CHAPTER 3

Business, the International Rule of Law and Human Rights

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I. INTRODUCTION

> [We do not like the fact that] the Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse.
>
> Nike CEO Philip Knight[1]

The perception of most of civil society, of many governments and of some of the employees of corporations is that corporations do not care about human rights or the rule of law.[2] Yet, as the statement above shows, it is in the interests of business to uphold human rights and to work within the law. It is also in their interests, as will be discussed, for there to be an international rule of law to enable them to operate effectively around the world.

There is a great deal of support for the rule of law. As will be shown, it is propounded in national and international documents, asserted in speeches and acknowledged in writings and case law. Yet, in the absence of a clear definition, a national rule of law is derided as 'ruling class chatter',[3] or dismissed as the 'jurisprudential equivalent of motherhood and apple pie'.[4] These criticisms become even stronger when the possibility of an

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[1] Quoted in B Herbert, 'Nike Blinks' *New York Times* (New York New York May 21, 1998).

[2] See, for example, the caption to cartoon by K Bendib for A Landman, 'Absolving Your Sins and CYA: Corporations Embrace Voluntary Codes of Conduct' August 18, 2008 on www.corporatewatch.org (and see http://www.prwatch.org/node/7724): 'Nothing like a good corporate code of conduct, as long as it remains voluntary and one remains free to do with it as one wishes'.

[3] J Shklar, 'Political Theory and the Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987) 1.

[4] T Bingham 'The Rule of Law' (2007) 66 Cambridge Law Journal 67, 69.

international rule of law is raised. These issues are addressed by this paper and are applied to business in terms of their responsibilities in relation to human rights.

II. THE RULE OF LAW

The modern conception of the rule of law in the common law tradition centres on the work of Dicey, who identified three aspects of it: the absolute supremacy of the law over government power; equality before the law; and enforcement before the courts.[5] The civil law tradition has generally focused less on the judicial process and more on the nature of the state, in the form of *Rechtsstaat*, or the law-based state.[6] More recently Lord Bingham has encapsulated the core of the idea of the rule of law as being 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.'[7]

The rule of law is most succinctly set out by Bingham in terms of eight sub-rules or principles:

(1) The law must be accessible and, so far as possible, be intelligible, clear and predictable;
(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
(3) The law should apply equally to all, except to the extent that objective differences justify differentiation;
(4) The law must afford adequate protection of human rights;
(5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
(6) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred, and without exceeding the limits of such powers;
(7) Judicial and other adjudicative procedures must be fair and independent; and

[5] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), (Macmillan, London, 1902) (2005 facsimile) Part II.

[6] See, for example, H Kelsen, *Pure Theory of Law* (2nd edn, University of California Press, Berkeley, 1970). See also the summary in S Chesterman, 'An International Rule of Law' (2008) 56 American Journal of Comparative Law 331.

[7] Bingham (n 4) 69.

(8) There must be compliance by the state with its international law obligations.[8]

These principles are necessary to ensure that there is legal order and stability in the state, equality of application of the law, protection of human rights and settlement of disputes before an independent legal body. These principles separate the rule of law from the rule by power and from the rule by law (as having law by itself does not mean that it meets the requirements of a *rule of law*).

Bingham includes in his definition a requirement that the law afford adequate protection to human rights.[9] Other definitions have tended to emphasize the rule of law as involving procedural, rather than substantive, protections, with a strong focus on judicial independence.[10] Bingham's approach is adopted here, not least because the rule of law must include justice in a substantive sense as part of its elements, and that part of modern justice requires respect for human rights, including, for example, the right to a fair trial, freedom from discrimination, rights to participation in public life, and cultural rights.

Additionally, many attempts to define the rule of law do so, if only implicitly, by considering the rule of law as an 'all-or-nothing' concept. For example, Bingham sees the rule of law as encapsulating the idea that the law either binds a government and its subjects or it does not; Dicey wrote of an 'absolute supremacy' of law over government power; and Crawford refers to the 'subjection of government to general laws, regardless of their character'.[11] However, the reality is that the existence of the rule of law is a matter of degree, with all legal systems being on a spectrum with no rule at all at one end and a complete actualization of the rule of law at the other. For example, the 'Rule of Law Index', pioneered by the World Justice Project, has sought to measure the *relative* compliance of legal systems throughout the world with the ideals of the rule of law.[12] Therefore it is not

[8] ibid 69–84. See also R McCorquodale, 'The Rule of Law Internationally' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (OUP, Oxford, 2009) 137.

[9] Bingham (n 4) 75. See, in support of this view, Bingham's successor as (now) President of the UK Supreme Court, Lord Phillips: 'The Rule of Law in a Global Context', speech at the Qatar Law Forum, May 2009.

[10] Chesterman (n 6) 340, although arguably the procedural version also contains inherent assumptions about substance, see H Charlesworth, 'Comment' (2003) 24 Adelaide Law Review 13, 14.

[11] J Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3 at 4.

