

**Division of Roles
in the
International Economic
and
Legal Order**

**Enterprises, governments, trade unions,
NGO's and human rights**

**Willem van Genugten
Ruud Lubbers**

Editors



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Foreword

In the nineties a renewed debate arose on the question of which role multinational enterprises can play in the field of the realization of human rights. In the Netherlands the discussion has, among other things, led to the report *Multinational Enterprises and Human Rights*, published by the Dutch branch of Amnesty International and Pax Christi (in 1998, followed by a translation in Dutch in 1999). This report is based on detailed discussions with the trade unions and nine multinational enterprises with their head offices in the Netherlands (ABN-AMRO Bank, Ahold, Heineken, ING, KPMG Accountants, Philips, Rabobank, Shell and Unilever). In the report – that was produced under the supervision of the Supervisory Committee of which the authors of this foreword were members – the role multinational enterprises (MNE's) and non-governmental organizations (NGO's) could and should play in the sphere of the worldwide realization of human rights, as is written in the 1948 Universal Declaration of Human Rights, and for example, in the 'human rights conventions' of the International Labor Organization, is discussed in detail. The main consideration in the report is that businesses should make the realization of human rights their responsibility ('Like every organ in society, they are called upon to behave responsibly and to respect, protect, promote and, where they can, fulfil human rights'; p. 17), but also that the worldwide realization of the human rights is impossible without a large contribution from a non-governmental angle (trade unions, NGO's). The opinion is also that states and their inter-governmental organizations such as the Council of Europe and the UN are both unable, and often unwilling, to realize all human rights satisfactorily on their own initiative. The inability to do this is further reinforced by the process of the globalization of the economy and political decision-making, whereby states are confronted even more with affairs that go beyond their direct power and regulating capacities.

FOREWORD

In the discussions on the report the nine participatory MNE's constantly expressed that they were not planning on shunning their responsibilities concerning human rights. It must be added, however, that one business is further in its line of thought and policy practice on this point than the other. However, they also strongly wish to guard against the extension of tasks for the business community as they do not wish to end up in the states shoes when it comes to matters such as the responsibilities in international law for the realization of human rights. This also applies to NGO's to a certain extent. They have a great tendency to interpret rather generally their own ability with regard to the supervision on the observance of human rights.

All this has led to the initiative to organize a seminar with as its title 'The new division of roles in the developing international economic and legal order'. The question presented was: how do the various roles (that of MNE's, NGO's, employers' and employees' organizations, and states and their inter-governmental organizations) relate to one and other and how can all these actors combine themselves and divide the roles in such a way that the – controversial – objective of the worldwide realization of human rights is served to the full? The seminar was organized by GLOBUS, Institute for Globalization and Sustainable Development at Tilburg University, and the Netherlands School of Human Rights Research. It took place in Tilburg on 29 October 1999. We hope you enjoy reading this report and that it leads to new inspiration and a new insight into the subject.

Willem van Genugten
Ruud Lubbers

Tilburg, January 2002

The division of roles in a dynamic international order; a review of the past and a look into the future

Willem van Genugten and Ruud Lubbers

1. Introduction

Nurtured by the discussions on themes such as the globalization of the economy and the dwindling power of national states, the need has arisen for a closer reflection of the relationships between the actors who stand together in the international arena. In the seminar, of which this compilation is an account, the emphasis was on four of those actors. In order of presentation: trade unions, NGO's, businesses and governments. In this final conclusion, the specific roles these actors fulfil, or sometimes: should fulfil, will be discussed in more detail. The same goes for the relational problems that arise and the options for cooperation that, up till now, have not fully been made use of. This will be concluded with a number of reflections on the themes that can be considered as being the Leitmotifs in the debate on the division of roles.

2. The role of the state

The state may be losing its power and may sometimes wish to abide in the comfortable cast shadow of the market. That does not, however,

eliminate the fact that in almost all of the contributions to the seminar it was emphasized that states should be aware of their responsibilities and that without well-functioning states the worldwide realization of human rights is hardly possible. The state is necessary, not in the role of the all powerful – the idea of being able to fully shape societies has disappeared into the background – but as a body that, apart from fulfilling a number of specific state duties, sees to it that the preconditions within which other actors can perform their duties are fulfilled.

