, in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the […] Covenant". In so doing, the various departments of the ILO have regularly provided the CESCR with valuable information on the realization of the core labour rights, as contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[2] That Declaration sets "baseline entitlements or a floor set of rights" that all States must comply with, "regardless of their level of development or location in the international economy".[3] The seven fundamental Conventions embraced in that Declaration which itself re-iterates the thrust of the

[2] Adopted at the 86th Session of the International Labour Conference in June 1998.

[3] See generally Patrick Macklem, "The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?" in Philip Alston (ed.), *Labour Rights as Human Rights*, Oxford, 2005, pp. 61-84.

1944 Philadelphia Declaration and the ILO Constitution,[4] refer to freedom of association and collective bargaining (Nos. 87 and 98), forced labour (Nos. 29 and 105), non-discrimination (Nos. 100 and 111) and minimum age (No. 138), all of which affect specific Covenant rights as well. And in the monitoring process, CESCR members regularly ask State parties why they have not ratified some of the relevant ILO Conventions, and if not, the CESCR will regularly recommend ratification in its concluding observations addressed to the State Party.

Not all ILO Conventions are covered by the Covenant, many of them relating to domestic labour law issues, not specifically to human rights situations. The distinction is important, because in non-human rights areas, States are free to change positions in the light of later societal developments, which cannot be the case with human rights standards – because once a human right, always a human right! Thus it has to be carefully assessed whether a labour law convention affects core labour standards as human rights standards or not. The core labour rights have proven to form the minimum baseline to which the CESCR now regularly refers.

III. General Comments

The CESCR has recently adopted a General Comment on the right to work, drawing heavily on the material provided by the ILO. In fact, General Comment No. 18 on the right to work[5] emphasizes that the Covenant deals more comprehensively with that right than any other international instrument.[6] It stresses that that work specified in article 6 of the Covenant must be decent work, and that articles 6 to 8 are interdependent.[7] As outlined in its General Comment No.3 (1990) the CESCR stresses core obligations of article 6, encompassing non-discrimination and equal protection of employment; access to employment, especially for marginalized and disadvantaged individuals and groups must be ensured, in order for them "to live a life of dignity"; and measures must be avoided that lead to discrimination and unequal treatment in the private and public sectors of such individuals and groups; and the State party further is required to adopt and implement a national employment strategy and plan of

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[4] Originally Part XIII (articles 387-427) of the Treaty of Versailles setting up a permanent organization of the League of Nations. The ILO was set up as a specialized agency under article 57 of the UN Charter on 14 December 1946. On the Philadelphia Declaration, adopted 10 May 1944 and annexed to the ILO Constitution, see P. A. Köhler, "ILO" in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, vol. 1, München/Dordrecht, 1995, pp.714-723. See also K. Samson and K. Schindler, "The Standard-Setting and Supervisory System of the International Labour Organization" in R. Hanski and M. Suksi (eds.), An Introduction to the International Protection of Human Rights, Turku, 1999, pp.185-218.

[5] General Comment No. 18 (The Right to Work, art. 6 ICESCR), adopted on 24 November 2005, UN Doc. E/C.12/GC/18, 6 February 2006.

[6] *Ibid.*, para.1.

[7] *Ibid.*, paras. 7, 8.

action "based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations".[8] From this can be seen that the approach taken by the CESCR reflects similar efforts undertaken in the context of the ILO, even though the human rights approach is broader, transcending tripartite relationships.

Beyond the scope of core labour standards within the meaning of the 1998 Declaration on Fundamental Principles and Rights at Work, the CESCR has also embarked on a Draft General Comment on the right to social security, as laid down in article 9 of the Covenant. Here the CESCR heavily relies on ILO Convention No.102 on the right to social security,[9] and takes up the ILO structure of the nine social security areas[10] elaborated there.

Moreover, the CESCR held a day of general discussion in 2006, where ILO representatives, representatives of trade unions and employers' associations, and other experts of social security explained their respective positions in relation to several key questions that the Draft General Comment No. 20 seeks to clarify, namely: (i) whether the CESCR should ensure that contributory insurance-style schemes should not be favoured vis-à-vis non-contributory schemes; (ii) whether in relation to non-contributory schemes, the CESCR should not favour targeted schemes over universal schemes; (iii) the need to emphasize that lack of social security is not just increasing risk but has clear human rights dimensions, and is responsible for poverty; (iv) the need to follow more closely the ILO approach in indicating the types of benefits that should be made available, i.e. follow the nine categories of Convention No. 102 that are reflected in the CESCR reporting guidelines; (v) stressing State parties' obligations in relation to the informal sector, or informal economy, as well as the effects on migrant workers, refugees, asylum seekers, and internally displaced persons; (vi) provide greater detail on rights of women to social security; (vii) define the right to social security as embracing social insurance and also social assistance; (viii) look at accessibil-

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[8] *Ibid*., para. 31.

[9] See generally E. Riedel, "The Human Right to Social Security: Some Challenges" in E. Riedel (ed.), *Social Security as a Human Right*, Berlin/Heidelberg, 2007, pp.17-28; E. Renaud, "The Right to Social Security – Current Challenges in International Perspective", *ibid*., p. 1-16; M. Langford, "The Right to Social Security and Implications for Law, Policy and Practice", *ibid*., pp. 29-53; A. Nussberger, "Evaluating the ILO's Approach to Standard-Setting and Monitoring in the Field of Social Security", *ibid.*, pp. 103-116. See also the doctoral dissertation by C. Steiner, *Das Recht auf soziale Gesundheitsversorgung*, Frankfurt a. M., 2004, English summary at pp. 215-218; J. van Langendonck, "The Right to Social Security and Allied Rights" in F. Ruland (ed.), *Festschrift H .F. Zacher*, Heidelberg, 1998, pp. 477-488; M. Scheinin, "The Right to Social Security" in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights – A Textbook*, 2nd ed., Dordrecht, 2001, pp. 211-222; L. Lamarche, "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights" in A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerp, 2002, pp. 87-114.

[10] See Draft General Comment No. 20 (The right to social security, art. 9 ICESCR), UN Doc. E/C.12/GC/ 20/ CRP 1. The Draft is presently under discussion in the CESCR and may conceivably be adopted in 2007.

ity and eligibility for benefits and justiciability of rights; (ix) define more closely the minimum core obligations of States and domestic implementation; (x) look more closely at the roles of international financial institutions in relation to the current crisis in developing countries, and at the role of the private sector; (xi) address the issue of emergencies (natural disasters and armed conflict) and system responses of social security.

These and other questions are now examined by the CESCR, and will probably lead to the adoption of a General Comment sometime in 2007. As can be seen from the issue list, the ILO input has been crucial throughout, and thanks must go to all ILO experts and members of the CEACR who have contributed to this venture.

The ILO has also been most helpful in the preparation of General Comments No.14 (right to health) and No. 16 (equal rights of men and women), and undoubtedly will offer similar assistance with General Comments on articles 7 and 8 of the Covenant, on which work has just begun. At the same time, drafting projects are under way on the principle of non-discrimination (article 2 (2) of the Covenant) as cross-cutting Covenant obligations, and on the right to participate in culture (article 15), but it will take some time before specific General Comments on labour rights, particularly on articles 7 and 8 of the Covenant will materialize. The CESCR, as in the past, will rely heavily on the excellent cooperation offered by the ILO secretariat, and by members of the CEACR in particular.

IV. Institutional Framework and Compliance

At present, the Covenant has been ratified by 155 States out of 192 UN Member States, the most notable exception being the USA. As the text of the Covenant did not set up a monitoring body, as happened with the International Covenant on Civil and Political Rights (ICCPR), the United Nations Economic and Social Council (ECOSOC) decided in 1985 by resolution to set up a working group, which was transformed into the CESCR in 1987.[11] The Committee was to receive State reports and to make suggestions and recommendations to State parties, after a so-called "constructive dialogue". The process since developed and now follows that adopted by the other seven, soon nine[12] human rights treaty bodies. It starts with the submission of an initial report and subsequent regular periodic reports at five-year intervals, followed by the elaboration of a list of additional questions arising from the report, to which the State party

[11] See ECOSOC Decision 1978/10 setting up a Sessional Working Group, transformed into the Committee on Economic, Social and Cultural Rights by ECOSOC resolution 1985/17. The Committee took up its work in 1987.

[12] Two more treaty bodies are expected to monitor the application of the International Convention on the Rights of Persons with Disabilities, 2006, (not yet in force) and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (not yet in force).

responds by submitting extensive answers to the "list of issues".[13] In preparing those lists of issues, the five members of a pre-sessional working group draw on information received from the Office of the High Commissioner for Human Rights (OHCHR), and also from the ILO and other specialised agencies on the specific countries under review, and also on information provided by non-governmental organizations (NGOs). Before the actual dialogue with the State Party takes place, the CESCR devotes a half-day at the beginning of each session for consultations with specialized agencies, NGOs and the country desk officers of the OHCHR, so that CESCR members can obtain additional information about the States examined, all of which helps to structure the questions put to the State delegation during the ensuing dialogue. During the last week of the session, concluding observations are drafted, mentioning positive and negative factors, and sometimes also factors impeding the full implementation of the Covenant, such as natural catastrophes or armed conflict. The Concluding Observations then outline major concerns, and end with suggestions and recommendations, frequently indicating that the CESCR will come back to the particular issue during the next dialogue with the State party.

V. Indicators and Benchmarks

In recent years the CESCR has begun to ask for indicators and benchmarks to be set by the States parties themselves, so that disaggregated data relating to such issues as urban/rural distribution, how marginalized and disadvantaged groups of society are affected, particularly women, children, older persons, the disabled, minority groups and indigenous peoples can be assessed more effectively.[14] The CESCR now regularly asks for these data on an annual basis, so that changes can be assessed, enabling CESCR members to inquire, for instance, why the situation has improved so little despite a period of financial stability, or what are the reasons for failing to achieve targets and plans set. There may be good reasons for that, such as armed conflict or natural catastrophes, but the burden of proof is on the State party to show that it has done everything in its power to improve the situation, including asking for international co-operation and assistance under article 2(1) of the Covenant.[15]

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[13] Cf. B. Simma, "The Examination of State Reports" in E. Klein (ed.), *The Monitoring System of Human Rights Treaty Obligations*, Berlin, 1998, pp. 31-48; E. Riedel, "The Examination of State Reports", *ibid*., pp. 95-105.

[14] See, for example, General Comments No.14 (right to health), paras. 57-58; No.15 (right to water), paras. 53-54; No. 16 (equal rights of men and women), para. 39; No.17 (right to benefit from the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author), paras. 49-50; No.18 (right to work), paras. 46-47.

[15] Cf. E. Riedel, "Measuring Human Rights Compliance – The IBSA Procedure as a Tool of Monitoring" in *Mélanges en l'honneur du Professeur Giorgio Malinverni*, 2007 (in print). See also A. Eide, "The Use of Indicators in the Practice of the CESCR" in Eide, Krause, Rosas, *op.cit.*, *supra* n.9, pp. 545-552.

VI. Resource Allocation and Covenant Obligations

One of the difficulties in the reporting framework of the Covenant is the vague and sometimes ambiguous wording of the Covenant provisions.[16] Article 2(1) may serve as an example. It reads in part: "Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant *by all appropriate means*, including particularly the adoption of legislative measures."

Words like "*maximum*", "*available*", "*progressively*", "*appropriate means*" sound wonderful to the ears of lawyers, because they are so ambiguous that almost any position can be taken in that respect. The CESCR, ever since General Comment No. 3, adopted in 1990,[17] has carefully defined this provision as a principle that serves as a chapeau to the specific provisions of Part III of the Covenant, and therefore may not be viewed as a "stand-alone" provision, but like articles 2(2) and 3 on non-discrimination and equal rights of men and women, has always to be read in conjunction with the specific rights set out in articles 6 to 15.

In the extensive reporting practice of the CESCR, several general interpretations have emerged which now structure the dialogue with the States parties, and which the States parties have regularly accepted. The interpretations concern the level of obligations placed on States parties and detail obligations to respect, protect and fulfil.

The obligation to respect refers to immediate negative obligations of the State party with which it must comply at all costs, such as not to discriminate in its legislation on the prohibited grounds mentioned in article 2(2). These are largely resource-independent obligations which even less developed countries are required to respect.

The obligation to protect shifts the focus of obligation to the State party having to oversee the activities of private actors, if these violate basic human rights protected by the Covenant. Although the State party in that case has done nothing directly to violate human rights provisions, it remains responsible for not regulating and overseeing the activities of third parties, such as trans-national corporations, operating in its territory. NGOs are attempting to broaden this responsibility of States parties to cover activities of nationals even in other countries, but at present there seems to be little support for that amongst States, in particular developed States.[18]

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[16] See generally E. Riedel, "International Law Shaping Constitutional Law – Realization of Economic, Social and Cultural Rights" in E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds*, Berlin, 2005, pp. 109-126.

[17] General Comment No.3 (The nature of States parties' obligations, article 2(1) ICESCR), HRI/GEN/1/Rev. 7, pp. 15-18.

[18] On this issue see C. Scott, "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights" in Eide, Krause, Rosas, *op.cit., supra* n.9, pp. 563-595, at 580. See also A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, 2006, p.195 et seq.

Obligations to fulfil embrace duties to inform, promote, educate about certain Covenant rights, and also cover direct provision of resources for meeting the "survival kit", or minimum essential levels of rights protection, such as for primary education, or social assistance, if no other resources are available to the individuals concerned.

In fact, the CESCR in its monitoring practice has staunchly resisted any attempt to differentiate the level of protection in each Covenant right, which would amount to lower levels of individual rights protection, for instance by regarding certain Covenant obligations merely as promotional obligations, programmes for legislation, or target norms for States parties creating objective duties for them, but not subjective rights for individuals or groups.[19] The CESCR, instead, is of the opinion that quite apart from such promotional and programmatic levels of protection, each Covenant right – read together with the principles enunciated in articles 2(1), 2(2) and 3 Covenant – contains a core area of protection for individuals concerned, namely the core minimum essential levels of protection, or the "survival kit", the existential minimum, without which a life in dignity cannot be ensured. The core rights guarantees should be respected, protected and fulfilled by the States parties, and this applies across the board to all States, rich or poor. If the States parties are unable to meet even these minimum levels of protection, for instance, in relation to basic health care or equal access to available job opportunities, then under article 2(1) Covenant the Member States that are in a position to do so, should render technical cooperation and assistance to those States.[20] It is incumbent to all States to do their best to realize the rights guaranteed by the Covenant, to the best of their capabilities. "Taking steps", therefore, is not just a programmatic promise in article 2(1), but a binding legal obligation to take active steps to realize the Covenant rights, in line with the available resources for that particular State. Doing nothing, therefore, would be a clear breach of Covenant obligations.

VII. "Constructive Dialogue" or "Violations Approach"?

In the literature, an elaborate discussion has taken place, drawing a distinction between the "constructive dialogue"[21] and the "violations" approaches

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[19] For a critical analysis see C. Tomuschat, *Human Rights between Idealism and Realism*, Oxford, 2003, p. 38 et seq. Contra, see A. Eide, "Economic and Social Rights" in J. Symonides (ed.), *Human Rights. Concept and Standards*, Aldershot, 2000, reprinted 2005, pp.109-174; M. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, Oxford, 1995, p. 106 et seq.; E. Riedel, *op.cit., supra* n.16, p. 109 et seq. See also H. J. Steiner and P. Alston, *International Human Rights in Context*, 2nd ed., Oxford, 2000, pp. 237-320.

[20] Cf. General Comment No. 3, paras. 13, 14.

[21] See E. Riedel, *op.cit., supra* n.13 at p.100; M. Craven, *op.cit., supra* n.19, pp. 66, 104, arguing strongly in favour of having a quasi-judicial complaints procedure to render the CESCR procedure more effective.

of the CESCR[22] in dealing with States reports. Suffice it to say here that the three categories of obligations (to respect, protect and fulfil) have been firmly established in the practice of the CESCR, and while it generally tries to uphold the spirit of a "constructive dialogue" with the State party, hoping that this will entice the country concerned to do everything in its power to improve the human rights situation for its population, there are limits to that approach. If the State party does nothing to remedy the situation, if there is no follow-up at all, or if the alleged breaches of Covenant provisions display a "pattern of gross and massive, reliably attested breaches of human rights", as under the UN Charter-based 1503 procedure of the ECOSOC, then the CESCR will call a spade a spade, and attest clear violations. But generally, it is felt to be better to suggest and recommend remedial action rather than insist on stating that violations have occurred.

VIII. An Optional Protocol for the Covenant

Since the establishment of an Open-ended working group on the elaboration of an Optional Protocol to the Covenant,[23] this debate has taken on a new dimension. The new Human Rights Council in its Resolution 2006/3 has given the Working Group a drafting mandate, which in all probability will considerably speed up the process of elaborating such an Optional Protocol, setting up a communications procedure for individual and possibly also group communications, embracing mechanisms that the Optional Protocol to the International Convention on the Elimination of Discrimination against Women (CEDAW OP) and the First Optional Protocol to the ICCPR have developed, such as interim measures and inquiry procedures. Needless to say, very strict and detailed admissibility criteria will have to be elaborated, but it looks as though the Optional Protocol will be forthcoming and ready for adoption soon.

The advantages of such a quasi-judicial procedure are obvious: Very little is known about the Covenant practice, and the mass media rarely report about it at the national level, because the concluding observations are very technical, often abstract, and relate to complicated issues, which journalists hardly understand or do not find newsworthy, even if the issues touched upon really matter, such as widespread poverty, existence of grave discriminatory measures, and the plight of disadvantaged and marginalised groups of society, finding themselves in situations of great vulnerability. To take but one example, even in highly developed countries, hundreds of thousands of homeless people exist, and amongst the unemployed millions, vast numbers are permanently out of work.

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[22] For more on the violations approach, see C. Fenwick, "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights" in Chapman and Russell, *op.cit., supra* n.9, pp. 53-86.

[23] Cf. Reports of the open-ended working group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, 23 February – 5 March 2004, E/CN.4/2004/44; second session 10 – 20 January 2005, E/CN.4/2005/52; third session 6 – 17 February 2006, E/CN.4/2006/47.

If an individual communications procedure were to exist, media attention would be greatly enhanced. CESCR views, suggestions and recommendations would frequently be reported in the press, as if a court of justice had handed down a decision, even though technically the decision under an Optional Protocol would represent no more than a recommendation, very similar to those under the State reporting procedures, but individualised.

The greatest advantage in having an Optional Protocol would be that the CESCR would henceforth develop a case law, thus helping to interpret the Covenant and supplementing the work under the State reporting procedure. The Optional Protocol would underline the position outlined above that the CESCR has taken from the very beginning, namely that every single right in the Covenant contains some justiciable elements that are capable of being directly applied.

While some States parties still maintain that the Covenant merely contains non self-executing obligations of States, the CESCR has consistently insisted that by ratifying the Covenant States parties have accepted the obligations to respect, protect and fulfil the Covenant obligations, and that these obligations exist immediately, without further implementation steps, at least as far as core obligations are concerned. All the General Comments so far produced by the CESCR have reaffirmed this view. If an Optional Protocol were to be accepted like with the ICCPR, the issue of justiciability would clearly be answered in the positive. The CESCR will soon deal with a Draft Statement on how it would treat the question of "resource allocation" under article 2 (1) of the Covenant, leaving a margin of discretion to States in questions of concrete resource allocation, but pointing out that there are limits to national policy choices, when fundamental human rights positions are at peril. Some common law jurisdictions have developed the notion of "reasonableness" as a limiting factor, while civil law traditions stress the principle of proportionality, whereby the State party has to opt for the policy choice that least restricts a Covenant right, if several policy choices are available. Such a test strikes a careful balance between sovereign policy choices at the national level and international accountability for the policy choices taken, measured against the provisions of the Covenant and other human rights norms.

In this connection, the Working Group had to deal with the allegation that there would be a great deal of overlap with other monitoring bodies, such as the ILO Committee of Experts, the Committee on Conventions and Recommendations of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and regional bodies, but it was shown that the mandates and functions of these bodies addressed different issues than those arising under the Covenant. For instance, while the CEACR could deal with collective complaints under the tripartite model, the position of individuals not covered under the trade union or employers' association umbrella would only be coped with under the Covenant. The mandate of the UNESCO Committee is geared far more towards producing recommendations, although it also deals with communications in a non-public procedure, and is an inter-governmental body of 30 ambassadors, not a Committee of independent experts. Important as such an institutional frame-

work may be, it cannot be compared with the CESCR under the Covenant, apart from the fact that it covers only three of the Covenant rights.

IX. Conclusion

The institutional framework in which the CESCR operates thus provides a legal basis on which key questions of common concern to all UN bodies can be discussed. The real challenge facing the UN system, and in particular the specialised agencies like the ILO, and all human rights treaty bodies, is the challenge of globalisation. Trade liberalisation, capital and financial flows, concentration tendencies of multinational enterprises, the development of transport facilities, coupled with the general urbanisation trend, all have positive and negative aspects. The human rights focus taken since the Millennium Declaration, and the Millennium Development Goals has put particular emphasis on the human rights requirements that have to be insisted on. The erosion and destruction of traditional social and religious systems, and the concurrent loss of cultural identity, particularly for indigenous peoples, has led to the realization that a human rights approach to development is indispensable. The CESCR has tried, within its limited means, to highlight these challenges, focussing particularly on how marginalized and disadvantaged groups suffer from globalisation tendencies [24] where the poor stay poor, or become poorer while the rich become richer. [25] In the field of labour rights this is exacerbated by a race to the bottom, whereby developing countries vie with each other to attract investments, lowering minimum human rights standards, particularly in the area of environmental law and labour law. We are all aware of this, and the close cooperation existing between the CESCR and the CEACR, undoubtedly will help to face more squarely the challenges posed by globalisation. We need to find viable solutions soon, and the human rights approach undoubtedly is a good complementary strategy, based as it is on legal obligations resting on all Member States of the United Nations. The ILO and its Committee of Experts, like the CESCR, will continue to play a significant role in those endeavours. While that process primarily affects the political responsibility of the community of States, and of the United Nations family of organizations, and all its subsidiary bodies, the concurrent and increasingly important role of non-governmental and civil society actors should not be forgotten. Both Committees should be and remain receptive to new ideas and input provided by these sources as well. [26]

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[24] On this, see the statements made by the CESCR on globalization and its impact on the enjoyment of economic and social rights (UN Doc. E/C.12/1999/9) and on poverty and the International Covenant on Economic, Social and Cultural Rights (UN Doc. E/C.12/2001/10).

[25] See generally E. Benvenisti and G. Nolte (eds.), *The Welfare State, Globalization, and International Law*, Heidelberg, 2004, in particular pp. 175 et seq., 321 et seq., 371 et seq.

[26] For a fuller analysis, see Clapham, *op.cit., supra* n.18, p. 82 et seq.; E. Riedel, "The Development of International Law: Alternatives to Treaty-Making? International Organizations and Non-State Actors" in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Heidelberg, 2005, pp. 301-318.

Les procédures spéciales des Nations Unies en matière de droits de l'homme

Doudou Diène *

Je voudrais tout d'abord souligner l'importance du contexte dans lequel se tient cette réunion du BIT et qui est caractérisé par une réflexion en profondeur sur la pertinence, l'efficacité et la portée de tout le système de protection des droits de l'homme, menée à l'initiative du Secrétaire Général des Nations Unies et à l'instigation de l'Assemblée générale. Des décisions importantes ont d'ores et déjà été adoptées par l'Assemblée générale des Nations Unies, entre autres, le remplacement de la Commission des droits de l'homme par le Conseil des droits de l'homme, la nouvelle procédure d'élection de ses membres et la réduction de leur nombre ou le principe de revue périodique universelle des pays en matière de droits de l'homme.

Dans ce contexte de réflexion et de réforme de l'ensemble du système des droits de l'homme, une des questions clés pour la réussite de la réforme porte sur le système des procédures spéciales, car elles représentent la dernière avancée dans la mise en place progressive de mécanismes pour la protection des droits de l'homme. En effet, au cœur de ces procédures spéciales se trouvent deux avancées qui seront peut-être des points-tests pour l'efficacité et le futur de tout le système de protection des droits de l'homme.

La première, fondatrice de toute l'architecture des procédures spéciales, est relative à l'indépendance des titulaires de mandats. En effet, les procédures spéciales ont été créées comme troisième mécanisme, indépendant des gouvernements et même du Secrétariat des Nations Unies, pour compléter les mécanismes intergouvernementaux que représentaient la Commission – et actuellement le Conseil – et les organes de traités. Les gouvernements et les organisations de défense des droits de l'homme ont donc estimé opportun de créer un mécanisme

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dont le fonctionnement repose sur l'indépendance de ses titulaires de mandat comme garantie de leur libre contribution à la protection des droits de l'homme. C'est d'abord autour de ce concept d'indépendance des titulaires de mandat, sa nature, sa portée et ses limites éventuelles que s'articule actuellement le débat, de nature juridique mais surtout politique, au sein du Conseil des droits de l'homme.

La deuxième avancée, peut être la plus innovatrice pour rendre tangible la protection des droits de l'homme, est l'autorité accordée aux Rapporteurs spéciaux de procéder librement à des visites de pays de leur choix, pour enquêter *in situ* sur le thème de leur mandat – comme le racisme, la discrimination raciale et la xénophobie, en ce qui me concerne. Le progrès immense que cette capacité de visite ouvre n'est rien moins que l'accès aux victimes, la captation de leur témoignage et de leur vécu, la connaissance directe de leur situation réelle. Briser la solitude ou l'isolement des victimes est l'étape fondatrice, la condition *sine qua non* de la défense et de la promotion des droits de l'homme. Très concrètement, l'enjeu central de la visite de pays porte sur l'accès, entre autres, aux minorités victimes de racisme, aux familles de victimes d'exécutions extrajudiciaires, aux prisonniers et personnes torturées, isolées au fin fond de leurs geôles ou dans des zones reculées et isolées de leurs pays.

Le débat s'articule, dans ce contexte, autour d'un certain nombre de points critiques en cours d'examen. Le débat sur l'indépendance des procédures spéciales se concentre à ce stade sur la procédure de sélection: nomination par le Président du Conseil des droits de l'homme après consultation avec les groupes géographiques (procédure actuelle) ou élection par le Conseil des droits de l'homme. Si bien des divergences existent parmi les pays sur la meilleure garantie d'indépendance (nomination ou élection), une solution hybride combinant les deux procédures est en train d'émerger en trois étapes: liste courte élaborée par la Haut Commissaire aux droits de l'homme sur la base d'un *roster* (constitué sur la base de critères de compétence, d'intégrité et d'équilibre géoculturel), soumission de cette liste au Président du Conseil, et élection par le Conseil.

La question centrale, en filigrane de ce débat, qui sous-tend en profondeur ce que je voudrais appeler «la tension ontologique des droits de l'homme» est celle du rôle, du poids des gouvernements dans l'architecture des droits de l'homme en général et, en l'occurrence, dans les procédures spéciales. En dernière analyse, cette tension permanente est inhérente à la nature intergouvernementale du cadre institutionnel du système des droits de l'homme, l'Organisation des Nations Unies. Elle se traduit par la quête permanente d'un équilibre indispensable entre la réalité politique des droits de l'homme – incarnée par les appareils politiques des Etats, acteurs incontournables de l'élaboration et de la mise en œuvre des droits de l'homme – et la dimension universelle et éthique des droits de l'homme – assumée par la société civile et les organisations non gouvernementales. La recherche de cet équilibre constitue un défi permanent pour les procédures spéciales, tant dans l'organisation et le déroulement des visites que pour le contenu des rapports de visites.

L'indépendance des procédures spéciales inclut la liberté du choix des pays à visiter. En ce qui concerne mon mandat, les critères de sélection de ces pays

me permettent à la fois de mettre en lumière différentes dimensions du racisme et de la xénophobie et de promouvoir un échange d'informations entre les gouvernements et les organisations de la société civile sur les politiques et programmes pour combattre le racisme. Quatre critères déterminent mon choix: la gravité des manifestations de racisme et de xénophobie, déterminée sur la base des informations et des allégations reçues; le rôle des constructions identitaires et historiques dans la genèse et la recrudescence du racisme et de la xénophobie; l'instrumentalisation politique du racisme et de la xénophobie; et le lien entre multiculturalisme, immigration et racisme. J'ai ainsi, entre autres, visité la Colombie et la Fédération de Russie sur la base du critère de la gravité des allégations de manifestations de violence raciste et xénophobe; le Japon, sur la base du critère du rôle des constructions identitaires et historiques dans la genèse et la montée du racisme et de la xénophobie; la Guyane, Trinité et Tobago, la Suisse et l'Italie sur la base de l'instrumentalisation politique et électorale du racisme et de la xénophobie; le Canada, mais aussi la Suisse et l'Italie, sur la base du lien entre multiculturalisme et racisme.

Dès le début de mon mandat, j'ai pris conscience du fait que le principe des visites comportait, en filigrane, trois potentialités essentielles pour le combat contre le racisme: le renforcement des dimensions nationale et internationale; la mise en lumière des typologies des manifestations et expressions de racisme; et l'échange d'informations entre pays sur les politiques et programmes de lutte contre le racisme. Le programme de mes visites et la structure de mes rapports de visite sont déterminés à cet effet.

Pour minimiser le conflit entre la durée limitée des visites et la complexité des questions à étudier et garantir une perception objective de la réalité d'un pays, j'ai estimé nécessaire de poser trois questions identiques aux principaux acteurs concernés – chronologiquement, le gouvernement et les institutions concernées de l'appareil d'Etat, les communautés et groupes ethniques, raciaux, culturels et religieux concernés, et les organisations de la société civile engagées dans la défense des droits de l'homme et le combat contre le racisme. Ces trois questions portent sur la réalité du racisme et de la xénophobie dans le pays, la nature de ses manifestations et expressions, et les politiques et programmes, tant sur les plans politique, social et économique que culturel.

Le rapport de visite est en conséquence structuré en quatre parties: la position du gouvernement sur la réalité du racisme ainsi que la description de ses politiques et programmes; les témoignages, informations et allégations des groupes et communautés victimes ainsi que leur évaluation des politiques du gouvernement et les solutions appropriées à leur situation; la position des organisations de la société civile; et, en dernière partie, les analyses et recommandations du Rapporteur spécial. La capacité du rapport à refléter la réalité du racisme dans le pays visité et la nature des solutions adoptées ou nécessaires est conditionnée par la précision et l'objectivité des informations reflétées dans les trois premières parties, lesquelles sont garanties notamment par la soumission du projet de rapport au gouvernement du pays visité et, pour des raisons d'équilibre, aux représentants des communautés et de la société civile. Dans son rapport final, le

Rapporteur spécial est libre dans le choix et la formulation des corrections, ajouts ou précisions proposées par ces acteurs de la société.

Le rapport de visite est de nature à entraîner trois développements imprévus dans la définition des mandats, mais favorables à la promotion des droits de l'homme en général et, en l'occurrence, au combat contre le racisme. D'abord, sur le plan interne, par les faits et politiques rapportés ainsi que par la référence systématique aux instruments internationaux pertinents et aux engagements des gouvernements, le rapport est de nature à promouvoir et nourrir un débat contradictoire sur une question comme le racisme, souvent occultée par les pouvoirs politiques. Ensuite, sur le plan international, par la présentation précise des politiques, programmes, législations et mécanismes de combat contre le racisme, le rapport favorise l'information réciproque et la comparaison non seulement entre gouvernements mais également entre communautés victimes et organisations de la société civile. Enfin, la capacité de suivi des visites par le Rapporteur spécial, tant dans ses rapports annuels que par des visites de suivi, est de nature à maintenir la vigilance et l'observation de la situation du racisme dans un pays par la communauté internationale. Dans ce sens, un facteur fondamental de la promotion et du respect des droits de l'homme consiste à convaincre tous les gouvernements que les questions des droits de l'homme ne relèvent pas de leur seule autorité, prérogative ou discrétion, mais que leurs pays peuvent à tout moment faire l'objet d'un examen sur le respect de tel ou tel aspect des droits de l'homme. C'est sur ce terrain fondamental que les procédures spéciales apportent une contribution décisive en mettant, par leurs visites, le curseur international sur les pays visités.

Le suivi des visites constitue, dans ce contexte, un enjeu essentiel. En effet, les visites effectuées dans le cadre des procédures spéciales ne peuvent constituer la manifestation de la vigilance internationale pour le respect des droits de l'homme que si elles sont pratiquées, non comme un acte ponctuel, isolé et final, mais comme une étape initiale de cette vigilance. C'est précisément cette dynamique des visites qui met en lumière la résistance des gouvernements à accepter ou à faciliter le suivi des visites et leur volonté de faire de la visite un acte final, une page tournée et close. L'enjeu est, par conséquent, à la fois la mise en œuvre des recommandations formulées dans le cadre des procédures spéciales et la continuation, par un examen du Conseil des droits de l'homme, du suivi du respect des droits de l'homme par les gouvernements. En ce qui me concerne, j'ai estimé nécessaire de promouvoir le suivi des visites comme manifestation de vigilance internationale pour le respect des droits de l'homme par deux pratiques de suivi: d'une part, l'inclusion dans mon rapport général annuel sur le racisme d'une partie portant sur «le suivi des visites du Rapporteur spécial» relative à tout développement et fait significatif sur le racisme en général et les recommandations du Rapporteur spécial en particulier, de la part du gouvernement ou de la société civile et des communautés victimes; d'autre part, la demande systématique d'une visite de suivi, deux ou trois ans après la première visite. C'est également pour donner substance à cette vigilance internationale que j'ai plaidé devant le Conseil la nécessité d'un vrai débat international sur les

rapports de visite, à l'opposé de la pratique actuelle qui, en général, se limite à un débat avec la délégation du pays visité, avec occasionnellement l'intervention des ONG, sans prise de position, évaluation ou jugement de la part des autres délégations.

Si les titulaires de mandat dans les procédures spéciales ont la liberté de choisir les pays à visiter, il appartient aux gouvernements d'accepter ces visites. C'est là que nous rencontrons un des premiers problèmes de relation avec les gouvernements, dans la mesure où tous les gouvernements n'ont pas, à l'égard de ces demandes d'invitation, la même attitude. Certains gouvernements ont donné une «standing invitation», c'est-à-dire, une invitation permanente qui indique qu'ils sont prêts à recevoir les rapporteurs. Beaucoup de gouvernements n'ont pas encore adopté cette formule. Le problème se pose lorsque certains gouvernements prennent du temps pour répondre, étant donné qu'ils n'ont aucune espèce de contrainte de temps pour donner une réponse à la demande. De ce fait, les gouvernements peuvent tout autant contribuer au travail des rapporteurs spéciaux que le retarder, le freiner ou le rendre beaucoup plus difficile.

J'ai le cas de plusieurs gouvernements pour lesquels j'attends une réponse depuis deux ou trois ans. Je l'ai signalé au Conseil des droits de l'homme en lui demandant dans le cadre des débats sur les reformes envisagées des procédures spéciales, de fixer un délai de réponse aux gouvernements pour les demandes de visite.

Un autre aspect important des visites des pays concerne la liberté d'action. C'est là où se trouve une des avancées des procédures spéciales. Les titulaires de mandat ont l'autorité de visiter les pays et d'aller voir *in situ* comment les problèmes se présentent, par exemple, la question du racisme en ce qui me concerne, la question des populations autochtones ou celle de la torture ou des exécutions extrajudiciaires pour d'autres collègues. C'est là que se manifeste également toute la complexité des relations avec les gouvernements. Un certain nombre de gouvernements jouent le jeu: ils laissent les enquêtes s'effectuer de manière libre et sans entraves; d'autres gouvernements établissent un certain type de rapports qui les amènent à vouloir privilégier la relation du Rapporteur spécial avec le gouvernement, par exemple, pour les informations que le gouvernement peut fournir, les lieux que le Rapporteur spécial peut visiter et les groupes et institutions que le Rapporteur spécial peut rencontrer. Certains gouvernements jouent là-dessus et ne collaborent pas d'une manière extrêmement ouverte. Un point également important concerne la liberté des rapporteurs spéciaux de s'adresser à la population d'un pays qu'ils visitent à travers, par exemple, la presse.

Enfin, le problème le plus délicat et qui est actuellement au cœur du débat sur la réforme du système des droits de l'homme concerne la place et le rôle de la société civile et des organisations non gouvernementales. Beaucoup de gouvernements tentent, de manière presque instinctive, soit de restreindre le rôle de ces organisations de la société civile, soit de limiter l'information, les contacts et les visites. Par exemple, quand je visite un pays, je veux absolument rencontrer les organisations de défense des droits de l'homme concernées; je visite les

communautés, je ne les écoute pas seulement dans les capitales ou dans des bureaux des Nations Unies, mais je vais voir leur contexte de vie pour voir si cela donne une indication sur les discriminations dont elles sont l'objet; je demande également à visiter les prisons pour voir quelle est la répartition ethnique dans la population carcérale. C'est un terrain complexe et sensible sur lequel les rapports avec les Etats ne sont pas faciles et font souvent l'objet de négociations extrêmement dures.

Une dernière question qui me paraît essentielle pour faire progresser le rôle des procédures spéciales dans la nouvelle problématique des droits de l'homme, c'est tout le rapport, la coordination et la complémentarité avec les autres mécanismes du système des Nations Unies. Ceci est un point extrêmement sensible. D'abord, cette coordination se fait généralement de manière libre pour chaque procédure spéciale, cela signifie qu'il va falloir, dans les réformes en cours, procéder à une révision de ces relations et formaliser la complémentarité et la coordination avec les autres mécanismes du système. Deuxièmement, il apparaît très clairement que la plupart des institutions du système – ce n'est pas le cas du BIT – ignorent la nature, le rôle, les actions et les mandats des procédures spéciales. Il y a donc un problème d'information. Un autre enjeu important concerne le rapport des procédures spéciales avec les représentants de l'ONU. Si mon expérience montre que, dans la plupart des cas, les représentants du système coopèrent avec les rapporteurs spéciaux, j'ai été confronté à des situations où ma visite a été considérée comme une nuisance par quelques représentants locaux à cause des rapports très intimes et particuliers qu'ils ont établis avec les gouvernements. L'arrivée du Rapporteur spécial bouscule ce type de relations. De manière plus ou moins subtile, ces représentants vous suggèrent, par des conseils amicaux, de ne pas toucher à certains problèmes, de ne pas visiter certains lieux, etc. J'ai senti, comme d'autres de mes collègues, qu'il y a un travail de fond à faire pour que les représentants des institutions du système des Nations Unies sur le terrain coopèrent dans l'esprit et le mandat des procédures spéciales.

En conclusion, je voudrais rappeler que l'enjeu actuel de la crédibilité de toute la réforme du système des droits de l'homme va dépendre de ce que les gouvernements vont décider dans les mois à venir sur les procédures spéciales. J'aimerais souligner que ces procédures constituent une avancée majeure dans la protection, la défense et la promotion des droits de l'homme. Pourtant, des questions sensibles essentielles doivent être réglées pour conforter l'indépendance des titulaires de mandat dans le cadre de ces procédures. Il s'agit de l'indépendance par rapport aux Etats et aux gouvernements, de l'équilibre entre les gouvernements et la société civile et, enfin, de l'efficacité de leur travail, c'est-à-dire, de tout le suivi des rapports et des recommandations qu'ils soumettent au Conseil ou à l'Assemblée générale.

Discussion

*Budislav Vukas** – J'aimerais que M. Diène revienne sur un point qu'il a soulevé à la fin de son exposé et qu'il précise s'il y a eu une réaction négative face à la nouvelle tendance de nommer des rapporteurs spéciaux pour des régions déterminées. Personnellement, je suis originaire d'un petit pays des Balkans qui compte quatre millions d'habitants et 22 minorités ethniques entre lesquelles il existe de nombreuses différences. Il me semble très difficile pour une personne mandatée par les Nations Unies de comprendre toutes ces différences et de constater les faits de discrimination dans l'ensemble des 192 Etats membres de l'ONU. Je suis donc favorable à la nomination de personnes qui connaissent bien la région concernée, son histoire et son contexte politique.

Doudou Diène – Le système des rapporteurs par pays fait certainement partie des grands progrès de ces procédures spéciales, ainsi, lorsqu'un pays fait face à une situation critique de violations des droits de l'homme, le Conseil – auparavant c'était la Commission – nomme quelqu'un pour suivre la situation de ce pays et faire un rapport extrêmement utile. Je donne un exemple: un Rapporteur spécial avait été nommé pour le Rwanda avant le génocide et, dans son rapport, il avait alerté la communauté internationale sur la dynamique génocidaire qui était en train de se mettre en place et avait demandé des mesures urgentes. Ses recommandations n'ont pas eu un effet fondamental et le génocide a eu lieu. Mais ce que nous voyons, et c'est la réalité du débat actuellement au Conseil des droits de l'homme, c'est que le point sur lequel les gouvernements sont les plus critiques, c'est le maintien de ces rapporteurs par pays. C'est sur ce maintien des rapporteurs par pays que va également se jouer toute la crédibilité de la réforme en cours.

J'élargirais votre question pour dire que c'est le rapport avec les gouvernements qui est le point sensible. En voici deux illustrations: un exemple personnel et un autre plus politique. Voici l'anecdote personnelle. J'ai récemment visité la Suisse parce qu'aucun rapporteur n'était jamais venu dans ce pays qui accueille le système des Nations Unies. Tout le monde pensait qu'il n'y avait rien à voir. J'ai pourtant lu dans la presse des choses qui me paraissaient sérieuses à l'occasion des votations, de discours, la presse parlait de xénophobie. Je suis allé voir ce qui se passait. J'ai été accueilli avec extrêmement de courtoisie. J'ai vu tout ce que je voulais voir. J'ai visité les prisons, rencontré les communautés. Mais à la fin de ma visite, le porte-parole d'un des grands partis de la coalition au pouvoir a fait une déclaration en disant que: «M. Diène vient de finir sa visite en Suisse, nous sommes obligés en tant que pays membre de l'ONU de l'accueillir, mais franchement comment se fait-il que ce soit un Sénégalais qui vienne visiter notre pays»? Le rapporteur aurait en effet pu être un Danois aux yeux bleus… Cette question est très intéressante parce que le grand problème

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que je rencontre en tant que rapporteur, c'est d'amener les institutions, les représentants de l'Etat ou de l'appareil politique à révéler leurs sentiments profonds. Ils sont souvent masqués derrière des formules diplomatiques ou des programmes extrêmement généraux dans lesquels il est difficile de voir la réalité. Je me suis dit: «pour une fois, ce Monsieur a parlé ouvertement, je vais l'indiquer dans mon rapport, cela va illustrer l'enjeu». Ce qui était intéressant, c'était que la déclaration de ce Monsieur a suscité immédiatement une condamnation du Président de la Confédération, du ministre des Affaires étrangères et du ministre de l'Intérieur, et donc un débat interne à la société suisse. J'aime bien ce rapport de tension parce qu'il est révélateur.

Le deuxième exemple que je voulais citer porte sur les rapports avec les gouvernements. Nous avons décidé d'envoyer une équipe de rapporteurs spéciaux pour visiter Guantanamo parce que les informations que nous recevions nous semblaient graves. Un groupe de rapporteurs a été nommé pour aller visiter Guantanamo, mais le gouvernement américain ne les a pas autorisés à aller sur place et a posé des conditions qu'ils ne pouvaient pas accepter. On revient donc à cette problématique du rapport avec les gouvernements qui fait actuellement l'objet d'un débat au Palais des Nations.

The Inter-American Human Rights System

*Thomas Buergenthal**

The ILO Committee of Experts is a true pioneer in the supervision of labor rights and human rights. The UN human rights treaty bodies, among other modern human rights reporting mechanisms, are in many ways modeled on the structure and function of the Committee of Experts. The Committee's many important achievements in its 80-year history justly merit a special place of honor among international protective mechanisms.

The topic assigned to me is the "Inter-American Human Rights System," a system to which I devoted many years of my past professional life, although my work on the International Court of Justice no longer permits me to follow the inter-American human rights developments as closely as I once did. My heart is still in San José, but my head is in The Hague.

Unlike the European human rights system, which was brought into being by the European Convention of Human Rights, the Inter-American system has two normative sources. One of these sources is the Charter of the Organization of American States, the other is the American Convention on Human Rights. The evolution of the Inter-American system thus bears greater resemblance to the United Nations human rights system, which evolved in a parallel way from the UN Charter, on the one hand, and the human rights conventions adopted under UN auspices, on the other.[1]

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[1] For some selected writings on the Inter-American human rights system, see H. Faundez-Ledesma, *El sistema internamericano de protección de derechos humanos: aspectos institutionales y procesales*, 2nd ed., 1999; T. Buergenthal & D. Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th ed., 1995; D. Shelton, "New Rules of Procedure of the Inter-American Commission on Human Rights", *Human Rights Law Journal*, vol. 22, 2001, pp. 169-171; J.M, Pascualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*,

Continued on page 24

When the Charter of the Organization of American States, which established the OAS, was adopted in Bogotá, Colombia in 1948, it made only some vague and innocuous references to human rights. However, the Bogotá conference also adopted the American Declaration of the Rights and Duties of Man whose catalog of rights resembles the Universal Declaration of Human Rights. Prior to the entry into force of the American Convention of Human Rights, the human rights provisions of the OAS Charter, read together with the American Declaration, which had been adopted in the form of a non-binding conference resolution, provided the sole and rather weak legal basis for the protection of human rights by the OAS.

Until 1960, moreover, the OAS had made no serious efforts to create a mechanism for the enforcement of these rights. That year the Inter-American Commission on Human Rights came into being, an action that had much to do with Fidel Castro's successful revolution in Cuba a year earlier. Composed of seven independent experts, elected by the General Assembly of the OAS, the Commission was charged with the promotion of the rights proclaimed in the American Declaration. It was to perform this task by preparing country studies and by adopting resolutions of a general character only. A few years later, the Commission was authorized to establish a limited petition system that allowed it to receive individual communications charging large-scale violations of a selected number of basic rights set out in the American Declaration, including the right to life, equality before the law, freedom of religion, freedom from arbitrary arrest, and the right to due process of law. During this period, however, the Commission was hampered in the performance of its functions because of its ambiguous legal status. Since the OAS Charter contained no provision for such a body, the Commission was established as an "autonomous entity" of the OAS. Its lack of a sound constitutional status weakened its authority from the start and made it easy for OAS Member States not to take the Commission very seriously. This unsatisfactory state of affairs was partially remedied in 1970 with the entry into force of the Protocol of Buenos Aires. It amended the OAS Charter and transformed the Commission into a Charter organ which was charged with the promotion of the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

In the early years of its existence, both as autonomous entity and later as Charter organ, the Commission was kept busy preparing reports on human rights situations in various countries. These reports were based on on-site visits and/or information found in communications by individuals and groups addressed to the Commission. The Commission adopted its first country reports in the early 1960s. These dealt with the human rights situations in Cuba, Haiti and the

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Continued from page 23

2003; F. Salvióli, "La protección de los derechos económicos, sociales y culturales en el sistema interamericano de derechos humanos", *Revista IIDH*, vol. 39, 2004, pp. 101-167; M. Pinto, "Los derechos económicos, sociales y culturales y su protección en el sistema universal y en el sistema interamericano", *Revista IIDH*, vol. 40, 2004.

Dominican Republic. Only the Dominican Republic had granted permission for the visit to the country. It thus became the first OAS Member State to host a so-called *in loco* or on-site investigation by the Commission. (The reports on Cuba and Haiti had to be prepared on the basis of communications received by the Commission from individuals and groups.) During its *in loco* visit to the Dominican Republic, the Commission criss-crossed the country, held hearings and met with different groups of claimants. This *modus operandi* came to serve as a model for the Commission's subsequent on-site visits generally. The Commission's most dramatic on-site investigation took place in Argentina, which permitted the Commission to visit the country in 1979 after rejecting many earlier requests. Once in Argentina, the Commission was able to verify allegations of the massive forced disappearances that had been taking place in that country during its so-called "dirty war". The publication of the Commission's report on the Argentine situation in 1980 had a dramatic effect in that country and abroad and contributed to ending this terrible practice.

For many years, even after the entry into force of the American Convention on Human Rights, the Commission's *in loco* investigations and country reports occupied much of its time, primarily because until the early to mid-80s various Latin American countries continued to be ruled by dictatorships of one form or another that engaged in widespread violations of human rights. Most of these States did not, of course, ratify the Convention until democratically elected regimes came to power. Until then the investigations and the reports of the Commission in these countries provided the only means for putting pressure on their governments to improve their human rights conditions. It is important to note, in this connection, that the Commission continues to this day to prepare country reports for problem countries, even if they have ratified the Convention. Such action is necessary because the Commission's powers under the Convention are for all practical purposes limited to dealing with individual violations, whereas its powers as an OAS Charter organ authorize it to address countrywide violations of human rights. As an OAS Charter organ, the Commission also prepares studies on various human rights topics.

The American Convention on Human Rights was concluded in San José, Costa Rica in 1969. It came into force in 1978. Like the European Convention, the American Convention guarantees only civil and political rights. Economic, social and cultural rights are dealt with in a parallel treaty of the Organization of American States, the so-called Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – "Protocol of San Salvador". This treaty entered into force on November 16, 1999. While the catalogue of rights that the European Convention guarantees has grown with the adoption of further protocols, the drafters of the American Convention opted for a comprehensive instrument that drew heavily on the much more extensive catalogue of rights set out in the International Covenant on Civil and Political Rights. But not all the rights guaranteed in the American Convention derive from the Civil and Political Covenant. Some of them reflect the historical and cultural traditions of the Americas. This is true, for example, of the

provision that guarantees the right to life. It provides, *inter alia*, that this right "shall be protected by law and, in general, from the moment of conception." Delegates from Latin America's overwhelmingly Catholic countries insisted on this provision during the drafting of the Convention. This provision has proved to be a major obstacle to United States ratification of the American Convention.

The institutional structure of the American Convention is modelled on the European Convention as originally drafted, that is, before Protocol No. 11 entered into force and abolished the European Commission on Human Rights. The American Convention provides for a Commission and a Court. Each of these bodies consists of seven members. Because the Inter-American Commission retains the powers its predecessor exercised as an OAS Charter organ in addition to being a Convention organ, all OAS Member States have the right to elect the members of the Commission. Only the States Parties to the Convention have the right to elect the judges of the Court since it is solely a Convention organ. However, because not all OAS Member States have to date ratified the Convention, the Commission continues to apply the human rights provisions of the Charter and the American Declaration to these States, whereas it applies the Convention to the States Parties to that instrument. Various amendments of the OAS Charter have over the years strengthened its human rights provisions, reinforcing the normative status of the American Declaration in the process. The dual role of the Commission as a Charter organ and Convention organ permits it to deal with massive violations of human rights which, although not within its jurisdiction as a Convention organ, it has the power to address as a Charter organ and that regardless whether or not the State in question is a party to the Convention.

It is worth noting that by ratifying the American Convention, the States Parties are automatically deemed to have accepted the jurisdiction of the Commission to hear cases brought against them by individuals. Inter-State complaints, on the other hand, can be heard by the Commission only if the Applicant and Respondent States have each filed a separate declaration accepting the Commission's jurisdiction to receive such complaints. This is a reversal of the rule traditionally found in human rights treaties. Until Protocol No. 11 to the European Convention entered into force, no other human rights instrument conferred on individuals the favourable status they enjoy under the American Convention. It is also important to note that under the American Convention not only victims of human rights violations or their representatives may file individual complaints with the Commission; NGOs and groups also have standing to do so, whether or not they are victims. The existence of this remedy has proved over the years particularly useful for dealing with forced disappearances because it is as a rule impossible for victims of this violation to file such complaints. Frequently, too, their next of kin are afraid to do so on their behalf. Here it is most helpful that NGOs can step in and institute proceedings before the Commission on behalf of victims.

As a Convention organ, the Commission passes on the admissibility of individual and inter-State communications. If the case is not referred to the Inter-American Court, the Commission examines the merits of the case, assists in

efforts to work out a friendly settlement, and failing that, makes final findings on the merits. If the State Party in question has recognized the jurisdiction of the Court – a separate declaration to that effect is necessary – the Commission or an interested State may refer the case to the Court. Individuals have no standing to do so, but once a case has been referred to the Court, individuals may now, that is since 2001, appear before the Court to plead their case. While the Commission tended in the early years of the Court's existence rarely to refer cases to it, this situation also changed in 2001 when it adopted new Rules of Procedure. These rules provide, with some minor exceptions, for the referral to the Court of all cases of non-compliance by States with the recommendations of the Commission.

Today the Inter-American Court of Human Rights, which has both contentious and advisory jurisdiction, plays an ever more important role in the inter-American human rights system. Most of the States that have to date ratified the Convention have now also accepted the Court's contentious jurisdiction. The American Convention, moreover, allows OAS Member States, whether or not they have ratified the Convention, and all OAS organs, to request advisory opinions from the Court seeking the interpretation of the Convention or of other human rights treaties of the inter-American system. Such advisory opinions may also be sought regarding the compatibility with the Convention of national legislation.

Since 2001, when the Inter-American Commission decided to routinely refer cases to the Court, the Court has come to play an ever more important role in the implementation of the Inter-American human rights system. Not only has the Court been able to decide many more cases, it has also made very effective use of the provisional measures provision of the Convention by ordering an increasing number of such measures and by closely supervising their implementation, a practice that is not expressly provided for in the Convention. In this connection, it is interesting to note that in 2004, for example, the Court ordered 13 provisional measures and in 2005 seven. The fact that such measures are deemed by the Court to be necessary is very telling since the Convention provides in Article 63(2) that they shall be issued only "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons." In short, some democratically elected governments are still deemed by the Court to be guilty of inadequately protecting their citizens against serious human rights violations.

In general, the Inter-American human rights system still lags behind its European counterpart in protecting human rights, although with the expansion to the East of the States Parties to the European Convention, its Court is now confronting problems similar to the ones the Inter-American Court faced in the past. The American continent continues to suffer from widespread poverty, corruption, discrimination and illiteracy as well as archaic judicial systems that are badly in need of reform. Also, some of the Commonwealth Caribbean nations as well as the United States and Canada have to date not ratified the Convention. Their absence has had a detrimental effect on the system, which is thereby

deprived of the presence of States with strong legal traditions. Although it has also been taking some national courts in the Americas a long time to familiarize themselves with the practice of the Convention institutions and to give domestic legal effect to the rulings of the Court, that situation has gradually improved in recent years. It must be recognized, all in all, that notwithstanding the problems the region faces, substantial progress has been made over the years as far as the protection of human rights in the Americas is concerned.

The ILO system of regular supervision of the application of Conventions and Recommendations: A lasting paradigm

Kari Tapiola *

In my own language, there is a saying which goes something like "if you have reached happiness, make sure to hide it from others". I am not certain that this is always the wisest thing to do. Yet, we seem to be rather good at this with our precious standards supervisory mechanism. I have senior colleagues who some time after joining the Organization and trying to understand how it works have called our standards system the "best held secret" of the ILO. We are actually quite good at not making public what the Committee of Experts and the rest of the supervisory mechanism do. Sometimes it seems that we are like the owner of a Rolls Royce Silver Ghost who guards the car so jealously that no-one else dares to even manifest a desire to use it.

We believe that this is the most sophisticated standards supervisory system in the world, and we quite probably are right. But then we must continue to make sure that it is known, recognized, understood – including the language in which its conclusions are couched – and that it is used in a transparent, fair and efficient way. Otherwise it, and all those who work with it, including its Secretariat, will be seen as a semi-secret society, a group of the initiated and the enlightened – the keepers of the faith but also the only ones authorized to use it and its findings.

I am not calling for a public relations effort. I am simply saying that if we want to reaffirm our relevance for the next eighty years, we need to be several things at the same time. The system needs to be in practice more user-friendly, and it also must express itself with sufficient clarity. It needs to demonstrate its

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worth in a competitive world – including the fundamental role of international labour standards as public goods. The system also needs to show how its workings get translated into better laws, better practice, trade union members reinstated in their jobs and renewed social justice in a market economy. At the same time, the system must be simple enough and accessible for those who use it and those whom it addresses. It has to continue to navigate between the Scylla of detail and the Kharybdis of generality.

Too much detail will not reach even indirectly the political decision-maker who notoriously will not read anything which does not fit on one page. Some situations that the supervisory bodies examine contain such a multitude of detail that it is too easy for its addressees to either say that no-one can cope with all these recommendations or, maybe, find fault with one detail and thus question the validity of the rest. I can think of a number of countries which at present actually can use the sheer amount of detail as an alibi to do nothing, particularly if they are not clearly guided towards action on the most urgent issues. If again the system is too general, it does not help in finding concrete solutions to concrete problems. It is important to derive practical recommendations from general principles, and they have to address specific issues, be they laws or administrative practices or the fate of persons who are unjustly treated and abused.

But I probably have rushed too quickly into the debate on the future of the supervisory mechanism. I need to go back to the beginning. In order to determine where we want to go, we need to know where we are coming from.

In the second year of the ILO's existence, in 1921, the Governing Body adopted draft questionnaires for the first two Conventions which by then had been sufficiently ratified to enter into force. This was the point where the supervisory functions of the ILO became operative. They are based on obligations contained in the Constitution: (i) a Member State has to report annually to the International Labour Office on measures it has taken to give effect to the provisions of a Convention to which it is a party; (ii) these reports have to be made in such form and must contain such particulars as the Governing Body may request; (iii) the Director-General must lay before the annual Conference a summary of the governments' reports.

The original method, or lack thereof, was too "raw" to be dealt with by the Conference directly, without the help of specific bodies and additional procedures. Even today, a summary of a report from a government is not likely to generate an objective discussion. Yet some governments have still, over eighty years later, not quite accepted this point. If the drafters of the ILO Constitution expected that information from governments alone would have been a sufficient and reliable basis for supervision, they may have got carried away by the post-war euphoria of 1919.

In fact, when reporting to the Conference in 1926, the Chairperson of the Committee which then dealt with the annual reports noted that the very large amount of space that these summarized reports took, ranging from 200 to 300 pages, made it impossible for delegates to "discuss the reports with profit

and in detail". Consequently, a preparatory examination of the reports would be needed by "some body which would bring into light the particular points to which attention of the Conference should be directed".

An Irish government delegate had already at the 1925 session of the Conference suggested that special supervisory committees should be set up at future sessions, to examine reports and to make sure that the system of control set out in the Versailles Peace Treaty functioned. In 1926 the Conference adopted a resolution which called for the setting up each year of a Committee to examine the summaries of the reports as well as the establishment by the Governing Body of a committee of experts who would in advance study the reports.

This draft resolution was adopted after an animated discussion by 66 votes to 36. The point of divergence was on the nature of both the new bodies and supervision itself. This certainly was not the last time that the spectre of supervisory bodies becoming a tribunal was raised, or the fear that the mechanism was utilized to force ratifications. The adopted resolution finally stipulated that a "technical" expert committee would be appointed for a trial period of one, two or three years. Later on in the Governing Body, the debate centered on whether the Committee would consist of representatives of member countries or be one whose membership was to be determined by the competence of the persons concerned alone. The criterion of competence certainly was the approach chosen when the first six-member Committee was appointed. At the same time, the underlying assumption from the beginning was that there would be diversity in competence and nationality.

The process leading to the Committee of Experts shows a number of things. In its wisdom, the Organization had given the Governing Body the powers to deal in an innovative and efficient way with the needs that quickly arose – and have continued to evolve since. If the functioning of the supervisory mechanism had been prescribed by the Constitution itself in more detail than the short article 408 of the Peace Treaty, the Organization would have had quite serious difficulties in coping with the steady rise of ratifications and subsequent reporting. The current Constitution's articles 22 and 23 also retain this framework in a suitably succinct way.

The ILO has, from the beginning, been remarkably pragmatic when it comes to dealing with processes which, however, we tend to at each given time hold sacrosanct and look upwards with reverence. Let us hope that this pragmatism will continue to serve the purpose of an efficient and fair standards supervisory mechanism.

Another heritage from those early days is one of frank debate, rich with criticism – a questioning of the constitutionality and authority of new methods, with concerns expressed that the Organization was granting itself powers of a court of inquiry or even becoming a social Interpol. Yet innovation has continued to take place – even reaching to the otherwise rather untouchable Constitution, which in 1946 was amended to include the obligation of Member States to supply – again at the request of the Governing Body – reports on Conventions they have not ratified, leading into the regular General Surveys. And, of course,

the special machinery for the protection of freedom of association was established in 1950 by the Governing Body.

I think it is fair to say that today, the Committee of Experts is one of the least criticized, and probably also the best respected, part of the supervisory system. Member States and the Office labour in trying to feed it in time with the material needed, and its conclusions have served many passionate debates in the Conference Committee. Its recognized independence serves as a tranquil centerpoint in the sometimes quite rough ocean of supervision. No doubt it has lived up to the words of Wilfred Jenks who in 1967 referred to

> "a general spirit imbuing the ILO supervisory bodies, to some unwritten wisdom guiding their action based on certain fundamental principles: firm adherence to accepted international obligations and standards; a scrupulous thoroughness; the strictest objectivity; recognition of the need for a sympathetic understanding of what lies beyond the letter of the law, of problems of timing, and of practical difficulties; and acceptance of the duty to observe the highest standards of tact and courtesy in the valuation of complex and delicate problems".[1]

I trust that the Members of the Committee recognize themselves in this characterization. It might be more difficult to use exactly the same words for all other parts of the supervisory process, which after all is a combination of both legal and political elements. This only underlines the obvious fact that laws emerge out of the political process, and labour law is determined to a great extent by the interplay of the forces in the labour market itself.

With the Committee of Experts, we have for the purpose of supervision found a good balance between independent and objective expert advice and the tripartite policy process. The same is true, although not in such a structured way, for the setting of standards, where expert meetings can take place prior to the tripartite drafting of a Convention. Whether, and how, more expert analysis could or should be systematically injected into the process of standard setting goes beyond the scope of this morning's talk but might be worth revisiting in another context.

Nicolas Valticos gave in the 1990s an unequivocal answer to whether the ILO system of standards supervision still was a model. By that time it had survived, and had been developed, through political and structural change, the end of the Cold War, and the arrival of a virtually universal market economy – a condition which had not earlier existed in the lifetime of the ILO. The answer of Valticos was, yes, the ILO system still remained a model. To quote his words:

> "The reasons remain numerous. The fact that it combines two basic methods of supervision, periodic reports and complaints, the fact that on some basic matters freedom of association it provides for supervision even on the absence of ratifica-

[1] See Wilfred Jenks, "Human rights, social justice and peace – The broader significance of the ILO experience", Norwegian Nobel Institute, Symposium on the international protection of human rights, 25-27 Sept. 1967, p. 37.

> tion. The fact that reports are requested and examined, even on unratified conventions and on recommendations. The fact that it has established the principle of quasi-judicial assessment by independent persons and the due process of law. The fact that it has worked out methods for on-the-spot inquiries and that it has also developed methods of quiet diplomacy. All these aspects constitute solid achievements and significant progress in the field of international supervision and, more generally, international law".[2]

This is the way in which Nicolas Valticos defines the happiness we have reached – an achievement which, I would argue, we should not, like the proverb-loving Finns, hide but rather make full use of.

What is interesting is the reminder, in both citations; one part of the system has to do with "methods of quiet diplomacy", argues Valticos. An "acceptance of the highest standards of tact and courtesy in the valuation of complex and delicate problems", adds Jenks. All ardent partisans of "naming and shaming" are thus reminded that the system is there for analyzing the issues raised, identifying the problems, drawing governments' attention to them, rendering the findings public, but also working with the governments and the employers' and workers' organizations to find solutions.

Sometimes it seems that over the years and decades, we have been better at identifying the problems than moving forward towards solving them. When I called for more information and publicity for what the supervisory mechanism is doing, I did not necessarily mean directing a stronger searchlight on our usual suspects or those who have willingly, or by mistake, erred in the application of standards. Rather, I believe that we should make better known how the ILO method of supervision works. A key part of this is the dialogue between the supervisory bodies and the countries concerned, assisted by the International Labour Office.

I keep on hearing that the problem of our supervisory mechanism is that it does not have teeth. We are told that although we can bark, we cannot bite. Recently, I have taken to answering this ever-recurring issue, which could be called the "dental work question", by reminding that the track record of mechanisms that are based on economic or other sanctions actually is not much to write home about. I am sure that for any success that sanctions-based mechanisms can claim, we can come up with several achievements which have combined a factual and principled analysis and recommendations with the diplomacy and courtesy that Jenks and Valticos referred to.

We can measure this in the number of legislative amendments, or changes in practice, or, for that matter, the number of detained trade unionists that regain their freedom because of interventions by either the supervisory bodies or the Office. If I am correct, recently this number has been around at least 500 persons a year.

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[2] See Nicolas Valticos, "Once more about the ILO system of supervision: In what respect is it still a model?" in *Mélanges H.G Schermers*, 1994, vol. I, p. 112.

But if we speak about our strengths, we have to address our weaknesses – before going to the obvious item of future challenges. The alleged weakness of "no teeth" I have already dealt with, and I believe that we can safely put it aside as a non-question. It is no wonder that the ILO cannot solve human and labour right problems in certain countries which resist fairly unanimous condemnation and pressure by the whole international system. What is important there is that once the conditions are there for us to work, we can contribute with our accumulated knowledge, as we have done over the years in such countries as South Africa, Poland, Indonesia, Turkey and many others. What we cannot do today in Myanmar/Burma or Belarus, we may be able to do tomorrow. What some see as a weakness is, in fact, a source of future strength.

A potential weakness, however, is if the supervisory mechanism does not recognize the root causes of problems it is asked to deal with. A failure to respect international labour standards can be caused by a deliberate decision of a government to ignore its obligations. It can be the result of a government's failure to set out, in law and policy, the expectation that private actors respect standards. It can arise out of systematic non-compliance, aided and abetted by weak or non-existing labour inspection. It can also arise out of institutional weakness and ignorance on all sides of the tripartite constituents.

It should be obvious that conclusions drawn in a case of willful non-compliance by responsible authorities would be different from those drawn in a situation where the main problem is a lack of capacity. This seems to be increasingly recognized by the supervisory bodies, when they call for technical cooperation as a primary means to address the failures that have been identified. I would dare to submit that most of the problems that the Committee of Experts deals with are problems of capacity, including a lack of awareness and also a deficiency of social consciousness. The number of countries that do not want to comply with standards although they have the capacity to do so may be rather small. In fact, arguably some of those we tend to see as the worst offenders also suffer from a lack of capacity. If, for instance, Myanmar/Burma would genuinely decide tomorrow to stop using forced labour, it would still be facing a huge problem of deficiency in capacity (which is why as part of our attempts for dialogue, we worked out a plan on how infrastructure projects could be carried out while respecting minimum labour standards – this plan is, of course, shelved for the time being).

Inevitably, there is also the question of resources. Legislative advice is reasonably cheap to deliver. Direct contact procedures which were introduced in 1968 have still been manageable within the human and material resources available to the Office. But when we look at implementing labour standards through proper technical cooperation, we need to go well beyond what we traditionally have seen as standards-related activities. One example is the biggest technical cooperation programme of the ILO, the almost exclusively donor-financed IPEC programme to eliminate child labour. The programme has been a success. The two relevant Conventions, Nos. 182 and 138 have attained very high levels of ratification, and figures published last spring show that child labour is declining.

But one cannot ignore the fact that recently the annual expenditure of the programme has been around at least 35 million US dollars.

And yet, behind this development lies a success story on the way we can deal with problems with the application of standards. When the IPEC programme started, a number of governments hesitated to get involved because they feared that admitting the existence of such a human rights and labour standards problem might make them vulnerable to criticism, boycotts and sanctions. In fact what has happened is that engaging in cooperation with the ILO has become a way for them to demonstrate that they are tackling the problem. What could have been negative has turned into a positive message. At the same time, we have a practical example of how technical cooperation and normative action can support one another. This is demonstrated by both the success of the Worst Forms of Child Labour Convention No. 182 and the revival and surge in ratifications of the Minimum Age Convention No. 138.

All this presupposes, of course, that the engagement in technical cooperation is genuine and results can be reported over a reasonable period of time. This is where the supervisory mechanism again comes in, as the regular reporting should expose any attempts at using technical cooperation as a cover for not doing anything.

I have tried to speak of weaknesses but seem to be sliding back to our strengths again. This concerns in particular the potential strength of combining supervisory action with technical cooperation. Some new avenues are becoming open to us, for instance through the introduction of Decent Work Country Programmes. If we can integrate the comments of the supervisory bodies into the comprehensive programmes which our constituents carry out at the national level, we have another tool to support the solutions to identified problems.

Let me then pass on to challenges. The system of supervision has developed continuously and it will have to develop further. As the beginnings of the Committee of Experts show, very early on it became clear that reports had to be treated as the assumption that the Conference would directly deal with summaries of them became impractical. Observations by employers' and workers' organizations are now a crucial element of the process. Annual reports have become either biannual, in the case of priority Conventions, or every five years for others. The last reform, which we have to evaluate soon, rearranged Conventions by groups or "families" in order to facilitate reporting. The previous readjustment in 1993 also gave the employers' and workers' organizations a better possibility to break into the cycle when serious concerns arise.

Currently, the system runs the risk of being choked up at several levels: at the national level, where reports are prepared; at the Office level where the files are processed; at the level of the Committee of Experts that examines the files; and also at the level of the Conference Committee on the application of standards, which does not have an unlimited absorptive capacity either. At each of these levels answers can be found, but all of them will be partial. Nationally tripartite cooperation could be used more. Both the Office and the Experts could strive at distilling the essential questions into the observations, and the Confer-

ence Committee could think of more strategic approaches to discussing the report. But within each approach there are dangers. Genuine tripartism is still a scarce commodity, and the guise of tripartism can be used against the legitimate interests of minority groups. What may not be essential for someone is a matter of freedom and subsistence for others, and the system will still have to be able to help individuals who have been discriminated because they have exercised their rights to freedom of association and non-discrimination. And if we only single out the worst offenders, we end up with a rather one-sided "rogues' gallery", which would furthermore crowd out the supervision of important technical Conventions.

I still have a preference of saying, let's keep on course, as I do not believe that it will lead us into a wall. The fundamental logic of the system is sound. The amount of detail can be reviewed, as can the frequency of reporting – as the 1993 decision showed, there is a trade-off between the frequency of reporting and the possibility of employers' and workers' organizations to break into the cycle. But, as was generally agreed in the last review in 2001, reporting cycles that go much beyond five years are liable to lead into serious lapses of institutional follow-up and memory.

The feasibility of a country-based approach – and different alternatives for it – should of course be studied. In my view, it would have to be accompanied by a boost to the engagement and capacity of the tripartite constituents in the countries concerned. Maybe this could take place with the help of Decent Work Country Programmes, which by definition should set the national priorities for all ILO action in a given country. Another area to look at is how our field staff is integrated into the dialogue with the supervisory bodies.

