Introduction

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This book analyses the relationship between economic globalisation and human rights. It raises two main issues. How can human rights provide protection whenever economic globalisation threatens human dignity? Secondly, should human rights themselves evolve in response to a changing global economy? The main purpose of this opening section is to indicate how subsequent chapters address these questions.

Defining the terms

While the authors in this book use a common concept of human rights, it is less certain that they share a common understanding of economic globalisation. This is not surprising. Although both concepts are contentious, there is at least a legal definition of human rights around which all contributors can rally. For many authors there is no need to explicitly define economic globalisation, as they only deal with a specific aspect (such as the liberalisation of trade, or the human rights impact of companies) rather than with the phenomenon as a whole.

By human rights, the contributors mean the rights included in the core international human rights instruments adopted by the United Nations.[1]

[1] Apart from the Universal Declaration of Human Rights, GA Res. 217A (1948), UN Doc. A/810 (1948), which was the starting point of the codification of human rights at the international level, the UN High Commissioner for Human Rights now embraces seven treaties as core international human rights treaties: the International Covenant on Civil and Political Rights of 16 December 1966, 999 U.N.T.S. 171; 6 I.L.M. 368 (1967) (156 States parties); the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 U.N.T.S. 3; 6 I.L.M. 368 (1967) (153 States parties); International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, 660 U.N.T.S. 195, 212; 5 I.L.M. 352 (1966) (170 States parties); the Convention on the Elimination of All Forms of Discrimination against Women of 18 Dec 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980) (170 States parties); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

With the exception of the Migrant Workers' Convention, these treaties have been widely ratified. Non-ratifying states are still bound by human rights law to the extent that human rights have become part of customary international law. Both the International Court of Justice and the international criminal tribunals have asserted in their case law that (a number of) human rights have achieved the status of international customary law.[2] The normative development of international human rights law still continues, but it can safely be said that a comprehensive body of international human rights law now exists that entails binding obligations for all states.

The United Nations' approach to human rights is based on a commitment to the indivisibility and interdependence of civil, cultural, economic, political and social rights. *George Ulrich* explains that in the post-Cold War era a shift occurred in human rights thinking from conceiving human rights as a set of norms designed primarily to curb the abuse of State power as epitomised by the protection of the lone dissident, to a broader conception of human rights as a set of tools to advance social justice on a global scale. It is this expanded human rights agenda that underlies the contributions in the present publication.

One could take a different view, dear to proponents of economic globalisation that mobilise economic arguments to select specific human rights or aspects of human rights on the basis of their usefulness to the establishment of a global free market. Inevitably, the result is a prioritisation of some aspects of civil and political rights over other rights. This approach is not in line with the insistence, in current international human rights law, that all human rights must be treated globally in a fair and equal manner, on the same footing, and with the same emphasis. Although it is not shared by the authors in this book, the selective approach enjoys considerable support, particularly among economists.

Dec. 10, 1984, 1465 U.N.T.S. 85, 113; 23 I.L.M. 1027 (1984) (141 States parties); the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989) (192 States parties) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990) of 18 December 1990 (34 States parties). Status of ratification on 8 May 2006, except that of the Migrant Workers' Convention: status of ratification on 17 July 2006 (Cf. http://www.ohchr.org/english/law).

[2] See J. Oraa Oraa, 'The Universal Declaration of Human Rights' in F. Gomez Isa and K. De Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (Deusto: University of Deusto, 2006), pp. 123–127.

