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EDITORIAL COMMENT

The *Student Supplement* to the *Human Rights Law Review* offers postgraduate students around the world an opportunity to publish their work. This year's Supplement covers a range of topics and includes two academic articles as well as a feature article, an interview, a report and a conference paper.

In the first article, Gilbert Leung critically examines the potential of the cosmopolitan project to contribute to the realisation of human rights. He argues that cosmopolitanism should not be treated as a solution but as a question that invites us to focus on the paradoxical nature of legal subjectivity.

Anna Demeneva and Anton Burkov then discuss the possible implications of a European Court of Human Rights decision (*Rakevich v. Russia*) on Russian legislation dealing with the involuntary confinement of mentally ill persons. They stress that the decision may have far-reaching implications for the Russian mental health system and that signs of change are already visible.

In their feature article, Linda Darkwa and Joe Hindovei Pemagbi describe some of the current problems facing the development of a human rights regime in Sierra Leone. Based on first hand experience having worked for human rights charities in Sierra Leone, their article focuses on the post-conflict protection of children's rights.

These three articles are followed by an interview by Eva Chinapah with Sara Magnusson, a Socially Responsible Investment (SRI) analyst working for Ethix SRI Advisors. She describes the potential clash of values between business and human rights in view of the increasing prominence of human rights and transnational corporations and business.

The University of Nottingham Human Rights Student Conference held in March 2004 explored the link between human rights and development. Yassin M'Boge and Katherine Chan report on the success of the conference, which gave postgraduate students an opportunity to present their research topics in this area.

Next, one of the speakers from the conference, Andrew Lang, examines the possibility of putting human rights on the international economic agenda through the particular case of the right to water. As the author demonstrates, there are many advantages in applying human rights law to global trade regulations, especially in the context of the fair distribution of privatised staple commodities.

We hope you find this edition of the *Student Supplement* both informative and inspirational. The editorial board would like to thank all those who submitted articles for publication as well as the academic staff of the Nottingham School of Law and the Human Rights Law Centre who gave their support and advice. On behalf of the incoming Editorial Board we would like to encourage submissions for the 2004-2005 edition.

The Student Supplement Editorial Board 2003-2004.

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HUMAN RIGHTS, WORLD CITIZENSHIP AND THE COSMOPOLITAN QUESTION

Gilbert Leung *

For more than half a century the Universal Declaration of Human Rights[1] has been the standard-bearer of positive rights, yet the aspirations contained within its preamble and the standards set out in its articles have not been realised. *Barbarous acts* of mass murder and ethnic cleansing continue decade after decade and in continent after continent. *Freedom from fear or want* is itself found wanting as the gap between the richest and poorest widens while over a billion people survive in conditions of absolute poverty.[2] As Costas Douzinas pointedly remarks, "if the twentieth century is the epoch of human rights, their triumph is, to say the least, something of a paradox".[3]

Some claim there are too many procedural and institutional barriers to the effective realisation of universal rights;[4] others consider the international system to be skewed towards state sovereign and hegemonic interests that fatally undermine efforts to deal with the problems of the third world.[5] The solution, for a number of political theorists, is a radical reshaping of the global order according to the principles of cosmopolitanism that turns each individual into a world citizen and direct legal subject of human rights.

This essay will confront the cosmopolitan panacea with a degree of scepticism. Both human rights and cosmopolitanism rely upon a discourse of the universal that is ultimately local, a locality that lays claim to moral correctness and assumes its application to others. While universalism is generally understood to be antagonistic to cultural relativism, both concepts are in effect quite similar in their metaphysical essentialization of humanity. The intellectual move that attempts to define what it means to be 'human' and the subsequent projection of this meaning onto others within the local or global community can be used to justify natural rights, fellowship and world peace as well as oppression, imperial domination and war. The result is an unstable dialectic of vice and virtue that is driven by the infinite contexts in which the abstract human is manifested as a unique and concrete person. It will be argued that cosmopolitanism should not be treated as a solution but as a question that invites us to focus on the paradoxical nature of legal subjectivity.

COSMOPOLITANISM IN HUMAN RIGHTS

Cosmopolitanism (*kosmos*: world or universe/ *polis*: city / *politēs*: citizen) can be traced back to the ancient Stoics who understood the cosmos to be permeated and governed by *logos*, the divine principle of rationality implanted in the form of reason in every human being. Such belief in reason as the metaphysical essence of Man led the early Stoic Zeno towards an ideal notion of human unity that overcame the distinction between Greek and barbarian and turned each individual into a cosmopolite or citizen of the universe.[6]

Cosmopolitanism in modernity draws its philosophical potency from Kant's *Perpetual Peace* in which he argues for a permanent end to war through the implementation of a universal right of humanity or 'cosmopolitan right' based upon a prototypical theory of globalisation, that is to say, an explicit assumption that the peoples of the earth have entered into such a degree of association that "a violation of rights in *one* part of the world is felt *everywhere*".[7] The context of Kant's world community consists of those able to travel from one country to another and so he limits cosmopolitan right to the 'conditions of universal hospitality' by which he means the "right of a stranger not to be treated with hostility when he arrives on someone else's territory".[8]

Today, cosmopolitanism continues to draw strength from increasingly sophisticated theories of globalisation. Its ethical basis relies on the assumption that all human beings belong to a single domain and ought, in principle, to behave hospitably towards one another across that domain. Cosmopolitanism shares with modern human rights a utopian vision of global justice that focuses upon the welfare of the individual regardless of his or her geographical or cultural location. From this position it is used to critique the statist insistence on the primacy and non-violability of national sovereignty in the face of threats to human dignity. For staunch cosmopolitans, the 1948 Declaration is more than a global bill of rights; it is the very embodiment of cosmopolitan principles and constitutes a building block in the potential move towards the political realisation of a cosmopolitan world order.[9]

Over the past decade, political theorists, chief among them David Held and Daniele Archibugi,

have developed a cosmopolitan political framework known as cosmopolitan (or cosmopolitical) democracy.[10] Moving beyond mere ethical obligation, the theory incorporates a plan for the reformation and democratisation of global institutions. In an increasingly interconnected world, this is seen as the necessary consequence of extending Kant's condition of universal hospitality to "comprise mutual acknowledgement of, and respect for, the equal and legitimate rights of [all] others to pursue their own projects and life-plans".[11] Proposals include the creation of a new political status of world citizenship under a democratically elected world parliament and a new cosmopolitical executive with the power to enforce international norms such as the 1948 Declaration, militarily if necessary.[12] Where the international law of states fails in protecting the individual, the cosmopolitan law of the people promises success by turning each individual into a cosmopolitan legal subject, a world citizen with all the ensuing institutional protections and freedoms.[13] Only by implementing cosmopolitan law through democratic global governance can there be the 'legitimate' institutional capacity to pierce the shield of national sovereignties in response to gross injustices and human rights violations. If human rights are the embodiment of cosmopolitan principles then cosmopolitan democracy is the global system that promises to deliver on the 1948 Declaration.

IMPERIALISM AND INDETERMINACY

Although the original idea of cosmopolitanism as human unity, fellowship and universal citizenship is attributed to Zeno, this did not imply the institutional apparatus of a world order. On the contrary, human unity meant a monotone society, a kind of huge commune that resisted the building of distinctive institutions and commercial activity.[14] Only much later, in the medieval tract *De Monarchia*, did Dante Alighieri provide the first institutional framework for cosmopolis: a temporal world government, headed by a goodly monarch - the servant rather than the master of the citizens - who was not meant to replace other rulers but to ensure their quarrels did not disturb the peace of the world.[15] His vision of a higher power overseeing a world of local sovereignties pre-empts the idea of a modern cosmopolitical executive. More poignantly, his reasoned preference for a monarchy at the head of a universal Roman Empire also pre-empts cosmopolitan imperialism.

For the modern cosmopolitical project, the violence of imperialism through the imposition of one set of institutional practices on another is ostensibly mitigated by its faith in the altruism of democratically elected representatives working in the sole interests of the world's peoples. It is, in effect, a pastiche of Dante's monarchy. Democracy, in history, has never prevented acts of imperialism between states and could never, in theory, act as guarantee against global imperialism in a cosmopolitan world order. On the contrary, democratisation lends a form of legitimation to the decision-making processes of a world regime motivated more by *realpolitk* than altruism. As Geoffrey Hawthorn insightfully remarks: "those who represent 'the people' in the nominally representative government of existing republics are not merely not part of the solution. Addicted as they are to duplicity, secret agents, and conferring behind closed doors, they are a large part of the problem".[16]

The world citizens that cosmopolitanism sets out to protect are necessarily subject to a political calculus that is weighted towards the entrenched interests of global capital. Cosmopolitan democracy forms an environment that facilitates and legitimates the exploitation of human rights as a tool of economic imperialism through the imposition of what Upendra Baxi has termed "trade-related, market-friendly human rights".[17] Such rights are the extension of the liberal logic of human rights that provides corporations and other business associations with the status of right-bearers. Whatever lies at the centre of concern for cosmopolitanism and human rights, it is only nominally 'human': as well as including corporate legal personality, it also, paradoxically, excludes potentially limitless categories of natural persons.

The universal 'human' of human rights is ultimately a metaphysical concept, a ghostly form devoid of concrete reality until it becomes socially constructed. Only then does the legal subject manifest its tangible form, a form that is always, in the end, more or less 'human'. Even for Cicero, the late Roman Stoic, fellowship in cosmopolitan unity was restricted to the standards of the Roman 'gentleman' and shaped by the prejudices of the Roman aristocracy. Cosmopolitans might seek fellowship within certain classes of society, namely, the free, the men, and the rich, while denying humanity to the slaves, the women and the poor. After his comprehensive survey of the *Unity of Mankind in Greek Thought*, H.C. Baldry leads inexorably to the conclusion that the whole of Greek philosophy, from Homer to the Stoics, rests on the assumption that "only those who conform to certain

standards were really men in the full sense, and fully merit the adjective 'human' or the attribute 'humanity'".[18] It is a extraordinarily prescient observation of the human condition, for it shows how those who set the standards of humanity and who delineate the frontiers of fellowship wield a powerful instrument of exclusion and oppression that is as relevant today as it was then.