I do not believe in one magic solution, a "Big-Bang" which would solve all the problems in the functioning of the supervisory system. I do not think that the system has failed to address the major issues involved in the application of standards, either in terms of understanding the provisions of the standards or examining their application in specific countries where issues are urgent.

If the workload is the main problem we have, maybe we should rather consider it a good problem, much better than reluctance or refusal to use the mechanism. In 1926, the Conference interrupted its discussion on the supervisory mechanism and went to the Governing Body to get the 6,000 Swiss francs that were annually needed for the new technical expert committee. But today our budgetary masters are unlikely to tell us that there is a big pot of gold at the end of this particular rainbow. Consequently, we have to keep working on the right trade-off between detail and relevance. The Committee of Experts should be particularly well placed to concentrate, and give guidance, on the most essential issues that arise out of reports. That after all is exactly why it was set up eighty years ago.

The European Committee of Social Rights and the collective complaints procedure under the European Social Charter

Andrzej Marian Swiatkowski *

I. Introduction

The Additional Protocol of 1995 to the European Social Charter introducing the collective complaint procedure gave the Committee of Social Rights the status of a quasi-judicial body.[1] The Committee was vested with the power to examine collective complaints lodged by selected international and national organisations against the authorities of Member States wich violate the provisions of the European Social Charter or the Revised European Social Charter, or do not adapt their domestic labour and social insurance legislation to the European standards. The Additional Protocol of 1995 was opened for signature on 9 November 1995. It came into force on 1 July 1998, upon ratification by eight European States.[2] The signatories of the Protocol could only be States which had previously ratified the European Social Charter of 1961. In adition, five States signatories of the European Social Charter of 1961, signed the Additional Protocol of 1995 undertaking to comply with its provisions.[3] Two other States signatories of the Revised European Social Charter of 1996, declared that they would abide by the provisions of the Protocol.[4] Therefore, the procedure of the Committee of Social Rights for the examination of collective complaints applies to 15 out of 46 Member States of the Council of Europe.

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[1] See A. Swiatkowski, "Funciones causi-jurisdiccionales del Comité de Derechos Sociales del Consejo Europeo", *Revista de Derecho Laboral y Seguridad Social*, Abril 2005, p. 533.

[2] Cyprus, Finland, France, Greece, Norway, Portugal, Sweden and Italy.

[3] Austria, Belgium, Croatia, Denmark, Slovakia.

[4] Bulgaria and Slovenia.

The Additional Protocol of 1995 is based on the procedures applicable in proceedings before the ILO's Committee on Freedom of Association. The ILO Committee has less power than the Committee of Social Rights of the Council of Europe. The Committee on Freedom of Association deals only with complaints concerning the violation by the authorities of Member States of the rights related to freedom of association. The Committee of Social Rights examines collective complaints lodged against the authorities of the Member States of the Council of Europe concerning the violation of economic and social rights, including the freedom to organise in trade unions and in employers' organisations (art. 5) guaranteed under the Social Charters.

II. Entities empowered to initiate collective complaints proceedings

Under the Additional Protocol of 1995, the following types of organisations are entitled to lodge collective complaints:

(i) International employers' organisations and trade unions invited by the Subcommittee of the Governmental Committee[5] (art. 27(2) the European Social Charter). This provision provides for the invitation of no more than two international organisations of employers and no more than two international trade union organisations to be represented as observers in a consultative capacity at the meetings of the Governmental Committee. Although the European Social Charter protects mainly the rights of employees[6], one international trade union organisation (The European Trade Union Confederation – ETUC) and two international employers' associations (the Union of Industrial and Employers' Confederations of Europe – UNICE and the International Organization of Employers – IOE) have been invited to participate in the work of the Governmental Committee. These organisations are entitled to file collective complaints (art. 1(a) of the Additional Protocol of 1995).

(ii) Other international non-governmental organisations (INGOs) having a consultative status with the Council of Europe and appearing in a list established for this purpose by the Governmental Committee (art.1(b) of the Protocol). To be included in the list, an organisation has to fulfil certain conditions set out in the Decision of the Committee of Ministers of the

[5] The Committee was formerly known as the Governmental Social Committee.

[6] Article 6(4) of the European Social Charter guarantees the employers' right to undertake collective actions, hence, it gives them the right to organise defensive lock-outs; see Committee of Independent Experts, Conclusions I, 1969-70, Council of Europe Press, Strasbourg 1995, pp. 38,40; Conclusions III, p. 38; Conclusions V, p. 48; Conclusions VI, pp.39-40; Conclusions VIII, p. 95; Conclusions IX-2, pp. 47-49; Conclusions XV-1, vol. 1, pp. 81, 123; Addendum to Conclusions XV-1, p. 27. See also *The right to organize and to bargain collectively – Study drawn up on the basis of the case law of the European Social Charter*, 2nd edition, Council of Europe Publishing, Strasbourg 2001, pp. 79-81; L. Samuel, *Fundamental social rights – Case law of the European Social Charter*, 2nd edition, Council of Europe Publishing, Strasbourg 2002, p. 167.

Council of Europe of 22 June 1995.[7] All the INGOs having consultative status with the Council of Europe, competent in matters governed by the European Social Charter, which have access to sources of information and are able to draw up and professionally present – from a legal point of view – their stand in matters examined by the Committee of Social Rights of the Council of Europe are entitled to apply for the right to lodge collective complaints.[8] The applications for inclusion in the list of INGOs entitled to lodge collective complaints are examined by the Secretary General of the Council of Europe. An application is considered accepted by the Governmental Committee unless it is rejected in a ballot by a simple majority of votes cast.[9] An INGO can be included in the list for a period of four years and has the right to apply for renewal.

(iii) Representative national employers' organisations and trade unions, having the right to undertake their activities within the jurisdiction of a Member State of the Council of Europe, against which they will be entitled to lodge a collective complaint (art. 1(c) of the Protocol). Only employers' and employees' organisations are entitled to apply to be included in the list. Therefore, those employers who are not members of any employers' organisation or association are not entitled to lodge any collective complaints. Trade unions enjoy the status of organisations and, hence, trade unions and associations of trade unions are entitled to apply for entry. Pursuant to article1(c) of the Additional Protocol of 1995 national organisations are also entitled to apply for entry in the list. The decision admitting an organisation to apply for entry is not conditional upon a membership of a national employers' organisation or a trade union in an international organisation of similar character. Only "representative" employers' organisations and trade unions are eligible for inclusion in the list. None of the cited international documents specify any criteria for establishing whether an organisation is or is not representative. Nor do they specify a body which would be entitled to make such judgments. The Committee of Ministers of the Council of Europe would rather leave this issue to the authorities of its Member States. Thus, an employers' organisation or a trade union, which, under the domestic legislation, enjoys the status of a representative organisation, retains this status for the purposes of the Social Charter of the Council of Europe. Yet, in the absence of any criteria for the assessment of the "representativeness" or "non-representativeness" of an organisation on a national level, the power to make judgments concerning the status of a

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[7] See Explanatory report to the 1995 Protocol in *European Social Charter – Collected texts*, 4th edition, Council of Europe Publishing, Strasbourg 2003, p. 149.

[8] See R.Brillat, "La Charte sociale européenne du Conseil de l'Europe – développements récents", *Droit en Quart Monde*, 1996, No.12, p.3. Several hundreds of international non-governmental organisations have the right to express their opinions in the Council of Europe.

[9] Three organisations which applied for the right to lodge collective complaints have not been included in the list by the Governmental Committee.

national organisation applying for entry in the list of organisations entitled to lodge collective complaints is vested in the Committee of Social Rights. Factors such as the number of members and the organisation's actual role in national negotiations should be taken into account.[10]

(iv) Representative national non-governmental organisations (NGOs) entitled to carry out their statutory activities within the jurisdiction of the Member State of the Council of Europe, against which their complaint is made (art. 2(1) of the Protocol), if the State in question has previously issued a declaration in this respect. The Committee of Social Rights has been authorised to verify whether NGOs other than organisations of employers and trade unions, referred to in article1(c) of the Additional Protocol of 1995, entitled by the authorities of Member States to lodge collective complaints, have the status of a representative organisation, as construed under article 2(1) of the Protocol. The authorities of the Member States have the right to authorise representative NGOs to initiate proceedings in accordance with the procedures laid down in the Additional Protocol of 1995. The authorisation is valid for the period stated in the relevant authorising document or for an unlimited period. An authorisation to lodge collective complaints can be revoked by way of denunciation of the Protocol.[11] Finland is the only State among those which have ratified or signed the Additional Protocol, to have authorised its representative NGOs to lodge collective complaints. No Finnish NGOs have so far made use of this possibility.

The Additional Protocol of 1995 makes a clear distinction between the organisations entitled to lodge collective complaints against their own state. Organisations of employers and trade unions falling within one of the four categories of organisations entitled to lodge collective complaints may do so in respect of every matter governed by the provisions of the European Social Charter. Other organisations, falling within any of the categories mentioned in the Additional Protocol, are entitled to lodge collective complaints only on those matters specifically recognised by the Committee of Social Rights (art.3 of the Additional Protocol).

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[10] It is pointed out that the Additional Protocol has the status of an international treaty which should apply identical criteria while assessing employers' organisations and trade unions; see Explanatory report, *op.cit.*, *supra* n.7, p. 153. The report also considers that the Committee of Social Rights should be vested with the power to assess all employers' organisations and trade unions – also those which, pursuant to their domestic legislation, already enjoy the status of representative organisations. See also R.Birk, "The Collective Complaint: A New Procedure in the European Social Charter" in C. Engels and M. Weiss (eds.), *Labour Law and Industrial Relations at the Turn of the Century – Liber Amicoum in Honour of Roger Blanpain*, Kluwer Law International, 1998, pp. 265-266; D. Harris and J. Darcy, *The European Social Charter*, 2nd edition, Transnational Publishers, Ardsley 2001, p. 358.

[11] The notice period for denunciation is 12 months.

III. Examining the admissibility of the complaint

The Committee of Social Rights plays a quasi-judicial role during the examination the status of an organisation lodging a collective complaint (i.e. representative or non-representative, active or not in the areas regulated by the European Social Charter). Another important element of the quasi-judicial proceedings carried out in respect of collective complaints is the initial examination of a complaint and deciding upon its admissibility. Out of 31 collective complaints submitted to the Committee of Social Rights in the years 1998-2005, only one was lodged by an employers' organisation,[12] 11 by NGOs[13] and 13 by trade unions and trade union organisations.[14] During the "pre-court" proceedings, the Committee of Social Rights examined the right of an international lawyers' association to lodge a collective complaint against the authorities of Portugal, for allowing the employment of children under 15 years of age, which constitutes a violation of article 7(1) of the European Social Charter.[15] The Committee also had to decide whether a Quakers' organisation has the right to lodge a collective complaint against Greece for violation of the provision prohibiting forced labour (art. 1(2) of the European Social Charter) by introducing some alternative forms of compulsory military service. As regards the complaints examined so far, the Committee of Social Rights has pronounced that INGOs making collective complaints meet the requirements laid down in the additional Protocol of 1995. They have been established either to represent and defend economic and social rights expressed in the European Social Charter, or to protect the rights of a particular social group, such as for instance children or immigrants. Decisions on the admissibility of collective complaints are made by the Committee in a plenary

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[12] Confederation of Swedish Enterprises v. Sweden, Complaint No.12/2002. See *European Social Charter – Collected texts, op.cit*., p. 500.

[13] International Commission of Jurists v. Portugal, Complaint No/1998; International Federation of Human Rights Leagues v. Greece, Complaint No/2000; Quaker Council for European Affairs v. Greece, Complaint No/2000; Autisme-Europe v. France, Complaint No.13/2002; International Federation for Human Rights (IFHR) v. France, Complaint No.14/2003; European Roma Rights Centre v. Greece, Complaint No.15/2003; World Organisation Against Torture (OMCT) v. Greece, Complaint No.17/2003; OMCT v. Ireland, Complaint No. 18/2003; OMCT v. Italy, Complaint No. 19/2003; OMCT v. Portugal, Complaint No. 20/2003; OMCT v. Belgium, Complaint No.21/2003.

[14] European Federation of Employees in Public Services (EFEPS) v. France, Complaint No.2/1999; EFEPS v. Greece, Complaint No.3/1999; EFEPS v. Italy, Complaint No.4/1999; EFEPS v. Portugal, Complaint No. 5/1999; Syndicat national des professions du tourisme v. France, Complaint No. 6/1999; Confédération française de l'Encadrement – (CFE) CGC v. France, Complaint No.9/2000; Tehy ry and STTK ry v. Finland, Complaint No.10/2000; European Council of Police Trade Unions v. Portugal, Complaint No.11/2001; CFE-CGS v. France, Complaint No. 16/2003; Confédération générale du Travail v. France, Complaint No. 22/2003; Syndicat Occitan de l'education v. France, Complaint No.23/2003; Syndicat Sud Travail Affaires Sociales v. France, Complaint No.24/2004; Centrale générale des services publics (CGSP) v. Belgium, Complaint No. 25/2004.

[15] See International Commission of Jurists v. Portugal, Complaint No.1/1998, Council of Europe Publishing, Strasbourg 2000, p. 13.

session. A report prepared by a member of the Committee selected by the President to be a spokesperson in a particular case serves as the basis for discussion.

IV. Grounds of Collective Complaints

A collective complaint can only be made in the event of an alleged unsatisfactory application of the European Social Charter by the authorities of a Member State (art.1 of the Additional Protocol). Since Member States do not "apply" the Charter and are only obliged to abide by the Charter's provisions on the basis of which the Committee of Social Rights formulates European standards for social and economic rights, the wording used in article1 of the Additional Protocol should be construed as meaning that a collective complaint may be lodged, whenever the authorities of Member States fail to fulfil their obligations arising from the European Social Charter, which they have voluntarily accepted for implementation.[16] When lodging a collective complaint, the complainant should identify particular provisions of the Charter and indicate in what respect State authorities have not ensured a satisfactory application thereof (art.4 of the Additional Protocol). Presenting its conclusions, the Committee of Social Rights has to assess whether or not the Member State concerned has ensured the satisfactory application of the provision of the Charter, referred to in the complaint – art.8 Section 1 of the Additional Protocol. As regards the supervision over the reports presented by Member States, the Committee of Social Rights assesses whether labour law and practice in the countries concerned comply with the European standards set out in the Social Charters of the Council of Europe. Hence, a collective complaint can be made in the event of the alleged unsatisfactory application of the provisions of the European Social Charter and of the standards laid down by the Committee of Social Rights by a Member State.

The allegations made in a collective complaint cannot be of a general nature. They have to refer to a specific case of unsatisfactory application by a Member State of a particular provision of the European Social Charter or noncompliance with a particular European standard laid down by the Committee on the basis of the Charter. The analysis of the collective complaints examined so far by the Committee of Social Rights shows that they concern the unsatisfactory application of the following provisions of the European Social Charter: article 7(1) (the right of children and young persons to protection)[17], art.5 (the right to organise)[18], article 6 (the right to bargain collectively)[19], article 1(2) (nondiscrimination as regards the right to work and prohibition of forced labour)[20], article 10 (the right to vocational training)[21], article 2 (the right to just conditions

[16] Cf. Harris and Darcy, *op. cit., supra* n. 10, p. 360.

[17] Complaint No.1/1998.

[18] Complaints No.2/1999, No.3/1999, No.4/1999, No.5/1999, No.11/2001, No.12/2002.

[19] Complaints No.2/1999, No.4/1999, No. 5/1999, No. 9/2000, No.11/2001, No.16/2003.

[20] Complaints No.6/1999, No.7/2000, No.8/2000.

of work)[22], article 2(4) (the right to work in safe conditions)[23], article 4 (the right to a fair remuneration)[24], article 27 (the right of workers with family responsibilities to equal opportunities and equal treatment)[25], article 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community)[26], article 17 (the right of children and young persons to social, legal and economic protection)[27]. Collective complaints include some allegations of violation of certain economic and social rights guaranteed in the above-mentioned provisions of the European Social Charter against public authorities of certain Member States of the Council of Europe. Collective complaints can be made for the benefit of all citizens (not only employees and persons having social insurance) of a particular Member State which, while introducing regulations with regard to a particular social group, does not abide by the provisions of the Social Charters or does not comply with the standards set on the basis of the Charters. A review of the complaints examined by the Committee of Social Rights shows that collective complaints can be made for the benefit of children, young persons, families, disabled persons, persons deprived by the State of their right to organise and organisations deprived by the State of their right to bargain collectively. The terms used in the Additional Protocol of 1995 suggest that a collective complaint can be made to protect the interests and rights of a particular community. As construed in the Additional Protocol of 1995, the admission of a complaint as a collective complaint does not exclude the possibility to identify persons for whom the complaint has been made. The Committee of Social Rights admits the possibility of making a complaint on behalf of employees of a particular establishment, as in the case of employees of the British Governmental Communications Headquarters (GCHQ) – an organization responsible for intelligence, security and military communication systems – deprived of the right to organise guaranteed in article 5 of the European Social Charter.[28] Another specific social group, in respect of which the Committee of Social Rights considered a collective complaint admissible, was a group of Norwegian workers employed in the oil drilling industry and nurses working on the drilling platforms, who had been obliged to submit a collective dispute for settlement by a social arbitration body before they could decide to go on strike, which constitutes a violation of article 6(4) of the European Social Charter.[29]

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[22] Complaints No. 9/2000, No.16/2003.

[23] Complaint No.10/2000.

[24] Complaints No. 9/2000, No. 16/2003, No.17/2003, No.18/2003, No.19/2003, No.20/2003.

[25] Complaint No.9/2000.

[26] Complaint No.13/2002.

[27] Complaints No.13/2002, No.14/2003.

[28] Conclusions XI-1, p.80.

[29] Conclusions XII-1, p.130; Conclusions XIII-1, p.158.

V. Formal requirements of collective complaint proceedings

A collective complaint is addressed to the Secretary General of the Council of Europe. The Additional Protocol requires the Secretary General to acknowledge receipt of the complaint, to notify the Member State concerned and to immediately forward the complaint to the Committee of Social Rights (art.5). Formal requirements for making collective complaints have been laid down in the Rules of Procedure of the Committee of Social Rights.[30] A collective complaint has to be made in writing, in one of the two official languages of the Council of Europe (English or French) and signed by a person authorised to represent the entity that is entitled to lodge collective complaints.

The fact that the case is pending before other authorities or that a judgment has already been passed (*res judicata*) does not constitute any formal impediment to the examination of a complaint. There is no time limit, the lapse of which, in the case of individual complaints, results in the loss of right to demand certain benefits. A collective complaint can be lodged even when not all legal remedies have been exhausted before domestic state authorities. The *ne bis in idem* principle (prohibition against double jeopardy) does not apply in the case of collective complaints, either. The Committee of Ministers of the Council of Europe has clearly stated that a collective complaint may be declared admissible by the Committee of Social rights, even if a similar case has already been submitted to another national or international body. The cases on the violation of the right to organise are dealt with by the ILO's Committee on Freedom of Association and by the Committee of Social Rights of the Council of Europe. Making a complaint in one of these institutions does not exclude the possibility to refer for legal opinion on domestic legislation concerning collective labour law and common practice in this respect to another institution authorised to assess the compliance of national collective labour law with the international standards laid down in ILO Convention No. 87 (art.2) and the Social Charters of the Council of Europe (art.5). The examination of a collective complaint, subject to the provisions of the Additional Protocol of 1995, is also possible when the Committee of Social Rights had already presented its opinion on the subject in the course of its regular supervision – based on reports submitted by the authorities of Member States – concerning compliance with the provisions of the Social Charters and with the European standards on labour law and social insurance laid down on the basis of these Charters. Other, less rigorous standards are set by the ILO – a global organisation, the members of which often vary considerably as regards the level of economic, technological, social and cultural development. The standards established by the Council of Europe, whose Member States all come from the same continent, are definitely more stringent.

[30] The legal basis for the Rules of Procedure is to be found in the provisions of articles 24 and 25 of the European Social Charter as amended by the Amending Protocol of 1991; see *European Social Charter – Collected texts, op.cit., supra* n.7, p. 189.

The Committee of Social Rights has two roles: first, it acts as a body setting the standards and supervising the compliance with these standards. Secondly, it is empowered to examine collective complaints lodged against authorities of Member States which do not comply with the standards concerning the protection of social and economic rights. As a supervisory body, the Committee monitors the situation in Member States and its evaluation is mainly based on the reports submitted by the authorities of the States concerned. In the case of collective complaint proceedings, a different approach is followed. Legal environment and common practice as regards the compliance with the provisions of the Social Charters of the Council of Europe and with the relevant European standards are assessed on the basis of a collective complaint. Proceedings initiated by an entity entitled to lodge collective complaints is of contradictory nature. Every party has to present statements and evidence in support of the allegations made in a collective complaint (presented by the complaining party) and in the response to the allegations (presented by the authorities of the State against which the complaint is made). If a collective complaint is made by national employers' organisations, national trade unions and national or international NGOs, the Committee of Social Rights has to notify – through the Secretary General of the Council of Europe – the international employers' organisations and trade unions referred to in art. 27(2) of the European Social Charter of the proceedings and invite them to submit their observations on the subject and to consider the stand expressed by the organisation acting in the collective complaint proceedings as amici curiae.

The specific quasi-judicial role of the Committee of Social Rights results from a lack of any formal impediments to the examination of the case already examined or currently being examined by another organisation or by the Committee itself. This role is further attested by the limited formalization of the proceedings and the non-binding character of the Committee's conclusions.

VI. Collective Complaint Proceedings

Unlike in the case of proceedings before the ILO's Committee on Freedom of Association, the Committee of Social Rights may examine a collective complaint during a hearing with the participation of the parties. The decision on the form of examination is made by the Committee in a plenary session. The Committee decides to proceed with the participation of the parties whenever it believes that such procedure is "necessary". The hearing enables the Committee to establish the facts which cannot be established on the basis of the procedural writs and documents. Hearings are open to the public. They are held in the courtroom of the European Court of Human Rights. The Parties and their representatives put forwards their arguments and offer additional explanations. The right to present arguments during the hearing is also given to organisations acting as *amici curiae*.

The proceedings of the Committee of Social Rights are concluded with the adoption of the Committee's a report. The findings of the Committee of Social Rights are presented to the Committee of Ministers of the Council of Europe and to the parties. On the basis of the report and findings of the Committee of Social Rights, the Committee of Ministers passes a resolution or a recommendation. A resolution on the compliance of domestic labour and social insurance legislation with the Social Charters of the Council of Europe is passed by a simple majority vote of the Committee of Ministers. A recommendation concerning the unsatisfactory application of one of the two Social Charters of the Council of Europe requires a qualified majority of two-thirds of those voting. The report of the Committee of Social Rights accompanied by the resolution or recommendation of the Committee of Ministers is forwarded to the Parliamentary Assembly of the Council of Europe and to the parties engaged in the collective complaint.

The Committee of Ministers is not bound by the conclusions of the report prepared by the Committee of Social Rights. In the case *International Commission of Jurists v. Portugal*,[31] the Committee of Ministers adopted a resolution approving the report of the Committee of Social Rights, which concluded that the authorities of Portugal unsatisfactorily applied article 7 of the European Social Charter although, pursuant to article 9(1) of the Additional Protocol of 1995, it should have adopted a recommendation stating the unsatisfactory application of the European Social Charter.[32]

The authorities of the Member State against which a collective complaint is lodged have the right to request the Committee of Ministers to consult the Governmental Committee of the Council of Europe before adopting a recommendation. An opinion of the Governmental Committee is required when the report of the Committee of Social Rights raises some "new issues", or when the qualified majority of the Committee of Ministers so decides (art.9(2) of the Additional Protocol). The "new issues", which require the Committee of Ministers to consult the Governmental Committee, may be legal issues which have not been dealt with by the Committee of Social Rights within the framework of regular supervision. The Governmental Committee, composed of representatives of Member States is a political body. The Committee of Ministers is also political in nature. An additional political body in the proceedings contributes to a balanced assessment of the findings of the Committee of Social Rights. Although the recommendations of the Committee of Ministers are not biding upon the Member States of the Council of Europe, the authorities of the States against which proceedings have been initiated consider that the Governmental Committee should participate in the proceedings to counterbalance the legal evaluation of the Committee of Social Rights with a political opinion.

[31] Complaint No.1/1998, *op.cit., supra* n.15.

[32] See Harris and Darcy, *op.cit., supra* n.10, pp. 366-367.

VII. Conclusions

The Committee of Social Rights is not a judicial body. It does not deal with any individual complaints concerning instances of violation of the provisions of the European Social Charters by the Member States of the Council of Europe. As regards collective complaints, the Committee does not adjudicate. It gathers information and adopts a reasoned position, whenever an authorized entity lodges a complaint against a Member State which has ratified the Additional Protocol of 1995 and has thus submitted its national labour and social insurance legislation and practice to the supervision and assessment of an independent international body. The procedure for the examination of collective complaints follows the pattern of similar international judicial bodies competent to hear complaints in matters of labour and social security law. Hence, the view that the Committee of Social Rights plays a quasi-judicial role seems justified. This role is supplementary to the main function of the Committee, which is to serve as an international body established to set European standards with regard to labour and social insurance legislation and to supervise the compliance of the Member States of the Council of Europe with the provisions of the European Social Charter of 1961, the Revised Social Charter of 1996 and of the standards set on the basis of those Charters. The Committee of Social Rights and its predecessor, the Committee of Independent Experts, is sometimes regarded as a body less influential than the European Commission on Human Rights and the European Court of Human Rights – the bodies supervising the compliance of the Member States of the Council of Europe with the provisions of the European Convention on Human Rights[33]. The criticism is voiced mostly on grounds of effectiveness.[34] The Committee of Social Rights as an independent, professional body does not pronounce any binding judgments. It presents its view on technical aspects, and is subject to the political control of the Governmental Committee and of the Committee of Ministers of the Council of Europe. The quasi-judicial role of the Committee of Social Rights does not influence the number of collective complaints examined by this body of the Council of Europe. As of 30 June 2005, the Committee had received 31 collective complaints for examination.[35] As the number of Member States which decide to ratify the Additional Protocol of 1995

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[33] See Ph. Alston and J. Crawford, *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge, New York 2000; M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, Clarendon Press, Oxford 2002; R.R.Churchill and U. Khaliq, "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?", *European Journal of International Law*, vol.15, 2004, p. 417.

[34] SeeL. Betten, *International Labour Law – Selected Issues*, Kluwer, Boston 1993, pp. 416-417; T. Novitz, *International and European Protection of the Right to Strike – A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union*, Oxford Monographs on Labour Law, Oxford University Press, Oxford 2003, p. 212.

[35] The Committee examined one collective complaint in 1998, five in 1999, four in 2000, one in 2001, two in 2002, ten in 2003 and five in 2004.

increases, the working methods of the Committee of Social Rights will also change. The reports of Member States will be progressively replaced by collective complaints lodged by social partners active in the national or international arena and by the INGOs included in the list drawn up by the Council of Europe. The role and nature of the Committee will necessarily evolve as well. The Committee will ultimately be transformed from a supervisory body monitoring the compliance with the provisions of the Charters to a judicial body.

Discussion

*Jean-Maurice Verdier** – J'aimerais faire un peu le rapport avec l'intervention de M. Diène sur les procédures spéciales. J'ai eu l'occasion de faire ce que l'on appelle des visites sur place dans le cadre du contrôle régulier de la commission d'experts. Je crois qu'un des gros problèmes du contrôle, étant donné que la sanction n'est qu'une sanction d'appel à l'opinion publique, il faut bien le dire, c'est le problème de l'application pratique. M. Diène a eu raison d'insister sur le suivi des rapports spéciaux et, par conséquent, dans le cadre du rapport régulier, de l'importance du suivi qui est prévu par le rapport régulier puisqu'il y a des rapports périodiques. Ce qui m'a intéressé, c'est que M. Diène a mis l'accent sur les visites sur place et même les visites de suivi. Je pense que ce serait peut-être un exemple à suivre dans le cadre du contrôle régulier sur les rapports périodiques.

J'ai eu l'expérience suivante quand je suis allé dans un de ces pays, accompagné d'un fonctionnaire du bureau. Je suis rentré très satisfait, ainsi que le fonctionnaire, parce qu'on avait fait des engagements par écrit avec les autorités qui avaient commis des violations aux droits de l'homme graves (tous les syndicalistes étaient mis en prison, tous leurs emplois étaient perdus, dans le privé aussi bien que dans le public, etc.). On prend des engagements précis avec un calendrier dans lequel on note ce que l'on vient de dire et cela est constaté par la commission d'experts. Pendant quinze jours, trois semaines, on fait quelques petites actions «paravent» et puis plus rien. Autrement dit, on a fait un cinéma formidable, comme on dit en français. Un beau film. Un cinéma formidable, avec des réunions, rassemblant des ministres, des syndicalistes, etc., les engagements sont pris et puis plus rien ne se passe. Je ne sais pas où cela en est actuellement, mais je sais que pendant les deux ou trois années qui ont suivi, la commission s'est bornée à constater que cela n'évoluait pas. C'est là où je pense qu'il serait intéressant de faire des visites de suivi. Pas seulement des visites sur place comme la commission a l'habitude de le faire mais des visites de suivi parce que je pense que l'on ne peut pas, à la seconde visite, refaire le même cinéma qu'avant. Faire du cinéma cela est possible une fois, c'est beaucoup plus difficile de le refaire après.

* Ancien membre de la Commission d'experts (1974 -2001).

Kari Tapiola – To react to what Professor Verdier has just said, we all know that there are places where we are liable to be shown what he called the *cinéma formidable*. I can think of one country, in particular, where we have seen the same film over and over again, and then the Conference Committee was not convinced and asked us to actually specify to the Governing Body what Article 33 of the Constitution would mean. So we had a reversal of the situation. We were no longer invited to come to the country but the country decided to send a high-level delegation here to make their presentation which we might say was a *présentation formidable*, but at least the process had led to reaction.

If we look at some of the most difficult cases that we have, we need to be sufficiently sceptical but on the other hand we also need to see where we can try to keep on the engagement and if it is not for any other purpose, – after all the commission of enquiry at the time was not allowed to go to Poland – it might well be just for the sake of maintaining a presence and an opening. After all, situations change, and then you need a model, something that can be followed up in that country. If we cannot produce anything else, I would say we should still try to articulate a response so that, if and when the country is politically ready, if and when it decides to fulfil its obligations properly, some groundwork be readily available. The experience of South Africa is a case in point.

The Conference Committee decided last year that with respect to 19 individual cases of non-compliance its recommendations should be followed up by missions, and it seems that in most of those missions the discussion was genuine. This is an approach that we have to develop further even though the danger of a *cinéma formidable* always exists.

*Tom Etty** – My question relates to something which has been said by Mr. Tapiola about the strength and the quality of what he called the quasi-judicial output of the Committee of Experts. The point is that the legitimacy of the Committee of Experts and the reason why very few people would be prepared to criticise it is the undisputed quality of its members, their impartiality, their independence, their objectivity – that is a mantra which we repeat year after year, and quite rightly, in the Conference Committee. We should not forget, however, that there is another body in the ILO that also produces case-law, that is the Committee on Freedom of Association, which is not composed of legal experts. It is composed of government representatives, trade union representatives and employers' representatives and therefore it is more of a political body. Interestingly enough, despite the fact that this latter body is not truly legal, my impression is that the case law it produces remains also unchallenged. How is this to be explained?

Kari Tapiola – The Committee on Freedom of Association (CFA) has the habit of referring the legislative aspects of a case to the Committee of Experts

* Adviser, International Affairs, Netherlands Trade Union Confederation (FNV).

but the Committee on Freedom of Association, as you said, does have a broader view of the situation. If I would have gone into discussing case-law in general, I would have integrated more comments on the Committee on Freedom of Association but I think that we have in-built mechanisms to ensure that we do not end in a situation where the conclusions of these two Committees are contradictory which would, of course, be unfortunate.

In line with the logic of the system, the legitimacy of the Committee of Experts comes from independence and expert knowledge, whereas the legitimacy of the Committee on Freedom of Association comes from its tripartite nature, in other words the fact that you have employers' and workers' representatives who are there in an expert capacity. It is worth noting that the CFA does not reach a conclusion unless it is a unanimous one. This, of course, gives remarkable legitimacy to these issues which are in the core mandate of the Organization. This interaction between expertise and representativeness has always been instrumental, including during the debate that led to the establishment of the Committee of Experts. There is this constant need to find the balance between the tripartite functioning of the Organization, the preparatory work that is being done by the Office and the independent expertise that gives the touch of excellence to this work.

*Angelika Nussberger** – With reference to the latest developments in the Strasbourg system of protection of social rights, it is particularly interesting the emphasis given to the role of NGOs. It is indeed striking that the European Committee of Social Rights can even use the court room of the European Court of Human Rights for its deliberations. The ILO has of course its own long-established tradition of tripartism but there is also a different form of bringing in the civil society. So, the collective complaint procedure introduced within the Council of Europe might be seen as a forerunner of similar arrangements to be adopted elsewhere.

*Abdul Koroma*** – Is the European Social Charter not enforceable domestically because, if I understood well what Professor Swiatkowski said, there are some 40,000 pending complaints or cases only 36 of which have come before the Committee.

Andrzej Marian Swiatikowski – Concerning the figure of 40,000 cases, this is the average number of individual cases pending on an annual basis before the European Court of Human Rights. As regards the application of the European Social Charter in domestic jurisdiction, the Charter is considered to be a legal source in Member States but there is ongoing debate as to whether national constitutional courts are bound by the findings of the European Committee of

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** Judge, International Court of Justice; Member, ILO Committee of Experts.

Social Rights. As far as the relationship between the European Committee of Social Rights and the European Court of Human Rights is concerned, the only area of overlap is the right to organize, or freedom of association, under Article 5 of the European Social Charter and Article 11 of the European Convention on Human Rights respectively.

*Yozo Yokota** – My specific question is addressed to Mr. Tapiola who started by saying that one should be secretive about happiness and success. In my experience of four years in the ILO Committee of Experts, I think I found one good thing about the Committee and we have been keeping it secret and that is the Secretariat. I am sure all Committee members agree that our function cannot be fully carried out without the good services of the Secretariat and it is true that we have benefited from an excellent support from the International Labour Standards Department. Reverting to my question, many of the comments we put in our report relate to the provision of further information or copies of legislative texts and court decisions. At the same time, I understand that there are regional or country-specific ILO offices throughout the world but I have not encountered in reading all the documents any direct contacts between those offices and the governments concerned so that instead of repeating every year requests for the dispatch of documents we could use more effectively our local resources to remind governments and eventually collect and transmit the necessary information. The work of the Committee would be tremendously facilitated but this involves the secretarial support of not only the Standards Department but of other departments as well and I am not sure whether this is feasible or advisable.

Kari Tapiola – Thanks for your nice words to the Secretariat. We sometimes tend to like to keep it a secret also because we seem to be confronted with governments who think that basically the Secretariat writes all the texts and the different supervisory bodies simply put their stamp on them. As you all know, this is not the case. On the other hand, if one carefully looks at the Constitution, the fact that the Director-General has to present the summary of the reports actually legitimizes a role for the Secretariat which is an argument that we sometimes need to recall.

The direction we are going to is to try to engage our field structure much more in the supervisory process and engage it in an integrated way. What we are doing, of course, through our standard specialists in the field is that they are involved in the follow-up and in many cases they assist governments with their reporting obligations. But this brings us back to what I said earlier that if we go really into technical cooperation then we cannot do it with that part of the Secretariat that deals with the standards issues alone. We need full involvement and this is where the approach of comprehensive decent work country programmes is important.

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* Professor , Chuo Law School, Japan; Member, ILO Committee of Experts.

The ILO Committee of Experts in pictures (1926-1959)

ILO Governing Body, 33rd session, Geneva, 14-16 October 1926

Mr. Paul Tschoffen (Belgium)
Member of the ILO Committee
of Experts (1927-1961)

Mr. William Rappard (Switzerland)
Member of the ILO Committee
of Experts (1927-1958)

CEACR, 29th session, Geneva, 6-18 April 1959
(left to right): Mr. Günther Beitzke (Federal Republic of Germany) and Mr. Isaac Forster (Senegal)

CEACR, 29th session, Geneva, 6-18 April 1959
(left to right):
Mr. Paul Tschoffen (Belgium) and Mr. Paul M. Herzog (United States)

Mr. Paal Berg (Norway)
Member of the ILO Committee of Experts (1945-1958)

Ms. G. J. Stemberg (Netherlands)
Member of the ILO Committee of Experts (1948-1956)

CEACR, 29th session, Geneva, 6-18 April 1959
(foreground): Mr. C. Wilfred Jenks, Principal Deputy Director-General and Mr. Nicolas Valticos, Chief of the International Labour Standards Division, in the gardens of the old ILO building (Center William Rappard).

CEACR, 29th session, Geneva, 6-18 April 1959
(left to right):
Professor Henri Batiffol (France),
Baron Frederik van Asbeck (Nethelands),
Mr. Paul Ruegger (Switzerland)

The Committee of Experts in session, April 1959
Chairperson: Mr. Paul Tschoffen (Belgium)
Reporter: Mr. Harold Stewart Kirkaldy (United Kingdom)

Sir Grantley Adams (Barbados)
Member of the ILO Committee
of Experts (1948-1971)

Sir Ramaswami Mudaliar (India)
Member of the ILO Committee
of Experts (1959-1971)

CEACR, 29th session, 6-18 April 1959
in front of the old ILO building (Center William Rappard)

1. Mr. Paul TSCHOFFEN (Belgium), Chairman of the Committee
2. Mr. Afonso Rodrigues QUEIRO (Portugal)
3. Mr. Enrique GARCÍA SAYÁN (Peru)
4. Sir Ramaswami Mudaliar (India)
5. Mr. C. Wilfred JENKS, Principal Deputy Director-General
6. Mr. Isaac FORSTER (Senegal)
7. Mr. Choucri CARDAHI (Lebanon)
8. Mr. Harold Stewart KIRKALDY (United Kingdom), Reporter of the Committee
9. Mr. Nicolas VALTICOS, Chief, International Labour Standards Division
10. Mr. Isidoro RUIZ MORENO (Argentina)
11. Mr. Paul M. HERZOG (United States)
12. Mr. Günther BEITZKE (Federal Republic of Germany)
13. Baron Frederik VAN ASBECK (Netherlands)
14. Mr. Paul RUEGGER (Switzerland)
15. Mr. Henri BATTIFOL (France)
16. Sir Grantley ADAMS (Barbados)
17. Mr. Max SØRENSEN (Denmark)

II. Rethinking methods, evaluating impact – Issues and dilemmas

Promoting compliance now and then: Mobilizing shame or building partnerships?

Christine Chinkin *

The invitation from the organisers invites me to address the various modes of supervising or ensuring compliance with human rights obligations and to consider the merits or otherwise of mechanisms that are used primarily to induce compliance through shame and partnerships that may be formed to foster compliance. In this brief presentation, I first survey some of the existing methods of UN human rights monitoring processes and then consider some issues of compliance.

Before the evolution of what we now think of as the international human rights system, the League of Nations pioneered methods for the supervision of human rights obligations through the mandate, for example through such methods as the annual reporting system,[1] and individual petitions.[2] In the same era the ILO's wide range of innovative supervisory mechanisms laid the foundations for the UN human rights processes for promoting compliance:[3] periodic state reporting, complaints procedures, fact-finding commissions of inquiry, direct contacts between ILO and government representatives, and the possibility of recourse to the Permanent Court of International Justice, subsequently the International Court of Justice (ICJ). Some of these same methods and their underlying rationales have been incorporated into the UN human rights procedures.

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* Professor of International Law, London School of Economics and Political Science.

[1] Article 22 of the Covenant of the League of Nations required mandatory powers to submit an annual report to the League Council.

[2] In its advisory opinion concerning the *International Status of South-West Africa*, the ICJ noted that the right of petition was not mentioned in the League Covenant or the Mandate for South-West Africa, but was organized by a decision of the Council of the League; see *ICJ Reports* (1950).

[3] See V. Leary, "The International Labour Organization", in P. Alston (ed.), *The United Nations and Human Rights* (Oxford), 1992.

Through a mixture of treaty obligation and 'opt-in' requirements within the human rights treaty body system there are provisions for state reporting, inter-state complaint, individual complaint, inquiry and visitation. The objectives of such supervisory processes are mixed and include offering authoritative guidance on the meaning of international obligations, the prevention of violations, and ensuring prompt and effective responses when violations occur.[4] International supervisory mechanisms also look forward to prevention of violations by seeking to identify obstacles to compliance and offering practical or technical assistance. They allow for the mediation of international standards at the national level so as to facilitate compliance for the benefit of the individuals subjects of the system.

These objectives emphasise mediatory and cooperative rather than confrontational and shaming techniques. They appear to be based upon a belief that the best way to ensure initial and continued participation in the human rights treaty regime and compliance with its obligations is to assume political will and that what is needed is expert assistance in giving it effect, for example through capacity building. There are a number of instances of this non-confrontational approach. Underlying the single procedure applicable to all UN treaty bodies – the state reporting system – are the concepts of self-evaluation and 'constructive dialogue'. The human rights treaty bodies do not have the coercive weight of the Security Council behind them, as do other committees to which States must report such as sanctions committees and the Counter Terrorism Committee.[5] The more confrontational process of inter-state complaint has never been used at the global level[6] and rarely do States make formal objections to another State's reservations, despite the inroads made by reservations into the integrity of a treaty text. Where individual complaint is allowed it leads only to recommendations and only recently has there been any requirement that States indicate their response to any such recommendations.

The same is true of the UN Charter-based mechanisms. It was not until the late 1960s that ECOSOC provided for any form of investigatory procedure before the State-based Commission on Human Rights. Even after the introduction of the 1503 and 1235 procedures the potential for 'naming and shaming' through outcomes such as condemnatory resolutions and the mandating of country-specific rapporteurs has been limited by political realities. There have been contradictory signals as to the effectiveness of condemnation, with States on the one hand purporting not to be shamed by adverse statements but on the other

[4] See Concept Paper on the High Commissioner's Proposal for a Unified Treaty Body, UN Doc. HRI/MC/2006/2, 22 March 2006, para. 3.

[5] The Counter Terrorism Committee was established by SC Res. 1373, 28 September 2001.

[6] The Democratic Republic of the Congo unsuccessfully argued the Convention on the Elimination of All Forms of Discrimination against Women, 1979, article 29 (1), as a basis for jurisdiction in its case against Rwanda; see *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, *ICJ Reports* (2006).

going to considerable lengths to see off any attempt at a condemnatory resolution, or at least to ensure diluted language. The need for thematic rapporteurs to seek consent for access to state territory also places some premium on diplomacy and negotiation. Joint reports by special rapporteurs, members of working groups and Secretary-General special representatives, such as those into the condition of detainees in Guantanamo Bay (2006)[7] and conditions in Lebanon and Israel (2006),[8] are an innovative move away from the model of single-authored reports. In the former the experts rejected the US conditions for visiting the detention facilities and produced a hard-hitting and non-compromising report that was predictably rejected by the US as 'largely without merit'.[9] Conclusions and recommendations agreed in joint reports may have greater authority and thus more potential for inducing shame, although it must be admitted that this has not transpired in either of these instances. They also provide a practical example of combining different mandates so as to address together violations of both economic and social rights and civil and political rights, an integrative approach that has been at the core of ILO activity from the outset.

The politicization of the Commission on Human Rights contributed to its demise in 2006.[10] However, the language of the General Assembly Resolution adopting the Human Rights Council[11] is also that of conciliation and negotiation, preserving the position that persuasion and assistance are the most effective keys to human rights compliance. Thus the Council will promote human rights through education, learning and advisory services, technical assistance and capacity building, all to be provided in 'consultation with and with the consent of the Member State concerned.' This implies cooperation, working together to achieve a common object. The projected universal periodic review – intended to ensure that no State will be able to avoid being called to account – is designed as a 'cooperative mechanism' based on interactive dialogue and consideration

[7] See UN Doc. E/CN.4/2006/120, 15 February 2006. The report on Guantanamo Bay was made by the special rapporteurs on independence of judges and lawyers, torture, cruel inhuman and degrading treatment, freedom of religion or belief, and health. They were joined by the chairperson of the working group on arbitrary detention.

[8] The Lebanon and Israel mission was carried out by the special rapporteur on extrajudicial, summary or arbitrary executions; the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the representative of the Secretary-General on the human rights of internally displaced persons; and the special rapporteur on adequate housing as a component of the right to an adequate standard of living; see UN Doc. A/HRC/2/7, 2 October 2006.

[9] BBC News, 16 February 2006.

[10] In the words of Kofi Annan: "the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole"; see *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the UN Secretary-General, UN Doc A/59/2005 (2005), para. 182.

[11] See GA Res. 60/251, 3 April 2006.

given to the state's capacity building needs. The Council is answerable to the General Assembly, not the Security Council.

Two interlocking themes run through these enforcement and monitoring processes: the first is the concept of working together (partnership) as a means to promote delivery of human rights obligations and the second is that non-coercive methods (no stronger than mobilizing shame) are the best ways of ensuring compliance.

Human rights supervisory mechanisms create partnerships between States and the international nongovernmental organisations (INGOs) or expert bodies that are based on the assumption that they will work together to achieve the agreed goals. But more broadly 'partnerships have emerged as the key institutional innovations in the expanding global governance toolbox.' [12] We see a range of different partnerships across international arenas, *inter alia* partnerships between the UN and regional organizations in the security field; between the UN and multinational corporations in the Global Compact; between different specialized agencies and the human rights treaty bodies; [13] between the different treaty bodies; and public/private partnerships between INGOs, States and a range of NGOs and independent contractors across numerous programmes, for example in delivery of humanitarian assistance and state-building. Such partnerships are extolled within the UN system. In the words of former UN Secretary-General, Kofi Annan:

> I think it is clear that there is a new diplomacy, where NGOs, peoples from across nations, international organizations, the Red Cross and governments come together to pursue an objective. When we do […] this partnership […] is a powerful partnership for the future. [14]

One of the advantages of partnership is flexibility allowing for a functional, contextual and pragmatic approach. Accordingly there are many different models. At one extreme they may be formal, endorsed by UN Security Council resolution and contractually determined. At the other they may be informal, the parameters worked out on the ground and variable.

In the specific context of human rights monitoring systems there are a range of informal partnerships that effectively operate as the 'glue' of the system. One evident partnership in human rights compliance exists between NGOs and the treaty bodies. The State reporting system provides the framework for

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[12] See T. Benner and J. Witte, "Everybody's Business: Accountability, Partnerships, and the Future of Global Governance" in S. Stern and E. Seligmann (eds.), *The Partnership Principle – New Forms of Governance in the 21st Century* (London, Archetype Publishers), 2004 at p. 36.

[13] At times this is formalized as is the case with UNICEF and the Committee on the Rights of the Child, at others it may be informal, functional and have evolved through practice; see Concept Paper, *op. cit.*, *supra* n. 4, para. 55.

[14] NGO Forum on Global Issues, 30 April 1999, cited by W. Pace and J. Schense, 'The Role of Non-Governmental Organisations', in A. Cassesse, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press), vol. I, 2002 at p. 105.

dialogue between national stakeholders, including government and civil society,[15] as well as between the State and the treaty body. The many roles of NGOs in the reporting system are well known, for example through the techniques of shadow or parallel reporting, offering data and comments to assist the treaty bodies in their questioning of State representatives, meeting informally with treaty body members and attending the public session. NGO involvement has to some extent been formalized in some committees through time set aside for NGOs to make formal statements to the relevant committee or to meet with members of the Committee. NGOs may seek to ensure that a particular issue is taken up in the reporting session of a number of different States and thus make its way into the concluding comments and enhance the normative effect. In such processes NGOs often form partnerships *inter se*, that is working together and networking so as to present a coordinated position, or dividing the work to avoid duplication of effort and to maximize expertise.[16] NGOs also work with the Committees in the preparation of general comments or recommendations. INGOs may also form partnerships with local NGOs, for example to offer training in the reporting process so as to assist local NGOs in making the greatest use of the process. A long active example of this has been the work of the International Women's Rights Action Watch (IWRAW) and IWRAW-Pacific in assisting local women's groups to work with the UN Committee on the Elimination of Discrimination against Women. After the issuing of concluding comments, NGOs can continue communications with the Committee by providing updates on whether the government has adopted follow-up measures and engage the local media with reports of the process.

This informal relationship between NGOs and the treaty bodies may however set up an apparent opposition between the State on the one side and the committee and NGO community on the other. This appears somewhat at odds with the aim of the Committee to engage in constructive dialogue with the State and to assist it in treaty compliance. But NGOs – especially national NGOs – have an ongoing relationship with the State and have the greatest stake in human rights compliance. To be effective international standards and the comments of international monitoring bodies must be domesticated, translated into local realities and adapted accordingly.[17] One NGO observer has noted that to be effective an NGO should seek to 'make strategic demands' of governments and then to 'follow them up with defined indicators of progress'.[18]

NGOs thus perform at least two functions in monitoring human rights obligations: they assist the committees in strengthening the effect of the reporting

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[15] See Concept Paper, *op. cit, supra* no. 4, para. 8.

[16] Human rights treaties typically cover many areas of social and political life and different NGOs have different areas of expertise.

[17] See P. Antrobus, *The Global Women's Movement – Origins, Issues and Strategies* (Zed Books), 2004 at p. 124.

[18] See Faustina Pereira, "Monitoring Implementation of CEDAW: A Snapshot of the Bangldesh Experience", paper at Conference on CEDAW, Galway, 2006.

process and they seek to further state compliance with the committees' recommendations, for example through lobbying and making recommendations for practical measures for change within national laws and to ensure the interface between the national and international. There is thus a tripartite relationship between the State, the treaty body, and the NGO sector. The latter function – ensuring compliance with recommendations – has been recognized and institutionalized in other contexts, for example in the strategies addressed jointly to governments, NGOs and other actors in the international instruments, such as the Beijing Platform for Action.[19] States too recognize that to be 'effective, efficient and legitimate' they must work with other, multisectoral bodies, constituting what has been termed the global public policy network [20] – an integrated and collaborative approach to governance in accordance with human rights standards. A further complexity is added at the national level where the State outsources services to the private sector, including NGOs. For example, the State may have been recommended to improve its provision of welfare services within prisons. One solution may be to encourage NGO assistance in this regard whereupon the NGO and the State become partners in compliance. Such partnership may undermine government commitment through a privatization of responsibility, removing pressure on governments to provide adequate resources to carry out their own obligations. It also puts the onus on the NGO to ensure that partnership does not become co-option and collusion, or that by becoming too closely entwined with government the NGO loses its independence and capacity for critique. Working or functional partnerships must not be allowed to prejudice a rules-based system. The dilution of legal principle is a trend that can be detected in many areas of the international legal system and must not be allowed to undermine commitment to human rights standards. Similar concerns occur at the international level and NGOs need to be somewhat cautious of the UN's initiatives for partnerships. The Development Alternatives with Women for a New Era (DAWN) expresses a healthy skepticism about the assumed benefits of partnership:

> The Partnerships Initiatives lock NGOs into a very difficult position. On the one hand they provide opportunity to engage in dialogue […] On the other, they represent a strategy of control and deliberately gloss over the inequalities in power and capacity of different actors (NGOs and TNCs); and use NGO participation to legitimise the claims to democracy in the neo-liberal models of governance. [21]

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[19] See Fourth World Conference on Women, Platform for Action, 15 September 1995, UN Doc. A/CONF. 177/20.

[20] See J. Witte, C. Streck, T. Benner, "The Road from Johannesburg: What Future for Partnerships in Global Environmental Governance", available at http://www.globalpublicpolicy.net/fileadmin/gppi/Road_from_JohSnesburg_Artic.pdf.

[21] See Antrobus, *op, cit., supra* n. 17 at p. 105.

Compliance with international legal obligations depends upon many factors and has been the subject of many studies.[22] Benedict Kingsbury has suggested that compliance cannot be regarded as a monolithic or freestanding concept but rather one that derives meaning and utility from different theories of law.[23] Different approaches to inducing compliance have been explained, for example punitive, managerial or rewards-based. As stated, the human rights system tends to work on the assumption that persuasion and technical assistance are the most effective keys to human rights compliance. NGOs however may not see it this way and might favour more confrontational means of promoting compliance than so-called constructive dialogue, including mobilization of shame within the national context (for example through use of the media, parliamentary questions) and recourse to the courts (for example advocacy through intervention in existing litigation or commencing test cases).[24] NGO tactics at different times, or simultaneously, are thus both aimed at pressuring the state through a shaming process and seeking to assist in the practicalities of compliance. What they must seek is a workable balance between confrontation with government and a demonstration of a cooperation that seeks to assist in achieving the required change in national laws and policies and, crucially, in their implementation.

It is striking, however, that the non-coercive approach to law enforcement favoured by the UN human rights system contrasts with developments elsewhere in international law, for example the compulsory jurisdiction under the WTO Dispute Settlement provisions and the possibility of sanctions for non-compliance, the promotion of accountability through the individual criminal jurisdiction of the International Criminal Court (ICC) and the ad hoc criminal tribunals, and the compulsory jurisdiction of regional human rights courts. NGOs have been instrumental in the establishment of adjudicative processes in international criminal law and have used them both to combat impunity and for the deterrent effect that may be gained in mobilizing shame. However, instead of perceiving criminal trial processes as shameful, defendants may seek to manipulate them to suggest bias or a 'witch hunt', as was the case with the proceedings against Milosevic at the International Criminal Tribunal for the Former Yugoslavia.

NGOs have also looked beyond the more obviously human rights-oriented processes to other procedures. This may be especially useful where there is a gap in human rights law, for example with respect to the legal responsibility under

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[22] See, for instance, A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press), 1998; D. Shelton (ed.), *Commitment and Compliance The Role of Non-Binding Norms in the International Legal System* (Oxford University Press), 2000.

[23] See B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", *Michigan Journal of International Law*, vol. 19, 1998, pp. 345-372.

[24] There is regular recourse to adjudicative processes within the European and Inter-American human rights systems. Nevertheless friendly settlement is available to the parties; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 38; American Convention on Human Rights, articles 48 (f) and 49.

international law of transnational corporations. An innovative example is the significant NGO activism after the hiking of water rates by Bechtel (an American company) by an average of 50% in a Bolivian town. Bechtel sought compensation after it had failed to generate its anticipated profits because of public demonstrations against its policies and commenced arbitration proceedings at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) against Bolivia. Trade unions, environmental groups, consumer organisations, research groups and religious bodies joined together in petitioning to participate in the ICSID hearings (which are held in private). Over a four-year period there were protests, adverse media reports and demands that the Bechtel bring an end to the proceedings. Since ICSID proceedings are held in private the potential for mobilizing shame through reporting about their progress would have been limited, but the adverse publicity generated by the many protests caused Bechtel to drop the case. One commentator heralded the outcome as 'the first time that a major corporation has ever dropped a major international trade case as a direct result of global public pressure'.[25] The episode suggests ways in which different arenas can be targeted for human rights direct action.

State failure to comply with human rights obligations occurs not only through lack of technical expertise. There are many other reasons, for example reporting fatigue and the complexity of the regulatory framework, or more fundamentally because a State favours other cultural, religious or social norms, regards human rights as unnecessary constraints upon sovereignty, or simply because it lacks the political will. Non-compliance may not be a technical or bad faith problem but a political one: substantive disagreement about obligations incurred by the party accused of non-compliance,[26] or internal political opposition. In this light naming and shaming by international intergovernmental and nongovernmental organisations may itself be seen as selective in that it is invariably the South that is named and blamed by the North. Such constructions are rooted in assumptions of 'civilised' states and the 'other' and may inhibit the effectiveness of partnerships of equals across States in seeking human rights compliance.

There are also some intractable States or regimes that simply reject their human rights obligations, for example apartheid South Africa, the Taliban, Myanmar. This reality raises the dilemma of whether international bodies (private and public) should work with the regime fearing that exclusion and isolation will simply aggravate the abuses suffered by the population, or whether coercive measures such as sanctions should be introduced in an attempt to change behaviour. This is the position of the ILO with respect to Myanmar. The Committee of Experts has been commenting on this situation for over 30 years, Myanmar has been the subject of condemnation by the Conference Committee

[25] See H. Elver, "International Environmental Law: Water and the Future", *Third World Quarterly*, vol. 27, 2006 at p. 896.

[26] See M. Koskenniemi, "The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law", *Modern Law Review*, vol. 65, 2002 at p. 165, n. 23.

on the Application of Standards of the International Labour Conference, and by the Governing Body. A Commission of Inquiry has reported on its flagrant continuing breaches of standards relating to forced labour.[27] The Governing Body has previously indicated that effective dialogue and cooperation should be undertaken with the Government, although it must be asked whether this can ever be appropriate when there has been a blatant disregard of condemnatory findings, a refusal to be shamed and indeed an expressed determination to prosecute as terrorists those who complain of being subjected to forced labour. Article 29 of the ILO Constitution envisages the possibility of the referral of a complaint to the ICJ, whose decision shall be final (Article 31). In November 2006, delegates to the Governing Body expressed their 'great frustration' at the lack of any progress in dealing with complaints of forced labour in Myanmar. They decided upon an agenda item at the March 2007 session of the Governing Body 'to enable it to move on legal options, including involving the International Court of Justice'.[28] However, with the exception of individual criminal responsibility, the effectiveness of even such greater coercive action as international adjudication rests upon the hope that the State will respond to being named and shamed in this way. The example of the Israeli Security Wall case[29] where the ICJ strongly affirmed Israel to be in violation of its human rights obligations in the occupied territories shows the weaknesses of this procedure when the affected State rejects the judicial opinion.

This discussion has focused on partnerships within the UN human rights institutional frameworks. Perhaps we should also be thinking more widely about partnerships across the human rights field as occurs, in the security field where for example NATO and the African Union work with the UN or with each other. There is cross-fertilisation between the global and regional human rights institutions with respect to substance, for example through drawing upon the jurisprudence of each other and through joint participation by personnel from the various bodies in seminars and workshops. But could these informal relationships be extended to more formal working partnerships or are there reasons why such arrangements might be undesirable?

There is no simple binary distinction between compliance and non-compliance as international practice is fluid, variable and contextual.[30] Concepts of compliance depend upon understandings of the relations between law, behaviour, objectives and justice. Further, violations of human rights are rarely straight-forward but bring together complex issues of political and cultural

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[27] See Forced labour in Myanmar (Burma), Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2 July 1998.

[28] See ILO Press release, 17 November 2006; ILO/06/53.

[29] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* (2004).

[30] See Kingsbury, *op. cit.*, *supra* n. 23 at p. 346.

self-determination, economic restructuring and long histories of various forms of intervention which all compromise commitment to universal standards. Methods such as the world travelling notion advanced by Isabelle Gunning,[31] or the cross-cultural dialogue advocated by Abdullah An-Naim,[32] that rest on mutual communication in an attempt to achieve understandings of the root problems may in the long term be more effective than coercive responses such as sanctions. Nor can there be a dichotomy between mobilizing shame or building partnerships but rather different strategies should continue to be engaged in different contexts so as to benefit as much as possible from the diversity and flexibility offered by coordinated action between UN agencies and the private sector.

[31] See I. Gunning, "Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries", *Columbia Human Rights Law Review*, vol. 23, 1991-1992 at p. 189.

[32] See A. An-Naim, "State Responsibility to Change Religious and Customary Laws" in R. Cook (ed.), *Human Rights of Women National and International Perspectives*, 1995, pp. 178-181.

Duplication des travaux, superposition des normes, engagements diffus: où sont les limites?

Emmanuel Decaux *

En tant que membre de la Sous-Commission, un organe subsidiaire qui vient de tenir sa 58e session en août dernier – et sans doute son ultime session du moins dans sa forme actuelle, puisque son organe supérieur a disparu – je suis particulièrement sensible à cette invitation de participer à un colloque international célébrant le 80e anniversaire de la Commission d'experts de l'OIT. Au-delà de l'admiration naturelle pour la continuité des efforts de générations de juristes – je pense notamment au nom de Georges Scelle qui a si profondément marqué la doctrine française, mais aussi à d'autres grands internationalistes comme Roberto Ago – nous avons des leçons à tirer s'agissant du développement et de la coordination des mécanismes internationaux de contrôle. Rien de durable ne se fait sans une évolution créatrice, marquée par la fidélité aux origines et aux principes, mais aussi une vitalité permanente, propice aux innovations et aux adaptations nécessaires. Là où la SdN avait sombré, corps et âme, l'OIT a su renaître, forte des valeurs partagées de la Déclaration de Philadelphie.

Mais le système international de protection des droits de l'homme mis en place en 1945 n'a lui-même cessé de se développer de manière de plus en plus complexe. Le nouvel ordre international fondé sur la Charte des Nations Unies a eu l'immense mérite de consacrer l'universalité et l'indivisibilité des droits de l'homme «pour tous». Pour autant le tableau actuel est caractérisé par la diversification, la fragmentation, voire l'émiettement…

L'indivisibilité est remise en cause par la diversification des «*générations des droits de l'homme*» selon une doctrine qui me semble elle-même datée, mais

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surtout erronée et dangereuse. La distinction vulgarisée par Karel Vasak a certes les vertus de la simplicité pédagogique et de la correction politique, en opposant la première génération avec les «droits civils et politiques» des démocraties occidentales, la deuxième génération avec les «droits sociaux» des démocraties populaires et la troisième génération, avec des «droits de solidarité» inhérents au Tiers monde[1]. Mais elle néglige l'histoire interne propre à chaque Etat et plus encore l'histoire du droit international, puisque le droit humanitaire est apparu au milieu du XIX[e] siècle, le droit international du travail en 1919, et le droit international des droits de l'homme à partir de 1945. Enfin, elle introduit une sélectivité perverse, comme si les Etats pouvait exceller dans une catégorie de droits, tout en négligeant ou en bafouant les droits d'une autre génération. Fort heureusement, les grands textes onusiens, depuis la Charte de 1945 et la Déclaration universelle des droits de l'homme de 1948, notamment à l'occasion de la conférence de Téhéran de 1968 et de la conférence de Vienne de 1993, n'ont de cesse de rappeler le caractère indivisible et interdépendant de tous les droits de l'homme.

L'universalité se trouve elle-même confrontée à la multiplication des systèmes régionaux. Certes ces systèmes s'inscrivent le plus souvent dans le droit fil des principes universels, mais par là force des choses des variantes ne manquent pas de s'établir entre les différents «modèles» qui se développent. Là encore la Déclaration de Vienne a présenté une synthèse particulièrement nécessaire: «*S'il convient de ne pas perdre de vue l'importance des particularismes nationaux et régionaux et la diversité historique, culturelle et religieuse, il est du devoir des Etats, quel qu'en soit le système politique, économique et culturel, de promouvoir et de protéger tous les droits de l'homme et toutes les libertés fondamentales*» (I, §5)[2]. Reste que la multiplication des systèmes régionaux crée une différenciation objective, à travers une superposition de normes. Lorsqu'il existe un seul système régional, les choses restent relativement simples, comme en Amérique latine ou en Afrique. Les choses sont plus compliquées lorsque telles des poupées russes, les sous-systèmes régionaux s'emboîtent, comme dans le cas de l'Union européenne, du Conseil de l'Europe et de l'OSCE, créant ainsi cinq niveaux différents de normes relatives aux droits de l'homme. Il faudrait aussi tenir compte des systèmes trans-régionaux de plus en plus actifs sur le terrain de droits de l'homme, comme le Commonwealth et la Francophonie, mais aussi la Ligue arabe et l'Organisation de la conférence islamique (OCI), sans parler de la Communauté des Etats indépendants (CEI).

Mais on constate aussi, sur un plan plus technique, une diversification interne des systèmes. Chaque organisation internationale connaît ses spécialisations et ses cloisonnements. Il y a ainsi une sorte de diversification juridique

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[1] Pour une réfutation, cf. notre rapport général sur les droits culturels, 8[e] colloque international sur la convention européenne des droits de l'homme, Budapest, in *Annuaire de la Convention européenne des droits de l'homme*, vol. 38A, 1995.

[2] Texte in *Les Nations Unies et les droits de l'homme (1945-1995)*, série livres bleus, Nations Unies, 1995.

qui passe par la différenciation des organes et des fonctions, des approches thématiques, des techniques de contrôle. Une réflexion théorique a été lancée récemment, comme on le sait, au sujet de la fragmentation du droit international, avec notamment les rapports présentés par Martti Koskenniemi à la Commission du droit international[3]. Cette interrogation plus large sur les régimes juridiques «auto-centrés», touche aussi le droit international des droits de l'homme, dans ses relations avec le droit international public, proprement dit, mais aussi avec des domaines connexes, comme le droit international humanitaire et le droit international pénal. A travers l'interrogation fondamentale sur la notion d'«ordre juridique» c'est la hiérarchie entre les différents ordres juridiques qui se trouve en jeu et la possibilité même d'un «*ordre public international*», à travers la consécration d'un *jus cogens* des droits de l'homme tel que la Cour internationale de justice vient de l'esquisser[4].

Reste, plus modestement, que sur le plan concret, la juxtaposition de systèmes conventionnels et de mécanismes institutionnels pose des problèmes pratiques d'articulation, avec les risques de concurrence et de contradiction, mais aussi les chances de complémentarité et d'effectivité plus grande. L'enjeu juridique est évident, comme l'avait bien montré il y a déjà une vingtaine d'années le professeur Emmanuel Roucounas dans son cours sur «*les engagements parallèles et contradictoires*»[5]. La question technique qui est toujours actuelle, s'enrichit désormais d'une dimension politique. Au moment où l'on débat de la réforme d'ensemble du système des droits de l'homme, à travers la mise en place du Conseil des droits de l'homme, il ne faudrait pas que le souci évident de rationalisation et de simplification fasse oublier l'atout que constitue la multiplication des «filets de sécurité» ou des outils de rechange et que le désir légitime d'amélioration se traduise par un affaiblissement des mécanismes et des procédures existants et aboutisse en fin de compte à une régression dans la protection des droits de l'homme. A défaut d'un impossible inventaire, on se bornera à examiner la question posée, sous deux angles, celui du développement des normes et celui de l'effectivité des contrôles.

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[3] Commission du droit international, *Fragmentation du droit international: difficultés découlant de la diversification et de l'expansion du droit international*, rapport A/59/10. Et le rapport du groupe de travail, A/.CN.4/L.663/Rev.1 de 2004.

[4] Arrêt du 3 février 2006, affaire des activités armées sur le territoire du Congo, RDC c. Rwanda. Cf. aussi Emmanuel Decaux, «La Cour internationale de Justice et les droits de l'homme» in *Studi in onore di Gaetano Arangio-Ruiz*, Editoriale scientifica, 2004, t. II, pp. 921-970.

[5] RCADI 1987, vol. 206. Cf. aussi la même année, le cours d'A.A. Cançado Trindade, «Coexistence and Co-ordination of Mechanisms of International Protection of Human Rights (at Global and Regional Levels) », RCADI 1987, vol. 202, et plus récemment, Emmanuel Decaux, «Concurrence et complémentarité des systèmes juridictionnels de protection des droits de l'homme», *cours Euro-Méditerranéens Bancaja de droit international*, vol. V, 2001, pp. 719-769.

I. Le développement des normes

D'un simple point de vue quantitatif, le recueil des «instruments internationaux» relatifs aux droits de l'homme publié par le Haut-Commissariat des Nations Unies, qui est loin d'être exhaustif, comporte deux tomes consacrés aux «instruments universels» qui font plus de mille pages, laissant de côté les instruments régionaux auxquels un volume de cinq cents pages environ est consacré [6]. A s'en tenir aux traités, la liste des «*principales conventions internationales*» et régionales qui est recensée chaque année par Jean-Bernard Marie couvre désormais 115 traités et protocoles [7]. On est loin de la pause normative, de l'hiver climatique, que certains préconisaient après la Conférence mondiale de Vienne de 1993. Faut-il craindre pour autant que «trop de droit tue le droit»? La question doit être posée en distinguant le droit primaire, avec les traités, la *hard law*, et le droit secondaire, à travers le «droit dérivé», le développement des «standards», la *soft law*.

1. La consolidation du droit primaire

La notion de «traités de base» est une formule largement utilisée pour parler des «*core instruments*» en matière de droits de l'homme. En fait ce vocabulaire est fallacieux, car il vise en pratique les seuls instruments dotés d'un organe de suivi, les «*treaty-bodies*», longtemps au nombre de six, avant de passer à sept avec l'entrée en vigueur de la *convention internationale sur les droits des travailleurs migrants et de leur famille* en 2003. Plus récemment encore deux nouvelles conventions ont été adoptées, la *convention internationale pour la protection de toutes les personnes contre les disparitions forcées*, ouverte à la signature le 6 février 2007 à Paris, et la *convention relative aux droits des personnes handicapées*, ouverte à la signature le 30 mars 2007, à New York. A terme, c'est un ensemble de neuf comités – sans parler du sous-comité contre la torture créé à la suite de l'entrée en vigueur le 22 juin 2006 du protocole de 2002 à la convention des Nations Unies contre la torture.

Mais au-delà ce cet aspect structurel, rien ne permet de déterminer sérieusement en droit une hiérarchie des instruments internationaux en matière de droits de l'homme [8]. Tous les traités sont égaux, et seule une qualification extra-conventionnelle permettrait de faire un sort particulier à un instrument donné. A cet égard, il est notable que les instruments correspondant à des obligations intangibles, comme les conventions sur le génocide ou l'esclavage, n'ont pas de mécanisme propre de surveillance. Certaines conventions relatives à la traite et à l'esclavage étaient confiées à un suivi du groupe de travail sur les formes contemporaines de l'esclavage qui a été créé il y a 30 ans au sein de la Sous-Commission des droits de l'homme, mais faute de méthodologie efficace pour

[6] Haut-Commissariat des Nations Unies aux droits de l'homme, *Recueil d'instruments internationaux*, vol. I (2 parties), Instruments universels, ST/HR/1/Rev.6, 2002.

[7] Au 1er janvier 2007. A paraître dans la *Revue universelle des droits de l'homme*, 2007, n° 1.

[8] Pour une réflexion d'ensemble, voir le colloque de Bruxelles, sous la dir. d'Emmanuelle Bribosia et Ludovic Hennebel, *Classer les droits de l'homme*, Bruylant, 2004.

organiser un dialogue structuré avec les Etats transmettant les informations requises, ce rôle était devenu purement formel. C'est en ce sens que nous avons pu parler de «conventions orphelines», en l'absence d'un mécanisme centralisé de suivi. Si l'on tient compte de l'ensemble des traités dont l'objet est la «protection des civils», la liste est longue.

Il faut espérer que les déclarations d'intention des Etats candidats pour siéger au Conseil des droits de l'homme comme les indicateurs établis dans le cadre de l'examen périodique universel prendront pleinement en compte l'ensemble de ces instruments internationaux. La consolidation du système normatif international passe en effet par la ratification prioritaire de ces instruments universels par l'ensemble des Etats, conformément à la Déclaration et au programme d'action de la Conférence mondiale de Vienne. Ce faisant les Etats eux-mêmes tourneraient le dos à la neutralité classique du droit des traités – où un Etat est souverainement libre de ratifier ou de ne pas ratifier, de formuler des réserves dès lors qu'elles sont compatibles avec le but et l'objet du traité – pour créer une dynamique vertueuse en fixant l'objectif d'une ratification universelle et en recommandant le réexamen des réserves.