One of the difficulties with defining globalisation is that the phenomenon can be approached from various disciplinary angles. Depending on the discipline, different types of evidence attesting to the reality of globalisation are brought forward. They include increased economic interdependence, technological change, cultural homogenisation or the growing importance of global institutions. Research on the human rights impact of globalisation fits within a large research agenda that focuses on the impact of globalisation on governance. Governance can be understood as the planning, influencing and conducting of the policy and affairs of institutions (including of the state). These processes determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern. A leading volume on globalisation and governance describes globalisation as:

> . . .a set of processes leading to the integration of economic activity in factor, intermediate, and final goods and services markets across geographical boundaries, and the increased salience of cross-border value chains in international economic flows.[3]

The authors of the volume identify three categories of views on how globalisation may impact on the state. The first view is that the state will wither away, not physically, but in terms of policy options it can effectively exercise in the economic realm. The second perspective is that existing instruments of economic policy, perhaps with some modifications, are sufficient to handle the challenges posed by globalisation. The third is that states will rearticulate themselves by shedding some political and economic functions and adopting new ones.[4] In his contribution to our book, *Jernej Pikalo* argues that economic globalisation will not lead to the demise of the state, but to a system of multi-level governance, with agents at different levels (global, regional, national, local) ideally working together to achieve common goals. From a historical perspective, the result may nevertheless be that the State exercises less control over the regulation of the market than before, a situation that may require compensatory protection action at other regulatory levels.

Nevertheless, as Pikalo argues convincingly, economic globalisation is not something 'that is happening to us.' States consciously decide, in the exercise of sovereignty, to participate in the process. Some speak of

[3] See A. Prakash and J. Hart, 'Introduction' in A. Prakash and J. Hart (eds.), *Globalization and Governance* (London: Routledge, 1999), p. 3. [4] *Ibid.*, pp. 11–17.

the 'internationalization of the state', a shift in the state's priority away from the domestic constituency in favour of transnational market interests.[5] States choose to subscribe to the neo-liberal ideology that underpins the current, hegemonic form of economic globalisation. The aim of the neo-liberal approach is to secure the free flow of trade in goods and services, to liberalise foreign direct investment, to remove capital controls, and to allow labour to move to where it is most productive. A variety of public and private actors that promote the approach, encourage the state to use its sovereign powers to allow these free flows in and out of its territory. The state remains sovereign on its territory, but it is increasingly influenced by organisations and companies that operate across borders.

Both the project of economic globalisation and the project of the international protection of human rights are incomplete. Neither has been fully achieved. Both projects impact on the exercise of the power, and on the relationship between the domestic state and internal and external public and private actors. The theme of the book then is to discover how these two processes interact, and how they shape emerging forms of global governance.

Linking economic globalisation and human rights

On the eve of the fiftieth anniversary of the Universal Declaration of Human Rights, the UN Committee on Economic, Social and Cultural Rights adopted a Statement on Globalisation and Economic, Social and Cultural Rights.[6] The Committee was concerned that governments were too focused on promoting globalisation, while 'insufficient efforts are being made to devise new or complementary approaches which could enhance the compatibility of those trends and policies with full respect for economic, social and cultural rights.'[7] In the Committee's view, globalisation was not incompatible with human rights, but:

> . . . globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations in general and the International

[5] Cf. F. Quadir, S. MacLean and T. Shaw, 'Pluralisms and the Changing Global Political Economy: Ethnicities in Crises of Governance in Asia and Africa' in S. MacLean, F. Quadir, and T. Shaw (eds.), *Crises of Governance in Asia and Africa* (Aldershot: Ashgate, 2001), p. 8.

[6] UN Committee on Economic, Social and Cultural Rights, 'Statement on Globalization and Economic, Social and Cultural Rights' (11 May 1998), reproduced in *International Human Rights Reports*, 6 (1999) 4, p. 1176.

[7] *Ibid.*, para. 4.