Cosmopolitanism in human rights cannot protect against the potential dehumanisation of the other. Ever since the 1948 Declaration, cosmopolitan theorists and many others have claimed a *de facto* standard of universality whereby human rights, in principle, apply equally to everyone everywhere. But even though the universal 'human' officially exists as a proclamation of the United Nations, the gap still remains between official existence and actuality. In this sense, the positivisation of universal rights perpetuates its own fiction. According to Douzinas, "rights are not universal or absolute, they do not belong to abstract men but to particular people in concrete societies with their 'infinite modification' of circumstances, tradition and legal entitlement".[19]

Despite the 1948 Declaration and the ensuing proliferation of human rights instruments, perpetrators of atrocities continue to exculpate themselves through an endless reclassification of their 'human' victims as either possessed of humanity or as quasi-humans, whether they be women, blacks, homosexuals,[20] untouchables, infidels, Jews, Arabs or even collateral damage. This gives cause for scepticism in the assertion that human rights can somehow educate people to identify with the wrongs others suffer.[21] Richard Rorty, for example, argues that a human rights culture is not the result of an increase in moral knowledge but of hearing sentimental stories and that a more effective way to get people to identify with the wrongs others suffer is through a sentimental rather than a legal education.[22]

Sentiment is stronger than reason, so it is not a question of demonstrating that duties correlate to rights and that such rights belong to some higher moral law that ought to be obeyed, but of generating sympathetic responses 'out of sheer niceness' through the stimulation of imaginative and sentimental connections with others. Although the 1948 Declaration constitutes a powerful symbol of how others should be treated, this is far from Zeno's ideal notion of human unity and universal fellowship. It is doubtful whether any sense of fellowship or bare connection with others can be mechanically taught or effectively imposed through the coercive application of human rights within a cosmopolitan democracy.

CONCLUSION

Universal 'humanity' in cosmopolitanism and human rights has always been reserved for those worthy of the adjective 'human' within the concrete designations of particular social circumstances. Despite Cicero's contention that we should show the same consideration towards fellow-citizens as towards our own family, and towards foreigners as towards fellow-citizens, universal 'man' remains a myth of common fellowship, for even Cicero did not view all, in practice, to be possessed of humanity.[23] Examples abound today and in recent history of acts of cruelty, oppression and dehumanisation; and in these contexts, the propagation of the fiction of a foundational essence of 'man' contributes to rendering such exclusionary practices invisible to their perpetrators as well as often their spectators.

For the proponents of cosmopolitan democracy, the potential for political and economic imperialism may not offset the ideal of global liberal democracy. In their quest for global justice, cosmopolitans set faith in a liberal utopia against disillusionment with a self-centered statism that prevents global concerns from being effectively addressed in the interests of 'all'. But if utopia is the ultimate, as it is also an impossible ideal that looks to the future to critique the present, then perhaps we need to imagine more desirable utopias to that end. We might, for instance, consider the 'oppositional postmodernism' of De Sousa Santos who describes cosmopolitanism as 'nothing more than the networking of local progressive struggles with the objective of maximizing their emancipatory potential".[24]

Alternatively we might consider the seminal post-Marxist critique of Hardt and Negri who view the freedom of movement of global citizens as crucial to a 'cosmopolitical liberation' that provides the multitude with the power to re-appropriate control over space.[25] But whatever version of cosmopolitanism or global citizenship we care to contemplate, there lies the contradiction of a double imperative. Derrida's deconstruction of Kant's cosmopolitanism shows this clearly: on the one hand there is an unconditional right of hospitality, but on the other hand it must have limitations "without which the unconditional law of hospitality would be in danger of remaining a pious and irresponsible desire, without form and without potency, and of

being perverted at any moment."[26] By exposing the inherent tension within cosmopolitanism, we expose the struggle that epitomises justice itself. It invites us to look beyond cosmopolitanism as a solution and to focus critique on the fundamental question it raises. In one form it asks: Who is the 'human' of human rights? In another form: Who is the 'citizen' of citizenship? And in the scriptures: Who is my neighbour? All questions beginning with "who" end in a foundational move that defines being in immanent relation to the stranger, the foreigner or the outsider. It is a classification that necessarily includes some and casts out others into the hinterland of the refugee centre and Guantanamo Bay or the graveyard of the unspeakable. It extends hospitality to the winners and denies it to the losers. The cosmopolitan question is nothing more than the problematic question of subjectivity at the heart of legal philosophy.

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[1] Hereafter referred to as the '1948 Declaration' and used as symbolic of all other human rights arrangements within international law.

[2] United Nations Development Program, *Human Development Report 2003* (Oxford: Oxford University Press, 2003), *available at* http://www.hdr.undp.org

[3] Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000) at 2.

[4] See for example, Chinkin, "International Law and Human Rights", in Evans (ed.) *Human Rights Fifty Years On* (Manchester: Manchester University Press, 1998) at 117-119.

[5] See generally, Archibugi (ed.), *Debating Cosmopolitics* (London: Verso, 2003).

[6] Baldry, *The Unity of Mankind in Greek Thought* (Cambridge: Cambridge University Press, 1965) at 155-156.

[7] Kant, *Perpetual Peace* (Cambridge: Cambridge University Press, 1970) at 107-108.

[8] Ibid, at 105.

[9] Booth, "Three Tyrannies of Human Rights", in Dunne and Wheeler (eds.) *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999) at 65.

[10] See generally Archibugi, supra note 5.

[11] Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995) at 228.

[12] See generally, Archibugi, Held and Köhler (eds.), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998).

[13] Held, supra note 11 at 228.

[14] Baldry, supra note 6 at 155.

[15] Alighieri, *De Monarchia* (Cambridge: Cambridge University Press, 1996).

[16] Hawthorn, "Running the World through Windows", in Archibugi, supra note 5, 19.

[17] Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002) at 144.

[18] Baldry, supra note 6 at 201.

[19] Douzinas, supra note 3 at 99.

[20] It is apposite to note that Article 2 of the 1948 Declaration does not even include homosexuals amongst the categories of humanity to which it applies.

[21] Booth, supra note 9 at 65.

[22] Rorty, "Human Rights, Rationality and Sentimentality" in Van Ness (ed.) *Debating Human Rights* (London: Routledge, 1999) at 119.

[23] Cicero, "*De Amicitia*", in Baldry, supra note 6 at 199.

[24] De Sousa Santos, *Towards a New Legal Common Sense* 2nd ed. (Cambridge: Cambridge University Press, 2002)

[25] Hardt and Negri, *Empire* (Massachusetts: Harvard University Press, 2000) at 400.

[26] Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001) at 21.

PROBABLE LEGAL CONSEQUENCES OF RAKEVICH V. RUSSIA

Anna Demeneva and Anton Burkov *

The seventh case from Russia to win in the European Court of Human Rights concerned the involuntary confinement of psychiatric patients. Anna Demeneva, the applicant's legal representative in the case, and Anton Burkov discuss what this result may mean for Russian legal and medical practice.

On 28 October 2003, the European Court of Human Rights ("the Court") ruled against the Russian Federation in the case *Rakevich v Russia*.[1] The Court decided that Russian legislation and practice on psychiatric treatment, in particular regarding the placement of individuals against their will in psychiatric institutions, did not meet the required standards of the European Convention on Human Rights (ECHR).

The Russian Federation ratified the ECHR in 1998. Since then, the Court has delivered nine judgments against Russia. The judgments require significant changes to Russia's legislation in the areas, for example, of criminal procedure and prison conditions,[2] administration of justice,[3] and the bailiff system.[4] The full extent of the legal consequences resulting from Russia's international human rights obligations can only be subject to supposition. Yet, as the cases brought before the Court are often strategically chosen, certain reforms may be anticipated.

From the strategic litigation perspective, this article analyses *Rakevich v. Russia*, a recent successful case brought against Russia. The applicant was represented by a lawyer from the Yekaterinburg-based NGO Sutyajnik, and advised by the London-based Interights. Of interest are the likely effects the judgment will have on the Russian legal and medical systems. The case is significant because it challenges many components of the Russian predilection for involuntary placement of individuals in psychiatric hospitals. Moreover, the Court's decision has the potential to engender major changes throughout Russian administrative law, both in theory and practice.

FACTS OF THE CASE

On 26 September 1999, the applicant was detained by an emergency team responding to a call from an acquaintance of hers. The hospital's representatives testified that the applicant "had remained awake throughout the night studying the Bible and weeping."[5] The applicant was placed in Yekaterinburg City Psychiatric Hospital where she was diagnosed with a serious mental disorder, which made her "a danger to herself."[6] She had no history of mental illness prior to this episode. After a follow-up diagnosis another medical opinion determined that she was not a person of unsound mind.[7]

Several days later she was diagnosed by the medical commission of the hospital as suffering from paranoid schizophrenia and in need of compulsory treatment. On 5 November 1999, after 39 days of detention, the Ordzhonekidzevskiy District Court of Yekaterinburg confirmed that the detention had been necessary, as the applicant had suffered from an acute attack of paranoid schizophrenia. In its findings, the court relied exclusively on assertions by the hospital's medical commission that the applicant's aggravated mental condition had put her physical integrity in danger. Despite repeated requests, neither the applicant nor her representative could gain access to the commission's report at any stage of the hearing. Moreover, the court hearing was conducted in the absence of the applicant and her representative, who were required to wait in the lobby while the court considered the medical documents in private session.