Tom Etty is the first in this compilation to remind the state of its duties. He talks of a 'leading role' for the state and sees in addition 'supporting roles' for the unions, employers' organizations and NGO's (section 1). This terminology reflects the importance that Etty ascribes to the state with regard to the realization of human rights. States are first and foremost, when it comes to accepting obligations in this area. And even though organizations like trade unions and NGO's have often taken the lead in protecting human rights and initiating developments, it is ultimately the states that, as the principle makers of international law, must accept their responsibilities. This responsibility may not be 'privatized away' as it were (section 3).

Henk Schrama and Kees Vos also go into the specific duties of the state concerning the realization of human rights. Having pointed out that it was the joint states that signed up for the further development of the existing international law, and that subsequently human rights in particular served as an 'internationally inspired pattern of present day social policy' (section 5), they sum up a number of state duties suitable for a state such as that of the Netherlands: the further development of the international legal order to see to it that good observance mechanisms are realized internationally, to make a contribution to the realization of the most adequate observance mechanisms within various international organizations, and to realize on a national level what is propagated internationally, that is to say: to continue to work on the motto 'think globally, act locally', which

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

means, for instance, the preparedness to serve as a 'body of knowledge' on the national level (section 6). Both authors conclude their review with an agenda for the future, wherein the Dutch government is challenged to further propagation of the economic function of social policy (the export of the 'Polder model'), to intensify the dialogue with the business community, and to work on the international level on the realization of the ILO's fundamental labor norms (section 6).

Sometimes *in passing*, and sometimes explicitly, Schrama and Vos let it be known that in their opinion the Dutch government plays a precursory role in such areas. Our observations certainly give us cause to defend this position. However, this may not lead to complacency. Etty is, of course one could say in view of his position of policy official of international affairs of a large trade union, the first to rub in that the Dutch government's impression of matters does not always coincide with reality: 'The way in which the Dutch government (and other governments, with exception of but a few) has acted when it comes to the promotion of human rights using the codes of conduct of the OECD and the ILO is absolutely pitiful and unfortunately this has not made these instruments seem any more credible' (section 4). As far as he is concerned, this can be compared with the Dutch contribution to the (failed) negotiations on the Multilateral Agreement on Investments, the MAI. The role the Netherlands fulfilled here has 'saddened' him (*ibid.*), which, considering the explanation Etty gives, can rightly be noted as an euphemism. According to Etty, it is also time for the Dutch government to start speaking with one voice. It is with regularity that the ministries of Foreign Affairs, Social Affairs and Employment and Economic Affairs all have (completely) different stories to tell in the international organizations they are active in (section 4). In other words: what one by virtue of the Single European Act and the Treaties of Maastricht and Amsterdam should be doing on a European level (speak with one mouth), one should certainly also fulfil on a national level.

3. The role of businesses

The 'other side' of the globalization medal is made up of the (international) business community. Without exaggerating too much, it can be supposed that an organization such as the WTO is principally based on the notion of the market, and is providing a clear field for free enterprise. In that perspective, the state is appointed the role of the body that in the fields of justice, politics and security should create the preconditions within which free enterprise can optimally prosper. The idea behind this, which we support, is thus that through free enterprise prosperity is created in which ultimately human development can flourish. However, this position requires some comment. Although it reflects the right way of thinking and acting (free enterprise is the starting point and the state the serving body) that does not mean to say that it is already being realized in all areas. On the contrary, much of the globalization way of thinking still consists of rhetoric, and in no way does it guarantee that increasing prosperity, including that between countries, or between social layers within countries themselves, will be distributed equally. Does the 'global neighborhood' also apply to victims of lapsed forms of international entrepreneurship, where businesses, supported by an incompetent or corrupt government, carry on in a way that is far from what is today described as responsible and sustainable entrepreneurship? It would be wrong to close one's eyes for such excrescence.

Having said all that, however, we emphasize the potentially powerful role that the business community can play in a social and economic sense in the countries where it is active. Just as it is important to keep in mind that employees who work in a 'responsibly active company' also undertake of activities outside the factory walls, where they can, as it were, spread ideas that the host state attempts to dam at other times (*cf.* Rutgers van der Loeff, section 6).