Mais si la priorité est à la consolidation de l'acquis, pour mieux garantir le «respect universel et effectif des droits de l'homme» selon les termes de l'article 55 de la Charte, au lieu d'une accumulation compulsive, quitte à oublier les engagements précédents, par une sorte d'effet de mode, plusieurs problèmes techniques doivent être posés.

La question s'est posée dès les lendemains de la Déclaration universelle des droits de l'homme, lorsque pour des raisons essentiellement politiques, l'idée d'adopter une convention internationale couvrant l'ensemble des droits de l'homme a été abandonnée au profit de deux instruments distincts. Accepter une telle différenciation entre les deux Pactes, c'était non seulement revenir au volontarisme conventionnel en permettant le «*pick and choose*» des Etats parties, là où la Déclaration universelle définissait un socle objectif ayant vocation à s'imposer à tous les Etats membres des Nations Unies, mais également ouvrir la voie à une déqualification des droits économiques, sociaux et culturels. Les deux Pactes, malgré le renvoi croisé de leur préambule, sont en effet de faux jumeaux: alors que le Pacte international relatif aux droits civils et politiques institue un comité d'experts indépendants chargé d'examiner les rapports périodiques des Etats parties, ainsi que les communications individuelles présentées par les particuliers, le Pacte international relatif aux droits économiques, sociaux et culturels prévoit seulement la remise de rapports périodiques à l'ECOSOC. C'est seulement par le biais d'une résolution de l'ECOSOC sous-traitant cette compétence que le comité des droits économiques, sociaux et culturels a vu le jour. Les efforts se sont multipliés pour élaborer un Protocole facultatif au Pacte international relatif aux droits économiques, sociaux et culturels permettant les communications individuelles. A la suite de l'avant-projet adopté par le Comité[9],

[9] Cf. notre étude «La réforme du Pacte international relatif aux droits économiques, sociaux et culturels» in *Droit et Justice, Mélanges en l'honneur de Nicolas Valticos*, Pedone, 1999, p. 405.

un groupe de travail a fini par être mis en place dans le cadre de la Commission, puis du Conseil des droits de l'homme.

La négociation a longtemps buté sur la question de la justiciabilité des droits économiques, sociaux et culturels, qui seraient d'une nature différente de celle des droits civils et politiques. Sur le plan théorique, la distinction faite par Asbjorn Eide entre les obligations de respecter, de protéger et de mettre en œuvre, montre que le sujet est plus complexe que l'opposition binaire entre «libertés-abstentions» et «droits-créances», entre obligations négatives et obligations positives. En fait, c'est l'absence de jurisprudence qui donne un caractère flou aux droits proclamés et non leur défaut de justiciabilité. Les notions de «vie privée» ou de «procès équitable» étaient beaucoup plus vagues que la «liberté syndicale» ou «le droit à l'éducation» consacrés dans le Pacte relatif aux droits économiques, sociaux et culturels. Et la mise en place d'un système pénitentiaire digne de ce nom est plus coûteuse que le respect du principe de non-discrimination. Il est temps de mettre à niveau les deux Pactes, avec la même gamme de mécanismes complémentaires, rapports périodiques, communications individuelles, voire enquêtes sur le terrain, pour revenir sur le divorce idéologique hérité des années cinquante. Le débat en France sur «l'opposabilité du droit au logement» montre que les esprits progressent, tout comme le fait que la nouvelle convention sur les droits des personnes handicapées, dont bien des dispositions sont particulièrement vagues, est accompagnée d'un protocole facultatif instaurant un système de communications individuelles.

Reste une question tout aussi fondamentale, face à la multiplication d'instruments spécialisés: faut-il multiplier les systèmes indépendants ou favoriser des blocs de compétence? Avec 14 protocoles additionnels, la Convention européenne des droits de l'homme est un bon exemple d'un instrument vivant, qui s'est transformé au fil de plus de cinquante années. Pour autant, des instruments parallèles ont été mis en place qu'il s'agisse de la Charte sociale européenne ou d'autres textes concernant les minorités nationales, l'informatique ou la bioéthique, alors que des passerelles auraient pu être maintenues. Cette structuration se retrouve ensuite à tous les niveaux. Ainsi, alors même que la Charte sociale européenne a été rattachée à la direction générale des droits de l'homme du Conseil de l'Europe, les programmes d'action et les documents des Sommets du Conseil de l'Europe font figurer les questions relatives aux droits sociaux sous le thème de la «cohésion sociale» et non sous celui des droits de l'homme! On retrouverait le même clivage entre les instruments relevant de la direction générale des affaires juridiques et de la direction générale des droits de l'homme, au risque du brouillage des messages s'agissant de la lutte contre le terrorisme dans le plein respect des droits de l'homme, en utilisant un vocabulaire visant à un «*équilibre*» entre lutte contre le terrorisme et protection des droits de l'homme. La mauvaise rédaction de la *Convention européenne pour la prévention du terrorisme* adoptée en 2005, malgré les mises en garde du Commissaire aux droits de l'homme du Conseil de l'Europe, trahit cette absence de vision d'ensemble.

On pourrait en dire autant dans le cadre des Nations Unies, entre les différents sièges de New York, de Vienne et de Genève. Dès les premières sessions

de la Commission des droits de l'homme, la Sous-Commission de la condition de la femme a obtenu son émancipation, en rendant compte directement à l'ECOSOC. Devenue un organe subsidiaire de l'ECOSOC, au même titre que la Commission des droits de l'homme, elle a trouvé son prolongement avec la mise en place du Comité pour l'élimination de la discrimination à l'égard des femmes (CEDAW) constituant un pôle à part à New York, au détriment du *mainstreaming* des droits de la femme au sein de tout le système des droits de l'homme basé à Genève. Le même problème a failli se poser avec la nouvelle convention sur les droits des personnes handicapées, que certains Etats souhaitaient voir mise en œuvre dans le cadre du département du développement social, au lieu de mettre en relief la problématique des droits de l'homme. Le dynamisme du Haut Commissaire aux droits de l'homme, Louise Arbour, a permis de créer une nouvelle synergie entre ces instruments afin de renforcer leur cohérence et leur efficacité, en obtenant à terme le rapatriement de ces instruments à Genève. La question a été encore plus grave s'agissant de la coopération pénale et de la lutte contre le terrorisme, les priorités en matière de droits de l'homme n'ayant pas été spontanément prises en compte par les organes spécialisés mis en place à Vienne ou à New York, avec des risques évidents de contradictions entre des logiques différentes.

La multiplication des systèmes cloisonnés présente en effet une série de risques juridiques trop souvent négligés. Des logiques différentes peuvent se cristalliser dans des instruments distincts. Ainsi, la convention n° 182 de l'OIT sur les pires formes de travail des enfants a été mise en cause par les milieux associatifs, et notamment en France le Défenseur des enfants, qui y voyaient une reconnaissance de la prostitution infantile comme une forme de travail, alors même que le but de l'OIT était de mobiliser tous les efforts pour mettre un terme à ces «pires formes» de travail. Pour ces mêmes ONG, la priorité doit être donnée aux définitions abolitionnistes des instruments déjà anciens comme la *Convention pour la répression de la traite des êtres humains et de l'exploitation de la prostitution d'autrui* de 1949 – alors même qu'un mouvement de dénonciation se fait jour – ou aux nouveaux textes répressifs, notamment le *Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée, visant à prévenir, réprimer et punir la traite des personnes en particulier des femmes et des enfants*, adopté par l'Assemblée générale en 2000.

La montée en puissance du droit communautaire a multiplié les contradictions potentielles. C'est le cas du travail de nuit des femmes, la logique de protection spéciale de l'OIT ayant été battue en brèche par la logique de non-discrimination de l'Union européenne. C'est encore plus vrai pour les instruments du Conseil de l'Europe, comme la convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel, qui a été doublement remise en cause. D'abord par la directive européenne sur le même sujet, faisant prévaloir la logique concurrentielle des lobbies commerciaux sur la protection des citoyens, mais plus encore par l'accord bilatéral conclu par la Commission avec les Etats-Unis, sacrifiant les libertés individuelles aux impératifs de la «guerre contre le terrorisme» décrétée par l'administration améri-

caine. Il n'est pas sûr non plus que la directive européenne sur la brevetabilité du génome humaine offre les mêmes garanties que la Convention sur les droits de l'homme et la biomédecine d'Oviedo et ses protocoles. Plus généralement en imposant une «clause de déconnection» dans les nouveaux instruments négociés dans le cadre du Conseil de l'Europe, comme dans la négociation de la récente convention européenne contre la traite des êtres humains adoptée en 2005, l'Union européenne impose son particularisme, sans nécessairement offrir de meilleurs garanties à ses ressortissants.

En dehors même du danger de contradiction, il existe également un danger de régression. A force de répéter ou de décliner les mêmes principes, on risque de les affadir, de les banaliser. On risque aussi de donner la possibilité aux Etats de remettre en cause indirectement leurs engagements. La situation de conventions internationales qui ne sont pas signées par un nombre significatif d'Etats, comme c'est le cas actuellement de la convention sur les droits de tous les travailleurs migrants et de leur famille de 1990, a un effet désastreux, alors même que la plupart des engagements recensés correspondent aux obligations liant déjà les Etats en vertu des deux Pactes. De même lorsque la Sous-Commission des droits de l'homme avait envisagé, à la suite du rapport Treat-Tchernichenko, d'élaborer un troisième protocole facultatif au Pacte sur les garanties judiciaires, c'est le Comité des droits de l'homme lui-même qui avait mis en garde contre les effets d'une non-ratification, par un raisonnement *a contrario* offrant une sorte d'*opting-out*, alors que les Etats se trouvaient déjà liés en pratique par l'interprétation du Comité. Plutôt que de multiplier les obstacles juridiques, le développement progressif des normes existantes, à travers le droit dérivé constitue la voix de la sagesse.

2. L'approfondissement du droit secondaire

Pendant longtemps la doctrine française a eu une vision linéaire du développement du droit international des droits de l'homme, passant d'une phase déclaratoire, à une phase conventionnelle appelée à se prolonger par une phase juridictionnelle, avec la mise en place de garanties effectives. Ce faisant elle limitait la portée de la Déclaration universelle, simple «pierre de touche», en attente d'une consécration conventionnelle en bonne et due forme, mais elle négligeait aussi le foisonnement du droit déclaratoire[10]. Theodor Meron a bien montré que la Déclaration universelle pouvait être considérée comme une interprétation autorisée des principes affirmés par la Charte de 1945, tandis que le Comité des droits de l'homme a mis l'accent sur le «bloc» constitué par la «*Charte internationale des droits de l'homme*» autour de la Déclaration, des Pactes et de leurs protocoles, à travers une sorte de cristallisation juridique[11].

[10] Cf. «De la promotion à la protection des droits de l'homme: droit déclaratoire et droit programmatoire» in colloque de Strasbourg de la SFDI, *La protection des droits de l'homme et l'évolution du droit international*, Pedone, 1998, p. 81.

[11] Observation générale n° 27. Pour une discussion théorique, cf. la thèse d'Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international*, Pedone, 2004.

L'exemple de l'OIT montre bien qu'une Déclaration de droits fondamentaux peut traduire la quintessence des obligations conventionnelles des Etats membres.

Alors que les conventions ne lient par définition que les Etats parties et dans la stricte mesure de leur engagement, le droit déclaratoire possède une portée plus vaste, née de la recherche du consensus dans un système institutionnel donné. Ce n'est pas pour rien que la Déclaration universelle sert de référence indiscutée aux travaux des organes de contrôle qui ont été mis en place dans le cadre de la Commission des droits de l'homme, que ce soit la procédure confidentielle, sur la base de la résolution 1503 adoptée en 1970 par l'ECOSOC, ou encore la procédure de plainte mise en œuvre depuis 1990 par le groupe de travail sur la détention arbitraire. A défaut de tout engagement conventionnel, les Etats membres des Nations Unies sont liés par ce socle commun, et de fait, aucun Etat n'a remis en cause cette base de référence déclaratoire de la procédure, alors même qu'il pouvait contester comme Cuba l'invocation du Pacte, considéré non sans abus comme *inter alios pacta*.

Mais le droit dérivé a une fonction tout aussi importante de codification et de développement des normes. En ce sens, il est particulièrement utile de faire travailler ensemble les organes compétents. La Sous-Commission a pu jouer ce rôle à travers ses études, et encore récemment, avec ses travaux en matière de non-discrimination ou de droits des non-ressortissants, qui ont été repris par plusieurs comités dans leurs observations générales. Quel que soit le résultat de la réforme en cours, cette fonction d'exégèse est indispensable. Elle doit être confiée à un organe collégial, de caractère indépendant et à vocation généraliste, pour maintenir une stratégie d'ensemble afin de définir des priorités et pour éviter la pression des lobbies n'ayant qu'un seul agenda ou l'excès de spécialisation sans vision d'ensemble de l'architecture du système. A cet égard l'argumentation du porte parole de l'Union européenne préconisant une liste d'experts est assez naïve pour ne pas dire plus: «*A roster of experts would be an instrument to support the work of the Human Rights Council in a flexible and responsive manner. Qualified experts would be appointed on a case-by-case basis to study a specific issue upon the request of the HRC. In a nutshell – if you need to fix a specific problem – go straight to the specialist!*»[12]. Non seulement l'existence d'un organe permanent est une garantie collective d'indépendance, même si l'indépendance individuelle de certains membres peut prêter à caution, mais surtout la délibération collégiale est une phase importante dans l'élaboration conceptuelle des projets de textes et un test décisif de leur acceptabilité par les diverses composantes de la communauté internationale.

On pourrait s'interroger sur la nécessité de développer en commun de nouvelles problématiques, de nouvelles priorités, alors que le corpus des droits de l'homme correspond à des principes immuables. La multiplication des standards ouvre la porte aux «doubles standards», avec un risque de brouillage et de dévaluation, «la mauvaise monnaie chassant la bonne», comme pour les économistes. Pour les juristes, le risque est celui de voir le droit mou remplacer le droit dur.

[12] WG RMM, Expert Advice, Draft 30.01.2007.

Le droit dérivé ne doit pas être une occasion de remettre en cause les obligations des Etats, il doit les préciser et les approfondir, à travers des références précises et cohérentes visant à en faciliter l'interprétation et l'application par toutes les parties concernées.

A cet égard les «principes directeurs» adoptés, à la suite des travaux de la Sous-Commission en matière de lutte contre l'impunité, avec Louis Joinet, ou sur les formes de réparation des violations massives des droits de l'homme, avec Théo van Boven, sont exemplaires. Il ne s'agit pas d'imposer de nouvelles obligations aux Etats en matière de justice ou de réparation mais de leur offrir une grille d'analyse systématique de leur propre situation. On pourrait en dire autant des récents principes en matière d'administration de la justice par les tribunaux militaires, transmis en janvier 2006 par la Sous-Commission à la Commission, qui éclairent les angles oubliés de la justice militaire, sans remettre en cause la diversité des expériences nationales. Le succès de tels principes est moins leur adoption formelle par l'organe supérieur, que leur mise en œuvre pratique par les intéressés eux-mêmes, dans des négociations de paix ou lors de processus de réforme. Les références et les renvois leur confèrent ainsi une réalité objective, une évidence pratique, avant même leur consécration officielle: les principes sur la justice militaire ont déjà été cités par la Cour européenne des droits de l'homme et ont servi de moteur à la réforme trop longtemps différée de la justice militaire en Argentine.

L'apparition de nouvelles problématiques dépend également de la conjoncture internationale. La priorité donnée à la lutte contre le terrorisme depuis 2001 a impliqué une réflexion urgente sur les impératifs en matière de droits de l'homme. Cette évaluation, loin de se faire dans l'abstrait, de manière idéologique, a pu très rapidement se fonder sur la base de la jurisprudence européenne développée notamment lorsque diverses formes de terrorisme avait frappé plusieurs Etats, à commencer par le Royaume-Uni et l'Irlande, mais aussi l'Allemagne, l'Italie et la France ou la Turquie. C'est le sens des *lignes directrices sur les droits de l'homme et la lutte contre le terrorisme* adoptées le 11 juillet 2002 par le Comité des ministres du Conseil de l'Europe, à partir d'une codification à droit constant de la jurisprudence de Strasbourg. Ces principes ont été complétés par des *lignes directrices sur la protection des victimes d'actes terroristes* adoptées par le Comité des ministres le 2 mars 2005. De son côté, le Haut Commissaire aux droits de l'homme, Bertrand Ramcharan, avait dès 2003 établi une compilation des textes pertinents, faisant une large part à ces expériences régionales, publiée sous le titre *Digest of jurisprudence of the United Nations and regional organizations on the protection of human rights while countering terrorism*[13]. Le rappel de ces références jurisprudentielles a permis de recadrer le débat, en montrant que la lutte indispensable contre le terrorisme devait être menée dans le strict respect des principes de l'Etat de droit et du droit international, notamment en matière de protection des droits de l'homme. Parallèlement

[13] Office of the United Nations High Commissioner for Human Rights, Geneva, 2003.

aux références générales introduites peu à peu dans ce sens dans les résolutions du Conseil de sécurité, le développement d'un corpus détaillé de «principes directeurs» s'est avéré particulièrement utile.

On pourrait multiplier les exemples, avec les travaux de la Sous-commission ayant abouti en 2003 à l'adoption par consensus d'un projet de principes directeurs sur la responsabilité des entreprises en matière de droits de l'homme, contribuant ainsi à mettre la question à l'ordre du jour de la Commission, malgré sa réaction immédiate de rejet. Le danger évident est de vouloir imposer un ensemble cohérent de principes, dépassant la diversité des codes volontaires et des normes sectorielles, mais d'ajouter à la confusion, en apportant une référence de plus, parmi tant d'autres, et non une référence unique, faute d'acceptation par les destinataires. Sur ce terrain, l'exemple du tripartisme de l'OIT montre bien la nécessité d'associer étroitement toutes les parties prenantes à l'élaboration des normes.

Reste que le cheminement des idées dans le système international pour arriver à une consécration consensuelle par l'Assemblée générale demande une longue patience, comme l'illustre l'adoption de la déclaration des droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques en 1992, la déclaration sur les défenseurs des droits de l'homme de 1998 ou la déclaration sur les droits des peuples autochtones adoptée en 2006 par le Conseil des droits de l'homme pour se voir remise en cause devant l'Assemblée générale.

Tous ces efforts sont loin d'être inutiles, ils font vivre le droit. Mais il ne s'agit pas de réinventer sans cesse les droits de l'homme, comme un amnésique pour qui chaque instant serait un premier matin. L'essentiel est de tenir les deux bouts de la chaîne, en affermissant la cohérence théorique d'un système fondé sur des droits universels, inhérents à «la dignité de la personne humaine», mais également en sachant décliner son contenu pratique en fonction des situations concrètes et des nouveaux défis qui se présentent. C'est assez dire que sur ce terrain, l'universalité est indissociable de l'effectivité.

II. L'effectivité des contrôles

Le problème de la duplication ne se pose pas de la même manière si l'on envisage les garanties contentieuses ou les garanties non-contentieuses. On entendra ici les garanties contentieuses au sens large, en visant des systèmes de plaintes faisant l'objet d'un traitement juridique par un organe indépendant, au terme d'une procédure contradictoire, même si l'on est parfois dans des systèmes quasi-juridictionnels, faute d'un élément essentiel, comme l'autorité de la chose jugée, s'agissant du Comité des droits de l'homme. L'ambiguïté est parfois au sein d'une même procédure où l'on passe du règlement juridictionnel au «règlement amiable», comme l'on peut glisser d'un «différend politique» à un «différend juridique». A l'évidence la gamme des modes de règlement pacifique

des différends énumérés à l'article 33 de la Charte peut se décliner dans le domaine des droits de l'homme, comme dans les autres matières[14].

1. Les garanties contentieuses

Si l'on s'en tient aux systèmes de plaintes, fondées sur des communications individuelles ou collectives, à défaut de communications étatiques, il existe des règles pour éviter duplications ou contradictions.

Une règle procédurale classique est celle de la litispendance, en vertu de laquelle le Comité des droits de l'homme «*n'examinera aucune communication d'un particulier sans s'être assuré que: a) la même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement* (…)» (art.5 §2 du Prot. add.). Cette formule que l'on retrouve, *mutatis mutandis*, dans de nombreux instruments, ne règle qu'une partie du problème, puisqu'une fois que l'organe s'est prononcé, l'affaire n'est plus en «cours d'examen». C'est le sens de la réserve formulée par la France, à l'instar de nombreux Etats membres du Conseil de l'Europe, en ratifiant le protocole, afin d'éviter de faire du Comité des droits de l'homme une sorte de juridiction d'appel des arrêts de la Cour européenne des droits de l'homme: «La France fait une réserve à l'alinéa a) du paragraphe 2 de l'article 5 en précisant que le Comité des droits de l'homme ne sera pas compétent pour examiner une communication émanant d'un particulier si la même question est en cours d'examen ou a déjà été examinée par une autre instance internationale d'enquête ou de règlement». Mais cette extension ne règle pas tout, comme l'ont montré les débats au sein du Comité lors d'une première affaire danoise où la requête avait été déclarée irrecevable par la Commission européenne des droits de l'homme, sans avoir été «examinée» en tant que telle, ce que Bernhard Graefrath, l'expert est-allemand s'était empressé de relever dans une opinion individuelle[15]! Mais au-delà même de ces arguties procédurales, il est très facile de pratiquer le *forum-shopping*, en portant la même question de droit devant des juridictions différentes, dès que des droits collectifs sont en jeu ou que des violations en série sont commises, puisque la règle *non bis in idem* ne vaut que pour un même requérant et une même «cause».

Une autre règle de fond mise au point pour éviter aux juges d'avoir à se prononcer en vertu de règles différentes, est de prévoir une clause d'indexation, en précisant, comme la Convention européenne des droits de l'homme, qu'aucune de ses dispositions «*ne sera interprétée comme limitant ou portant atteinte*

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[14] Cf. notre chapitre sur «Le règlement des différends» in Denis Alland et al., *Droit international public*, Coll. droit fondamental, PUF, 2000.

[15] A. M. c. Danemark, décision de rejet du 23 juillet 1982, *Sélection des décisions du Comité des droits de l'homme*, vol. 1 (1976-1982). Comparer avec deux affaires norvégiennes, O. F, décision du 26 octobre 1984 et V. O, décision du 17 juillet 1985, in *Sélection des décisions du Comité des droits de l'homme*, vol. 2 (1982-1988). Cf. le commentaire de Markus Schmidt, in Emmanuel Decaux (dir.), *Le Pacte international relatif aux droits civils et politiques*, Economica, 2007, à paraître.

aux droits de l'homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toute Partie contractante ou à toute autre Convention à laquelle cette Partie contractante est partie» (art. 53). On a fait grand cas de cette formule qualifiée de «clause la plus protectrice», à l'instar de la clause de nation la plus favorisée, notamment lors de l'élaboration de la Charte des droits fondamentaux de l'Union européenne et de son incorporation dans la deuxième partie du traité sur la Constitution européenne[16]. Mais c'est négliger la relativité de la plupart des droits de l'homme qui impliquent un arbitrage du juge entre des droits de l'homme concurrents ou entre des droits de l'homme et des buts légitimes: s'agit-il de donner l'extension la plus grande à la liberté d'expression ou à lutte contre le racisme, à la protection du domicile ou au caractère «sacré» de la propriété privée? En soi, la clause n'apporte aucune solution. Tout au plus indique-t-elle une certaine dynamique, le choix de la *cross-fertilization* entre systèmes distincts, de l'influence mutuelle des instruments internationaux.

De plus en plus souvent, le juge est appelé à invoquer des références multiples, soit à titre de source directe, soit à titre de simple comparaison. Les juridictions du Commonwealth ont toujours eu cette culture des précédents, sans considération de frontières. Certains juges de la Cour internationale de Justice, le plus souvent issus du Tiers monde, ont également depuis longtemps cité la jurisprudence européenne dans leurs opinions individuelles, notamment en matière de bonne administration de la justice dans des affaires relatives au TANU, tout comme les juges de la Cour européenne des droits de l'homme issus des pays d'Europe centrale n'ont pas hésité à se référer aux principes de la Cour suprême des Etats-Unis, dans un contexte pourtant tout autre. Mais c'est désormais le cas pour les juridictions nationales les plus jalouses de leur souveraineté. La Cour suprême des Etats-Unis a fini par faire état d'un précédent de la Cour européenne des droits de l'homme, s'agissant de la dépénalisation de l'homosexualité entre adultes consentants[17]. Le Conseil constitutionnel, plus tardivement encore, s'est résolu à citer un arrêt (non définitif!) de la Cour européenne des droits de l'homme pour renforcer son argumentation sur la conformité au principe de laïcité du Traité sur la Constitution européenne[18].

Mais même avant de formuler des références expresses à de telles jurisprudences, les juges nationaux ont multiplié les références implicites, s'agissant notamment de combler une lacune, un déficit de garantie, face à un système «*mieux disant*». Le Conseil constitutionnel a donné un tel exemple en découvrant dans l'article 16 de la Déclaration des droits de l'homme et du citoyen de

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[16] Cf. Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne,* le Seuil, 2001 et Laurence Burgorgue-Larsen, Anne Levade et Fabrice Picod (dir.), *Traité établissant une Constitution pour l'Europe,* tome 2 (*Partie II: La Charte des droits fondamentaux de l'Union*), Bruylant, 2005.

[17] Commentaire de Marina Eudes, in revue électronique *Droits fondamentaux,* www.droits-fondamentaux.org n° 3 (janvier-décembre 2003).

[18] C.C., décision du 19 novembre 2004 relative au traité établissant une Constitution pour l'Europe.

1789, le principe du droit à un recours, par une illumination soudaine deux siècles après, faute de pouvoir fonder sa décision sur l'article 13 de la Convention européenne ou l'article 2 §3 du Pacte[19].

Ces emprunts peuvent concerner le fond, comme lorsque la Cour européenne développe sa jurisprudence sur la base de l'article 1er du Protocole I et de l'article 14 pour garantir par le biais du principe de non-discrimination des droits sociaux qui ne sont pas protégés en tant que tels par la Convention. Plus curieusement encore le Conseil d'Etat qui dans un premier temps avait refusé de suivre la jurisprudence Gueye c. France du Comité des droits de l'homme[20], en considérant que l'article 26 du Pacte relatif aux droits civils et politiques ne s'étendait pas aux droits sociaux, a fini par adopter la même solution mais sur la base – pourtant plus incertaine, mais sans doute plus familière – de la Convention européenne, avec l'arrêt Diop[21]. Paradoxalement une telle jurisprudence rend largement superfétatoire la ratification du protocole no 12 à la Convention européenne des droits de l'homme que la France rechigne pourtant à ratifier pour ne pas surcharger la Cour européenne de recours sur la base du principe de non-discrimination. Or le Protocole no 12 avait pour unique objet de mettre l'article 14 de la Convention à niveau avec l'article 26 du Pacte. Ce que le processus formaliste de révision conventionnelle n'a pas encore parachevé, la dynamique de la jurisprudence l'a déjà largement atteint. Pour autant le tableau est confus, la jurisprudence dressant une frêle passerelle entre deux strates de droit conventionnel, avec l'article 14 initial d'une part, l'article 14 complété par le protocole no 12 d'autre part. *A fortiori*, la non-discrimination du droit communautaire n'est pas celle des multiples clauses du Pacte international relatif aux droits civils et politiques ou des conventions spécialisées.

Les emprunts qui ne disent par leur nom peuvent également toucher la procédure avec une émulation de plus en plus évidente entre les juridictions. Les compétences du Tribunal international du droit de la mer en matière de mesures conservatoires ont entraîné des réactions en chaîne de la part de la Cour internationale de justice et de la Cour européenne des droits de l'homme pour affirmer *contra legem* que les mesures conservatoires étaient désormais obligatoires, ce qu'à chaque révision du statut les Etats s'étaient refusés à concéder. On retrouve la même contagion en matière de réserves, lorsque le Comité des droits de l'homme a fait sienne, avec l'observation générale no 24, la jurisprudence de la Cour européenne des droits de l'homme, alors que la formulation des deux traités est très différente, comme ne manque pas de le rappeler le rapporteur de la CDI sur les réserves, le professeur Alain Pellet.

Mais l'assimilation peut également se faire de façon expresse, lorsque le juge n'hésite pas à appliquer lui-même d'autres instruments. Parfois c'est son statut qui lui donne cette compétence, comme lorsque la Cour interaméricaine

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[19] C.C., décision du 9 avril 1996 concernant la LO relative au statut de la Polynésie française.

[20] Décision du 3 avril 1989, in *Sélection des décisions du Comité des droits de l'homme*, vol. 3 (1988-1990).

[21] C.E., arrêt Diop du 30 novembre 2001.

est amenée à interpréter des traités «relatifs aux droits de l'homme», y compris la convention sur les relations consulaires de 1963, avant même la Cour internationale de Justice, dans l'affaire Avena. Il en ira sans doute de même avec la nouvelle Cour africaine des droits de l'homme à travers notamment les dispositions très générales de l'article 60 de la Charte africaine des droits de l'homme et des peuples visant les «principes applicables». La Cour européenne des droits de l'homme est allée très loin dans cette direction, sans une telle base textuelle. Ainsi elle s'est fondée sur la convention des Nations Unies contre la torture de 1984, pour introduire une série d'«obligations positives», en matière d'enquête, de poursuite et de sanction, à côté des «obligations négatives» de l'article 3 de la Convention européenne des droits de l'homme qui se borne à consacrer «l'interdiction de la torture». Mais plus concrètement encore la Cour se réfère très fréquemment aux constatations du Comité européen pour la prévention de la torture, malgré les clauses de la convention de 1987 visant à cloisonner de manière étanche les deux systèmes de contrôle, ou aux rapports du Commissaire aux droits de l'homme, et ce d'autant plus que depuis la suppression de la Commission européenne, la Cour ne peut guère mettre en œuvre ses possibilités propres d'enquête sur le terrain[22]. Elle multiplie les références au droit secondaire, comme les normes pénitentiaires européennes ou les règles minimales des Nations Unies, voire des principes encore en gestation, comme les principes relatifs à l'administration de la justice par les tribunaux militaires.

Le plus étonnant est que la Cour internationale de Justice a adopté une attitude identique dans des affaires récentes, en se fondant sur les travaux ou les constations d'organes des Nations Unies en matière de droits de l'homme. Dans l'avis du 9 juillet 2004 *sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, la Cour consacre un long développement à l'application des conventions internationales relatives aux droits de l'homme qui lient Israël, après en avoir établi l'applicabilité aux territoires occupés, en se référant à «la pratique constante du Comité des droits de l'homme» (§109), tout comme à la position du Comité des droits économiques, sociaux et culturels (§112). La Cour prend en compte les dispositions pertinentes du Pacte international relatif aux droits civils et politiques (§127), du Pacte international relatif aux droits économiques, sociaux et culturels (§130) et de la Convention des droits de l'enfant (§131). Elle se réfère également aux rapports du Secrétaire général, comme à ceux du Rapporteur spécial de la Commission des droits de l'homme sur la situation des droits de l'homme dans les territoires palestiniens occupés par Israël depuis 1967, le professeur John Dugard (§133). Pour déterminer si des dérogations aux obligations conventionnelles pesant sur Israël peuvent être invoquées, la Cour n'hésite pas à «reprendre la formulation retenue par le Comité des droits de l'homme» dans son observation générale n° 27 (§136). La Cour peut conclure «au vu du dossier» que la construction du mur constitue» une violation par Israël de diverses obligations qui lui incombent en vertu des

[22] Pour un cas-limite où la Cour n'a pas pu enquêter sur le terrain, cf. l'arrêt Chamaiev c. Géorgie et Russie, du 12 avril 2005.

instruments applicables de droit international humanitaire et des droits de l'homme» (§137).

L'arrêt rendu le 19 décembre 2005 dans *l'affaire des activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)* comporte lui aussi une appréciation de la Cour sur les «violations du droit international relatif aux droits de l'homme et du droit international humanitaire», prenant «en considération les éléments de preuve contenus dans certains documents de l'Organisation des Nations Unies dans la mesure où ils ont une valeur probante et sont corroborés si nécessaire, par d'autres sources crédibles» (§205). La Cour se fonde ainsi sur les rapports du Rapporteur spécial de la Commission des droits de l'homme et du Secrétaire général, ainsi que sur les résolutions du Conseil de sécurité (§206) pour estimer «qu'il existe une concordance suffisante entre les informations émanant de sources crédibles pour la convaincre que des violations massives des droits de l'homme et de graves manquements au droit international humanitaire ont été commis (…)» (§207). S'agissant du droit applicable, la Cour recense un certain nombre de traités qui lient les deux parties, comme les conventions de Genève et le protocole I de 1977, le Pacte international relatif aux droits civils et politiques ou la convention sur les droits de l'enfant et son protocole sur l'implication des enfants dans les conflits armés, mais aussi la Charte africaine des droits de l'homme et des peuples, avant de déterminer les obligations conventionnelles qui ont été violées par l'Ouganda (§219).

Cette pluralité de normes et cette multiplicité d'interprètes ouvrent grand la porte à des contradictions potentielles. Il faut admettre que c'est un fait de la vie, et que sur le plan interne, les divergences et les revirements de jurisprudence sont un lot quotidien. Pour s'en tenir à un exemple français récent, pendant une dizaine d'années, la Cour de cassation a considéré que la Convention sur les droits de l'enfant n'était pas directement applicable, avant de se rallier à la position de sagesse du Conseil d'Etat qui avait admis que certaines dispositions étaient directement applicables par le juge interne, en se fondant l'une et l'autre sur «l'intention» des Parties contractantes et la lettre de la convention. De même, les spécialistes n'ont pas manqué de pointer les contradictions entre la Cour de Luxembourg et la Cour de Strasbourg sur la portée de la notion de «domicile» au sens de la Convention européenne des droits de l'homme, s'agissant de locaux professionnels ou de véhicules. Pourquoi s'étonner que dans une société internationale, hétérogène par nature, on retrouve ces mêmes contradictions? C'est plutôt le nombre limité de telles situations qui devrait nous étonner.

Une contradiction virtuelle est celle qui existe, entre un juge «généraliste» et un juge «spécialisé». Par définition, un juge spécialisé a un intérêt investi dans une «discipline» et on comprend la réticence des Etats à se présenter devant une «chambre de l'environnement» constituée au sein de la CIJ. Cela vaut sans doute pour la compétence du Comité pour l'élimination de la discrimination raciale ou du Comité contre l'élimination des discriminations à l'égard des femmes, face au Comité des droits de l'homme ou à la Cour européenne. Ainsi le CERD a-t-il félicité le Danemark pour les poursuites contre un journaliste qui ont donné lieu à un arrêt de condamnation de la Cour européenne des droits de l'homme, dans

l'affaire Jersild[23]. Et à terme, rien ne dit que le Comité des droits économiques, sociaux et culturels aura la même jurisprudence que le Comité des droits de l'homme, alors que leurs compétences se chevaucheront inéluctablement, notamment par le biais de l'article 26 du Pacte international relatif aux droits civil et politiques. Une autre contradiction latente découle de la composition des organes: à l'évidence le Comité des droits de l'homme s'est trouvé en complet décalage, s'agissant de la peine de mort, par rapport à la Cour européenne des droits de l'homme, comme en témoignent les fortes opinions dissidentes des membres européens du Comité des droits de l'homme. Plus grave encore est le conflit latent entre la Cour internationale de justice et les juridictions pénales, Tribunal pénal international pour l'ex-Yougoslavie, aujourd'hui, et, demain, Cour pénale internationale.

2. Les garanties non-contentieuses

Les garanties non-contentieuses sont encore plus diffuses, notamment en matière de rapports ou d'enquêtes, ce qu'on appelle aujourd'hui au sens large le «monitoring». Il faut d'abord constater la multiplicité des structures mises en place. Parallèlement au développement des autorités indépendantes qui viennent compléter les garanties judiciaires sur le plan interne – institutions nationales de protection des droits de l'homme, Ombusdman et médiateurs, commissions spécialisées s'agissant d'un groupe vulnérable – on observe le même mouvement à l'échelle internationale, notamment sur le plan européen: Ombusdman européen, Haut-Commissaire de l'OSCE sur les minorités nationales, Commissaire aux droits de l'homme du Conseil de l'Europe, Commission européenne contre la racisme et l'intolérance (ECRI), Observatoire de Vienne contre le racisme et la xénophobie transformé à compter du 1er janvier 2007 en Agence européenne des droits fondamentaux. On retrouve la distinction classique de la science administrative, entre «*administration de gestion*» et «*administration de mission*»: chaque nouvelle institution indépendante doit trouver sa place auprès des structures institutionnelles beaucoup plus lourdes qui préexistent, mais surtout apprendre à travailler ensemble avec ses homologues, légitimement jaloux de leur indépendance.

Paradoxalement, malgré cette multiplicité d'acteurs, il existe encore des angles morts, des risques de lacunes, faute de vue d'ensemble de la situation des droits de l'homme dans tous les Etats du monde ou de prise en compte des réalités concrètes, sur le terrain. Ainsi, le Turkménistan qui ne remettait aucun rapport aux organes de contrôle a pu passer largement inaperçu, avant le déclenchement du mécanisme de Moscou de l'OSCE en 2002, suivi d'une série de résolutions de la Commission des droits de l'homme et de l'Assemblée générale qui ont contribué à attirer l'attention des rapporteurs spéciaux et des organes conventionnels, contribuant ainsi à placer la situation de ce pays sur l'agenda

[23] CEDH, arrêt du 23 septembre 1994, cf. commentaire de l'article 10 par Gérard Cohen-Jonathan in Louis-Edmond Pettiti, Emmanuel Decaux et Pierre-Henri Imbert (dir.), *La Convention européenne des droits de l'homme*, Economica, 2ème ed., 1999.

international. Il existe aussi des thèmes longtemps oubliés, comme la question des formes contemporaines de l'esclavage, relancée par le groupe de travail de la Sous-Commission des droits de l'homme, il y a 30 ans, ou encore la question des «pratiques traditionnelles affectant la santé des femmes et des fillettes», grâce aux rapports de Mme Warzazi, là encore dans le cadre de la Sous-Commission, sans parler du travail de fond sur l'extrême pauvreté et les droits de l'homme entrepris depuis 1987, sur la base de l'étude de Léandro Despouy.

Aussi bien pour éviter les «conflits positifs» que les «conflits négatifs», les doubles emplois que les omissions, une meilleure coordination s'impose à tous les échelons. Il faut coordonner les coordinations, c'est bien le sens du «multi-multilatéralisme». Un retour à l'esprit des origines serait très utile, comme lorsque l'OIT était associée aux premiers travaux de la Charte sociale européenne. Le Comité des droits économiques, sociaux et culturels a su nouer de tels liens avec l'UNESCO, comme avec l'OIT. De manière informelle, le Rapporteur spécial de la Commission des droits de l'homme sur la liberté d'expression se concerte avec ses partenaires de l'UNESCO et de l'OEA pour signer un appel commun chaque année lors de la journée de la liberté de la presse. De son côté l'OSCE a mis en place un groupe de travail sur la torture qui réunit des représentants des principaux protagonistes: rapporteur spécial ou ancien rapporteur de la Commission des droits de l'homme, membre du Comité européen pour la prévention de la torture, etc.

Mais ces liaisons institutionnelles devraient être systématiques, et dépasser les rencontres protocolaires entre les responsables administratifs des organisations internationales. Les réunions «inter-comités» organisées par le Haut-Commissariat des droits de l'homme pourraient être organisées sous une forme plus méthodique, avec une véritable continuité des membres et un programme de travail débouchant sur de véritables décisions communes. Il faut que les experts indépendants et les rapporteurs spéciaux apprennent à se connaître, à savoir ce que font les autres et à travailler en commun. Il faut créer des carrefours. Faute de connaissance mutuelle et d'«esprit de corps», ils manquent de la cohésion nécessaire pour résister aux atteintes des Etats à leur indépendance ou prendre des initiatives collectives, au-delà d'appels urgents ou de déclarations de principe. Ce qui est vrai au sein des Nations Unies, l'est plus encore entre organisations internationales, notamment à l'échelon régional.

III. Remarques finales

Quelle articulation concrète envisager, dans le respect de l'indépendance des acteurs? Un souci de cohérence et de continuité devrait prévaloir. Une réforme radicale serait d'établir un système de comités fortement hiérarchisé, avec un organe unique doté de chambres spécialisées, mais il est peu probable que les Etats acceptent ce saut qualitatif, tant pour des raisons politiques que juridiques. A tout le moins il supposerait une révision des traités existants. Mais même dans cette hypothèse, l'unification resterait partielle. Le rôle joué par la

Cour européenne des droits de l'homme n'a pas empêché l'essor de mécanismes non-contentieux, notamment sur le terrain préventif. Reste que le problème se pose de manière plus spécifique: lorsqu'un nouvel instrument est mis en place, faut-il créer un nouvel organe spécialisé ou confier une mission supplémentaire à un organe préexistant? La question s'est posée avec acuité lors de l'élaboration de la convention sur les disparitions forcées, dans le contexte des réformes en gestation. La solution de compromis a été de créer un nouveau comité, tout en prévoyant une clause de révision. Curieusement, les rédacteurs new-yorkais de la convention sur les droits des personnes handicapées n'ont pas eu ce scrupule, en prévoyant la mise en place d'un comité supplémentaire. Pourtant l'exemple du nouveau sous-comité contre la torture montre bien l'intérêt d'établir des liaisons organiques, tout en prévoyant une spécialisation liée au thème en jeu ou au mode de fonctionnement de l'organe.

S'agissant de l'élucidation des normes, un système de questions préjudicielles ou de renvois pour interprétation permettrait d'éviter les contradictions, tandis que des «observations générales» communes pourraient être adoptées pour adopter des positions de principe. De même des missions conjointes pourraient être envisagées en matière d'enquête, de manière souple, si les moyens nécessaires sont dégagés. Déjà, la Commission et le Conseil n'ont pas hésité à envoyer sur le terrain des équipes de rapporteurs spéciaux. L'accent pourrait également être mis sur le suivi, en tablant sur les acquis des autres organes au lieu de repartir à zéro, à chaque fois. Pour ce faire un véritable tableau de bord serait nécessaire, afin d'harmoniser le calendrier des activités et d'améliorer le suivi des observations.

Cette réforme semble d'autant plus nécessaire que la «fatigue» des Etats, y compris de la part des mieux disposés, est évidente. Trop de rapports, trop de visites, trop de questionnaires inutiles, trop de demandes répétitives ou contradictoires surchargeraient les services compétents. De fait, un Etat a pu adresser au groupe de travail des communications, dans le cadre de la procédure 1503, une réponse déjà transmise au Comité des droits de l'homme et au Comité pour l'élimination des discriminations à l'égard des femmes. Inversement, il faudrait éviter les «passages à vide», concernant les pays oubliés ou intouchables, les sujets négligés ou ignorés.

On le voit, le programme des droits de l'homme est immense. C'est un travail quotidien qui demande le concours de tous. Il n'y aura jamais trop d'ouvriers pour contribuer au «*progrès des droits de l'homme*» comme la Charte nous y invite. Il ne faut pas craindre les duplications, si les efforts convergent. Dans un monde idéal, on peut souhaiter un saut qualitatif visant à rationaliser, coordonner et hiérarchiser toutes les activités, mais attention par angélisme à ne pas jouer aux apprentis sorciers. Nous vivons dans un monde réel, où il est sage de multiplier les garanties, les voies de recours, les sauvegardes… Ce qui compte c'est l'effectivité, l'efficacité, l'expérience, c'est la différence sur le terrain. Il faut décloisonner, sans détruire les fondements de l'édifice, même si son architecture baroque, faite de bric et de broc, ne correspond pas aux canons de l'architecture classique.

Le contrôle du respect des droits économiques et sociaux: privilégier la soumission de rapports ou l'examen de plaintes?

Giorgio Malinverni *

Dans la panoplie des mécanismes qui existent à l'heure actuelle pour le contrôle de la mise en œuvre des traités internationaux de protection des droits de l'homme, il y a, d'une part, les mécanismes non contentieux, au premier rang desquels figure la soumission de *rapports*; et, d'autre part, le mécanisme contentieux par excellence: *la requête individuelle*. Mon propos est de comparer et de mesurer les avantages et les inconvénients de ces deux systèmes. Je souhaiterais cependant formuler auparavant une remarque d'ordre général.

En droit international, la nature du mécanisme de contrôle de la mise en œuvre d'un traité international qui peut être mis en place dépend du contexte géographique et politique. D'une manière générale, il me semble que c'est au niveau régional, que ce soit en Europe, en Amérique ou, plus récemment, en Afrique, qu'ont pu être mises en place les techniques les plus sophistiquées, à savoir les requêtes individuelles et les contrôles judiciaires effectués par une Cour internationale. Au niveau universel, en revanche, sauf dans quelques cas, les mécanismes non contentieux, et en particulier la soumission de rapports, demeurent les moyens de contrôle les plus répandus.

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I.

Dans un premier temps, j'aimerais rappeler brièvement les principales caractéristiques des systèmes de rapports, puis je tenterai d'esquisser les améliorations que l'introduction d'un système de communications individuelles pourrait représenter pour les droits économiques, sociaux et culturels.

Historiquement, le système fondé sur l'envoi de rapports est le plus ancien. Cette technique a déjà été utilisée dans les années vingt, dans la Constitution de l'OIT et dans d'autres traités, comme la Convention relative à l'esclavage. Si ce type de mécanisme reste d'actualité, il est relativement primitif et peu sophistiqué. C'est en réalité le système le plus simple parmi les moyens de contrôle du respect des droits de l'homme, et c'est pour cette raison qu'il a surtout été utilisé dans un cadre universel. Sur le plan régional, en revanche, il a été supplanté par des mécanismes contentieux plus élaborés, tels que la requête étatique ou individuelle. Les informations transmises aux organes de contrôle par le biais des rapports sont essentiellement d'ordre législatif et concernent moins la jurisprudence et la pratique. Il faut toutefois noter que, dans le cadre des Nations Unies, ces rapports sont complétés par un dialogue oral avec les délégations des Etats concernés et par des contre-rapports des ONG. L'organe de contrôle peut ainsi disposer d'une image plus complète de la situation dans le pays.

II.

1. Examinons maintenant la valeur ajoutée que pourrait présenter un système de plaintes individuelles, plus particulièrement dans le cadre du Pacte relatif aux droits économiques, sociaux et culturels des Nations Unies. Actuellement, le mandat du Comité est limité à l'examen de rapports. Cependant, un projet de protocole additionnel ouvrirait la voie, s'il est adopté, à des communications individuelles. De mon point de vue, la valeur ajoutée de cette innovation serait importante, et ce pour plusieurs raisons. Premièrement, l'introduction d'un système de requêtes individuelles permettrait de clarifier grandement les obligations des Etats. On considère souvent que les droits économiques, sociaux et culturels sont imprécis, formulés de manière vague, et ne sont donc pas justiciables. La possibilité de soumettre des communications individuelles pourrait contribuer à affiner les contours de ces droits et leur portée, par le biais d'une analyse approfondie des problèmes juridiques soulevés à l'occasion de chaque affaire qui serait portée devant le Comité des droits économiques, sociaux et culturels. Il est bien connu que c'est à l'occasion d'affaires concrètes que le contenu précis d'un droit est défini.

2. L'introduction d'un système de communications individuelles pour les droits économiques, sociaux et culturels permettrait en outre une meilleure appréhension de sujets qui restent souvent théoriques. Actuellement, le Comité des droits économiques, sociaux et culturels, à l'instar des six autres comités des Nations Unies chargés de contrôler le respect des traités relatifs aux droits de

l'homme, conclut l'examen de chaque rapport par des observations finales dont la formulation est générale et relativement abstraite. Le Comité y recommande à l'Etat de prendre des mesures pour mieux s'acquitter des obligations qui découlent pour lui de tel ou tel article du Pacte. Je crois que l'examen de cas concrets permettrait au Comité d'appréhender de manière pratique les manquements aux obligations résultant du Pacte et son appréciation serait plus proche de la réalité.

3. Un autre point positif serait l'efficacité des sanctions. En effet, l'effectivité d'un droit se mesure à la possibilité de voir sa violation sanctionnée. Il n'y a aucune commune mesure entre les observations finales adoptées dans le cadre d'un système de rapports, qui sont de simples recommandations, et les constatations faites par les organes qui disposent de la compétence d'examiner des plaintes individuelles. Les constatations du Comité des droits de l'homme ou du Comité contre la torture, sans parler des arrêts des Cours internationales, permettent de déterminer si, dans un cas donné, il y a eu violation d'un traité international. Elles ont donc une force juridique nettement plus importante que les observations finales du Comité des droits économiques, sociaux et culturels.

4. Le système de communications individuelles permettrait également aux individus lésés de réclamer des réparations en cas de violation de leurs droits. Conformément à l'adage «*no right without remedy*», je pense que les droits économiques, sociaux et culturels ne seront pas considérés comme de véritables droits tant qu'il ne sera pas possible de remédier à leur violation au moyen d'une réparation.

5. Enfin, les procédures de communication individuelle joueraient un rôle de catalyseur et permettraient ainsi d'améliorer la mise en œuvre des droits économiques, sociaux et culturels au niveau national. La première raison en est le principe de l'épuisement des voies de recours internes, les juges nationaux se trouvant alors dans l'obligation d'examiner les griefs du requérant, faute de quoi il s'adresserait à une instance internationale qui pourrait, le cas échéant, condamner l'Etat en question. Les juges nationaux auraient donc tout intérêt à tenter de remédier à une éventuelle violation des droits du requérant avant que ce dernier ne porte son recours devant une instance internationale, en l'occurrence devant le Comité des droits économiques, sociaux et culturels. Par ailleurs, la jurisprudence de ce Comité pourrait également éclairer les juges nationaux qui pourraient s'en inspirer dans l'interprétation de la portée des droits économiques, sociaux et culturels.

III.

J'aimerais, maintenant, dans la dernière partie de ma brève présentation, essayer de voir quelles sont les modalités des mécanismes de contrôle que l'on pourrait imaginer. Je crois que ces modalités peuvent varier en fonction de trois critères. Puisqu'on est en présence de requêtes individuelles, il faut d'abord examiner la question des personnes qui seraient habilitées à saisir le Comité des

droits économiques, sociaux et culturels. Ensuite, celle des infractions que ce dernier pourrait, le cas échéant, constater et finalement se pencher sur la question de savoir quel pourrait être le contenu du dispositif des constatations que le comité pourrait adopter.

1. Quelles sont, tout d'abord, les personnes qui pourraient être habilitées à saisir le comité? Je crois qu'une première remarque d'ordre terminologique doit être faite. Il conviendrait probablement d'éviter des expressions ayant une connotation judiciaire trop marquée parce qu'elle fait peur aux Etats, comme les expressions de requérant ou de recourant, et de leur préférer l'expression, qui est d'ailleurs habituelle dans ce domaine, d'auteur de la communication, qui est une expression beaucoup plus neutre et qui a un caractère judiciaire moins marqué.

Ensuite, quelle devrait être la compétence *ratione personae* du comité? Est-ce qu'elle devrait être limitée aux individus ou s'étendre également à des groupes, voire à des tiers? Le projet de protocole reconnaît l'intérêt à agir à la fois aux individus et aux groupes. Ses auteurs sont partis de l'idée que les réclamations collectives peuvent jouer un rôle majeur surtout dans les sociétés où les groupes ont un rôle important à jouer comme, par exemple, les populations autochtones. S'agissant des personnes physiques, il conviendrait de reconnaître la qualité pour recourir ou l'intérêt à agir non seulement aux victimes directes mais également, en s'inspirant là aussi de la jurisprudence de la Cour européenne des droits de l'homme ou de celle d'autres instances, aux victimes indirectes qu'on appelle victimes par ricochet, voire aux victimes potentielles.

La plupart des traités de sauvegarde des droits de l'homme, on le sait, réservent la qualité pour recourir aux personnes relevant de la juridiction de l'Etat défendeur, peu importe leur nationalité ou que les personnes n'aient pas un permis de séjour valable. Convient-il de limiter pareillement la qualité pour recourir dans le domaine de la violation des droits économiques, sociaux et culturels? On peut, en effet, se poser la question: vu le phénomène de la globalisation et de l'interdépendance entre les Etats, il est permis de s'interroger sur le point de savoir si une personne établie sur le territoire d'un Etat ne pourrait pas se voir reconnaître la compétence pour déposer une requête contre un autre Etat dont la politique économique aurait pour conséquence de violer les droits économiques et sociaux du requérant. Je crois que cette solution aurait pour avantage de mettre en avant le caractère *erga omnes* que les Etats assument en ratifiant un traité comme le Pacte relatif aux droits économiques, sociaux et culturels, et d'ailleurs on l'a vu ce matin avec l'exposé sur la Charte sociale européenne et les réclamations collectives qui peuvent être déposées non seulement par les ONG nationales mais également par des ONG internationales qui agissent tout simplement dans l'intérêt du respect de la Charte.

S'agissant maintenant des organisations non gouvernementales ou, de manière plus générale, des personnes morales, la qualité pour déposer une communication devrait leur être reconnue, me semble-t-il, en tout cas dans deux hypothèses. D'abord les ONG devraient pouvoir représenter les victimes se trouvant dans l'incapacité d'agir elles-mêmes. Elles devraient également pouvoir saisir le Comité des droits économiques, sociaux et culturels dans leur propre

intérêt, en leur propre nom, en tout cas à chaque fois que leur but statutaire leur confie la tâche de veiller au respect des droits économiques, sociaux et culturels. Par conséquent, concernant le problème des personnes habilitées à saisir le comité, il faudrait reconnaître cette qualité non seulement aux personnes physiques mais également à des personnes morales sans nécessairement que le lien de territorialité doive, à mon avis, être une condition.

2. Quelles sont les infractions qui pourraient être susceptibles d'être constatées? Il s'agit là d'un problème politique délicat. Vous savez que, aux termes de l'article 2, paragraphe 1, du Pacte relatif aux droits économiques, sociaux et culturels, chacun des Etats parties s'engage à agir tant par son effort propre que par l'assistance de la coopération internationale au maximum de ses ressources disponibles en vue d'assurer progressivement le plein exercice des droits reconnus par le pacte.

Comme l'a déjà mentionné M. Riedel, les Etats ont pris plusieurs précautions au moment de l'adoption de ce pacte. Evidemment, avec un protocole additionnel et les requêtes individuelles, le comité serait en mesure de prononcer des condamnations et dire, par exemple, que tel Etat ne respecte pas le pacte. Toutefois, avant de constater une violation d'un droit garanti par ce dernier, le comité devrait, une fois que le protocole sera en vigueur, s'efforcer de distinguer dans chaque affaire dont il aura à connaître entre deux hypothèses bien distinctes. D'une part, les cas dans lesquels il s'agit d'un *manque de volonté* ou d'une négligence de l'Etat de respecter, protéger ou mettre en œuvre un droit garanti par le pacte et qui se trouvent à l'origine de la communication individuelle. D'autre part, les cas dans lesquels l'Etat se trouve objectivement dans l'*incapacité* de mettre en œuvre des droits garantis par le pacte.

Dans la première hypothèse, manque de volonté, je pense que l'infraction aux droits garantis par le pacte est évidente. Un Etat dépourvu de la volonté d'utiliser au maximum les ressources qui se trouvent à sa disposition pour réaliser les droits économiques, sociaux et culturels ne respecte pas ses obligations conventionnelles. Ce même Etat ne devrait, cependant, pas être totalement disculpé lorsqu'il invoque son incapacité objective à s'acquitter des obligations engendrées par le pacte, par exemple, lorsque la pénurie des ressources le mettrait selon lui dans l'impossibilité de se conformer à ses obligations. Je crois que, pour échapper à toute condamnation, l'Etat devra alors apporter la démonstration qu'il n'a négligé aucun effort pour utiliser toutes les ressources dont il dispose en vue de respecter ses obligations. Le comité devra naturellement laisser aux Etats une assez grande marge d'appréciation mais qui ne devrait pas être illimitée. Mais l'Etat devra en contrepartie apporter la preuve qu'il a de bonne foi – et ici le critère de la bonne foi est fondamental – fourni tous les efforts raisonnables auxquels l'on est en droit de s'attendre de lui pour respecter le pacte.

3. Dernier point: quel pourrait être le contenu du dispositif des constatations? J'utilise le mot «dispositif» qui est utilisé généralement pour les jugements, mais il est clair que les constatations du comité s'apparenteraient à un jugement. Je crois que là aussi il faut faire attention à la terminologie et qu'il

conviendrait de préférer le terme «constatations» de préférence à celui de «décisions» qui a une connotation judiciaire plus marquée. De toute manière, le comité ne sera investi ni d'un pouvoir de cassation – cela tous les Etats le comprennent bien – ni d'un pouvoir d'appel ou de réforme ni même d'un pouvoir d'injonction. Son seul pouvoir serait un pouvoir déclaratoire, celui de constater que l'Etat n'a pas respecté les obligations découlant du pacte.

Ceci dit, deux possibilités sont envisageables selon moi. La première, qui présente l'avantage d'assimiler les droits économiques, sociaux et culturels aux droits civils et politiques, consisterait à conférer au comité la compétence de constater une violation – je souligne le mot violation – des droits économiques, sociaux et culturels. Cette possibilité pourrait être à mon avis envisagée au moins dans quatre hypothèses.

D'abord, des violations du pacte pourraient résulter de politiques, de lois ou de décisions adoptées par les Etats. Le comité pourrait, par exemple, constater que telle politique, telle loi ou telle décision constituent des ingérences inadmissibles dans l'exercice de la liberté syndicale ou du droit de grève garanti par l'article 8 du pacte. Il pourrait également constater une violation de l'article 11 du pacte dans le cas où des personnes feraient l'objet d'évacuation forcée.

Des violations pourraient également être constatées par le comité si un Etat se rendait responsable d'une violation du principe de non-discrimination tel qu'il est garanti aux articles 2, paragraphe 2, et 3 du pacte. C'est un principe qui est directement applicable. Je pense que le même raisonnement pourrait être fait lorsque un Etat adopte des mesures dites rétrogressives, lorsqu'il fait marche arrière au lieu d'assurer progressivement la réalisation des droits économiques et sociaux.

Troisièmement, le comité pourrait être habilité à prononcer une violation chaque fois que l'Etat mis en cause a manqué à l'obligation fondamentale d'assurer la satisfaction de l'essence d'un droit – ce que l'on appelle en anglais «*core obligations*». Enfin, en reprenant la célèbre distinction que plusieurs d'entre vous connaissent et qui est familière au comité, puisqu'il la reprend dans chacune de ses observations générales, la distinction entre les obligations de respecter, de protéger et de mettre en œuvre les droits garantis par le pacte. J'estime que le comité pourrait constater des violations du pacte chaque fois qu'il y a violation des obligations de respecter et de protéger, parce qu'à ce niveau-là, il n'y a pas de différence de nature entre les droits économiques, sociaux et culturels, d'une part, et les droits civils et politiques, d'autre part. Quant à la nature même de l'obligation il n'y a pas de différence, tandis que dans tous les autres cas et en particulier lorsque l'Etat défendeur ne respecte pas le troisième volet de l'obligation, à savoir l'obligation de mettre en œuvre (en anglais obligation de «*fulfil*»), il conviendrait peut-être de ne pas habiliter le comité à constater une véritable violation. Dans ce cas il faudrait peut-être limiter sa compétence à celle de constater que l'Etat défendeur s'acquitte de manière insatisfaisante, et c'est d'ailleurs ce que fait aussi le Comité européen des droits sociaux dans certaines de ses décisions, dans lesquelles il établit que l'Etat condamné, l'Etat défendeur, ne s'est pas acquitté de manière satisfaisante de ses obligations. Pour un Etat, il

est plus acceptable de dire: l'Etat ne s'acquitte pas de manière satisfaisante que de dire qu'il a violé un droit, cette formule étant plus respectueuse de la souveraineté des Etats et mieux adaptée à la nature juridique des droits économiques, sociaux et culturels dans cette troisième dimension qui est la dimension de mettre en œuvre.

En conclusion, le but unique de mon intervention était le suivant, il faut que je réponde à la question que l'on a posée, qui était sous forme interrogative: faut-il privilégier la soumission de rapports ou l'examen de plaintes dans le contrôle du respect des droits économiques et sociaux?

Ma réponse est que les deux se complètent. Actuellement, il y a un déséquilibre entre les deux pactes qu'il s'agit maintenant de rétablir et il est clair que s'il fallait donner la préférence à l'un ou à l'autre, ma préférence, vous l'aurez compris, va vers le système de plaintes.

Discussion

Guido Raimondi* – Je partage dans une large mesure l'analyse faite par le professeur Decaux en ce qui concerne les risques juridiques liés à l'accumulation, d'une part, des instruments et, d'autre part, des mécanismes de contrôle. Il nous a tracé un tableau avec des ombres et des lumières, mais, si j'ai bien compris l'esprit de son discours, les lumières ont tendance à prévaloir. C'est à ce propos que j'aimerais formuler un commentaire marginal. Le professeur Decaux a évoqué l'article 14 de la Convention européenne des droits de l'homme, qui contient une clause antidiscriminatoire. Comme il l'a indiqué, il s'agit d'une clause «fermée», c'est-à-dire qui fonctionne uniquement par rapport aux droits protégés par la Convention. Le Protocole n° 12 vise à transformer l'article 14 en clause ouverte en élargissant les critères de discrimination. Le professeur Decaux a cependant précisé que ce protocole est très peu ratifié. Tout en partageant son analyse, j'ai l'impression que ce protocole n'a pas eu que des effets pervers. Après son adoption en novembre 2000, on a assisté à un développement spectaculaire de la jurisprudence de la Cour européenne des droits de l'homme en ce qui concerne l'article 14. Auparavant, la Cour donnait une interprétation très stricte de cette disposition. Depuis l'adoption du Protocole n° 12, elle en a élargi la portée. Elle cherche toujours à relier l'article 14 à tel ou tel droit protégé par la Convention, mais en utilisant des critères très larges. Une fois qu'elle a établi ce lien, elle peut identifier une violation de l'article 14 en tant que tel.

Emmanuel Decaux – Je suis tout à fait d'accord avec M. Raimondi, qui connaît bien le Conseil de l'Europe. Il semble y avoir une pratique de la Cour européenne des droits de l'homme consistant à anticiper l'entrée en vigueur de protocoles. Il a donné l'exemple du Protocole n° 12, on pourrait aussi citer le

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Protocole n° 6 et le Protocole n° 13 en matière de peine de mort. D'une certaine manière, la jurisprudence prend déjà acte d'une évolution. On peut aussi rappeler que le Comité des droits de l'homme, par le biais de l'article 26 du Pacte international relatif aux droits civils et politiques, a déjà développé une jurisprudence très importante dans le domaine des droits économiques et sociaux sous l'angle de la protection contre la discrimination. Il serait intéressant d'étudier la jurisprudence du Comité des droits économiques, sociaux et culturels concernant l'application du principe de non-discrimination: on disposerait alors d'un regard croisé sur un problème donné.

*Blanca Ruth Esponda Espinosa** – I wish to ask Mr. Malinverni whether in his opinion there is any intention under the Protocol to look at the fundamental differences in the application of international labour standards pertaining to human rights between the States that follow the so-called "monist" system and those having a "dualist" system.

Giorgio Malinverni – Il me semble que le Comité se pose déjà, dans le cadre de la procédure des rapports, la question du système moniste ou dualiste d'incorporation du Pacte ou, le cas échéant, du Protocole additionnel. La question n'est cependant pas présentée directement sous cette forme. Que les Etats soient de tradition moniste ou dualiste, ce qui compte c'est que le traité soit incorporé en droit national. Dans le cadre du dialogue que nous avons avec les Etats, nous leur demandons si les tribunaux internes appliquent le Pacte et considèrent que ses dispositions sont directement applicables. Pour nous, le choix entre un système moniste et un système dualiste est relativement secondaire. Avec un système de plaintes individuelles, les juridictions nationales seraient tenues d'appliquer les droits garantis par le Pacte pour éviter que la requête ne soit examinée directement par le Comité des droits économiques, sociaux et culturels.

*Alberto Odero de Dios*** – Je voudrais souligner la contribution de l'OIT et de la commission d'experts au développement des droits de l'homme en droit international. L'OIT a adopté, dans les années vingt, une convention sur les heures de travail; dans les années trente, il y a eu la première convention sur le travail forcé; dans les années quarante, les conventions sur la liberté syndicale et la négociation collective; dans les années cinquante, les conventions sur l'égalité. Une jurisprudence très élaborée a été construite sur la base de ces conventions. J'aimerais demander au professeur Malinverni dans quelle mesure la jurisprudence basée sur les Pactes des Nations Unies peut être développée. Certes il s'agit de droits universels, mais les principes consacrés dans les deux Pactes restent très généraux. Les modalités d'application des droits ne sont pas universelles, il existe des vues contradictoires, des polémiques à leur sujet.

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J'aimerais donc savoir s'il existe un espoir de voir la jurisprudence relative à l'application des Pactes se développer. Je voudrais également que le professeur Malinverni indique s'il considère qu'il serait souhaitable d'utiliser, dans le cadre du contrôle de l'application des Pactes des Nations Unies, les études d'ensemble de la commission d'experts, dans lesquelles la commission établit des principes d'interprétation à partir des exemples précis de législation nationale, mais aussi en tenant compte d'autres considérations.

Giorgio Malinverni – Vous avez parfaitement raison de dire que le Pacte relatif aux droits économiques, sociaux et culturels est beaucoup plus concis que les conventions de l'OIT. Si l'on fait abstraction des articles 2 et 3 sur l'interdiction de la discrimination, les dispositions de fond figurent dans les articles 6 à 15 du Pacte, il s'agit donc d'un texte extrêmement court. Cependant, il est possible de le développer par le biais de la jurisprudence. On peut faire une analogie à cet égard avec la Convention européenne des droits de l'homme, qui contient également une quinzaine de dispositions normatives. Au fil des années, la Cour européenne a élevé un monument de jurisprudence en concrétisant de manière très précise ces différentes clauses. Il serait possible de procéder de la même manière avec le Pacte relatif aux droits économiques, sociaux et culturels.

En droit international, il existe deux sortes de traités. D'un côté il y a l'OIT, qui a donné naissance à un grand nombre de conventions extrêmement détaillées. On y retrouve aussi le droit international humanitaire: les quatre Conventions de Genève et leurs deux Protocoles additionnels constituent un corps de règles extrêmement détaillé et précis. D'un autre côté il y a des textes beaucoup plus courts, pour lesquels la jurisprudence joue un rôle. Le Pacte relatif aux droits civils et politiques n'est pas très détaillé non plus, si on le compare aux conventions de l'OIT. C'est probablement pour cette raison que les organes chargés du contrôle de l'application de ces traités ont pris l'habitude d'adopter des observations générales qui clarifient la portée des dispositions. Si le Protocole additionnel entre un jour en vigueur, le Comité des droits économiques sociaux et culturels aura comme base de travail le texte du Pacte lui-même, c'est-à-dire le droit primaire, les observations générales et les observations finales qu'il a adoptées au fil des années à l'occasion de l'examen des rapports. Bien entendu, il disposera également des conventions de l'OIT. D'ailleurs, il se réfère déjà actuellement aux conventions de l'OIT dans le cadre du dialogue qu'il mène avec les représentants des Etats, en demandant par exemple pourquoi l'Etat n'a pas ratifié telle ou telle convention. Comme le disait le professeur Decaux, il y a une influence réciproque des jurisprudences des différents organes internationaux. A l'heure actuelle, il n'est plus possible de travailler en vase clos. Le vice-président du Comité européen des droits sociaux a dit tout à heure qu'il y a actuellement deux affaires en train d'être jugées par le Comité et qui concernent, d'une part, le pendant de la liberté d'association, à savoir le droit de ne pas adhérer à un syndicat et, d'autre part, la question des châtiments corporels. Or, ces deux questions ont déjà fait l'objet d'une jurisprudence abondante de la Cour européenne des droits de l'homme, respectivement sur la base de l'article 11 de

la Convention, qui garantit la liberté syndicale, et de son article 3, qui interdit les traitements inhumains et dégradants, y compris les châtiments corporels. La question est donc de savoir dans quelle mesure le Comité européen des droits sociaux va prendre en compte la jurisprudence de la Cour européenne des droits de l'homme dans l'examen de ces affaires. Puisque ces organes dépendent tous deux du Conseil de l'Europe, je ne pense pas que le Comité européen des droits sociaux puisse ne pas tenir compte de la jurisprudence de la Cour. De même, si le Protocole additionnel entre un jour en vigueur, je suis absolument certain que le Comité des droits économiques, sociaux et culturels des Nations Unies s'inspirera de la jurisprudence des organes de contrôle de l'OIT, et notamment du Comité de la liberté syndicale.

Panel discussion – Effectiveness of international supervision in the field of social and economic rights

On social participation, public awareness and social capacity

Tonia Novitz *

I would like to begin by saying how much I have, as an academic researching in this field and a university teacher, benefited from hearing those who are directly engaged in key supervisory processes and learning from their knowledge of its intimate operation.

As a panel, we have been given a specific remit which I intend to keep to in these introductory remarks, which hopefully will preface a larger and richer discussion. We were advised to consider how effectiveness of international supervision might be assessed, what characteristics might make an institutional arrangement effective, and whether certain mechanisms not discussed so far, such as 'soft law' or 'international trade law' could provide greater scope for the effective protection of socio-economic rights.

I intend to start with a tentative definition of effectiveness, for indeed, it makes little sense to speak of the effectiveness of international supervision in the field of social and economic rights without considering how this might be assessed. I should say at the outset that I do not expect that such assessment will be straightforward. It seems that we may be looking for the findings of a supervisory body to have effect in a variety of ways, such as: (1) impact on government policy, as manifested in labour legislation and administrative conduct; (2) effect on workplace relations in practice, such as between employers, workers and their representatives; and (3) application in domestic courts (in monist systems potentially directly and in dualist systems indirectly for interpretive purposes).

The evidence for such effect may not be straightforward and we should discuss this further as a panel. Nevertheless, I would envisage that it might be

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possible to provide evidence through both case studies and statistical indicators of welfare and prosperity.

My interest lies more in the criteria for or characteristics of effective supervision. It seems to me that we are familiar with many of these criteria. For example, for a supervisory organ to be effective it must be authoritative, and in the opening session of this colloquium, Robyn Layton identified eloquently certain ways in which this status could be achieved. Those appointed to this supervisory organ may be recognised as having special expertise in the area in question, and it may help for them to be seen as independent. Moreover, such a body may to be authoritative not only be impartial, but appear to be so, and for that reason it makes sense to seek to achieve geographic spread in the persons appointed to it. As she rightly pointed out, it is this authoritative status and respect that the ILO Committee of Experts on the Application of Conventions and Recommendations has in fact achieved. Additionally, the efficacy of a supervisory body can be linked to its administrative capabilities, the number of cases it can handle without significant delays, which may depend largely on its funding and resources.