[12] World Justice Project, 'Rule of Law Index', available at http://www.worldjusticeproject.org/sites/default/files/Index%202%200%20-%20Feb-6-2009.pdf; Mary Robinson, 'Why the Rule of Law Matters', Keynote Address to the World Justice Forum, 3 July 2008.

possible to conclude if states *have* or *do not have* the rule of law.[13] To adopt an approach that only focuses on a complete actualization of the rule of law would be of no practical relevance and would be of limited conceptual value, especially in an international legal system where philosophical ideas are strengthened if developed by reference to the reality of international actions.[14]

Rather, the issue is the extent to which rule of law principles are operative within a particular system. While the objective must be towards complete actualization of the rule of law, the lack of this does not mean that there can be no rule of law at all. In the same way, a lack of compliance by all states with their national legal obligations in regard to criminal law enforcement by an independent judiciary does not mean that enforcement does not exist. Instead, the state is seen as being far from complying with the rule of law. Thus this paper will consider whether there can be an international rule of law for which relative compliance can be determined.

III. THE RULE OF LAW IN THE INTERNATIONAL SYSTEM

A. Upholding National Rule of Law

There are many international documents and statements that address the rule of law. For example, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations 1970 (which is often seen as clarifying the terms of the United Nations (UN) Charter) referred to the 'paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations'.[15] Further, in matters of collective security, many UN peacekeeping operations have included the restoration or establishment of the rule of law as part of their aims, in the context of the overall purpose of enhancing peace and security.[16]

[13] cf I Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, The Hague, 1998) 14.

[14] This is the approach of many third world, critical race theory, feminist and newstream international legal theorists. See, for example, J Gathii, 'The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' 41 *Harvard International Law Journal* 263 (2000), Panel on 'International Dimensions of Critical Race Theory' 91 *American Society of International Law Proceedings* 408 (1997), H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000) and M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Cooperative, 1989). Note also H Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 Law Quarterly Review 438 and (1948) 64 Law Quarterly Review 97.

[15] UN GAOR Res 2625 (XXV) (1970).

[16] See, eg, Security Council Resolution 152 (2004) (concerning Haiti) and Security Council resolution 1756 (2007) (concerning the Democratic Republic of Congo).

In economic and development matters the rule of law has also featured, with the World Bank considering that the practical application of the rule of law means that people in a society 'have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence'.[17] This view was echoed in the World Summit Outcome Document 2005, which declared that 'good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger'.[18] Indeed, the (then) UN Secretary-General, Kofi Annan stated that:

> [The rule of law is] a concept at the very heart of the [UN] Organization's mission. It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[19]

These statements are strong and powerful. They reassert the need for a rule of law. Indeed, Annan's statement largely repeats the rule of law principles seen above, especially in terms of transparency, accountability, good governance and justice.

However, these statements are essentially about the rule of law in *national* systems. They demonstrate agreement at the international level by all states that the rule of law should operate in national systems.[20] They are intended to clarify why states should actualize the rule of law in their jurisdictions, as there are consequences for the state if the rule of law is not complied with. For example, issues of good governance, which are part of the rule of law, may affect the extent to which the state has access to international financial support.

Accordingly, few of these international statements assist in terms of understanding if there is an *international* rule of law. Indeed, existing definitions of

[17] World Bank, *A Decade of Measuring the Quality of Governance* (2006) 3.

[18] UN Doc A/Res/60/1.

[19] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004), para 6.

[20] See also the Statute of the Council of Europe 1949 where, in Article 3, each member state commits itself to accepting the rule of law.

the rule of law tend to be definitions created and refined within the national system. There is considerable difficulty in applying them directly to the international system, where there is no one binding court, no one executive or legislature, and where there is the sovereignty of states with which to contend.[21]

B. Upholding the International Rule of Law

This does not mean that a rule of international law cannot be discerned. In fact, the UN Millennium Declaration 2000 urged states to:

> [S]trengthen respect for the rule of law *in international and in national* affairs and in particular to ensure compliance by member states with the decisions of the International Court of Justice, in accordance with the Charter of the United Nations, in cases to which they are parties.[22]

This demonstrates that there is an understanding of the existence of a national rule of law and an international rule of law. Nonetheless, relative compliance with the rule of law remains problematic at both the national and the international levels. Whilst the rule of law at an international level is very much, as Kofi Annan has stated, an 'unfinished project'—with the sovereignty of states seen as a particular obstacle[23]—it is evident that the international rule of law has been identified as a goal for the international system.[24]

It is argued here that the core elements of an international rule of law would still be essentially the same as for a national rule of law, being legal order and stability, equality of application of the law, protection of human rights and settlement of disputes before an independent legal body. Sir Arthur Watts, a former United Kingdom (UK) government legal adviser, expressed it this way:

> The protection of the interests of all states and the creation of international stability requires that state-to-state relations be subject to a long-term framework [of an international rule of law], which ensures that

[21] See H Correll, 'A Challenge to the United Nations and the World: Developing the Rule of Law' (2004) 18 Temple International and Comparative Law Journal 399 and R Higgins, 'The Rule of law: Some Sceptical Thoughts' in R Higgins, *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (OUP, Oxford, 2009).

[22] UN Doc A/Res/55/2 (my emphasis).

[23] Note that P Allott, *Eunomia: New Order for a New World* (OUP, Oxford, 1990) s 16.49, comments that governments are 'generating an international Rule of Law, whilst still conceiving of themselves as masters of the Rule of Power'.

[24] 'We the Peoples: The Role of the United Nations in the Twenty-First Century' (UN Doc A/54/2000) at para 84.