The District Court confirmed the necessity of the applicant's detention and sanctioned it for a period of six months. The applicant appealed the decision and, on 12 November 1999, she was released from the hospital. Over a month later, on 24 December 1999, the Sverdlovsk Regional Court dismissed the applicant's appeal and confirmed the District Court's decision that her detention had been necessary, justified and lawful. However, the Regional Court also held that compulsory care was no longer necessary for three reasons: the applicant was gainfully employed; she was a single mother; and, she had already spent a considerable time in the hospital.[8] Thus, the Regional Court ordered the authorities not to further prolong the applicant's detention.

In her petition to the Strasbourg Court, the applicant complained under Articles 5(1) and 5(4) of the ECHR. The applicant alleged that her detention in

the psychiatric hospital was in breach of Article 5(1)(e) of the ECHR, which reads as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
> (e) the lawful detention ... of persons of unsound mind...[9]

The applicant further complained that the judicial review of her detention was deficient in its scope, fairness and speed. She also maintained that, under the Law on Psychiatric Treatment and Associated Civil Right Guarantees ("the Law"), a detainee did not have a right to initiate a judicial review of detention. With respect to these complaints, the applicant relied on Article 5(4) of the ECHR, which reads as follows:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[10]

The Court found violations of ECHR Article 5(1)(e) – due to the 39 days spent in detention without review; and of Article 5(4) – as Section 33(2) of the Law does not grant patients the independent right to take proceedings to test the lawfulness of their detention in a court.[11] The Court held that Russia should pay the applicant EUR 3000 for non-pecuniary damage.[12]

STRUCTURAL PROBLEMS

In order to analyse the case effectively, we must identify the root conditions for its occurrence, namely, the structural problems that lead to human rights abuses within Russian legislation and judicial practice.

Legislation

The basic principles of psychiatric medical care in Russia are governed by the Law. Section 29 sets out the grounds for involuntary placement in a psychiatric facility:

> A mentally disturbed individual may be hospitalised in a psychiatric facility contrary to his will or the will of his legal representative without a court decision, if the individual's examination or treatment can only be carried out by in-patient care, and the mental disorder is severe enough to give rise to:
>
> (a) a direct danger for the person or for others, or
>
> (b) the individual's helplessness, i.e. an inability to take care of himself, or
>
> (c) a significant impairment in health as a result of a deteriorating mental condition, if the affected person were to be left without psychiatric care.

According to Section 33(2) of the Law, it is the detaining hospital that initiates the case in a court. Any involuntary detention and medical examination must be approved by the court prior to the actual detention or immediately after in case of emergency. A hospitalised person is a passive "defendant" in such a procedure with no right to challenge the lawfulness of the detention. Under Section 47(1) of the Law a hospitalised person is entitled to subsequent review of the detention and an appeal against unlawful actions perpetrated by the doctors in the process of treatment only. The failure of the Law to extend an adequate right to judicial review of the initial detention violates Article 5(4) of the ECHR and demonstrates the need for reform of the Law. Persons unlawfully detained must be granted the opportunity to challenge the official bodies which detain them. The case of *Rakevich v. Russia* challenged the absence of an independent right of persons to initiate proceedings against doctors and hospitals with the objective to test the lawfulness of their detention.[13]

Moreover, the Law does not outline the effective remedies that the detained person may seek for unlawful detention. By Russian law, cases of involuntary hospitalisation are dealt with under the terms of civil, not administrative, procedure. Consequently, the burden of proof for unlawful detention rests on the detained person – they must establish, after the fact, that the hospital or doctors had insufficient grounds for the involuntary detention. The Constitutional Court of the Russian Federation has stated that cases involving an individual seeking the judicial review of administrative proceedings by an official body

('administrative cases') should be regulated by administrative, not civil, procedure.[14] This is significant, given that the individual has fewer rights and guarantees under civil procedures than under administrative procedures. In administrative cases, there is a "presumption of guilt" or liability on the part of any official body. The procedure provides guarantees for an individual and mitigates the imbalance of power between an individual and an official body. Under civil procedures, a person is not entitled to such guarantees. Specifically, *Rakevich v. Russia* and other cases of involuntary detention should be considered under administrative procedure.

In the case of involuntary hospitalisation, the official body is the detaining hospital. By detaining a person, the public body fulfils its public function provided that it can be shown that there is a threat to public order or that a person's health is in danger. The instant case is clearly analogous to an administrative case. The applicant argued that by trying a case on compulsory hospitalisation under a civil procedure, the Russian Federation failed to ensure a detained person's right to judicial review (Article 5(4) of the ECHR). If rights are granted through the ECHR, they must be effective, enforceable and not merely symbolic.[15] However, in *Rakevich* the Court avoided consideration of this issue, stating that:

> …since the proceedings did not satisfy the core requirement of Article 5 § 4, and in view of the finding of a violation of Article 5 § 1 due [to] the excessive length of the proceedings in the present case, it is not necessary to assess the manner in which the proceedings were conducted…[16]

To resolve this problem demands, in short, reform of the relevant Russian laws. Consequently, persons unlawfully detained must be granted the opportunity to challenge decisions of the official bodies which detain them through administrative procedures.

Judicial Practice

Observation of Russian judicial practice with regard to involuntary hospitalisation supports the following conclusions:

- An individual in Russia who challenges his/her detention in a psychiatric hospital will almost always lose the case; "[o]nly 1 to 2 percent of all cases are ever overturned on appeal."[17]

- Section 34(1) of the Law provides that a decision will be reached within five days. But this time limit is invariably breached when district courts deal with cases of involuntary hospitalisation. There are ample grounds to regard such violation of the ECHR as not an isolated occasion. According to the Report of the Ombudsman of the Russian Federation there were violations of Section 34(1) of the Law in almost every region of Russia. The length of the proceedings usually exceeded one month.[18] Judges wishing to avoid visits to the hospital have been known to consider 'a collection' of such cases all in a single day.[19] In *Rakevich v. Russia*, the judicial decision approving the applicant's confinement was delivered 39 days after she was detained.[20]

- "[A]ll medical records are kept secret from patients in at least 70 percent of all Russian hospitals… the records are released only when requested by a court, prosecutor's office, or the medical profession's associations."[21]

- In delivering judgments, courts rely entirely on medical documents and make no attempt to independently ascertain or verify facts in support of their decisions. A mental disorder should be severe enough in order to justify a limitation of a person's right to liberty.[22] Unlike a medical examination, it is within the court's jurisdiction to establish a high level of mental disorder by evaluating the medical documents in regard to the particular circumstances of the case. However, this rarely happens in Russia. Yuri Savenko, the chairman of the Russian Association of Independent Psychiatrists, has described the situation:

  > The courts do not explore the details of each case of involuntary hospitalization. Instead, they base their decisions solely on the conclusions made by the panel of psychiatrists at the clinic directly involved in the case. In practice, many judges refuse to consider all sides of a case. "We don't understand this; we'll trust the doctors," is their justification.[23]

The *Rakevich v. Russia* case was designed to challenge the prevalent Russian practice of arbitrary detention without legal justification.

SIGNS OF REFORM IN THE RUSSIAN PSYCHIATRIC SYSTEM AND ADMINISTRATIVE JUSTICE

The European Court of Human Rights decisions are not everyday rulings. They can lead to major changes in a particular country. Full implementation of a judgment "might include, for example, reform or repeal of a law or a change in administrative practice […]"[24] For instance, in Austria the *Bulut v. Austria* judgment[25] led to the amendment of Article 35(2) of the Code of Criminal Procedure. The amendment required that "[o]bservations submitted by a public prosecutor in response to an accused's appeal on grounds of nullity (*Nichtigkeitsbeschwerde*) have to be communicated to the accused except when the prosecutor takes a position in favour of the accused or when the appeal is allowed in full (Resolution DH (97) 500 of 29 October 1997)."[26] Due to the *Airey v. Ireland* case[27] a Scheme of Civil Legal Aid and Advice administered by the Legal Aid Board, an independent body, has been set up in order to grant applicants an effective right of access to a court (Resolution DH (81) 8 of 22 May 1980).[28] The Chairman of the Russian Supreme Commercial Court, Venyamin Yakovlev, has not denied the possibility of changing Russian law in the event of an adverse ruling by stating that "… today's task is to analyse our procedural legislation and practice very carefully in order to put them in line with European standards."[29]

The Law was passed in 1992, but never effectively implemented, in particular its procedural as well as substantive rules of detention. After *Rakevich v. Russia* was heard, on 17 June 2003, and became the subject of a BBC report, based on interviews with Russian doctors,[30] signs that change might be on the horizon have increased. Recent changes in the field of administrative justice, for example, after a long delay a bill of the Law on Administrative Courts is due to be given its second reading at the Russian State Duma, have raised hopes that the Court judgments will compel Russia to implement more far-reaching administrative reforms. In spite of the fact that the Court did not decide on the appropriateness of dealing with cases of involuntary detention as administrative procedure, interviews with Russian high court officials, which appear in the official press with increasing frequency, confirm the likelihood that administrative cases will be considered under the administrative procedure.

Again, Yakovlev provides the best example: "In the future, Russia may create a separate system of administrative courts … A special feature of such [administrative] cases is that government defendants bear the burden of proving their innocence."[31] It was precisely the absence of such a burden of proof on the part of an official that was central to the applicant's petition to the Court. The government, the prosecution (*procuratura*) and the hospital medical staff should have had to prove that the applicant was indeed in need of treatment and that the threat to public order and health justified her involuntary detainment. In fact, however, she was hospitalised against her wishes, was given injections, and then was forced to face the court without any right to a defence.

CONCLUSION

In *Rakevich v. Russia,* the Court found violations of ECHR Article 5(1) and Article 5(4). The Court held that Russia should pay the applicant EUR 3000 in respect of non-pecuniary damage for the distress, anxiety and frustration brought about by her detention.[32] The ruling was not, however, all in the applicant's favour. The Court stated that it "is satisfied that the applicant's condition presented an "emergency"[33] and that it "does not consider that the applicant's detention was arbitrary."[34]

Having decided in the applicant's favour, the Court did not find it necessary to consider the allegation that, by treating cases on compulsory hospitalisation as civil procedure, not administrative, the Russian Federation does not guarantee the right to adequate judicial review (Article 5(4) of the ECHR). The lawfulness of this procedure therefore remains open to question.