Yet, we have been asked to talk specifically about effective supervision of socio-economic rights and, arguably, particularly labour standards. My suggestion is that the nature of the rights in question is relevant to the criteria for effective supervision. Labour standards have a social dimension insofar as they are concerned with the promotion of workers' welfare and are economic insofar as they connect to income and regulation of markets. In particular, labour standards like other socio-economic rights cannot easily be removed from the people they are meant to benefit. Although a groundswell of public opinion and political approval has seen their recognition in key international instruments, these entitlements cannot be viewed in abstract legal terms, without reference to the people they are designed to protect. It is for these reasons that I want to suggest that the effectiveness of their supervisory mechanisms cannot only be determined with reference to the criteria already identified, but rather at least two (or three) further characteristics. The first could be described as 'social participation', while the second could be described as 'public awareness' which is thereby closely linked with social capacity.

We have to understand social and economic rights as inextricably linked to civil and political rights and, in particular, rights to freedom of speech and participation in both the setting of legal norms and their enforcement. This point relating to social participation will not come as a surprise to any one within the trade union movement, given that the collective exercise of this kind of voice and influence at both the national and international level is a significant legacy of the labour movement. Today we have the recent creation of the International Trade Union Confederation, whose 168 million members, no doubt expect this new entity to continue this tradition. When we evaluate supervisory mechanisms, a significant sign of their effectiveness is the extent to which civil society, trade unions and NGO representation of those in the informal labour market, have access to and utilise their procedures. They may do this both in order to repre-

sent victims and to endeavour to protect their own entitlements as collective entities.

Moreover, while their bare minimum may be referred to in international instruments, the content of socio-economic rights – and workers' rights – cannot be understood to be set in stone. Contemporary developments always pose problems for the implementation of labour standards, as do the conditions peculiar to any given country, or region, or grouping of people. Both reporting and complaints mechanisms therefore can be understood as providing a discursive forum for the determination of the content, as well as the application, of workers' rights. Socio-economic rights can only be understood to be efficacious to the extent that civil society have meaningful access to them and can affect the contours of the deliberations which take place. In this respect, the tripartite character of the ILO Governing Body Committee on Freedom of Association offers an unusual and valuable model for supervision. Still, it should also be observed, as it was by the Chair of the last session, Michael Halton Cheadle, that the ILO Committee of Experts also uses reports from worker and employer associations to inform its understanding of state reports, and thereby the observations and recommendations made to states.

It is this ideal participatory aspect of the enforcement of socio-economic rights which makes me hesitant to endorse with enthusiasm the introduction of a social clause within a WTO setting, where the discourse has been dominated by the trade interests of particular states, and within which labour has yet to exercise significant voice. I also remain sceptical of the so-called 'soft-law' mechanism of the Open Method of Co-ordination within the context of the EU's endeavours to promote employment. Diamond Ashiagbor's excellent recent book on the *European Employment Strategy* (Oxford University Press, 2006) suggests that this may in fact be a more coercive mechanism than it first appears, in which state peer review and bureaucratic recommendations obscure the representations of those most affected.

A second criterion for effectiveness of supervisory mechanisms, which is perhaps too often neglected, is public awareness and the ways in which this affects social capacity to implement socio-economic rights. Earlier today, Kari Tapiola cited some of the successes of the ILO in this regard, but added that he did not want to launch a public relations exercise, but I suppose that I do, for somehow the discursive process that takes place at the international level has to reach those affected on the ground, so as to achieve genuine multi-lateral governance and self-determination.

Ideally, we would seem immediate implementation by states of recommendations made by international supervisory bodies concerning socio-economic rights, but as speakers have stressed today, we tend not to find states found to be in breach so very co-operative. In this context, we have also witnessed relative apathy from the press and other media. We therefore have to look for other means of achieving awareness and the capacity to implement supervisory findings. There are various means to achieve this. For example, Daniel Blackburn who is here today from the International Centre for Trade Union Rights (ICTUR)

is initiating a project of legal education, so as to encourage the introduction of submissions concerning ILO standards in employment tribunals and ordinary courts at first instance. There has also been a new initiative in the form of an Academic Network on the European Social Charter, which was established last year, and which with the assistance of the Charter Secretariat is launching training events, conferences, and publications designed to raise awareness.

The ILO itself has made various efforts in this regard. These include its long established role of technical assistance to states to assist in compliance with the findings of ILO supervisory bodies, funded programmes such as the International Programme for the Elimination of Child Labour, the 1998 Declaration, its follow-up and associated projects, as well as the ILO World Commission on the Social Dimension of Globalization. In this way, the profile of workers' rights as socio-economic rights has been maintained, if not raised. The move to popularise understanding of workers' rights as human rights will not, one hopes, obscure the need for other long-standing and vital ILO standards to be respected, such as those on health and safety and working time, which might seem less immediately compelling than the list of core labour rights in the 1998 Declaration, but are of direct relevance to all those in work. My hope is that we will not confuse the brilliant endeavours of the ILO under the leadership of Juan Somavia to reinvigorate the protection of workers' rights within a framework of globalization with abandonment of its traditional supervisory mechanisms. ILO supervisory organs, such as the Committee of Experts and the Committee on Freedom of Association, play a vital role in identifying the respects in which the legal and policy framework of particular states do not comply with their international obligations, and as such serve as a crucial reference point for those who hope to challenge government policy domestically. This is another respect in which its supervisory role can be seen as effective.

This celebration of the work that the Committee of Experts has done over the past 80 years may be regarded as a mark of ILO recognition of its extremely valuable function and continuing role in the effective protection of socio-economic rights. My hope is that the work of the ILO continues in this complementary vein, and that it can be emulated across the international system. In this way, it may be possible to promote co-ordination of diverse mechanisms for the protection of socio-economic rights, and ensure that they are broadly consistent in their approaches.

Facing the realities of supervision of social rights: The experience of the UN Rapporteur on indigenous peoples

Rodolfo Stavenhagen *

I. Introduction

Over the last two decades the situation of indigenous peoples worldwide and the enjoyment of their human rights has become a key issue in the international arena. This development is reflected in the establishment of the Working Group on Indigenous Populations (WGIP) in 1982, the proclamation by the United Nations General Assembly of the Second International Decade for Indigenous Peoples, 1995-2004, and the establishment of the Permanent Forum on Indigenous Issues in 2000. The ILO has been a pioneering actor in the contemporary saliency of indigenous issues on the human rights agenda, particularly since the adoption in 1989 of the Convention on Indigenous and Tribal Peoples (No. 169).

In 2001, the Commission on Human Rights established the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in response to the growing international concern regarding the marginalization and discrimination against indigenous people worldwide. The mandate represents a significant moment for the ongoing pursuit of indigenous peoples to safeguard their human rights and aims at strengthening the protection mechanisms of the human rights of indigenous peoples.

The various activities undertaken within the mandate can be seen as a test case for evaluating the effectiveness of international human rights mechanisms. The issue is particularly relevant in relation to indigenous rights, many of which belong to the wider area of economic, social and cultural rights.

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In this article, I discuss the role of the Special Rapporteur's recommendations in strengthening the protection of the rights of indigenous peoples in their respective countries. After a brief introduction to the mandate and activities of the Special Rapporteur, reference will be made to different follow-up initiatives put in place by governments, international agencies, and civil society organizations in order to promote a more effective implementation of the Special Rapporteur's recommendations. A number of examples will be provided of recommendations that have actually contributed to specific changes in law and policy in some countries. In the concluding section, I reflect on the overall impact and effectiveness of the mechanism of the Special Rapporteur as it relates to other international human rights bodies and procedures.

II. The mandate of the Special Rapporteur on indigenous peoples

In 2001, the Commission on Human Rights established the mandate of the Special Rapporteur on the situation on human rights and fundamental freedoms of indigenous people, as part of the wider system of thematic and country special rapporteurs, independent experts, special representatives and working groups of the Commission (commonly known as "special procedures").[1] The mandate of the Special Rapporteur was renewed for an additional period of three years in 2004,[2] and subsequently extended by the Human Rights Council for an additional year in 2006 together with the rest of the Commission's bodies and procedures.[3]

As distinct to the other main pillar of the UN human rights machinery –treaty bodies– special procedures are not created by specific international human rights conventions; they are normally unipersonal; and they do not act under formal reporting or complaint procedures. They represent a more dynamic – and also more universal – side of the UN human rights mechanisms, and the flexibility of their specific mandates allows for a wide range of different activities, mixing both elements of protection and promotion.

As defined by the Commission's resolution, the mandate of the Special Rapporteur is threefold. First, to "gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms".[4] Second, to formulate

[1] Commission on Human Rights Resolution 2001/57, UN Doc. E/CN.4/RES/2001/57 (24 April 2001).

[2] Commission on Human Rights Resolution 2004/62, UN Doc. E/CN.4/RES/2004/62 (21 April 2004).

[3] Human Rights Council Decision 2006/102, UN Doc. A/HRC/DEC/1/102 (13 November 2006).

[4] Commission on Human Rights Resolution 2001/57, UN Doc. E/CN.4/RES/2001/57 (24 April 2001), para. 1(a).

recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people.[5] And third, to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights.[6]

Since my appointment in 2001, I have concentrated on three main areas of work, which are similar to the ones undertaken by other special procedures: first, thematic research on issues that have an impact on the human rights situation and the fundamental freedoms of indigenous peoples; second, country visits; and third, communications with Governments concerning allegations of violations of human rights and fundamental freedoms of indigenous peoples worldwide.

My first annual report and plan of work to the Commission in 2002, was followed by three annual thematic reports to the Commission and two to the Council, each one focusing on specific issues, such as the impact of large-scale development projects on human rights and fundamental freedoms of indigenous peoples and communities;[7] the access to the administration of justice by indigenous peoples and indigenous customary law;[8] the hindrances and inequalities that indigenous peoples face in relation to the access to and the quality of education systems;[9] and the question of constitutional reforms, legislation and implementation of laws regarding the promotion and protection of rights of indigenous people and the effectiveness of their application.[10] My last report, presented to the Human Rights Council in March 2007, presented an overall picture of the state of the rights of indigenous peoples of the world, focusing on new trends and challenges that have become visible in recent years.[11]

Official missions to countries are a crucial component of the mandate, as they allow for a constructive dialogue with the Government, indigenous communities, and other relevant organizations. Country visits are essential for a clearer analysis and understanding of the situation of indigenous peoples in different circumstances and also contribute to raise awareness about these issues in the international community. Since 2002, I have reported to the Commission and

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[5] *Ibid*., para. 1(c).

[6] *Ibid*., para. 1(d).

[7] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc E/CN.4/2003/90 (21 January 2003).

[8] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc. E/CN.4/2004/80 (26 January 2004).

[9] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc. E/CN.2005/88 (6 January 2005).

[10] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc. E/CN.4/2006/78 (16 February 2006).

[11] *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council" – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc. A/HRC/4/32 (27 February 2007).

the Council on visits to 10 countries in Africa, the Americas, Asia, and the Pacific.[12]

Finally, an important feature of the mandate are the communications with Governments regarding allegations of human rights violations of indigenous people. This procedure consists of letters to Governments that are typically classified as "urgent appeals" in case of imminent danger to persons or communities, and "allegation letters," in less urgent cases.[13] While these communications are indeed important means to draw the attention of Government and other actors to specific situations or trends, for the purposes of this article reference is made particularly to the impact of the recommendations incorporated in my reports to the Council.

III. The nature of the Special Rapporteur's recommendations

The thematic and country visit reports include recommendations that are important for the advancement of the promotion and protection of indigenous people's rights. Although mainly intended for Governments, some are also addressed to United Nations agencies and programmes, indigenous peoples' organizations, civil society and academic institutions.

These recommendations are not compulsory decisions adopted by an international court nor are they equivalent to the observations of human rights treaty bodies. However, in as much as they are incorporated in an official document prepared by an independent expert for the Human Rights Council, the highest body responsible for human rights issues in the United Nations, these recommendations have some level of authority that cannot simply be disregarded by the States concerned.

In addition, they do not operate in a normative vacuum. The Special Rapporteur's work is informed by and builds upon existing international standards regarding indigenous rights, including treaties, customary law and "soft law"; the decisions and recommendations of international human rights bodies responsible for monitoring those norms, which have developed a specific jurisprudence concerning indigenous peoples among others.[14] Thus, the recommendations of

[12] The following reports are available: Guatemala (UN Doc. E/CN.4/2003/90/Add.2), Philippines (UN Doc E/CN.4/2003/90/Add.3), Mexico (UN Doc. E/CN.4/2004/80/Add.2), Chile (UN Doc. E/CN.4/2004/80/Add.3), Colombia (UN Doc. E/CN.4/2005/88/Add.2), Canada (UN Doc. E/CN.4/2005/88/Add.3), South Africa (UN Doc. E/CN.4/2006/78/Add.2), New Zealand (UN Doc. E/CN.4/2006/78/Add.3), Ecuador (A/HRC/4/32/Add.2) and Kenya (A/HRC/4/32/Add.3).

[13] As a general rule, both urgent appeals and letters of allegation remain confidential until published in the annual report of the Special Rapporteur to the Commission on Human Rights, now to the Human Rights Council. A summary of such communications and the replies received from the concerned Government are formally included in the first addendum to the Special Rapporteur's annual reports.

[14] See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*, UN. Doc. E/CN.4/2002/97 (A/HRC/4/32/Add.2), paras. 6-33, and *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, UN Doc. E/CN.4/2006/78 (26 February 2006), paras. 7-13, 51-79.

the Special Rapporteur are part of the wider system of international norms, actors and procedures that interact to promote the rights of indigenous peoples, and from which they also derive their own legitimacy.

The human rights situation of indigenous peoples is derived from complex historical processes and structural phenomena, and therefore the actions and strategies required to improve this situation are necessarily multifaceted. At times, when there is need for specific legal, institutional or constitutional reform to guarantee the rights of indigenous peoples or to solve possible conflicts between existing domestic legislation, then the implementation of these recommendations may be relatively easy to assess. In other instances, when for example indigenous populations are systematically disadvantaged regarding the delivery of social services, then recommendations concerning adequate institutional measures and precise indicators may be in order.

In 2005, the Commission on Human Rights requested the Special Rapporteur to study the best practices carried out to implement the recommendations contained in his reports.[15] This preliminary study, presented at the 4th session of the Human Rights Council in March 2007, records various national level initiatives that follow-up on the recommendations of the Special Rapporteur, and examines their impact including the effectiveness of the mechanism as a whole.[16]

IV. Follow-up on the Special Rapporteur's recommendations: The OHCHR project in Mexico and Guatemala

In 2005, the Office of the High Commissioner (OHCHR) country offices in Mexico and Guatemala, in cooperation with the respective Governments, initiated the project *Promotion and protection of human rights of indigenous peoples in Central America with a special focus on Guatemala and Mexico*, with funding by the European Commission. One of the main objectives of this project is to provide support to both Governments in implementing the recommendations of the Special Rapporteur's country reports, particularly by setting up human rights protection and monitoring standards to measure the implementation of the recommendations, the developments in the legal system, and the changes in the human rights situation of indigenous peoples and of women in particular.

In the framework of this project, OHCHR has promoted training courses for members of the Government, the judiciary and indigenous organizations on

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[15] Commission on Human Rights Resolution 2005/51, UN Doc. E/CN.4/RES/2005/51 (20 April 2007), para. 9.

[16] See *Study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur*, UN Doc. A/HRC/4/32/Add.4 (26 February 2007). A preliminary report on the study was presented to the Human Rights Council in 2006; see *Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur*, UN Doc. E/CN.4/2006/78/Add.4 (26 January 2006).

the rights of indigenous peoples. The project also promoted the dissemination of the reports by way of printed and audio materials in Spanish and indigenous languages. Two research projects on the recognition of traditional indigenous law in the official legal system of Mexico, following my recommendations on indigenous law and access to justice, and one on the situation of the rights of indigenous women were launched in 2006.

OHCHR Mexico, its counterparts in the Government and indigenous and human rights organizations held meetings to evaluate the state of implementation of these recommendations in 2006 and 2007. Similar meetings, widely attended, have taken place in Guatemala during the Special Rapporteur's follow-up mission in 2006.

OHCHR Mexico conducted a survey on actions taken by government institutions, the legislative and judicial branches, as well as national human rights institutions at the federal and state levels to implement the Special Rapporteur's recommendations. In Guatemala, the Office has assisted the Presidential Commission on Human Rights (Comisión Presidencial de los Derechos Humanos, COPREDH) in the elaboration of indicators to improve monitoring of the Special Rapporteur's recommendations.

The OHCHR binational project has also helped further the action of OHCHR country offices in the field of indigenous rights in those two countries. In Mexico, the Office identified the administration of justice in the State of Oaxaca as one of the priority areas for 2005. In planning the different activities in this area, consideration was given to the Special Rapporteur's recommendations in his report on administration of justice and indigenous law.

Together with the OHCHR initiative, a number of international agencies have used the Special Rapporteur's thematic and country recommendations in their programmatic work. For instance, in Guatemala the UN country team's inter-agency thematic group on indigenous and multicultural issues engages in training indigenous peoples' organizations, as recommended in the Special Rapporteur's report.[17]

In addition, indigenous peoples and their support organizations also contribute to the practical implementation of the recommendations. A growing number of experiences in countries visited provide examples of how indigenous peoples have appropriated these reports and used them as practical tools in the defense of their rights. This is particularly the case of Mexico, where the Citizen Observatory of Indigenous Peoples (Observatorio Ciudadano de los Pueblos Indígenas, OCPI), of the Mexican Academy of Human Rights, in cooperation with the UNESCO Chair on Human Rights of the National Autonomous University of Mexico, monitors the implementation of the Special Rapporteur's recommendations after his visit to Mexico in 2003. The Observatory launched a

[17] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/5, Addendum: Mission to Guatemala,* UN. Doc. E/CN.4/2003/90/Add.2 (24 February 2003) [hereinafter "*Report on Guatemala*"], paras. 86 and 87.

nationwide campaign to promote knowledge of the Special Rapporteur's mandate and recommendations, and to evaluate their state of implementation through an information request system (SISI), which is available on the Internet.[18]

V. "Best practices" in the implementation of the Special Rapporteur's recommendations

The OHCHR project in Guatemala and Mexico, as well as the follow-up initiatives promoted by international agencies and civil society in these two countries, offer an unprecedented test-tube to assess the domestic impact of the mandate. The study on best practices provides a number of examples of how these recommendations have resulted in actual legal and policy changes in these two countries in areas that are of direct interest for indigenous peoples. Many of these "best practices" are the result of specific governmental and non-governmental initiatives to follow-up on the recommendations of the reports. Despite these positive steps, however, many important human rights concerns alluded to in the Special Rapporteur's recommendations have still not been addressed. The mixed record of implementation suggests a necessary reflection on the limits of UN special procedures, particularly in the field of economic, social, and cultural rights, and of the need to rethink ways of enhancing implementation in cooperation with all relevant stakeholders.

1. Guatemala

In Guatemala, the follow-up visit provided an opportunity to recognize an increasing level of awareness among State authorities of the need to give priority attention to indigenous issues, as recommended. The Report paid special attention to the 1996 Peace Accords, which include the Agreement on Identity and Rights of Indigenous Peoples. This agreement defines a comprehensive program of action to advance the recognition and protection of the rights of indigenous peoples. But the Report noted that the full implementation of the Agreement was behind schedule and recommended that appropriate measures be taken to overcome this delay.[19] An encouraging development in this regard is the adoption in August 2005 of the Framework-Law on the Peace Agreement (Decree No. 52-2005) which makes the implementation of the Peace Agreements a legal commitment of the Guatemalan State.

In connection with the Peace Agreements, the Special Rapporteur also welcomed a number of initiatives seeking redress for the atrocities committed during the civil war against indigenous people. In 2004, in implementation of the decision of the Inter-American Court of Human Rights in the Masacre de

[18] See http://www.amdh.com.mx/ocpi (last consulted 12 March 2007).

[19] *Report on Guatemala, op.cit., supra*, paras. 4, 71.

Plan de Sánchez case, concerning a massacre in a Mayan village in 1982 committed by the military, the Government organized a public event at which it acknowledged its responsibility for the atrocity and apologized to the victims and their relatives. In 2006 the Presidential Commission on Human Rights (Comisión Presidencial de Derechos Humanos, COPREDEH) initiated the compensation to the victims of the massacre.

The Special Rapporteur's report emphasizes the need to strengthen and prioritize measures to combat the high level of racism and discrimination in the country. There have been a number of court decisions in recent years regarding cases of racial discrimination, which is a crime under the Guatemalan Penal Code. Institutional action in this regard has been reinforced with the establishment of the Presidential Commission to Combat Discrimination and Racism against Indigenous Peoples (Comisión Presidencial contra la Discriminación y el Racismo contra los Pueblos Indígenas en Guatemala, CODIRSA). As a follow-up to a specific recommendation in the Special Rapporteur's report,[20] CODIRSA, with the technical assistance of OHCHR Guatemala, announced the launching in 2007 of a national campaign for coexistence and elimination of racism and racial discrimination.

Addressing the situation of serious and systematic discrimination faced by indigenous women, the Report recommended the adoption of "special measures", including "greater political, legal and economic support to the Office for the Defense of Indigenous Women [Defensoria de la Mujer Indígena, DEMI]."[21] A positive development in recent years has been the strengthening of the work of DEMI, with the support of international organizations and agencies, including OHCHR, UNDP, UNICEF and others. DEMI is now a key actor in the national human rights machinery, and requires continuous support to perform its important task.

The Report further recommends that Guatemala strengthen the educational system as a "national priority", including the extension of bilingual education to all areas of the country.[22] An important measure of the implementation of this recommendation is the establishment of a Vice-Ministry of Bilingual Inter-cultural Education in 2003 and the adoption of Government Agreement No. 22-2004 on the extension of multicultural bilingual education in the school system, including the development of appropriate curricula. In addition, in 2003 Congress passed the Law on National Languages (Decree No. 19-2003), which officially recognizes the Mayan, Garifuna and Xinka languages and promotes their preservation and use in the Administration. This new legal and institutional framework has been welcomed by indigenous organizations and experts, who now demand its full implementation.

[20] *Ibid*., para. 67.

[21] *Ibid*., para. 79.

[22] *Ibid*., para. 77.

2. Mexico

After the controversial constitutional reform of 2001 regarding indigenous peoples, a number of federal states (Nayarit, Campeche and Quintana Roo among others) adopted their own laws on indigenous rights and culture, in line with the recommendations of the Special Rapporteur.[23] Nevertheless, the federal constitutional review on indigenous issues remains at a stalemate.

Important efforts to promote the implementation of recommendations concerning the review of the administration of justice in order to address the specific needs of indigenous peoples have been initiated, such as the consolidation and extension of the system of bilingual translators in the courts, the training of bilingual legal aid services, including university students in Oaxaca.[24] In Chiapas, the Office of the Prosecutor on Indigenous Justice (Fiscalía de Justicia Indígena) was created in 2005, and is staffed by indigenous lawyers who receive special training to ensure that the rights of indigenous peoples are respected in cases involving indigenous communities and individuals. In Querétaro, the Public Prosecutor's Office established a mobile office specializing in indigenous issues. Several states, including the State of México, Michoacán and Puebla, now have programs to train legal translators and interpreters in indigenous languages.

In line with the Special Rapporteur's recommendation to incorporate indigenous law in the judicial system,[25] new "indigenous courts" or "peace and reconciliation courts" have been established in Campeche, Chiapas, Hidalgo, Puebla, Quintana Roo and San Luis Potosí, comprised of members of local indigenous communities, with power to hear civil and family cases, as well as minor criminal cases, on the basis of indigenous law and custom. The National Commission for the Development of Indigenous Peoples (Comisión Nacional para el Desarrollo de los Pueblos Indígenas, CDI) has conducted studies on indigenous law and its "compatibility" with human rights norms and national legislation.

The Special Rapporteur's recommendation to review the case files of indigenous persons prosecuted by the different courts in order to "remedy any irregularities" has been addressed by CDI, which has reviewed thousands of case files and is preparing a census of the indigenous population in national prisons. Similar programs have been implemented in Hidalgo, Michoacán and Oaxaca.[26]

A best practice is the implementation of the Special Rapporteur's recommendation to strengthen and provide adequate institutional resources to bilingual

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[23] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Mission to Mexico*, UN Doc. E/CN.4/2004/80/Add.2 (23 December 2003) [hereinafter "*Report on Mexico*"], para. 66. See CNDI, *La vigencia de los derechos indígenas en México* (2006). Electronic book available at: http://cdi.gob.mx/derechos/vigencia_libro/vigencia_derechos_indigenas_mexico.pdf (last consulted 12 March 2007).

[24] *Report on Mexico, op.cit., supra*, paras. 82, 85.

[25] *Ibid*., para. 93.

[26] *Ibid*., para. 86. The Special Rapporteur recommended particularly (para. 87) that CDI should be assigned a "greater role" in this regard.

intercultural education in the country.[27] The Ministry of Public Education has recently expanded bilingual secondary education, already provided in preschool and primary school, through a special course on indigenous peoples taught in several indigenous languages, and a number of "intercultural high schools" and "communitarian high schools", with adapted curricula and teaching in indigenous languages, have been created in areas of Chiapas, Oaxaca and Tabasco. Eight "intercultural universities" have been set up in indigenous regions in the States of Chiapas, Guerrero, México, Michoacán, Puebla, Quintana Roo, Tabasco and Veracruz. The use of indigenous languages in education and in other spheres of public life has also been reinforced by the recently created National Institute on Indigenous Languages, responsible for the implementation of the General Law on the Linguistic Rights of Indigenous Peoples (2003).

VI. Conclusions

The various cases reviewed suggest that my thematic and country reports have had differential impacts. As official United Nations documents providing a fully independent viewpoint, thematic reports are part of ongoing discussions and policymaking concerning issues of special relevance for indigenous peoples, and their impact cannot be easily evaluated in terms of the implementation of the specific recommendations they contain. The Special Rapporteur's country visits have generally had a more direct impact on legal, social and political dynamics at the national level. These reports, and the visits themselves, have helped promote spaces of dialogue between States and indigenous peoples, have contributed to educating government actors, civil society and the general public on the situation of indigenous peoples in their own countries, and have been appropriated by indigenous peoples and human rights organizations as an advocacy tool.

The recommendations in these reports do not provide a "magic fix", and do not generate automatic and speedy changes in the situation of the rights of indigenous peoples. Their level of implementation varies according to different country situations and issues addressed. The various cases of initiatives to monitor and promote their implementation indicate that successful results cannot be left to traditional institutional routines alone, but require specific "push" actions based on the cooperation between governments, the United Nations, civil society and indigenous peoples themselves.

In countries where follow-up mechanisms exist, such as in Mexico and Guatemala, institutional efforts towards implementation have been more sustained, leading to concrete changes in law and practice. These mechanisms take different forms, such as monitoring bodies, national forums and follow-up missions, and involve a myriad of governmental and non-governmental actors, as

[27] *Ibid*., para. 102.

well as international agencies. The process of implementation of the Special Rapporteur's recommendations has opened spaces for dialogue between Governments, civil society and indigenous peoples and organizations. In all cases where substantive advances can be reported, indigenous peoples have been actively involved in the process.

The comparative analysis of best practices in several countries shows that the effective changes in implementation of the Special Rapporteur's recommendations are more easily detected in relation to recommendations related to the areas of social policy and development, as well as to the strengthening of specific government institutions and policies related to indigenous affairs. However, many of the main recommendations remain unaddressed, particularly in the fields of legal and constitutional reform and indigenous land and resource rights, including the right of consultation in relation to development projects in indigenous territories.

These experiences suggest that, despite the advances that can be identified, the general record of implementation of the Special Rapporteur's recommendations is gloomy. Much remains to be done by the Governments, international agencies and other relevant stakeholders to bridge the "implementation gap" that divides international and domestic norms and the serious human rights violations that indigenous peoples continue to experience in all parts of the world.

Réflexions sur le parallélisme dans la mise en œuvre des droits économiques et des droits sociaux

Brigitte Stern *

Pour reprendre le titre de cette table ronde qui est l'effectivité du contrôle international dans le domaine des droits économiques et sociaux, je désire, en ce qui me concerne, faire deux ou trois remarques. Dans un premier temps, je souhaite articuler quelques réflexions sur le concept d'effectivité avant d'essayer de vous vous proposer ensuite une grille des différents mécanismes possibles pour assurer cette effectivité. Je voudrais, enfin, poser la question qui est de savoir si on peut toujours parler d'effectivité dans le domaine des droits économiques et sociaux sans distinguer les droits économiques et les droits sociaux. Il semble que dans certains cas il y a peut-être des contradictions, j'en donnerai des exemples.

Quelques remarques d'abord sur l'effectivité. Lorsque l'on dit «effectivité du contrôle international» je vais appréhender cela comme «effectivité des normes», car le but est d'avoir des normes qui ont une effectivité. L'effectivité des normes juridiques n'est pas, à mon avis, un concept strictement juridique, même s'il peut avoir des liens avec le système juridique et les mécanismes de contrôle mis en œuvre. L'effectivité est, selon moi, un concept sociologique, social, qui mesure le degré de mise en œuvre des normes dans la réalité juridique. Le but des règles est qu'elles soient appliquées, donc, au fond, l'effectivité c'est tout simplement de savoir si elles le sont.

Selon Monsieur Malinverni, l'effectivité se mesure à la possibilité d'être sanctionné. Il s'agit là d'une remarque qui peut, éventuellement, être un peu discuté. Cela est vrai, il y a une plus ou moins grande probabilité d'effectivité

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lorsqu'il y a des sanctions, mais ce n'est pas évident. Outre la sanction, l'effectivité va également être en partie liée au caractère, plus ou moins obligatoire, de la norme. En réalité, ni l'une ni l'autre de ces affirmations ne sont totalement justes dans la mesure où il y a des normes dont le non-respect pourrait être sanctionné sans pour autant que cela donne des résultats probants. Après tout, il ne se passera rien si un Etat décidait de ne pas mettre en œuvre un jugement de la Cour international de Justice. En ma qualité de membre du Tribunal administratif de l'ONU, je peux également me référer à titre d'exemple à un avis important de ce tribunal qui, je le pense, était important mais n'a pas plu à l'Organisation puisqu'elle ne l'a pas mis en œuvre. Voilà, par conséquent, un certain nombre de cas où nous avons apparemment une sanction, un processus, et où l'effectivité est tout de même assez moyenne.

De la même façon, je pense qu'il y a des cas où les traités sont assez inefficaces, alors que des normes de soft law, des codes de conduite, s'ils sont respectés, peuvent être très efficaces. L'effectivité n'est, dès lors, pas, je le crois, strictement liée ni à la nature juridique, ni au mécanisme juridique de mise en œuvre.

Bien sûr, l'analyse de l'effectivité d'une norme ne peut pas se faire de façon complètement isolée du système juridique et, en particulier, des mécanismes juridiques qui assurent la mise en œuvre des normes.

Après ces quelques réflexions introductives concernant l'effectivité, je voudrais essayer de réfléchir un peu aux différents mécanismes possibles qui sont susceptibles de l'assurer. Bien sûr, on l'a dit et redit, et plusieurs des contributions s'inscrivent dans l'une ou l'autre de ces catégories, il y a des mécanismes juridiques dont l'objet est de favoriser les normes. Il y a des mécanismes à différents stades, après la violation, avant celle-ci, des mécanismes plutôt juridictionnels ou quasi-juridictionnels et d'autres non juridictionnels.

Je vais tout d'abord évoquer très rapidement les mécanismes juridictionnels et de mise en œuvre de la responsabilité, des mécanismes qui interviennent après la violation de la norme. Dans tous les systèmes juridiques existe le mécanisme de la responsabilité qui intervient une fois qu'une violation est commise. La responsabilité, qu'elle soit nationale ou internationale, est donc le fait de répondre de ses actes. Il en va ainsi de la réparation due lorsque l'acte en question porte atteinte à un devoir garanti par la norme ou, dans certains cas, à l'équilibre matériel, par exemple dans le cas de responsabilité sans faute.

Nous avons précédemment parlé de compensation: il faut réparer, rétablir la situation qui aurait existé si l'acte à l'origine de la responsabilité n'avait pas eu lieu. Bien évidemment, cette responsabilité est mise en œuvre dans le cadre des mécanismes déjà évoqués comme la Commission européenne des droits de l'homme, la Cour interaméricaine des droits de l'homme, mais également dans d'autres enceintes comme l'OMC ou l'ALENA.

Je me propose de m'arrêter quelques instants sur l'OMC, qui dispose d'un mécanisme quasi-juridictionnel de règlement des différends mais dont on pourrait presque enlever le «quasi», puisque les différents cas examinés au sein de ce mécanisme donnent lieu à un corps de décisions que l'on serait en droit de

considérer comme une jurisprudence. Ainsi, bien que stricto sensu il s'agisse d'un mécanisme quasi-juridictionnel, je crois que l'on peut pratiquement dire que c'est une juridiction. Le plus grand défaut du mécanisme de l'OMC est que son but est la mise en œuvre de la norme, mais par la réparation. Dans le cas où un Etat aurait, pendant trois ans, violé la norme, il n'y a pas de réparation, il n'y a pas de mécanisme de responsabilité, c'est un mécanisme de mise en conformité pour le futur. Il y a des cas où cela ne marche pas du tout, par exemple, dans l'affaire de l'acier américain où les Etats-Unis avaient besoin, durant quelques années, de protéger leur industrie de l'acier. Lorsque la décision établissant que cela était contraire aux règles de l'OMC est finalement intervenue, les Etats-Unis n'en avaient plus besoin. Toutefois, pendant trois ans, la violation n'a eu aucune conséquence négative. Il s'agit par conséquent d'une chose à laquelle l'OMC devrait, à mon sens, réfléchir.

Je voudrais maintenant, après avoir abordé les mécanismes de responsabilité qui interviennent après la violation, parler des autres mécanismes qui ne sont pas contentieux et sur les lesquels ce colloque s'est très largement penché. Ces mécanismes font appel à différentes techniques. Si nous regardons un peu au-delà de notre domaine, je pense que nous n'adoptons pas tout à fait les mêmes méthodes dans les domaines du désarmement, des droits de l'homme – économiques et sociaux –, et dans le domaine de l'environnement. Très rapidement, il semble que dans le domaine du désarmement on utilise surtout l'inspection – on va, par exemple, vérifier sur place le nombre d'ogives, vérifier que l'Iraq n'a pas d'armes de destruction massive ou, plutôt, qu'il en a. Dans le domaine des conventions des droits de l'homme, qui sont au centre de nos travaux, ce n'est pas tellement la logique de l'inspection, mais celle de la dénonciation (la «mobilisation de la honte»), quant au domaine de l'environnement, il s'agit d'une logique d'accompagnement, d'incitation. Quelqu'un évoquait précédemment la différence entre l'Etat qui ne veut pas et celui qui ne peut pas. Dans le domaine de l'environnement, cela est pris en compte et il y a des comités d'application, par exemple, dans le cadre du Protocole de Montréal, qui mettent en œuvre ce que nous appelons des procédures de non-conformité. Cela est très important: ce ne sont pas des procédures de violation mais des procédures de non-conformité, et nous cherchons à voir comment nous pouvons inciter les Etats à se mettre en conformité. Cela est, bien sûr, aussi le côté incitatif qui est sous-jacent à un certain nombre des procédures qu'on a vues dans le domaine des droits de l'homme et dans celui des droits économiques et sociaux.

J'en arrive maintenant au troisième point, qui est une interrogation: pouvons-nous parler comme cela, sans vraiment y réfléchir, des droits économiques et sociaux? Nous l'avons tout le temps fait, mais n'y a-t-il pas des domaines où il y a une très grande effectivité de la mise en œuvre de droits économiques dans l'ignorance, ou même au détriment, peut-être, des droits sociaux? Je vais donner un ou deux exemples, et tout d'abord celui de l'OMC justement, où les droits économiques sont très sérieusement mis en œuvre, avec possibilité d'une sanction mais où, par exemple, les droits économiques des Etats (un commerce qui n'est pas discriminatoire, le droit à la liberté du commerce, etc., ce sont des

droits économiques), peuvent rejaillir sur les entreprises. On sait très bien que dans le cadre de l'OMC la clause sociale qui était censée protéger les travailleurs, assurer un minimum social à tous les pays de l'OMC, a été refusée par les pays en développement et n'a pas été intégrée dans le droit de l'OMC. Nous avons donc là une grosse efficacité de la mise en œuvre des droits économiques et assez peu des droits sociaux.

Autre domaine où ce problème se pose, à mon avis, de plus en plus, celui de l'investissement international. Je vais ici dire quelques mots de l'ALENA (Accord de libre-échange nord-américain), dans lequel le chapitre 11 permet aux investisseurs de faire respecter leurs droits face aux Etats, et également du CIRDI (Centre international de règlement des différents économiques internationaux) sous l'égide de la Banque mondiale, qui de la même façon permet à des investisseurs de mettre en œuvre ces droits économiques. Dans ces deux domaines, on s'aperçoit de plus en plus que le droit économique, le droit de propriété des investissements, qui est un droit économique, est assez bien protégé mais qu'il y a de plus en plus d'ONG qui interviennent et qui essayent de mettre en avant les droits sociaux qui ne seraient peut-être pas aussi bien respectés – droits sociaux allant jusqu'au droit à l'environnement sain, etc. Je voudrais, à cet égard, peut-être marquer un tout petit désaccord avec ce qu'a dit Mme Novitz, qui a dit «there is limited scope for civil society» à l'OMC. Je ne le crois pas. L'OMC a largement ouvert ses portes aux *amicus curiae*; la société civile se fait entendre pratiquement dans toutes les affaires, tant au niveau des panels que de l'organe d'appel. C'est une évolution assez remarquable et ce phénomène a débordé sur l'arbitrage international, d'abord dans le cadre de l'ALENA où dans une affaire opposant UPS au Canada, les syndicats des postiers sont intervenus afin de faire valoir des droits qui n'allaient pas toujours dans le sens des droits économiques de la société plaignante. Il est donc évident que nous sommes en présence de choses plus complexes que la formule «droits économiques et sociaux». Le raisonnement des organes de règlement des différends de l'OMC a parfois été repris textuellement par les tribunaux arbitraux dans le cadre de l'ALENA et en mai dernier il y a eu deux décisions arbitrales dans le cadre du CIRDI qui, allant à l'encontre de la volonté des parties, ont accepté des *amicus curiae* qui se préoccupaient de la façon dont était gérée l'eau potable en Argentine dans deux affaires. Voilà donc quelques réflexions autour de l'idée que l'effectivité des droits économiques et des droits sociaux ne va pas toujours de pair.

Discussion

*Cassio Mesquita Barros** – In order to assess the effectiveness of supervision, it is essential to clearly define the objective of this action. In this context, the difference between social and economic rights and human rights is key. Yet, this difference has rather been blurred. The evaluation of social and economic rights in democratic regimes belongs to the legislator who determines what can each group demand from society. The decision of the Federal Constitutional Court of Germany concerning Article 109(2) of the German Constitution illustrates this point. The main parameter for the budget of the Federal Government and the Lander is the general economic balance, and therefore the budget is subject to what is economically possible. Labour rights share the same characteristics and are subject to the consideration of the economically possible in the global economy. In contrast, human rights do not carry such considerations. Human rights only crystallize those principles, where humanity, according to its experience, accepts that violation leads to arbitrary situations and backward movement of society. It is therefore crucial to clarify the difference between social and economic rights and human rights, to be able to decide an appropriate mechanism for assessing effectiveness.

*Eibe Riedel** – I agree with Ms. Novitz that the subject matter of this colloquium is significant. Addressing human rights in the field of labour law and standard-setting in the ILO is about mainstreaming human rights in the entire UN system. It is in this context that the discussion about the Declaration plays such an important political and legal role; the treaty bodies and the Committee of Experts represent just one facet of the picture.

I concur that soft law often offers an alternative to sanctions. This is to be taken into consideration, when dealing with the policy aspects of human rights, strategies and plans of action. For example, the UN Committee on Economic, Social and Cultural Rights, in making suggestions and recommendations, regularly pushes a little bit beyond the text of the Covenant. However, when interpreting the Covenant, we are in the strictly legal field and bound by the text.

I also wholeheartedly agree with Ms. Stern that standards of soft law may be quite effective. What we have increasingly in the field of international law are standards that can be applied but do not have to be applied. For the millions of people suffering from poverty, however, it does not matter whether they can be applied or whether they must be applied. What eventually is important is that these standards are applied. The 'can' norms, as I call them, or the "zebras", as they have been called in the ILO context, illustrate that, in the end, it is the outcome for the people affected that matters. This is the genuine human rights

* Former Member, ILO Committee of Experts (1991-2006).

** Professor of Law, University of Mannheim; Vice-Chairperson of the UN Committee on Economic, Social and Cultural Rights.

approach: to look at the issue from the point of view of the recipients, and not from the point of view of the "*domaine reservé*" of Member States.

I would further like to refer to the passionate speech of Mr. Stavenhagen. It is extremely interesting how the combat for greater acceptance of ILO standards on indigenous people moves ahead, and we all know the reasons why it is so difficult. For example in the cases that we have had in Canada, the conflict between constitutional considerations on the one hand, and self-determination and First Nations approach on the other represented a major stumbling-block. Solutions to these complex questions need to be found. The Committee on Economic, Social and Cultural Rights has tried from its very inception to take an approach to show the indivisibility, interdependence, co-variance and equal treatment of all human rights, be they civil and political or economic, social and cultural. The issue of indigenous people threatened with extinction is a key area for human rights law and human rights standards. I therefore fully support Mr. Stavenhagen's comments.

Finally, I would like to address Ms. Stern's point on the mechanisms developed within the WTO, such as the panel decisions, which each party may either accept or refer to the appellate "tribunal". This is a very subtle way to describe those decisions as if they emanated from a court. The WTO community would probably like that but I beg to differ from an international law point of view – particularly when you look at how the exceptions to the GATT Article 20 are being dealt with. On this point, the Committee on Economic, Social and Cultural Rights has taken from the outset a very strict and firm view that should not be ignored.

*Giorgio Malinverni** – J'aimerais revenir sur la distinction faite par Mme Stern entre droits économiques et droits sociaux du point de vue de l'effectivité de leur mise en œuvre et de leur contrôle. Il me semble que les exemples donnés par Mme Stern sont des droits économiques, de l'État ou des entreprises. Cependant, si par «droits économiques» on entend «droits économiques de l'homme», je ne crois pas que l'on puisse faire une grande différence entre droits économiques et droits sociaux. En ce qui concerne le Pacte sur les droits économiques, sociaux et culturels, on dit généralement que les articles 6 à 8 traitent des droits économiques, les articles 9 à 12 portent sur les droits sociaux et les articles 13 à 15 concernent les droits culturels. Il n'existe cependant pas de différence de nature quant à la mise en œuvre et à l'effectivité de ces différents droits. C'est juste une question de définition.

*Mohamed Ezzeldin Abdel-Moneim*** – Ms. Novitz and Mr. Malinverni have emphasized the link between the Covenant on economic, social and cultural rights and the Covenant on civil and political rights. I agree that both

* Juge à la Cour européenne des droits de l'homme; ancien membre du Comité des Nations Unies sur les droits économiques, sociaux et culturels.

** Member, UN Committee on Economic, Social and Cultural Rights.

Covenants are interdependent, and that they entail the same obligations to fulfil, to respect and to protect. Yet, the fundamental differences between the two Covenants should not be overlooked. Some of the rights in the Covenant on civil and political rights may be suspended temporarily under strict limitations. This can hardly be the case for the economic rights in the Covenant on economic, social and cultural rights because they relate to survival. The only limitation which might seem acceptable in this case is a limitation in scope, not a suspension of the right as such. That is one of the reasons why the General Assembly, when adopting its famous resolution in 1966, did not opt for a single Covenant for political, civil, economic, social and cultural rights, but for two separate instruments. I think the interdependence of the two Covenants should be emphasized and further linkages be explored, while at the same time keeping in mind the fundamental differences between the two instruments.

*Andrzej Marian Swiatkowski** – At the European level, there is only general regulation in the field of social rights, and therefore international standards are a necessity. It is quite clear that governments would challenge any decision relating to standard-setting. The focus must therefore be paced on enforcement. A recent study on the effective enforcement of EC labour law concluded that effective enforcement depended on the existence of a relevant legal instrument, no matter whether regulations are in the form of norms or standards. At present, there is no legal instrument for enforcing social rights due to the general nature of some of those rights, e.g. the right to work, where one has to basically evaluate the programmes set up by governments in order to fight unemployment. There has been some discussion about the possibilities of the European Social Charter, for instance, the adoption of negative conclusions by the European Committee of Social Rights, the formulation of recommendations by the Council of Ministers, etc. However, the problem is that the Committee is limited to presenting opinions on standards and has not as yet reached any conclusion as to whether it should rather regulate those standards. There are, of course, examples of negative conclusions adopted by the European Committee of Social Rights since the very first cycle, such as those concerning the entitlement to social and medical assistance based on the habitual residence test as applied in the United Kingdom. Such examples illustrate that the decisions of the Committee are often faced with the stubbornness of certain governments. Nonetheless, it remains crucial that existing standards continue to be monitored by institutions or committees sufficiently empowered to move forward and promote ideas necessary for the protection of human rights.

*Yozo Yokota*** – Mr. Mesquita Barros said that, in order to assess effectiveness, it was imperative to clearly define the objective. Evaluating effectiveness means to see whether certain studies or monitoring done by a supervisory

* Vice-President, European Committee of Social Rights.

** Professor, Chuo Law School, Japan; Member, ILO Committee of Experts.

body have, after a certain time, achieved an improvement in the enjoyment of economic, social and cultural rights of the persons concerned. The main difficulty in the past has been how to measure any amelioration of the situation. Apart from mere impression, we have no tangible, easily understandable figures for determining whether the level of economic, social or cultural rights enjoyed in a particular country has actually improved. I am going to propose something to try to remedy this situation. Since 1990, the UNDP has been publishing the human development index, a figure that it has constantly tried to refine. I think we could use this figure or develop on the basis of this figure a specific index for the enjoyment of economic, social and cultural rights, which would help us determine whether there is progress in certain countries or for certain communities, even for the community of indigenous people. It is widely argued that indigenous people enjoy less economic, social and cultural rights compared to other groups in the same country. At present, UNDP country-level figures are not broken down by community. For the purpose of assessing the situation of indigenous peoples, we could study the human development index of a particular indigenous community. I therefore propose to use the UNDP figures and try to improve them for the sake of better assessing the level of economic, social and cultural rights.

Brigitte Stern – M. Malinverni a indiqué que nous ne pouvions pas opposer les droits économiques aux droits sociaux. Je ne lui donne que partiellement raison. Je ne suis pas tout à fait d'accord avec lui lorsqu'il affirme que les exemples auxquels je me suis référée relèvent plutôt des droits des États ou des entreprises. En ce qui concerne les droits des entreprises, des entrepreneurs individuels – c'est-à-dire des personnes physiques – peuvent se prévaloir de mécanismes tels que ceux de l'ALENA (Accord de libre-échange nord-américain) ou du CIRDI (Centre international pour le règlement des différends relatifs aux investissements). Par ailleurs, il est clair que les droits des entreprises recouvrent en réalité les droits des actionnaires. Sans entrer dans un débat sur la levée du voile social, j'estime que ce sont quand même les droits économiques des personnes qui sont en cause. Certes, dans le cadre de l'OMC, ce sont les États qui gèrent les procédures. Toutefois, dans l'affaire «tortues-crevettes» par exemple, la question était de savoir s'il fallait protéger le droit des pêcheurs asiatiques à pêcher les crevettes avec leurs méthodes traditionnelles ou le droit à un environnement respectant la diversité biologique. Dans ce cas, s'agissait-il d'un droit social ou de droit de l'environnement? En tout cas il y avait un débat entre, d'un côté, les droits économiques de certaines personnes (les pêcheurs), défendus par un État déterminé devant les organes de l'OMC, et, de l'autre, la question de la protection des tortues. Mon propos était simplement de montrer qu'il existe des tensions considérables au sein de ces arènes économiques.

Rodolfo Stavenhagen – I agree that the human development index is a good instrument, but it is an insufficient one. The figures contained therein must be enhanced, and I am glad to hear that UNDP continues to work on it. I would also

like to stress – in line with my recommendations to a number of countries in my reports – the importance of breakdown data. We need disaggregated data because so many countries have national averages which do not reflect the distribution of goods and services, and indigenous peoples are always invariably at the bottom end of the scale – both in poor countries, where they are the poorest of the poor, and in rich countries, where they are the poor amongst a majority of well-to-do people.

Tonia Novitz – I would be sceptical about the exclusive use of statistical indices as an indication of compliance. Case studies supplement such information and give a degree of detail and explanations of statistical indicators, which are absolutely vital. While the picture is always going to be incomplete, by using the two sources and taking evidence, you make the best you can within the given framework.

On the point relating to the stubbornness of the United Kingdom Government, which is a fair point, I think one can underestimate – and this is particularly true for the ILO comments on freedom of association in relation to the United Kingdom, but, more generally, also for the comments made by the European Committee of Social Rights – the degree of hope that such comments give campaigners within countries to actually challenge aspects of legislation. Progress is incremental. So, in terms of time delay, while you often do not see results on the ground, you do see them incrementally take place. For instance, the changes in the United Kingdom in 1997, 1998 and 1999, took place by virtue of particular comments from the ILO and a committee of independent experts.

My last point relates to the inter-linkages between civil and political rights and social and economic rights. There are a series of debates about their nature, and it is often assumed that, simply because workers' rights have social and economic dimensions, they are costly and impose positive obligations on States. This is often not true – they impose positive obligations on other civil actors and employers. Assumptions are also made that social and economic rights and workers' rights are inherently collective by nature. The overlap between the European Convention on Human Rights and the European Social Charter, or between the two Covenants, shows that this is not necessarily the case. For instance, if you think of the importance of non-discrimination clauses in relation to wages, you link one civil and political right to a social and economic right. Other examples would be the importance of freedom of speech and freedom of association to the enjoyment of collective bargaining, or privacy and its link to non-discrimination at the workplace. Civil and political rights and social and economic rights cannot be so readily disentangled in concrete situations. We need to find better ways of integrating our supervision of the two.

*Janice Bellace** – In relation to the title of our colloquium, I would like to cite a great comparative labour lawyer, Sir Otto Kahn-Freund, who said that

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labour law was one of the most important branches of law because it dealt with workers, and that the vast majority of people depended either upon their own earnings or the earnings of someone in their household for their ability to live, and – I would add – to participate in society.

Even in order to be able to exercise one's human rights, one needs a job, needs to be able to live, to participate in society. I therefore feel very privileged to be a member of the ILO Committee of Experts because we are concerned with having human rights apply at the workplace, which in a sense gives people a foundation in the society. As to what effectiveness really means, I particularly liked Mr. Stavenhagen's comment that the mere fact of opening up a space for action may in itself be a sign of effectiveness because it gives people ability in their own country – it empowers them to be able to achieve progress.

Dinner address

Friday, 24 November 2006 – *Evening*

Présent et avenir des mécanismes de contrôle de l'Organisation internationale du Travail

Ruth Dreifuss **

Mesdames et Messieurs,

C'est un grand honneur que de pouvoir partager ces moments de commémoration et de travail avec les éminents membres de la Commission d'experts de l'OIT, avec les membres du Comité des Nations Unies sur les droits économiques, sociaux et culturels, avec les participants au colloque consacré au présent et à l'avenir des mécanismes de contrôle ainsi qu'avec les hauts responsables du BIT.

Votre commune mission est le progrès des droits humains (droits de l'homme), non seulement en ce qui concerne leur formulation mais encore en ce qui concerne leur application. Ces droits sont indivisibles et ne connaissent pas de hiérarchie. Cependant, ils sont conjugués en divers temps, appliqués à diverses situations, prenant en considération diverses catégories de population. Ce sont autant de précisions qui attirent une attention particulière sur les personnes que leur vulnérabilité expose davantage que d'autres au risque de se voir priver de leurs droits. Ce sont autant de réponses détaillées aux questions que posent les relations spécifiques au sein de la société. Les droits humains sont indivisibles, mais les gouvernements – chargés de les garantir – doivent être rappelés à leur responsabilité pratique, envers les enfants, envers les femmes, envers les travailleurs, envers les migrants et les réfugiés, envers les peuples autochtones, et j'en passe. En plaçant donc la protection des droits au travail sous la bannière des droits de l'homme, le colloque d'aujourd'hui et de demain montre à la fois

* Ancienne Présidente de la Confédération helvétique. Discours prononcé lors d'un dîner offert par le *Friedrich-Ebert-Stiftung (FES)*.

l'universalité et la cohérence des droits de l'homme et le besoin de «mode d'emploi détaillé», afin qu'ils puissent être appliqués concrètement en toutes circonstances. Ce colloque réunit aussi nombre de celles et de ceux qui s'engagent, chacun dans sa structure et son domaine, à cette progression des droits humains: un réseau de bonne complicité pour le respect de la dignité humaine.

J'ai parlé des différentes conventions, chartes et pactes des droits humains comme d'autant de recettes pour leur transposition concrète. Il ne suffit pas d'écrire les recettes, encore faut-il regarder si les cuisiniers les suivent scrupuleusement, quitte d'ailleurs à les améliorer. C'est là que se pose, encore et toujours, la question des mécanismes de contrôle. Les Etats s'étant engagés au respect des droits fondamentaux, sont-ils disposés et capables de tenir leurs engagements? L'efficacité des organes de contrôle reste un des problèmes centraux de l'efficacité des droits proclamés: à la charnière entre l'effort commun de la communauté des nations et le principe de la souveraineté nationale, les organes de contrôle disent le droit, sans avoir toujours suffisamment de moyens d'investigation et sans avoir le plus souvent la possibilité d'imposer le droit. Mais dire le droit, c'est tenter d'initier une collaboration pour que le droit s'impose, en fin de compte, par une double stratégie «pédagogique»: celle qui renforce, à l'intérieur de l'Etat considéré, les forces intéressées à faire reculer le non droit, et celle qui renforce, à l'externe, la pression en faveur du respect des engagements pris. Le système de contrôle de l'OIT est certainement un des meilleurs, parmi tous ces systèmes imparfaits et insuffisants: d'une part, sa commission d'experts a pu développer, en huit décennies, une jurisprudence remarquable et d'une grande cohérence, d'autres part parce que les considérants et les conclusions de ses éminents juristes se nourrissent des informations reçues non seulement des gouvernements mais aussi des organisations syndicales et patronales – de la société civile – et viennent nourrir ensuite les interventions de ces organisations auprès des gouvernements. Par ailleurs, l'offre insistante de collaboration avec les Etats qui ne remplissent pas leurs obligations, les suggestions très concrètes pour améliorer la situation, l'engagement du Bureau international du travail dans cette procédure «itérative» d'actions, de rapports, d'analyse, de coopération, etc. tout cela concoure à ne pas oublier ni abandonner une cause. Dans les années quatre-vingt, j'ai participé, au nom des travailleurs et des travailleuses de mon pays, au mécanisme d'application des normes. J'ai été saisie, comme les autres parties prenantes, de ce que Rimbaud appelait une «ardente patience»: revenir sans arrêt, tant que le problème n'était pas résolu, sur le servage en Inde, l'esclavage en Mauritanie, la liberté syndicale en Pologne, et tant d'autres, au Sud et au Nord, à l'Est comme à l'Ouest. Cette même «ardente patience», je la vois en œuvre dans le cas du travail forcé en Birmanie. Et il arrive effectivement parfois, selon l'expression allemande, que la constance des gouttes finit par creuser la pierre («*Steter Tropfen höhlt den Stein*»). Mais cette patience nous brûle aussi de la souffrance de ne pas agir suffisamment vite, suffisamment fort, pour libérer les victimes du joug de leur souffrance. Entre frustrations et espoir, entre conviction et désillusions, les deux prestigieuses commissions réunies aujourd'hui poursuivent une tache lourde et longue. Leur haute

autorité morale, leur action assidue et leur vision cohérente inscrite dans la durée sont la clé de leur influence.

Bien des choses ont changé au cours des 80 années de vie de la Commission d'experts. Des régimes politiques totalitaires sont nés et se sont effondrés, nous avons assisté à la fin de la colonisation du Sud par le Nord, l'économie s'est mondialisée d'abord à travers les entreprises multinationales puis à travers une libéralisation voulue par les Etats. Alors qu'aux origines de l'Organisation internationale du Travail on trouve la claire volonté de lutter contre la sous enchère des conditions de travail entre des économies relativement proches, on assiste aujourd'hui à une revendication accrue de faire jouer les avantages comparatifs, y compris au niveau des conditions de rémunération, sinon des conditions de travail au sens plus large. Le rôle de l'OIT, de ses conventions et de son mécanisme de contrôle, est donc aujourd'hui aussi important, sinon encore davantage, qu'en 1926. Face aux possibilités de contrôle et de sanction de l'Organisation mondiale du commerce, le renforcement du mécanisme de contrôle des droits humains fondamentaux est le défi que nous devons relever. Dans ce contexte de la mondialisation, il existe un important besoin de repères et d'action. Il nous faut mondialiser aussi le respect des droits humains. Nous avons plus que jamais besoin des institutions internationales capables d'interpeller les responsables et de signaler les abus: nous devons aussi sans doute les doter de compétences accrues.

Pour terminer, j'aimerais souligner l'influence réciproque des normes nationales et internationales, des «jurisprudences» nationales et internationales. De plus en plus souvent, des juges nationaux appliquent des principes inclus dans des conventions internationales. Mais sommes nous toujours dans une phase d'émulation positive, où les progrès réalisés en un lieu, à la fois inspirent les autres pays et permettent de s'engager ensemble à les accomplir? Mon pays, la Suisse, qui avait été pionnière dans le domaine de la protection des travailleurs au XIX^{e} siècle (durée du travail, protection des femmes et des enfants) a progressivement repris à son compte, dans la seconde moitié du XX^{e} siècle, les avancées expérimentées ailleurs puis largement généralisée. C'est peut-être ce genre de lenteur qui a inspiré à Einstein son fameux désir de venir mourir en Suisse: les choses les plus évidentes s'y passant avec vingt ans de retard. Pour avoir lutter pendant plus de vingt ans pour le congé maternel, pour m'être appuyée sur la convention pertinente de l'OIT et les rapports des autres pays, j'aimerais exprimer ici ma reconnaissance toute personnelle face au caractère exemplaire de l'OIT.

Des organes de contrôle réunissant indépendance, sagesse et expertise restent la pièce maîtresse du contrôle international. L'OIT peut être fière du travail accomplis. Genève, et la Suisse, sont heureux d'avoir, sur leur territoire, une organisation pionnière dans le contrôle des normes internationales en matière de droits humains. Il n'y a chez vous aucune complaisance à fêter l'anniversaire de la Commission d'experts; je perçois bine au contraire la ferme volonté de faire mieux encore à l'avenir et de relever les défis du XXI^{e} siècle. Recevez mes meilleurs vœux, ainsi que l'expression du soutien de mon pays, de ses employeurs et de ses travailleurs, pour la réalisation de vos hautes – et si utiles – ambitions.

The ILO Committee of Experts in pictures (1969-1992)

CEACR, 42nd session, Geneva, 16-29 March 1972

1. Mr. Edilbert RAZAFINDRALAMBO (Madagascar), Reporter of the Committee
2. Mr. C. Wilfred JENKS, ILO Director-General
3. Mr. Enrique GARCÍA SAYÁN (Peru), Chairman of the Committee
4. Bégum Raàna Liaquat Ali KHAN (Pakistan)
5. Mr. Kisaburo YOKOTA (Japan)
6. Mr. Isidoro RUIZ MORENO (Argentina)
7. Mr. Jean MORELLET (France)
8. Mr Lazare A. LUNZ (USSR)
9. Mr. Arnaldo Lopes SUSSEKIND (Brazil)
10. Sir Adetokunbo ADEMOLA (Nigeria)
11. Mr. Harold Stewart KIRKALDY (United Kingdom)
12. Mr. Earl WARREN (United States)
13. Mr. Günther BEITZKE (Federal Republic of Germany)
14. Mr. Pralhad Balacharya GAJENDRAGADKAR (India)
15. Mr. Jo_a VILFAN (Yugoslavia)
16. Mr. Arnold GUBINSKI (Poland)
17. Mr. Paul RUEGGER (Switzerland)
18. Mr. Nicolas VALTICOS, Chief, International Labour Standards Department
19. Mr. Boutros BOUTROS-GHALI (Egypt)
20. Mr. Joseph J.M. van der VEN (Netherlands)

Mr. Wilfred Jenks, Principal Deputy Director-General, addressing the members of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, 17 March 1969.

Mr. Jean Morellet (France)
Member of the ILO Committee of Experts (1965-1973)

Mr. Earl Warren (United States)
Member of the ILO Committee of Experts (1971-1974)

Mr. Robert Ago (Italy)
Member of the ILO Committee of Experts (1979-1995)

CEACR, 43rd session, Geneva, 15-28 March 1973
Chairperson: Mr. Enrique García Sayán (Peru)
Reporter : Mr. Harold Stewart Kirkaldy (United Kingdom)

CEACR, 51st session, Geneva, 12-25 March 1981
Chairperson: Sir Adetokunbo Ademola (Nigeria)
Reporter: Mr. Edilbert Razafindralambo (Madagascar)
The Committee of Experts in session with the presence of Mr. Francis Blanchard, ILO Director-General.

CEACR, 51st session, Geneva, 12-25 March 1981
(left to right): Mr. Prafullachandra Natvarlal Bhagwati (India), Sir Adetokunbo Ademola (Nigeria), Mr. Ian Lagergren (Deputy Director of the International Labour Standards Department) and Sir William Douglas (Barbados)

CEACR, 59th session, Geneva, 9-22 March 1989
Chairperson: Mr. José Maria Ruda (Argentina)
Reporter: Mr. Edilbert Razafindralambo (Madagascar)
The Committee of Experts in session with the presence of Mr. Michel Hansenne, ILO Director-General.

CEACR, 62nd session, Geneva, 12-25 March 1992

1. Ms. Badria AL-AWADHI (Kuwait)
2. Mr. Thiecouta SIDIBE, Director, International Labour Standards Department
3. Mr. José Maria RUDA (Argentina), Chairperson of the Committee
4. Mr. Edilbert RAZAFINDRALAMBO (Madagascar), Reporter of the Committee
5. Mr. Cassio MESQUITA BARROS (Brazil)
6. Baron Bernd von MAYDELL (Germany)
7. Mr. Toshio YAMAGUCHI (Japan)
8. Mr. Fernando URIBE RESTREPO (Colombia)
9. Mr. Kéba MBAYE (Senegal)
10. Mr. Semion A. IVANOV (Russian Federation)
11. Sir William DOUGLAS (Barbados)
12. Mr. Prafullachandra Natvarlal BHAGWATI (India)
13. Mr. Boon Chiang TAN (Singapore)
14. Mr. Jean-Maurice VERDIER (France)
15. Mr. Arnold GUBINSKI (Poland)
16. Mr. Antti Johannes SUVIRANTA (Finland)
17. Mr. Benjamin AARON (United States)
18. Sir John Crossley WOOD (United Kingdom)
19. Mr. Benjamin Obi NWABUEZE (Nigeria)
20. Mr. Budislav VUKAS (Croatia)

Mr. Roberto AGO (Italy) does not appear in this photograph.

III. International supervision at the time of institutional reform

A fresh start in human rights protection: The United Nations Human Rights Council

Wan-Hea Lee *

As you may all know, there are many interesting things going on within the Office of the High Commissioner for Human Rights, not least of which the upcoming opening of the 2nd session of the Human Rights Council which also explains our inability, despite our best efforts, to bring someone who is in the heart of developments of the Council to be addressing your symposium. On behalf of the High Commissioner for Human Rights, we would like to extend our heartfelt congratulations to the Committee on its eightieth anniversary.

Speaking for an organization that was established only 12 years ago, we can only hope that at our eightieth anniversary we will be able to look back and celebrate with the same joy and pride our contributions, however modest, for a safer and more human world. Unfortunately today it seems that our every achievement is being overshadowed by ever-growing challenges, even in areas where relevant norms, human rights norms, were previously universally accepted, today there is dispute. And perhaps that is why there is so much hope placed on the historic creation of the Human Rights Council earlier this year.

The context and the evolution of the establishment of the Council is very recent. As you may know, the idea of upgrading the Human Rights Commission to a Council was part of the package of widening reforms proposed by the Secretary-General in his report *In Larger Freedom* last year. In that report, the Secretary-General continued his efforts to firmly establish the priorities of the United Nations, security, development and human rights across the system. As he expressed it, these are mutually reinforcing imperatives and a person or people who would lack anyone of them would not be truly free.

His vision for reinvigorating the United Nations human rights machinery was endorsed by the experts, particularly the High-Level Panel on Threats,

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Challenges and Change, and, at the governmental level, endorsed by the 2005 World Summit, which, as expressed by the President of the General Assembly at the time, is the greatest meeting of world leaders ever assembled. They all believed that it was time for the Human Rights Commission to be upgraded to a Council. The idea was to replace the Commission – an inter-governmental body that met in Geneva once a year for a marathon six-week session, once a year – with a smaller, more dynamic standing body. There would be several new features: to be elected as members States would have to make voluntary pledges and commitments for the promotion and protection of human rights abroad and at home; member States would be subjected to term limitations, so that after two consecutive terms they could not stand for re-election again immediately (thus it would not be possible for some States to retain their seats for decades, as had happened in some cases, and criticize the performance of other States without committing itself to take action as well).

The Council on Human Rights, at this level, can be said to have been successful; pledges have been made and we see among the more common pledges across the States that are now members of the Council, pledges for ratifying any outstanding human rights treaties, to which they are not already a party, pledges to enforce or strengthen their national judicial systems, to better cooperate with civil society and to cooperate with the international mechanisms of monitoring, particularly, the treaty bodies and the special rapporteurs. This was not a given in the previous Commission.

There are other features of the old Commission that are retained within the Council. The best features – despite the many criticisms concerning the credibility of the Commission – were unanimously agreed upon as essential for the evolution of the human rights system, particularly those related to independent fact-finding, global studies on major issues, retaining geographical balance and the like, the system of special rapporteurs has been retained and, pending a comprehensive review of all the mechanisms, the mandates have been extended for one year. There are details in the modalities of the functioning of the special rapporteur system that are already evidenced within the Council, particularly time limitations. As a result, special rapporteurs after one renewal of a three-year term would not be renewed again on the mandate.

Turning to the main criteria for determining whether the Council is truly an improvement over the Commission, it should be noted that the Council has a higher profile and it is in more direct access to the decision-making processes within the United Nations, therefore in this regard there is unanimity that it is an improvement. However, in dealing with specific human rights issues, is it more effective? Is it more dynamic? Will it lead to better promotion and protection of human rights? I think the key here will hinge on one new feature, the true innovation of the Human Rights Council, which is yet to bear out, and that is the commitments that States take upon themselves to improve their own records at home and abroad. This is encapsulated in a new process called the “universal periodic review”, outlined in the resolution that establishes the Council. The modalities for this periodic review of all UN member States are currently the

subject of intense negotiations and debate. A working group has been set up on the universal periodic review to address issues such as: How would it function? Would it involve the state under review? On what norms will it be based? Most likely, the consensus seems to be that it must be based on the Universal Declaration on Human Rights. To what extent would it involve the creation of new machinery to undertake these reviews? To what extent will they rely on information that is already produced by the treaty bodies and special rapporteurs? Will it be based on consensus? What is the follow-up after the review takes place? What would be the legitimate expectations for the State under review to implement possible recommendations and would there be any consequences for not doing so?

It is, of course, too early to give an assessment of this as the universal periodic review mechanism is not yet in place, but these very profound questions are at the heart, I believe, of the question as to whether the Council is an improvement.

At this stage, we can say that the steps towards creating a more effective Council are under way, although the road is extremely turbulent and the views are varied, but I think is beyond dispute that the new body is more dynamic than the Commission. A number of working groups have been established and have already produced extensive work. The Council has already held two special sessions on emerging urgent themes, on Lebanon and on Israel, and in this sense it is much more dynamic than the Commission was before. It was very rare before that the Commission would hold a special session. Now it is becoming an accepted part of the way the Council functions.

There is a great deal more that needs to be said about the Council but because it is a work in progress, because there is much more to be elaborated, the assessment will have to be made some years down the road. At this point, the tools that the Council places at its disposal are the right ones: active involvement of civil society; retention of the system of special procedures; a look at the functioning of the Sub-Commission for the Promotion and Protection for Human Rights which is mandated to study new issues for the consideration of the Council. These remain in place and reviews are being undertaken to improve their functioning. Beyond that, it is the responsibility not only of the Council, not only of the member States, but all of us who have an interest, a stake, in better promotion and protection of human rights to keep the Council on its guard, to provide it with the information that it needs and civil society has been very keen across the world to hold the governments that are now members of the Council to the pledges that they made when they submitted their candidacies.

These are then the main highlights of the newborn Human Rights Council. The General Assembly has taken note of its first report and the reactions have been mixed so at this juncture the pressure continues on the Council to prove itself and within a year's time this could perhaps be a much more informative presentation not only on what is in place but also on how it is working.

La réforme des organes des Nations Unies chargés du contrôle de l'application des traités relatifs aux droits de l'homme

*Linos-Alexandre Sicilianos**

À l'heure actuelle, le vent des réformes des mécanismes de protection internationale des droits de l'homme souffle tant au niveau régional que sur le plan universel. Au Conseil de l'Europe, on attend toujours le dernier instrument de ratification du 14e Protocole à la Convention européenne des droits de l'homme (CEDH)[1], qui vise essentiellement à alléger la charge de travail de la Cour européenne des droits de l'homme. Dans le même sens se situent également les propositions récentes, souvent plus drastiques mais parfois discutables, du «Groupe des sages»[2], institué par les chefs d'États et de gouvernement des États membres du Conseil de l'Europe. Au sein de l'Union européenne, on vient de créer, enfin, une Agence des droits fondamentaux[3]. Celle-ci aura des fonctions bien plus larges que l'ancien Observatoire européen des phénomènes racistes et xénophobes, sans pour autant satisfaire les attentes de ceux qui espéraient qu'un tel organe puisse agir directement dans les domaines sensibles relevant du «troisième pilier». Au sein de l'Union africaine, on attend depuis longtemps la

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[1] Parmi les 46 États parties à la CEDH seule la Fédération de Russie n'a pas encore ratifié ledit Protocole. Pour une analyse de ce texte cf. L.-A. Sicilianos, «La 'réforme de la réforme' du système de protection de la Convention européenne des droits de l'homme», *Annuaire français de droit international*, 2003, pp. 611-640.