> international law is applied in conformity with principles of justice … [and enables states to have a] stable, safe and predictable world in which they can better pursue their political and economic goals.[25]

This view corroborates some of the terminology about the rule of law at the international level, as seen above, which has tended to consider the rule of law at the international level in terms of order and stability, transparency, good governance, justice and accountability.

Evidence of acceptance of an international rule of law is seen in the doctrine of *pacta sunt servanda*. This is a rule of customary international law binding on all states (and part of *jus cogens* ie a binding constitutional rule of international law), which means that states must comply in good faith with legal obligations to which they have consented. In particular, if they consent to be bound by a treaty then they are legally bound to the terms of the treaty and, more generally, to the broader aims of the treaty, to which they must comply in good faith.[26] The benefit of this rule is for all states, so that each of them have confidence in reaching binding legal agreements to secure their own interest and to assist in attaining international peace and security.

This aspect of the international rule of law can be seen with the immediate decision by the new President of the United States of America (US) in 2009 to close the detention facilities at Guantanamo Bay and restore adherence to the Geneva Conventions 1949.[27] The aim was to show, as President Obama said, '[that] America will again set an example for the world that the law is not subject to the whims of stubborn rulers and that justice is not arbitrary.'[28] Indeed, the negative consequences for the lack of compliance with the international rule of law was shown when the US acted as it did at Guantanamo Bay, as other states sought to justify their lack of compliance with the rule of law by reference to the actions by the US.[29]

[25] A Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, 25, 41.

[26] B Simmons and D Hopkins, 'The Constraining Power of International Treaties: Theory and Methods' (2005) 99 American Political Science Review 623.

[27] M Mazzetti and W Glaberson, 'Obama Issues Directive to Shut Down Guantanamo' *New York Times* (New York New York 21 January 2009). See also the US Supreme Court's decision affirming the Geneva Conventions: *Hamdan v Rumsfeld* 548 US 557 (2006). The US has not yet acted fully on this intention but it is nevertheless a clear intention by the US government to comply with the international rule of law.

[28] American Society of International Law, 'Barack Obama Survey', Response to question 11, available at http://www.asil.org/obamasurvey.cfm.

[29] For example, the President of Zimbabwe, Robert Mugabe, used the US's actions at Guantanamo Bay as a shield to defend the many human rights abuses in Zimbabwe: T Otty, 'Honour bound to defend Freedom? The Guantanamo Bay Litigation and the Fight for Fundamental Values in the War on Terror' (2008) 4 European Human Rights Law Review 433, 450.

It may be difficult to recognize the principle of accountability in the international rule of law, at least in terms of the settlement of international disputes before an independent judicial or arbitral body. As noted, the International Court of Justice (ICJ) has a limited remit (eg primarily state-to-state disputes) and does not have compulsory jurisdiction, as states must specifically agree to allow it to decide on a dispute. Nevertheless, even in this voluntary context, 66 states (out of 192 members of the UN) have made declarations accepting the compulsory jurisdiction of the Court (under article 36(2) of its Statute).[30] Furthermore, almost all states that have had disputes before the ICJ have complied to a large extent with its decisions.[31]

Yet it is important not to focus solely on the ICJ when considering the settlement of international disputes. There are now a large number of international courts and tribunals that are deciding cases across a very wide area of international law. For example, the United Nations Convention on the Law of the Sea (UNCLOS), which has been ratified by over 150 states, specifically requires that disputes arising under it be settled by one of the methods set out in Part XV, which includes the International Tribunal for the Law of the Sea, the ICJ or an arbitral tribunal.[32] Also the dispute settlement systems in international economic, trade and human rights law are extensive at both the international and regional level, as will be referred to below.

The most advanced example of the operation of an international rule of law is the European Union (EU). In 1963 the European Court of Justice (ECJ) held that

> The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights.[33]

This is an 'international order writ-small'.[34] Indeed, Jacobs has noted that the EU created a 'new order of international law', where states have stabil-

[30] 'Declarations Recognizing the Jurisdiction of the Court as Compulsory', International Court of Justice Website, available at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

[31] C Schulte, *Compliance with decisions of the International Court of Justice* (OUP, New York, 2004) 271. Although the record for compliance by states with the ICJ's judgments on provisional measures is much worse.

[32] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982.

[33] Case 26/62 *Van Gend en Loos v Nederlanse Administratie der Belastingen* (1963-02-05) (in the context of the formulation of the doctrine of direct effect).

[34] A van Staden, *Between the Rule of Power and the Power of Rule: In Search of an Effective World Order (*Martinus Nijhoff Publishers, Leiden, 2007) 212.

ity, economic benefits and judicial review.[35] They have also accepted the power of the ECJ to determine legal issues that bind the states, so that the 'veil of protection that the notion of sovereignty might otherwise provide' is lifted.[36] There are also many national law mechanisms that enable enforcement of international law.[37]

It is evident that there is now an extensive range of international dispute settlement mechanisms that can operate in a manner that is consistent with an international rule of law. This does not cover all areas of international law but nor is it restricted to small 'enclaves' of the rule of law.[38] These mechanisms are undoubtedly a patchwork but a patchwork that deals with many of the areas of greatest current activity in the international system.[39]

Therefore, there is sufficient evidence that there are principles upon which an international rule of law have been founded and developed. While the actualization of the international rule of law is still far from being completed, it is evident that:

> [I]f the daunting challenges now facing the world are to be overcome, it must be through the medium of rules internationally agreed, internationally implemented, and if necessary, internationally enforced.[40]

This is a strong argument for an international rule of law, not just for governments but also for all those who participate in the international system. In particular, an international rule of law could be of relevance to transnational corporations and other business entities.