Realistically, it will take much time and a great deal of selfless and dedicated work by those involved in the case to realise the "probable legal consequences" of the *Rakevich v. Russia* case. The Court left as many questions unanswered as it answered. The authors of this paper will continue to work on the issue, inquiring, examining and analysing the evidence, and particularly the judgment.

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[1] *Rakevich v Russia*, no. 58973/00, 28 October 2003.
[2] *Kalashnikov v. Russia,* judgment of 15 July 2002, *Reports of Judgments and Decisions* 2002-VI.
[3] *Posokhov v. Russia,* no. 63486/00, 4 March 2003.
[4] *Timofeyev v. Russia,* no. 58263/00, 23 October 2003.
[5] *Supra* note 1, at para 15.
[6] *Ibid,* at para 12.
[7] Savenko, "Rakevich vs. Russia. A landmark case in the European Court of Human Rights has exposed the deep flaws in Russia's psychiatric system, says the head of Russia's Association of Independent Psychiatry. Worse may be to come"*, the web-site of the Open Society Institute & Soros Foundations Network* (28 November 2003), 1 at 2, available at: http://www.soros.org/initiatives/mdap/articles_publications/publications/integrating_20031209/mdap_tol_russia.pdf
[8] *Supra* note 1, para 18.
[9] *Ibid*, para 19.
[10] *Ibid*, para 36.
[11] *Ibid*, para 35, 46.
[12] *Ibid*, para 53.
[13] *Ibid*, para 46.
[14] Judgment of the Constitutional Court of the Russian Federation, 28 May 1999 No 9-P (Rossiyskaya Gaseta, 9 June 1999). This decision defines the general rules concerning the administrative procedure and emphasizes the distinction (in Paragraph 3 Article 118 of the Constitution) between civil, administrative and criminal procedures as resulting from "the different character of cases, the nature of sanctions, and their legal consequences…"
[15] *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-13, para 24.
[16] *Supra* note 1, at para 47.
[17] *Supra* note 7, at 2.
[18] Mironov, "A Special Report Written by Russia's Human Rights Ombudsman On Respect of Rights of Citizens with Psychiatric Disorders", *the web-site of the Russia's Human Rights Ombudsman* (16 June 1999), at: http://www.ombudsman.gov.ru/docum/sppsix.htm
[19] Demeneva, "Psychiatrists are not malefactors. However, a strait-jacket should not deprive a person his rights," 7 *Your Right* (2004), 1 at 1, available at: http://www.sutyajnik.ru/rus/library/articles/2004/psihiatri_ne_zlodei.html
[20] *Supra* note 1, para 35.
[21] *Supra* note 7, at 2.
[22] Winterwerp v. Netherlands, judgment of 24 October 1979, Series A no. 33 (1979) 2 EHRR 387, para 39.
[23] *Supra* note 7, at 2.
[24] Boyle, "Europe: The Council of Europe, OSCE and the European Union" in Hammum (ed.) *Guide to International Human Rights Practice* (New York: Transnational Publishers, Inc., 1999), 135 at 152.
[25] *Bulut v. Austria*, judgement of 22 February 1996, *Reports* 1996-II.
[26] "Effects of Judgments or Cases 1959 – 1998", *the Web-site of the European Court of Human Rights,* at: www.echr.coe.int/Eng/EDocs/EffectsOfJudgments.html
[27] *Supra* note 15.
[28] *Supra* note 26.
[29] Yakovlev, "Commercial courts cases influence on legislation improvement", 1 *Russiyskaya Ustiziya,* (1999), 20 at 25.
[30] "Russia's Mental Health Revolution: Doctors in Russia are Spearheading a Revolution in the Way Patients with Mental Illnesses are Treated", *BBC NEWS UK edition* (28 June 2003), at: http://news.bbc.co.uk/1/hi/health/3026648.stm
[31] Yakovlev, "Administrative Justice", 117 *Rossiyskaya Gazeta* (2003), 4 at 4; see also, Yakovlev, "Statement of the Chairman of the Supreme Commercial Court of the Russian Federation to the Journal State and Law", 6 *State and Law* (2003), 1 at 5.
[32] *Supra* note 1, para 52, 53.
[33] *Ibid*, at para 29.
[34] *Ibid*, at para 30.

FEATURE ARTICLE: SIERRA LEONE AT TWO - READY FOR TAKE OFF?

*Linda Darkwa and Joe Hindovei Pemagbi**

Two years after the formal declaration of an end to the conflict in Sierra Leone, we are in a good position to look at the post-conflict situation in respect of structural development and child victims of war. This article is written from day to day observations of children in Freetown, the capital of Sierra Leone and in surrounding provinces. We write as people who have lived and, in the case of Joe, continue to live in Sierra Leone and who are in tune with the fears, hopes, aspirations and dreams of the children. Interweaving the present and the past, we contrast the situation of pre-conflict Sierra Leone with post-conflict Sierra Leone, aiming to point out the marked improvements in the situation of children and highlight areas that may require some more effort. Although the article focuses on Sierra Leone, some of the issues discussed herein can be generalised for many West African countries.

In January 2002, the chapter of the decade old civil war that had engulfed Sierra Leone was finally declared over. Sierra Leone began the long journey towards peace-building. As various programmes are being implemented to ensure sustainable peace and development, we take a look at the situation of the children of Sierra Leone whose lives were interrupted for a decade and examine how the pieces can be picked up.

BRIEF HISTORY OF THE WAR

23rd March 1991 marked the beginning of Sierra Leone's walk into bloodshed, pillage, plunder and virtual anarchy - a walk that would go on for ten years and destroy a country that had already suffered from years of misrule and instability. Bequeathed with the legacies of colonial rule and coupled with political misrule, corruption in almost all sectors of society, and external interventions in the form of aid and conditionalities, Sierra Leone was a failing state before the insurrection of 1991.

The internal problems had taken their toll on the country before the advent of the war and this was to impact on the initial support received by the Revolutionary United Front (RUF) in the early stages of the war. Under the patronage of Liberia's Charles Taylor, a loose band of about sixty men under the leadership of a number of people, notable among them Foday Sankoh, Abu Kanu and Rashid Mansaray, launched two initial attacks in Sierra Leone; one in the east and the other in the South of Sierra Leone. Angered at the role played by Sierra Leone in providing a launching pad for the activities of the Economic Community of West African States' Monitoring Group (ECOMOG) to prevent his early takeover of Monrovia, Charles Taylor swore revenge. Capitalising on the widespread dissatisfaction in Sierra Leone and the spill over of the Liberian conflict into the border towns of Sierra Leone, Taylor and his men struck Sierra Leone. Allegedly, these men and their recruits were to rid Sierra Leone of corruption and to restore "genuine democracy".

Four days after they had arrived in Sierra Leone, the number of people fighting alongside the RUF had increased from 60 men to about 300 people. The war was to last a decade and leave in its trails the destruction of an entire generation. The progression of the war saw the active recruitment of children by all factions into their ranks. Sooner, rather than later, children were actively fighting the war. Wanton destruction and arson were carried out by children high on drugs and driven by fear. Some of the children attained the ranks of Commanders and Generals and wielded the power over life and death between their fellow children and adults alike.

The Sierra Leonean armed conflict is interesting because although it began as a war between the RUF and the government, many developments resulted in an increase in the number of fighting factions. In the midst of the bigger war between the government and the rebels, there were three coup d'états, a break away of a part of the military, as well as other small splinter organisations. When it became obvious that the security forces were unable to protect the entire population from the atrocities of the rebels, local hunters and members of the various secret societies organised themselves into community watchdogs to protect their communities. However, what began as community watchdog committees later developed into an armed faction under the generic name of Civil Defence Forces (CDF), which was heavily relied upon by the government of President Kabbah after he assumed power. All these groups recruited and used children and there were times where children who had fled from one fighting faction were re-recruited by another group. Depending on the group re-recruiting them, these children suffered various degrees of punishment.

SIERRA LEONE'S CHILDREN BEFORE AND DURING THE WAR

Amnesty International (AI) reported that an estimated five thousand child combatants were serving under both government and opposition forces in the Sierra Leone armed conflict, whilst five thousand others had been recruited for labour among other armed groups such as the CDF.[1] However considering data on children who actually went through the disarmament process, AI's figures of ten thousand direct and indirect combatants seem to be on a low side. It is estimated that about six thousand children from the RUF and between three thousand to four thousand children from the CDF were disarmed, having directly engaged in combat.[2] Questioned on the use of children by the Armed Forces Revolutionary Council (AFRC), Ibrahim Bangura, broadcasting officer of the National Committee for Disarmament, Demobilization and Reintegration responded that although the AFRC recruited children, they were not used in direct combat.[3] There were many more children involved in the armed conflict, but available statistics seem to be focused only on the so-called direct participants of war, to the neglect of civilian children who were equally affected by the armed conflict.

Long before the outbreak of the war, children in Sierra Leone suffered various human rights violations. The first identifiable reason for this is that children in many parts of Africa, in general and Sierra Leone in particular, were, and are to an extent, still considered as 'objects' and not 'subjects' of the law. There were virtually no laws to protect Sierra Leone's children except for the *Prevention of Cruelty to Children Act of 1926* and the *Children and Young Persons' Act of 1945*. The former defined a child as a person under the age of sixteen years[4] whilst the latter defines a child as anyone under the age of fourteen years. The Children and Young Persons' Act of 1945 therefore lowered the threshold for the end to childhood from 16 to 14 years. Until the signing of the Convention on the Rights of the Child, Sierra Leone's children were thus defined as anyone below the age of fourteen. However, in practice, the end of childhood was determined on a number of variables which are not necessarily based on age.