> Bill of Human Rights in particular. This is especially the case in relation to economic, social and cultural rights. Thus, for example, respect for the right to work and the right to just and favourable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights contained in the Covenant.[8]

As exemplified by the Statement, the most obvious link between economic globalisation and human rights is in the area of labour rights. This was also the argument for the inclusion of the only contribution in this book (by *Adalberto Perulli*) that focuses on a single set of rights, i.e. social rights. Economic globalisation aims at organising the labour market in a specific way (primarily by encouraging labour mobility across borders), and thus impacts directly on domestic employment levels. Immediately, the issue of whether governments are ready to abandon international levels of protection of labour rights, in order to attract investment and maintain employment comes to mind. In any case, as Siegel argues, 'it is likely that no other sphere of social or economic human rights has been, or will be, as strongly affected by globalisation as employment-related rights.'[9]

Nevertheless, economic globalisation impacts on the whole range of human rights, as a host of recent publications demonstrate.[10] The opposite is equally true. Since human rights are also a global project, they can be used to shape economic globalisation.

Ulrich suggests that human rights are increasingly being cast in the context of a global ethical commitment, and offers as evidence the

[8] *Ibid.*, para.3.

[9] R. Siegel, 'The Right to Work: Core Minimum Obligations' in A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002), p. 25.

[10] An impressive number of recent publications deal with various aspects of the relationship between economic globalisation and human rights. They include: F. Abbott, C. Breining-Kaufmann, and T. Cottier (eds.), *International Trade and Human Rights, Foundations and Conceptual Issues* (World Trade Forum, Vol. 5) (Ann Arbor: University of Michigan Press, 2006), G. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart Publishing, 2005), C. Breining-Kaufmann, *Globalisation and Labour Rights* (Oxford: Hart Publishing, 2006), R. Brownsword (ed.), *Global Governance and the Quest for Justice. Volume IV: Human Rights* (Oxford: Hart Publishing, 2005), T. Cottier, J. Pauwelyn, and E. Bürgi Bonanomi (eds.), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005), K. De Feyter, F. Gomez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia, 2005), K. De Feyter, *Human Rights: Social Justice in the Age of the Market* (London: Zed Books, 2005), O. De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006), A. Gearey, *Globalization and Law: Trade, Rights, War* (New York: Rowman & Littlefield Publishers, 2005), S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2006).

campaign for human rights launched by the former UN High Commissioner for Human Rights, Mary Robinson under the heading of 'ethical globalisation'. Human rights are presented as a normative framework that should guide the outcome of globalisation. Other contributors echo this view. Pikalo argues that human rights can serve as a moral code for institutions, agencies and networks according to which they can judge and regulate processes of economic globalisation on all levels, from the village to the supranational organisation. *Fabrizio Marrella* takes the view that the integration of economic globalisation and the globalisation of human rights could result in 'sustainable globalisation'.

A similar approach underlies the contributions of *Wolfgang Benedek* and *Davinia Ovett* on the World Trade Organization (WTO). Ovett argues that the WTO (and agents at other levels) should ensure that trade agreements allow for sufficient flexibility so that they do not undermine the capacity of States to honour their human rights commitments. International human rights law should operate as a benchmark and framework for trade agreements. Benedek adds that strengthening the interface between WTO and human rights is needed to address the lack of coordinated global governance. There is an unavoidable link between human rights and trade agreements, and therefore the human rights impact of trade agreements is an issue of legitimate concern that needs to be addressed by global institutions.

Human rights continue to offer protection in a global economy

Both proponents of economic globalisation and human rights advocates have specific expectations of the state. In human rights law, the state is the principal duty holder. In the law of economic globalisation, the state's role is primarily to facilitate the operation of market forces. This leads to the question of whether there is any contradiction between these two sets of expectations. Is the state still able to fulfil its human rights obligations while at the same time enabling market forces to take responsibility for many sectors of the economy that are human rights sensitive, such as the exploitation of natural resources or the provision of services of general interest?

In law, it is clear that economic globalisation, as of itself, has no impact on the state's human rights obligations. A state cannot retract its consent to be bound by human rights treaties, simply by arguing that it no longer has the capacity to comply with these obligations due to globalisation. The rules on termination and suspension of the operation of treaties in

the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT) are strict, and they cannot be invoked when lack of compliance with human rights obligations results from a deliberate decision by the state to open up to economic globalisation. In such a case, the VCLT does not allow a defense based on a state of necessity,[11] the impossibility to perform the treaty or on an unforeseen fundamental change of circumstances.