C. Business and the International Rule of Law

There has been an understanding of the link between the rule of law and business for centuries, with Adam Smith noting:

[35] F Jacobs, 'The State of International Economic Law: Re-thinking Sovereignty in Europe' (2008) 11 Journal of International Economic Law 5.

[36] ibid 7. Note the concerns about the EU's rule of law in T Cowen, 'Justice Delayed is Justice Denied: The Rule of Law, Economic Development and the Future of the European Community Courts' (2008) 4 European Competition Journal 1, and reprinted in this publication (Chapter 4).

[37] For example, the cases under the Alien Torts Claims Act in the United States: see S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004).

[38] cf J Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3, 12.

[39] JG Merrills, 'The Globalisation of International Justice' in D Lewis (ed) *Global Governance and the Quest for Justice* (Hart Publishing, Oxford, 2006) 89. See also B Zangl, 'Is there an Emerging International Rule of Law' (2005) 13 European Review 73.

[40] T Bingham, 'The Rule of Law in the International Order' Grotius Lecture of the British Institute of International and Comparative Law, 18 November 2008, reprinted in this volume (Chapter 1).

> Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.[41]

While Smith was concerned primarily with the national rule of law, he used international examples extensively throughout his book and his insights are just as relevant in an international context today. The key factors that Smith recognized as being essential for the rule of law, and thus allowing for business to flourish, such as security, stability, good governance, justice and enforcement/accountability, are essentially the same factors that underpin support by states for an international rule of law, as shown above. Indeed, it is recognized this century, that the rule of law is essential for business in terms of 'securing investment, defining property rights, forming contracts, and preventing default on debts, and otherwise to aid in reducing the avoidable risks of investment',[42] which largely repeats the same factors noted by Smith in 1776.

The demands by business today that these factors be present in the international system in order for them to invest internationally is seen most clearly in the considerable developments in the international economic area. For example, the enormous growth in bilateral investment treaties (BITs) between states in recent years is primarily due to the demand by business to have more security of their investments, particularly when investing in less industrialized states.[43] These BITs create strong protections for its corporate national investors, as the host state wants to attract that investment, ostensibly to improve its economic development[44] and BITs 'maintain a stable framework for investment and maximum effective use of economic resources'.[45] These treaties are the umbrella under which international busi-

[41] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London, 1776) Book 5, ch III (his spelling).

[42] A Gerson, 'Peace Building: The Private Sector's Role (2001) 95 AJIL 101, 111.

[43] There are currently over 2, 400 BITs in existence: See UNCTAD, *Investor-State Disputes Arising From Investment Treaties: A Review* (United Nations, New York and Geneva, 2005), 3.

[44] See M Sornarajah, *The International Law on Foreign Investment* (CUP, Cambridge, 1995) 195.

[45] See Preamble, Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, entered into force 20 October 1994. See also E Neumayer and L Spess, 'Do Bilateral Investment Treaties increase Foreign Direct Investment to Developing Countries? (2005) 33 World Development 1567 and M Busse, J Koniger and P Nunnenkamp, 'FDI Promotion

ness enters into contracts with a state to provide investment for a variety of projects, from state infrastructures to private endeavours. While there are distinct state-to-state treaty obligations, the resulting contracts have traditionally included two key provisions relevant to the rule of law: stabilization clauses and international arbitration requirements. Stabilization clauses are designed to ensure that the host state's government does not change its laws or procedures in such a way as to affect adversely the investment by the business. The purpose of such clauses is to protect business operations by requiring the host state to maintain its regulatory framework as it existed at the time the investment was made.[46] These contracts also give the business a right to take the host state to binding international arbitration to seek compensation should there be a dispute.[47]

These international arbitrations have increased rapidly, with many avenues available for disputes to be settled, including the International Centre for the Settlement of Investment Disputes and an ad hoc arbitration tribunal established under the UNCITRAL rules or through the International Chamber of Commerce. Any resulting award is usually enforceable under the New York Convention.[48] It is of note that these are contractual disputes between a state and a non-state actor (under a broad-based treaty) that are being settled by an international tribunal, with the decisions being binding on both parties. While the dispute settlement procedures in this particular area are still ad hoc, inconsistent, not necessarily free from bias, and not part of an institutional structure sufficient to create a norm of international law,[49] they demonstrate a number of the key factors for an international rule of law, including security, stability and accountability before an independent body.

In a related area of international trade law, there is now a clear institutional structure that supports the rule of law principle of independent legal dispute settlement. The Dispute Settlement Body within the World Trade Organisation (WTO) consists of a binding decision-making body, an appellate body, monitoring of compliance and a system of trade sanctions for non-compliance.[50] Rulings are automatically adopted by the membership

through Bilateral Investment Treaties: More Than a Bit?' Kiel Institute for the World Economy, Working Paper No 1403, February 2008.

[46] G Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 ICLQ 371.

[47] P Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP, Oxford, 2007).