Poverty, ignorance and a general lack of concern for children by the ruling elite caused many children to stay out of school, engage in dangerous jobs such as mining, and resort to child prostitution. According to data available from the 1985 population census, nearly 92% of females aged 5 years were functionally illiterate whilst 83% of their male counterparts fell in the same category.[5] According to the same report, "over 70% of the population aged 5 and over have never been to school, implying a high level of illiteracy". The situation is worse among females. The Census of 1985 showed that children up to 17 years formed 47.3% of the entire population. Yet, from available data, it is obvious that this group of people were very much neglected. This neglect contributed to the high use of children both as objects of and for attack in the war.[6]

Apart from the neglect of children by the State, long before the armed conflict, the high incidence of poverty degenerated the structured African family system in Sierra Leone. At the middle of the war, the warring factions began recruiting children from mines and the streets who were under no parental control.[7] As vulnerability is exacerbated in times of violent conflict, the children of Sierra Leone who had become neglected were easily used and abused in the period of war.

Added to this, in Africa, governments tend to carry out their international obligations towards children inefficiently, and without effective input from the international community. For example, despite obligations under international law to provide free primary education, many governments are unwilling to make available the requisite resources to the educational sector. The quality of the free basic compulsory education being offered in most African countries is poor to say the least. Inadequate infrastructure such as school buildings and furniture, as well as scarce human resources and teaching materials are contributory factors to the poor quality of education being provided in Africa. These factors serve as disincentives to pupils and parents alike, who believe that, due to its poor quality, education is simply a waste of time.[8] At the end of primary and junior secondary education, most children are neither qualified to attain higher education nor do employable skills.

Thomas Turay, acting director of Caritas Makeni, a locally based Non-Governmental Organisation (NGO), pointed out that in theory education is free in Sierra Leone but, in practice, this is not the case, because parents have to pay for all but subsidised tuition.[9] In a separate interview, Francis Lahai concurred that, "the freedom is just words. In practice, it is not done. School facilities are not enough for children to get back into schools. Some districts have only one secondary school whilst some

chiefdoms have none. Parents have to pay extra charges".[10] When asked to cut down on their budget, African governments tend to cut down spending in the educational sector whilst maintaining high budgets on the defence sector - a practice that does not meet resistance from the donor community and only a thin protest from the international community. Poor parents are unable to offer children education or the needed employable skills in a world of technological advancements. Slowly, a class system is emerging in most African countries, Sierra Leone included, where "[f]rustrated, poor and hopeless, many young people resort to menial and sometimes hazardous jobs such as small scale mining, timber felling and transportation, stone quarrying etc"..[11] Parents who can afford to, send their children to private schools where success is often guaranteed, whilst those who cannot afford to resort to the so-called 'free education' offered by the government.

THE NEW SIERRA LEONE

Post-war Sierra Leone has seen a marked shift in the perception of children. One of the advantages of the influx of aid workers to Sierra Leone has been the legacy of human rights. The ordinary person in Sierra Leone has received some education on human rights, which includes the rights of children. Governmental policy reflects the changed attitude among the ruling elite on the rights of the child. For instance, there has been an initiation of real free education for the girl child in some deprived provinces. The government has begun implementation in the Kambia and Bombali districts of the North and the Kailahun district in the East and intend to implement the programme nationwide.[12]

To address the issue of children affected by war, a Commission for War Affected Children was established, charged with the duty of ensuring that their concerns are translated into policy and addressed with adequate resources. A number of international and local NGOs have also been instrumental in the rehabilitation of children affected by the war and in the quest to accord children their rights in Sierra Leone.

Nevertheless, despite the modest gains made in the promotion and protection of the rights of children, a lot still remains to be done. As has been mentioned, emphasis has been placed on the so-called direct participants of war. This has resulted in a neglect of a vast majority of civilian children who have simply been ignored or whose needs have been immersed into the programmes designed for the direct participants of war.

Ten years of fighting has meant that many children lost out on formal education and are now being trained in the acquisition of employment skills for the first time. Applauding the many initiatives to equip those in this category, we remain concerned that the skills being imparted to these children may not necessarily make them employable. Many of the children who have undergone the skills training programmes studied under local craftsmen and women. Although they receive certification for their apprenticeships, they are not standardised and it is unknown if the certificates will be acceptable outside Freetown.[13] Currently, there is no known provision in the educational sector to enable those in this "mid-level" sector to upgrade their skills by way of writing the standard examinations for the City and Guilds Certificate or any other such certification that may be available in Sierra Leone. Will these children be able to make inroads into higher vocational learning outside their country where they may be able to perfect the skills they have acquired using modern technologies to add finesse to their handiworks? If they are unable to add value to the basic skills learnt how will their products compete effectively on the world markets against those with the perfect finish of advanced machines?

The widespread amputation of limbs of children due to war injuries has rendered a great proportion of an entire generation disabled. Although this is a big problem, there is very little provision for such children. Disabled children are very unlikely to benefit from mainstream educational systems, as their peculiar situation demands specific educational tools to facilitate their learning. The tools required are non-existent in Sierra Leone, which means that many of those affected in this way by the war will grow up without education.

As an example, one afternoon, as we were making appointments for interviews in the office there was a knock at the door. At the door was an amputee boy of about fourteen years, who had learnt to carve dolls depicting the suffering of children who had suffered a similar fate as him. He would go from one office to the other in the offices of the Truth and Reconciliation Commission for Sierra Leone selling his craft. Although he was able to make some sales, many people purchased the doll out of pity and admiration for his determination to make something out of his life, rather than the beauty of his wares. Although this young boy was determined, he simply

lacked the tools to realise his dreams and so he used crude methods of carving out of cheap wood with a knife and the power of his imagination. Sadly, although his dolls are powerful tools of expression, they will never be able to compete in the art market.

What happens to an entire generation whose productive lives have been limited by the atrocities meted out to them either by adults or at the command of adults? The Aberdeen amputee camp in Freetown is a reflection of the neglect suffered by all those who live there – adults and children alike. Initially meant to be temporary structures, the camp, which has become dilapidated, serves as home to many of Sierra Leone's amputees and people disabled through the war.

CONCLUSION

Post-conflict reconstruction, especially after prolonged armed conflicts such as Sierra Leone experienced, is a Herculean task that requires huge resources. It ranges from practical reconstruction of infrastructure to the development of human resources, capacity building for civil society and the security forces, as well as educational reforms that will address the needs and demands of the new state. It also involves laying down the foundation of a new state based on the tenets of democracy and human rights. Post-conflict reconstruction offers such states the opportunity to chart new courses and carve out new rules - it permits the redefinition of age-old customs and traditions.

This is the reason why Sierra Leone should not be abandoned by the international community at the end of the United Nation's mission. The exit of the United Nations Mission in Sierra Leone (UNAMISL) and the demands of other conflict and post conflict countries have led to a massive pull out of NGOs from Sierra Leone. UNAMISL is expected to make its final exit in June 2005 and this would mean that the entire security of the country would be dependent on the local security forces. While we do not believe that Sierra Leone should continue to be dependent on the NGO community, a lot of capacity building is still required to sustain the foundations that have been laid. As the "emergency" NGO teams pull out, we hope that others help in the peace-building efforts to consolidate the gains made. Sierra Leone has come a long way since the end of the armed conflict, but there is still more to be done to ensure a secure environment for all, including children. Many children in Sierra Leone have lost faith and hope in themselves, their abilities, and their country. There are practical ways of helping them regain their hope, ways of assuring them that all is not lost.

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[1] Amnesty International, "Sierra Leone Childhood-a Casualty in Conflict", AI Index: AFRSI/069/2000, 31 August, 2000.

[2] Independent Interview conducted in Freetown by Linda Darkwa with Mr. Ibrahim Karim Bangura, Broadcasting Officer, National Committee for Disarmament, Demobilization and Re-integration on 20th August 2003.

[3] Ibid.

[4] Art 2, Chapter 31, Prevention of Cruelty to Children Act, CAP31, 1926.

[5] "Situation Analysis of Women and Children in Sierra Leone", 1999, p. 67

[6] Richards P., *Fighting for the Rain Forest War Youth & Resources in Sierra Leone*, (Oxford: James Currey, 1996), Ch. 2; see also Abdullah I., "Bush path to destruction: the origin and character of the Revolutionary United Front/Sierra Leone," 36, The Journal of Modern African Studies, (1998), 203 at 235

[7] This is a view echoed throughout the various interviews and Focus Group Discussions held with Non Governmental Organisations and Officers from some Ministries by the authors in Freetown and Makeni in Sierra Leone

[8] Interview conducted by Linda Darkwa in Freetown on 23rd July 2003. The interviewee pleaded anonymity.

[9] Independent Interview conducted by Linda Darkwa with Thomas Turay at the office of Caritas Makeni, Freetown on 23rd July, 2003.

[10] Independent Interview conducted by Linda Darkwa with Francis Lahai, Reintegration Officer, Ministry of Social Welfare, Gender and Children's Affairs on 23rd July, 2003.

[11] Richards P., Supra note 6 at 10.

[12] As part of the project, girls in these Provinces receive uniforms, stationery and have their tuition paid by the state.

[13] Unlike standardised recognised certificates for vocational and tertiary education such as the City and Guilds Certificate, those given at the end of the skills training programmes are not universally recognised. They can be used in Sierra Leone but it is unsure if they will be acceptable outside Sierra Leone.

"BUSINESS AND HUMAN RIGHTS – CLASHES OF VALUES?": INTERVIEW WITH SARA MAGNUSSON, SRI ANALYST AT ETHIX SRI ADVISORS

*Eva Chinapah**

Ethix SRI Advisors (Ethix) is a research and analysis company, based in Stockholm, Sweden, specialised in screening investment portfolios on the basis of the United Nations Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises[1]. The service provided by Ethix to institutional investors and asset managers is research, analysis and advice to further socially responsible investments (SRI), but also to address issues of corporate social responsibility (CSR). This includes identification of companies involved in situations in which human rights, including environmental norms, are threatened or violated. In their work, Ethix keep a continuing dialogue with UN agencies such as the ILO, civil society organisations like Human Rights Watch, Earth Justice and Transparency International and multinational companies.