The UN bodies that monitor human rights treaties, and the UN's political human rights bodies thus insist that economic globalisation in no way diminishes the legal obligations of the state to respect, promote and protect human rights. But, as Benedek shows, UN bodies are increasingly worried about the impact of globalisation and of trade in particular, on human rights. Reports and resolutions on the human rights impact of globalisation have multiplied at the UN Commission on Human Rights over the last decade, and, as Benedek points out, a number of new mechanisms were created to deal specifically with this issue. They include the initiative of the UN Sub-Commission on the Promotion and Protection of Human Rights to annually call a meeting of the 'Social Forum', or the appointment by the UN Secretary-General of a Special Representative on Business and Human Rights.[12] In addition, Ovett reviews the efforts of the UN human rights treaty bodies to deal with intellectual property rights from a human rights angle. She encourages the treaty bodies to approach the issue more systematically, and to produce recommendations that are clearer and more precise.

Although economic globalisation does not as such affect the state's human rights obligations, more complicated legal issues arise when states commit in law to integrate into a process of economic globalisation. The international financial institutions and the WTO certainly encourage or offer incentives to states to accept international legal obligations in this area. From a globalist perspective, it is preferable that states provide legal security under international law to those availing themselves of the opportunities that arise from the opening up of domestic markets. Obligations under international law ensure that domestic positions cannot simply be reversed by a change of direction in national politics. The large majority of states have now committed themselves, under international economic law, to liberalise trade in goods and services, to facilitate foreign direct investment, etc. – albeit to varying degrees.

[11] Compare International Court of Justice, *Gabcikovo-Nagymoros project* (Hungary v. Slovakia), Judgment of 25 September 1997, para. 57.

[12] See UN Commission on Human Rights resolution 2005/59 (20 April 2005). In July 2005, the UN Secretary-General appointed US expert John Ruggie to the position.

Consequently, there is a potential for conflict between a state's obligations under international human rights law and its obligations under international economic law. Examples include a loan agreement with an international financial institution, under which a state commits to cuts in public social expenditure, a regional trade agreement guaranteeing protection of intellectual property rights far beyond what is required by WTO law, or a bilateral investment treaty unconditionally opening up the market in services of general interest to foreign private investors. These may all lead to conflicts with a state's obligations under international human rights law.

Ideally, conflicts between treaty obligations are settled by reading the treaties in such a way that the conflict no longer exists. This solution is envisaged in Article 31, para. 3 (c) of the VCLT that stipulates that when interpreting a treaty, reference can be made to any other 'relevant rules of international law applicable in the relations between the parties'. The WTO Doha Declaration on TRIPS and public health, as discussed by Ovett, could perhaps serve as an example of a WTO effort to interpret the TRIPS Agreement in such a way that it does not conflict with the obligations of WTO member states under international human rights law. Treaties can also be amended to eliminate the potential for conflict, but, as *Adalberto Perulli*'s discussion of WTO debates on the social clause (i.e. the proposal to extend Article XX of GATT to all fundamental social rights) shows, there are limits to the willingness of States and of the WTO to apply a human rights rationale at a trade negotiations forum.

If reconciliation of treaties proves impossible, intricate legal issues arise under Article 30 of the VCLT on the application of successive treaties relating to the same subject matter. Article 103 of the UN Charter, providing that in the event of a conflict between obligations under the Charter and obligations under other agreements, the Charter obligations prevail, and the *ius cogens* provisions in the Vienna Convention introduce elements of hierarchy that may be helpful in ensuring that human rights protection takes precedence.