[48] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, entered into force 7 June 1959 (144 state parties).

[49] C McLachlan, 'Investment Treaties and General International Law (2008) 57 ICLQ 361.

[50] Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Agreement Establishing the World Trade Organization, done at Marrakesh 15 April 1994, especially arts 6, 12, 16.4, 17 and 22.

of the WTO unless there is a consensus against doing so.[51] These dispute settlement arrangements cover a broad scope, including international trade in goods, services, finance and intellectual property. In addition, the dispute settlement procedures under the Energy Charter[52] are expressly part of the aim of the Charter, being:

> [T]o strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy related investments and trade.[53]

These international rule of law principles directly and indirectly protect businesses and enable them to participate effectively within the international system.

There are also broader economic arguments about an international rule of law. There is economic research showing that entrenchment of the rule of law will have beneficial economic results, and is critical to developing the trust and certainty needed for entrepreneurship activity.[54] This also shows that a functioning judiciary applying credible rules in the absence of corruption enhances the investment environment.[55] Indeed, the World Bank now

[51] G Evans, 'Issues of Legitimacy and the Resolution of Intellectual Property Disputes in the Supercourt of the World Trade Organisation' (1998) 4 International Trade Law and Regulation 81. Although these disputes are state-to-state only, business is also usually closely involved. Examples of the driving role of business in directing litigation under the WTO include Kodak and Fuji representatives being on the US and Japanese delegations on a case affecting them, and the large banana corporations convincing the US and the EU to litigate about the trade in bananas from the Caribbean, despite the very few bananas produced in the US and the EU: see C Tietje and K Nowrot. 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law' (2004) 5 European Business Organization LR 321, and C Brown and B Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Case: Engaging the Private Sector' (2005) 8 J Int'l Econ L 861.

[52] Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, signed in December 1994 (entered into force April 1998).

[53] Energy Charter Secretariat, 'An Introduction to the Energy Charter Treaty', *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, September 2004, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211.

[54] J Higbee and F Schmid, 'Rule of Law and Economic Growth' *International Economic Trends*, August 2004, available at http://research.stlouisfed.org/publications/iet/20040801/cover.pdf. It has also been suggested the 'rule of relationships' is a possible substitute: R Peerenboom, 'Social Networks, Rule of Law and Economic Growth in China: The Elusive Pursuit of the Right Combination of Private and Public Ordering', (2002) 31 Global Economic Review.

[55] R Lensink and G Kruper, 'Recent Advances in Economic Growth: A Policy Perspective' in M Oosterbann and others (eds), *The Determinants of Economic Growth* (Kluwer, Massachusetts, 2000) at 254 and K Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, Washington DC, 2006).

regularly produces indicators that show correlations between real Gross Domestic Product (GDP) per capita and the rule of law, such that GDP per capita increases as the rule of law becomes more firmly entrenched in a state.[56] Indeed, *The Economist* has described the rule of law as the 'motherhood and apple pie of development economics'.[57]

Thus there is clear evidence that an international rule of law is necessary for both states and business, that it is accepted and being applied, and that there are incentives for it to be asserted by both these participants in the international system. Indeed, the incentives for business to press for an international rule of law and for the rule of law to be part of its decision-making processes may be even greater as foreign direct investment by businesses in developing states is now more than six times greater than investment by other states.[58]

D. Business and Human Rights

While there are strong economic and institutional rationales for an international rule of law, as demonstrated above, there are also human rights elements to the rule of law that need to be taken into account. As noted above, human rights protections are within the principles of a rule of law. These apply equally in the international system, especially as every state has ratified (ie accepted that they have an international legal obligation) at least one of the major global human rights treaties.[59] Although no state complies fully with its international human rights legal obligations, and many states have reservations to aspects of some human rights treaties, all states have acknowledged that 'the promotion and protection of all human rights is a legitimate concern of the international community'[60] and all states have

[56] World Bank Governance Indicators are available at http://info.worldbank.org/governance/wgi/. See also the World Bank policy research papers: D Kaufman and A Kraay, 'Governance Matters: The "Development Dividend"' (2004) and D Kaufmann, A Kraay and M Mastruzzi, 'Governance Matters VI: Governance Indicators for 1996–2006'. For application in the context of Central and South America see Americas Society and Council of the Americas Working Group, Rule of Law, Economic Growth and Prosperity, July 2007.

[57] 'Economics and the Rule of Law' *The Economist* (London England 13 March 2008). See also T Cowen, (n 36) 6: 'good governance provides a framework for economic growth and prosperity; individuals feel safer and countries get richer the better the quality of the governance'.

[58] See the statistics quoted in D Kinley, *Civilising Globalisation* (CUP, Cambridge, 2009) 99–100.