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

The potential role of the business community is discussed most clearly by Rutgers van der Loeff of course. It is interesting to notice that he speaks in terms of 'visionary companies', that is to say: companies that realize that 'human ideals and healthy business economics are not at loggerheads with each other but that they are complementary to each other' (section 4). Rutgers van der Loeff mentions a number of examples of thinkers and businesses that have fulfilled this role of precursor in practice. Also interesting in this context is his reference to Shell's model with the five shells, which begins with the protection of human rights that directly have something to do with their own employees and ends with the level of the society as a whole in which the enterprise is active (section 7). Perhaps even more interesting though is his comment that visionary companies are precisely the one's that are occupied with these outer shells (section 8). Rutgers van der Loeff refers to Shell here, but at the same time he speaks in much broader terms – 'just as many "visionary" companies', his opening sentence in section 8 – which seems to apply that this could be a trend as well as the sort of behavior to be expected in the future. The latter is, after all, the connotation of the concept 'visionary': the spearhead that deserves to be imitated.

The key question Rutgers van der Loeff broaches, concerns the means that are necessary to convince businesses to join the afore mentioned spearhead: how effective are laws and codes in bringing about a changes in behavior? He proposes that changes of behavior are not brought about by external powers: 'A code is nothing, but coding is everything' (*Ibid.*). Company policy must be based on internal agreement, internal support, and should, partly for these reasons, regularly be adjusted to meet the needs of its time and new insights. Thus Rutgers van der Loeff notes a thought that also causes furore among legislators. Moreover, he is consistent, because he also applies the principle of the free market to the phenomenon of bringing about a company philosophy that is or is not laid down in a specific company code.

In view of such codes Rutgers van der Loeff quotes two authors who state 'that the authenticity of the company ideology and the consistency with which this is actually applied are more important than the specific content' (section 8). Nicola Jägers argues with him on this point. She reminds him that codes often do not refer to statutory international law (the Universal Declaration of Human Rights, the ILO's 'human rights conventions'), and that they therefore leave too much room for obscurity. For the same reasons, the chances of them being abused are also greater. She believes moreover, that businesses should go a step further than simply incorporating existing internationally judicial texts in their codes. They should also be open to independent external assessment.

Thus we have a difference of opinion that deserves further consideration, but it is one that can be bridged. Firstly, we have been so free as to interpret what Rutgers van der Loeff says in the following way: that company policy has little chance of success purely on the basis of external pressure and of what has been decreed from outside the company. But is Jägers wrong to say that the Universal Declaration of Human Rights and the core conventions of the ILO should at least serve as a frame of reference? In our opinion, references are all too often made in many internal company codes to the desired respect for *the* human rights without stating exactly what is meant by this. Therefore, it is of the utmost importance that companies that incorporate a reference to human rights in their codes, make it clear that they use as their starting point the concept of human rights as is officially stated in international legal documents and by international supervisory bodies. The latter could be, for example, the UN Human Rights Committee or the ILO's Committee on Freedom of Association. By joining with such supervisory bodies, companies explicitly indicate that they wish to be related with recognized human rights norms. Moreover, under the 'horizontal effects of human rights' companies no longer even have the right to withdraw from such official norms.

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

A similar reasoning may be maintained concerning the assessment of compliance with the codes. Much can be said for allowing this to be done more or less internally by accountants firms that also act as surveyors in other business matters, even if it is only because this is a relatively new phenomenon. The business community should be given the opportunity to learn through experience and to re-adjust company practice should the accountants indicate that there may be reason to do so. But at the same time, should it not be so that a company such as Shell – and the same goes for other companies that are working on an international level and that have more or less ended discussions on the problems in hand and published the results in specific company codes – should open itself to external assessment so as to make a clear statement acknowledging that it is wholly committed to its own principles?