[2] Cf. «Rapport du Groupe des Sages au Comité des Ministres», 15 novembre 2006, doc. CM(2006)203.

[3] Cf. le règlement (CE) No 168/2007 du Conseil du 15 février 2007 portant création d'une Agence des droits fondamentaux de l'Union européenne, JO de l'Union européenne L 53/1, 22.2.2007.

mise en place de la Cour africaine des droits de l'homme et des peuples[4], qui devrait renforcer le mécanisme de protection plutôt faible de la Commission africaine. Aux Nations Unies, la création du Conseil des droits de l'homme[5] à la place de l'ancienne Commission des droits de l'homme a suscité un moment d'euphorie auquel semble succéder un certain scepticisme.

C'est précisément dans ce contexte plus vaste que se situe la réforme des organes des Nations Unies chargés du contrôle de l'application des traités relatifs aux droits de l'homme (dorénavant organes des traités). En effet, les efforts tendant à l'amélioration du fonctionnement et au renforcement de l'efficacité de ces organes constituent une partie importante de la réforme du système onusien de protection des droits de l'homme dans son ensemble.

Encore faut-il, cependant, clarifier les termes. Par réforme des organes des traités nous n'entendons pas seulement les mesures qui impliqueraient la modification, du reste difficile à réaliser, de ces instruments. Nous entendons aussi les changements dans le fonctionnement du système de surveillance institué par les traités onusiens relatifs aux droits de l'homme qui ne nécessitent pas la modification formelle de ces conventions. Autrement dit, nous utiliserons la notion de «réforme» dans un sens large pour couvrir l'ensemble des efforts et des propositions actuellement sous examen.

On rappellera à cet égard que dans son rapport intitulé «Dans une liberté plus grande: développement, sécurité et respect des droits de l'homme pour tous», l'ancien Secrétaire général des Nations Unies, Kofi Annan, estimait qu'«il conviendrait d'élaborer et d'appliquer des directives harmonisées sur l'établissement des rapports à l'intention de l'ensemble des organes créés en vertu d'instruments relatifs aux droits de l'homme, afin que ces organes puissent fonctionner comme un système unifié»[6]. Cette approche se situait dans le droit fil des recommandations adoptées par les présidents des organes des traités, ainsi que par les réunions inter-comités depuis 2003. On sait, en effet, qu'après l'abandon de l'idée d'un rapport unique destiné à l'ensemble des organes des traités et conformément aux recommandations de la réunion de Malbun (Liechtenstein), tenu en mai 2003[7], on s'est orienté vers l'élaboration de directives harmonisées pour un «document de base commun», accompagné de rapports ciblés aux différents comités existants. Dans le même ordre d'idées, quelques mesures concrètes ont été adoptées par les différents comités en vue de l'harmonisation de leurs méthodes de travail respectives, y compris pour ce qui est du suivi de leurs recommandations.

Cependant, après avoir relevé les faiblesses du système tel qu'il existe aujourd'hui, et afin d'y remédier, la Haute Commissaire des Nations Unies aux

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[4] Cf. sur ce point la contribution de F. Ouguergouz dans ce volume.

[5] Cf. A/Rés. 60/251, 15 mars 2006.

[6] NU doc. A/59/2005, 24 mars 2005, par. 147.

[7] Cf. "Report of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System", Malbun, Liechtenstein, 4-7 mai 2003, doc. HRI/ICM/2003/4, HRI/MC/2003/4, 10 juin 2003.

droits de l'homme, Louise Arbour, avançait une idée plus décisive en estimant «qu'à long terme il faudra trouver un moyen de regrouper les travaux des sept organes existants et de créer un seul organe conventionnel permanent»[8], qui serait composé de 35-40 experts. Le Document final du Sommet mondial de 2005, lui, ne se prononçait pas explicitement sur cette idée. Il semblait s'orienter plutôt vers l'amélioration du système existant[9].

Néanmoins, la Haute Commissaire a persévéré avec son idée et son Bureau a préparé un «Document de réflexion»[10] qui analysait sa proposition. Celle-ci s'est heurtée, toutefois, à des réticences plus ou moins vives exprimées tant par les organes des traités que par les gouvernements. Face à ces réactions préliminaires et afin de faire examiner plus en profondeur la proposition de créer un organe conventionnel permanent unifié, la Haute Commissaire a convoqué une réunion de brainstorming qui s'est tenue une fois de plus à Liechtenstein du 14 au 16 juillet 2006[11]. Pendant cette réunion – à laquelle ont participé des experts de tous les organes des traités, des représentants d'Etats, d'institutions nationales et de quelques ONG – de très sérieuses réserves ont été mises en avant concernant tant l'opportunité que la faisabilité de la proposition de fusionner les comités de protection des droits de l'homme.

Toutefois, il faut bien reconnaître que cette idée audacieuse de Louise Arbour a créé une dynamique certaine qui aboutira, espérons-le, à des améliorations tangibles du système actuel. En effet, un groupe de travail inter-comités a été chargé d'examiner plusieurs propositions alternatives et de présenter ses recommandations à la prochaine réunion inter-comités qui se tiendra à Genève en juin 2007 et qui sera suivie de la réunion annuelle des présidents des organes des traités. Dans cette perspective, il importe d'évaluer le diagnostic plutôt sombre établi par la Haute Commissaire et son Secrétariat quant au fonctionnement et à l'efficacité du système en vigueur avant d'examiner les remèdes à y apporter.

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[8] «Plan d'action présenté par le Haut Commissaire des Nations Unies aux droits de l'homme», NU doc. A/59/2005/Add. 3, par. 99.

[9] Le Document final du Sommet mondial de 2005 énonçait, en effet, que: «Nous chefs d'État et de gouvernement] prenons la résolution d'améliorer l'efficacité des organes conventionnels s'occupant des droits de l'homme, notamment en assurant la présentation des rapports en temps utile, en améliorant et en rationalisant les procédures d'établissement des rapports, en accordant une assistance technique aux États pour renforcer leurs capacités d'établissement de rapports, et en veillant à la mise en œuvre plus efficace des recommandations de ces organes» (doc. A/Rés. 60/1, par. 125).

[10] «Document de réflexion sur la proposition du Haut Commissaire relative à la création d'un organe conventionnel permanent unifié, Rapport du Secrétariat», doc. HRI/MC/2006/2, 22 mars 2006 (dorénavant «Document de réflexion»).

[11] Cf. "Report of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System", Triesenberg, Liechtenstein, 14-16 juillet 2006, doc. HRI/MC/2007/2, 8 août 2006.

I. Le diagnostic

Le diagnostic établi par le «Document de réflexion» sur la proposition du Haut Commissaire relative à la création d'un organe conventionnel permanent unifié est non seulement sombre, mais parfois aussi assez sévère – peut-être un peu trop sévère – pour le système actuel. En analysant ce diagnostic, on sera amené à évoquer les problèmes qui résultent de la prolifération des organes conventionnels et des arriérés dans l'examen des rapports étatiques et des plaintes individuelles, ainsi que les questions relatives à la visibilité et l'accessibilité du système, à l'autorité des organes des traités, voire à l'intégration et à l'efficacité du système.

1. La prolifération des comités et la non soumission de rapports

La première constatation de ce document est liée au nombre des comités existants, auxquels s'ajoute désormais le Sous-comité pour la prévention de la torture et dans l'avenir les comités qui seront créés en vertu des nouvelles Conventions sur les disparitions forcées et les droits des personnes handicapées[12], ce qui fera neuf comités au total plus le Sous-comité. Il est évident que cette multiplication des instruments juridiques et des comités chargés de la surveillance de leur mise en œuvre s'accompagne de la prolifération des obligations des Etats parties, y compris de celles concernant la présentation de rapports initiaux et périodiques.

Sur ce point la Haute Commissaire n'hésite pas de souligner – et elle a raison – que «de nombreux Etats acceptent le système conventionnel mis en place dans le domaine des droits de l'homme en théorie mais n'y participent pas réellement ou alors ne le font que de façon superficielle par manque de moyens ou par manque de volonté politique»[13]. On remarque, en effet, qu'en 2006 seuls huit Etats sur 194 étaient tout à fait à jour avec leurs rapports, les 186 autres devant présenter au total 1,442 rapports aux différents organes conventionnels. Certains de ces rapports sont dus depuis une dizaine d'années, voire même plus. Il est vrai que statistiquement parlant 70% des rapports attendus ont été soumis. Toutefois, ce pourcentage à première vue plutôt encourageant résulte d'une astuce qui consiste à présenter simultanément plusieurs rapports regroupés en un seul document.

Il est vrai aussi que les différents comités disposent, dans la plupart des cas, d'une masse d'informations, provenant de sources onusiennes ou d'autres sources non gouvernementales, qui leur permet d'examiner la situation dans un pays donné en l'absence de rapport. Il n'empêche que dans une telle éventualité il ne peut pas y avoir de dialogue constructif avec l'Etat partie, ce qui prive le processus de sa fonction «pédagogique», voire de l'essentiel de sa raison d'être. Les

[12] Pour le texte de ces deux instruments cf. A/Rés. 61/177, 20 décembre 2006, annexe et A/Rés. 61/106, 13 décembre 2006, annexe, respectivement.

[13] Doc. HRI/MC/2006/2, précité, par. 16.

recommandations adoptées, le cas échéant, suivant la procédure dite de bilan auront, dès lors, peu de chances d'être suivies par les Etats concernés. Autrement dit, la procédure en question permet aux comités de s'acquitter de leur devoir moral vis-à-vis d'un Etat donné et d'avoir pour ainsi dire la conscience tranquille, sans pour autant avoir les effets escomptés sur le terrain.

2. Les arriérés dans l'examen des rapports et des plaintes individuelles

Le deuxième constat du diagnostic constitue, dans une certaine mesure, l'autre face de la médaille puisqu'il concerne principalement non pas les retards dans la soumission des rapports par les Etats parties, mais les arriérés dans leur examen de la part de certains comités. Il est vrai que le problème n'est pas général, étant donné que le Comité pour l'élimination de la discrimination raciale, par exemple, n'a pratiquement pas d'arriérés, les rapports des Etats étant examinés, en principe, la même année ou l'année qui suit leur soumission, selon les circonstances. Il est évident, toutefois, que si un rapport est examiné deux, voire trois ans après sa soumission il risque de ne plus refléter la situation réelle sur le terrain. Une mise à jour est dès lors nécessaire, ce qui implique un travail supplémentaire plus ou moins important tant pour les Etats concernés que pour les comités eux-mêmes.

Des considérations analogues valent mutatis mutandis pour les retards dans l'examen des communications émanant de particuliers ou de groupes de particuliers, selon le cas. À l'heure actuelle et malgré le fait que les procédures relatives aux communications individuelles sont sous-utilisées, il s'écoule en moyenne 30 à 33 mois entre le dépôt de la plainte et l'adoption d'une décision finale à son sujet, «ce qui remet sérieusement en question la capacité du système à offrir une réparation aux particuliers victimes de graves violations de leurs droits»[14]. Par ailleurs, la situation risque de s'aggraver en cas d'augmentation du nombre de requêtes, due soit à une sensibilisation des milieux juridiques et à une meilleure connaissance des procédures onusiennes soit à une prolifération des Etats qui acceptent la compétence des comités concernés[15] à connaître des plaintes individuelles.

Autrement dit et pour reprendre les termes du Bureau du Haut Commissaire, «les organes conventionnels manquent de moyens et leurs sessions ne durent pas assez longtemps pour qu'ils puissent absorber leur charge de travail»[16]. D'où la nécessité, selon Louise Arbour, de créer un organe conventionnel unifié qui siégerait en permanence.

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[14] *Ibid*. par 18.

[15] On rappelle à cet égard que cinq comités sont habilités actuellement à examiner des communications individuelles: le Comité des droits de l'homme, le Comité pour l'élimination de la discrimination raciale, le Comité contre la torture, le Comité pour l'élimination de toutes les formes de discrimination à l'égard des femmes et le Comité pour les droits des travailleurs migrants.

[16] Doc. HRI/MC/2006/2, précité, par. 18.

3. La visibilité et l'accessibilité du système

Le troisième problème de ce diagnostic plutôt sombre concerne la visibilité du système conventionnel des Nations Unies pour la protection des droits de l'homme et des organes des traités. Selon l'appréciation contenue dans le «Document de réflexion» sur la proposition de la Haute Commissaire, le système en question «est peu connu en dehors des milieux universitaires, des administrations et des fonctionnaires publics qui sont directement en contact avec les organes conventionnels ainsi que des juristes et des ONG spécialisées[17]. On ajouterait à cette énumération les institutions nationales pour la promotion et la protection des droits de l'homme, établies conformément aux «Principes de Paris»[18] et fonctionnant dans plusieurs dizaines de pays dans le monde, institutions qui sont souvent activement impliquées dans le travail des organes conventionnels.

Certes, cela fait déjà pas mal de monde. Il n'empêche que le système mériterait d'être mieux connu des milieux judiciaires et des agents responsables de l'application des lois, voire du grand public. Il mériterait aussi d'être mieux connu des médias, d'être mieux promu par les médias. Il en résulte que ce problème de visibilité est un problème réel, il faut bien le reconnaître.

La question de la visibilité du système est intimement liée au quatrième constat du diagnostic, à savoir l'accessibilité des mécanismes onusiens tout particulièrement pour les individus et les ONG. Il est inutile d'insister sur l'importance de cet aspect, tant il est vrai que l'apport des ONG aux travaux des organes des traités est décisif pour la crédibilité du système[19]. Or la complexité de celui-ci fait que par rapport au grand nombre d'ONG qui ont le statut consultatif auprès de l'ECOSOC il y en a relativement peu qui connaissent les méandres des procédures, qui sont en mesure de présenter des rapports alternatifs et de participer activement aux travaux des différents comités.

D'un autre côté, les procédures de communications individuelles qui existent auprès de cinq comités sur sept[20] sont relativement peu exploitées. C'est ainsi que le Comité pour l'élimination de la discrimination raciale, par exemple, a examiné plus ou moins 35 affaires jusqu'à ce jour, malgré le fait que plus de 45 Etats ont fait la déclaration de l'article 14 de la Convention concernée, permettant au Comité de connaître de telles communications.

4. L'autorité des organes des traités

Le cinquième constat du diagnostic concerne – et là Madame le Haut Commissaire est très sévère – l'«autorité des organes de suivi». Le «Document de réflexion» fait état des disparités entre les organes conventionnels «composés d'experts à temps partiel non rémunérés et désignés par les Etats parties pour un

[17] *Ibid*. par. 21.

[18] Cf. A/Rés. 48/134, 20 décembre 1993, annexe.

[19] Cf. sur cette question G. Cohen-Jonathan et J.-F. Flauss (éd.), *Les organisations non gouvernementales et le droit international des droits de l'homme*, Bruxelles, Bruylant, 2005.

[20] Cf. *supra* note 15.

mandat d'une durée déterminée renouvelable, du point de vue des compétences et de l'indépendance ainsi que de la répartition géographique, de la représentation des principaux systèmes juridiques et de l'égalité entre les sexes»[21].

Faire une critique constructive du système existant quand on veut proposer des changements est bien. Discréditer le système aux yeux de l'opinion mondiale quand on est Haut Commissaire aux droits de l'homme l'est peut-être moins. Quoi qu'il en soit, la question des disparités des compétences, voire du degré d'indépendance des membres d'organes internationaux de contrôle n'est certainement pas un problème propre aux comités onusiens de protection des droits de l'homme. Le même problème existe malheureusement dans bien d'autres fora que ce soit au niveau universel ou régional. Sur un ton bien plus diplomatique, cette question est évoquée, par exemple, dans le récent rapport du «Groupe des sages» du Conseil de l'Europe pour ce qui est des juges à la Cour européenne des droits de l'homme[22]. Pourtant, eux, ils sont très bien rémunérés, contrairement aux experts onusiens, et ils siègent en permanence.

Par conséquent, le problème n'est pas d'ordre financier, comme semble le suggérer la Haute Commissaire, en parlant d'experts «à temps partiel et non rémunérés». Il s'agit à notre sens d'un problème politique ayant trait à la qualité des experts (ou des juges internationaux) proposés par les gouvernements. On peut donc se féliciter du fait que le Protocole facultatif se rapportant à la Convention contre la torture, entré en vigueur en 2006, contienne des dispositions spécifiques sur les qualifications et les compétences professionnelles exigées des membres (art. 5, par. 2). Encore faut-il que les Etats suivent de telles indications lorsqu'ils présentent des candidats, voire au moment du vote.

Plus généralement, l'autorité des organes internationaux de contrôle dépend essentiellement de la clairvoyance, de la sagesse, de la pertinence, de la qualité de leurs recommandations et décisions. Encore faut-il, cependant, que l'on s'attache à assurer une harmonisation plus poussée des méthodes de travail des organes des traités pour que le système onusien de protection des droits de l'homme fonctionne de manière plus intégrée et efficace.

5. L'intégration et l'efficacité du système

En effet, le sixième et dernier constat de ce diagnostic souligne le fait que le système des organes des traités a été développé *ad hoc* et ne fonctionne pas «comme un cadre intégré et indivisible de protection des droits de l'homme, ce qui affaiblit son efficacité globale»[23]. Il est vrai que le système de contrôle des organes des traités a été établi sur une période de plus de quarante ans, depuis l'adoption de la Convention pour l'élimination de la discrimination raciale, en 1965, puis des deux Pactes des Nations Unies de 1966, jusqu'à nos jours. Il s'agit

[21] Doc. HRI/MC/2006/2, précité, par. 22.

[22] Cf. la partie du rapport précité du Groupe des Sages concernant «le statut institutionnel de la Cour et des juges».

[23] Doc. HRI/MC/2006/2, précité, par. 23.

d'un système créé progressivement et, par conséquent, il est vrai que chaque comité a son histoire propre, a développé peu à peu ses procédures, ses propres méthodes de travail, ses propres «coutumes», pour ainsi dire[24]. Dans ces conditions, il est naturel qu'il y ait des divergences dans le fonctionnement des différents comités, voire même dans la terminologie utilisée.

Il s'agit là d'un facteur qui ne manque pas de créer certaines confusions auprès des délégations étatiques qui se présentent, que ce soit à Genève ou à New York, pour l'examen de leurs rapports. Les institutions nationales pour la promotion et la protection des droits de l'homme et les ONG, surtout les ONG nationales, affrontent souvent des difficultés analogues lorsqu'elles souhaitent présenter leurs propres rapports alternatifs, ou en tout cas leurs observations, que ce soit en pré-session, pendant la session, pendant le premier jour de la session, en relation avec la présentation d'un rapport étatique particulier, etc.; autant de variantes dans les méthodes de travail suivies par les différents comités qui compliquent la tâche des «usagers» du système.

Dans un ordre d'idées voisin, le «Document de réflexion» sur la proposition du Haut Commissaire fait état également du «risque d'interprétations divergentes», voire «contradictoires», «qui peuvent déboucher sur des incertitudes au sujet des normes et des principes fondamentaux en matière de droits de l'homme, ce qui nuit à une interprétation holistique, approfondie et commune des dispositions relatives aux droits de l'homme»[25]. Il n'est pas exclu, en effet, qu'en interprétant la convention en vertu de laquelle il a été créé chaque comité mette l'accent sur tel ou tel aspect qui lui semble prioritaire. Dans la mesure où certains droits apparaissent dans deux ou plusieurs instruments à la fois – dans des contextes certes différents – on peut aboutir, il est vrai, à des recommandations qui contiennent des nuances quelque peu diversifiées, ce qui, du reste, pourrait être un facteur de richesse. Cependant, de là à parler d'«interprétations contradictoires» des principes fondamentaux, au sens strict des termes, il y a un décalage très considérable. Le risque évoqué par le «Document de réflexion» existerait notamment en relation avec l'examen de communications individuelles. C'est dans ce contexte que les comités compétents sont appelés à se prononcer en termes strictement juridiques. Pour l'instant, toutefois, il est difficile de déceler de véritables contradictions dans la jurisprudence des différents comités en matière de communications individuelles. Il est vrai, néanmoins, que le risque d'interprétations sinon carrément contradictoires, du moins divergentes, ne saurait être écarté d'emblée.

Plus généralement, on constate qu'il existe un certain manque de coordination et de collaboration entre les différents organes des traités. Ceci est accentué par le fait que les comités ne siègent pas au même moment nécessairement et, par conséquent, il y a relativement peu de contacts parmi leurs membres. Les

[24] Pour un examen comparatif des procédures et des méthodes de travail des sept organes conventionnels, cf. «Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process – Note by the Secretariat», doc. HRI/MC/2006/4, 17 mai 2006.

[25] Doc. HRI/MC/2006/2, précité, par. 23.

réunions annuelles inter-comités, instituées depuis 2002, auxquelles chaque comité est représenté par trois de ses membres à commencer par son président, constituent une occasion significative pour faire avancer un esprit de corps et, partant, pour promouvoir une harmonisation progressive des procédures et des méthodes de travail des organes des traités. Encore faut-il que les recommandations importantes formulées par ces réunions et entérinées par la suite par les présidents eux-mêmes se transforment en actions et que les réformes nécessaires avancent à un rythme soutenu. On est ainsi amené à examiner plus avant les remèdes au diagnostic dressé jusqu'ici.

II. Les remèdes

La première question qui se pose dans ce contexte est celle de savoir si la proposition de la Haute Commissaire de créer un organe conventionnel permanent unifié est le bon remède face à la situation actuelle. Cependant, indépendamment de l'opportunité de cette proposition, il faudra examiner sa faisabilité. Étant donné que celle-ci soulève des problèmes sérieux, il importe d'envisager également des propositions alternatives, qui consistent à créer un organe unique pour examiner exclusivement des communications individuelles, ainsi que d'autres idées pour faire avancer l'intégration du système.

1. L'opportunité de la proposition de créer un organe permanent unifié

L'avantage primordial de la proposition en question est qu'un organe conventionnel permanent unifié aurait probablement bien plus de visibilité que les différents comités d'experts, sept actuellement, plus le Sous-comité pour la prévention de la torture, neuf dans l'avenir. Par ailleurs, un organe unifié pourrait être plus accessible pour les «usagers» du système, puisque sa création entraînerait une simplification du point de vue institutionnel et procédural. Cette nouvelle structure, même si elle fonctionnait en chambres[26], devrait avoir des méthodes de travail homogènes, ce qui assurerait, théoriquement du moins, l'intégration du système et renforcerait son efficacité.

En revanche, il n'est pas sûr du tout que la proposition de fusionner l'ensemble de l'édifice, en quelque sorte, constitue une réponse adéquate au problème de la non soumission ou de la soumission tardive des rapports étatiques. On ne croit pas non plus que ce remède contribue à résoudre le problème des arriérés dans l'examen des rapports et des communications individuelles. Au

[26] Le «Document de réflexion» évoque plusieurs hypothèses sur ce point: un organe unique sans chambres, des chambres fonctionnant parallèlement, une chambre par fonction, une chambre par traité, une chambre par thème ou une chambre par région (doc. HRI/MC/2006/2, précité, par. 40-45). Une chambre par traité serait, à notre sens, la seule solution envisageable, sauf qu'elle reproduirait en substance le système actuel.

contraire, la situation actuelle risquerait de s'aggraver. On observe, en effet, que les sept comités qui fonctionnent actuellement siègent pas moins de 57 semaines par an (pendant plusieurs semaines certains comités se réunissent simultanément) et qu'ils comportent 115 experts au total pour se partager le travail (rapporteurs par pays, rapporteurs sur les communications individuelles, etc.). On voit mal, par conséquent, comment un seul organe, qui siégerait tout au plus 46-47 semaines par an, absorberait plus efficacement sa charge de travail – qui serait l'agrégat de celle de tous les comités existants et à venir – avec 35-40 experts mis à contribution!

Par ailleurs, la proposition de créer un organe unifié risquerait de faire perdre la spécificité de certains instruments. Là réside le problème le plus aigu avec cette proposition, ainsi qu'il a été souligné abondamment lors de la réunion de brainstorming qui s'est tenue au Liechtenstein, au mois de juillet 2006. On sait, en effet, qu'au fil du temps chaque comité a su faire apparaître la richesse et les potentialités de chaque instrument[27]. Chaque comité a bâti peu à peu une véritable vision de la convention dont il surveille l'application, en allant vraiment au fond des choses pour ce qui est de la discrimination raciale, des droits des femmes, des droits de l'enfant, des manifestations infinies de la torture et des autres formes de mauvais traitements, etc. Chaque comité a pu créer des liens privilégiés avec des agences spécialisées – l'UNICEF, par exemple, pour ce qui est du Comité sur les droits de l'enfants –, des ONG ayant une expérience particulière en la matière ou avec d'autres acteurs du système international. Bref, grâce à l'approche sectorielle du système actuel, chaque convention dispose aujourd'hui d'un acquis précieux qui risquerait d'être diffus, de se perdre, de s'évaporer peu à peu avec le système d'organe unifié. En d'autres termes, l'approche unitaire qu'impliquerait la création d'un tel organe pourrait aboutir à la marginalisation de certains instruments spécifiques. Ceci est d'autant plus vrai qu'il sera difficile de trouver des experts capables de maîtriser le vaste éventail des questions posées par l'ensemble des traités existants.

Encore faut-il dissiper un malentendu. En effet, au long des débats sur la proposition de Louise Arbour on a parfois évoqué l'exemple de la «Cour unique» à Strasbourg. Cependant, il ne faudrait pas perdre de vue que même si la Cour européenne des droits de l'homme a une place privilégiée dans l'ordonnancement du Conseil de l'Europe en tant qu'organe juridictionnel au sens propre du terme, elle n'est l'unique organe de protection des droits de l'homme qui fonctionne au sein de l'Organisation régionale, loin de là. On ne saurait sous estimer, en effet, la contribution extrêmement importante du Comité des droits sociaux, fonctionnant sur la base de la Charte sociale européenne, telle que révisée; du Comité pour la prévention de la torture, créé par la Convention de 1987 sur le

[27] Pour ce qui est, par exemple, de la richesse et les potentialités de la Convention pour l'élimination de toutes les formes de discrimination raciale, telles qu'elles apparaissent à travers la pratique du Comité pour l'élimination de la discrimination raciale, cf. L.-A. Sicilianos, «L'actualité et les potentialités de la Convention sur l'élimination de la discrimination raciale», *Revue trimestrielle des droits de l'homme*, octobre 2005, pp. 869-921.

même thème; du Comité consultatif de la Convention-cadre pour la protection des minorités nationales; ou de la Commission européenne contre le racisme et l'intolérance (ECRI), fonctionnant sans base conventionnelle. On mentionnera aussi l'organe qui sera créé au titre de la nouvelle Convention sur la traite des êtres humains, adoptée en mai 2005. Bref, à l'instar du système onusien, tel qu'il existe aujourd'hui, les mécanismes du Conseil de l'Europe se fondent sur une approche sectorielle. Sans même vouloir parler des problèmes énormes qu'affronte actuellement la Cour européenne des droits de l'homme, qui a plus de 90.000 affaires pendantes, le parallélisme entre la «Cour unique» à Strasbourg et l'organe conventionnel unifié qui est proposé pour les Nations Unies n'est nullement convaincant. On dirait même que jusqu'ici c'est le Conseil de l'Europe qui s'est inspiré du modèle onusien et non pas l'inverse.

2. La faisabilité de la proposition de créer un organe permanent unifié

Un autre problème relatif à la proposition de fusionner tous les organes des traités est celui de la faisabilité de cette idée. Les organes des traités ont la vie dure, précisément parce qu'ils ont été créés par un texte conventionnel[28]. Il ne faudrait pas perdre de vue, en effet, la différence fondamentale entre les organes conventionnels et les organes intergouvernementaux à caractère subsidiaire. Le discours relatif à la réforme du système onusien des droits de l'homme a donné parfois l'impression d'un certain amalgame entre ces deux catégories d'organes. On a pu avancer, en effet, qu'une volonté politique forte serait un élément nécessaire, certes, mais aussi suffisant pour réformer rapidement le système. Ceci est tout à fait vrai pour ce qui est des organes intergouvernementaux à caractère subsidiaire. Abolir un tel organe et créer un autre présuppose uniquement, d'un point de vue juridique, une décision en ce sens de la part du ou des organes principaux intéressés. Il en alla ainsi, on le sait, de l'abolition de l'ancienne Commission des droits de l'homme – organe subsidiaire de l'ECOSOC – et de la création du Conseil des droits de l'homme par la résolution 60/251 de l'Assemblée générale des Nations Unies.

Les organes conventionnels, en revanche, ont une existence autonome, liée au traité dont ils relèvent. Contrairement aux organes intergouvernementaux à caractère subsidiaire, les organes des traités ne sont pas subordonnés à un quelconque organe politique principal. Tout en fonctionnant au sein de l'Organisation et en étant appuyés par le Secrétariat de celle-ci, les organes conventionnels sont régis par l'instrument qui les a créés. Par conséquent, la fusion des différents organes des traités impliquerait nécessairement la modification des traités existants.

[28] Ceci vaut pour l'ensemble des comités onusiens dans le domaine des droits de l'homme à l'exception du Comité pour les droits économiques, sociaux et culturels, créé par la résolution 1985/17, 28 mai 1985, de l'ECOSOC.

Étant donné le caractère institutionnel de la révision proposée, les instruments y relatifs devraient prendre la forme de Protocoles d'amendement. Ce genre d'instrument doit être distingué d'un Protocole additionnel. Celui-ci ajoute de nouveaux droits substantiels (ou de nouvelles interdictions, comme celle de la peine de mort, par exemple) ou prévoit de nouveaux droits procéduraux, et notamment celui de soumettre des communications individuelles. Les Protocoles additionnels sont de nature optionnelle. Ils entrent en vigueur une fois acquis le nombre de ratifications qu'ils prévoient eux-mêmes. En revanche, le Protocole d'amendement entre en vigueur lorsqu'il est ratifié par le nombre d'États parties à l'instrument principal prévu par ce dernier. C'est ainsi, par exemple, que, selon son article 51, l'amendement du Pacte international relatif aux droits civils et politiques (PIDCP) requiert, outre l'approbation de l'Assemblée générale des Nations Unies, la ratification par une majorité des deux tiers des États parties au Pacte. Des dispositions analogues régissent l'amendement des autres traités qui nous concernent.

Cependant, si l'on se contente d'une ratification par les deux tiers des États parties aux différents instruments à amender, il y aura deux systèmes qui fonctionneront parallèlement: le nouveau système, qui s'appliquera aux États qui auront ratifié les Protocoles d'amendement, et le système actuel, qui s'appliquera aux autres États. Or, il est évident qu'une coexistence de l'organe unique, d'une part, et des sept et bientôt neuf comités actuels, d'autre part, créerait une situation chaotique, impossible à gérer. Pour éviter cette situation intenable, il faudrait, par conséquent, une ratification universelle des instruments d'amendement des traités existants, c'est-à-dire une ratification par les 194 États parties aux traités en question[29]. Il suffit de songer aux problèmes que rencontre actuellement l'entrée en vigueur du 14e Protocole à la CEDH, faute d'une seule ratification sur 46 États européens, pour réaliser les difficultés énormes, voire l'impossibilité d'obtenir des amendements qui feraient l'objet d'une ratification universelle[30].

Outre ces paramètres d'ordre essentiellement juridique, il apparaît également qu'il n'existe pas de volonté politique pour examiner plus avant la proposition de la Haute Commissaire. En effet, lors de la réunion au Liechtenstein, tenue en juillet 2006, le Groupe africain a été clairement défavorable à cette proposition; le Groupe des Etats asiatiques était tout aussi réticent, alors que les Etats occidentaux ont adopté une position «mi-figue mi-raisin». Dans ces conditions, il est opportun d'examiner des idées alternatives.

3. La proposition alternative du CERD : un organe unique pour examiner des communications individuelles

Parmi ces propositions alternatives, on mentionnera, tout d'abord, une proposition émanant du Comité pour l'élimination de la discrimination raciale, qui

[29] C'est précisément ce qu'a constaté le Service juridique des Nations Unies dans un document officieux, distribué lors de la réunion susmentionnée qui s'est tenue au Liechtenstein en juillet 2006.

tend à faire créer non pas un organe conventionnel unifié, qui traiterait de tout, mais un organe unique pour examiner exclusivement des communications individuelles[31].

En tant que membre de ce Comité, nous avons la faiblesse de croire que cette proposition aurait plusieurs mérites. Elle assurerait la cohérence de la jurisprudence en matière de communications individuelles, en répondant pour l'essentiel à la préoccupation, évoquée précédemment, d'interprétations divergentes des instruments onusiens de protection des droits de l'homme. Par ailleurs, un tel organe aurait probablement une visibilité accrue, tant il est vrai que les médias, mais aussi les milieux juridiques au sens large s'intéressent bien plus aux affaires concrètes qui conduisent à des décisions précises qu'à des recommandations d'ordre général. La notoriété de la Cour européenne des droits de l'homme n'est-elle pas due, en grande partie, à cet élément?

La proposition tendant à créer un organe unique qui traiterait exclusivement des communications individuelles assurerait, en même temps, une plus grande accessibilité du système pour les particuliers. On rappellera à cet égard qu'actuellement il y a, pour ainsi dire, cinq portes d'entrée au système, cinq procédures de communications individuelles auprès de cinq comités différents[32], avec des règles de procédure qui ne sont pas toujours les mêmes. Cette complexité entraîne des difficultés certaines pour les plaignants et semble expliquer le fait que les procédures en question restent largement sous-exploitées. Avec la création d'un seul organe compétent à se prononcer sur des communications individuelles il n'y aurait qu'une seule porte d'entrée au système au lieu de cinq, ce qui simplifierait singulièrement les choses. De plus, il n'est pas exclu qu'une plainte puisse concerner des droits reconnus par deux ou plusieurs instruments à la fois. Avec un organe unique on aurait pu très bien soumettre une plainte qui se baserait sur l'ensemble de ces instruments, ce qui n'est pas le cas aujourd'hui.

Pour ce qui est de la faisabilité de la proposition du CERD, on observe que, contrairement à la proposition de la Haute Commissaire, elle n'implique pas nécessairement la modification des traités existants. Un organe unique pour

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[30] On pourrait songer, le cas échéant, à une mise en application provisoire du nouveau système, mais, selon l'article 25 de la Convention de Vienne de 1969 sur le droit des traités: «1. Un traité ou une partie d'un traité s'applique à titre provisoire en attendant son entrée en vigueur: a) si le traité lui-même en dispose ainsi; ou b) si les États ayant participé à la négociation en étaient ainsi convenus d'une autre manière. 2. À moins que le traité n'en dispose autrement ou que les États ayant participé à la négociation n'en soient convenus autrement, l'application à titre provisoire d'un traité ou d'une partie d'un traité à l'égard d'un État prend fin si cet État notifie aux autres États entre lesquels le traité est appliqué provisoirement, son intention de ne pas devenir partie au traité». Autrement dit, la mise en application provisoire du système de l'organe conventionnel permanent unifié présupposerait une acceptation universelle d'une telle solution, ainsi que d'une clause qui exclurait la possibilité d'y mettre fin unilatéralement, chose extrêmement difficile. Pour un examen approfondi de la problématique et de la pratique internationale en matière d'application provisoire des traités, cf. A. Geslin, *La mise en application provisoire des traités*, Paris, Pedone, 2005.

[31] Cette proposition a été présentée dans ses grandes lignes lors de la cinquième réunion inter-comités, tenue à Genève en juin 2006, pour être explicitée ensuite, lors de la réunion susmentionnée, tenue au Liechtenstein en juillet 2006.

examiner des communications individuelles pourrait être créé non pas par un protocole d'amendement, mais par un protocole facultatif, c'est-à-dire avec le soutien des Etats qui seraient intéressés par un tel mécanisme.

Lors de la réunion du Liechtenstein au mois de juillet 2006 certains experts, notamment des membres du Comité des droits de l'homme, ont soulevé quelques questions d'ordre pratique, concernant par exemple les difficultés qui existeraient à leurs yeux par la coexistence du Comité des droits de l'homme et de cet organe unique qui traiterait des communications individuelles. On se demandait notamment dans quelle mesure les experts de l'organe unique suivraient les observations générales du Comité des droits de l'homme. Avec tout le respect dû à ces collègues, nous ne pensons pas que ces questions soient difficiles à résoudre. Afin d'apaiser ces craintes d'approches divergentes, on pourrait très bien envisager d'insérer une clause particulière dans le protocole facultatif, disposant que dans l'exercice de ses fonctions l'organe unique s'inspire des observations générales et des recommandations générales adoptées par les différents organes des traités. Il ne s'agit pas d'inventer la roue. Il s'agit de se baser sur le formidable acquis que constitue la multitude des recommandations générales et des observations générales adoptées par les comités compétents[33].

Bref, en mettant en balance les avantages certains que présente à notre sens la proposition du CERD et les quelques difficultés pratiques qui pourraient résulter de la création d'un organe unique pour se prononcer sur des communications individuelles, on pense que les premiers l'emportent et que, par conséquent, ladite proposition mérite d'être examinée de façon plus approfondie[34].

4. Les autres propositions tendant à promouvoir l'intégration du système

Toutes les autres propositions n'impliquent ni la modification des traités existants ni l'élaboration de nouveaux instruments à caractère facultatif. Elles peuvent être réalisées, dans la plupart des cas, par simple décision des comités concernés. Si elles ont des implications financières, de telles décisions devront être entérinées par la cinquième Commission de l'Assemblée générale. On mentionnera ainsi la proposition du Comité sur les droits de l'enfant, qui consiste à créer un bureau permanent, composé des présidents des organes des traités, chargé de coordonner les activités de ceux-ci. Il s'agit d'une proposition inté-

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[32] Cf. *supra* note 15.

[33] On mentionnera à cet égard le précédent de la Cour spéciale pour la Sierra Leone, dont le Statut se réfère à diverses reprises à la jurisprudence et à la pratique du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie. Cf., par exemple, l'article 19, par. 1 du Statut de la Cour spéciale et tout particulièrement l'article 20, par. 3, stipulant que: «The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. (…) ».

[34] C'est effectivement de qu'a recommandé le groupe de travail inter-comités lors de la réunion qui s'est tenue à Genève les 27 et 28 novembre 2006, doc. HRI/MC/2007/2, 9 janvier 2007, par. 26.

ressante, quitte à trouver, bien sûr, des présidents disponibles pour s'installer quasiment en permanence à Genève. Encore faudrait-il préciser le mandat du bureau et ses relations avec les comités.

Une importance toute particulière devrait être accordée, enfin, à l'idée émanant du Comité pour l'élimination de la discrimination à l'égard des femmes qui consiste à créer non pas un organe conventionnel unifié, mais un système harmonisé et intégré d'organes conventionnels. Cette formule «catch all» va dans le sens des recommandations des réunions inter-comités depuis cinq ans, recommandations entérinées par les présidents des organes des traités. Par exemple, lors de la cinquième réunion inter-comités, tenue en juin 2006, les directives harmonisées pour l'établissement du document de base commun[35], que nous avons évoquées en introduction, ont été acceptées, et il appartient maintenant aux différents comités de réviser leurs propres directives pour l'établissement de rapports ciblés, de rapports spécifiques au titre de chaque instrument.

Par ailleurs, tous les comités établissent aujourd'hui des listes de questions qui sont envoyées aux États pour que les différentes délégations qui présentent leur rapports sachent à l'avance les principales préoccupations des comités et, partant, le cadre dans lequel sera mené le dialogue constructif avec eux. Il s'agit là d'une méthode de travail particulièrement importante pour la qualité et la transparence du processus d'examen des rapports étatiques.

Dans le même contexte, il faudrait également que la coopération avec les ONG soit intensifiée. Il en va de même de la coopération avec les institutions nationales pour la promotion et la protection des droits de l'homme. Les rapports alternatifs de ces institutions ou leurs observations aux rapports des États sont d'une grande utilité pour les comités[36]. Les institutions nationales pourraient également intensifier leurs efforts au niveau de la mise en œuvre des observations finales et des recommandations des organes conventionnels.

L'approfondissement du dialogue avec les États parties passe également par le renforcement de la collaboration des organes des traités avec les autres composantes du système onusien, à commencer par les agences spécialisées ou les rapporteurs spéciaux ou experts indépendants de l'ancienne Commission et bientôt du Conseil des droits de l'homme. Cette coopération permet d'enrichir la perception par les comités de la situation qui prévaut sur le terrain et s'avère précieuse au moment du dialogue avec les États parties.

Encore faut-il, cependant, insister tout particulièrement sur l'importance du suivi aux observations finales des organes des traités. Actuellement, il y a

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[35] Cf. doc. HRI/MC/2006/3, 10 mai 2006.

[36] Dans cet ordre d'idées, le Comité pour l'élimination de la discrimination raciale encourage les institutions nationales à participer – de façon séparée des délégations étatiques, afin de ne pas entamer l'indépendance des institutions nationales – aux séances officielles pendant lesquelles est examiné le rapport de l'État concerné et de répondre directement – avec l'assentiment, certes, du chef de la délégation étatique – aux questions des membres du Comité. Il s'agit là d'une nouveauté, instaurée depuis l'examen du rapport irlandais, en mars 2005, qui mériterait peut-être d'être suivie par d'autres comités.

trois comités sur sept qui disposent d'un mécanisme de suivi: le Comité des droits de l'homme, le Comité contre la torture et, depuis 2005, le Comité pour l'élimination de la discrimination raciale. Le rapporteur pour le suivi est encadré, certes, par les services du Secrétariat. Il n'en reste pas moins que même là où ils existent les mécanismes de suivi sont relativement faibles. L'examen périodique universel, qui sera mis en place prochainement au sein du Conseil des droits de l'homme, pourrait changer la donne sur ce point, à condition que le Conseil prenne comme base de départ les recommandations, les observations finales des différents comités, non seulement pour éviter les duplications, mais aussi pour apporter un certain soutien politique aux organes de contrôle, soutien qui manque cruellement dans le système.

À côté de ce suivi aux observations finales, il y a une autre forme de suivi concernant les opinions formulées à l'occasion de communications individuelles. Généraliser et intensifier cette forme de suivi contribuerait certainement à l'efficacité des travaux des organes des traités dans le domaine des communications individuelles. Dans le même ordre d'idées, on pourrait harmoniser également les procédures de communications individuelles, y compris en modifiant, le cas échéant, les règlements des différents comités, ce qui faciliterait l'accès des individus aux mécanismes concernés.

En vue de promouvoir le fonctionnement des comités en tant que système intégré, on pourrait envisager également l'adoption d'observations générales conjointes dans des domaines d'intérêt commun à deux ou plusieurs comités; la tenue de sessions communes (du moins en partie); l'institution d'un secrétariat commun à tous les comités; le renforcement des ressources au sein du bureau du Haut Commissaire, y compris pour offrir plus fréquemment une assistance technique, etc. Ce ne sont certainement pas les idées qui manquent. Il y en a d'autres qui sont actuellement sous examen.

En guise de conclusion, notre proposition semble être plutôt facile à réaliser: plusieurs idées concernant la réforme du système figurent déjà, sous forme de recommandations, dans les rapports des réunions inter-comités qui se sont tenues depuis 2002. Ces recommandations ont été entérinées par les présidents des organes des traités. Faisons un récapitulatif de l'ensemble de ces propositions, et essayons de les mettre en œuvre! Ce sont des propositions qui émanent de nos comités, ce sont des propositions qui ont été entérinées par nos présidents. Il faut les mettre rapidement en application si l'on veut être crédible. Espérons que la prochaine réunion inter-comités, qui se tiendra à Genève en juin 2007, constitue une occasion pour passer à l'action.

Discussion

*Mohamed Ezzeldin Abdel-Moneim** – I wonder whether it would not be right to expect that this phenomenon of non-reporting to treaty bodies will grad-

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ually decrease. One might even assume that the phenomenon will eventually disappear as States become fully aware that the new UN Human Rights Council is going sooner or later to embark on the periodic review, irrespective of reports being received. States might therefore think that it would be in their interest to report to treaty bodies in a timely fashion and interact with the Council in handling their case. I therefore tend to think that this phenomenon of non-reporting might eventually decrease, if not disappear altogether.

Regarding the two presentations on international supervision at the time of institutional reform, I have to emphasize that the concept of supervision might vary from one treaty to another, from one instrument to another, and we have to be cautious since the scope of the mandate is sometimes too limited to ensure effective supervision. On institutional reforms, I think the reform proposals have to be taken as a package, not separately, and be analyzed and examined thoroughly as a whole. Reform has to be comprehensive, it has to consider the overall human rights machinery, not one part of this machinery. This is the only efficient way of dealing with this and unless you manage efficiency you cannot reach effectiveness.

Apart from the strictly institutional aspects of the current reforms, e.g. new mandate, new composition, method of work etc., there is also an extra-institutional aspect of crucial importance, that is to say the experience and echoes from the field. It is not within some bureaucratic confines that you can best reflect on how to reform but in the field, in all these places out there where human rights are being honoured or violated. Such extra-institutional factors have to be looked at thoroughly before institutional approaches to reform are defined, otherwise there is a risk of putting the cart before the horse. While I was listening to Mr. Sicilianos' presentation, I was looking into the ILO publication which was distributed to us, *The Committee of Experts on the Application of Conventions and Recommendations – Its Dynamic and Impact*, in particular as regards the synergy between the various supervisory bodies of the ILO, which reads in part: "The Committee of Experts was created at the same time as the Conference Committee on the Application of Standards. Although there have been at times been differences in approaches between the two Committees, they have developed a close collaborative relationship especially in recent years and each relies on the work of the other." I think this offers a good example to follow in pursuing the current reforms.

*Budislav Vukas** – This has been an extremely objective and informative report on a new body from which – having followed the UN bodies for almost half a century – I do not expect any major changes since there is nothing really new that an organization with 192 member States can deliver. First of all, Ms. Lee mentioned that one of the changes introduced by the Human Rights Council relates to composition; but what is the difference if you only decrease

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membership by just six members? Secondly, the question to whom you report, whether you report to the Economic Committee or to the General Assembly, this can hardly be qualified a real change. The number of terms does not really matter either. I therefore have the feeling – and my suspicions are confirmed by reading some very critical reports and articles on the work of the Council – that the Council was basically remodeled to serve specific purposes. It is a fact that for the time being the Council deals only with Lebanon and Israel; it does not seem to worry about the hundreds of thousands of people dying in Darfur simply because there is a majority of States that has no particular interest in addressing the human rights situation of this poor population. I would be grateful if you could respond to these criticisms.

Wan-Hea Lee – You might dream of a cake but when you look in your kitchen and find you are missing this or that you might end up with something resembling a cake, yet not quite what you wanted. In the case of the Council, the intention was to have a much smaller and dynamic body. The original idea was to have 17 Council members who would meet frequently and who would not be embroiled in too many broader issues and political discussions. However, in the process of negotiations regarding geographical representation, the formula that was agreed upon was 47 members. I would therefore agree that at the end there may not be significant difference although the Council was intended to be smaller and much more flexible than its predecessor.

Does the Council deal with only certain situations and not others? This was one of the major criticisms of the old Commission, namely politicization of the Commission. I do not think anyone would deny that the same problem exists in the new Council simply because the Council continues to be an intergovernmental body and preferences with respect to particular situations continue to depend on the will of governments. After all, this is a reality in the United Nations system; this is the existing decision-making process within the UN.

How can the new Council be less driven by political considerations? I think this concern is upper-most in the minds of most observers and to some extent the universal periodic review is hoping to address such concerns although I would not suggest that this problem could be completely overcome. I am not in a position to advance any reasons why the Council held two special sessions on Israel and Lebanon and not on Darfur, and I would leave it to the participants to make their judgment in this regard.

Linos-Alexandre Sicilianos – With respect to non-reporting, the pessimistic view, if I may, is that once a particular State has reported to the Human Rights Council, that is the governmental body, it may fail to come before the different committees of experts. However, I prefer to think that this problem will seriously decrease. As far as the coordination is concerned, Mr. Abdel-Moneim mentioned the synergies within the ILO and the different supervisory organs; in fact, the ILO paradigm was specifically referred to during the Liechtenstein brainstorming meeting and also mentioned in the final report which reads in part: “in con-

nection with the proposed unified standing treating body, reference was made to the system of the International Labour Organization which provided for a single body of a non-standing nature, to handle States reports, one that was able to process some 2,000 reports per year. While […] systems were not comparable in other respects, the ILO model could nevertheless be useful in considering the possible creation of a unified standing treaty body". I therefore stand in admiration before the work the ILO Committee of Experts is accomplishing and I believe that this positive comment is well deserved.

*Yozo Yokota** – Ms. Lee said that the Council has decided to maintain the existing system of special procedures. My question is how the special procedures, and in particular the country-specific mandates, would be coordinated with the universal periodic review. Are they going to be carried out separately or in parallel? In any case, there is the risk of duplication, and even of conflicting reviews. Secondly, as regards the possible participation of the civil society and non-governmental organizations in the process of Council discussions, my question is who is going to decide on the consultative status of NGOs eligible to participate in the activities of the Council? Will the Human Rights Council screen them or will it automatically accept the NGOs currently recognized by the ECOSOC? My last point relates to the work of the sub-commissions. The Sub-Commission on the promotion and protection of human rights held its last session in August under the instructions of the Human Rights Council. I understand from your presentation that the Council is thinking of retaining an expert body similar to the Sub-Commission to be mainly engaged in research studies. However, the Sub-Commission on the promotion and protection of human rights had also been engaged in standard-setting activities – the best example being the UN Draft Declaration of the Rights of Indigenous Peoples, which was subsequently adopted by the Human Rights Council in its first meeting. My question is whether any thought is given to the possibility of conferring such standard-setting function to the new expert body which will replace the Sub-commission on human rights.

Wan-Hea Lee – The first question is actually being discussed quite vigorously, i.e. in what respects the universal periodic review may be different from those institutionalized review processes that are already in place. How would the universal periodic review be distinguishable from the treaty bodies if it draws upon their work? This is still under discussion, but the intention is to introduce the universal periodic review in a way that complements and harmonizes with the existing systems and not duplicate them – easier said than done.

There has not as yet been any discussion about ECOSOC status granted to NGOs, but I think the presumption is that ECOSOC status will be the main determining method for accrediting NGOs also to the Human Rights Council, even though some other formula may not be excluded at this stage. On the work

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of the Sub-commission, the Council seeks to retain both the research and the standard-setting functions. However, the body that will replace the Sub-commission is unknown at this point, the question having been deferred at the Council's last session.

*Bob Hepple** – My question is whether changing the treaty bodies can proceed with the harmonization of certain conventions on the substantive side and I am thinking particularly of discrimination. Here, the ILO has set a wonderful example 50 years ago, in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) where all branches of discrimination are covered in employment and occupation. It has been realized as long ago as the 1950s that these methods have to be looked at together. I happen to be the chairman of a body called the European Roma Rights Centre, which takes cases on behalf of the Roma, which is the oppressed minority in Europe and we once had an issue of compulsory sterilization of Roma women. Was that an issue for the Committee on Racial Discrimination? Was it an issue for the Committee on Discrimination against Women and you can imagine in the future with the convention about disability, how far one can go. As it happens, we made the right choice and we went to the Committee for Discrimination against Women and they have given a very important ruling on this issue. But it seems to me, in an area such as that there really ought to be harmonization on each of the conventions because they came into force at different times and there are important inconsistencies, anomalies but also things like special measures. Linked to that is the question of the possible merger of committees. Even without substantive changes, what about having a single committee to deal with all issues of discrimination?

Linos-Alexandre Sicilianos – Concerning the harmonization of the conventions, in particular in respect of discrimination, you mentioned the example of the sterilization of Roma women. This case also came before our committee – the Committee on Racial Discrimination – in respect of some countries. We have said that this phenomenon happened in the past but has since progressively disappeared, and we have been able to envisage and to examine this phenomenon on the basis of our general recommendation No. 25 concerning the so-called double discrimination based on gender and race or ethnic origin. Beyond that, there is an effort towards harmonization of the conventions in regard of discrimination based on the new guidelines for common basic document. In part three of these very recent guidelines, adopted last June, there is a whole part concerning discrimination, precisely because discrimination, as you very rightly pointed out, is present in almost all human right treaties of the United Nations system. States are therefore invited to give coherent and global information about discrimination in respect of all relevant conventions. This is indeed an extremely pertinent point that we are trying to address through these new guidelines.

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Concerning the second question on the merger of committees, I am quite skeptical about this idea. Having a committee to deal exclusively with issues of discrimination presupposes the creation of a new instrument, and a new instrument should be created – legally speaking – by a new protocol. Yet, a new protocol to which convention? Should there be a common protocol to all conventions since the issue of discrimination is related to all conventions? I am not sure this is feasible. It is certainly an interesting idea but one should not forget that each committee has its specificities. Each committee is approaching the issue of discrimination in a different manner and this is also part of the richness of the system.

*Eibe Riedel** – My first question is addressed to Ms. Lee, who has given us such a courageous outline of the problems. She mentioned the word "new machinery" in the process of being set up and the relation to existing treaty bodies. I am sure that in the Office of the High Commissioner there must be floating various models of new machineries. Could you perhaps mention just a few of those models? The second question is how are we to avoid the surperficiality of the universal periodic review in the country analysis if one just goes through the motion of having 192 States reporting regularly – perhaps on a yearly, tri-annual or six-annual basis – or drawing upon the work of the treaty bodies. I think we all agree that the universal periodic review would be an improvement compared to the existing Charter-based petition system. But the value added would still have to be shown. Finally, the third question is about the concept paper discussed by Mr. Sicilianos. I see the concept paper as a pike in the pond. It was intended to provoke reaction and get things moving especially by the rather complacent treaty bodies, and in this sense, it is already a success. However, no matter its intrinsic merits, I still think the concept paper was a proposal made mainly for financial reasons. Having a single unified treaty body would probably be cheaper than having more than 100 independent experts. Financial imperatives therefore might have prompted the initiative of the Office of the High Commissioner.

Wan-Hea Lee – As regards the "models" – I would not even call them "models" – there is no a single systematic or comprehensive proposal that is being scrutinized but rather different ideas that are being examined or discussed. How to avoid superficiality of country analysis? I think this is a challenge all mechanisms are facing, not only the universal periodic review but also the existing processes. We are all subject to constraints and there is a difference in the mandate of each mechanism, Geneva-based or country visits. Even country visits cannot be carried out every time there is a problem in a particular country. Special rapporteurs may visit a country once in 10 or 15 years time. In the case of the universal periodic review, I think part of the question is who will be involved and what will be the nature of the incoming information. Will it be

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Geneva-based? Will be in situ? For the 47 members of the Human Rights Council who have pledged to cooperate there should be no problem, but what about the other 150 UN Member States who are not members of the Council? If they do not cooperate, can it not help but to be superficial or are there other ways of getting around it? What we have seen across the UN system but also beyond the UN, is that a great deal of it depends on the level of support and research that is brought to the system.

Can the Office of the High Commissioner cope with a review mechanism that is very ambitious? Probably not immediately, although I can say that this is a time of probably the greatest renewal for the Office. This is a time where resources are being made available to the Office at an unprecedented rate, not specifically tied to the universal periodic review but to UN human rights machinery reform in general. The universal periodic review replacing the Charter-based petition system may well be one of the ideas in the minds of the members of the Council. At this point, however, the Charter-based petition system would be retained while the periodic review modalities are being worked out. At resent, there is a working group on review of the mechanisms, so it might look different in the future but at this point there is no direct linkage between those petition systems and the periodic review.

Linos-Alexandre Sicilianos – Vous me permettrez d'ajouter une réflexion concernant le premier point du professeur Riedel au sujet du caractère éventuellement superficiel de cet examen périodique universel. Je vais citer l'exemple du Conseil de l'Europe, qui n'est peut-être pas à transposer tel quel: il faut y réfléchir et l'adapter évidemment. L'exemple concerne la convention-cadre pour la protection des minorités nationales. Il y a là deux niveaux de contrôle: le comité consultatif, qui est un comité d'experts indépendants, et le comité des ministres, qui est un organe. Le comité des ministres, dans son examen, qui est peut-être un peu superficiel, renvoie à l'ensemble du rapport du comité consultatif, puis choisit deux ou trois sujets qui lui semblent prioritaires et fait des recommandations insistantes auprès de l'Etat concerné pour que, sur ces deux ou trois points, on aille de l'avant et l'on adopte des mesures efficaces. C'est un examen assez superficiel de la part de l'organe politique, du comité des ministres, mais cette idée pourrait s'avérer efficace, quitte à la transposer, à la roder, à travailler dessus.

Concernant votre deuxième point, je le partage parfaitement, je l'ai d'ailleurs déjà dit. La proposition de Madame la Haut-Commissaire a créé une dynamique certaine qui a abouti à des propositions alternatives et c'est vrai qu'au sein de nos comités, nous pouvons mieux faire. J'ai eu le sentiment, après avoir participé à des réunions intercomités, que chaque comité veut faire la réforme à sa manière et voudrait que les autres suivent ses propres méthodes de travail. Mais il faut que chaque comité aille vers les autres pour voir comment ils travaillent. Le secrétariat a publié un document extrêmement intéressant sur les méthodes de travail des différents comités. Il faut que chaque membre des différents comités lise ce document de travail, parce qu'il y a beaucoup de choses

à en tirer sur les bonnes pratiques suivies par les différents comités. Chacun ne peut pas camper sur sa propre position et dire: «Voilà ce qui s'applique chez nous depuis 1970, depuis que je suis membre de ce comité, c'est-à-dire depuis le début de notre comité». Il y a des voix comme cela au sein de notre propre comité mais on ne peut pas fonctionner ainsi, les temps changent. Depuis 1970, il est vrai que certaines choses ont changé dans le monde.

*François Vandamme** – En écoutant les interventions de ce matin, je mettais en permanence en parallèle les avantages de la commission d'experts de l'OIT et ceux de la réforme des organes de contrôle que nous a présentés M. Sicilianos. Je voudrais vous faire part de trois points qui mettent en évidence, me semble t-il une inspiration que le système des Nations Unies pourrait prendre du fonctionnement de la commission d'experts de l'OIT.

A mon avis, cette commission a trois arguments majeurs en sa faveur. Premièrement, ses membres sont capables de traiter au sein d'un organe unique des conventions extrêmement différentes. Certes, elles se rapportent au domaine du mandat général de l'OIT. Mais entre la convention sur l'emploi, la convention sur la liberté syndicale, la non-discrimination, il y a des spécificités importantes qu'elle est capable de gérer elle-même, grâce au support efficace du secrétariat et à la spécialisation de ses membres. Deuxièmement, elle est assez prévisible dans ce qu'elle dit, puisque son rapport est entièrement écrit et que l'on en discute par la suite. Il n'y a plus, ensuite, d'interventions et de demandes complémentaires qui pourraient surprendre les Etats. Troisièmement, il y a chaque année un débat global avec l'ensemble des parties contractantes de toutes les conventions au sein de la Commission de l'application des normes de la Conférence internationale du Travail. Il s'agit là d'un autre organe, mais c'est le fonctionnement des deux commissions ensemble qui crée une dynamique.

L'enseignement que j'en tire par rapport à ce qu'a dit M. Sicilianos est que tout d'abord l'argument du maintien de la spécificité de chaque comité conventionnel n'est peut-être pas si convaincant que cela, puisqu'il y aurait moyen, par l'organisation ou par la spécialisation des membres, de voir éventuellement l'organisation de chambres. Il ne faut pas perdre de vue dans ce débat le traitement des plaintes individuelles sur la base des protocoles qui les permettent et dont on a parlé hier.

En ce qui concerne la prévisibilité, l'expérience de mon gouvernement est que les comités spécialisés ont été un peu imprévisibles et c'est ce qui crée parfois des difficultés. Au-delà de l'analyse des rapports et des questions complémentaires soumises avant les comparutions orales, il y a encore des questions totalement imprévisibles et qui donnent parfois l'impression que les comités étendent leur intérêt sur les champs de compétence d'autres comités. Il y a sans doute une tentation de chaque comité à vouloir se profiler, avec les meilleures intentions du monde, et cela n'a pas toujours été facile à gérer. En fait, le problème est qu'après la comparution les gouvernements, les Etats Membres

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oublient un peu l'existence du comité jusqu'à la comparution suivante. On ne peut pas imaginer, dans le système des Nations Unies, l'installation d'un comité unique avec des spécialisations organisées éventuellement en son sein, mais qui accepterait aussi d'organiser un débat périodique avec l'ensemble de ses membres pour qu'il y ait cette pression permanente et cette connaissance de ces recommandations qui s'intégreraient dans les politiques des gouvernements. Je trouve que cela redonne un certain intérêt à l'idée d'un comité unique qui serait un peu à contre-courant de la tendance des travaux dont M. Sicilianos a parlé mais je ne pensais pas que cette proposition devait être évacuée aussi rapidement.

Je termine avec une autre recommandation. Tout le monde parle ici des Etats. Nous avons eu hier l'exemple d'une discussion très intéressante et humoristique sur la volonté politique. Je crois qu'il faudrait que, tant aux Nations Unies qu'à l'OIT, on puisse dégager des moyens pour la formation aux droits de l'homme de tous les corps décentralisés et déconcentrés des Etats. Les Etats ne sont pas uniquement les gouvernements centraux. Ils font ce qu'ils peuvent mais connaissez-vous les conditions et les contraintes de la décision politique dans les Etats et encore plus dans les démocraties? Dans les niveaux subordonnés il y a également tout un travail de connaissance, de formation aux droits de l'homme qui est important pour améliorer la qualité des décisions prises à ce niveau là, car il y a tout de même des entités régionales qui ont des pouvoirs forts et étendus dans le cadre des Constitutions et on ne parle pas tellement de cette dispersion des compétences et des mécanismes qui rend parfois difficile la comparution des Etats.

Linos-Alexandre Sicilianos – Vous dites qu'il faudrait organiser le futur organe unique, si jamais un tel organe voit le jour, en chambres en fonction des spécialisations, c'est-à-dire en fonction des traités. Dans ce cas, on reproduirait plus ou moins le même schéma qui existe aujourd'hui. C'était une proposition qui a été faite par Madame le Haut-Commissaire et qui figure effectivement dans le document de réflexion qui a été longuement discuté lors du brainstorming du Liechtenstein. Tout le monde a considéré que c'est effectivement une possibilité qui résoudrait, le cas échéant, le problème des spécificités. Cependant, si l'on devait créer quelque chose de nouveau qui reproduirait le système actuel, cela n'en vaudrait pas la peine.

Pour ce qui est de l'imprévisibilité, je partage tout à fait votre point de vue. Il est vrai que lors de l'examen des rapports étatiques, nous nous sentons obligés d'ajouter chacun une ou deux questions qui nous viennent en tête après avoir lu la documentation, le rapport, et après avoir entendu les ONG, le cas échéant, à la toute dernière minute. C'est imprévisible. Les ONG qui font un briefing juste avant la présentation du rapport étatique peuvent avoir des informations extrêmement intéressantes et on aimerait quand même, ne serait-ce qu'à la dernière minute, demander une question à ce sujet à la délégation étatique. Je dirais que l'imprévisibilité fait, en quelque sorte, le charme du système lorsqu'une délégation y est bien préparée, et la délégation belge est extrêmement bien

préparée d'habitude, elle est prête à répondre à tout, y compris à des questions tout à fait imprévisibles.

Il y a une pression permanente. C'est pour cela qu'on a essayé de créer ce système de suivi, de follow-up aux observations finales, dans le cadre duquel on demande deux ou trois questions prioritaires à chaque délégation et on prie cette délégation de bien vouloir nous donner des informations supplémentaires dans un certain délai pour instaurer précisément un dialogue, sinon continu du moins rapproché, entre les deux rapports.

Enfin, quant à la qualité des décisions des entités régionales, voire des entités fédérées, il y a un besoin de formation à ce niveau, je partage votre avis. Je suis parfaitement conscient des difficultés qu'ont un certain nombre d'Etats, notamment quelques Etats fédéraux, qui disent devant les comités que le gouvernement central fait tout ce qu'il peut mais qu'il y a aussi les entités fédérées, les entités régionales et locales, qui ont leurs pouvoirs en vertu de la Constitution et pour lesquelles le gouvernement central ne peut rien. Je sais que, dans l'esprit de mes collègues constitutionnalistes, ceci est un argument très fort que nous respectons parfaitement. De notre point de vue, en vertu du sacro-saint principe du droit international, l'Etat est unitaire. Un organe international de contrôle considère l'Etat comme une seule entité et, comme la Cour internationale de Justice le dit depuis plusieurs décennies, ce qui se passe à l'intérieur de l'Etat, c'est un pur fait du point de vue du droit international. On ne peut pas faire autrement, vous peut-être non plus, et c'est une différence d'approche entre les constitutionnalistes et les internationalistes, je le reconnais volontiers mais je n'ai pas de réponse à cette discordance.

Reforming the Council of Europe's system of human rights protection: Current developments

Jutta Limbach *

I. Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), which came into force in September 1953, pursues the aims of maintaining and further realising human rights and fundamental freedoms. It is the first international instrument which did not only lay down individual rights legally binding on all States parties, but also set up a mechanism for the enforcement of these rights. The most distinctive feature of this mechanism is the right of individual application. The European Court of Human Rights (hereinafter "the Court") is the only international court to which any individual, or group of individuals, may have access for the purpose of enforcing their rights under the Convention, in accordance with Articles 34 and 35 of the Convention. This right of individual application is both an essential part of the system and a basic feature of European legal culture.[1] Since 1998, the task of supervising State compliance with the Convention standards is performed by a single, full-time Court replacing the original Convention organs, namely, the Commission and the former part-time Court. The role of the Court within the Convention system is twofold: Firstly, the Court has been assigned the task of supervising the States parties' respect of the Convention rights in the

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[1] See the Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203, 15 November 2006, para. 23.

individual cases brought before it. Secondly, it has been given a specific "constitutional mission", consisting of laying down common principles and standards relating to human rights and of determining the minimum level of protection to be observed by the contracting States.[2] If the Court is to retain its leading role in the system of the international protection of human rights, both these principles have to be preserved.

With the accession of the East European member States to the Convention following the fall of the "iron curtain", the Court's caseload increased dramatically. This may be illustrated by the following numbers: during the 35 years between the setting up of the Convention organs in 1955 and 1990, an overall number of some 54,000 applications were lodged with the Convention organs; in 2004 alone some 44,000 applications were lodged with the Court.[3] By the end of September 2006, 89,000 cases were pending before the Court. Even though more than 90 per cent of these applications will eventually be declared inadmissible, the processing of these cases bind the judges and their supportive Registry staff and prevent them from concentrating on those cases which merit more intensive consideration. This leads to an increasing backlog of cases which cannot be processed within the time-limits set by the Court itself in order to ensure the effectiveness and the credibility of its work.

The exponential increase of the Court's caseload jeopardises the functioning of the whole system. In order to ensure the future effectiveness of the Court system, the Council of Europe launched a number of initiatives, culminating in Protocol No. 14 to the Convention which opened for signature in May 2004. This Protocol will enter into force three months after all the Parties to the Convention have ratified it. To date, only one ratification is missing.

In addition, the Council of Europe Third Summit of Heads of State and Government, held in Warsaw in May 2005, established a Group of Wise Persons in order to develop a long-term strategy for the Convention system. The group was assigned the task to submit proposals which went beyond the measures established by Protocol No. 14, while preserving the basic philosophy of the Convention.[4] This group submitted its report on 15 November 2006. Some of the recommendations contained in this report are outlined below.

The subject-matter of today's lecture compels me to focus on the difficulties the Court is facing in the wake of the accession of the East European member States to the Convention. However, I should not do so without recalling that this was a highly fortunate event which placed the Council of Europe and its Court right into the heart of Europe. When discussing the issue of reforming the system of European human rights protection, we should keep in mind the eminent role that the European Convention on Human Rights, and the Court as its executing organ, play in safeguarding democratic values across Europe, as well as in

[2] *Ibid.*, para. 24.

[3] See the Court's Annual Report 2005.

[4] Third Summit of Heads of State and Government of the Counsel of Europe (Warsaw, 16-17 May 2005), Action Plan, CM(2005)80 final 17 May 2005, para. I(1).

setting an example even beyond the borders of its member States. The Convention and the Court have become "genuine pillars in the protection of human rights and fundamental freedoms".[5] More than that, the Convention has been rightly depicted as "both a symbol of, and a catalyst for, the victory of democracy over totalitarian Government", as well as "the ultimate expression of the capacity, indeed the necessity, for democracy and the Rule of Law to transcend frontiers".[6] Bearing this in mind, it is essential to ensure that any reform steps taken do not curtail the Court's aptitude to continue performing this role.

II. The changes introduced by Protocol No. 14

Under the present procedural system, incoming applications are allocated either to a Committee of three or to a Chamber of seven judges. The Committee of three judges may decide, by unanimous vote, to declare inadmissible applications where it can do so without further examination, which means in cases which are clearly inadmissible. All remaining applications have to be considered by a chamber of seven judges.

Protocol No. 14 endeavours to provide the Court with the necessary procedural means and flexibility to process applications within a reasonable time. It seeks, in particular, to reduce the time spent by the Court on manifestly inadmissible and repetitive cases. The main changes introduced to the procedure of the Court are the following:

(i) A single judge will acquire the competence to decide on cases which are plainly inadmissible.[7] He or she will be assisted by non-judicial rapporteurs, that is to say, by lawyers from the Court's Registry.[8]

(ii) The powers of the three-judge Committees are extended. In addition to their existing competency to declare an application inadmissible or to strike it out of the Court's list of cases, they will be competent to declare an application admissible and render at the same time a judgment on the merits, if the underlying question in the case is already the subject of well-established case-law of the Court.[9] This measure aims at unburdening the Chambers from giving judgment in cases which are clearly well-founded, such as repetitive or so called "clone cases".

(iii) A new admissibility criterion is introduced. The Court will be empowered to declare inadmissible any individual application where the applicant has not suffered a significant disadvantage. However, cases may not be

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[5] See Report, *op. cit., supra* n. 1, para. 15.

[6] See speech given by Luzius Wildhaber on the occasion of the opening of the judicial year, 20 January 2006.

[7] New Articles 26 and 27 of the Convention.

[8] New Article 24(1).

[9] New Article 28(1)(b).

dismissed on this ground if "respect for human rights" requires an examination of the merits or where the case has not been duly examined by a domestic tribunal.[10]

(iv) Protocol No. 14 also provides that the admissibility and merits of an application shall be examined jointly, unless the decision-making body decides otherwise. This regulation merely endorses a practice which has already been adopted by the Court and which leads to a considerable acceleration of the processing of cases. As a matter of current practice, in fact, the Court disposes of the majority of admissible cases by giving a joint decision on the admissibility and the merits of an application, eliminating one procedural step, namely the separate examination of the admissibility.

(v) Lastly, Protocol No. 14 contains a number of provisions on the execution of Court judgments and on the judges' election and terms of office.