[59] The major global human rights treaties include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Prohibition on Torture and other Cruel, Inhuman and Degrading Treatment and Punishment, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

[60] Vienna Declaration and Programme of Action 1993 32 International Legal Materials (1993) 1661, para 4.

accepted that the Universal Declaration of Human Rights 1948 is a legitimate universal standard by which to measure every state's performance of human rights under the Universal Periodic Review process of the UN Human Rights Council.[61]

In addition, under the current international human rights law structure, businesses (being non-state actors) do not have any international legal obligations; only states have these legal obligations. This means that states have international responsibilities with regard to any human rights abuses by businesses operating within their territory and, in some instances, in relation to businesses operating extra-territorially.[62] For example, the investigations after the discovery of prisoner abuse during the (illegal) occupation of Iraq have shown that some of these abuses were committed by employees of private contractors, which were businesses acting extraterritorially through governmental authority, and for which the state should be internationally responsible.[63]

Nevertheless, it is clear that businesses have some responsibilities with regard to human rights, as Mary Robinson has shown. For example, there has been very widespread support from the business community for the framework created by John Ruggie, the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (the Ruggie framework), in which business has a clear responsibility to respect human rights.[64] While there are a number of concerns about this framework,[65] this widespread support by the business community is consistent with the broad practice by almost all businesses operating across state boundaries to have some type of corporate social responsibility (CSR) policy, usually dealing with social, environmental and ethical issues. Indeed, many of these corporations see their CSR policies and their voluntary codes of conduct as being the equivalent to a human rights policy and/or as making them compliant with human rights norms.[66] Having a CSR policy is not the same as providing protection for all human rights, as a number of businesses with CSR poli-

[61] Human Rights Council Resolution 5/1, 18 June 2007, Annex, para 1(b).

[62] For a fuller discussion see R McCorquodale and P Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598.

[63] See OR Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 Connecticut Journal of International Law 249.

[64] Report to the UN Human Rights Council of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 7 April 2008. UN Doc A/HRC/8/5 ('Ruggie Report 2008').

[65] See R McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 Journal of Business Ethics 385.

[66] See, for example, the survey evidence of corporations in relation to human rights in A McBeth and S Joseph, 'Same Words, Different Language: Corporate Perceptions of Human Rights Responsibilities' (2005) 11 Australian Journal of Human Rights 95.

cies have been found to be acting contrary to human rights in a variety of cases worldwide.[67] Perhaps this is not surprising as essentially CSR policies[68] are management-driven and corporate-determined policies that focus on a few human rights only and are designed to assist the corporation's business, including in terms of its reputation, even if genuinely aimed for a positive social end. In contrast, human rights protections are person-centred, based on human dignity, are not voluntary, and have legitimate compliance mechanisms (even if these are not strong). Also, as the Ruggie Report 2008 makes clear, all human rights are relevant to corporations, including economic, social, cultural and collective rights, such as the right to education and labour rights, as well as civil and political rights. CSR policies could thus be considered to be part of the rule of economics and human rights as part of the rule of law.

With human rights as part of the international rule of law, businesses will continue to be affected by it. Three examples demonstrate this: the requirement to protect the right to health within the protection of the intellectual property of businesses; the impact of BITs based stabilization clauses on human rights; and the effect on businesses of counter-terrorism actions by states.[69]

1. Intellectual property and the right to health

In 1994 the WTO accepted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This protects aspects of the intellectual property, including patents, of businesses worldwide, with the aim of having international legal rules to encourage businesses to develop new ideas. This includes patents in regard to medicines. However such patents can raise the costs of some medicines, with particular impacts on non-industrialized states.[70] This could have an impact on states' legal obligations under article 12 of the International Covenant on Economic, Cultural and Social Rights (ICESCR), which requires all state parties to take steps to achieve the full realization of every person's right to the highest attainable standard of physical and mental health.

[67] See the discussion in S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, Oxford, 2004).

[68] A useful definition of CSR policies is by H Ward, 'Corporate Social Responsibility in Law and Policy' in N Boeger, R Murray and C Villiers (eds), *Perspectives on Corporate Social Responsibility* (2008) 10: '[T]wo broad types of definitions of CSR: first, those that focus on outcomes—including outcomes in terms of "business impacts", "commercial success" and wider societal goals; and, second, those that stress the voluntary nature of CSR ("voluntary" in that CSR relates to business activity that is not mandated by legislation)'.

[69] My thanks to Oliver R Jones for the research on these examples.

[70] See J Greve, 'Healthcare in Developing Countries and the Role of Business: A Global Governance Framework to Enhance Accountability of Pharmaceutical Companies' (2009) 8 Corporate Governance 490.

A clear example of this problem arose in 1997 over the passage of the *Medicines and Related Substance Control Amendment Act* in South Africa. This legislation would have allowed the government to import or manufacture low-cost versions of branded anti-HIV medication that was protected by patents.[71] A lawsuit was brought in 2001 by 39 pharmaceutical companies to challenge the legislation based on the TRIPS protections, though it was eventually settled.[72] While it was evident that this action by the major pharmaceutical companies damaged their reputation, the extent to which the South African law would be able to overcome the TRIPS restrictions was unclear.[73]

Eventually, the WTO passed the Doha Declaration in 2001 to try to resolve this type of issue.[74] The Declaration reaffirmed both article 31(f) of TRIPS, which states that each Member state has the right to grant compulsory licenses in cases of national emergency (limited to use in the domestic market only) and that public health crises, including those relating to HIV/AIDS, could represent a national emergency. The Declaration also required the WTO TRIPS Council to take steps to resolve problems faced by developing states who could not take advantage of compulsory licensing provisions because they lacked the domestic capacity to manufacture generic drugs. On this basis the Council issued a temporary waiver of article 31(f) on 30 August 2003 that allowed WTO Member states to issue compulsory licences to export generic versions of patented medicines to states with insufficient manufacturing capacity to do so themselves.[75] In December 2005, WTO members reached an agreement to amend TRIPS to make this temporary waiver permanent,[76] and a few states have availed themselves of this waiver. [77]

[71] R Nessman, 'South Africa: Drug Companies Drop AIDS Suit' *Associated Press* (29 April 2001) available at http://www.corpwatch.org/article.php?id=121.