An additional drawback is that the issue of conflicting treaty obligations is less likely to emerge before an international human rights body (or even before a judicial body settling disputes under general international law), than before an economic dispute settlement body. WTO Member States, for instance, agree to submit trade disputes to the WTO dispute settlement system.[13] The WTO dispute settlement bodies have

[13] Article 23 of the Dispute Settlement Understanding of 15 April 1994 (DSU).

a specific competence to settle disputes under WTO agreements, and can only consider public international law in order to clarify the existing provisions of those agreements.[14] Under those conditions, it appears unlikely that, should a conflict arise, a WTO dispute settlement body would ever apply a human rights treaty *contra* a provision in a WTO agreement.

Efficient human rights protection depends on the ability of the holders of the rights to claim their rights – at the domestic or if need be at higher levels of regulation – before mechanisms with the requisite enforcement powers. One of the main achievements of human rights law has been to contribute to the recognition of individuals as subjects of international law, e.g. as entities having international personality, and thus capable of possessing international rights and duties, and having *some* capacity to maintain their rights by bringing international claims. Individual complaints procedures attach to a number of international and regional human rights treaties.

Access for individuals to international economic dispute settlement systems is limited, even when the decisions of these bodies may have a substantial impact on human rights. From a human rights perspective, the delocalisation of trade disputes creates a problem whenever the litigation affects the human rights of persons, e.g. because they are the consumers of a life-saving drug, or the users of a water distribution system. The persons affected are, however, not parties to the relevant trade agreement or contract and thus they will not have direct access to the competent economic dispute settlement body. One of the parties to the dispute will need to make the human rights argument on their behalf, thus leaving the individual with no active recourse.

The WTO dispute settlement mechanism is available to WTO members only, i.e. states and customs territories as defined in the Agreement establishing the World Trade Organization of 15 April 1994. In his contribution, Benedek discusses the possibility for non-governmental organisations to act as friends of the court in the public interest by submitting *amicus curiae* briefs. Such briefs have been accepted in the WTO dispute settlement system, and thus offer a possible entrance for human rights concerns. Benedek also points out, however, that no panel report has so far explicitly referred to an *amicus curiae* brief. On the other hand, Ovett notes that the United States dropped a case before the WTO dispute settlement system against Brazil on the compulsory licensing of HIV/AIDS drugs under the pressure of international civil society.

[14] Article 3, para. 2 of the DSU.

Koen De Feyter addresses possibly more promising developments in international arbitration proceedings which provide for *amicus curiae* petitions by non-governmental organisations on human rights grounds. Marrella offers a full discussion of the increasing importance of human rights in international commercial arbitration, including in the area of procedural requirements.

Laurence Boisson de Chazournes perceives the World Bank's Inspection Panel as a 'vehicle for public participation'. The World Bank's Inspection Panel is an administrative, rather than a judicial body, competent to receive requests for inspection presented to it by an affected party demonstrating that its rights have been or are likely to be adversely affected as a result of a failure of the World Bank to follow its operational policies with respect to projects financed by it. The Inspection Panel is limited to reporting on World Bank compliance with its own policies. The Panel therefore does not rule on violations of international law, including human rights law. On the other hand, nothing prevents the requesters from arguing that their *human* rights have been adversely affected by World Bank action, and this has occurred in a number of cases. Notably, the World Bank's management and the Inspection Panel responded substantively to the human rights claims.

On the need to adjust human rights to new economic realities

Even in situations where there is no doubt that the state is fully bound under international human rights law because no conflict with other treaty obligations arises, the impact of non-state actors on the actual implementation of human rights is probably much more important now than could be envisaged when the core human rights treaties were drafted.

International human rights law developed at a time when States monopolised international relations. The international human rights system was similarly state-oriented. In today's world, however, human rights violations often occur as a consequence of the behaviour of a variety of actors, including inter-governmental and private economic actors.

One option is to construct human rights duties for every actor whose actions have an impact on human rights. The other option is to maintain the state as the sole duty holder[15] under human rights law. The latter option is discussed first.

[15] With the possible exception of individuals, given the developments in international criminal law.