Sara Magnusson is an SRI analyst at Ethix and has been working there since September 2003. She is a lawyer specialising in international public law, with a background in CSR. She is also a previous student at the University of Nottingham. Eva B. Chinapah conducted the interview on 25th March 2004 in Stockholm.

A friend once told me that she found it impossible to combine business and human rights for the simple reason that they belong to two very different disciplines: one is focused on profit making and the other on empowerment of human beings usually against a more influential aggressor, the state. How do you react to this?

We have to be able to communicate both with the corporate world and the civil society. It is the institutional investors who buy our service and it is they who ultimately decide on what to do with the information that we provide in our analysis. The institutional investor is the one capable to practice direct influence on the behaviour of companies by, for example, excluding them from their portfolio. I believe that you can combine business with human rights. If it was not possible you could claim that companies do not have any responsibility at all for violating human rights. Ethix consider that companies do have a social responsibility that stretches beyond national legislation not providing for such a responsibility.

What is the difference between CSR and SRI?

CSR is the abbreviation for corporate social responsibility, while SRI refers to socially responsible investments. CSR is more concerned with the extent of the responsibility of companies. Can companies be held responsible for violating human rights? Shall human rights norms comprise company behaviours or solely that of states? Social responsibility extends beyond legal responsibility. In strict terms, companies can claim that their responsibility does not extend beyond what the law stipulates. NGOs, on the other hand, generally consider that social responsibility of companies should be extended.

Could you say that there is an area of human rights that companies most commonly violate?

It varies a lot. Unfortunately, I can not reveal any information with regard to the companies that we are actually screening. Local communities are those usually affected by a company's behaviour for example, oil companies. The problems are usually industry specific but our analysis is not. We put the violations into context in our research, meaning that a violation in a specific case will have to be part of a bigger problem. The context defines corporate social responsibility in a specific case meaning that it set the frames for what can be expected from a company in the situation of concern.

An illustrative example could be marketing and handling of pesticides, used to control insects in crop production. Inadequate precautionary measures in the marketing of such pesticides can lead to severe consequences for people in a country with a high rate of illiteracy, diverging languages and insufficient regulatory control of pesticides. Given the context in such a situation, Ethix believes that it can be expected from a company that it is socially responsible to reduce the risks of misuse of the company's product in accordance with industry codes and the United Nations Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises.

Are the recommendations issued by Ethix exclusively based on its own conclusions?

Yes. Our recommendation to exclude a company from an investment portfolio is based on the analysis of a company's social responsibility taken and conduct in a specific situation of concern in which human rights are threatened or violated. When we recommend clients to exclude a company from investment we have concluded that the company has not taken sufficient social responsibility, for example in a case of marketing of its products or anti-union discrimination of its workers.

On the other hand, there are companies that establish codes of conduct and invest in resources to ameliorate their behaviour and express their good will to do so. Those companies are usually put on a monitor list where we supervise the process they have initiated. We try to avoid punishing the same company twice as a result of the fact that Ethix wants to produce analysis that leads to companies taking social responsibility.

Could you describe an ordinary working day as a SRI advisor?

The information we include in our research and analysis is usually based on information provided by civil society. We perform a daily screening that provides us with information concerning the behaviour of companies on the international market. We focus on incidents related to the UN Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises. We are aware of the fact that there does not exist consensus on the compulsory application of those norms since some refer to them as the "draft" norms. In principle the norms do not add anything substantially new to the debate on the responsibilities of companies.

However, they do specify the extent of such a responsibility. We screen the company that an investor wants us to analyse against the specific sources that we use. Those are international organisations, NGOs and companies. The screening will help us to see whether the name of that company appears in connection with any direct or indirect violation of human rights. Such a violation could be, for example, the exploitation of child labour by local suppliers. If we receive that kind of information we proceed by searching for more indications to verify and substantiate the initial information. If we finally reach the conclusion that the exploitation of child labour is actually occurring, we contact the company and inform them of the information we have retrieved about their local supplier. The next step is to ask the company if they have adopted any means by which to deal with suppliers exploiting child labour. When this information is received, we perform an analysis of the company's social responsibility taken and if they have any codes of conduct, policies, and management system to deal with possible violations.

Our point of departure is "the lowest common level of decency". This means that we assess whether the company has a social responsibility to address the situation of concern due to the norms we apply in the analysis. Do they take any action to improve their practice? We ultimately issue a recommendation on the basis of one of three levels. In the cases we issue a recommendation, the company concerned is or has been, directly or indirectly, involved in situations in which human rights, including the environment, have been violated. The first, "exit", is a recommendation to exclude the company from the portfolio because the company is assessed as not having acted socially responsible for people or the environment in the given case. Secondly, "monitor" is recommended if the company is in an adequate process of acting socially responsible for people and the environment. Thirdly, "early warning", when a company may be assessed as not acting socially responsible for people and the environment, but it is to early to come to a conclusion due to the time aspect given. In these cases Ethix wants to give the companies a chance to address the situation of concern that we are analysing.

How often do you recommend an investor to exclude a company from their portfolio?

It does not happen too often. The first screen often provides us with information about approximately 1500 companies. The second screen leaves in about 200 companies that we proceed with. At the moment we have 11 companies that we consider as not acting socially responsibly and we recommended them for "exit". But new companies are continuously added to our screening process. Currently, we have about 30 companies that have initiated adequate proactive work to confront the situations of concern involving human rights abuses and to prevent it from happening again.

Could one say that Ethix is trying to further the respect for human rights and make companies responsible for violating them, using a corporate language rather than a legal language of responsibility?

Ethics is not law. When it comes to ethics you have to take into account several other aspects. If a company is behaving unacceptably in a certain country without efficient national legislation to make the company legally responsible for its behaviour, the behaviour as such could, even if not legally, be considered as reprehensible on an ethical basis. Companies should be able to be held socially responsible on that basis and should respect human rights regardless in which country they operate.

Did you experience any moral dilemma in working with human rights as you do in relation to the corporate world and not actually working with the victims of corporate violations of human rights?

We believe that we can affect companies to take an increased responsibility for people and the environment. Investors buy our analysis and we believe that in the long run it can affect corporate behaviour in a positive way in implementing human rights. If shares are not bought in companies violating human rights it may eventually affect the value of that company negatively. There are so many other aspects to an incident that are perhaps not included in the final analysis. This is because the screening process and analysis need to be easily accessible, transparent and methodological. As a result all situations we get information about are not assessed, since they do not fulfil the analysis criteria. This sometimes makes me feel trapped in a moral dilemma, realising that under these circumstances I can not do more in the given situations. But it is much better to do something than not being able to do anything at all!

Information about Ethix SRI Advisor can be found at www.ethix.se.

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[*] LLM candidate, University of Nottingham.
[1] E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1

REPORT: UNIVERSITY OF NOTTINGHAM ANNUAL HUMAN RIGHTS CONFERENCE 2004

Yassin M'Boge and Katherine Chan[*]

The Annual Student Human Rights Conference took place on 13 March 2004 at the University of Nottingham Portland Building. The purpose of the Conference was to provide a forum for students in the early stages of their academic career to engage in presenting their research and in academic debates with leading academics of the field. This year's theme was "Developing the Notion of Human Rights: Human Rights in Development", where we attempted to link issues of development and human rights in our discussions.

The keynote speaker, Professor Upendra Baxi from the University of Warwick, opened the discussion by examining the virtues and vices of the UN Draft Principles for Transnational Corporations. The Principles sought to impose an obligation on States to ensure that transnational corporations and other business organisations respect human rights. Dr. Margot Salomon from the University of Essex addressed the familiar issue of the right to development. Her analysis focused not on whether there was a right to development, but on what value it might add to the discourse on human rights and development. In the second session Michael O'Flaherty, Co-Director of the Nottingham Human Rights Law Centre, discussed how the rights-based approach to humanitarian action could be used in understanding how to link human rights with development. Finally, Laure-Helene Piron from the Overseas Development Institute concluded the list of speakers' presentations by reviewing the extent to which human rights considerations are being integrated into the work of bilateral aid agencies.

Eleven student were invited to speak on the day, chosen from more than twenty-five abstracts that were submitted in response to the call for papers. The student speakers came great distances for the conference – with one coming from the Centre for International Sustainable Development Law, Canada, another from the University of Geneva and four from Ireland. The theme for the Conference also attracted students from a non-legal background; one student speaker was from the Sociology Department of Oxford University. The student presentations were divided into two groups running simultaneously in the morning and afternoon sessions. The discussions in the morning were concerned with more general themes related to development and human rights, with the afternoon presentations focusing on specific examples and case studies. The presentations were the highlight of the Conference, evident from positive comments made about them from those who had attended.

Over one hundred people, among them students, legal practitioners and academics, attended the Conference. The Conference attracted students from over ten universities from across the UK.

The success of the Conference can be attributed to the high academic standing of the guest speakers who were invited, the quality of the student presentations and the hard work of the nine students of the Student Conference Committee.

On behalf of the Student Conference Committee we would like to thank: the Co-Directors of the Human Rights Law Centre, Professor David Harris and Mr. Michael O'Flaherty; the Head of the Law School, Professor Robert McCorquodale; and the Secretary of the Human Rights Law Centre, Mrs. Catherine Lovesy. We hope the success of the Conference will continue for years to come.

For further details of upcoming conferences, see: http://www.nottingham.ac.uk/law/hrlc/.

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[*] The authors are LLM Candidates at the University of Nottingham and were Conference Committee Members.