All in all it seems that Rutgers van der Loeff and Jägers are both speaking about the same thing, but from two different perspectives. Only one (Jägers) thinks that the other permits himself too much freedom, whilst the other (Rutgers van der Loeff) is of the opinion that people like Jägers stick too much to the official rules and pay too little attention to developments within companies and stubborn company practice. Put it this way, however, the question is whether Rutgers van der Loeff is not placing too much emphasis on the 'obstructional function' of rules in his approach. 'Humanity (...) cannot be learnt from textbooks or a code, but from reflection on the reality' (section 8). In addition to this, he argues that the approach he chooses leaves room for 'the dilemmas companies are faced with in reality as well as room for creativity' (section 9). However, this suggests that the afore mentioned norms in the Universal Declaration of Human Rights and the ILO conventions are extremely detailed and stringent and that the practical application of them would leave absolutely no room for consideration. But is not the application of norms all about finding a solution that is reasonable in all given circumstances? Regarding it in this way, a 'rule guided framework' offers all the space needed for discussion of the dilemmas Rutgers van der Loeff refers to. For that

reason, to our mind businesses should on a large scale follow the example of those businesses that do refer to official international laws in their codes (see the examples given by Jägers). As Rutgers van der Loeff would say, the latter businesses could possibly be called 'visionary', and the same would undoubtedly apply to those businesses that would allow legitimate external assessment to take place.

4. The role of the trade unions

What do you mean by new, Tom Etty asked himself aloud during the seminar in a reaction to its title. Indeed, much is old. The terminology used by the organizers, however, can be defended too, because a lot is actually new in the rapidly changing, dynamic international context. It must be added, however, that much of the 'new' has to do with a re-definition of the roles of the individual actors and the demands put by modified international situations on their (willing) mutual cooperation ('division of roles'). Put this way, Etty might be of the same opinion.

Etty is right when he talks about the role trade unions play in the international discussion on the realization of (a number of) human rights, including the fundamental labor rights, describing them as being from neither the present nor the past ('old'). Having characterized trade unions as being an 'important government counterpart in the setting and implementation of socio-economic policy' (section 1), and before he points out the international leading role of trade unions in, for example, the realization of OECD and ILO codes of conduct, Etty suggests that trade unions 'saw the social significance of multinational enterprises in both the positive and the negative sense, long before NGO's did' (section 1). Kees Flinterman supports him on this point: 'Trade unions have, as non-governmental human rights organizations *avant la lettre*, made an important contribution to this change in international law' (point 3) and they are 'professional organizations with deep, historic roots, a great many members and direct access to their own consultative bodies at the national and international level',

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

with which most human rights NGO's 'simply' cannot compete (point 5).

In his contribution, ETTY sketches a rich variety of tasks that at this juncture are awaiting the attention of the trade unions or with which they are already fully occupied: the discussion within the WTO on fundamental labor standards, the actual application of the 1998 ILO Declaration on fundamental labor rights, etc. (section 2). His examples illustrate just how full the international trade union's agenda is at the start of the new millennium, and again just how much these activities are rooted in a rich past.

In addition to this, ETTY makes a great number of remarks on the relationship between the trade unions and the other actors. He ascertains that within the relation between national governments on the one hand and trade unions on the other, it is out of the question that the government's responsibility to respect human rights (including fundamental employee and trade union rights) be 'privatized away' as it were in the application of business codes (section 3), whilst in the relation between trade unions and multinationals such codes may never be used in order to sidestep the trade unions.

Most difficult and evidently the most sensitive relation is, however, the relation with that third actor: the NGO's. In section 3, ETTY discusses these mutual delicate subjects in detail, and he concludes that 'the old role-play has brought to light a large number of shortcomings in the effectiveness of the internationally agreed instruments', and that each of the parties involved 'can be reproached for something', the trade unions included. Flinterman supports this analysis, and adds the observation that in the eyes of NGO's the trade unions often belong to the political and economic power and as such they should be approached critically (point 6). In view of this approach, is it not surprising that Flinterman suggests the idea of round-table talks between these organizations whose tasks are 'for a large part complementary' (points 7-9). According to Flinterman, these talks should include a

meticulous analysis of the relationships between the two and of past successful and less successful joint ventures (point 8). We agree with this, although in the Netherlands talks between trade unions and NGO's are already in progress, even though perhaps not yet on a regular basis. An alternative for Flinterman's round-table talks could be to have a more informal dialogue but at the same time one with more substance. A 'public confession' such as Etty's – 'the last thing I would do is to exclude the trade unions of this' (section 3) – combined with the recognition of the role trade unions have played in history, as well as the helping hand given by NGO representative Martha Meijer during the seminar, where she indicated that NGO's and the trade unions 'are each others only logical partners in enforcing rights for citizens and employees' (section 5), could be the ingredients for the successful course of such a dialogue. Flinterman's round-table talks then become an annexation of small bilaterals.