III. The Group of Wise Persons' proposals

The Group of Wise Persons expressly welcomed the changes introduced by Protocol No. 14, which we deemed extremely useful.[11] We considered, however, that the measures proposed in this Protocol would not be sufficient to enable the Court to find any lasting solution to its serious problem of congestion. Accordingly, we took this Protocol as a starting point and proposed further measures designed to ensure that the Court is able to perform its specific functions fully and on a long-term basis.[12]

During our deliberations, we considered a number of proposals. For example, it had been suggested that the Court should be given a discretionary power to decide whether or not to take up cases for examination, comparable to the *certiorari* procedure before the United States Supreme Court. While such a measure might to a certain degree ease the burden of the Court's workload, the price to be paid for this relief would be too high. As I have already pointed out, the right of individual application has to be regarded as a key element of the European human rights protection system. The Court's authority stems to a significant degree from the fact that every applicant claiming a violation of a Convention right has the assurance that his or her case be heard in Strasbourg. The introduction of a *certiorari* procedure would run contrary to this assurance and thus undermine the public confidence in the Convention system. At the same time, such a measure would be alien to the philosophy underlying the Convention. It should further be noted that the Court's credibility relies on its political neutrality. Granting the Court a greater margin of appreciation as to which applications it wishes to accept for adjudication would entail a risk of politicising the system as the Court would have to select cases for examination. The choices it

[10] New Article 35(3)(b).

[11] See Report, *op. cit.*, *supra* n. 1 para. 30 .

[12] *Ibid*., para. 33.

would make might have led to inconsistencies and might even have been considered arbitrary. For these reasons, we decided not to endorse this proposal.[13]

Instead, we decided to go beyond the reforms envisaged by Protocol No. 14 by proposing to establish a new judicial filtering body that would be attached to, but separate from the Court. We called this new judicial body the "Judicial Committee". The purpose of this measure would be to guarantee, on one hand, that individual applications result in a judicial decision – thus upholding the tradition that "every case be heard in Strasbourg" – while assuring, on the other hand, that the Court is relieved of a large number of cases, enabling it to focus on its essential role. The members of the Judicial Committee would be judges enjoying the same guarantees of independence and disposing of similar qualifications as the other judges of the Court. Their term of office would be limited in time. The composition of the Judicial Committee should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between States.

The Judicial Committee would, in particular, perform functions which, under Protocol No. 14, are assigned to committees of three judges and single judges. Accordingly, the Judicial Committee would have jurisdiction to: (a) hear all applications raising admissibility issues; (b) hear all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court; and (c) award just satisfaction in cases in which it found a violation of a Convention right. The decisions of the Judicial Committee should, in principle, be taken by benches of three judges. However, since the Judicial Committee would perform, among others, functions which, under Protocol No. 14, are assigned to a single judge, we considered it appropriate that provision should also be made for manifestly inadmissible cases to be heard by a single judge. We considered that it would be inappropriate to provide for the possibility of appealing against the decisions of the Judicial Committee. Providing for such a possibility would place an additional burden on the control system and jeopardise the aim of easing the Court's workload. However, the Court should be given a special power allowing it, on its own motion, to assume jurisdiction to review any decision adopted by the Judicial Committee.[14]

By creating a Judicial Committee within the Court's administration, we would avoid the problems of a dual system such as those that arose between the old Commission of Human Rights and the Court. Furthermore, the Judicial Committee could dispose of applications more effectively than the old Commission, as it would be competent to give binding decisions not only in inadmissible, but also in clearly cut, well-founded cases. For these reasons, we consider that the establishment of a Judicial Committee would contribute to a substantial degree to the solution of the Court's present problems.

In order to achieve a long-term effect, this measure is corroborated by a number of other suggestions. For instance, consideration was given to the

[13] *Ibid*., para. 42.

[14] *Ibid*., paras. 51-65.

principle of subsidiarity as "one of the cornerstones of the system for protecting human rights in Europe",[15] implying that violations of Convention rights should be first and foremost remedied by the member States themselves. As the President of the Court has rightly put it, the task consists in achieving a balance between national and international protection; both components must function effectively if the system is to work.[16] Accordingly, we suggested a number of measures aimed at strengthening the co-operation between the Court and the States parties, such as ensuring a broad dissemination of important judgments within the member States[17], allowing certain national courts to request the Court's advisory opinion[18] and encouraging the member States to improve their domestic remedies for redressing violations of the Convention.

Furthermore, we suggested that certain tasks could be delegated by the Court to the domestic authorities, such as the award of just satisfaction after the Court has found a violation of the Convention. Being closer to the subject-matter at issue, the national authorities are frequently better placed than the Court to assess the actual damage.

Finally, we also encouraged the Court to continue giving pilot judgments and proposed certain modifications to the Court's procedural rules which would allow the parties to have recourse to mediation during proceedings.

IV. Final remarks

Now that the Group of Wise Persons has submitted its report, the next step will consist in discussing our proposals in the decision-making bodies of the Council of Europe and its member States with a view to a swift implementation of reform measures. At this stage, it is of crucial importance that all member States detach themselves from any short-term political interests, in order to ensure not only the survival, but also the thriving of the European system of human rights protection. I suppose that you all know only too well how ambitious projects can get watered down by nitty-gritty politics. However, bearing in mind that the Heads of State, in their Warsaw summit, have clearly expressed their determination to "ensure the long-term effectiveness of the Convention […] by all appropriate means",[19] I am confident that last and this year's work was not in vain and that the joint efforts of the member States, the organs of the Council of Europe and – last but not least – the Court itself will effectively safeguard the future of the European system of human rights protection.

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[15] *Ibid*., para. 16.

[16] See Luzius Wildhaber, "Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on judgments revealing an underlying systemic problem – Practical steps of implementation and challenges", in Reform of the European human rights system – Proceedings of the high-level seminar, Oslo, 18 October 2004, Council of Europe, 2004.

[17] See Report, *op. cit., supra* n. 1, paras. 66-75.

[18] *Ibid*., paras. 81-86.

[19] See Action Plan, *op. cit., supra* n. 4, para. I(1).

Discussion

Linos-Alexandre Sicilianos * – With reference to the Judicial Committee, I am personally enthusiastic about this major proposal. The problem is, however, that this proposal originated from the Court itself, four years ago during the *travaux préparatoires* of the 14th Protocol and more than two-thirds of the Member States of the Council of Europe were against this proposal for fear that it would in a way recreate the European Commission of Human Rights. Although I fully agree with Ms. Limbach that there are some important differences between the Judicial Committee and the European Commission of Human Rights, I believe that the political will is lacking and therefore it would be very difficult to convince the governments concerned at the present juncture.

My second comment is somewhat more critical and relates to the proposal to delegate to the national authorities the issue of just satisfaction. I think this may affect the credibility of the whole system. Applicants are mostly interested in this very practical, and evidently very important issue. Should they see that the European Court is referring this issue back to the national authorities, which by definition have already rejected their claims, there would certainly be an element of frustration and scepticism. I am therefore in doubt as to how such a proposal would be viewed from the applicants' point of view, and I would very much like to have Ms. Limbach's views on this.

Jutta Limbach – I think we have made our point very clear that there is a distinction between the former Commission of Human Rights and the proposed Judicial Committee. There are certain characteristic features which should leave no doubt that this is far from being a repetition. According to the Group of Wise Persons' final report, for instance, the Judicial Committee has to adjudicate under the aegis of the Court and a member of the Court will be the chairman of the Judicial Committee. It is true, however, that we might need to argue further in favour of such measure.

The second point concerning just satisfaction was very intensively discussed in the Group of Wise Persons. According to our proposals, individual applicants, if they consider that the amount of compensation obtained is not appropriate, or not in compliance with the European Convention on Human Rights, would have the possibility to go back to the Judicial Committee, or to the Court, in order to challenge the decision of a national body. This is not the only remedy but I think that our proposal can be formulated in a way that gives reassurance that the Court not only pronounces itself on principles but keeps a close grip on practice too.

Laura Cox ** – It might interest those of you that are here to know that, in fact, earlier this year I handed down a judgment in which I found that there had

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been a violation of article 2 and had to assess compensation myself under our own Human Rights Act and, in fact, although the Act requires us to look to the Strasbourg Court for guidance on all these matters, the one thing that the Strasbourg Court has not been terribly consistent on is how they arrive at compensation. There is no clear structure as to how awards are to be calculated. Actually, I regarded this as a very good opportunity. It presented me, as the judge, to formulate some guidelines as to how one should go about assessing compensation and I laid them all down. I now wait, of course, to be overturned by the Court of Appeal whenever the case will turn up. Whatever the concerns about national courts, in some cases it might actually be quite an advantage because in this particular case I feel I was probably more generous than the Strasbourg Court might have been.

*Budislav Vukas** – I wonder whether the Group of Wise Persons was wise enough to reconsider the question of the protection of persons belonging to minorities. In the past, it has been suggested that the Council of Europe should set up a mechanism to enable persons belonging to minorities to have access to the Court or earlier to the Commission. In 1993 a group was established to draft a special protocol on the protection of minorities but in 1996 the group was dissolved and it was decided to adopt the current framework convention which in essence is soft law. Apart from the clause on the prohibition of discrimination, there is nothing specific in the European Convention relating to the protection of minorities. On several occasions, the idea of a protocol was floated but it was never really intended to move forward with such a project. My question is whether the Group of Wise Persons has given thought to any fresh initiative in this regard.

Jutta Limbach – I have a very short answer. It was not our task to re-examine concrete, substantive issues. We only made proposals aiming at easing the burden of the workload of the Court and, therefore, we addressed exclusively procedural questions. There might be need for another Group of Wise Persons to reflect on the possible establishment of future committees and commissions. I am afraid I am not in position to provide a better answer to this very important question.

*Eibe Riedel*** – The idea of the Judicial Committee is, of course, a very interesting proposal. I would be interested, however, in hearing more about cost and also about the extent to which this new body is expected to reduce the caseload. One might have just increased, or even doubled, the number of judges instead of having two parallel institutions with all potential difficulties. At the

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same time, the Judicial Committee would conceivably come very close to the old Commission, with the addition that its members will be fully established judges and will have to be treated alike. After all, this would appear to be the court of the first instance of the European community.

Beyond this, a point of real concern is the issue of subsidiarity. I think that in the long run we have to look very closely at the old common law development of "itinerant justices", or something similar to that, and go back to the national level having European judges travelling around and overseeing that the common standard of Strasbourg is maintained because statistical figures will inevitably continue to rise. They have continually gone up, and therefore the 80,000-case figure is only a temporary one. What if the workload were to mount at 150,000 cases? I would really like to know your personal views on this.

Jutta Limbach – I know that our proposals would have been warmly welcomed if we had managed to put forward solutions that would cost nothing. However, you cannot validly expect to reach any meaningful results without being prepared to allocate sufficient resources to such extraordinary task. The Group of Wise Persons has, in fact, suggested that the membership of the Judicial Committee should not necessarily correspond or otherwise be related to the number of Member States. It was also suggested that the Committee of Ministers should reconsider whether the Court should continue to be composed of 46 judges. There must be a reduction, not only for reasons of cost but also in the interest of guaranteeing uniform jurisprudence. Therefore, I think that a "double court", or a Judicial Committee as a court of the first instance, is not what is envisaged. This was also the view of the Chairperson of the Group of Wise Persons, and former President of the European Court of Justice, Mr. Rodriguez Iglesias. Regarding the principle of subsidiarity, it is undeniably very important and Mr. Riedel is totally right in saying that the best way to protect human rights is to do so within national borders. Yet, standards differ considerably across Europe and the European Court of Human Rights has a challenging task in this regard. Finally, the concept of "itinerant justices" would merit to be given serious consideration as an alternative proposal.

La fusion de la Cour de Justice de l'Union africaine et de la Cour africaine des droits de l'homme et des peuples

Fatsah Ouguergouz *

Je voudrais, pour commencer, vous dire le grand honneur et l'immense privilège que je ressens d'avoir été convié à participer aux travaux de ce Colloque commémoratif du 80e anniversaire de la commission d'experts de l'OIT. Je suis d'autant plus honoré que je ne suis probablement pas la personne la plus indiquée pour parler de la métamorphose du système régional africain de protection des droits de la personne humaine et plus particulièrement du projet de fusion de la Cour africaine des droits de l'homme et des peuples et de la Cour de Justice de l'Union africaine. En effet, je ne suis pas un véritable praticien des droits de l'homme ou un membre du corps académique spécialisé dans la question. Ce n'est que très récemment que j'ai été impliqué professionnellement dans le domaine des droits de l'homme sur le continent africain. A cet égard, je tiens à indiquer que j'utiliserai les expressions «droits de l'homme» pour le générique et sans aucune connotation particulière ou «droits de la personne humaine», certes un peu plus longue, mais non le concept de droits humains que j'exècre. Mon engagement récent dans ce domaine auprès de la Cour africaine des droits de l'homme et des peuples n'a, en effet été rendu possible qu'après avoir démissionné de mes fonctions de Premier Secrétaire de la Cour internationale de Justice et quitté mes pensées noyées dans les brumes de la mer du Nord et engourdies dans le silence du Palais de la Paix à La Haye. En effet, depuis début 2006, j'ai le redoutable privilège de compter parmi les membres de ce premier organe judiciaire international à l'échelle du continent africain ce qui me vaut très certainement l'honneur d'être en mesure de m'adresser aujourd'hui à vous pour vous parler du présent et du futur de cet organe judiciaire et de la question

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complexe de la fusion de cette Cour avec la Cour internationale de Justice. Ne conférez toutefois pas à mes propos une autorité qu'ils n'ont pas car ce n'est pas vraiment un expert qui vient aujourd'hui vous parler de la métamorphose du système régional de protection des droits de l'homme en Afrique et de la fusion envisagée des deux Cours mais plutôt un néophyte, un conférencier occasionnel fraîchement revêtu de l'hermine du juge international.

Mon propos s'inscrira dans le droit fil de l'ensemble des travaux de ces deux jours consacrés essentiellement à la dimension institutionnelle ou organique de la pratique de la protection des droits de la personne humaine et des droits économiques, sociaux et culturels en particulier. J'examinai cette dimension institutionnelle ou organique dans le cadre particulier du continent africain. Toutefois, avant de me pencher sur cette question de la métamorphose du système régional de protection des droits de l 'homme en Afrique et de la question particulière de la fusion des deux cours, j'aimerais tout d' abord esquisser à grands traits les contours du système général de protection des droits de la personne humaine sur le continent africain et dire quelques mots sur la Charte africaine des droits de l'homme et des peuples adoptée en 1981.

Je commencerais donc tout d'abord par le système général de protection des droits de l'homme sur le continent africain. J'aimerais faire cette présentation à l'intention de celles et ceux d'entre vous qui ne seraient pas vraiment familiers avec cette question et j'ajouterais également qu'en ma qualité de juge je me sens également un devoir de participer à la promotion de cet instrument juridique international et d'en assurer la visibilité.

La protection des droits de l'homme sur le continent africain est assurée par un réseau dense et complexe d'instruments juridiques internationaux qui ont été adoptés, pour la plupart, avant même l'indépendance des Etats africains. Je citerais la Déclaration universelle des droits de l'homme de 1948 et un très grand nombre d'instruments juridiques à valeur obligatoire, de conventions internationales adoptées dans le cadre de l'ONU, au premier rang desquelles le Pacte de 1966 auquel un très grand nombre d'Etats africains sont parties. Aux conventions conclues dans le cadre des Nations Unies *stricto sensu*, j'ajouterais toutes les conventions qui ont été adoptées dans le cadre de cette belle Organisation qu'est l'Organisation internationale du Travail, et également les conventions qui ont été adoptées dans le cadre de l'UNESCO. Il convient de mentionner également les instruments qui ont vocation à s'appliquer en situation de conflits armés internationaux ou non internationaux, à savoir le droit de Genève. Si toutefois je devais limiter mon examen aux seuls instruments internationaux à valeur juridique obligatoire, c'est-à-dire aux seuls instruments conventionnels adoptés *par* les seuls Etats africains et *pour* les seuls Etats africains, je dirais qu'il faut d'abord mentionner la Charte africaine des droits de l'homme et des peuples qui est le pendant régional de la Convention européenne des droits de l'homme en Europe et de la Convention américaine des droits de l'homme en Amérique.

La Charte africaine des droits de l'homme et des peuples, dois-je le souligner, n'est pas le seul instrument africain relatif à la protection des droits de l'homme sur le continent africain. Elle n'est qu'un des éléments de ce que

j'appellerais l'édifice régional de protection des droits de l'homme sur le continent africain. Pour utiliser une image, je dirais que tel qu'il a été conçu par les Etats africains eux-mêmes cet édifice repose sur quatre piliers de solidité inégale dont certains ont été renforcés au cours des ans. D'un point de vue chronologique, le premier pilier a été coulé à Addis-Abeba en 1963. Il s'agit, en l'occurrence, de la Charte constitutive de l'Organisation de l'unité africaine. A mon sens, il s'agit là du pilier le plus fragile de tout l'édifice. Cet important document politique et juridique consacre, en effet, une place très faible à la question des droits de l'homme si on le compare, par exemple, à la Charte des Nations Unies, à la Charte constitutive de l'Organisation des Etats américains ou encore au Statut du Conseil de l'Europe. Contrairement à ces dernières qui accordent une plus grande importance aux peuples, la Charte de l'OUA est un document plutôt orienté vers la souveraineté de l'Etat et le territoire.

Le deuxième pilier de cette construction a été coulé en 1969 sous la forme de la convention régissant les aspects propres aux problèmes des réfugiés en Afrique. Il s'agit d'une convention importante et généreuse s'il en est puisqu'elle est venue sensiblement élargir la définition de la notion de «réfugié» donnée par la convention des Nations Unies de 1951 telle que complétée par son protocole de 1967, en ne se limitant pas à la protection des seuls réfugiés politiques mais en protégeant également toute personne qui, du fait d'une agression, d'une occupation extérieure, d'une domination étrangère ou d' événements troublant gravement l'ordre public, est obligée de quitter son pays.

Le troisième pilier, le plus solide, a été coulé en 1981. Il est constitué par la Charte africaine des droits de l'homme et des peuples sur laquelle je reviendrai plus tard.

Enfin, le quatrième et dernier pilier de cet édifice date, pour sa part, de 1990 et consiste en la Charte africaine des droits et du bien-être de l'enfant.

Le premier pilier de cette construction régionale, le pilier le plus fragile, à savoir la Charte de l'OUA, a aujourd'hui été remplacé par un pilier beaucoup plus solide avec l'entrée en vigueur de l'Acte constitutif de l'Union africaine, le 26 mai 2001. Ainsi, ce pilier qui était, pour ainsi dire en pisé, en terre battue, a été remplacé par un nouveau en béton armé, beaucoup plus solide, dans le cadre de la mutation fondamentale qu'a subie l'Organisation panafricaine en 2001.

Comme j'ai déjà eu l'occasion de le mentionner, l'Organisation de l'unité africaine vouait un culte immodéré à la souveraineté nationale et à la protection des territoires des Etats membres. L'Acte constitutif de l'Organisation de l'Union africaine, pour sa part, place la protection des droits de la personne humaine au centre de ses préoccupations. Ainsi, alors que l'Organisation de l'unité africaine était centrée sur les territoires et sur l'Etat, l'Union africaine est davantage centrée sur l'individu et les peuples africains. En effet, sans le citer dans son intégralité, il convient de mentionner que l'article 3 de l'Acte constitutif de l'Organisation de l'Union africaine accorde une grande importance aux droits de l'homme et envisage même un droit d'intervention humanitaire de l'Union africaine dans certaines circonstances, en particulier les situations de violations graves et massives des droits de l'homme comme par exemple le

génocide ou la violation des normes de *jus cogens*. Désormais le non-respect des prescriptions de l'organe suprême de cette organisation qu'est la Conférence des chefs d'Etat et de gouvernement expose les Membres à une intervention de l'Organisation voire à des sanctions. Cela témoigne d'une mutation fondamentale – les dispositions juridiques restent à être mises en œuvre mais leur simple adoption témoigne indubitablement d'un changement d'esprit des dirigeants africains.

Le troisième pilier, à savoir la Charte africaine des droits de l'homme et des peuples, a également été renforcé. Il a été renforcé à deux reprises par le biais de protocoles. Le premier renforcement est intervenu au moyen de l'adoption du protocole portant création de la Cour africaine des droits de l'homme et des peuples en juin 1998. Il a également été renforcé en 2003 par l'adoption du protocole relatif aux droits des femmes en Afrique. A mon sens, la Charte africaine des droits de l'homme et des peuples constitue la clé de voûte et le noyau dur du système régional de protection des droits de l'homme en Afrique.

Laissez-moi aborder brièvement maintenant les caractéristiques principales de la Charte africaine des droits de l'homme et des peuples. En ce qui concerne le contenu matériel, je serai assez rapide. Ce qu'il convient de retenir, c'est que la Charte consacre deux catégories de droits individuels dans un seul instrument: les droits civils et politiques d'un côté et les droits économiques, sociaux et culturels de l'autre, contrairement au modèle européen et interaméricain. Elle consacre tant des droits d'abstention ou des droits immédiatement exécutoires que des droits programmatoires ou des droits de créance. Au niveau universel, comme vous le savez, la question de savoir s'il fallait adopter un seul pacte ou deux pactes distincts a été longuement discutée, pour finalement se solder par l'adoption de deux pactes – un pour chaque type de droits avec deux mécanismes de supervision différents. La deuxième originalité importante de la Charte africaine est qu'elle consacre des droits de solidarité ou les droits de la troisième génération. Il s'agit du premier instrument juridique à valeur obligatoire consacrant des droits tels le droit des peuples au développement ou le droit des peuples à l'environnement. J'aimerais, d'ailleurs à ce stade, rappeler que dans son Historia natural, une vaste encyclopédie des connaissances de son temps, Pline l'Ancien écrit: «*ex Africa semper aliquid novi*», de l'Afrique il sort toujours du nouveau. Le moins que l'on puisse dire, c'est que les Etats africains n'ont pas fait mentir ce naturaliste romain décédé il y a presque 2000 ans aujourd'hui. La troisième originalité de la Charte est qu'elle consacre le concept de devoir et prévoit la création d'une Commission africaine des droits de l'homme et des peuples qui a deux attributions principales: la promotion des droits de l'homme d'un côté et la protection des droits de l'homme de l'autre. Cet organe avait, en fait, des prérogatives très faibles dans le cadre de la Charte africaine mais il a peu à peu subi des métamorphoses. En effet, cette Commission a vu ses prérogatives élargies, en même temps que diminuaient celles de l'organe suprême de l'Union africaine, la Conférence des chefs d'Etat qui voulait garder la main haute sur cet organe de promotion et de protection des droits de l'homme. Ceci témoigne donc déjà d'une métamorphose au niveau de l'évolution de la Commission africaine elle-même qu'on a parfois beaucoup accusé de

ne pas avoir fourni beaucoup de travail durant ses 20 années d'existence. Pour ma part, je ne serai pas trop critique à son égard, dans la mesure où cet organe n 'a pas vraiment de moyens matériels ni de moyens humains à sa disposition puisqu'il n'est constitué que de onze commissaires qui ne sont pratiquement pas assistés. Il faut, par ailleurs, rappeler une chose importante qui est que la Commission africaine n'a pas hésité à se prononcer sur la justiciabilité des droits économiques, sociaux et culturels et il convient de mettre ceci à son crédit. Il ne faudrait, par conséquent, pas être trop critique à son endroit. Comme l'écrivait Roger Caillois, en évoquant l'histoire du mythique Sisyphe, «il n'y a pas d'efforts inutiles, Sisyphe se faisait les muscles». A l'objection que le temps est maintenant venu pour cette Commission d'agir, je répondrais que la situation risque maintenant d'évoluer avec la récente installation de la Cour africaine des droits de l'homme et des peuples avec laquelle elle est appelée à travailler en tandem.

En effet, la Cour africaine des droits de l'homme et des peuples a été établie au début de cette année suite à l'entrée en vigueur en janvier 2004 du Protocole prévoyant sa création. L'élection des juges qui devait initialement intervenir en juillet 2004 n'a, en fait, été possible que 18 mois plus tard, à savoir en janvier 2006. Je reviendrai plus tard sur les raisons de ce retard. La Cour est composée de 11 membres et peut être saisie aussi bien par des Etats que par la Commission africaine elle-même, ou encore par des organisations intergouvernementales africaines. Il s'agit d'un accès direct et automatique dans la mesure où les Etats parties à la Commission africaine et les organisations intergouvernementales peuvent accéder directement à la Cour. Les individus et les ONG peuvent également accéder à la Cour, mais seulement sur une base consensuelle – l'Etat partie défendeur doit, au préalable, avoir fait une déclaration d'acceptation de cette compétence. Il s'agit là, à mon sens, d'un point faible de ce protocole. La compétence matérielle est, quant à elle, beaucoup plus intéressante dans la mesure où la Cour africaine n'a pas uniquement pour objet de connaître des violations de la Charte africaine des droits de l'homme et des peuples, comme c'est le cas dans le cadre interaméricain ou européen, où il y a un instrument de référence unique. La Cour africaine des droits de l'homme et des peuples peut connaître de la violation «de tout autre instrument pertinent relatif aux droits de l'homme et ratifié par les Etats parties». En d'autres termes, la Cour africaine pourrait, en théorie, être saisie d'une violation du premier ou du second Pacte des Nations Unies de 1966, ou d'une violation d'une quelconque convention de l 'OIT, à laquelle serait partie un Etat africain. La Cour pourrait ainsi venir assister la commission d'experts de l'OIT et le Comité des droits de l'homme des Nations Unies ou le Comité des droits socio-économiques et culturels dans leur lourde et précieuse mission. La dernière chose importante que j'aimerais dire à propos de cette Cour est que ses jours sont comptés. Comme vous le savez, elle n'atteindra jamais l'âge très respectable de cette auguste commission d'experts indépendants du BIT.

Nous arrivons ainsi à la question de la fusion de la Cour africaine des droits de l'homme et des peuples et de la Cour de justice de l'Union africaine. Cette

question rejoint d'ailleurs celle du retard expliquant l'élection des juges. Alors qu'elle devait initialement élire les juges en juillet 2004, la Conférence a finalement décidé de fusionner les deux cours. Un certain nombre de raisons économiques comme la rationalisation des organes de l'Union africaine ont présidé à cette décision et la principale raison invoquée fût le manque de moyens financiers de disposer de deux cours. Je me référerais ici à nouveau à Pline l'Ancien qui disait qu'il sort toujours du nouveau de l'Afrique. Fusionner deux cours a vocation totalement différente. En effet, la Cour de justice de l'Union africaine est prévue par l'Acte constitutif de l'Union africaine et en particulier par le Protocole de Maputo adoptée en 2003. Cette cour peut être comparée à la Cour de justice de Luxembourg dans la mesure où elle a compétence pour connaître tout le contentieux constitutionnel de l'Union africaine, mais également de tout autre contentieux international. En fait, la Cour de justice de l'Union africaine est à la fois une Cour du Luxembourg et une mini Cour internationale de justice. Les chefs d'Etats africains ont décidé de fusionner la Cour africaine des droits de l'homme et des peuples et la Cour de justice qui a, elle-même, deux casquettes. En pratique, cela reviendrait à fusionner la Cour de Strasbourg, la Cour du Luxembourg et la Cour internationale de justice.

Il s'agissait là d'une gageure très importante que certains, comme moi-même, ont considéré non comme une fusion mais comme une «confusion», qui pouvait être une manière pour les chefs d'Etats africains de repousser aux calendes africaines la création d'une cour africaine. En juillet 2005, à l'instigation du ministre algérien des Affaires étrangères, M. Mohamed Bedjaoui, la Conférence des chefs d'Etat a finalement pris la décision de rendre opérationnelle la Cour africaine des droits de l'homme et des peuples et de poursuivre le projet de fusion. M. Bedjaoui qui est actuellement ministre des Affaires étrangères de la République démocratique algérienne et ancien membre et Président de la Cour internationale de Justice a dit, je cite: «On opérationnalise la Cour africaine des droits de l'homme et moi je m'occupe de vous aider à rédiger un protocole». En effet, l'idée des chefs d'Etat était d'avoir trois protocoles: un protocole qui crée la Cour africaine des droits de l'homme et des peuples, un protocole qui crée la Cour de justice de l'Union africaine et un protocole de fusion. Voici la raison pour laquelle je vous parlais de «confusion» – pour que cette nouvelle cour puisse voir le jour, il fallait que les Etats parties ratifient trois protocoles. Trois protocoles pour une seule cour. Pourquoi faire simple quand on peut faire compliqué, n'est-ce pas? M. Bedjaoui a donc proposé l'idée d'un instrument unique en disant que «nous devons tout effacer et construire de nouveau». Deux mois après sa proposition, il a effectivement soumis un projet qui est, actuellement, toujours en cours de négociation. Le projet devait être discuté par une réunion d'experts ainsi que par une réunion de ministres de la Justice, mais cette discussion a été reportée à l'année prochaine.

The ILO Committee of Experts in pictures (2000-2006)

CEACR, 71st session, Geneva, 23 Nov.-8 Dec. 2000

1. Ms. Ewa LETOWSKA (Poland)
2. Sir William DOUGLAS (Barbados), Chairman of the Committee
3. Mr. Edilbert RAZAFINDRALAMBO (Madagascar), Reporter of the Committee
4. Ms. Janice R. BELLACE (United States)
5. Ms. Robyn A. LAYTON (Australia)
6. Ms. Blanca Ruth ESPONDA ESPINOSA (Mexico)
7. Mr. Boon Chiang TAN (Singapore)
8. Ms. Laura COX (United Kingdom)
9. Baron Bernd von MAYDELL (Germany)
10. Mr. Cassio MESQUITA BARROS (Brazil)
11. Mr. Prafullachandra Natvarlal BHAGWATI (India)
12. Mr. Andre ZENGER, Director a.i., International Labour Standards Department
13. Mr. Amadou SÔ (Senegal)
14. Mr. Benjamin Obi NWABUEZE (Nigeria)
15. Mr. Jean-Maurice VERDIER (France)
16. Mr. Budislav VUKAS (Croatia)
17. Mr. Sergey Petrovich MAVRIN (Russian Federation)
18. Mr. Anwar Ahmad Rashed AL-FUZAIE (Kuwait)
19. Mr. Lee SWEPSTON, Chief, Equality and Employment Branch

Mr. Toshio YAMAGUCHI (Japan) and Mr. Miguel RODRÍGUEZ PIÑERO Y BRAVO FERRER (Spain) do not appear in this photograph.

CEACR, 76th session, Geneva, 21 Nov.-9 Dec. 2005

1. Ms. Laura COX (United Kingdom)
2. Ms. Angelika NUSSBERGER (Germany)
3. Mr. Cassio MESQUITA BARROS (Brazil)
4. Ms. Cleopatra DOUMBIA-HENRY, Director, International Labour Standards Department
5. Ms. Robyn A. LAYTON (Australia), Chairperson of the Committee
6. Ms. Janice R. BELLACE (United States)
7. Ms. Blanca Ruth ESPONDA ESPINOSA (Mexico)
8. Mr. Michael Halton CHEADLE (South Africa)
9. Mr. Denys BARROW (Belize)
10. Mr. Yozo YOKOTA (Japan)
11. Mr. Mario ACKERMAN (Argentina)
12. Mr. Amadou SÔ (Senegal)
13. Mr. Miguel RODRÍGUEZ PIÑERO Y BRAVO FERRER (Spain)
14. Mr. Budislav VUKAS (Croatia)
15. Mr. Pierre LYON-CAEN (France)
16. Mr. Anwar Ahmad Rashed AL-FUZAIE (Kuwait), Reporter of the Committee

Mr. Sergey Petrovich MAVRIN (Russian Federation) does not appear in this photograph.

Opening session of the international colloquium on the CEACR 80th anniversary
Geneva, 24-25 November 2006
(left to right): Ms. Cleopatra Doumbia-Henry, Director of the International Labour Standards Department; Ms. Robyn Layton, Chairperson of the Committee of Experts; Mr. Kari Tapiola, Executive Director of the Standards and Fundamental Principles and Rights at Work Sector; Ms. María-Angélica Ducci, Executive Director, Office of the Director-General

International colloquium on the CEACR 80th anniversary
Geneva, 24-25 November 2006
(left to right) : Mr. Pierre Lyon-Caen (France), Mr. Budislav Vukas (Croatia), and Mr. Anwar Ahmad Rashed Al-Fuzaie (Kuwait)

International colloquium on the CEACR 80th anniversary
Geneva, 24-25 November 2006
(left to right): Ms. Robyn Layton (Australia) and
Mr. Michael Halton Cheadle (South Africa)

International colloquium on the CEACR 80th anniversary
Geneva, 24-25 November 2006
(left to right): Ms. Laura Cox (United Kingdom) and Mr. Denys Barrow (Belize)

International colloquium on the CEACR 80th anniversary
Geneva, 24-25 November 2006
(left to right): Ms. Blanca Ruth Esponda Espinosa (Mexico) and Ms. Janice Bellace (United States)

Dinner on the occasion of the international colloquium on the CEACR 80th anniversary
Geneva, 25 November 2006
(left to right): Mr. Francis Maupain, Special Adviser to the ILO Director-General and Ms. Ruth Dreifuss, former President of the Swiss Confederation

IV. Future approaches to international regulation and supervision

Códigos de conducta y regímenes voluntarios de cumplimiento: ¿es la autoregulación una respuesta?

Adrián Goldin *

I. Unas cuestiones previas

Para ensayar una respuesta al interrogante planteado en el título, nos ha parecido necesario abordar inicialmente dos cuestiones previas en cuyo marco se insertarán luego consideraciones de contenido más específico: procuraremos, en primer lugar, identificar cuál es, entre las diversas significaciones que es posible asignar al movimiento de la denominada Responsabilidad Social Empresaria, la que nos parece de la mayor importancia política y conceptual (i); en segundo lugar, poner de manifiesto la notable diversidad de formas que asumen las iniciativas voluntarias que se reconocen como emergentes de aquella idea y, por cierto, las implicaciones de tan amplia variedad (ii).

1. Las iniciativas voluntarias y la relación de las empresas con el sistema de protección

Con la ligereza que impone el objeto de este documento hay que decir que si bien las iniciativas que buscan sustento en el ámbito de la RSE suponen invariablemente una actividad empresaria que se reivindica voluntaria y no vinculante, el ideario en el que abrevó en sus orígenes responde en verdad a la preocupación por el medio ambiente y el principio del desarrollo sostenible enunciado por primera vez por el informe de la comisión Brundtland a fines de los ‘80, consagrado luego en la Cumbre de la Tierra de Río de 1992 y prolongado más tarde en la formulación de la dimensión social del desarrollo sostenible, esta

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última de filiación más bien sindical.[1] En cualquier caso lo notable y significativo, a los fines de nuestra reflexión, es que las empresas exploran y reinterpretan ese espacio y asumen un rol activo en su desarrollo.[2] No está ausente en esa opción, por cierto el componente "colateral" de las políticas de liberalización, desregulación y privatización, que asocia la búsqueda de políticas de bajo costo y poco mantenimiento.[3]

Más allá de los cuidados con los que conviene evaluar esas experiencias en cuanto tienen de unilateralidad empresaria – de ello nos ocupamos más abajo – el carácter extenso y sostenido de ese movimiento sugiere la conveniencia de no minimizar la significación de su ocurrencia, sino, por el contrario, de considerarla en el marco de la problemática situación en que encuentra al sistema de tutela.

En efecto, no parece que quepa dudar de la idea de que la finalidad manifiesta del marco institucional del régimen de protección laboral es aún – y lo será en el futuro - la de proteger al trabajador en tanto protagonista débil de las relaciones de producción. En ella convergen los propósitos de tutela, de compensación y de construcción y sostenimiento del sistema de relaciones laborales.[4]

Es, en cambio, el modo en que evoluciona el conjunto de *funciones* del ordenamiento una de las tendencias sustantivas – uno de los rieles – sobre los que transita aquel marco institucional rumbo a nuevas denotaciones.

Desde esa perspectiva, existe un difundido consenso teórico en torno de la idea de que la *función* inicial del derecho del trabajo fue la de producir la integración de las clases trabajadoras[5] por medio de la juridificación de las contradicciones entre las necesidades de los trabajadores y los intereses de la empresa y la consiguiente institucionalización del conflicto en el trabajo asalariado.[6] Desde una óptica de frontal contestación, en cambio, se le percibió más bien como concesión calculada de la burguesía para hacer tolerable la explotación de la clase obrera.[7] En cualquier caso, aún si no cupiera aplicar aquél propósito integrador más que a sustentar la permanencia y desarrollo del sistema de

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[1] Cf. Dwight W. Justice (del Departamento de Empresas Multinacionales de la CIOSL), "El Concepto de responsabilidad de las empresas: desafíos y oportunidades para los sindicatos"; www.ilo.org/public/spanish/dialogue/actrav/publ/130/1.pdf .

[2] En línea con la idea del triple fundamento – financiero, medioambiental y social – del rendimiento de las empresas.

[3] Dwight W. Justice, *op. cit.*, nota 1.

[4] Cf. A. Martín Valverde y otros "Derecho del Trabajo" Ed. Tecnos, Madrid, 2000, págs. 57/59.

[5] *Ibid.*, pág. 61. En el mismo sentido, Manuel Carlos Palomeque, "La función y la refundación del Derecho del Trabajo", *Relaciones Laborales*, Madrid No. 13 del 8 de Julio de 2000, pág. 21 y sgtes y Eduardo Rojo Torrecilla, "Pasado, presente y futuro del Derecho del Trabajo", *Relaciones Laborales*, Madrid No. 18, septiembre de 1996 pág. 16,citando a su vez a Alonso García y Jeammaud.

[6] Cf. Manuel Carlos Palomeque, *op. cit.*, nota 5.

[7] Al invocar esta perspectiva, Martín Valverde y otros, *op. cit.*, nota 4, esta vez en su 4ta Edición pag. 55) recuerdan que ella se encuentra ya, "con una retórica convertida luego en estereotipo, en el folleto de V.I. Lenin, "La ley de multas de fàbricas", 1987.

producción capitalista y las paredes maestras de la sociedad burguesa, habría igualmente que admitir que el Derecho del Trabajo devino desde una perspectiva histórico-evolutiva "...un elemento básico para el bienestar de los trabajadores".[8]

Podría afirmarse que esa *ambivalencia funcional* de origen no abandonó nunca al Derecho del Trabajo y probablemente (al igual que su finalidad tutelar), tampoco haya de "dejarlo sólo" en los tiempos por venir. Proteger a los trabajadores y preservar el sistema económico, legitimar y luego limitar los poderes empresariales, *arbitrar un delicado equilibrio estructural* entre libertad de empresa y poder empresarial por un lado y protección tutelar del asalariado, por otro.[9] Todo ello, tras su *función* última (también, paradójicamente, la inicial): la de *proveer legitimidad al sistema social y a su orden económico*[10] (ambivalencia que merecerá mayor reconocimiento o rechazo según cual sea la perspectiva ideológica desde la cual se contemple el fenómeno).

Hay que decir, sin embargo, que ese equilibrio funcional, construido otrora, parece haber colapsado como consecuencia de transformaciones profundas con incidencia directa sobre el sistema de relaciones de producción: entre otras, innovación tecnológica y consecuente renovación de los modos de organizar el trabajo y la producción, profundización sin precedentes de las "cotas" de internacionalidad de los flujos del comercio, las finanzas y los procesos de inversión directa, alteración notable de las relaciones de poder[11], presiones desregulatorias, debilitamiento sindical, desaparición, con el fin de la guerra fría, de la amenaza comparativa que planteara la existencia misma del socialismo real.[12]

Desde esa perspectiva podría pensarse que si aquel equilibrio – basado en un cierto *consentimiento crítico del empresariado* respecto del ordenamiento imperativo que se sustenta en el concepto del orden público – declinó como

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[8] Cf. Manuel Carlos Palomeque, *op. cit.*, nota 4.

[9] Cf. Manuel Carlos Palomeque, *idem* nota anterior, quien da cuenta de que, por lo demás, se trata de un equilibrio contingente, que opera redistribuyendo en expansión, y procurando preservar la viabilidad de la ecuación económica en tiempos de contracción. En la misma lógica, la finalidad de tutela que detenta el sistema de relaciones laborales en su condición de productor normativo asume su propia ambivalencia bajo la forma de nuevos cometidos: la instrumentación de medidas especialmente traumáticas de gestión crítica de las relaciones laborales (despidos, suspensiones colectivas, otras medidas de crisis) (en ese sentido, María Emilia Casas Baamonde, "Las transformaciones del trabajo y de las relaciones colectivas" en *Relaciones Laborales*, Madrid No. 23, diciembre de 1997, pág. 1). Ambivalencia que definió expresivamente G.Lyon-Caen bajo su hipótesis de la "reversibilidad" del Derecho del Trabajo en "Le droit du travail, une technique réversible" Dalloz, Paris, 1995. También Rodríguez Piñero, en "El Derecho del Trabajo a fin de siglo", *Relaciones Laborales*, Madrid No. 24 1999, pág. 1, reivindica esa función de sostener el modo de producir en la economía de mercado y de libre empresa a la búsqueda de un equilibrio entre los intereses contrapuestos de trabajadores y empresarios.

[10] Cf. Manuel Carlos Palomeque, *op. cit.*, nota 4.

[11] Cf. Adrián Goldín, "El Derecho del Trabajo en la Encrucijada" *Derecho del Trabajo, 1999-B-2469.*

[12] Cf. Francis Maupain, "Persuasion et contrainte aux fins de la mise en œuvre des normes et objectifs de l'OIT", en *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, BIT, Genève, 2004, pág 687.

consecuencia de aquellas transformaciones, otros fenómenos sobrevinientes, relacionados esta vez con la transnacionalización de las cadenas de producción y abastecimiento activadas por las empresas multinacionales (EMNs) y la consecuente reacción de consumidores, sindicatos, gobiernos, ONGs, de los mercados, de los medios, de la sociedad en su conjunto, están generando *(¿en su lugar?) este nuevo tipo de vinculación de las empresas con el sistema de tutela*.[13] Se trataría esta vez de un modo de relacionarse que no hace eje, como fuera entonces, en una aceptación crítica de la norma imperativa, sino que exalta el perfil estrictamente voluntario y no vinculante de las iniciativas que en él se generan.

Habrá que ver en qué medida puede alumbrarse desde aquí alguna nueva manifestación de equilibrio en torno de la idea de la protección del trabajo cuya realización en este esquema es ciertamente más compleja, pues supone una propuesta de legitimación – del sistema económico, del régimen de la protección laboral – que demanda una armonización de no fácil ni segura materialización entre la norma imperativa y vinculante y la oferta empresaria, esta última basada en la reivindicación sostenida de su soberana voluntad.

En cuanto a sus motivaciones últimas, antes se trataba de legitimar un modelo económico en competencia con el socialismo real; ahora, *de legitimar la liberalización de los intercambios contra el riesgo acuciante de la desilusión global sobre sus proyecciones*[14].

En ambos casos, se trataría de la construcción – en esta instancia, por el momento sólo meramente hipotética - de un equilibrio que hace de protección y sistema económicos dos dimensiones que se proveen recíproca sustentación.

2. Amplísima variedad de iniciativas voluntarias

Variadas son, como veremos luego, las motivaciones que conducen a la consagración de las iniciativas voluntarias[15]. Muy diversas son también estas

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[13] Como respuesta a la publicidad negativa generada por los informes acerca de las condiciones de trabajo peligrosas, las jornadas de trabajo inhumanas, los salarios de hambre, las conductas brutales y la utilización de la mano de obra infantil en la producción, de prendas de vestir, calzado, juguetes y otras actividades mano de obra intensivas (cf. Neil Kearney y Dwight Justice "Los códigos de conducta. Algunas preguntas y respuestas para Sindicalistas" en "Herramienta de los trabajadores o truco publicitario? Una guía para los códigos de prácticas laborales internacionales" Friedrich-Ebert-Stiftung, Südwind, Instituto de Economía y Ecumenismo, 2003, pág. 53.

[14] En la Conferencia Ministerial de la OMC reunida en 1996 se exaltó el compromiso de respetar las normas fundamentales del trabajo y la labor de la OIT para evitar que las esperanzas que, a juicio de los participantes, genera el proceso de liberalización comercial *no se transforme en desilusiones*. http://www.wto.org/spanish/thewto_s/minist_s/min96_s/wtodec_s.htm

[15] Para un examen ordenado de esa amplia variedad, véase Janelle Diller, "Una conciencia social en el mercado mundial dimensiones laborales y de los códigos de conducta, el etiquetado social y las iniciativas de los inversores", *Revista Internacional del Trabajo* vo. 118, 1999 núm 2 pág. 111 y siguientes y Jean-Michel Servais, "Normes internationales du travail et responsabilité sociale des entreprises" en "Quelle responsabilité sociale pour l'entreprise", Actes du Séminaire International de droit comparé du travail, des relations professionnelles et de la sécurité sociale" Comptrasec, UMR, CNRS, Université Montesquieu, Bordeaux IV, 2005, págs. 37 y siguientes.

iniciativas según el grado de unilateralidad/multilateralidad que exhiben (en su elaboración, en su adopción, en el control de su funcionamiento); de tal modo, pueden ser el producto de una pura elaboración corporativa o, de modo más extenso pero análogamente unilateral, de elaboración al interior de un sector empresario o una industria. Pueden, en cambio, ser resultantes de alguna forma de participación, alianza, combinación o acuerdo entre una empresa (o una industria o sector) con gobiernos, sindicatos, ONGs, asociaciones de la comunidad local, etc; manifestaciones todas ellas a su vez distintas entre sí según el grado de participación e influencia relativa asumida en cada caso por cada uno de esos sujetos.[16]

Puede tratarse también del acto de adhesión a un código propuesto por organismos internacionales (como la OCDE, la ONU, la Comisión Europea o la propia OIT)[17], adhesión que en todo caso puede ser total o sólo parcial, y en este último supuesto, con muy diversos criterios selectivos. O derivación de un acuerdo marco de una empresa multinacional (EMN) con una federación sindical internacional.

Ni que decir hay que semejante grado de diversidad ha de dar lugar a un espectro de contenidos, criterios selectivos, modos de elaboración y redacción, efectos y alcances, correlativamente amplio.

Otro factor distintivo puede referirse esta vez a los alcances del régimen voluntario: puede, en efecto, ser sólo aplicable a la propia empresa que los emite, que participa en su concepción o que a él se adhiere (a ésta y sus filiales) o pretenderse aplicable a toda su cadena de producción o abastecimiento.

Diverso también puede ser el tipo instrumental mediante el cual se expresa la iniciativa voluntaria: puede tratarse de un código de conducta, de alguna forma de label o etiquetado social o programa de acreditación o certificación, de la producción de informes sociales o de la aplicación de inversiones socialmente responsables.

Múltiples son también los sistemas de monitoreo, seguimiento, supervisión y control a que pueden dar lugar. Meramente internos o asignados a terceros, y en este último caso a consultoras o entidades privadas, o a mecanismos con participación sindical, o a ONGs u otras entidades comunitarias.

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[16] Cf. *Codes of Corporate Conduct - An Expanded Review of their Contents*, OECD (2001). OECD, por ejemplo, se examinan 246 códigos de conducta de los que 118 fueron emitidos por empresas de modo individual, 92 por asociaciones industriales y comerciales, 32 por asociaciones entre diversos tipos de entidades, incluyendo sindicatos y ONGs y 4 por organizaciones intergubernamentales.

[17] Se trata en este caso de instrumentos que forman parte de un marco internacional de principios acordados por gobiernos, empleadores y sindicatos y recomendados a las empresas. Su preocupación no pasa por garantizar la soberanía de los gobiernos sino que, por el contrario, abordan situaciones que se crean cuando los gobiernos nacionales y la sociedad internacional no adoptan o no hacen cumplir normas laborales aceptables. Están pensados para ser aplicados internacionalmente, independientemente de dónde se realice el trabajo; generalmente están dirigidos a ser aplicados en las prácticas laborales de los proveedores y subcontratistas de las empresas (cf. Ingeborg Wick, "Herramienta de los trabajadores o truco publicitario? Una guía para los códigos de prácticas laborales internacionales" Friedrich –Ebert-Stiftung, Südwind, Instituto de Economía y Ecumenismo, 2003, pag. 47).

En un contexto de tan amplia diversidad es necesario establecer, en primer lugar, que *toda generalización que aquí se formule – inevitables en razón de las naturales restricciones de espacio y tiempo impuesto a este documento y, en especial, de la respuesta que se requiere – deberá someterse a reservas, matices y salvedades* que quedarán implícitas y diferidas al juicio crítico del lector; una presentación analítica más minuciosa deberá necesariamente referir esos juicios a cada específica variante del espacio de la denominada RSE.

II. Sobre la filiación disciplinar de las iniciativas voluntarias

1. Desde el derecho

Pese al tiempo relativamente breve transcurrido desde la aparición de las primeras manifestaciones de este modo empresario de vincularse con el sistema de tutela, son cuantiosos los esfuerzos que se han dedicado a establecer su filiación disciplinaria.

Desde luego, desde el territorio de los juristas no ha dejado de advertirse que, sea cual se crea que es su condición, tienen de una u otra manera origen – por creación, participación o adhesión – en la empresa como uno de los ámbitos de producción de normas[18] o, en sí misma, orden de derecho objetivo o, en términos más kelsenianos, centro de imputación de ese orden formativo.[19]

En ese marco, fluye naturalmente un ejercicio de asimilación con otras de las manifestaciones de regulación unilateral propias de ese ámbito, como lo es el reglamento interno de la empresa.[20] Éste, sin embargo, como derivación del poder de dirección del empleador y de la consecuente facultad de especificar dentro de ciertos límites los contenidos del contrato de trabajo, funge como un instrumento de imputación de obligaciones, mientras que las iniciativas voluntarias se proponen, en cambio, *manifestar la disposición* a proceder de un cierto modo que se pretende funcional al sistema de tutela.[21]

A partir de allí, los interrogantes en clave jurídica se multiplican (sin que sea este el momento para darles respuesta). ¿son entonces esas iniciativas expresiones singulares de esa aptitud reglamentaria o no lo son?; ¿o expresan en cambio una oferta contractual aceptada que convoca la aplicación del derecho

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[18] Condición esta recordada por Sylvain Nadalet, en "La responsabilité sociale des entreprises à l'échelle globale: quelle responsabilité juridique", en Actes du Séminaire International de droit comparé du travail, des relations professionnelles et de la sécurité sociale" Comptrasec, UMR, CNRS, Université Montesquieu, Bordeaux IV, 2005, pág. 239.

[19] Por ello mismo, no conviene dejar de advertir que las iniciativas voluntarias provenientes de ese nivel – el de la empresa - tienen límites insuperables en cuanto a objetivos sociales que trascienden del nivel de la empresa, como los que se vinculan con el empleo, la formación profesional, la distribución del ingreso, el desarrollo o la pobreza.

[20] Cf. Sylvain Nadalet, *op. cit.*, nota 18, pág. 243.

[21] *Ibid.* "Manifestar una disposición" es el modo en que se nos ocurre traducir una voluntad que no necesariamente parece implicar *asumir obligaciones vinculantes*, ni *reconocer derecho*s.

de los contratos[22]? ¿Implican, por el contrario una obligación unilateralmente asumida cuya insatisfacción da lugar a una responsabilidad civil de naturaleza delictual?[23]

Como es propio del más moderno pensamiento jurídico, no se trata de elucidar una cuestión ontológica, sino de establecer los efectos de estos instrumentos en términos de la consiguiente responsabilidad que generan. ¿Responsabilidad como condición virtuosa atribuida a un determinado sujeto (en este caso, una empresa) por medio de ciertos matices del lenguaje[24] o, de modo más concluyente, *responsabilidad jurídica*? Y en este último caso, ¿qué tipo de responsabilidad?: ¿la de aquel que obtiene el beneficio (*ubi emolumentum ibi onus*) o la de quien pone el producto en circulación?[25]; ¿la de quien hace nacer una esperanza legitima de terceros en su cumplimiento, al modo de la que nace de los usos de empresa?[26] Todo lo que demanda, en cualquier caso, una previa toma de posición en relación con el carácter voluntario que deviene de su propia designación y que los empresarios reivindican de modo sistemático y enérgico: ¿voluntarios en su adopción o también – y con qué alcances – en su ejecución y cumplimiento?

Las preguntas en clave jurídica no se detienen ahí. Si hay un tal efecto vinculante ¿en qué medida ha de alcanzar a sujetos – como los que integran las cadenas de producción o abastecimiento– que no han asumido por sí mismos ese compromiso? ¿Cuál es, en su caso, su exigibilidad en un país distinto del emisor, vg. el de los proveedores o contratistas (país de acogida)? Y, esta vez en cuanto a la actuación vicaria y la representación, por ejemplo, ¿pueden los sindicatos internacionales actuar en representación de trabajadores que carecen de sindicato en los países de acogida? Más complejo aún ¿y si en los países de acogida sí existen esos sindicatos?[27]

2. Entre la gestión de los recursos humanos y las relaciones industriales

En todo caso, y más allá de que los productos de la RSE merezcan una calificación jurídica que, como se ve, no es fácil asignar, la recurrente insistencia empresaria en su condición estrictamente voluntaria los refiere a una condición de unilateralidad que parece incluirse más bien en el terreno de la *gestión* que en

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[22] Interrogante que se formula Jean- Michel Servais, *op. cit*., nota 15, pág. 39.

[23] *Ibid.*

[24] Ver éste entre otros sentidos del término "responsabilidad" en "Introducción al análisis del derecho" de Carlos Santiago Nino, 2da. Edición ampliada y revisada, Buenos Aires, 2001 pag. 184, quien recuerda el modo en que Hart ilustrara esa diversidad de significaciones.

[25] Son los supuestos de imputación de responsabilidad jurídica que invoca Alain Supiot en "De nouveau au self-service normative: la responsabilité sociale des entreprises" en *Etudes ofertes a Jean Pelissier, Analyse juridique et valeurs en droit social*, Paris, Dalloz, 2004, págs. 541 a 558.

[26] Cf. Emmanuel Dockés, "L'engagement unilateral de l'employeur", *Droit Social*, 1994, pág. 227.

[27] Son los interrogantes que, entre otros tantos, se formula Sylvain Nadalet, *op. cit.*, nota 18.

el jurídico-normativo.[28] Desde esa perspectiva, parece pertinente asociarlo al ámbito de las técnicas de *gestión de recursos humano*s, denotadas por su unilateral condición de función del management, bien que en el caso de las iniciativas voluntarias de RSE expresen algo singular en el marco de la mencionada función, como lo es el *de manifestar la disposición*[29] a observar ciertos "standards" de tutela que algunas veces (las menos) se remiten a normas del ordenamiento jurídico nacional o internacional, y otras (las más frecuentes), se definen con la misma unilateralidad. Pese a que las iniciativas voluntarias exhiben ciertas notas comunes con el trayecto de "autopista" o el denominado "camino alto", pese a que incluso pueden formar parte un mismo continuo y a que en algunos casos sus fronteras pueden ser difíciles de discernir y sus productos se confundan, responden a motivaciones habitualmente diversas: en tanto el trayecto de "autopista" se propone optimizar el rendimiento y la productividad mediante prácticas que, precisamente por tener un satisfactorio desempeño social, tienden a satisfacer aquellos objetivos, las iniciativas voluntarias de RSE, en cambio, se proponen (como lo señalamos luego) atender otros objetivos y otras motivaciones.

Sí parece claro que si las iniciativas voluntarias de RSE adscriben más a la categoría de la unilateral gestión de los RRHH y se distancian por ello del ámbito de las "*industrial relations*" (en clave continental, relaciones laborales o "*relations profesionnelles*") basadas en la bilateralidad, el reconocimiento de la oposición de intereses, la negociación y el intercambio de concesiones[30]. Buscando analogías, podría también decirse que, de algún modo, *las iniciativas voluntarias de RSE son a la gestión de RRHH, lo que la negociación colectiva es al sistema de relaciones laborales*. También que la participación sindical de diversa intensidad en los modelos híbridos de RSE (cuyas manifestaciones más conspicuas toman la forma de acuerdos marco entre EMN y federaciones sindicales internacionales), *expresan otro continuo que liga esta vez gestión de RRHH y relaciones laborales mediante expresiones intermedias que contienen a esos órdenes "a diverso dosaje"*.

III. Para elaborar una respuesta

Más allá de cuál sea la significación funcional de la denominada RSE o la adscripción disciplinaria de las iniciativas que la expresan, particular atención debe ponerse sobre el modo en que esas manifestaciones de voluntarismo empresario se articulan con el ordenamiento tutelar histórico montado sobre la idea de orden público y el principio de norma mínima. Este último forma parte indesplazable del patrimonio jurídico de la humanidad, de modo que *el voluntarismo tutelar empresario debe relacionarse con él de un modo que le potencie y no le debilite ni le ponga en cuestión*. Un breve examen analítico concebido con ese

[28] Tal lo que sugiere Dwight W. Justice, *op. cit.*, nota 1, pág. 14.

[29] Ver esa calificación de la intencionalidad empresaria en nota 21.

[30] Cf. Dwight W. Justice, *op. cit.*, nota 1.

propósito nos sugiere la conveniencia de considerar, en un primer momento, las motivaciones de los criterios de RSE expresado en los diversos tipos normativos que lo exteriorizan (i), la determinación de sus objetos regulatorios – sus contenidos - y del modo en que se formulan (ii), de los criterios de control y verificación de su realización (iii) para abordar luego – también sintéticamente como lo exige la oportunidad – el modo de vincularse con la ley (iv), con la negociación colectiva (v) y con las normas internacionales del trabajo (vi)

1. Sobre las motivaciones de las iniciativas voluntarias

Las iniciativas voluntarias emergentes del ámbito de la RSE se proponen, entre otros fines, obtener ventajas competitivas, más lealtad de los consumidores y de su personal, mejorías en el desempeño comercial;[31] influir en consumidores, socios, inversores y los medios de prensa, fortalecer o reconstituir la imagen de las empresas, preservar las marcas[32], satisfacer requerimientos del mercado, de las bolsa de valores y de textos legales como la ley Sarbanes-Oxley.[33] Responden también a objetivos de gestión, tal como mejorar el desempeño del personal), orientar la toma de decisiones y reducir el nivel de supervisión[34]. También, desde luego, puede estar presente el interés específico por producir progresos en términos de la sostenibilidad social de los procesos económicos.

En cualquier caso, esas y otras motivaciones utilitarias de ningún modo desvalorizan los emprendimientos voluntarios[35], como no invalida la negociación colectiva el hecho de que los empresarios actúen en ella motivados por el deseo de contener el conflicto y mantener la producción y las ventas. Se trata, eso sí, de *conocer esas motivaciones para poder establecer qué aptitudes tienen las propuestas normativas de la RSE para satisfacer las demandas de sostenibilidad social de los procesos económicos* y qué rol pueden jugar en relación con el ordenamiento jurídico tradicional, sujeto al criterio del orden público, la imperatividad de sus normas y la vigencia del principio de norma mínima. De establecer, en suma, en qué medida son funcionales a los objetivos del ordenamiento de tutela.

Parece cierto que cuando los estándares de tutela se asumen voluntariamente para satisfacer esos objetivos utilitarios, es razonable esperar que los criterios de selección de los contenidos, el modo de su formulación – de su lectura,

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[31] Tales las motivaciones que se reconocen en el estudio de la OCDE, ver nota 16.

[32] Cf. Jean-Michel Servais, *op. cit.*, nota 15, pág.38.

[33] Motivaciones estas últimas evocadas en Lynn, Payne, Rohit Deshpandé, Joshua D. Margolis y Kim Eric Bettcher, (de la Havard Business School de Boston), "Se ajusta la conducta de su empresa a estándares de clase mundial", Publicado en Harvard Business Review América Latina´, Santiago de Chile, septiembre de 2006 pág. 36 y siguientes.

[34] *Ibid.*

[35] Sobre esa condición utilitaria y su valoración, ver Antonio Monteiro Fernández, "À propos de la responsabilité sociale de l'entreprise", en Actes du Séminaire International de droit comparé du travail, des relations professionnelles et de la sécurité sociale" Comptrasec, UMR, CNRS, Université Montesquieu, Bordeaux IV, 2005, pág. 37.

su interpretación – los criterios de monitoreo y control, etc, se sujeten a cuanto conviene a la realización de aquellos fines. De tal modo, cuando la preocupación que prevalece es la del fortalecimiento de la imagen de la empresa, los contenidos han de vincularse más con la preferencia del público que de los propios beneficiarios.[36] Naturalmente, cuando los intereses de tal modo determinantes convergen con los de tutela en la forma de su concreción, sus efectos serán probablemente valiosos; pero si tal convergencia no se verifica – y ello sucede con frecuencia - es probable que los efectos de las iniciativas voluntarias no sean satisfactorios en términos de su contribución social y que, por el contrario sean, en algunos casos, hasta contraproducentes.[37]

Y de vuelta – también en términos comparativos - sobre los procesos y productos de la negociación colectiva, parece obvio que la análoga finalidad utilitaria de las posiciones que asumen los empresarios en esos procesos se encuentra, a diferencia de cuanto sucede en la elaboración de las iniciativas unilaterales, mediada por la intervención sindical en la identificación de las demandas sociales y consiguiente control a la hora de su incorporación y redacción. Va también sin decirlo, por lo tanto, que cuanto más intensa sea la intervención sindical – y también la de otros actores, como gobiernos, ONGs, entidades comunitarias, etc- en la elaboración de de las iniciativas de RSE y más negociados sean los productos de ese intercambio, más alto sea probablemente el rendimiento tutelar del instrumento del que se trate.

En otras palabras: la apreciación frecuentemente utilitaria e interesada de los estándares que se incluyen en las iniciativas voluntarias no las descalifica por esa sola condición, pero advierte acerca de su posible disfuncionalidad "en clave" tutelar, y ello debe ser tenido en cuenta a los efectos de su valoración.

2. Los contenidos de las iniciativas voluntarias y el modo en que se formulan

Por las razones ya expresadas, se señala con frecuencia el carácter selectivo que determina el modo en el que se incorporan los estándares de tutela a las iniciativas voluntarias.[38] Esa selectividad se percibe, en términos absolutos, de la sola lectura de cada una de las iniciativas, pero se hace tanto más elocuente cuando se comparan los contenidos – notablemente más restrictivos - de las iniciativas estrictamente empresarias (de empresas individuales y de entidades del

[36] Así se señala en OIT, Consejo de Administración, GB.273/WP/SDL/1, 273 reunión, Ginebra 1998, pág. 15.

[37] En ese sentido, Jean-Michel Servais, *op. cit.*, nota 15, pág. 55.

[38] En el estudio de la OCDE citado en la nota 16 se advierte, por ejemplo que el tema de la libertad de asociación se menciona sólo en el 29,7% de los instrumentos (contra cuestiones como un "entorno razonable de trabajo" que aparece en el 75% de los casos y la no discriminación, que se registra en el 60,8% de ellos. También en la investigación de la OIT referida por Janell Diller (*op. cit.*, nota 15, pág. 124) que registra que mientras las cuestiones de seguridad social se encuentran consideradas en el 75% de los 215 códigos que fueron objeto del estudio, los temas de libertad sindical aparecen apenas en el 15%.

comercio o de la industria) con los de otras que cuentan con diversas instancias de participación de gobiernos, sindicatos, ONGs y otros actores no empresarios.[39] Muy especialmente, cuando se compara a aquellos con los códigos provenientes de organismos internacionales de carácter intergubernamental, como la OCDE, la OIT, las Naciones Unidas y la Comisión Europea.

Se advierten, además, diferencias de contenidos de carácter sectorial que responden en cada caso a los intereses específicos del sector y a las demandas del público o del mercado que a esas empresas o sectores empresarios les importa satisfacer.

Se puede percibir, de tal modo, una notable ausencia de referencias a las normas internacionales del trabajo en las iniciativas unilaterales, en tanto esas normas alcanzan presencia más notable en las que cuentan con la participación de otros actores, además del empresario, y, en especial, en las que se originan en organismos internacionales. Ciertos derechos, tales como la seguridad y la salud en el trabajo así como la discriminación, suelen encontrarse en las iniciativas unilaterales con alguna frecuencia, en tanto otros, como la libertad sindical y la negociación colectiva aparecen de modo mucho menos habitual. Son también infrecuentes las referencias a los mínimos salariales, cuando se trata de iniciativas a aplicarse en países con niveles salariales por debajo del nivel de subsistencia; en estos casos, más común es la asunción del compromiso de aplicar la (de suyo menguada) ley nacional.

La elaboración de las iniciativas voluntarias suele llevarse a cabo en procesos no transparentes ni participativos, ora de modo reservado y unilateral, o por medio de negociaciones entre partes desigualmente informadas y con asimétrica capacidad negocial. Suele no ser tampoco transparente la provisión de información acerca de las prácticas de las cadenas de abastecimiento, y eludirse la presencia de observadores externos

El modo de redacción de los estándares autoimpuestos suele obstaculizar la viabilidad de todo reclamo formal o difuminar la naturaleza de la prescripción.[40] A modo de ejemplo, es frecuente que en esas iniciativas las empresas no

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[39] Mientras que los códigos empresarios o puros prestan mucha más atención al bienestar económico de la empresa y a las responsabilidadades de los empleados, los híbridos guardan silencio respecto a asuntos como la diligencia en la ejecución de los negocios de la empresa, la prudencia en el uso de sus recursos o el cuidado en la protección de sus activos. Los códigos híbridos están más orientados hacia los empleados y el público en general. La mayoría de ellos reconocen el derecho a la libre asociación y a la negociación colectiva, mientras que son pocos los puros que lo hacen. Las salvaguardas al empleo y el aviso con anticipación antre grandes alteraciones en el empleo reciben atención en los híbridos y no en los puros. Mientras los principios CRT piden una "compensación que mejore las condiciones de vida de los trabajadores", los códigos de negocio favorecen un pago que sea "justo" o competitivo (de la comparación efectuada en *op. cit.*, nota 33, pág. 42 y 43.

[40] Por medio de la redefinición o reinterpretación de los estándares o eludiendo las definiciones y la "jurisprudencia" de los órganos de control de la OIT (cf. Dwight Justice, *op. cit.*, nota 1 pág. 8), o recurriendo a las normas de la OIT de modo unilateral y selectivo, con el riesgo de que "...se logre una apariencia de legitimidad dando la impresión al público y al consumidor de que la OIT se encuentra asociada a la iniciativa..." cuando en realidad no es así (OIT, Consejo de Administración, GB.273/WP/SDL/1, 273 reunión, Ginebra 1998, pág. 16).

se *inhiban* de recurrir a proveedores que no respeten los estándares internacionales, sino que sólo manifiesten su disposición a *preferir* a quienes sí los observan; en el tema salarial, suelen prever el ofrecimiento de compensación "*justa y razonable*" y otras calificaciones de análoga imprecisión y vaguedad, que previenen, por ello mismo, cualquier intento de exigibilidad.[41] Las iniciativas voluntarias sirven con frecuencia para redefinir o reinterpretar las normas que en rigor - por imperio de la ley – se deben cumplir, de modo que en esos casos la RSE no agrega protección sino que, por el contrario, limita los alcances de la que está vigente.[42]

3. Métodos y criterios de control y verificación

Cuando se les prevé, suelen suscitar interrogantes en relación con sus objetivos e inspiración, con el grado de independencia de los agentes de control, con su capacitación y experiencia, con la duración, frecuencia y confiabilidad de los controles[43], con su sensibilidad para la denuncia de otras transgresiones referidas esta vez al ordenamiento legal, con el diseño interesado y también selectivo de los métodos de evaluación, con la transparencia (confidencialidad o publicidad) de los informes; las empresas prefieren los informes internos con el objeto de evitar filtraciones que limiten la confidencialidad que se pretende.

Frecuentemente, lo que se presenta como supervisión no descansa más que sobre visitas únicas o tan espaciadas que impiden la constatación eficaz del cumplimiento.[44] La heterogeneidad de los métodos de aplicación suele impedir su comparabilidad y limita la posibilidad de verificar la credibilidad de sus constataciones. Naturalmente, la selectividad interesada no suele estar ausente en el diseño de los métodos de vigilancia y evaluación. Muchas veces el código se conoce en el país de origen de la EMN y, en cambio, es absolutamente desconocido en los países de acogida.

Por otra parte, se suscita también la cuestión relativa a la relación de los agentes de control con la inspección del trabajo, los sindicatos, los grupos de reclamo. Si no se definen adecuadamente las competencias de aquellos agentes de control en relación con estos últimos, se asumen los riesgos de sustitución – privatización – de relevantes agentes que expresan la vigencia inderogable del orden jurídico imperativo.[45]

Como en el caso de las motivaciones determinantes y la selección de los contenidos, suele destacarse la relevancia de la presencia de sindicatos ONG,

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[41] Véase, a modo de ejemplo, el Codex GBS (Global Business Standards), elaborado por los autores del documento citado en nota 33, que se reproduce allí mismo.

[42] Así lo señala Dwight Justice, *op. cit.*, nota 1.

[43] Cf. Jean-Michel Servais, *op. cit.*, nota 15, pág. 42; también Janelle Diller, *op. cit.*, nota 15, pag. 134.

[44] Cf. Neil Kearney y Dwight Justice, *op. cit.*, nota 13.

[45] Cf. Justine Nolan, paper delivered on 5 September 2002 at Monash University, Clayton, based on an article by Michael Posner and Justine Nolan to be published in the Stanford Law Journal http://www.law. monash.edu.au/castancentre/events/2002/nolan.html, pág. 4

organizaciones legales, grupos de mujeres, de derechos laborales, religiosos, etc, en los instrumentos capaces de generar sistemas eficaces de monitoreo y supervisión.[46]

4. Las iniciativas voluntarias y la ley

Por el tipo normativo en uso en los sistemas de tutela – sujeto al principio de orden público, la norma imperativa y la regla de norma mínima – no hay otro espacio para las iniciativas voluntarias que el de la estricta sujeción a la ley, tanto en el país de emisión de la norma cuanto en el de acogida. En lo jurídico, ello significa precisamente lo que se viene de decir: sometimiento a la ley y de ningún modo opción. En lo político, implica que debe cerrarse acceso a toda iniciativa que procure un efecto sustitutivo (hacer la ley a un lado...) y, en cambio, alentar toda aquella otra que, por el contrario, pueda generar un aporte de complementariedad y mejoración.