PUTTING HUMAN RIGHTS ON THE INTERNATIONAL ECONOMIC AGENDA: A CASE STUDY OF THE RIGHT TO WATER

*Andrew Lang**

INTRODUCTION

One of the areas in which the cross-fertilisation of human rights and development concerns has been most productive is the area of international trade. By cross-fertilisation, I mean at least two things. First, human rights language is being used to articulate some of the concerns of developing countries and development institutions relating to the international trading regime. Second, the respective agendas of human rights and development communities are influencing one another in relation to international trade. Human rights institutions and networks are becoming interested in issues which originally arose in the development context, and vice versa, with the result that the work of the two systems is, in my view, becoming increasingly coherent and more persuasive.

In this short piece, which represents a summary of a presentation given at a conference hosted by the Human Rights Law Centre of the University of Nottingham, I want to make some comments on one example of the convergence of human rights and development in the context of trade – namely, the problem of water supply. In the first part, I give a brief account of the issue. I outline the concerns which human rights and development bodies have voiced, that international trade law may negatively affect water policy in developing countries. I present, in summary form, the core preliminary results of my ongoing research on this issue. In the second part, I outline six reasons why I believe it is useful to address this problem in human rights language. This second section provides the basis for a more general intervention into the broader question of the desirability of a rights-based approach to development.

THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) AND THE PROBLEM OF WATER

There are many aspects to the problem of water supply in developing countries. While the nature of the problem varies considerably – particularly between rural and urban areas – issues such as inadequate or overextended infrastructure, corrupt or incompetent management, inadequate financial resources, outdated technology and pollution or shortage of water resources, can all contribute to a failure of water distribution networks to meet the goal of affordable access to safe water for all. But one issue, more than any other, has proved to be particularly controversial, and has polarised the debate on how to go forward. That is the issue of foreign investment in the water sector – or water privatisation and structural reform more generally. Designed as a solution to some of the problems just mentioned, such foreign investment is perceived by its critics to be worse than the problem itself.[1]

The concern, simplified, is that private operators of water networks may undermine equal and affordable access to water through their pricing, investment and other operational decisions. It takes highly developed governance structures to regulate the operations of private monopolies so as to ensure that they act in the public interest. And, so it is argued, international legal protections for foreign investors (such as those protections found in the GATS), undermine such governance structures by making them more difficult to design and operationalise.

This kind of argument has been made in the UNDP-sponsored publication 'Making Global Trade Work for People'.[2] It is also the subject of a report of the High Commissioner for Human Rights entitled 'Liberalisation of trade in services and human rights'.[3] The success or failure of water sector liberalisation, this report argues, depends heavily on how effectively the state performs its function of monitoring, overseeing and directing private water operators through well-designed regulatory regimes:

> [i]n human rights terms, the need to regulate … is in fact a duty to regulate; the obligation on States to 'fulfil' human rights requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.[4]

There is a danger, the report continues, that the GATS constrains the kind of regulatory environment that governments can put in place, and in this way undermines their ability to fulfil their international human rights obligations:

> Many government regulations are measures that can come within the scope of the GATS. While GATS acknowledges Governments' right to regulate in its preamble, the question remains as to the extent to which GATS can affect government regulations that might have an impact on trade – including government regulations relevant to the promotion and protection of human rights.[5]

The High Commissioner's sentiments echo concerns which have been voiced by a number of human rights NGOs.[6]

The category of 'government regulations relevant to … human rights' is potentially a very broad one. Regulation as diverse as price controls, operator subsidies, consumer subsidies, water quality regulation, service quality regulation, minimum investment targets, and customer disconnection regulation can all be used by states as important parts of a regulatory regime designed to fulfil their international human rights obligations. Is it reasonable to think that these forms of regulation might be constrained by the GATS? The following represents a short summary of some key findings of a much longer and more detailed forthcoming paper on this issue.[7]

First, it is important to bear in mind that the general problem of disciplining domestic regulation is both a fundamental and an immensely difficult issue for the trade regime to resolve. Domestic regulation of all kinds – including tax law, competition law, consumer protection law, health and safety law, and so on – can be, and has been, used to discriminate against foreign goods and services in covert ways. At the same time, such regulation can disadvantage foreign goods and services *accidentally*, or as a necessary by-product of pursuing a legitimate objective. Too strict disciplines on domestic regulation therefore run the risk of unacceptably limiting the policy autonomy of states. Too lax disciplines, however, can mean that international trade commitments can easily be undermined.

This problem is particularly acute in the water sector. The sector has been historically associated with a high degree of political patronage, and probably more than its fair share of corruption and political interference.[8] Such cultures are difficult to eradicate, and in a context in which regulatory decisions are often highly discretionary, regulatory systems still partially experimental, and privatisation often subject to a great deal of political resistance, so-called 'regulatory risk' remains one of the key concerns of investors looking to enter a foreign market. Such investors will expect the GATS to contribute to the creation of a transparent, predictable and non-discriminatory regulatory environment. But at the same time, there are numerous reasons why social regulation may disproportionately disadvantage certain foreign investors for apparently legitimate reasons. It may be that regulatory burdens vary from operator to operator because they are imposed at a regional (rather than national) level, or because the government has different social priorities in different regions, or because the demographic make-up of consumers in a particular region requires special treatment, or because of structural differences in regional regulatory environments, or because of differences in the initial tender processes leading to privatisation. Drawing a line between *legitimate* and *illegitimate* discrimination in the water sector can be an exceedingly difficult political and juridical task.

Second, we have to remember that the trade regime's approach to disciplining domestic regulation is in the nature of an evolving compromise. It is a compromise in that it neither exempts social regulation entirely from scrutiny, nor requires such regulation to be strictly trade-neutral in its effects. Instead, the GATS approach to domestic regulation is an amalgam of overlapping and often ambiguous obligations, requirements, exceptions, qualifications and safeguards, which make it difficult to characterise the approach of the text as a whole. And this approach is *evolving*, not only through the processes of interpretation and application in the course of dispute settlement, but also through the gradual development of rules of behaviour, and inter-subjective understandings, between players within the trade regime.

As a result, it is very difficult to say that particular kinds of regulation are unambiguously prohibited or allowed. Rather, the claim is a much subtler one – namely, that the broad contours of the compromise have recently been shifted, so that domestic regulation is now subject to relatively greater oversight, and relatively stricter scrutiny than before. It is possible to identify key concepts or provisions in trade law, the interpretation of which

will provide strategic rhetorical battlegrounds on which this fundamental political compromise will be successively re-negotiated and re-shaped.

The governmental authority exclusion in Article I:3 is one example. If given a wide interpretation, it could perhaps be used to protect much water sector regulation from scrutiny. Its wording, however, suggests a narrower approach, excluding from protection measures in respect of services provided by private operators to consumers, and to public water authorities, as well as measures which cover services provided by both public and private operators. Much also will depend on the meaning given to the concept of 'like services and service suppliers' in Article II and XVII of the agreement. It is an open question whether the forms of competition between service suppliers in the water industry are sufficient to count as a 'competitive relationship' for the purposes of a determination of likeness. Similarly, the WTO Appellate Body is currently in the process of developing its jurisprudence on the extent to which regulatory distinctions are relevant to a determination of likeness, as well as the extent to which regulatory purpose is relevant to a determination of 'less favourable treatment' in the same articles. And finally, the application of Article XIV(b), safeguarding measures for the protection of human health will be crucial. How will measures which have dual, or ambiguous purposes be treated under this provision? How will the 'least restrictive means' test be applied?

It is impossible to give a detailed legal analysis of these provisions here.[9] Suffice it to say that such an analysis gives real, possibly substantial, cause for concern, though much remains uncertain. In this context, it is in many ways the mere fact of scrutiny which concerns human rights advocates. The systemic vetting of social regulation in terms of its trade effects can, by itself, affect the substance of a regulatory regime, through a process of 'regulatory chill', through the choice of trade-friendly measures as a risk reduction device, or through the diversion of resources from the task of ensuring the regulatory regime attains its core social objective. Fears of violating trade commitments may create a tendency in the design of regulatory regimes towards centralisation in decision-making, convergence of standards, reduced regulatory discretion, and an excessive focus on competitive neutrality – all of which would on occasion run directly contrary to the preferences of human rights advocates.[10]

This line of reasoning suggests at least one obvious avenue for action – namely advocating particular interpretations of GATS provisions, which would give governments greater flexibility and certainty in their pursuit of social objectives in water sector regulation. Such advocacy is potentially very important, but it would be misleading to suggest that it was all that is required. Concentrating on crafting particular legal interpretations of GATS provision runs the risk of portraying the problem of a safeguarding domestic regulatory autonomy as fundamentally a *technical* one. It can falsely imply the existence of a political consensus on what is and is not legitimate or desirable water policy. It can thus foreclose at least two crucial debates. It obscures, because it treats as already decided, controversies about the future direction of water sector policy, particularly relating to the trend towards privatisation. And it systematically diverts attention away from the ways in which the trade regime is always and already implicated in such political debates, both before and during the 'technical' process of adjudication.

My analysis therefore points to the need for clearer understanding of the ways in which trade law affects the politics of water sector reform, using more subtle modes of influence than the mode of direct legal coercion. Understanding such processes is the first step in (where necessary) resisting or redirecting them effectively.

In the next section, I set out my reasons for thinking that international human rights institutions, and human rights language, have an important role to play in precisely that project of resistance.

SIX BENEFITS OF A RIGHTS-BASED APPROACH TO TRADE ISSUES

The international trade regime is one of the key issue areas on the reform agenda of development institutions. It seems to me that, for a number of reasons, the language of human rights is peculiarly well suited to this task of reform. The six benefits of using rights language that I offer in this section should be viewed primarily as springboards for discussion, and as an heuristic for understanding the value of a rights-based approach to development concerns. They are all drawn from my observations of the debate about the right to water, but could be equally well applied to many other development concerns.