5. The role of NGO's

A central theme in Martha Meijer's contribution on the role of NGO's concerns the channels they have at their disposal: institutionalized consultations with policymakers, public pressure, campaigns, and the opportunity to influence international enterprises (section 4), as well as the strategies they can use to do so. These vary from tactical consultations and lobbying to a more confrontational approach (*Ibid.*). The methods differ according to the situation, and of course, in accordance with the evaluations NGO executives make on the effectiveness of their actions. Meijer: 'Both the cooperatives and the non-cooperatives have a role to play, making more explicit certain interests and oppositions in their own way. What is damaging is the *a priori* choice for one of either as being the rightful one, whilst denouncing the other. It is necessary to consider the effects in a professional manner' (section 6). The latter brings her to her plea for a human rights assessment in which, corresponding to the environmental effects reports, the effects

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

certain policy measures have in the field of human rights can be examined (section 7).

Meijer examines the mutual relationships between the most important actors of the seminar a number of times in her contribution. She comments, for example, on the trilateral relationship between citizens, governments and business community. Citizens have the right to, for instance, a decent existence and equal and reasonable pay for work done (Article 23 of the Universal Declaration of Human Rights). The citizen is the bearer of this right, the government is the addressee and should therefore create the conditions for application, but the executive is in reality the employer. Formulated in this way, the division of tasks seems clear and simple, but, as Meijer rightly notes, in reality it is an area of both 'excitement and pressure' (section 3). Indeed, as Meijer says, in the process of globalization, the interests of the government and the citizen often differ, whilst that same citizen gains a broader perspective and has higher expectations as a result of globalization.

The relation between NGO's and businesses also has its problems. Meijer points out the competitive advantage businesses attempt to obtain in low-wage countries. In doing so, they often bump into NGO's (section 3). However, on the other hand trade unions and NGO's often get on well together when it comes to such subjects (*Ibid.*). Sophie van Bijsterveld observes that the relation between the business community and NGO's has changed with the times from 'thinking in opposites' ('evil' versus 'good'; section 4) to a development, which is based more on debate and on the process of bringing about change (section 5). In her opinion, all this has contributed to the various actors moving in the direction of a more integral and realistic approach to the issue of the worldwide realization of human rights (section 6). This sketches as it were the development of NGO's that have made a great contribution to the specification of the international human rights armamentarium, and of NGO's actively in search of new ways to play a major role in debates on the actual implemen-

tation of those norms. As Meijer remarks, this means that among other things, NGO's sometimes have to be prepared to make compromises and commit themselves to unusual coalition partners like the business community (section 6): 'That is why a modern agenda for NGO's should be aimed at the demand to share power, and have a say in major policy decisions'; in addition, 'democratic assessment is the key word' (section 8). We add that this last demand also applies to NGO's themselves. In short, what is the state of their 'constituency', as this issue reads? Our idea would be to take the system of marketing effects as a starting point here too. There should be no exceptional rules for NGO's other than those that follow on from existing international law and from the rules of etiquette, which are customary in any civilized country. In other words: experience has taught us that an NGO that is 'too loud' or that misuses incorrect information in criticizing a company can, by means of the free exchange of information, be effectively dealt with.