Desde esa perspectiva, debe cuidarse que la iniciativa voluntaria no legitime – jurídica ni fácticamente – la inobservancia selectiva de ciertos contenidos de la ley (exaltando la asunción de ciertos compromisos que se está dispuesto a "pagar" a cambio, de la remisión de otros que, por el contrario, se prefiere eludir), ni su redefinición o reinterpretación parcial o interesada. Que no aliente la apreciación de la conducta socialmente sustentable como un producto del puro voluntarismo o generosidad del actor empresario (para sugerir la idea de que las empresas no necesitan de la intervención estatal para operar con propiedad)[47], ni genere un debilitamiento de la función regulatoria e inspectiva del estado.[48]

5. Las iniciativas voluntarias y la negociación colectiva

También la negociación colectiva se configura como norma imperativa respecto de los productos de la autonomía individual (de los de carácter bilateral, y con más razón de las expresiones de pura unilateralidad). Valen por lo tanto análogas advertencias: los convenios colectivos vigentes deben ser escrupulosamente observados y, ante el carácter obviamente voluntario de la concertación de los convenios, *es necesario prevenir que las iniciativas voluntarias sirvan para debilitar el espacio de negociación*: suele alegarse, en efecto, que la negociación colectiva es innecesaria cuando de todos modos la empresa está produciendo unilateralmente sus compromisos de tutela y se registran casos en que los proveedores se muestran reticentes a la negociación, alegando que no pueden autorregular sus relaciones de trabajo porque deben necesariamente cumplir las iniciativas voluntarias emitidas por las EMNs.[49] La experiencia comparada muestra de qué modo una forma regulatoria alternativa – en este caso, la inicia-

[46] *Ibid.*, pág. 7.

[47] En ese sentido, Dwight Justice, *op. cit.*, nota 1, pág. 13.

[48] Cf. Janelle Diller, *op. cit.*, nota 15, pag. 137.

[49] Cf. Kearney y Dwight, *op. cit.*, nota 13, pág. 51.

tiva voluntaria – puede ser altamente eficaz en un emprendimiento tendiente a debilitar la acción sindical y la negociación colectiva.[50]

Pero conviene tener también en cuenta que si las iniciativas voluntarias pueden ser un factor de deterioro de la negociación colectiva, pueden muy bien también servir de puerta de acceso a un valioso espacio de negociación; toda acción que sirva para hacer de los compromisos de solidaridad un ámbito negociado y vinculante contribuirá ciertamente a matizar las tendencias selectivas en la definición de los contenidos y en su modo de expresión. Es, por cierto, un actividad en la que el sindicato puede aliarse con otros sujetos interesados (inversores, ONGs, gobiernos, consumidores) para fortalecer esa negociación; le corresponde, de todos modos – he aquí un caveat – preservar cuidadosamente la titularidad de esa función, pues también en ella están presentes los riesgos de sustitución (la empresa puede preferir negociar con otros agentes con menor poder de conflicto).

De ese modo, puede reconocerse en ciertas manifestaciones vinculadas con la RSE y la negociación de solidaridad – señaladamente, en los acuerdos marcos entre EMNs y federaciones sindicales internacionales - un proyecto "in fieri" de negociación colectiva internacional[51]. Hay en ellos, ciertamente, contenidos de la denominada RSE pero esta vez sujetos a ciertas manifestaciones de contractualidad que se expresan en otros modos de definición y otros modos de control (v.gr. más independencia de los agentes que lo llevan a cabo, más efectividad en la supervisión).

En esa línea, una de las cuestiones más sugerentes que plantean las iniciativas voluntarias cuando se sustraen a la absoluta unilateralidad y, por el contrario, abrigan componentes de participación sindical, se vincula con la delimitación entre el espacio de la RSE y el de la negociación colectiva transnacional. Por una parte, habrá que computar la frecuente integración de otros agentes al proceso de negociación (como dijimos, gobiernos, ONGs, inversores, etc) y el grado de influencia que tienen los sindicatos en ese marco de pluralidad (en su definición y luego en su seguimiento y aplicación).

Hay que admitir, además, que tanto en las iniciativas voluntarias como en la negociación colectiva hay un componente voluntario (para este último ámbito, expresamente consagrado en el Convenio 98 de la OIT), y ambas también, de modo más o menos intenso, más o menos directo, están sujetas a un componente de exigencia y de presión (de los sindicatos, en el convenio colectivo; también de estos, pero sobre todo de los consumidores, del mercado, de otros agentes con

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[50] En Costa Rica, la habilitación legal (y la utilización masiva) de los denominados "arreglos directos" entre el empleador y un grupo de trabajadores no sindicalizados explicaría, a juicio de vastos sectores del pensamiento sindical y de la academia, la correlativa vertical caída de la negociación colectiva en el sector privado (en ese sentido, Bernardo Van der Laat, "El arreglo Directo en la legislación costarricense" en "La negociación colectiva en América Latina" Antonio Ojeda Avilés y Oscar Ermida Uriarte (editores), Editorial Trotta pag. 97 y siguientes).

[51] "…un aspecto de la evolución normal de las relaciones laborales en una era de globalización…" se les considera en el documento de OIT, Consejo de Administración GB.288/WP/SDG/3 288 Reunión, Ginebra 2003, pág. 6.

capacidad de influencia, en el caso de la iniciativas voluntarias). En el grado de incidencia de esa presión de origen, en el conjunto de sujetos – sindicales y no sindicales - que conciertan el producto de la negociación de solidaridad y en la intensidad de su respectiva influencia, en el tipo y modo de formulación de los contenidos, en los criterios de seguimiento y supervisión (grado de participación, autonomía, experiencia), en los modos en que se prevea sancionar las inobservancias, estarán los factores que determinarán el lugar de inclusión de la iniciativa en un continuo que va desde las formas más puras de iniciativa voluntaria hasta las más acabadas expresiones de la negociación colectiva.

6. Las iniciativas voluntarias y las normas internacionales del trabajo

Como lo apuntara con agudeza Francis Maupin hace no mucho, el proceso de elaboración de normas internacionales del trabajo está sometido a renovados desafíos.[52] Los productos de la RSE, bajo la forma de las iniciativas voluntarias agregan uno adicional y no desdeñable: el del hipotético tránsito del tripartismo al voluntarismo unilateral en el nivel internacional.

Una es la cuestión relativa a la situación de las NIT relativas a derechos fundamentales en el trabajo, así como a aquellas contenidas en otros convenios ya vigentes. Hay que decir que, por el momento, la respuesta de las iniciativas puramente unilaterales (de empresa, de asociaciones empresarias) es cuanto menos decepcionante a su respecto. Las invocaciones expresas de las normas internacionales es infrecuente, las referencias a los derechos fundamentales es selectiva (v.g., es mucho menos habitual la referencia a los derechos de libertad sindical y de negociación colectiva), y los derechos fundamentales que sí se recogen – habitualmente trabajo infantil, eliminación de la discriminación y, en menor medida, del trabajo forzoso - se formulan conforme criterios propios de sus elaboradores, soslayando la experiencia normativa internacional, suficientemente expresiva y enriquecida por sus instancias de interpretación y aplicación.

Ciertamente, la situación es más matizada en las iniciativas en las que participan otros agentes sociales como los sindicatos, los gobiernos, las ONGs, etc y, particularmente, en los códigos de organismos internacionales intergubernamentales como la OCDE, las Naciones Unidas, y, naturalmente, la propia OIT.

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[52] Cf. Francis Maupain (*op. cit.*, nota 12, pág. 687) sintetiza algunas de esas dificultades sobrevinientes; entre ellas, los cuestionamientos a la continuidad del ritmo regular de concertación de convenios internacionales en nombre de la desregulación y la presión a la baja de las condiciones de trabajo ejercida por el modo en que se ejerce la concurrencia comercial vis a vis el carácter voluntario de las ratificaciones. En otras palabras, la acción normativa internacional sufre una marcada desvalorización como consecuencia de dos puntos de vista opuestos entre sí: el de la desregulación y el de la cláusula social. Simultáneamente, se debilitan los sindicatos y con ellos la presiones internas dirigidas a la ratificación de los convenios, en tanto desaparece, con el fin de la guerra fría, la amenaza comparativa que plantea la existencia misma del socialismo real, mientras cae el clima de prosperidad y optimismo de los treinta años gloriosos, durante los que los países industrializados afrontaran sin preocupación la competencia, pues su competitividad resultaba asegurada por el avance tecnológico y la persistencia de las protecciones aduaneras.

Más compleja se presenta la continuidad de la actividad normativa internacional. Los empresarios, que no pueden definir por sí la acción legislativa nacional y ni siquiera la intensidad de la presión sindical a que quedan sometidos en los espacios locales y aún internacionales de la negociación colectiva, tienen sí autonomía para definir el modo en que han de participar en la formación de las normas internacionales. Si los factores antes evocados explican la creciente renuencia empresaria a asociarse a esos procesos de acción normativa, las manifestaciones de RSE les habilitan un espacio argumental de justificación de esas opciones y les marcan otro trayecto para su vinculación con el sistema de protección. De ese modo, *se hace evidente que también por esto se afronta un desafío crítico en el campo de la acción normativa internacional que demandará creatividad conceptual, aptitud política y liderazgo*.

IV. Ensayando una respuesta

Del somero análisis precedente se sigue sin dificultad *que las iniciativas voluntarias de RSE no son en modo alguno una respuesta admisible si lo que se pretende mediante ellas es sustituir, desplazar o circunscribir los espacios que ocupa el subsistema de protección del trabajo* (en el marco más amplio del sistema de protección social) que se fundamenta en la idea del orden público y se manifiesta operativamente sobre las normas legales, los convenios colectivos y los estándares internacionales. Ello es así, en efecto,

- por el tipo de selectividad temática que responde a diversos incentivos inespecíficos, y no necesariamente a las necesidades objetivas propias del sistema de tutela, contra cuya vigencia puede en ocasiones conspirar;
- por el modo en que se definen en el marco de la RSE las reglas y principios, frecuentemente no alineados con los que, tras larga experiencia, conforman el acervo jurídico y axiológico del sistema de protección;
- por la frecuente ausencia de participación de los beneficiarios y de otros agentes sociales relevantes en la concepción de las reglas y la consecuente falta de transparencia de su elaboración, que suele prolongarse luego en reticencias informativas, especialmente en lo relativo a las prácticas de los contratistas;
- por la insegura suficiencia de los modos de aplicación, supervisión y control, que se expresa en falta de independencia, conocimiento o experiencia de los sujetos que ejercen la función, en la insuficiencia cuantitativa – frecuencia, continuidad, profundidad de los controles, en la utilización de indicadores que adolecen de los mismos reparos de concepción selectiva invocados antes, además de frecuentes déficits de comparabilidad;
- porque su indeclinable carácter voluntario puede esgrimirse en un ejercicio de desvalorización del sistema de protección basado en la idea de orden público instrumentado en normas imperativas;

- porque el proceso de voluntaria elección de contrapartes, modos y agentes de aplicación puede servir para debilitar a sujetos relevantes, como los sindicatos, al sistema formal de control que ejerce la administración y , en especial, el servicio de inspección del trabajo, así como a las fuentes tradicionales del sistema de tutela, como la ley y la negociación colectiva;
- porque las iniciativas voluntarias tienen límites insuperables en cuanto a objetivos sociales que trascienden del nivel de la empresa, como los que se vinculan con el empleo, la formación profesional, la distribución del ingreso, el desarrollo o la pobreza;[53]
- porque no se ha acreditado hasta hoy que esos ejercicios de RSE hayan incidido de modo significativo en la calidad de vida y de trabajo, ni se ha producido aún conocimiento relevante sobre eventuales efectos secundarios sobre las empresas de los países en desarrollo, sobre el eventual desplazamiento de la mano de obra hacia sectores menos protegidos, sobre la evolución de la demanda hacia productos no etiquetados y, por consiguiente, menos costosos.[54]

Esa denunciada ineptitud de las iniciativas voluntarias de RSE no debe ser obstáculo, sin embargo, para agregar algunas reflexiones algo más matizadas a modo de síntesis.

En efecto, como queda dicho, las dificultades por las que atraviesa el sistema de protección social y, a su interior, el de protección del trabajo dependiente no encontrarán en las iniciativas voluntarias las respuestas que requiere. La búsqueda de más efectividad y eficacia, tanto en lo que concierne al universo alcanzado por las normas de protección cuanto en lo que se refiere a su vigencia efectiva, su aplicación y su control, debe ser dominante consigna tanto en los niveles nacionales, transnacionales e internacionales, como en el propio espacio de la autonomía.

Desde esa misma perspectiva, una utilización equívoca y no controlada de las iniciativas voluntarias puede ser disfuncional para la integridad de los sistemas de protección, en tanto se admita su uso para debilitar a los sindicatos, postergar o desplazar a la negociación colectiva, sustituir la acción normativa internacional o legitimar el uso selectivo de las normas nacionales de tutela.

Hay que decir, no obstante, que si las iniciativas voluntarias no son la respuesta, tampoco merecen que se les tenga por irreconciliable adversario del orden público y las normas imperativas de tutela. Si tras la desarticulación del denominado pacto socialdemócrata y del debilitamiento del doble rol funcional del sistema de protección – mejorar la situación de la clase trabajadora; legitimar el sistema económico de mercado – *la RSE es el modo en que el empresariado vuelve a vincularse positivamente (bien que de modo tenue y por otras motivaciones) con el régimen de la protección social*, ese movimiento no debe ser objeto de radical desestimación. Por el contrario, deben habilitarse para él

[53] Restricción ésta señalada por Jean-Michel Servais, *op. cit.*, nota 15, pág. 55.

[54] Así lo señala Janelle Diller, *op. cit.*, nota 15 en especial pág. 124.

sus instancias de valor: promover su actuación (sólo) en grado de complementariedad mejorativa respecto del ordenamiento imperativo, preservar su contribución respecto de empresas que se desempeñan sin controles en países de baja intensidad tutelar [55], limitar por fin su unilateralidad propiciando una creciente participación sindical (junto a los gobiernos, las ONGs y otras organizaciones provenientes de la sociedad civil) en su diseño, aplicación y control.

[55] Sobre esta cuestión, ver OIT, Consejo de Administración GB.273/WP/SDL/ 1 273 Reunión, Ginebra 1998, en especial página 20. Ver también Jean-Michel Servais, *op. cit.*, nota 15, pág. 43.

Does law matter? The future of binding norms

Bob Hepple *

I. The question

A story is told about a former Archbishop of Canterbury, Dr. William Temple, who was asked: 'Does law matter?' He replied by way of an example: 'When I travel on the train I think it morally right to purchase a ticket. But the fact that there is an inspector who can penalise me for not doing so just clinches it.'

The question I have been asked to address, 'does law matter?', seems rather old-fashioned. It recalls the famous debate between the French scholar Michel Foucault and his critics. Foucault appeared to think that law no longer matters because it has been replaced by the normalising disciplines that have come to dominate modern social life in the factory, the school, the hospital and elsewhere. He argued that there had been a decline in what he called 'the juridical matrix of power.' His critics said that in contrasting 'juridical power' and 'disciplinary power' Foucault was guilty of over-simplification, and was ignoring the vast range of regulatory forms and strategies that contemporary law uses. Some of Foucault's supporters say that his critics have misunderstood him,[1] but if that is so he had himself to blame because he explicitly used the word 'juridical' to mean the exercise of coercive power by the state. The message of the critics is that the place of coercive power in a wide spectrum of forms of regulation is changing. The issue is not 'does law matter?' but rather, 'how can we conceptualise the tasks and forms of regulation today?'.[2]

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[1] See V. Tadros, "Between Governance and Discipline: The Law and Michel Foucault", *Oxford Journal of Legal Studies*, vol. 18, 1998, pp. 75-103.

[2] See R. Cotterell, (ed.), *Law in Social Theory* (Aldershot, Ashgate), 2006.

The change in the question is not accidental. It reflects the huge changes in modes of social regulation. We live now in a network society where global production systems produce goods and services where costs are lowest.[3] In post-modern globalised society, manufacturing industries in Europe and North America, once reliant on the unionised labour of men, have been greatly reduced and standardised terms of employment have been eroded. They have been replaced in the developed countries by an increasingly feminised non-unionised workforce of part-time, temporary and self-employed workers engaged in service industries, and in the developing countries by both manufacturing and service industries that rely on low-wages and relatively low labour standards to achieve their competitive advantage. This is not the era of 'disciplinary normalisation' that Foucault described, but that of 'deregulation' and 'flexibilisation'. Transnational corporations (TNCs), with flatter, decentralised, less hierarchical structures than the traditional corporation, are the driving forces in this new economy. The welfare state and organised labour are in decline. The post-modern emphasis is on self-help, self-regulation and individualised rights.

The Foucauldian analysis assumes that rules of social and industrial organisation are national and universal within the nation-state, that there are national governmental and non-governmental organisations that undertake social regulation, and that these organisations shape individuals, their identity, expectations and responsibilities. In the world today regulation has an increasingly transnational character, for example the TNC codes of conduct, collective agreements between TNCs and international trade unions and NGOs, the rules of regional trading blocs, the rules of the World Bank and IMF, as well as ILO conventions and recommendations. Regulation operates not only through the sovereign power of nation states but also through dispersed entities such as supranational bodies, TNCs and NGOs. Above all, regulation now relies for its effectiveness heavily on market mechanisms.

So the question we have to ask, in the context of transnational labour regulation, is not 'does law matter?' but rather, where in the spectrum of globalised regulation do binding norms lie? And, since I have been asked to talk about the future of binding norms, where realistically should they lie?

II. Binding norms

Two fundamental points need to be made. The first is that the there is no hard and fast line between 'hard' law and 'soft' law, or 'hard' regulation and 'soft' regulation. The 'hard' end of the spectrum of regulation refers to binding legal instruments with enforcement mechanisms. This includes ratified ILO conventions. The soft end covers a wide range of techniques which are not directly legally enforceable. This includes ILO recommendations, codes of practice and

[3] See N. Fraser, "From Discipline to Flexibilisation? Rereading Foucault in the Shadow of Globalization", *Constellations*, vol.10, 2003, pp. 160-171.

guidelines. Maupain has pointed out the distinction between ILO conventions and recommendations is more a matter of theory than practice. Recommendations have some significant features in common with conventions, they are drawn up by the same lengthy and careful tripartite procedures, and are subject to the same follow-up procedures, apart from those specifically dedicated to monitoring the application of ratified conventions. Maupain concludes that recommendations like unratified conventions 'can exercise a real influence on national law and practice, with the degree of influence varying widely depending on the subject matter'.[4] Is the 1998 ILO Declaration of Fundamental Principles and Rights at Work, 'hard' regulation or 'soft' regulation? The unique legal character of the Declaration is that obligations are placed on all Member States not by reason of ratification of conventions but 'from the very fact of membership.' This is therefore, a constitutional obligation not one which rests on voluntary acceptance. But it is not a 'binding norm' in the traditional sense because the Declaration is regarded as purely promotional. The follow-up procedures rest entirely on reporting mechanisms and not on sanctions. However, there can be no doubt that the Declaration has had a huge impact in persuading States to ratify the core ILO conventions. The time is approaching when these principles will be regarded by courts as part of customary international law. This will occur when the principles enter 'habitual state practice' which States perceive to be required by international law. However, at the other end of the regulatory spectrum there is an increasing number of voluntary TNC codes and guidelines which are not directly legally enforceable, either as a matter of international or national law.

The second point that must be made is that the most fruitful way of looking at binding norms is through the spectacles of what has been termed 'responsive regulation'.[5] This is the idea that regulation needs to be responsive to the different behaviours of the organisations subject to regulation. The point is that a 'soft' or voluntary approach may work in influencing the conduct of some organisations but not others (e.g. an export company threatened by bad publicity will readily agree to restrict the use of child labour, while a domestic company facing strong competition may not). A regulatory strategy will not work if it simply uses one form of regulation (e.g. soft measures/voluntarism) to the exclusion of others (e.g. coercive sanctions). Enforcement can be viewed as having a pyramidical structure. At the base, the regulator assumes voluntary compliance, imparts information and seeks to persuade. Then the regulator tries to secure promises of cooperation and encourages voluntary plans to achieve stated goals. If this fails the regulator goes up the pyramid to investigate or inspect and sets out what must be done in order to comply. Only then do

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[4] See F. Maupain, "International Labour Organisation: Recommendations and Similar Instruments" in Shelton, D. (ed.), *Commitment and Compliance - The Role of Non-Binding Norms in the International Legal System* (Oxford University Press), 2000 at p. 383.

[5] See N. Gunningham, P. Grabosky, D. Sinclair, *Smart Regulation – Designing Environmental Policy* (Oxford, Clarendon Press), 1998.

coercive sanctions come into play, such as judicial enforcement, fines, compensation and loss of government contracts. In order to work, there must be gradual escalation and, at the top, sufficiently strong sanctions to deter even the most persistent offender.

In the light of these general considerations, what weaknesses are revealed in the present framework of enforcement of transnational norms? I am going to focus on five of these, and then I shall suggest some possible solutions.

III. Weaknesses of the present framework of enforcement

1. Absence of positive obligations on Member States to require TNCs to observe both core and core-plus standards

A crucial element in designing an enforcement pyramid is to identify the potential participants in the regulatory process. Modern regulatory theory offers two critical insights in this respect. The first is that private forms of social control are often far more important in changing behaviour than state law enforcement, and more can be achieved by harnessing the enlightened self-interest of affected parties than through command and control regulation.[6] The second insight is that the quality of regulation can be improved by bringing into the regulatory process the experience and views of those directly affected. The ILO's tripartite structure is the leading example of how supranational regulation can be organised to achieve this second aim, but the same lesson has not been adequately absorbed in the enforcement of norms at national and local levels. In some countries, like the United Kingdom, tripartism is in decline. The real problem with the social dialogue model when applied to enforcement is that in many, if not most States, independent trade unions and employers' organisations are weak or non-existent.

A serious weakness of ILO conventions is that they address only state actors and not the TNCs and other non-state actors who need to be persuaded and, if necessary compelled, to see that their self-interest lies in compliance with binding norms. Some violations of binding norms involve legislation for which the government is directly responsible. But there are also many in which private corporations are in violation of the norms. The Committee on Freedom of Association (CFA) has gone further than other ILO supervisory bodies when it finds violation of the principles of freedom of association by a private employer, advising the State to take measures to ensure compliance (e.g. the reinstatement of a worker dismissed for anti-union reasons). But this practice has not been generally followed by other ILO bodies.

This state of affairs is a consequence, in part, of the 1919 Versailles Treaty which rejected the demands by the workers' movement (and defeated Germany) for a 'Parliament of Labour' which would 'not produce international conventions

[6] See N. Gunningham, "Introduction" in Gunningham, Grabosky and Sinclair, *op. cit.* at p. 12.

without legal effect but international statutes which should have the same effect as national statutes on their ratification'.[7] The ILO has to rely on States, often those most weakened by globalisation, to bring TNCs into line. Not surprisingly, vast disparities exist between an elite of industrialised countries with strong and stable governments which comply with a relatively high number of conventions, and the great mass of developing countries, with weak or unstable governments, which have few ratifications and high levels of non-compliance.[8]

In a few countries, with monist theories of international law, direct legal effects have been given to ratified ILO conventions; in some others with a dualist approach, the courts are required to interpret national laws so as to give effect to ratified conventions. But in a majority of countries this is not the case. The ILO's regulatory system can be contrasted with that of the EU where treaty provisions, regulations and directives may have horizontal legal effects (between persons) as well as vertical legal effects (by persons against the State). For example, the European Works Councils Directive (94/54) provides legally enforceable duties aimed at improving information and consultation in TNCs. By contrast, the ILO Tripartite Declaration on Principles concerning Multinational Enterprises, although 'rich in principle' in relation to matters such as information and consultation is remarkably 'weak in enforcement'.[9] A comparison may be made with supranational regulation of financial services and intellectual property where strict substantive commitments are placed on states to ensure compliance.

2. Absence of effective enforcement through national labour laws

A second weakness is that national labour laws, which embody ratified ILO conventions, are not effectively enforced especially in developing countries. This leaves TNCs which observe those laws at a competitive disadvantage in comparison with other foreign or domestic companies which flout the legal requirements, so they have little incentive to comply. TNCs benefit from the National Treatment principle (embodied, for example, in the ILO Tripartite Declaration) that there must be no less favourable treatment of TNCs than that accorded in like situations to domestic companies – so a government cannot target TNCs for enforcement if it is not doing the same against domestic violators.

The main reason or the effective enforcement of EU labour law is that it is not only supranational; it also depends on laws and industrial relations processes at the level of the Member States. References for preliminary rulings and infringement proceedings before the European Court of Justice are the main means of enforcement at EU-level. There is a symbiotic relationship between enforcement at this level and national labour law. National remedies, which must

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[7] See T. Ramm, "Chap.7" in B. Hepple, (ed.), *The Making of Labour Law in Europe: a Comparative Study of Nine Countries up to 1945* (London, Mansell), 1986 at p. 283.

[8] See B. Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing), 2005 at p. 47.

[9] *Ibid*. at p. 83.

be effective and deterrent, have to be relied upon to bring home the treaty obligations as interpreted by the ECJ. These national remedies may be primarily administrative (as in France), or through negotiations between the social partners (as in the Nordic countries), or through the judicial process (as in the UK).

3. Absence of enforceable determinations

Neither the Committee of Experts on the Application of Conventions and Recommendations (CEACR) nor the CFA adopt adversarial procedures and their conclusions do not have legally-binding force. The CEACR has justifiably expressed satisfaction with the progress made in many thousands of cases by diplomacy, technical assistance and direct contacts. But there are well-known cases where the conclusions of supervisory bodies have been deliberately ignored, such as by Mrs. Thatcher's government in respect of trade union rights in 1984.[10] The lessons of regulatory theory also make ask whether satisfactory results might have been secured more rapidly and effectively had these bodies been able to issue binding determinations.

At present the only way in which a legally binding finding that a Member State has breached an obligation under a convention can be made is through the conclusions of a Commission of Inquiry. A Commission may be set up by the Governing Body following representations by a workers' or employers' organisation made under Articles 24 and 25 of the ILO Constitution, or a complaint by a Member State or a delegate to the International Labour Conference under Article 26. The conclusions of a Commission become binding when the Member State agrees explicitly to accept them, or abstains from referring the matter to the International Court of Justice (ICJ) under Article 29 of the ILO Constitution. In none of the cases in which a Commission has reported has the government exercised this right of appeal. Failure to appeal means that the findings cannot be re-opened: the only issue is how to implement them. The 35-year long and continuing saga of the case of forced labour in Myanmar shows that the threat of sanctions under Article 33 of the ILO Constitution, following a Commission report, coupled with sensitive and difficult negotiations, at first led to some response from a dictatorial government.[11] But the failure to enforce trade sanctions has enabled the government to stall indefinitely, and not even to agree on mechanisms for dealing with complaints of forced labour. The world awaits with interest the outcome of the threat by the Governing Body of the ILO to refer the matter to the UN Security Council and to the Prosecutor of the International Criminal Court. One may be sceptical as to whether this will in itself change the government's intransigence, but concerted international action may persuade those states which have tolerated the dictatorship to exert pressure for change.

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[10] *Ibid*. at p. 38.

[11] See F. Maupain, "Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience" in P. Alston, (ed.), *Labour Rights as Human Rights* (Oxford University Press), 2005 at p. 85.

4. Absence of selective sanctions

There are two obstacles to the use of Article 33 to impose sanctions against a State which fails to observe a Commission recommendation, one political, the other legal. The political one – and the main reason why Article 33 has been invoked only once, and then over the objections of several countries, especially from Asia – is the general hostility to trade sanctions as a means of enforcing international labour standards. It is sometimes argued that imposing sanctions in respect of ratified conventions would act as a disincentive to ratification. Against this, sanctions can be justified on the grounds of reciprocity: one country cannot be expected to ratify if other ratifying countries are flouting the provisions of conventions they have purported to ratify. The argument is strongest when there is a flagrant breach of fundamental rights.

The second obstacle is the legal ambiguity as to the scope of the 'action' that can be authorised under Article 33. Before 1946, Article 28 of the ILO Constitution allowed the Governing Body in response to findings of a Commission of Inquiry, to recommend 'the measures, if any, of an economic character' that should be taken against a defaulting government. Either party could then approach the Permanent Court of International Justice which was to make the final decision on the merits and on 'any measures of an economic character.' This was dropped in 1946, no such measures ever having been recommended, and replaced by the current Article 33 which refers only to 'such action' as may be deemed 'wise and expedient to secure compliance'. Maupain believes that the change in wording does not rule out economic sanctions. The wording of the Myanmar Resolution in 2000 deliberately left Member States and international organisations with a wide discretion in this respect. They were asked to 'review' their relations with Myanmar and to take 'appropriate measures'. Without this ambiguity, leaving responsibility with the Member States, it is unlikely that the Resolution would have been adopted.[12] The key issue, Maupain points out, is the compatibility of trade sanctions imposed by Member States with their commitment as Members of the World Trade Organisation (WTO), a matter to which I shall return.

5. Absence of effective protection for international solidarity action

In theory, a consumer boycott or industrial action may be just as important as legal sanctions as a means of securing compliance. Yet, in practice transnational boycotts and strikes are subject to severe legal restrictions under national laws. These restrictions have increased over the past two decades. A recent survey[13] indicates that among Members of the Organisation for Economic Cooperation and Development (OECD) only Belgium appears to leave national and

[12] *Ibid.*, pp. 105-108.

[13] See P. Germanotta, *Protecting Worker Solidarity Action: A Critique of International Labour Law* (London, Institute of Employment Rights), 2002.

international solidarity action unregulated. Outright prohibition is found in some countries (e.g. the United Kingdom) and in most OECD countries solidarity action is permitted only if certain strict conditions are satisfied. The ILO's stance on this has been equivocal and contested.[14] Although the Director-General has spoken strongly about the need for the ILO to contribute to the empowerment of workers, the Governing Body has not moved beyond inconclusive discussions, even within the framework of the 1998 Declaration. The crucial issue is the extent to which the CEACR and CFA are willing to recognise that solidarity action, particularly across national boundaries, is encompassed by the freedom of association. The CEACR and CFA have generally taken the position that a general prohibition on sympathy action could lead to abuse, and workers should be able to take such action, providing the initial strike they are supporting is itself lawful. The main problem with the CEACR's approach is that it makes lawful sympathy or solidarity action dependent on the lawfulness of the primary dispute. If the law applied is that of a country in which the primary dispute occurs, this limitation may make it impossible to take solidarity action with workers in a country where strikes are prohibited or severely restricted. Testing the legality of the primary dispute by the law of the country in which the sympathy actions occurs is also beset with difficulties because of the different institutional arrangements and collective bargaining procedures in each country. Application of the law of the country in which the sympathy action occurs would involve artificial modifications of unfamiliar systems. The CFA has been moving towards testing the legality of primary action by whether the legislation in question complies with the ILO's principles on freedom of association. But, in my view, it would make more sense for the ILO's supervisory bodies to apply a simple test of 'common interest' between the workers involved in the primary and secondary action.[15]

IV. The future of binding norms

In order to remedy these weaknesses I believe that the following are among the key reforms that need to be made.

1. Framework conventions with positive obligations

The artificial distinction between conventions and recommendations should be abolished. There should instead be a few framework conventions that set out fundamental principles and States must be placed under positive obligations to ensure compliance by TNCs and others within their territory of these principles. A step in that direction is the ongoing review and integration of

[14] See T. Novitz, *International and European Protection of the Right to Strike* (Oxford University Press), 2003.

[15] See Hepple, *op. cit., supra* n. 8, pp. 186-189.

standards. A model is the 2006 Maritime Labour Convention replacing about 65 maritime labour instruments and laying down a firm set of principles and rights for seafarers, a simplified amendment procedure. There is a strong enforcement regime backed by a certification system, as well as a clause ensuring that a ship flying the flag of a country which has not ratified the convention will not be more favourably treated than a ship flying the flag of a state which has ratified. Another example is the 2006 Promotional Framework for Occupational Safety and Health Convention (No. 187). Framework conventions should be supplemented by regulations and codes of practice directed at specific groups of countries at a similar level of development. These reforms would allow for a concentration on basic principles and, at the same time make specific recommendations which are relevant to countries at a similar level of development. Empirical evidence[16] indicates that the decision to ratify a convention depends crucially on whether or not peer countries have done so. A virtuous circle of ratifying countries depends on the initiative being taken by a competitor with similar factor advantages. Targeted guidance would encourage ratification and greater compliance. In the absence of regional authorities such as the EU, the ILO will have an important role in developing methods of coordination of national employment policies of countries at a similar stage of development. In order to maximise peer pressure, an effective surveillance system of cross-border monitoring and inspection between countries in the target group will be essential.

2. Core conventions should be updated and expanded

The four core principles in the 1998 Declaration are selective. The Declaration has been a useful means for promoting ratification of the eight core conventions, but there is no obvious reason why health and safety should not be included among the 'core'. The recent ILO proposals for reinvigorating and strengthening labour inspection worldwide are essential for the enforcement of all these core principles and rights. Moreover, the Declaration needs to be linked to the Decent Work Agenda so as to extend the core principles to all kinds of productive work.

The wording of the Declaration suggests that countries can adhere to these vague principles without observing the more numerous specific rights conferred by the eight core conventions. It is only ratification that can confer rights and obligations in international law; the Declaration creates no more than an unenforceable constitutional obligation. There is no express linkage between the follow-up mechanism under the Declaration, and the regular supervisory machinery of the ILO. Consideration should be given to the creation of a Governing Body committee, similar to the CFA, which would consider complaints by States, or individual delegates to the International Labour Conference, of

[16] See N.H. Chau and R. Kanbur, "The Adoption of International Labour Standards Conventions: Who, When and Why?" in S.M. Collins and D. Rodrik, *Brookings Trade Forum 2001* (Washington, Brookings Institution), 2001.

breach of the core standards other than freedom of association which is already dealt with by the CFA . The GB should be able to consider action under Article 33 on the basis of the recommendations of such committees, where the evidence is clear, without the need first to set up a Commission of Inquiry.

3. Selective use of trade sanctions

I have argued at length elsewhere that sanctions for breach of international labour standards imposed unilaterally are undesirable, and that WTO trade sanctions would be both undesirable in principle and unlikely to work in practice.[17] This does not mean that trade sanctions should be absent from the system of transnational labour regulation. On the contrary, persuasion and conciliation will not work unless there is ultimately an effective sanction that can be invoked. First, it would not be unreasonable to insist that no country which is in flagrant breach of fundamental human rights should be admitted to the ILO or WTO. These pariah states (*hostis humani generis*) who wish to join or remain members of the WTO or ILO should have to demonstrate respect for democracy and human rights, as is the case for membership of the EU. They should be forced to withdraw from the WTO or ILO if they are ruled by corrupt or dictatorial regimes which grossly abuse human rights. The forced withdrawal of apartheid South Africa from the ILO in 1964 was a significant landmark in the long struggle for democracy in that country. The WTO-ILO linkage could be strengthened if the WTO were to ask the ILO to certify that a country is taking steps to respect rights at work. This would ensure that the ILO retains prime responsibility in respect of core labour standards. Once a State is so certified, it should be able to enjoy the benefits of WTO membership. Another fruitful approach is to provide positive, as distinct from negative, conditionality in granting trade preferences. Here the EU's Generalised System of Preferences provides a model. Apart from these measures the ILO should show more willingness and urgency than it does at present in the application of Article 33. The Constitution needs to be amended so as to make it an obligation (not simply a request) for Member States to take 'action' within the permitted limits of the WTO agreements. The emphasis, however, should be on carrots rather than sticks. The ILO's supervisory bodies should give interpretations of freedom of association which make it possible for international solidarity action to take place. This is essential if local actors are to be empowered.

4. An International Mediation Service and Labour Tribunal

Beyond the ILO a whole new world of transnational labour regulation is emerging. This includes the growing number of corporate codes of conduct and collective agreements between TNCs and international trade unions. ILO standards need to be integrated into these codes and agreements. One way that the

[17] See Hepple, *op. cit., supra* n. 8, chapters 4, 5, 6.

ILO could encourage this would be through a framework convention of the kind I have suggested. Another way would be by facilitating dispute resolution under these agreements. Here the emphasis, in the first instance, should be on the well-tried industrial method of mediation (or conciliation). The ILO has been unable or unwilling to date to provide such a mediation service. It should, therefore, support the establishment of an independent mediation service available to TNCs and unions to resolve their differences over the application of codes and agreements.

In the longer term an International Labour Tribunal, set up under the auspices of the ILO (possibly in collaboration with the Permanent Court of Arbitration), will be necessary to resolve transnational labour disputes. Such a Tribunal might also serve the purpose of giving authoritative interpretations of international labour conventions and the ILO Constitution (replacing the ICJ which is unsuitable). This has become an increasingly pressing issue because of the adoption of regional instruments and multilateral and bilateral treaties, which adopt sometimes subtle differences from the wording of ILO conventions. The primacy of ILO standards could be ensured and confusion overcome, by an International Labour Tribunal where authoritative interpretations could be given.

V. Conclusion

I have argued that in the new globalised economy, labour regulation has an increasingly transnational character. This regulation operates less through the sovereign power of nation states than through dispersed entities at supranational, regional, national and local levels, and it relies for its effectiveness heavily on market mechanisms. Regulation ranges across a spectrum, with no fixed boundaries, between the 'hard' end of binding legally enforceable instruments and the 'soft' end of voluntary codes and guidelines. These two ends of the spectrum are not in opposition to each other. Indeed, a regulatory strategy will not work if it uses simply one form of regulation to the exclusion of others. Persuasion and voluntary compliance will usually not change conduct unless there is a creative 'dialectic between the threat of sanctions and their actual use'.[18]

I have identified five of the weaknesses of the current framework for the enforcement of transnational norms, namely (i) the absence of positive obligations on Member States to require TNCs to observe both core and core-plus standards; (ii) the absence of effective enforcement through national labour laws; (iii) the absence of enforceable determinations; (iv) the absence of selective sanctions; and (v) the absence of effective protection for international solidarity action. I have proposed some key reforms such as the development of framework conventions with positive obligations, the updating and expansion of core conventions, the selective use of trade sanctions, and the establishment of an international mediation service and labour tribunal.

[18] See Maupain, *op. cit., supra* n. 11 at p.105.

I have no illusions that these reforms can be quickly or easily achieved, because transnational labour relations depend so much on power relations. But the task of an expert is not to second-guess whether the political will exists to carry out reform. The expert's duty is to show the reforms that are needed if the noble aims of the ILO are to be fulfilled as the Committee of Experts approaches its centenary.

Discussion

*Geraldo von Potobsky** – Professor Hepple's comments and remarks are very challenging. I would not agree, however, with his remarks on the dividing line between "soft law" and "hard law". I think there is a dividing line and it relates to the possibility for judicial enforcement of hard law – not of soft law. Another point concerns ILO standards which do not only have a vertical effect, but also an horizontal effect, even more than the directives of the European Union. This is being recognized in an increasing manner by national judiciaries which apply ILO standards and refer to comments and interpretations made by the Committee of Experts and even the Committee on Freedom of Association. The ILO is promoting the dissemination of international labour standards for judges and the Turin Training Centre is very much involved in this type of activities. One must admit, however, that there is a lack of knowledge in most countries about ILO standards and how they could be applied by judges and lawyers at the domestic level.

*Budislav Vukas*** – I was struck by Mr. Hepple's statement in favour of framework conventions. To give you but one example, a framework convention is the type of instrument that a body like the Council of Europe adopts when it does not want to adopt a real convention for the protection of minorities. They adopt instead a framework convention which is nothing but a set of pious wishes and suggestions.

I fully concur with the views expressed by Mr. von Potosbky about the danger of blurring the borderline between hard and soft law. Keeping the distinction between binding and non-binding is essential to international law, think of Security Council resolutions taken under chapter 6 or 7, think of law students and the difficulty we often have to convince them that international law is law.

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Eibe Riedel * – I think the most inspiring part of Mr. Hepple's contribution was his idea of elaborating the pyramid of normativity into responsive regulation as a much more subtle instrument in the field of labour law, in that regulations need to be responsive to, first of all, at the bottom level, voluntary compliance, then promises of cooperation and partnership, then inspection field missions, and only in the last resort, coercive measures. I also found fascinating the suggestion of sanctions in the form of either suspension or termination of membership in the WTO, which is something that really matters and hurts.

Oscar de Vries Reilingh ** – When Mr. Hepple was pleading for the concept of framework conventions, he added that they should be targeted on particular countries. I would like to know what he meant. Did he mean regionalization of universal standards or should they be focused on constituents in particular level of economic and social development which, by the way, would amount to the same.

Mohamed Ezzeldin Abdel-Moneim *** – With reference to Chapter 7 of the UN Charter, I wonder whether you envisage that things or sanctions can go that far in relation to the application of international standards related to human rights.

Paraskevi Nastou **** – Si j'ai bien compris, M. Hepple nie aux constatations de la commission d'experts de l'OIT un caractère obligatoire ou contraignant. Et si c'est le cas, ne fallait-il pas dissocier le caractère obligatoire de la constatation de l'éventualité d'attacher une sanction éventuelle?

Anne Trebilcock ***** – I have a question for Professor Hepple in relation to the idea of having an independent panel of mediators and I just wondered if he could more specifically describe the parameters that such an institution would have and how it would be structured in a way that would not be competing with or would not undermine existing arrangements within the ILO and how it would in effect be positioned to be something complementary.

Bob Hepple – Concerning Mr. von Potobsky's point about the dividing line between hard and soft law, my point is that it is the wrong way to look at the question because it means saying that that is law and that is not law. I think we should change our mindset, that we look at this as a spectrum of regulations and I also presented this model of the Egyptian pyramid with the idea that we must

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realize that sanctions at the end are absolutely essential in order to make persuasion work in many cases. I therefore think that our focus has been too much on should we go for soft or should we go for hard law. In very much an academic discussion, we get a lot of debates about what is hard law/soft law and I think it is not really the issue.

Secondly, about the ILO standards' horizontal effect, I think I recognized that some national courts are giving direct application. We had a very notable role in the history of labour law in South Africa. I think the message from what you say, which I fully agree with, is that we need a lot more training of judges, we need judges to be more receptive. But there are obstacles; sometimes they are constitutional obstacles in a particular State, sometimes they are just conservative judicial attitudes or the traditions of a country. I think that is something we will have to overcome.

In response to Mr. Vukas' comment concerning framework conventions, let me say that I am quite influenced by the model of the European Union – think of health and safety as an example. We used to have a lot of detailed regulations in different European States on health and safety and then the European Union introduced a general framework directive on health and safety supplemented by lots of specific directives on specific areas of health and safety. I can only speak for the United Kingdom here, but this approach of framework directives truly transformed the approach to health and safety law in the United Kingdom. More generally, in this modern world of flexibilization, the danger with having very specific Conventions is that they are too rigid. Drawing on the fact that countries are very influenced by what neighbouring States do, I think it would be useful at that stage, for guidelines to be formulated for a group of countries, not departing from the universal standards but targeting particular problems.

Mr. Abdel-Moneim raised the very interesting question about Chapter 7 and how far I would think this could be the appropriate mechanism – indeed I feel it cannot be the appropriate mechanism for sanctions because of the limited terms of Chapter 7. But we have to think imaginatively and I believe that we should, first of all, just look at the question of membership of the ILO and we should also look at what sanctions can be imposed comparatively with WTO standards. And also I emphasized the notion of carrots as well as sticks to encourage people to comply.

Concenring the non binding nature of the findings of the Committee of Experts, there is of ocurse a procedure; the Conference Committee will look at the Committee of Experts' comment and may decide to insert a special paragraph, etc. It should therefore be clear that there are ways in which those findings can be supported.

Finally, in reply to Ms. Trebilcock's question, it seems to me that initially we should try to offer a mediation service to those people acting under international collective agreements. As you know, there is a growing number of international collective agreements. Most of them are very vague and there are also the corporate codes of conduct which do not always reflect ILO standards. Some of the collective agreements provide that ILO standards must be followed on

certain matters. Under the voluntary codes of conduct, the problem about mediation is that it may be too one-sided because it may just be a unilateral corporate code and you have to ensure that there is somebody on the other side who has the strength to speak. But I just simply suggest that the idea of mediation services should be explored because I worry that the ILO is not playing a role, a very strong role, in relation to these new forms of regulation which may come eventually to be far more important in some places than Conventions and Recommendations.

Adrián Goldin – Una cosa que me parece importante decir es que esas iniciativas voluntarias, porque son empresarias, se reivindican como estrictamente voluntarias. Se pretenden voluntarias en la solución y se pretenden voluntarias también en el cumplimiento, y ese es un tema que las coloca mucho más cerca del ámbito de la gestión que del ámbito del derecho, por lo que entonces yo diría más cerca de la gestión de recursos humanos aunque expresan otra cosa que en el ámbito de las relaciones profesionales, o las relaciones laborales. Si yo tuviera que ubicarlas podría decir que las iniciativas voluntarias son a la gestión de recursos humanos, lo que la negociación colectiva es a las relaciones industriales. Y finalmente, subrayo que, cuanta más intervención sindical, cuanta más negociación, cuanta más participación de terceros sujetos haya respecto de las iniciativas voluntarias más cerca estaremos de las relaciones industriales en ese continuo movimiento que va desde lo unilateral a lo multilateral, es decir, que va desde la gestión de recursos humanos hacia las relaciones industriales, y más cualitativos serán sus productos. De modo tal que esto alimenta esa idea de que, tomando las cautelas, el espacio de la iniciativa voluntaria como una expresión de reconvergencia empresaria hacia su vinculación con el sistema de protección debe seguir siendo mirado con extrema atención.

Panel discussion – The quest for new compliance tools: Marrying the best of the old with the new

Learning or Diversity? Reflections on the Future of International Labour Standards

Simon Deakin *

The occasion of the eightieth anniversary of the founding of the ILO's committee of experts system provides a suitable moment to take stock of recent developments in the law and practice of international labour standards. The ILO system represents one of the earliest attempts to diffuse good practice through a process of dialogue between nation states, mediated by the interpretive role of the experts. The system has stood the test of time and has been remarkably successful. But as in so many other respects, the functioning of this part of international labour law is under scrutiny as never before. Labour standards themselves are changing, in part as a response to globalization, but also in the light of new theories of governance which are challenging established conceptions. This much was clear from the course of the discussion which took place in Geneva in November 2006. In this short contribution to the published proceedings of that event, I wish to take up the challenge of what might be called 'learning-based' models of transnational governance, and to consider their relevance for the future form and function of labour standards.

The case for identifying a series of recent innovations in transnational governance in terms of a learning model has been powerfully made by Charles Sabel in a series of papers,[1] most recently with Jonathan Zeitlin,[2] which focus on the

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[1] See J. Cohen and C. Sabel, "Directly-deliberative polyarchy", *European Law Journal*, 1997, pp. 313-342; O. Gerstenberg and C. Sabel, "Directly-deliberative polyarchy: an institutional ideal for Europe?" in R. Dehousse and C. Joerges (eds.), *Good Governance and Administration in Europe's Integrated Market*, The Academy of European Law (EUI), Volume XI, Book 1, 2002, pp.289-341 (Oxford: Oxford University Press).

[2] See C. Sabel and J. Zeitlin, "Learning from difference: the new architecture of experimentalist governance in the European Union", Paper presented to the Theory of the Norm workshop, FP6 project 'Reflexive Governance in the Public Interest', Brussels, 27 October 2006.

experience of the European Union, but are by no means confined in their scope to practices on the European continent. According to this view, 'distinctive and surprisingly effective innovations' have emerged, the essence of which is that 'the EU is creating a single market while constructing a framework within which the member states can protect public health and safety in ways that grow out of these traditions and allow them to pursue their own best judgements for innovative advance'.[3] This analysis goes further than merely acknowledging, as others have done, the role of deliberation through the role of 'comitological' committees, or even the use of forms of multi-level 'concertation' which tend to dissolve the distinctions between a central 'core' of decision-making and national 'peripheries'. In addition, a new 'underlying architecture of public rule making' can be observed; this 'can neither be mapped from the topmost directives and Treaty provisions nor read out from any textbook account of the formal competences of EU institutions', but it nevertheless 'regularly and decisively shapes EU governance'. Its essence is the establishment, firstly, of 'framework goals', jointly set by action between the member states and EU institutions, such as the goal of a high employment rate set for the Open Method of Coordination (OMC) on employment policy in the late 1990s; secondly, the devolution to 'lower level units', a category including but not limited to member states, of the means of implementation of these goals; thirdly, the application of a duty on the part of those units to report on their performance, to benchmark it against agreed criteria, and to take part in a peer review process by which their performance is judged collectively; and, fourthly, a recursive mechanism through which the framework itself is periodically revised in the light of the information produced by the benchmarking process.

The result is distinctive, it is argued, for the following reasons.[4] Firstly, the goal of deliberation is not, as has been thought, to reach agreement in the sense of a 'reflective equilibrium'; rather, 'deliberative decision making is driven at least as much by the discussion and elaboration of difference'. Secondly, the result is not, necessarily, to replace formal norms with informal ones: 'those institutions whose explicit purpose is to expose and clarify difference so as to destabilize and disentrench settled approaches are typically highly formalised'. It is not simply that formal revisions to directives and national-level laws often result from the processes concerned; even where formal laws and sanctions are absent, the consequences of non-compliance can be far-reaching, in terms of possible economic losses and harm to reputation. Thirdly, new forms of governance rest not so much upon the imposition from above of supposedly optimal regulatory solutions, as upon a clear division of labour between EU institutions with responsibility for devising frameworks of general application, and the member states whose task is to adapt them to local conditions and to contribute, through reporting and monitoring, to a collective learning process: 'the most successful of these arrangements combine the advantages of decentralized local

[3] *Ibid.*, pp.1-2.

[4] *Ibid.*, pp.4-10.

experimentation with those of centralized coordination, and so blur the distinction between forms of governance often held to have incompatible virtues'. What this adds up to is a type of governance termed directly deliberative polyarchy – 'polyarchy' here referring to the element of mutual learning through monitoring by lower level units – which is, in essence, 'a machine for learning from diversity'.[5]

The core illustration of the operation of deliberative polyarchy as a distinctive form of governance in the EU, although by no means the only one, is the 'open method of coordination' formally adopted at the Lisbon summit in 2000. Formally, this had four elements: the fixing of guidelines at central level, coupled with timetables for the achievement of goals; the establishment of benchmarks for tailoring performance and allowing the identification of best practice at local level; the adoption of specific targets for the implementation of guidelines, while taking into account regional and national differences; and a process of 'periodic monitoring, evaluation and peer review organized as mutual learning processes'. Elements of the OMC were already in existence, in the form of the Broad Economic Policy Guidelines which can be traced back to the Treaty of Maastricht, and the Employment Guidelines adopted in relation to the European Employment Strategy which was formally embedded in the Treaty of Amsterdam. The Lisbon Summit stimulated a proliferation of new OMCs across a wide range of areas, which now include pensions policy, strategies on social inclusion, and policies on fundamental rights, while looser variants of the same idea have been applied in the contexts of research and innovation policy, the 'information society', and the promotion of small and medium-sized enterprises.

The arrival of the OMC appears to mark a fundamental break with what came before, and this is often the way in which it has been portrayed by critics and opponents alike. The authors of the OMC, as Sabel and Zeitlin put it, saw it as 'a "third way" for EU governance between regulatory harmonization and fragmentation'.[6] However, there is a case for identifying important continuities between the OMC and some long-standing debates about the proper role of harmonization within the common, later the single, market.

The theory of deliberative polyarchy sees the EU as simply one case amid a larger set of emerging governance forms to be found at national, regional and global level. Thus Sabel and Zeitlin cite instances of experimentalism in the US including environmental protection, education policy, child protection, and food safety. To some degree, their emphasis on EU-US similarities may simply reflect a particular selection of substantive areas of law on which to focus; they do not discuss labour or company law, both areas of considerable divergence (as we have just seen), in any detail. Nevertheless, they are prepared to extend the deliberative model to cover global-level governance too: 'developments cast doubt on the singularity of the EU's innovative regulatory architecture',[7] with the WTO and ILO, among others, beginning to borrow elements of the OMC approach.

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[5] *Ibid.*, pp.7-8.

[6] *Ibid.*, p.27.

[7] *Ibid.*, p.71.

Indeed, the influence of learning models is clear in the context of several ILO initiatives, the most important of which for these purposes is the recent Convention No. 187 of 2006 on a Promotional Framework for Occupational Safety and Health. Article 5 of this Convention provides that 'each Member shall formulate, implement, monitor, evaluate and periodically review a national programme on occupational safety and health in consultation with the most representative organizations of employers and workers', and goes on in paragraph 2 to state that this 'national programme shall:

(a) promote the development of a national preventative safety and health culture;

(b) contribute to the protection of workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in accordance with national law and practice, in order to prevent occupational injuries, diseases and deaths and promote safety and health in the workplace;

(c) be formulated and reviewed on the basis of analysis of the national situation regarding occupational safety and health, including analysis of the national system for occupational safety and health;

(d) *include objectives, targets and indicators of progress* (emphasis added); and

(e) be supported, where possible, by other complementary national programmes and plans which will assist in achieving progressively a safe and healthy working environment'.

If a learning model is to form an increasingly important part of the ILO's approach to standard setting in future, this is, in one sense, a natural development from what has gone before. Cross-national learning has always gone on in labour law. Before the first ILO Conventions, the nation states of Western Europe had made treaty commitments to a degree of harmonisation of laws governing health and safety at work. Innovations in welfare state regimes were exchanged from the late nineteenth century onwards. The ILO's system of reviewing member state compliance with Conventions and with its basic principles in such areas as freedom of association was an attempt to institutionalise a process of mutual observation among states. It does not depend upon hard sanctions, but on publicity and persuasion. In what respects do new forms of governance mark a potential departure from the existing model?

That new governance forms do mark a departure from previous approaches can perhaps most clearly be seen from the context in which they have been most extensively developed, which is the European Union. Like the ILO, the EU did not suddenly discover learning models in the early 2000s. A division of labour between central institutions and the member states and a commitment to experimentalism based on diversity of practices were part of the EU's regulatory architecture from the outset. European directives are like ILO Conventions in that they are not self-enforcing; although the legal instruments available to the European Commission for their implementation are evidently more extensive

than anything available to the ILO, they nevertheless depend for their effectiveness, in the final analysis, on measures taken by member states. The limited regulatory scope of Directives also needs to be kept in view. In the social policy field are by and large designed to set a 'floor of rights'. This model was established in the 1970s and, with some modifications and adaptations, remains the principal approach today. Most directives make explicit reference in their texts to 'minimum standards' which states must observe but on which they can improve, while many also contain 'non-regression clauses' which are intended to prevent member states from using the implementation of a directive to reduce the pre-existing level of protection guaranteed by national law. A 'race to the bottom' is thereby discouraged, but equally important is the implicit encouragement for a learning process to take place above the level of the basic floor.

This distinctive European approach to the regulation of transnational markets has been described using the term *reflexive harmonization*.[8] Rather than seeing reflexive forms of governance as a 'third way' between the standardisation and fragmentation of laws, as supporters of the OMC would have it, the guiding idea here was that the opposition between regulatory competition and harmonization was a false one to begin with. Regulatory competition, rather than necessarily involving a race to the bottom, should be seen instead as a process of discovery through which knowledge and resources were mobilized in the search for effective and workable rules. This was an adaptation of the idea that competition is a learning process which depends on norms that establish a balance between 'particular' and 'general' mechanisms,[9] between, that is, the autonomy of local actors, and the mechanisms which ensure a process of collective learning based on observation and experimentation. As with theories of deliberative polyarchy, an essential prerequisite for reflexive harmonization is the preservation of local-level diversity, since without diversity, the stock of knowledge and experience on which the learning process depends is limited in scope. However, there are several respects in which the reflexive harmonization approach differs from deliberative polyarchy.

The theory of reflexive harmonization was developed as part of an explicit engagement with, and response to, neoliberal critics of the EU's role in transnational rule-making. Those, for example, who argued against the European

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[8] See, for instance, S. Deakin, "Two types of regulatory competition: competitive federalism versus reflexive harmonisation. A law and economics perspective", *Cambridge Yearbook of European Legal Studies*, vol.2, 1999, pp.231-260; S. Deakin, "Regulatory competition versus harmonisation in European company law" in D. Esty and D. Geradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives*, 2001 (Oxford: Oxford University Press), pp.190-217; C. Barnard and S. Deakin, "Market access and regulatory competition" in C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises*, 2002 (Oxford: Hart); P. Zumbansen, "Spaces and places: a systems theory approach to regulatory competition in European company law", *European Law Journal*, 2006, pp.535-557; B. Caruso, "Changes in the workplace and the dialogue of labor scholars in the global village", Working Paper 50-2007, Centro studi di diritto del lavoro Europeo 'Massimo D'Antona', Universitá degli studi di Catania.

[9] See R. Sugden, "Spontaneous order" in P. Newman, *The New Palgrave Dictionary of Economics and the Law*, 1997 (London: Macmillan), p. 487.

Commission's social action programmes of the 1980s and 1990s, did so on the grounds that variety within the Union as a whole should be preserved: 'hidden in the historical experience of economic integration, there is […] a very important aspect of "system dynamics": international competition in the field of the welfare state serves as a kind of process of discovery to identify which welfare state package – for whatever reason – turns out to be economically viable in practice'.[10] As this critique recognized, there was a strong argument against the use of harmonizing legislation to cement in a single 'best' solution. However, the theory of reflexive harmonization argued that this was not a good account of how EU governance worked. It argued, as we have just seen, that European-style harmonization had evolved to play the role of maintaining the appropriate relationship between 'particular' mechanisms operating at the sub-federal level, and the 'general' mechanisms by which learning across the Union as a whole took place. The model of reflexive harmonization held that the principal objectives of judicial intervention and legislative harmonization alike were two-fold: firstly, to protect the autonomy and diversity of national or local rule-making systems, while, secondly, seeking to 'steer' or channel the process of adaptation of rules at state level away from 'spontaneous' solutions which might lock in sub-optimal outcomes, such as a 'race to the bottom' initiated by court-led 'negative harmonisation'. In contrast, the deliberative polyarchy approach is silent on the role that minimum standards might play in shaping the process of transnational integration. There is nothing in the deliberative polyarchy approach to suggest, for example, that experimentalist solutions of a deregulatory type should be ruled out in principle, and nor is there any clear engagement with the risks which this type of regulatory competition might pose.

There is a further problem with the learning model proposed by advocates of an OMC-type approach to transnational governance. This is that, despite protestations to the contrary, the use of benchmarking sets up the idea of a single best approach to issues of standard setting. Individual country practices end up being singled out as illustrations of best practice. An illustration of this is the current tendency to highlight the many positive features of Nordic systems of labour regulation in terms of promoting employment growth. The combination of a wide social security net, coupled with fairly loose employment protection legislation by European standards, is widely seen as contributing to high employment levels in the Nordic systems, and they are increasingly held up a model for other systems to follow, as in the recent European Commission Green Paper on the future of labour law.[11] The difficulty with this approach is that certain features of the Nordic model are not being emphasized – not least the very high levels of GDP (up to 5 per cent) being devoted to public expenditure active

[10] See K.-H. Paqué, "Does Europe's Common Market need a social dimension? Some academic thoughts on a popular theme" in J.T. Addison and W.S. Siebert (eds.), *Labour Markets in Europe: Issues of Harmonisation and Regulation*, 1997 (London: Dryden), p.109.

[11] See *Green Paper - Modernising Labour Law to Meet the Challenges of the 21st Century*, (Luxembourg: OOPEC), 2006.

labour market policy. The removal of so-called rigidities in labour laws, part of a programme of 'approximating' national laws to the Nordic standard, has been proposed. But to take just one part of the Nordic model, in isolation from the others, is potentially highly dangerous. National labour law systems are just that – systems, in which the different parts interrelate in ways which are driven by history and, quite often, by contingency. Taking parts of one system and transplanting them into others is as fraught with difficulty now as it always has been, a danger which labour law scholars of an earlier generation noted well.[12]

It is instructive to compare OMC-type learning with the model implied by the 'floor of rights' approach taken by ILO conventions and EU directives. Two points stand out. First, the texts of conventions and directives are distillations of the experience of many different national systems. They are, necessarily, abstracted from the experience of any single system. This is not to deny that, on occasion, one particular country has not provided a significant source of inspiration for a given measure. But in general, these standards embody a collective learning process, in respect of which many different national traditions make an input. The second point is the 'floor of rights' approach permits states considerable leeway in responding to the signals sent by the international standard. There is a certain 'framing' of permissible responses which, in principle, constitutes a countervailing force to a costs-driven race to the bottom. But above the 'floor', there is no question of there being a single right path for states.

Diversity of practice at national level is the precondition for learning, but learning models based on benchmarking run the risk of undermining that diversity. The ILO may well be making increasing use in future of such models. But if that is the case, it is imperative that emphasis be given to preserving *local* knowledge against centrifugal tendencies, as recent work on reviewing the ILO's social security standards has sought to emphasise.[13]

[12] See O. Kahn-Freund, "On uses and misuses of comparative law", *Modern Law Review*, vol.37, 1972, pp.1-27.

[13] See S. Deakin and M. Freedland, "Updating international labour standards in the area of social security: a framework for analysis", *Comparative Labor Law and Policy Journal*, vol.27, 2006, pp.151-166.

The ILO is not a State, its members are not firms

Brian A. Langille *

I. The rise of "global administrative law" and "global governance"

Administrative law is enjoying something of a comeback these days. And as with many current revivals of legal subject matters much of the impetus for this revival comes from the "globalization" of what had hitherto been, in the main and for most, a domestic inquiry. Equally important, this development has been accompanied by a privileging of the word "governance" (as opposed to "government") in discussions of global administration. So we see journal articles with titles such as "The Emergence of Global Administrative Law" [1] and "Global Governance as Administration". [2] Much of this is reasonably new and will remain controversial in academic circles as the debate is joined about the ability of this combination of ideas to provide sufficient intellectual structure to satisfy the demands placed upon any effort to articulate a compelling account or "grammar" of what used to be called "public law". [3] In addition to these difficult issues of conceptual coherence there is the obvious normative task of overcoming evident problems of democratic and legal "legitimacy".

This theorizing about global administration is of great relevance to global legal institutions, and in particular the ILO, which must, and does, continually

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[1] See B. Kingsbury, N. Krisch, R.B. Stewart, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, vol. 68, 2005, pp. 15-61.

[2] See B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Weiner, "Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law", *ibid*. See also "A Global Administrative Law Bibliography", *ibid*., pp. 357-377.

[3] See M. Loughlin, *Public Law and Political Theory* (Oxford University Press), 1992.

question its methodologies, modalities, and means of action as it seeks to effectively advance its goals in these times of "globalization". And the new global administrative governance theoreticians are at the ILO's gate.[4]

What should the ILO make of all of this? This is a very complex question and at first blush these developments are rather disconcerting for the ILO as a large and formal international agency, with a complex constitution which has at its heart the creation of international treaties and complex legal mechanisms for the supervision of their application. The main problem is that the new theoretical paradigm of "global governance as administration" is precisely articulated in terms of disenchantment with, and the inadequacy of, such formal and centralized administrative institutions, the law they apply, their techniques of "adjudication" and "enforcement", and so on. As long ago as 1997 David Kennedy observed, concerning the emergence of the idea of "governance" as opposed to "government" in international law circles:

> By governance, I mean the project, common to public international lawyers for generations, to build what seem to a particular generation the essential normative or institutional conditions for international public order. For some international lawyers this has primarily meant embroidering the doctrines of public international law and supporting the institutions and incidence of international adjudication. For some, the great public law institutions of the United Nations system and its predecessors, or of federal systems at the regional or global level, have seemed more central. It is now fashionable in public international law circles to treat both these normative and institutional projects as passé, in favour of what are thought the more complex, more or less formalized bundles of rules, roles, and relationships that define the interactions among governmental units and non-state actors alike in a broader transnational civil society. It is with this latest set of scholars and practitioners that «governance» has emerged as a distinctive motto for international public order, consciously distinguished from «government» and consciously identified with the group of phenomena that are thought to define the late twentieth-century international condition: globalization, interdependence, the demise of sovereignty, the apparent futility of further United Nations institution building, and the emergence of international civil society. These writers identify governance as a new, distinct phenomenon: either a defining characteristic of the new world order or a prescription for resolving its pragmatic challenges, or both. "Governance" in this literature, as opposed to «government,» is the complex of more or less formalized bundles of rules, roles, and relationships that define the social practices of state and non-state actors interacting in various issue areas, rather than formal interstate organizations with budgets and buildings and authority to apply rules and impose sanctions. The term has been picked up by an increasing number of liberal pragmatists in the mainstream of U.S. public international law, as a buzzword for

[4] See A.C.L. Davies, "Global Administrative Law at the International Labour Organization: The Problem of Softer Standards" (NYU Law School website, http://iilj.org/global_adlaw/documents/DaviesPaper.pdf)

> pragmatic international order, and as a clarion that will resurrect public international law as the keystone of international order despite the apparent demise of the project of United Nations institution building.[5]

It does seem plausible to say that the popularity and the rise of the ideas of "governance", and that an expanded account of "administration" is required to comprehend it, stem for many from the belief in (and resulting disenchantment with) the diminishing role of the state and of international institutions caused by a number of factors including those identified by Kennedy, above, including globalization (especially the mobility of capital), the resulting diminishment of sovereignty, the prevalence of conservative neo-liberal politics (ultimately resulting in what Harry Arthurs called "globalization of the mind")[6], the rise of "civil society" as a proffered alternative to formal state ordering, and so on. On the other hand there are clearly those for whom these developments are welcomed as liberating precisely because they limit the effectiveness of state "intervention" in the natural order of things.

This disenchantment is, perhaps not surprisingly, felt especially keenly in the United States and as a result some of the foundational writing about the new global legal dispensation has been developed there. One of the truly breathtaking and groundbreaking contributions to these recent efforts to re-imagine government and administration is to be found in Dorf and Sabel's monumental law review article "A Constitution of Democratic Experimentalism"[7] in which they offer, as a remedy for our current state of administrative affairs a "new form of government" which at its core involves a complex and radical decentralization of power away from our familiar, central, and formal legislative, administrative, and adjudicative institutions and towards smaller sub-units of government, other non-governmental social actors, and citizens engaged in constant experimentation and learning by monitoring. This in the name of recreating in the sphere of politics the gains created in the world of firms through the Japanese-led revolution in corporate organization and processes. As goes the vertically integrated, top down hierarchically managed, slow-to-react and reinvent firm, in a high speed and "just in time" world, so goes government, administration, law, and regulation as we have known them. It is a dramatic thesis and one which Professor Sabel and others have taken to the doorstep, or at least the backdoor, of the ILO by writing about how all of this is and should be happening in connection with labour standards.[8]

A more recent contribution by Orly Lobel seeks to place the Dorf and Sabel thesis in even a larger, if still American, context. It is a very useful point of depar-

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[5] See D. Kennedy, " New Approaches to Comparative Law", *Utah Law Review*, 1997, p. 545.

[6] See H. Arthurs, " Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields", *Canadian Journal of Law and Society*, vol. 12, 1998, p. 219.

[7] See M.C. Dorf and C.F. Sabel, "A Constitution of Democratic Experimentalism", *Columbia Law Review*, vol. 98, 1998, pp. 267-473.

[8] See, for example, A. Fung, D. O'Rourke, C.F. Sabel, "Realizing Labor Standards", *Boston Review*, Feb./March 2001.

ture for considering the relevance of all of this for the ILO. In "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought",[9] our author lets a number of cats out of the bag with her title which nonetheless actually undersells the power and breadth of the central argument. At its core is the idea that we are witnessing a "paradigm shift" to a new model of law, a new "legal regime". In the old days, that is the days of the "New Deal", law was national, top down, and sanctioned and gave us the large administrative agencies such as the National Labour Relations Board with detailed law, adjudication, and jurisprudence. In our times of "global competition, changing patterns of market organization, and a declining commitment to direct government intervention" the renew deal "supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model" while "highlighting the increasing significance of norm-generating nongovernmental actors".[10] So "law making shifts from command and control to a more reflexive approach" in which "scaling up, facilitating innovation, standardization of good practices, and the encouragement the replication of success stories"[11] are preferred methodologies. The basic idea is that the original New Deal involved a paradigm shift appropriate to its times and that we are now witnessing another shift to another model which better melds with our contemporary circumstances. In constructing this argument Lobel explicitly identifies Dorf and Sabel's work as one of the important threads in the complex theoretical tapestry of the renew deal.

To this type of theorizing there has been a reasonably predictable set of replies, especially from those on the left who are not quite so willing to write the obituary of the state, public law, and public administration as we have known them and who do not see, at least yet, the circumstances in which the lion will lie down with the lamb in a world in which familiar forms of legal constraint upon the exercise of power and self interest are to be diluted, disabled, and disrespected. So, for example, William Scheuerman responds to these brave new ideas, and in particular to Dorf and Sabel, by noting that their "creative and intellectually noteworthy programmatic undertaking" is flawed because "it exhibits an unjustifiably overstated enmity towards certain traditional liberal democratic achievements, including the rule of law and uniform central legislation"[12] leading to a proposal in which the "traditional idea of the rule of law as requiring stable, general, and relatively clear norms is unceremoniously dumped".[13]

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[9] See O. Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought", *Minnesota Law Review*, vol. 84, 2004, pp. 342-470.

[10] *Ibid* at p. 345.

[11] *Ibid*.

[12] See W.E. Scheuerman, "Democratic Experimentation or Capitalist Synchronization?", *Canadian Journal of Law and Jurisprudence*, vol. 17, 2004 at p. 102.

[13] *Ibid*. at p. 122.

II. The apparent ILO parallel

My interest in these debates flows from their apparent parallel to another debate – one explicitly about the ILO. I refer in particular to claims made by Philip Alston in his "Core Labour Standards and the Transformation of the International Labour Rights Regime",[14] to which I responded in "Core labour Rights – The True Story".[15] The apparent parallel – and I use the word "apparent" carefully – is as follows. The central thrust of Alston's critique is that recent developments in the international labour law regime, especially the ILO Declaration of 1998, undermine the hard-fought-for ILO legal results in the from of the international labour code with its detailed laws, the large legal supervisory machinery, resulting complex jurisprudence and efforts at enforcement. This is achieved by the Declaration's focus on a set of principles articulated at a general level and its reliance on soft promotional techniques. This represents exactly the sort of shift away from hard legal enforcement to some sort of soft governance approach advocated by the new global administrative theorists. In short, Alston can be seen in the role of Scheuerman. He is a defender of the rule of law virtues rules (clear, detailed and generally applicable legislation, adjudication by independent legal authorities, the elaboration of a coherent jurisprudence over time, and enforcement of resulting judgements) against a modern tendency in favour of uncertain norms, the abandonment of authoritative adjudicative processes and their jurisprudence, and the dismissal of the idea of "enforcement". The other obvious dimension of the parallel is that the defenders of the ILO Declaration, on the other hand, can be and are easily seen to precisely occupy the "renew deal" territory which Lobel celebrates. One debate seems to map perfectly on the other.

III. An important distinction

It is the "apparentness" of this parallel which I believe deserves scrutiny. The point of this essay is that the drawing of such a parallel obscures a very important distinction mentioned in my title – the distinction between states and firms. In my view this distinction cannot be overlooked and no matter how the debates about "governance" and "government" work out, at either the domestic or international level, this distinction still does and must do its own work. In what follows I try to clarify this point.

My views about the appropriateness of the Declaration's methodologies, and its possibilities as a model for further ILO reform, flow from my view that

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[14] See P. Alston "Core Labour Standards and the Transformation of the International Labour Rights Regime", *European Journal of International Law*, vol. 15, 2004, pp. 457-521.