[72] BBC News, 'Aids court battle: Joint Statement' (29 April 2001) available at http://news.bbc.co.uk/1/hi/world/africa/1285645.stm.

[73] S Joseph, 'Pharmaceutical Corporations and Access to Drugs: The 'Fourth Wave' of Corporate Human Rights Scrutiny' (2003) 25 Human Rights Quarterly 423.

[74] Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, Ministerial Conference, Fourth Session, Doha, WT/MIN(01)/DEC/2, available at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/Min01/DEC2.doc.

[75] Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August 2003, WT/L/540 and Corr. 1, available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

[76] The amendment has been ratified by the European Community, bringing the number of ratifying states to 55 as at 10 August 2009. 101 states are required for the agreement to enter into force. See http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm. The deadline for ratification is 31 December 2011.

[77] For example, in July 2007 Rwanda became the first State to inform the WTO that it was availing of the waiver to import cheaper generics made under compulsory licensing overseas. Shortly after, Brazil issued a compulsory license to import an Indian-made version of the HIV drug Efavirenz. See H Hestermeyer, 'Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines' (2007) 11 ASIL Insights, available at

The problems created by the initial TRIPS system, combined with the proactive movement of states towards entrenching the outcomes of the Doha Declaration, demonstrate that it is in the interests of business to combine corporate strategy with social responsibility to create and enhance stable markets for investment. Indeed, internalizing the need to ensure public health needs are met in developing states can provide an opportunity for business to establish a trusted presence in emerging markets—markets that would be unlikely to be able to pay a premium for vital medicines in any event—to have clearer regulation of those markets[78] and improve their business reputations.[79] Thus, there can be a strong international rule of law that both creates the stability needed by business and protects human rights within it.

2. Stabilization clauses and labour rights

As noted above, stabilization clauses in contracts under BITs have been one method for business to ensure stability in their investments, as part of their activities in support of an international rule of law. However these clauses can hinder states that wish to improve human rights, environmental and/or labour standards in their own territory, for to do so requires a change to the regulatory environment in that state and could have an adverse impact on the investor's project, which would make the state in breach of its contract.[80]

An example of such a stabilization clause is contained in the Host Government Agreements between Chad and an oil consortium led by Exxon Mobil for the extraction of crude oil from Chad (and transported by pipeline to the Cameroon coast):

> During the period of validity of this document, the state shall ensure that it shall not apply to the Consortium, without prior agreement of the Parties, any future governmental acts with the duly established effect of aggravating, directly, as a consequence, or due to their application to the shareholders of the Consortium, the obligations and charges imposed by

http://www.asil.org/insights071210.cfm and G O'Farrell, 'One small step or one giant leap towards access to medicines for all?' (2008) 30 European Intellectual Property Review 211, 213.

[78] Greve (n 70).

[79] Oxfam Briefing Paper 109, *Investing for Life: Meeting poor people's needs for access to medicines through responsible business practices*, November 2007, available at http://www.oxfam.org/sites/www.oxfam.org/files/bp109-investing-for-life-0711.pdf.

[80] International Finance Corporation, 'Stabilization Clauses and Human Rights' 11 March 2008, available at http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf. This study also showed that stabilisation clauses are now being used less frequently.

> the provisions of this Convention or with the effect of undermining the rights and economic advantages of the Consortium or its shareholders … Only the Consortium shall be able to cite this stability clause, which is offered to it to the exclusion of any third party to this Convention.[81]

In its Report on the Chad-Cameroon Pipeline Project, Amnesty International alleged that, as a direct result of the pipeline project, villagers have been denied access to clean water, farmers have been denied access to their lands, and fish stocks off Cameroon's coast have been destroyed, and it thus called upon the parties to renegotiate their agreement in order to guarantee that Chad would be permitted to comply with its international human rights law obligations.[82] There have been no reports of such renegotiations taking place.

A consortium led by BP for the building and operation of the Baku-Tblisi-Ceyhan (BTC) pipeline in Turkey had a similar stabilization clause.[83] Yet it responded to similar criticisms[84] by agreeing to a 'Human Rights Undertaking' in September 2003.[85] The undertaking prevents the BTC company (created by the consortium) from asserting in legal proceedings an interpretation of the governing agreements that is inconsistent with the regulation by the host states of their obligations under human rights treaties. The Consortium also published a 'Citizens Guide' to assist the citizens of the host states to understand the commitments made by the Consortium companies.[86]

The power of stabilization clauses in investment agreements demonstrates that the rigorous judicial enforcement paths open to investors under BITs (as seen in the discussion of international arbitration above) often overwhelms the pull to compliance of international human rights law obligations on

[81] Art 34.3 of the agreement between the Consortium and Chad of 2004, as cited in Amnesty International, *Contracting out of Human Rights: The Chad-Cameroon Pipeline Project*, September 2005, 46, fn 67.

[82] Amnesty International, *Contracting out of Human Rights: The Chad-Cameroon Pipeline Project*, September 2005.