6. Concluding remarks

The importance of cooperation between the various actors has been spoken about in almost all the contributions. Van Bijsterveld speaks in terms of an organizational development in that direction, whilst Etty points out that trade unions and NGO's need each other 'when it comes to making significant actors in international society such as multinational enterprises more alert to the positive and negative influence they can exert on the human rights situation in the countries in which they operate' (section 4). Meijer broaches the same subject but places the business community in a different light when she suggests that 'for those who look further than the short-term perspective, there is indeed a congruency in interests for entrepreneurs and trade unions, for citizens and governments', which she calls 'social sustainability' (section 5). This is most likely a choice of words that also would appeal to Rutgers van der Loeff. Schrama and Vos add to this the role of the government, when they talk about the

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

necessity to realize 'a functioning worldwide system of labor norms' and about sufficient combined action between the various actors which is essential for this (section 6)

This paints a rather rosy picture in which the interests of the various actors run parallel, and where the tendency to cooperate seems to offer the guarantee for success. Put this way – when in truth it should be said that the different authors have a more subtle approach – it can easily be forgotten that, in everyday life, the underlying interests of the various actors are certainly not always identical. As Van Hoof stresses, courts can regularly play a role in this. The ultimate goal – worldwide realization of human rights, in the context of sustainable development and an increase in (the distribution of) wealth – may be clear theoretically speaking, but this does not mean that, in more concrete situations, interests run sufficiently parallel to be able to expect a collective approach. There are a number of differences: making a profit can stand in the way of the development of employee's rights and not in the least children's rights; the afore mentioned 'outer shell' – taking up arms against the violation of human rights in the society as a whole by locally active businesses – may require the active intervention of the business community, that at the same time, however, will take into consideration long-term repercussions; governments and NGO's often weigh up the balance between geopolitical and strictly human rights issues differently, etc. One can add to this the fact that businesses (may) have mutual competitive interests and that states cannot ignore the fact that each one of them is in a different phase of development making it very hard for them to work together. Many examples could be added to this list, which just goes to show that cooperation in the international arena can reach a high rhetorical level. This will only get off the ground if it is based on the combined acknowledgment of joint and distinguished interests and lines of approach. Moreover, these will always involve 'tailor-made' solutions related to concrete issues that require attention. Anything else holds the risk of an abstract consensus that will fall apart as soon as 'it comes to the crunch'.

It is partly due to globalization that the classical Westphalian state is gradually losing its power. State boundaries are no longer satisfactory and are eroding under extreme influences, whether these be the cross-border functioning of the media and Internet, the international community states' right to involve themselves in the human rights situation in a country without that country arguing rightly that this is 'interference in internal affairs', or the way the business community operates on an international level. In turn, much can be said about the degree to which this perforation of state sovereignty is restricted and contained, but it is obvious that the above cannot be denied.

One of the problems that arise, concerns the need for a democratic legitimization of the new order with all its dynamic powers. This could apply to NGO's, for example. On behalf of whom do they speak? Put in abstract terms, it is clear that they represent the worldwide 'civil society' and that as such they fill a gap in the area of a supposed or demonstrable democratic deficit within organizations like the IMF and the WTO. But is this enough to close the gap? It is obvious that the present interplay of forces can only be considered as being legitimized democratically for a very small percentage, just as it is obvious that the world is developing from a more formal democracy into a more activist and informal one. Perhaps the essence of democracy lies here: in accepting that it will never be perfect, and thus more a process of trial and error than a model. Good combined action between the various actors, with each of them acting from the starting point of their own specific tasks and backgrounds, can contribute to making the pain of this easier to endure.

Finally: the seminar and this publication demonstrate the diversity of the various actors, and mark their specific motives and their complementary roles. In the meantime, it appears that a development is taking place on a worldwide scale towards 'global ethics', which is binding the various actors together more and more. This concerns ethics that have their roots in the United Nations Charter – with its ambition to realize democratic constitutional states all over the world

THE DIVISION OF ROLES IN A DYNAMIC INTERNATIONAL ORDER;
A REVIEW OF THE PAST AND A LOOK INTO THE FUTURE

– and the Universal Declaration of Human Rights, as well as the necessity for sustainable development. The latter is necessary for an adequate protection of the interests of nature and future generations. A reference to the ‘Earth Charter’¹ is fitting here. Here, the idea of sustainable development is most important and it also emphasizes what, in time, the mutual interests of all people and peoples will be. As such, it can also act as a modern line of action for all the actors reviewed during the seminar.

¹ [Http://www.earthcharter.org](http://www.earthcharter.org).