Access to human rights institutions, resources and constituencies

On a practical level, a rights-based approach to development is useful to the extent that it effects a pooling of resources between human rights and development bodies, particularly where there is an obvious thematic overlap. The sharing of ideas, of agendas, of expertise and institutional resources can be a highly productive process, increasing through co-operative action the effectiveness of the work of both sets of institutions. The creation of new spaces for co-ordination can in itself help to energise and mobilise new forms of political action.

The benefits of such co-operative action are perfectly clear in current debates about the trade regime, and not only in the area of water. The work of human rights institutions on structural, economic causes of human rights violations has been hugely enriched by engaging with issues which have preoccupied development institutions sometimes for decades. The four excellent reports of the High Commissioner for Human Rights are a good example,[11] but other illustrations abound.[12] Conversely, the work of human rights institutions complements the work of development organisations, together helping to establish a more credible, coherent and broad-based position in favour of change to the international economic system. In addition, in the NGO community, articulating development concerns in human rights language has helped to mobilise large human rights constituencies on issues related to the trading system, and thus to broaden popular support for political action on those issues.

Legitimacy and emancipatory potential

The sanctioned usage of human rights language by development advocates to articulate their trade concerns also allows such advocates to 'piggyback' on the considerable legitimacy of the human rights regime. And, related to what is widely perceived to be the universal legitimacy of human rights aspirations, is the *energising potential* of human rights language. People are attracted to human rights language; they engage with it, and are motivated by it. It can itself provide a crucial impetus for emancipatory projects – a shared commitment to human rights is not uncommonly the starting point of collective political action. Rightly or wrongly, human rights remain the most effective and most important contemporary language of human emancipation.

'Human rights' is, or can be, a legal discourse

Human rights language is particularly suitable as a way of speaking about trade concerns, because it is a legal discourse, and is therefore better suited to an engagement with the legal discourse of international trade law. It is common to characterise the transition from the GATT to the WTO as a movement along a continuum from a 'power-oriented' to a 'rule-oriented' regime. Regardless of the accuracy of this claim, it is true that the idea of being part of a system governed by *law* has become increasingly central to the self-understanding of key actors in the trade regime. The discourse of the trade regime is becoming increasingly legalised.[13]

In a very real sense, the result is that the trade regime becomes increasingly closed to claims which are not made in legal terms, or which are more generally made in terms which legal discourse is structurally incapable of comprehending properly. Advocates concerned with the effect of the trade regime on international trends towards water privatisation have often faced this difficulty. To put the matter simply and bluntly: they have to overcome the implicit difficulty that argumentation about the costs and benefits of water privatisation are simply not the kinds of matters which are normally discussed in the trade regime. They are political matters, and as such do not, apparently, fit the function and purpose of the trade regime, which is primarily the facilitation and enforcement of legal obligations.

Human rights can overcome this difficulty by speaking the language of law. An argument that trade commitments in some way violate international legal commitments relating to human rights is a qualitatively different kind of claim, and one which is more capable of comprehension by the trade regime. I would suggest that articulating social concerns about trade through the language of human rights therefore facilitates a better and more meaningful mutual engagement of the trade regime with its social critics.

Human rights language can avoid WTO 'blindspots'

Historically, the international trade regime has not been concerned with the distributional aspects of trade policy – matters on which it has remained ostensibly neutral. It is a common aphorism that international efforts in pursuit of trade liberalisation are designed to 'increase the size of the pie', but that it is for domestic politics to decide how best to divide

and allocate the pieces of that pie. Similarly, economic theory tells us that for every country the overall gains from trade are more than enough to compensate those who lose from trade. But again, it has been a matter for domestic governments, not the international trade regime, to ensure that task is carried out in accordance with domestic political preferences.

This is a simplification, but it is instructive, because it represents one rhetorical expression of a very important political compromise which has underpinned the stability and legitimacy of the trade regime from its beginning. On the one hand, by equating political claims with distributional claims, it allows the trade regime to characterise its actions as apolitical, adding to its legitimacy. On the other, it provides one way of discursively resolving a fundamental problem for the regime, namely the problem of creating credible and meaningful space for its own action, while at the same time allowing member states significant policy autonomy appropriate to their sovereign authority. Creating a self-imposed institutional blindness to distributional issues was one of the ways of achieving this compromise, many others of which have evolved in subtle and pragmatic ways over the course of the trade regime.

This institutional blindness has served its purpose well. But, at least for human rights advocates, such success has been bought at too high a price. One of the key benefits of human rights language is that it resists the rhetorical and conceptual manoeuvre which excludes distributional questions from the gaze of the trade regime. Human rights claims deal with distributional issues, but such claims cannot be categorised as either 'domestic' or 'political'. They are, emphatically, a matter of international concern, as well as a matter of *law*. As a result, human rights claims are, in principle at least, well suited to the task of forcing a discussion of the social consequences of trade, within the trade regime itself. In this context, it is the refusal to discuss them which suddenly starts to look political.

Conceptual suitability

Human rights language is also useful as a critique of trade law, because in a very real sense human rights law and trade law address the same conceptual problem, namely the legitimate boundaries of state power.[14] I noted above that in the context of adjudicating claims concerning discrimination, trade panels inevitably are asked to evaluate the legitimacy of the objectives which a state pursues, and to determine whether the means used fall within the bounds of proportionality and reasonableness.

Human rights language is peculiarly suited to this task. For many decades, it has developed highly sophisticated ways of conceptualising and defining the kinds of objectives which it is legitimate for a state to pursue, and (to a lesser extent) the means which can be used to achieve them. That is, after all, one of its core functions. Moreover, human rights claims often involve the balancing and prioritisation of competing, equally valid, social goals, and it is a task at which human rights institutions have come to excel.

The yardstick function

Finally, I return to a more familiar benefit of the international human rights regime, namely the valuable function it performs of providing reliable ways of measuring progress on the achievement of core aspects of human dignity. Claims are often made concerning the positive and negative impact of trade policy on aggregate wealth and social conditions in developing countries. The continual elaboration of the content of human rights (particularly social and economic rights), in addition to the activity as international human rights supervisory mechanisms, provide valuable ways of measuring such claims in terms of a comprehensive and widely accepted set of indicators.

CONCLUSION

The vast and rapidly growing field of contemporary social critiques of the international trading system represents, I believe, an exciting space in which human rights and development concerns are converging, and influencing one another in productive ways. The snapshot I have given of the issue of the water supply illustrates to some degree how this is happening, what kinds of issues are arising, and how they are being addressed. Detailed studies of particular issue areas like this can provide valuable ways of assessing and understanding the benefits of a human rights approach to development concerns.

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[1] One productive and influential source of criticisms of water privatisation is the Research Unit of Public Services International, see http://www.psiru.org/reportsindex.asp.

[2] Malhotra et al., *Making Global Trade Work for People* (London and Sterling, Virginia: Earthscan, 2003), sponsored by the UNDP and Rockefeller Foundation, at 268 and surrounding.

[3] "Liberalization of Trade in Services and Human Rights", Report of the High Commissioner, 25 June 2002, HE/CN.4/Sub.2/2002/9H.

[4] Above n3, at paragraph 50.

[5] Above n3, at p.4 of the Executive Summary.

[6] There is now a large array of material of varying quality on the issue published by NGOs, both in print and on the internet. See, for example, material from the Center for International Environmental Law (www.ciel.org), Canadian Centre for Policy Alternatives (www.policyalternatives.ca), Public Services International (www.psiru.org), The Center for Public Integrity (http://www.icij.org/water/), Public Citizen (www.publiccitizen.org), the Citizens' Network on Essential Services (http://www.servicesforall.org/), Friends of the Earth (http://www.foei.org/), among others.

[7] Lang, "The GATS and regulatory autonomy: a case study of social regulation of the water industry", forthcoming 7 (4) *Journal of International Economic Law* (2004), copy on file with author. I should note that this research is conducted on the assumption of full coverage of the water sector in a country's specific commitments. At present, only some services supplied in the sector are covered, and (like most sectors) the sector as a whole is subject to only patchy and incomplete commitments.

[8] See Wälde, "Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment", 34 (2) *Journal of World Trade* (2000), 1.

[9] See Lang, above n7. Also see Tuerk et al., "GATS, Water and the Environment", published online by the Center for International Environmental Law, available at http://www.ciel.org/Publications/GATS_WaterEnv_Nov03.pdf.

[10] For example, a human rights approach to governance of the water sector emphasises local participation in decision-making, rather than increasing centralisation.

[11] Office of the High Commissioner for Human Rights, 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights', 27 June 2001, E/CN.4/Sub.2/2001/13; 'Globalization and its impact on the full enjoyment of human rights', 15 January 2002, E/CN.4/2002/54; 'Liberalization of trade in services and human rights', 25 June 2002, E/CN.4/Sub.2/2002/9; 'Human rights, trade and investment', 2 July 2003, E/CN.4/Sub.2/2003/9.

[12] See also for example the reports received by the UN Sub-Commission on the Promotion and Protection of Human Right: 'Human rights as the primary objective of international trade, investment and finance policy and practice', Working Paper, 17 June 1999, E/CN.4/Sub.2/1999/11; 'Globalization and its impact on the full enjoyment of human rights', Preliminary report, 15 June 2000, E/CN.4/Sub.2/2000/13; Progress Report, 2 July 2001, E/CN.4/Sub.2/2001/10; Final Report, 25 June 2003, E/CN.4/Sub.2/2003/14

[13] Weiler makes some fascinating comments on this process in "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External legitimacy of WTO Dispute Settlement", 35 (2) Journal of World Trade (2001), 191-207. See also Howse, "From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading System" 96 American Journal of International Law (2002), 94.

[14] To be clear, I am not suggesting that either the trade regime or the human rights regime is *just* about setting boundaries on state power, whether *vis à vis* the market, or the citizen, and so on. I agree with Jeffrey Dunoff, for example, that both regimes "presuppose active, interventionist states" (see Dunoff, "Does globalization advance human rights? 25 *Brooklyn Journal of International Law* (1999), 125, at 132.