[83] The consortium members include, Amerada Hess, AzBTC, BP, Chevron, ConocoPhillips, Eni, INPEX, Itochu, Statoil, Total and TPAO. See BTC Co. Partners at http://www.bp.com/managedlistingsection.do?categoryId=9007998&contentId=7015010. For example, in its Host Government Agreement for the pipeline the Turkish government is prevented from requiring any consortium members to comply with labour standards 'that i) exceed those international labour standards or practices which are customary in international Petroleum transportation projects, or ii) are contrary to the goal of promoting an efficient and motivated workforce'.

[84] Amnesty International, *Human rights on the line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003, available at http://www.amnesty.org.uk/uploads/documents/doc_14538.pdf.

[85] The undertaking, made by deed on 22 September 2003, is available at http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf.

[86] http://www.amnesty.org.uk/content.asp?CategoryID=10128.

states, irrespective of whether one considers that these international obligations should take precedence over contractual obligations in private law. However, the power of human rights arguments can have a significant impact on some businesses and so strengthen the overall operation of the international rule of law (being inclusive of human rights), as well as having effects on the national rule of law in the state concerned.

3. Counter-terrorism sanctions

One of the many consequences of the 9/11 terrorist attacks was the passing of national, regional and international regulations supporting counter-terrorism actions by states. One example was the passing of resolutions of decisions by the UN Security Council that established a Counter-Terrorism Committee, with the power to make decisions imposing sanctions on individuals and organizations alleged to be involved in terrorist activity.[87]

This could have significant effects on business. If a business has given money to an organization, individual or another institution that is alleged to be involved in terrorist activity, even if that business is not aware of this, then it is at risk of having its assets frozen. This could be disastrous for any business. As the procedure by which the UN Security Council lists and delists entities from the terrorist sanctions list is particularly opaque—though the person, organization or business affected now must be informed if they are placed on a sanctions list[88]—there is a real issue of procedural fairness and breach of human rights.

As it is difficult for Security Council decisions to be judicially reviewed, it is arguable that these procedures are contrary to an international rule of law.[89] Indeed, decisions within Europe have indicated real concerns about these procedures, and the ECJ has held that the Security Council process of counter-terrorism listing of entities denies justice to those listed, because 'the procedure before the [Counter-Terrorism] Committee is still in essence diplomatic and intergovernmental [which means that] the persons or entities concerned have no real opportunity of asserting their rights'.[90] The European Commission is now working with states to create a new listing procedure to protect human rights.[91] Interestingly, just prior to the decision

[87] Security Council Resolution 1373 (2001).

[88] See, for example, Security Council Resolutions 1730 (2006), 1732 (2006) and 1735 (2006).

[89] S Chesterman, '"I'll take Manhattan": The International Rule of Law and the United Nations Security Council' [2009] Hague Journal on the Rule of Law 1.

[90] Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (3 September 2008) paras 286–288.

[91] See http://www.europa.eu-un.org/articles/en/article_9369_en.htm.

of the ECJ, the Security Council resolved to require the Committee to provide summaries of reasons for listing on their website and to establish detailed procedures for representations for delisting.[92]

It is perhaps ironic that the Universal Declaration of Human Rights makes clear that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.[93] These decisions may indicate that any attempt to create a rule of international law without regard to human rights is both contrary to business interests and is unsustainable.

IV. CONCLUSIONS

The rule of law has been debated for centuries and it includes core principles of transparency, accountability, good governance, order, human rights protections, justice and independence of the judiciary. These principles have been shown to be equally applicable at the international level and have been so applied in a variety of contexts, from peace and security to trade and investment. The international rule of law is far from being complied with, however, it is a relative concept in which compliance by states is relative in terms of fulfilling the elements of the rule of law.

An international rule of law can create conditions of stability, certainty, accountability in decision-making, and independence and efficiency in the settlement of international (and national) disputes according to law. These are conditions that reduce the risks for business and render them more willing to invest. It is therefore appropriate that business has been working towards improving the international rule of law, at least in areas such as international economic and trade law, although these developments do not necessarily lead to international legal accountability of business for compliance with the international rule of law.

However, these developments cannot be seen as excluding human rights. As the three examples of intellectual property, stabilization clauses and counter-terrorism have showed, human rights form a necessary part of the international rule of law. They also show that it is in the interests of both states and business to support and comply with an international rule of law that includes human rights obligations. Indeed, the progression in relation to business and human rights shows the gradual move from voluntarism towards law. As Harold Koh, now US Legal Adviser at the state

[92] Security Council Resolution 1822 (2008).
[93] Universal Declaration of Human Rights 1948, Preamble.

Department, noted at a meeting about security and human rights between governments and business in the energy and extractive industries:

> The participants in this process have recognized that the goal of maintaining a secure operating environment is compatible with the goal of protecting human rights … by supporting the rule of law, incorporating human rights into security arrangements, and working with NGOs, transnational companies can greatly strengthen and enrich the human rights environment in which they operate.[94]

This reasserts the crucial link between business, the international rule of law and human rights.

[94] Harold Koh was then US Assistant Secretary for Democracy, Human Rights and Labour: as quoted in 'Voluntary Human Rights Principles for Extractive and Energy Companies' (2001) 95 AJIL 636 637.