[15] See B.A. Langille, "Core labour Rights – The True Story", *European Journal of International Law*, vol. 16, 2005, pp. 409-437. See also F. Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights", *ibid*., pp. 439-465.

it is time to rethink the basic purposes of ILO law. Neitszche said that the most common form of stupidity lies in forgetting what it is you are trying to do. The question "why" comes first. Questions of who, what, where, when, and how, follow.

In my view, there has long been prevalent in debates about the ILO what I see as a "negative" rationale for the existence of the ILO and ILO law. On this long-standing and familiar account their role is to prevent Member States from pursuing their economic self-interest which, left unchecked, will lead a "race to the bottom" in labour standards. This account of the ILO's purposes flows from a standard account of the purposes of domestic labour law which is, in short, that there is a trade-off between justice and efficiency and that labour law is a set of constraints upon market activity, i.e. a tax which we ought to be willing to pay in the name of fairness, workplace citizenship, and so on. This rationale makes inevitable a race to the bottom dilemma for nation states as they discover it is difficult to maintain optimal tax rates in the face of mobile capital. It is in the self-interest of all States to enter the race (that is the tragic point about such races). It is the role of the ILO to forestall this race to the bottom by propounding enforceable and binding international agreements (ILO Conventions) which commit Member States to respecting certain minima below which there will be no such tax cuts. On this rationale the model of ILO law one requires is a model appropriate to constraining self-interest, i.e. one like the criminal law, where one spells out specific norms, puts in place an independent adjudicative mechanism, and provides for enforcement of the resulting judgments with appropriate sanctions which make the cost of non-compliance higher than that of compliance. This is simply what is required to prevent races to the bottom. From a certain account of ILO purposes one gets a certain model of ILO law appropriate to those purposes, a certain view of the role of the Committee of Experts, its configuration and so on.

My critique of Alston is not that, given this understanding of the role of the ILO (prevention of races to the bottom), we must revise our regulatory techniques along the lines of the Declaration. Far from it. The whole idea is that Alston's views about ILO law and enforcement are understandable given his account of what they are for. I expressed no opinion on alternative regulatory techniques appropriate to ILO purposes so conceived. My point was more basic and, as a result, finesses this debate. My point was that our standard rationale for the ILO, set out above, is implausible and inadequate. The key point remains that there is a grammatical link between purpose and processes used to advance those purposes. If our purposes require reassessment so must our methodologies for advancing them.

My account of the purpose of the ILO is an account which says that it is not in the self-interest of States to lower labour standards. There is no race to the bottom. It is not the job of the ILO to prevent members pursuing their rational economic self-interest. The model of law appropriate to that end (and the familiar model is the criminal law one I just mentioned, but whatever it is) is not, cannot rationally be, appropriate to a radically different purpose. That radically

different purpose is the following: to assist States in identifying their self-interest and in achieving it. The model of law appropriate to this end must be powerfully different than that appropriate to the constraining self-interest. The duty imposing model of law generally thought to be appropriate to constraining self-interest (and the rule law requirements associated with it) require clear, knowable-in-advance rules, independent adjudication of compliance, and effective enforcement. That is what critics of the Declaration believe we need, think we had, charge that the Declaration took away or at least undermines, and want back. But if the role of the ILO is not to prevent Member States form acting in their self interest, but rather to assist them in seeing it in the first place and then helping them achieve it, then a different style of law, and a different set of legal virtues and requirements, are brought into play. The game shifts from a duty imposing to an educational, capacity building, and power conferring one. Education, financial and technical assistance, best practices, benchmarking, continuous learning, and so on, all become of great concern. "Enforcement" becomes an odd word in this context. "Sanctions" even more so. It is at this point that the desire to draw the Alston/government and Langille/governance parallel seems irresistible. But to do so would be in my view a mistake – a mistake which overlooks a very important distinction between ILO law and other law.

At the heart of my claim is a point so obvious that it is rarely explicitly mentioned and can easily be overlooked. That point is that ILO law is, in general, addressed to states. It is not addresses to firms, or workers, or consumers, or citizens. Why is this of significance? The simple answer is that states are not firms. Here is a very brief explanation of this point. I am quite certain that Canadian workers still need law to protect them. They need, to take just one example, effective protection of their right to organize. At the moment, this is achieved through labour relations boards which are independent statutory administrative institutions, equipped with explicit unfair labour practice laws, effective adjudication processes, and real hard enforcement measures – all in place to deal with powerful employers who deny workers their right to freely associate and bargain collectively. And so on. This is not a world in which the lion will lie down with the lamb, at least not yet, even in Canada. And, perhaps unlike in the United States, this Canadian legal regime still, essentially, works. Any argument to change it would require careful scrutiny.[16] It may well be not in the interest of private firms (maximizing shareholder value) to respect labour rights. It seems that it is not for some percentage of firms. But it is an entirely different question whether it is in the interest of the State as a whole to ensure a general compliance with labour laws. It turns out that it is.

One small way, among many, of putting this point is that without the still large gap between government and private market activity there would be no

[16] This is not to say that I am averse to finding new ways of making the protection of worker rights more effective. My point here is that my argument for embracing of ILO reform is a much easier and more basic argument which is not and does not need to be directly involved in these more general debates about governance as opposed to government. The main set of worries that all agree are appropriate there, simply do not materialize here.

space for the theory of public goods to do its work. Another small way of putting this large point is that while the evidence shows that firms invest in countries which respect core labour rights, the idea of a free lunch (or ride) is predictably hard for private firms to resist. So, Toyota invests in Canada, rather than in the southern United States, in part because of the existence of a public health care system in which health care costs come out of general but higher taxes, and not payroll, providing a competitive advantage for Canada.[17] It is not necessarily in the interest or capability of the market or any individual firm to provide such a system. Firms would, in their self-interest, prefer to not pay the taxes to support such a system. They would prefer a free lunch to a paid one. But they still need the lunch. That is what States are for. What is in their self-interest is different from what is in any firm's self-interest. A State is not a firm.

So, here is another way of making the point I tried to make in my critique of Alston.[18] If States were firms I would agree with his worries about a shift away from enforcement and so on – just as I would worry about such a shift in the law in Canada. Any such shift would have to be carefully examined for important babies disappearing along with familiar bathwater. But States are not firms. Their self-interest lies elsewhere. And a style of law appropriate to firms is irrelevant to (most – recall Myanmar) States. Here is a new way of putting my critique of existing ILO law and practice, Alston's defence of them, and his critique of the Declaration; they make the mistake of treating ILO Members as if they were firms and the ILO as if it were a State. They are not.

IV. A better view of the ILO and the debate about global administrative governance

To return to global administrative governance the point is that the distinction between States making laws for firms and the ILO making laws for States is of great importance. Of course there is much more going on in the world of international labour law than ILO law making. Much of what the new theorists are writing about has obvious and important relevance to the real and complete world of international labour rights. As is well known there are complex efforts to regulate firms directly by non-state actors, using private incentive and sanctioning, often market based, and so on. And it is the case that the ILO itself is directly involved in these other sorts of initiatives in many ways – the Guidelines for Multinational Corporations, to take one example. And it may even be said to be that case that not all ILO conventions are primarily aimed at States. The new Maritime Labour Convention, for example, is really a form of direct regulation of an industry, negotiated by its key players, and resembling a global collective

[17] See P. Krugman, "Toyota, Moving Northward", *New York Times*, 25 July 2005.

[18] See also B.A. Langille, "What Is International Labour Law for?", International Institute for Labour Studies, ILO, March 2005, available at http://www.ilo.org/public/english/bureau/inst/edu/publecs.htm

agreement as much as a convention addressed to Member States. Here, in my view, the model of detailed law and hard enforcement are correctly deployed, albeit in a way and following processes of negotiation in which the new administrative governance theorists will find much satisfaction, for the objects of its attention are in reality not states but indeed (a large collection of) firms more effectively dealt with centrally than through national laws. But the ILO Constitution, as I read it, is in general aimed at making conventions which are aimed at States. Here we require, as I have said, a different model of law.

The point is that there is much to be said for the welcome emergence of a more complex approach to global administrative governance and it has a difficult but important set of tasks to tackle – first mapping and making sense of,[19] and then establishing standards of legitimacy for,[20] of these new constellations of actors and forms of norm creation. But it is also critical that we be clear about when and where we have to worry about abandonment or alteration of traditional rule of law virtues (clear rules, adjudication, and enforcement) and when and where we do not. My point is that with a better understanding of ILO purposes in place we will see that much of the concern expressed about the direction of the ILO (or much of the ILO law created under the old understanding) is importantly wrong-headed. This, however, merely removes ILO mainstream lawmaking, properly understood, from one line of fire in the current debates about how to make this part of our world a better one. It leaves lots of scope, on the other hand, for the requirement of the evolution of a rigorous theory of global administrative governance.

The significance of all of this for current ILO practices, including the role and nature of the Committee of Experts is, I believe, large. If these ideas are taken seriously and it turns out that we can defend a new purpose for much ILO lawmaking, then the question of what the Committee of Experts will become, what its role will be understood to be, what kind of experts they will be, what kind of law it will be asked to supervise, and so on, will be questions of central importance. We can only imagine the answers. To those writing 80 years from now will fall the task of explaining whether these questions were addressed and, if they were, how these questions were answered. But it is surely the duty of those writing now to pose them.

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[19] See, for example, D.M. Trubek and L.G. Trubek, "New Governance and Legal Regulation: Complementarity, Rivalry, or Transformation", Wisconsin Law School Legal Studies Research Paper Series No. 1022, June 2006.

[20] See, for example, A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", Paper presented at the Princeton Centre for Globalization and Governance, Feb. 2006 (unpublished – available at http://www.princeton.edu/~pcglobal/conferences/normative/index.html).

Rolling Rule labor standards: Why their time has come, and why we should be glad of it

Charles F. Sabel *

I. Introduction

Current debates about the role of ILO labor standards – notably the acrimonious dispute regarding the utility of condensing many of the ILO's traditional and highly specialized conventions into five broad core standards – are part of a vast, often tormented reconsideration of what kind of regulatory regime will today best protect the interests of working people, in the developing countries no less than the rich ones, in the informal sector as well as in formal employment, and regardless of gender and race. Collective bargaining was viewed from the end of the 19th century to the beginning of this one as the chief instrument of defending those rights (at least those of them that comported well with the assumption of the male factory worker as the typical breadwinner in need of protection). It is everywhere under threat: from legislation mandating rules concerning pensions, on-the-job discrimination and many other domains that were, or might once have been expected to become topics of collective bargaining; from private labor standards, elaborated by NGOs and transnational corporations, governing labor conditions along global supply chains in several industries; from company participation and incentive schemes that are more appealing, especially to highly qualified workers, than traditional union arrangements; and (resulting from and contributing to all this) from the slow erosion and disorganization of domestic law in the advanced countries whose labor regimes once served as models to the world. Similarly, tripartite or neo-corporatist governance at the national level – collective bargaining writ large – is everywhere strained, has frequently come undone, and is no longer emulated by countries which once strove to do so.

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Discussion is short circuited when these manifest changes are ascribed to the disruptions of globalization and the increase in management's power associated with it. Globalization is certainly disruptive; management has gained power through continuing reorganizing occasioned by the disruption. But it is also true that globalization and reorganization have led to increased decentralization within large firms, and often from them to their suppliers at various levels in the supply chain worldwide. Surely the extremely limited ability of unions rooted in collective bargaining to use this re-distribution of power from the top down to reconstitute themselves, or at least offset some the consequences of disruption on traditional prerogatives, suggests something more: part of the labor's problem of responding to changed circumstances is the strategy of response - and so at bottom the assumptions about what constitutes an effective labor regime - rather than the changed circumstances themselves.

This paper pursues this suggestion. The core idea is simply that regulation, to be effective, must correspond or mesh with the forms of cooperation whose effects it corrects in the public interest. When, as now, the forms of cooperation change, so do the forms of effective regulation. At the ILO and elsewhere we need to discuss not how to improve the regime we have – by shifting, or not, to standards or international human rights law – but, instead, whether we have the right kind of regime at all. To consider alternative regimes in turn requires rethinking, or at least contemplating the prospect of rethinking the core concepts – such as compliance – definitive of each.

To situate the argument, therefore, Part 2 looks very briefly at three ideas of compliance, each associated with a distinct area of law, and Part 3 shows how the contractual concept of compliance, in two variants, became central to the labor regime of the last century. Part 4 looks at the breakdown of the contractualist regulatory regime at the workplace. Part 5 considers the breakdown of contractualism in its home precincts: private contracting in relations between cooperating firms. A first argument here is that the generality of the failure points to a very general cause indeed: not a shift in workplace relations, but a transformation in the conditions of cooperation out of which "contracting" or the regulation of on-going exchange arises. A second one is that, discernible amidst the ruins of the old regime are the lineaments of a new, experimentalist one. In this regime learning from (by solving problems with) partners is inextricably connected with monitoring their performance, and the requirements of compliance – the very meaning of term – are defined for the parties in that process itself. Put another way, in this regime do enter contracts with agents in which the latter are incentivized faithfully to realize the plants of the former. Rather, in the course of executing projects "principals" learn from "agents", and vice versa, blurring the distinction between the two, but in which that heighten their mutual accountability. Part 6 interrupts the development of the argument to respond to the reasonable objection that however sweeping this transformation may be, the last place it will ever reach are lower reaches the international supply chains that define the current globalization, and most especially, China. Part 7 concludes where, in my view, the coming round of debate should start: with the recogni-

tion that many global brands, such as Nike and Addidas-Salomon, private international code makers like the Fair Labor Association, some unions (at least at the regional level) in countries such as Germany and Denmark and, not least the ILO – in its Maritime Labour Convention and health and safety standard – have already reckonized this shift in the conditions of co-operation and have taken important, but partial steps to address them. One shorthand for this, recognizable to "compliance" mangers working for some of the global brands, but also workers and production engineers in many sectors world wide, is "going lean" on compliance. By the time you hear that phrase again, it should be clear that there is reason to believe its time has come.

II. Three Ideas of Compliance

Take first contractual compliance, or contract, in which parties exchange promises and commit themselves to execute the terms of their agreement. Breaches of the agreement are typically sanctioned by money damages. Because contracting parties are presumed to know their situations and interests well – otherwise they would not enter agreements with each other – it is also presumed that the contracts between them will be richly detailed with respect to the particulars of their situation. Because contracting is incessant – it pulses with the market – the contexts or domains within which specific agreements are struck are likely to be familiar to courts or other specialized adjudicators, and these latter can supply default terms to fill gaps individual agreements as the parties would have filled them given sufficient time and resources to do so. Between the default rules and the parties' specialized terms, therefore, contracts are thought to come as close as any legal instrument can to specifying the parties obligations, and thereby guiding as much as law can the determination of non-compliance or breach. Transacting parties enter contracts precisely because they can subject themselves to a law suited to their circumstances.

A second idea of compliance derives from criminal law. Call it obligatory compliance: Criminal law prohibits certain acts, and we are obligated to respect those prohibitions as a condition of participation in the society that imposes them. If we don't we lose our freedom, in jail.

A third idea of compliance imposes a duty to act reasonably or responsibly in complex situation. This is the idea of compliance associated with tort law. If we are negligent in the duty to be reasonably careful in avoiding harm to others – in the products we design, the food we process, or the medical services we provide – then we are liable in tort, not just for money damages equal to the harm caused, but for punitive fines meant both to correct the injustice we have committed, and to deter others from negligence in similar situations. Tort law thus has a regulatory as well as a corrective function.

It is often said that contract law, as the law of the market, is fundamentally different from tort and criminal law as, respectively, the societal law of regulatory duties and unconditional social obligations. These distinctions are, of

course, easily confounded. Contract law is entangled in social norms, or embedded in society – contracts with (socially) "unconscionable" terms are invalid. Commercial contracts are traditionally read, under the United States Commercial Code, in the context of the norms of the industries to which they apply. Conversely, the actual application of sanctions under criminal and tort law often resembles in practice the kind of negotiation of damages associated with contract claims (pleas bargaining between prosecutors and accused in US criminal cases; creation of administrative "grids" fixing awards for various classes of harms in US mass tort cases, and so on).

More important, for present purposes, is the distinction between contract and tort liability or its obverse, compliance. The former is defined by rules: the exact content of the promises exchanged by the contracting parties. The latter is defined with reference to extremely open-ended standards: the designer of a product is only then not liable for damages caused by design defects if she was as diligent in anticipating and eliminating those defects as a designer of such products can reasonably expected to be. To determine what reasonable expectations of diligence require in the case of a particular defect, the court determines whether the designer, beyond meeting regulatory requirements, took such precautions as her peers currently do, or as special information available to her alone would have likely prompted them to take. Put another way, to comply with the tort duty to avoid harm through negligence it is insufficient merely to abide by the current rules specifying acceptable behavior. Rather the duty is, to use language to be developed in a bit, to anticipate and mitigate risks to the extent and by the means currently possible.

III. Labor Law as Contract

Labor law was, for most of the last century, a genus of the contract law family. It came in two species. The first and perhaps most salient was of course collective bargaining. The state set terms on the parties – capital and labor – with the aim of ensuring that their bargains were public regarding. At the limit, reached in such neo-corporatist arrangements as those prevailing in, say, Austria in the 1980s (and foreseen by Carl Schmitt in the 1920s) collective bargaining and the parties to it became the state – but this was legitimated (to the extent that it was, given what came to be seen as the unacceptable exclusion of essentially everyone but the traditional bread winner and his employer from the negotiating table) by the conviction that such contracting defined the public good.

The second species was administrative or regulatory: state agencies established rules for governing workplace conditions – setting terms for compensating workers for workplace injuries, for establishing pensions systems and unemployment insurance, for reducing health and safety hazards, and proceeding to protection and racial, gender and other forms of discrimination. Such regulation of the workplace was contractual in the superficial sense that the dense web of rules that it produced had the look and feel of the rules produced by successive

revisions of collective bargaining agreements. It was contractual in the deeper sense that in practice the state, in writing regulations in consultation with the workplace actors, helped the latter overcome prisoners dilemmas and other familiar collective action problems to "impose" on themselves, through the rules, terms they would have agreed were they not hostage to limited, self-defeating calculations of self interest. If it's a useful exaggeration to say that in collective bargaining the state sets the stage for the labor market parties to write the rules for themselves that an ideal administration would have written for them, then its an equally useful exaggeration to say that in regulation the parties make use of the administration to write the rules they would have bargained under other circumstances. The continuity between these two "contractualist" modes of setting workplace conditions is demonstrated with particular clarity by the French and other labor law regimes with labor inspectorates that can generalize collective bargaining agreements and enforce regulatory codes.

This classic form of labor regulation was, of course, rooted (or, in the language of Polanyi in which these matters are often discussed, embedded) in the social or economic conditions of particular epoch – the rise of mass production industry at the end of the 19th and beginning of the 20th century. It's worth evoking this epochal connection briefly to provide a point of reference for the vast changes that have occurred since. Once the extraordinary economies of scale afforded by mass production by means of specialized machines and workers with correspondingly specialized skills were well established, reformers could plausibly argue that capital and labor were so manifestly dependent on each other in the large factory, and society so dependent on their cooperation, that collective bargaining was not just the right but also the obligation of the parties. Similarly, the prohibition of forms of competition and workplace organization based on low wages and the minimum possible investment in plant and equipment – sweating – was good for society and good for workers. Good for the former because it led to more efficient use of resources; good for the latter because it penalized the spread of workplace settings that invited, indeed compelled abuse of labor, in favor of settings – the large factory – where capital gained from minimal respect for labor standards (the rational for collective bargaining). The ILO was created in the aftermath and spirit of the anti-sweating campaigns of the World War One period.

IV. The Breakdown of the Labor Law Regime

I put discussion of the "contractualist' mode of labor regulation in the past tense because it is, for all practical purposes, history. It has broken down, or is rapidly crumbling, in such diverse settings – in Germany as well as the US; in automobiles as well as garments and textiles – that insofar as it continues to exist, it is a historical legacy (with all the costs that outlived bequests continue to have for the living), not the vital, institutional embodiment of the values once

– and still – associated with it. Among the countless examples of this breakdown let me select just three of particular relevance to the subsequent discussion.

The first is the endless search for a reconciliation between German workplace collective bargaining (*Mitbestimmung*) and the forms of continuous workplace re-organization associated with the Toyota production system and all the innovations inspired by it. Very crudely, the tension is that *Mitbestimmung*, like all forms of collective bargaining, assumes that the workers' representative will periodically bargain away a (now) unworkable rule, in return for a substitute that respects workers' interests. In the continuous reorganization of the new production systems, the workers (typically in collaboration with managers and technicians) are themselves involved in devising new procedures, and changes occur so rapidly and fluidly that it is impossible to bargain them through one revision at a time. We will return below to the distinction between systems that aim to conserve as much of the existing rule structure as possible in solving problems (such as collective bargaining) and those that treat (almost all) rules and provisional, and re-write them as equitable problem solving requires. Here the key point is just the viscosity of traditional collective bargaining in the face of a significant and persistent change in environment: The German Metalworkers Union and auto industry, particularly VW, has been trying to reconcile flexibility with contractual control through collective bargaining for 25 years. Since they have done on much recent evidence far better at this than many of their competitors, the continuing struggle is surely a sign that there is a deep tension between the demands of productive efficiency under current conditions and traditional forms of protecting labor standards.[1]

A second indicator of the crisis of the contractualist labor regulation is the success of the currently much admired Danish flexicurity model. The core of the model – and you will look in vain in Denmark or elsewhere for accounts that go much beyond the assertion of this core – is that workers allow employers a nearly free hand in creating, abolishing and re-organizing jobs in return for access to (and financial support for pursuing) continuing training programs of such quality that workers who complete them have their pick of engaging, well paid jobs. Employers, correspondingly, have to upgrade their jobs they offer in order to retain current workers and attract capable replacements. The result is what everyone wants, i.e. a high skill, low-unemployment economy that is highly resilient to market changes because it is highly flexible, quickly abolishing jobs that are no longer needed and creating (quickly filled) ones that are. For present purposes the interest of this success story is in what it does not contain; although unions play an important role in the Danish labor market, especially with regard to continuing education, they do not bargain over the job definitions, or (certain formalities aside) over the creation or destruction of jobs at the workplace in the

[1] The question mark in the subtitle of an excellent recent book on progress towards this goal says as much; see Michael Schumann, Martin Kuhlmann, Frauke Sanders, Hans Joachim Sperling (eds.), *Auto 5000: Ein neues Produktionskonzept – Die deutsche Antwort auf den Toyota-Weg?*, Hamburg, 2006.

manner of "contractualist" unions. Though the comparison is by itself hardly conclusive, the Danes' success in regulating the labor market without the usual devices of collective bargaining and the associated regulation of employment protection together with the Germans' persistent difficulties in making collective bargaining work under current conditions re-enforce our strong suspicion that the "contractualist" model of labor regulation is out of joint with the times.

The third example of the breakdown of the contractualist regime in labor concerns the failures of international codes of conduct regulating labor conditions in multinational firms, particularly, the garment and sport shoe industries. A reasonable response to the difficulties of traditional labor law in the domestic settings of the US or other OECD countries was to argue that the problem lay not in the nature of the regulatory regime, but rather in the newfound ability of multinational corporations to escape its reach – first and foremost through the globalization of production to suppliers in distant, unregulated jurisdictions. But this response is unconvincing in light of the recent experience of corporations such as Nike. Largely out of concern that the sometimes scandalous behavior of its suppliers could devastate its reputation, Nike, like many other prominent brands in fashion-sensitive industries, imposed on itself and its suppliers a strict code of conduct regarding labor standards, and organized an internal inspectorate to assure compliance with its terms. Whatever its shortcomings, there is no doubt that as regards regulation of the work week, payment of and limitation on overtime, insistence on respectful, non-discriminatory treatment of the workforce and the like, the code mirrors provisions common in developed countries. Nor is there any doubt that the inspectorate makes a determined and good faith effort to enforce its terms, visiting factories subject to it more frequently, and examining them more thoroughly, than the (now understaffed and underpaid) labor inspectorates in advanced countries would typically survey like facilities within their own jurisdictions.[2] A review of Nike's own reports on suppliers' response to periodic review shows the inspections to be, at best, ineffective: findings of non-compliance in one period do not lead to improvements in labor conditions in subsequent ones. The inspectorate system is costly; its very existence constitutes an acknowledgement by Nike of responsibility (shading into liability) for labor conditions in the suppliers. It is hard, therefore, to view the system as a fig leaf, and easy to understand Nike's apparent frustration at its failure. The corporation is doing, after all, just what its critics demanded of it – applying the "contractualist" tradition of labor regulation and rule-based compliance. Surely this is as fair a test of the viability of that tradition under conditions of globalization can reasonably be expected; and the result strengthens, from a transnational viewpoint, the concerns nourished by diverse, domestic experience.

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[2] Efforts to enforce labor codes in the advanced countries are typically dismissed with remarks such as the following: "The system of monitoring and enforcing compliance with federal and state labor and employment laws in the US is broken"; see Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 2006 (ILR/Cornell University Press: Ithaca, NY), p. 264.

V. The Breakdown of Contractualism in General

The examples so far are consistent with idea – often implicit in discussions of labor standards – that the problems of traditional or contractualist regulation are specific to, or particularly acute in the workplace: the result of changes in the organization of heavy industry, or the shift to services or high-tech, or of all of these combining with globalization to shift power in favor of capital or otherwise undermine existing arrangements. But a glance at the vast literature on administrative changes in other domains – food safety, reporting in financial markets, air and maritime safety, operation of energy and telecommunications networks, and many more – compels the conclusion that the crisis of labor regulation is part – an especially acute part – of a broader crisis of the contractualist model of regulation. I'll limit the survey of a broad discussion to four salient aspects:

First, command and control regulation – in which a hierarchical superior (usually a state authority) writes detailed, stable rules to govern action within a particular domain – is today unworkable in almost all domains. The regulated activity changes too rapidly for the regulator to write rules governing it. More precisely, change is so rapid in relation to rule writing capacity that the rules on the books quickly become simply irrelevant to the primary actors, or are easily gamed by them to simulate compliance.

Second, in response to the breakdown of command and control or traditional regulation, administration is becoming "networked" or "multi-level." Differences of nomenclature aside, the common feature of these alternative regulatory systems is to blur precisely the distinction between rule conception (or definition) and rule execution (or application) that command and control emphasizes. This they do by an institutional architecture or decision making process that focuses on the definition and subsequent elaboration of framework goals. A notionally super-ordinate ("Federal") authority, frequently in "networked" consultation with notionally subordinate entities (the "States," "Provinces" or "Regions") sets an open-ended goal (e.g. clean water, safe food, schools providing an adequate education, reasonable accommodation for persons with handicaps) and provisional definitions of minimally acceptable performance levels and measures for gauging progress towards the goal. The subordinates report regularly on their performance, and, together with Federal authorities, periodically revise goals, minimal acceptable performance levels, and performance metrics in the light of their pooled experience. Such experimentalist or rolling-rule regulation is pervasive in the European Union, although it is naturally more fully developed in some domains than others. But administration on these lines is also evident in the US, for example, in education and child-protective services. Through recursive revision this kind of regulation plainly blurs the distinction between rule-based and standard-based compliance associated historically with contract and tort: in each period the standard is in effect applied in different rules in different, "inferior" jurisdictions, and then reinterpreted to incorporate generalizations that emerge from joint evaluation of the varying

applications. The standard reshapes the rules and the rules reshape the standard. Another variant of this kind of regime, spreading in human service administrations in areas such as child welfare and mental health in the US, is the quality service review, or QSR. In QSRs, the regulatory "center" regularly reviews a randomly drawn sample of cases in the "lower level" jurisdictions. The case record is supplemented by interviews with a wide range of stakeholders – the client and her family, the therapists, the case worker, the school counselor – to determine whether the diagnosis and the resulting individual service plan were reliable, whether the services indicated where actually provided and of high quality, and whether the service plan was revised if necessary. Like the first variant, this kind of quality review helps detect and correct misjudgments by individuals, flaws in administrative practice and ambiguities or omissions in the high level specification of agency goals.

As the reference to the EU was intended to suggest, the emergence of the new, experimentalist forms of regulation is not limited to domestic or municipal law. On the contrary, transnational settings, such as the EU and the WTO, seem if anything especially propitious to the emergence of the new regulatory model. One reasons for this is that no incumbent sovereign, accustomed to the prerogatives of Westphalian sovereignty – the *fons et origo* of command and control – to oppose the fragile pretensions of the new forms of governance. A corollary to this is the need, in transnational space, to harmonize many different bodies of domestic law. Agreement on high-level principal and continuous adjustment in the light of experience whose import is unpredictable – and is therefore unlikely to systematically favor one national solution over others – proves in practice to be a practical and politically effective means of reaching this end. A leading example of the spread of what has been called "anomalous" administrative law – where the anomaly is precisely the deviation from the command and control assumptions underpinning the traditional law of the administrative state – is the Codex Alimentarius, which though the SPS agreement incorporated into the WTO plays a key role in setting standards for food safety in world trade.

Third, and more controversially, as the reference to reasonable accommodation was intended to suggest, the new methods of regulations are not limited to apparently technical matters such as food or aviation safety. They can be, and are being, applied to the articulation and vindication of rights as well. Here too leading examples are from the EU, especially with regard to rights against discrimination at the workplace, or on the basis of gender, age, or ethnicity. But the application of experimentalist or rolling rule methods to rights is only incipient. It is much less developed than in other domains and remains, partly for that very reason controversial. Indeed many rights advocates believe that any attempt to build a rolling rule regime in the domain of rights is self defeating, as rights, in their view, must be articulated as stable, sharp-edged rules if they are to be effective at all.

The most comprehensive and fundamental indication of the crisis of the contractualist model, and the emergence of an alternative, is, finally, a transformation in the character of contractual relations among firms themselves, and

more specifically a deep change in the nature of long-term or relational contracts. The canonical relational contract was a agreement between a coal-fired electric power station optimized for coal of certain composition, and a nearby mine producing coal of just that type. As the power station was dependent on the mine and vice versa, neither party would invest without an assurance from the other that the relation would continue – despite variations in the cost of labor or of transport – at least as long as necessary for both parties to amortize their investment. The relational contract provided that assurance, binding the parties to buy and sell to each other for the necessary term of years, and establishing formulas for sharing the burdens caused by fluctuations in the price of their respective inputs. Such agreements still exist. But agreements between customers and suppliers are today much more likely to be open-ended in the sense of anticipating the co-development by both parties of the next generations of product, and establishing a governance committee (with equal representation from both parties) to determine which of the potential projects that emerge from collaboration should actually be pursued. In the canonical case, decisions are by consensus. In case of disagreement, the dispute is reviewed by (a committee of) the hierarchical superiors of the deadlocked governance committee. Presumably, no one on either side of the governance committee wants to jeopardize his/her career by raising an objection that is overruled at the next level; and in any case the members of the governance committee, who presumably believe deeply in the project, will always be inclined to think that more time and money will solve current problems. This creates powerful incentives to minimize obstacles. But the consensus rule means that any participant, by raising a strong objection can place the evidentiary burden on the others to demonstrate the feasibility of the project. So the incentive to proceed is balanced by a device that makes it easy to question the advisability of doing so, allowing doubters to express concerns in a form that leads to deliberate investigation, not horse trading.

The upshot is that where the traditional relational contract established rules to govern the relation, the new relational contract establishes framework goals and a governance mechanism for periodically evaluating emergent, alternative interpretations of it. Where the old regime contractualized regulation, the emergent one apparently regulates contract by experimentalist or rolling rule means. Another way to think about the new relational contract is as a formalization – flexible and corrigible – of the traditional tort obligation to act reasonably or responsibly in complex situation. But here is not the place to explore that limb of the argument.

In the shift from relatively rigid, rule-based exchange to fluid co-development we have, at last, a plausible candidate for the efficient or proximate cause of widespread distress of contractual regulation and the emergence of networked or experimentalist alternatives (the causes behind this cause are of course a different question entirely). Beyond that, the close connection between changes in the form of contract and changes in the form of regulation suggest that we have in this nexus a starting point for rethinking labor regulation: the diffusions of new forms of collaborating within and among firms. But before turning to that

task we have to address the obvious and reasonable objection that, even if the breakdown of contractualist regulation is not limited to the world of work, and even if changes in contracting among firms are somehow implicated in it, the actual organization of production on a global scale not only does not encourage collaboration in general and co-development between customers and suppliers in particular but rather maintains developing economies – and thus in effect the industrial workforce of tomorrow if not already today – as the subordinate instruments of advanced country design.

VI. Transformation of Global Supply Chains

The current globalization of production is often said to perpetuate, perhaps in a new form, the long standing division between a rich, advanced center which innovates technologically and controls access to markets, and a backward, poor periphery which performs routine, simple tasks. The multi- or transnational corporation organizes and administers this division of labor, headquartering its knowledge intensive activities in the world center, and then locating its production facilities (formerly internal subsidiaries, now at least nominally independent suppliers) in the country currently paying the lowest wages – and relocating them should a new entrant offer better terms. The early versions of the literature on global supply chains presented this view in some empirical detail. Thus this literature distinguished between "producer-driven" supply chains, as in autos, where the a manufacturing firm in the advanced countries directly organizes the decentralization of production to developing countries, and "consumer- or retail-driven" supply chains, as in garments or shoes, where an advanced country "brand" designs and markets products, but contracts with independent suppliers to produce them. Though based on long-range exchange and sophisticated communications and logistics, globalization in this account amounts to a modern version of sweating. Factories in the developing world at the limit have only variable, and no fixed costs, and therefore can be costlessly closed when demand for their output drops, and moved when lower variable costs are available elsewhere. Though this picture may have captured a key tendency in globalization circa the early 1990s, and though it is still all to easy to find examples of corporate behavior that correspond to it, four considerations strongly suggest that globalization today fosters, or at least creates many opportunities for new forms of collaboration.

The first piece of evidence in this direction is the absence of races to the bottom in labor regulation worldwide. If the sweating model were correct, there would be powerful, indeed nearly irresistible, pressures on developing economies to increase their attractiveness to transnational investors by adopting permissive labor standards, or none at all. Study after study has shown no connection between inward investment and such deregulation.[3] There is, on the con-

[3] See Robert J. Flanagan, "Labor Standards and International Competitive Advantage" in Flanagan and Gould (eds.), *International Labor Standards*, Stanford, 2003.

trary, some evidence of a race to the top in competition among corporate codes of conduct the garment and footwear industries. Consistent with the Nike findings reported earlier, the improvement referred to here is in code terms, not actual firm conduct. Nonetheless, it seems that corporations would have to be extremely cynical or shortsighted – or both – to impose higher and higher standards of conduct on themselves in global settings while pressing for more and more abusive conditions in host countries.

A second piece of evidence goes directly to the emergence of new forms of collaboration rather than the implausibility of the sweating model. It is the well documented spread of lean production from the auto industry to the garment industry, and from the advanced countries to the developing ones. Lean production is to manufacturing what co-design is to development: a method for treating current solutions as provisional and searching collaboratively, beyond the boundaries of current routine, for ways to improve it. In lean production, this is typically done by forming teams representing different production departments and specialties to trace disruptions, such as machine breakdowns, manufacturing defects, back to their (typically distant and counter-intuitive) root cause. This system requires close coordination and very often co-location of suppliers and assemblers – assembly problems often originate in defective parts, or erratic deliveries of supplies – as well as collaboration between customer and supplier to increase manufacturing efficiency shades into co-design of next generation parts and products. Lean production was pioneered by Japanese automobiles firms but variants of it have been introduced by all their competitors, frequently beginning with the co-location of new assembly and supplier facilities – unencumbered by tradition – in developing countries or transition economies such as Brazil, Mexico or the Czech Republic. Crucially, for present purposes, lean production has been embraced in recent years by just the firms that traditionally rely on production by semi-skilled seamstresses, and thus, on the sweating account, would be the last to do so – leading producers of garments and sportswear such as Nike and Addidas-Salomon. These firms and other are excluding suppliers who show no promise of adopting these methods and are cooperating more intensively in solving design and production problems with those who do (though not otherwise sharing the substantial costs of adjustment). Leading industry consultants routinely provide detailed cost accounting of the advantages to cut-and-sew producers – who simply assembled garments from textiles supplied by their customers – of themselves organizing low inventory systems able to shift quickly from one product to another as fashion demands: what the industry calls “full package production”. And whole regions, Central America in particular, which only recently built up garment industries to mass produce t-shirts and the like, are frantically discussing how to attract textile mills and trim makers able to produce short production runs at competitive prices and otherwise facilitate a shift towards lean production and co-development. The garment industry is of course a dominant – in the case of countries such as Bangladesh or El Salvador overwhelmingly dominant – component of developing economies, and often their principal connection to the world economy.

A transformation in the organization of the garment industry in direction of more cooperation within and among producers in that industry is therefore a sign of deep change in the nature of development: a blurring of the distinction between center and periphery at the core of the sweating model.

We come to the same conclusion by looking, third, at particular developing economies rather than key industries. Argentina is a good example of the profusion of product "upgrading" in mid-income developing countries, and the access to export markets it affords. At the beginning of the 20th century Argentine agriculture was frontier of efficiency. By the 1960s, its soils were depleted, its technology backward. From the late 1980s on Argentina again become a leader – this time in no-till soy cultivation, based on genetically modified seeds and precision seeders (capable of inserting one seed at a time at a depth and with the amount of fertilizer that will maximize yield in the particular plot under cultivation). The precision seeders are fabricated domestically. Close collaboration between the capital goods makers and the users of the equipment allows such rapid innovation in all the appliances that slit open, tamp down and otherwise touch the ground that foreign competitors can not keep pace. A similar story of close collaboration between different specialist firms (and between them and the national agricultural extension service) explains the transformation of the traditional wine industry in Mendoza province into a high-quality producer with a rapidly share of demanding world markets. The same goes for the emergence of new firms developing worldwide markets for "tv-formats": analytic descriptions (more detailed than a high concept, but much more open than a finished episode or pilot) of a sopa opera, reality tv or crime show that allows for customization in other countries. Indeed, influenced by the work of Hausmann and Rodrik on process of "self discovery" by which entrepreneurs in developing countries explore export possibilities, there is now a substantial case study literature suggesting that a key barrier to entry to world markets is not the closure of supply chains, but rather the limits to the search capacities and production capabilities of developing country economies.

Consider as a final and crucial entry on the list of counter-examples to the new sweating view concern the experience of China. With its low wages and vast pool of workers, authoritarian (but development-oriented government), and explicit prohibitions on labor organizing, China often stands as the knock down example – or rather, given its weight in the world economy, as proof – of the new sweating interpretation. But detailed recent reports suggest that China too is beginning to move, and rapidly, in the direction of the Toyota-style, co-design production methods. A striking indication of this is the emergence of what are called "supply chain" cities. This label is applied to two different phenomena. One is the emergence of huge factories – each large enough to constitute a small city in itself – constructed by foreign or domestic firms to integrate design and manufacturing. The other is profusion of industrial clusters: constellations of small and medium sized firms in complementary specialties which collaborate in constantly varying configurations to produce a changing mixture of highly specialized goods. The common feature is that both variants premise the local

integration of conception and execution. In other words, to the extent that the notion of "supply chain" cities captures an emergent reality, China, the last frontier of globalization, turns out to provide evidence for the spread of new forms of cooperation. These revisions in the picture of the global supply chain are all the more compelling in that they derive from the recent work of Gary Gereffi, whose earlier research presented the most thoughtful version of the new sweating view.[4]

VII. Traces of a New Labor Law Regime

Suppose then that labor law both in the form of regulation and as collective bargaining was contractualist. That contactualism – including of course contractualism in labor law regimes – is in crisis because new forms of co-operation and co-development require continuing governance of deep uncertainty rather than periodic adjustment of an enduring body of rules, in global supply chains and developing countries no less than in the advanced economies. Suppose finally that a successor labor regime will have to mesh with the new forms of co-operation if it is to alter, for public benefit, the high-order effects or externalities of that co-operation. What can we say about the basic features of such a regime? What, if anything, can we say about its progress and prospects in the world?

The rudiments of an answer to the first question follow from the discussion of new regulatory and relational contracting regimes. These suggest that we think of the labor regime on at least two levels. The first, plant or firm based, is directed at problem solving. Shop floor employees are increasingly being included in the teams responsible for continuous process improvement in just-in-time plants, and in the related problem solving teams that aim to get to the root of, and correct problems that cut across departments or products. Similarly, workers at various levels are being drawn into the process of continuous reorganization of plants that go hand in hand with continuous product upgrading and changes from one model generation to another. As issues concerning work organization, pay systems, and working conditions are inevitably intertwined – think of the shift, characteristic of the move to Toyota-style production, from pay systems that incentivize rapid repetition of known tasks to pay systems that incentive active participation in switching from one product set-up to another – problem solving inevitably shades into activities that impinge on working conditions. But this problem solving only becomes the foundation of a new labor regime when firms and workers deliberately decide to apply the problem solving techniques to the issues concern labor: Why are there spells of debilitating overtime? How can the pay system assure a fair distribution of the gains from joint problem solving? How can the "housekeeping" needed to reduce inventories in just-in-time systems make the workplace more accommodating?

[4] See Gary Gereffi, *The New Offshoring of Jobs and Global Development*, ILP Social Policy Lecturers, Jamaica, December 2005.

Still the formation of these first-level problem solving groups or teams is not by itself a labor regime. On the contrary, taken alone it obviously exposes workers to new risks – competition among problem solving groups, expropriation of their best solutions, or simply of a fair share of the productivity gains to which they contribute, and so on. To create a protective labor regime rather than a new threat to well-being, these first-level institutions must be complemented by a second level that pools the information generated locally in several ways. One is comparison of the results of problem solving across plants, firms and industries in order to establish benchmarks for rates of improvement and (periodically revisable) standards of minimally acceptable performance. Information on what comparable firms are – or are not – doing allows workers and their representatives to turn differences in performance into arguments for (more rapid) local improvement.

A second and complimentary form of information pooling would be based on the model of the QSRs. The second-level institution would in effect do selected diagnostic reviews of the plant or firm level institutions doing root-cause analysis of labor problems. The results of these reviews would naturally inform the setting of benchmarks and standards, but its primary purpose would be to help identify and overcome systemic problems in applying the new problem solving techniques to labor issues.

What, then, of the prospects of actually realizing this two-tier structure in the world? The short answer – the only kind the facts allow – is that there is not one robust, fully developed example of a regime of this type, at least as far as I know. But there are surprisingly many institutions, including the ILO, that are moving in the direction of creating one. While you are considering which fact should weigh more, here is a short list of what might prove the beginnings of a new regime:

- As noted above, Nike and other brands have encountered the limits of check-list compliance in their efforts to improve the labor conditions of their suppliers, and they are obligating their suppliers to shift to just-in-time, Toyota-style production methods. If nothing else, the simultaneity of the two developments has prompted many compliance officials in the firms to see the second – root-cause problem solving – as an answer to the first – the limits of rule-based (contractualist) compliance systems. Hence the call, ever more insistent, to "go lean on compliance" in the way described above. It is, however, difficult to know how seriously to take this call, given that the same firms call on their suppliers to go lean, but typically do little to help them get there. For that reason, it is relevant to note that the call to go lean on compliance from within the brands is seconded by calls from the FLA to move in this direction as well.
- The FLA's own experience with compliance checking dovetails with that of the brands. Moreover, the FLA sees the brands shift to lean suppliers. So far the organization has no fully developed response to these twin developments, but it is well positioned to act as a second-tier information pooler

in both senses. On the one hand, it already complies comparative information on performance with regard to labor standards, and on the other it is actively pursuing pilot projects that could produce QSR type review instruments.

- Groups of shop stewards in Denmark and Germany, together with some local or regional officials, have become actively engaged in linking shop-floor problem solving to labor issues in their plants and firms, and creating supra-plant fora (periodic meetings, conferences, etc.) for comparing results. In both cases, the national level of the unions has limited developments, apparently out of fear of creating counterpowers within the organization. But in both cases the regional successes have attracted broader attention.
- With regard to the ILO, I am instructed by those in a position to know, two developments signal a determination seriously to explore framework or recursive rule alternatives to the traditional contractualist labor regime. The first is the Maritime Labor Convention, adopted in 2006. The new convention, like traditional instruments, sets minimum requirements for work and employment conditions of seafarers, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection. Its novel features include rapid amendment procedures, akin to the problem solving mechanisms used to establish detailed provisions to international regimes such as the law of the sea, and a system of certification under which shipowners' make plans for assuring respect for the relevant law of the flag nation shipmasters are responsible for carrying out the plans documenting that they have done so, the flag state reviews the plans and certifies that they are being implemented. The system could easily develop into a version of the two-tier pooling mechanism describe above, or into a flexible form of traditional compliance checking.
- The second ILO example is the Framework for Occupational Safety and Health Convention, also from 2006. This instrument is plainly inspired by the EU framework directives discussed above: national governments, in consultation with key partners (labor, capital) are to formulate plans for improving the ensemble of the occupational health and safety policies, and periodic review of these plans is to lead to improvement in plans and practice. The affinity with the new forms of co-operation could not be more explicit: the objective of the convention, stated in Article 2 is that "each Member which ratifies this Convention shall promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme." But again developments are too fresh, and too open, to even begin assessing the probability that this innovation will work, and become a model for others.

So there we are – a labor regime in crisis, some stirring of a new age, some quietly bold proposals by normally cautious, and always well informed participants about the possibility of using novel forms of organization to safeguard traditional values in a changed epoch. This is hardly the blueprint (or the CAD equivalent) for a new labor regime. But it is of such gossamer stuff that new regimes take shape.

Discussion

*Steven Oates** – I would like to draw attention to a key aspect of the ILO's system which I think has not been discussed during this conference so far, namely tripartism. The social partners are a core element of the ILO system which is present both in the standard setting and in the supervisory side. I wonder how much importance the speakers would actually attribute to tripartism and to voluntary collective bargaining which is, or can be, an important part of both the standard setting and, at the national level, of the implementation of ratified Conventions and other international labour standards. I wonder whether the panellists think that the ILO system of involving non-governmental organizations is in any way a model for non-governmental organization participation in other international standard setting and supervisory bodies and processes. There have been several references to the fact that ILO Conventions and standards are addressed to States. In the ILO, we have a representation of States which is different from other organizations; again, it is tripartite. If employers' and workers' organizations participate in the formulation and adoption of international labour standards and can also participate in the implementation of them in terms of the supervisory processes, do they have a responsibility? This would be addressed particularly perhaps to representatives of enterprises. Don't they also bear some sort of responsibility in terms of implementation?

*Hedva Sarfati*** – I am dealing with issues of labour market reform and welfare reforms, mainly in Europe but also elsewhere. I just wanted to say how grateful I am to the three speakers for having shown the pitfalls and the risks of the changes that we are undergoing now but also for having pointed at possible positive answers to the challenges of globalization and eventually a race to the top. This, in turn, might guide possible future ILO action so that the Organization increases its visibility and becomes an influential actor at the global level.

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*Catherine Brakenhielm Hansell** – The subject of occupational safety and health has been brought up on several occasions and, in this context, I would like to bring to your attention that a new occupational safety and health Convention was adopted in June 2006. The new instrument actually relates in several ways to what has been brought up by the three speakers. It has a total different content from previous instruments. In a nutshell, it introduces a management systems approach to occupational safety and health and proposes to governments to undertake to progressively improve their situation as regards occupational safety and health by adopting national policies, national action plans and so forth. My proposition is that having such instrument as an international labour standard may contribute to this possibility of moving to the top rather than the bottom, although it is true that the specific details in the area of occupational safety and health are mostly laid down at the national level.

*Michael Halton Cheadle*** – Charles Sabel gave the example of the coal mine and the power station, and he suggested a movement from a relational contract into a framework agreement in which there was a co-development and governance committee. Such a framework agreement was not rule-based, but essentially some kind of governance model for regulating the relationship between the power station and the coal mine, each needing each other. But earlier on in his presentation, he contrasted the German co-determination model, which is in a sense a co-determination governance model at the level of the workplace. I do not think it is right to say collective bargaining takes place at the workplace in Germany, but certainly there is the works council and that, as I understood it, is, in a sense, a governance model to regulate relations, for workplaces to be able to adapt to changes. It just seemed to me that both governance models were meant to be directed towards adaptation and I wondered if you could comment.

*Janice Bellace**** – This is directed more towards Brian Langille's point about identifying what is in a nation's self-interest as a way of looking at ILO standard setting or regulation. One of the things that interests me most in tripartism, and particularly in the present time, is when something is not in the interest of the employers – or at least the workers representatives do not see it in their interest – but it might be in the interest of the nation. One example here that strikes me, at least in the most advanced economies, has to do with keeping older workers in the labour force. Most of our standards approaches and the conventional wisdom has been that when workers reach their late fifties basically they are physical wrecks and they would appreciate being put out to pasture for a

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while. But that is something that gets back to Charles Sabel's point. It is an early twentieth century model thinking about the standard, rather than what are we trying to achieve which is having labour force participation ages that match the productive capacity of workers and their educational needs.

I think that you are pointing out that, if we turn around and think about what is in a given country's self-interest in light of its stage of economic development, we would perhaps have some more flexible approaches towards the application of certain standards. This also reminds me of night work where the Committee of Experts had quite a discussion about what we were trying to achieve, if it is non-discrimination between men and women. The question is, whether by prohibiting night work of women, we are protecting women, we are favouring them, or we are disfavouring them. We had a very lively discussion, getting back to the point about what are we trying to achieve in light of the fundamental principles of the Organization.

Simon Deakin – Charles Sabel, as I understand it, is arguing that there is a transformation in forms of production and, more widely, in supply chains, a shift towards a governance model which would involve the emergence of framework contracts as a new paradigm of economic organization. I think that is extremely interesting and that it may well be the case. I can think of similar examples actually within the field of industrial relations where one observes governance-type mechanisms of this sort. If the point Charles Sabel is making is that globalization's competitive pressures really require firms to think up innovative ways of maintaining their competitive position and there is not necessarily a race to the bottom and a return to sweating, then I agree with that and I think that we should not assume that globalization always has negative implications. I would just like to pose a question. I am not sure whether a transformation of that sort necessarily involves abandoning either collective bargaining or the contract of employment or employment relationship as the founding notions of labour law. I would like to keep an open mind about that because I think that the basic concepts we use, and possibly also our model of international labour standard setting, these basic ideas are actually very flexible and may well also be capable of some adaptation.

Brian Langille – Let me pick up the example of the new health and safety standard. Here is a way of putting the point I am trying to make: what is the Committee of Experts going to do under that law? Is it benchmarking, noting progress and learning? Are we going to have the same kind of Committee of Experts 80 years from now if our Conventions are going to look more and more like that? That is the question I am trying to get at. If things are changing, could you get a certain model of what the Committee is for, a certain model of law and a certain set of purposes without rethinking about the institution?

Concerning Ms. Bellace's question about what happens when employers and trade unions have one view and it may not be in the interest of the State. Just to be provocative again, I think it is one of the mysteries why governments in the

ILO with 50 per cent of the votes do not run the show a bit more. Why don't those 50 per cent of the votes speak with more authority than they traditionally have and I think the reason for that is because we have been wedded to this whole race-to-the bottom divided set of interests. There is no coherent story that all States could tell each other about why they are in this scheme, no clear and positive story. But if there is a coherent, positive story that all States can see then there is much more possible unity among the governments, much less potential for divide and conquer by the other members of the tripartite delegations, to put it bluntly. I therefore think that getting this story right has a lot to do with maintaining the kind of political coalitions you need. On the old theory, it is really easy to divide and conquer the governments; on the new theory, it should be much more possible to have sustainable coalitions over a broader range of issues.

Charles Sabel – Let me say a word about tripartism and then come to this question of new forms of cooperation in relation to the older ones. My presentation was also a non-Canadian presentation, but a non-Canadian presentation by a non-Canadian is even worse than a non-Canadian by a Canadian. So, in that same spirit, let me just say that tripartism is bad for you. It is bad for you because you have three weak partners who need each other because this is one of their last places of self-legitimation. So, they are willing to make deals with each other to preserve the status quo to have an excuse for their continuing futility elsewhere and that is a disaster for the ILO because it means that you have a little bit of freedom but you have to keep secret everything you really want to do. This is like all these other things you well know. Things that an outsider can learn in two days in an institution, or things that are, by definition, common knowledge in that institution.

On the question of the relation between the power station example and the co-development example, this raises, of course, a fundamental issue and it goes to a key point that Simon Deakin is making as well. The part that was alighted, and perhaps too compressive is the following: I did not mean to say that in the current setting the power station and coal mine went to this new kind of agreement. If one looks at these agreements, they look pretty much like they always looked. The thing that has changed is that is no longer the canonical agreement. The canonical agreement looks much more like an agreement between a biotech company and a bio-informatics company developing new tools, or between a carmaker and a supplier, or even between Adidas and one of its shoe-producing factories. Those contracts, different as they are, have the features that I mentioned. The question that has been you raised is what is the difference between that and *Mitbestimmung*, and you can trust me, I do know how that actually works. The agonizing problem is that if you look at the two in the abstract on paper twenty years ago, they look equally flexible and the tragedy is that people thought that countries that had institutionalized that kind of cooperation already had a flexible adjustment instrument. It turns out that when you bargain continuously over rules, this is very different from setting a framework agreement, setting benchmarks and meeting periodically to re-adjust the whole system in the

light of that result. You would not know that unless you ran the two experiments and that is the difference between the German production model and the extension of the Japanese production model. They are both, theoretically, flexible and they just turn out to be flexible under different domain conditions and that is the answer and it is an empirical answer.

On Simon Deakin's rhetorical question whether we should ditch all the old things just because there is this difference, I think he is absolutely right. Crazy as I am in insisting on there being a big new thing, I do not think one knows any more the limits of the adaptability of the old things for the same reason you did not know exactly what the results would be of the comparison I made a moment ago. I think one has to keep an open mind on both sides. For the people who have been doing the old thing you need to recognize the emergence of a new thing, for people who believe there is a new thing you must not pretend that there cannot be some profound hybridization and I accept the latter proposition as much as I insist on the former.

Closing remarks – The Future of standards supervision: Reconciling development and adjustment

*Cleopatra Doumbia-Henry**

The true measure of success for the United Nations is not how much we promise but how much we deliver for those who need us most.

UN Secretary-General Ban Ki-moon
Acceptance speech to the UN General Assembly

Because most people must work in order to live, and because many have no choice as to the work they must perform, international labour standards and the protection they confer must clearly be considered as human rights instruments. As Chief Justice Robert Badinter of France has observed, "human rights occupy the summit of the hierarchy of norms and permeate its structure".[1] The preservation of human dignity is the essence of social protection – especially in times of upheaval and change – as was the case when the ILO was created. This is the continuing challenge that the Decent Work programme of the ILO has tackled and is securing.

The ultimate success or failure of this process of protection depends on the quality and the manner in which standards are implemented, and their subsequent supervision at both the national and international levels, points to which we shall return.

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[1] Robert Badinter, "The State and Human Rights" in *Democracy and the Rule of Law, Washington*, CQ Press/Library of Congress, 2001.

Globally, the sad reality is that the situation is deteriorating: changing patterns in the world of work, brought and wrought by globalization, jeopardize development for some and impose adjustment for others. Extreme working poverty at the one US dollar a day level continues to grow.[2]

Much is written today about successful human rights protection as a movement from exclusion to inclusion. For more than 80 years the ILO has functioned on just that basis according to the inclusive principles of tripartism. The ILO embraced this synergy from the outset, and in functional and operational terms it permeates everything we do. In this regard, it is neither prideful nor exaggeration to say that we are the beacon in the lighthouse.

The reality of the protection that the supervisory process confers is wholly dependent upon the quality of the ingredients that feed into it. As previously mentioned, this dynamic functions as a duality: both at the national and international levels, and in the former this begins with good governance. Governance is not government, rather it is a framework of rules, institutions and practices that set limits on the behaviour of individuals, organizations and companies.[3] However, the best explanation of the concept of good governance comes from the UN itself:

> "In practice, good governance involves promoting the rule of law, tolerance of minority and opposition groups, transparent political processes, an independent judiciary, an impartial police force, a military that is strictly subject to civilian control, a free press and vibrant civil society institutions as well as meaningful elections. Above all, good governance means respect for human rights".[4]

Under these conditions, implementation and supervision of international labour standards at the national level should be able to function smoothly, relying on the active participation of vibrant civil society institutions (such as employers' and workers' organizations), and an independent judiciary. At the ILO's Turin Centre, government officials, employers and workers, as well as judges, and legislators, are trained so that ILO standards are transposed into national legislation and effectively enforced.

When these structures are functioning well at the national level, they generate qualitative and statistical information that feeds into the ILO supervisory system, whose comments then help the International Labour Office to adjust and re-direct its technical expertise. Accurately targeting ILO technical assistance, while strengthening the rule of law and good governance, oils the wheels of the supervisory machinery at the national level. In functional terms, it is somewhat like an elevator: bringing the information from the national to the international level, and then returning it – enriched and informed – to make the process work better.

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[2] See *Global Employment Trends – Brief*, Geneva, ILO, 2007, p. 3.

[3] See United Nations Development Programme, *Human Development Report 1999*, p. 35.

[4] See United Nations, *Report of the Secretary-General on the Work of the Organization*, Doc.A/54/1, 1999, para. 53.

The quality of the expertise the ILO supervisory system can provide depends on the quality of the information the system receives. And it is in this partnership at the national and international level that the Office can and must do better, especially as regards information gathering. Report forms must be up to date and ask the right questions, if we are to get meaningful answers.

A key step in the process is, of course, ratification. Through this important act Member States confirm their acceptance of obligations as part of the international community. However, ratification is by no means an end in itself, and we do not measure the success of international labour standards solely in terms of the number of Conventions ratified. But ratification is indeed the threshold: it is both a point of entry and a step in a process – the process of implementing labour standards and securing social protection.

The increase in the number of Conventions ratified is indeed a very positive step. However, the workload for all is increasing and the system is strained. We need to be selective as to the information requested through the report forms to ensure that this is indeed information we can use and feed into technical assistance in order to remedy real problems. Employers' and workers' organizations need to be clear and concise in their comments provided to the supervisory system. Governments need to report fully and on time.

We need to harness the tremendous potential of information technology to bring reporting into the twenty-first century. Eighty years ago the ILO launched a revolutionary idea that sovereign States would send reports on the fulfilment of their obligations under ratified Conventions to an international body for review. Today, we need to innovate as to the form that reporting obligation takes: in particular to use the advances in IT, with the Office helping Members as necessary, so that our supervisory system can continue to function efficiently and produce high quality results.

As we renew our wishes to the Committee of Experts on its 80th birthday, we must keep in mind that those who need us most will judge us not on what we promise, but on what we deliver.

Appendices

Members of the ILO Committee of Experts (1927-2006)

Alphabetical list

- Mr. Benjamin **Aaron** (United States) (1985-1994)
- Mr. Mario **Ackerman** (Argentina) (2005-)
- Sir Grantley **Adams**, Q.C. (Barbados) (1948-1971)
- Sir Adetokunbo **Ademola**, C.G.F.R., K.B.E., C.F.R., P.C. (Nigeria) (1962-1986)
- Mr. Roberto **Ago** (Italy) (1979-1995)
- Ms. Badria **Al-Awadhi** (Kuwait) (1983-1998)
- Mr. Rafael **Alburquerque** (Dominican Republic) (2001-2004)
- Mr. Anwar Ahmad Rashed **Al-Fuzaie** (Kuwait) (1998-)
- Baron Frederik **van Asbeck** (Netherlands) (1947-1964)
- Mr. Rabindra Nath **Banerjee**, C.S.I., C.I.E. (India) (1955-1958)
- Mr. Denys **Barrow**, S.C. (Belize) (2005-)
- Prof. Henri **Batiffol** (France) (1958-1964)
- Mr. Günther **Beitzke** (Federal Republic of Germany) (1955-1982)
- Ms. Janice R. **Bellace** (United States) (1994-)
- Mr. Lélio **Bentes Correa** (Brazil) (2006)
- Mr. Paal **Berg** (Norway) (1945-1958)
- Mr. Prafullachandra Natvarlal **Bhagwati** (India) (1977-2005)
- Ms. Hanna **Bokor-Szegö** (Hungary) (1979-1981)
- Mr. Boutros **Boutros-Ghali** (Egypt) (1970-1979)
- Mr. Choucri **Cardahi** (Lebanon) (1957-1970)
- Mr. Antonio Ferreira **Cesarino** Jr. (Brazil) (1975-1981)
- Mr. César **Charlone** (Uruguay) (1934-1940)
- Mr. Atul **Chatterjee**, G.C.I.E. (India) (1936-1955)
- Mr. Michael Halton **Cheadle** (South Africa) (2004-)

– Dr. Ta **Chen** (China) (1947-1950)
– Mr. Adam **Ciolkosz** (Poland) (1940)
– Mr. Archibald **Cox** (United States) (1967-1971)
– Ms. Laura **Cox**, Q.C. (United Kingdom) (1998-)
– Prof. Henry Willian Carless **Davis**, C.B.E. (British Empire) (1927-1928)
– Sir William **Douglas**, P.C., K.C.M.G. (Barbados) (1975-2001)
– Prof. Rafael Waldemar **Erich** (Finland) (1928-1938)
– Ms. Bela **Erödi-Harrach** (Hungary) (1939-1940)
– Ms. Blanca Ruth **Esponda Espinosa** (Mexico) (1995-)
– Mr. Isaac **Forster** (Senegal) (1958-1964)
– Sir Selwyn **Fremantle**, C.S.I., C.I.E. (India) (1927-1936)
– Mr. Pralhad Balacharya **Gajendragadkar** (India) (1971-1977)
– Mr. Enrique **García Sayán** (Peru) (1953-1977)
– Mr. Jules **Gautier** (France) (1927-1936)
– Mr. Corrado **Gini** (Italy) (1927-1936)
– Mr. Marcel **Grégoire** (Belgium) (1967-1969)
– Mr. Arnold **Gubinski** (Poland) (1960-1992)
– Mr. Paul M. **Herzog** (United States) (1955-1967)
– Mr. Katswichi **Ikawa** (Japan) (1987-1990)
– Mr. Semion A. **Ivanov** (Union of Soviet Socialist Republics, Russian Federation) (1982-1993)
– Bégum Raàna Liaquat Ali **Khan** (Pakistan) (1954-1977)
– Mr. Harold Stewart **Kirkaldy** (United Kingdom) (1946-1976)
– Mr. Abdul G. **Koroma** (Sierra Leone) (2006-)
– Mr. E. **Korovine** (Union of Soviet Socialist Republics) (1962-1964)
– Mr. Ignacy de **Koschembahr-Lyskowski** (Poland) (substitute member 1927) (1928-1933)
– Mr. Shigeru **Kuriyama** (Japan) (1962-1967)
– Ms. Robyn A. **Layton**, Q.C. (Australia) (1993-)
– Ms. Ewa **Letowska** (Poland) (1992-2004)
– Mr. Roman Zinovievich **Livshitz** (Russian Federation) (1993-1997)
– Mr. Helio **Lobo** (Brazil) (1945-1948, 1950-1955)
– Mr. Lazare A. **Lunz** (Union of Soviet Socialist Republics) (1965-1974)
– Mr. Pierre **Lyon-Caen** (France) (2001-)
– Mr. Waclaw **Makowski** (Poland) (1934-1940)
– Mr. Norman Washington **Manley**, K. C. (Jamaica) (1948)
– Mr. Sergey Petrovitch **Mavrin** (Russian Federation) (1998-)
– Mr. Bernd Baron **von Maydell** (Federal Republic of Germany, Germany) (1982-2004)
– Mr. Kéba **Mbaye** (Senegal) (1982-1996)
– Mr. Frank **McCulloch** (United States) (1974-1985)
– Sir Arnold D. **McNair**, C.B.E., LL. D. (British Empire, United Kingdom) (1929-1946)
– Mr. Cassio **Mesquita Barros** (Brazil) (1991-2006)
– Mr. Jean **Morellet** (France) (1965-1974)

– Sir Ramaswami **Mudaliar**, K.C.S.I., D.C.L. (Oxon.), (India) (1959-1971)
– Mr. von **Nostitz** (Germany) (1927-1934)
– Ms. Angelika **Nussberger** (Germany) (2004-)
– Mr. Benjamin Obi **Nwabueze** (Nigeria) (1987-2005)
– Ms. Ruma **Pal** (India) (2006-)
– Prof. Tomaso **Perassi** (Italy) (1936-1937, 1947-1957)
– Mr. Sture **Petrén** (Sweden) (1964-1967)
– Prof. Otakar **Quadrat** (Czechoslovakia) (1927-1939)
– Mr. Afonso **Rodrigues** Queiro (Portugal) (1955-1964)
– Prof. William **Rappard** (Switzerland) (1927-1958)
– Mr. Edilbert **Razafindralambo** (Madagascar) (1964-2004)
– Mr. Miguel **Rodríguez Piñero Y Bravo Ferrer** (Spain) (1995-)
– Mr. José Maria **Ruda** (Argentina) (1977-1994)
– Mr. Paul **Ruegger** (Switzerland) (1958-1979)
– Mr. Isidoro **Ruiz Moreno** (Argentina) (1956-1975)
– Mr. Oscar **Saraiva** (Brazil) (1964-1969)
– Mr. Georges **Scelle** (France) (1937-1958)
– Mr. Akira **Shigemitsu** (Japan) (1982-1987)
– Mr. Friedrich **Sitzler** (Federal Republic of Germany) (1952-1955)
– Mr. Amadou **Sô** (Senegal) (1996-)
– Mr. Max **Sørensen** (Denmark) (1954-1962)
– Ms. G. J. **Stemberg** (Netherlands) (1948-1956)
– Mr. Antti Johannes **Suviranta** (Finland) (1984-1993)
– Mr. Arnaldo Lopes **Sussekind** (Brazil) (1969-1975, 1981-1990)
– Mr. Boon Chiang **Tan** (Singapore) (1978-2003)
– Dr. Shao Hwa **Tan** (China) (1945-1947)
– Mr. Paul **Tschoffen** (Belgium) (1927-1961)
– Mr. Senjin **Tsuruoka** (Japan) (1975-1981)
– Mr. Grigory **Tunkin** (Union of Soviet Socialist Republics) (1974-1982)
– Mr. Fernando **Uribe Restrepo** (Colombia) (1979-1998)
– Mr. Joseph J.M. **van der Ven** (Netherlands) (1969-1984)
– Mr. Jean-Maurice **Verdier** (France) (1974-2001)
– Mr. Jože **Vilfan** (Yugoslavia) (1964-1985)
– Mr. Budislav **Vukas** (Yugoslavia, Croatia) (1985-2006)
– Mr. Earl **Warren** (United States) (1971-1974)
– Sir John Crossley **Wood** (United Kingdom) (1977-1998)
– Honourable Charles E. **Wyzanski** Jr. (United States) (1945-1955)
– Mr. Toshio **Yamaguchi** (Japan) (1991-2003)
– Mr. Ilia **Yanouloff** (Bulgaria) (1937-1940)
– Mr. Kisaburo **Yokota** (Japan) (1967-1975)
– Mr. Yozo **Yokota** (Japan) (2003-)
– Mr. Shunzo **Yoshisaka** (Japan) (1937-1938)

Chairpersons of the Committee

- Mr. Jules **Gautier** (France): 1933-1936
- Mr. Paul **Tschoffen** (Belgium): 1927-1932; 1937-1938; 1940; 1945-1961
- Mr. Georges **Scelle** (France): 1939
- Mr. Ramaswami **Mudaliar**, K.C.S.I., D.C.L. (Oxon.), (India): 1962-1969
- Mr. Enrique **García Sayán** (Peru): 1970-1975
- Sir Adetokunbo **Ademola**, C.G.F.R., K.B.E., C.F.R., P.C. (Nigeria): 1976-1986
- Mr. José Maria **Ruda** (Argentina): 1988-1994
- Sir William **Douglas**, P.C., K.C.M.G. (Barbados): 1987; 1995-2001
- Ms. Robyn A. **Layton** (Australia): 2002-2006

Reporters of the Committee

- Mr. Jules **Gautier** (France): 1927-1932
- Sir Arnold D. **McNair** (United Kingdom): 1933-1939; 1945
- Mr. Georges **Scelle** (France): 1940
- Mr. Harold Stewart **Kirkaldy** (United Kingdom): 1946-1962; 1973
- Prof. Henri **Batiffol** (France): 1963-1964
- Mr. Enrique **García Sayán** (Peru): 1965-1969
- Mr. Edilbert **Razafindralambo** (Madagascar): 1970-1972; 1974-1994; 1995-2002
- Mr. Toshio **Yamaguchi** (Japan): 1995
- Mr. Anwar Ahmad Rashed **Al-Fuzaie** (Kuwait): 2003-2006

Note

(i) The dates in parentheses are the dates of admission, death or resignation of Committee members indicating the overall duration of their term.

(ii) No CEACR sessions from 1941 to 1944.

(iii) The Committee's report of 1940 was neither published nor examined by either the International Labour Conference or the Governing Body.

Statistics concerning the work of the ILO Committee of Experts (1960-2006)

Year	Member States	Conventions	Ratifications	Experts		Comments			Days by session
				Posts	Present	OBS	DR	Total	
1960	96	115	1957	17	17	209	392	601	12
1965	115	124	3098	18	18	436	829	1265	13
1970	121	134	3567	19	15	502	836	1338	14
1975	125	143	4053	18	18	506	825	1331	13
1980	141	153	4766	19	19	466	767	1233	14
1985	151	161	5167	20	20	451	1000	1451	14
1986	151	162	5248	20	20	505	921	1426	14
1987	151	166	5284	20	20	512	925	1462	15
1988	151	168	5371	20	19	461	1045	1505	14
1989	151	169	5428	20	20	504	876	1380	14
1990	148	171	5508	20	20	554	1164	1718	14
1991	152	172	5562	20	19	619	970	1489	14
1992	162	173	5719	20	20	547	1221	1768	14
1993	169	174	6050	20	18	535	1099	1634	14
1994	171	175	6160	20	20	564	1100	1664	16
1995	173	176	6253	20	18	592	1051	1643	16
1995bis	173	176	6293	20	19	541	892	1433	16
1996	174	180	6319	20	18	527	887	1414	16
1997	174	181	6400	20	18	568	1001	1569	16

Year	Member States	Conventions	Ratifications	Experts		Comments			Days by session
				Posts	Present	OBS	DR	Total	
1998	174	181	6491	20	18	694	1274	1968	16
1999	174	182	6611	20	19	602	1223	1825	16
2000	175	183	6851	20	18	642	1186	1828	16
2001	175	184	7005	20	18	723	1394	2117	16
2002	175	184	7088	20	19	696	1214	1910	14
2003	177	185	7177	17	16	643	1406	2049	14
2004	177	185	7253	16	16	774	1419	2193	14
2005	178	185	7356	18	15	753	1804	2557	17
2006	179	187	7432	18	18	853	1550	2403	14
2007	180	–	7438*	–	–	–	–	–	–

* As at 23 February 2007.

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