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The Role of Human Rights in Shaping International Regulatory Regimes

THE CURRENT SYSTEM OF GLOBAL GOVERNANCE IS FRAGMENTED among different and sometimes conflicting regimes that result in an imbalance between states' obligations under trade and investment agreements on the one hand, and human rights treaties on the other hand. This system restricts the policy space countries require to discharge their human rights duties toward their populations and must be rethought. Some have proposed that the current division of labor between regulatory regimes would be satisfactory if each regime were to be further strengthened. Others advocate building bridges across regimes in order to overcome the current fragmentation. Still others, giving up on the international level, argue that consistency can and should be achieved at the level of the nation-state and that our efforts should focus on strengthening domestic democratic processes.

My position is that self-determination at the national level can only be achieved by reshaping the international economic environment, and that internationally recognized human rights provide the appropriate departure point for that enterprise. What I call the "Rome model" of international cooperation is based on the recent establishment of the Committee on World Food Security, which seeks to recognize that the right to adequate food for all constitutes a global public good, and for the delivery of which more international cooperation, hence global governance, is required. The perspective is not a utopian one—the experiment in one discrete field could be replicated

in others—nor would it constitute a departure from the current state of international law. Instead, it would be a return to the original promise of the Universal Declaration of Human Rights, which calls for "a social and international order in which the rights and freedoms in this Declaration can be fully realized" (Art. 28). It is this promise that we must now reclaim.

THE BIRTH OF FRAGMENTATION: THE ORIGINAL BETRAYAL

The immediate post–World War II order established after the Bretton Woods and San Francisco conferences was premised on the idea that states should cooperate at international level for the full realization of human rights and the achievement of a just economic order.[1] Under the UN Charter, all members of the United Nations pledge to "take joint and separate action in cooperation with the Organization" to achieve the purposes set out in Article 55 of the charter, which include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." When it was adopted three years later, the Universal Declaration of Human Rights not only provided a catalogue of rights concretizing the requirements of the United Nations Charter. It also, as we have seen, set out a duty of international cooperation for the realization of economic, social, and cultural rights: this objective, it states, must be achieved "through national effort and international co-operation and in accordance with the organization and resources of each State," and it requires the establishment of an international economic order that supports states in the fulfilment of this objective.

The hopes expressed then were close to being fulfilled. In February 1946, negotiations began on the establishment of an International Trade Organization (ITO) as a specialized agency of the United Nations. The ITO's charter was agreed to in Havana in March 1948. Members pledged to implement Article 55 of the UN Charter by assuring "a large and steadily growing volume of real income and effective demand" and by increasing "the production, consumption and

exchange of goods, and thus to contribute to a balanced and expanding world economy." They also committed to "foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment"; to "further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development"; to promote trade as an instrument of economic development; and generally, to "facilitate through the promotion of mutual understanding, consultation and co-operation, the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy." The ITO thus was conceived as an organization in which countries could gradually agree on how to support international trade in order to ensure that it would contribute to employment and development, and in close cooperation with the United Nations Economic and Social Council. The Charter establishing the ITO also noted that unemployment should be treated as a common concern calling for international cooperation and that the promotion of trade should be at the expense of the protection of fair labor standards: it acknowledged that "all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit." It included strong provisions on the role of international assistance and cooperation in the service of development.

Those objectives soon appeared to be overambitious, however. On December 6, 1950, drawing conclusions from the strong opposition of the US Congress, where many feared the ITO would represent a too important check on US sovereignty, President Harry Truman announced that the United States would not ratify the ITO Charter (Jackson 1969, 37-38; Diebold 1952). In the meantime, the General Agreement on Tariffs and Trade (GATT) had become provisionally applicable in January 1948. But what had been lost was more than the

promise of one international agency that would ensure a consistent approach across the areas of trade, employment, and economic development: as would soon become clear, it was the idea of international cooperation itself for the fulfilment of the latter two objectives that was being questioned.

The result of this initial failure to set up the International Trade Organization are well known. The GATT—initially made to enter into force "provisionally" in order to avoid a sudden suspension of trade flows—was institutionalized and the regime of international trade significantly strengthened, almost 50 years after the initial GATT, by the setting up of the World Trade Organization (WTO). The Marrakesh Agreement of April 15, 1994, which established the WTO, may be seen as the final stage in a process that began in 1948. This process led to a gradual liberalization of international trade through a series of trade negotiations that were conducted formally outside the UN system and without any explicit connection to other areas (such as labor rights, environmental standards, or human rights) that were subject to international cooperation. In addition, since the establishment of the WTO, the disciplines imposed in the multilateral trading system have been enforced under the threat of economic sanctions through a dispute settlement mechanism that is a highly effective tool in the hands of the largest and most developed economies (which are in effect the only powers that can impose sanctions that can hurt): this is in contrast to the enforcement means at the disposal of the International Labor Organization or the UN human rights system, which essentially rely on the reputational costs incurred by countries that ignore their international commitments in these areas.

Both the separation between trade and other "nontrade concerns" and the imbalance between trade agreements and other international commitments are central characteristics of the international economic order that John G. Ruggie famously described as "embedded liberalism" (Ruggie 1982). In this order, the reduction or elimination of trade barriers between modern welfare states should serve to enhance the redistributive capabilities of each state vis-à-vis its own citizens, thus

leading the regulatory state at the domestic level to complement trade liberalization at the international level: the gains from trade should benefit the welfare state, just as the welfare state should protect the losers from international trade, thus ensuring that international trade remains a politically desirable option.

But does it work? This idealized view of how the expansion of trade and the deepening of the international division of labor should fuel economic growth, thus allowing countries to finance social protection and create employment at home, grossly underestimates the tension between the short-term and the long-term considerations that guide states in the commitments they make to remove barriers to trade. For the deepening of the international division of labor, which may bring about certain immediate benefits, may also not work in favor of the long-term development of poor countries, and thus of their ability to promote the full realization of human rights. As already noted by the United Nations Economic Commission for Latin America when it was under the leadership of Raúl Prebisch in the 1950s, countries that export raw commodities shall have to export increasing volumes in order to import the manufactured products, with a higher added technological value, that they are unable to produce themselves. Thus, in the long term, the removal of barriers to trade, which accelerates the specialization of each country into the kind of production in which it has a comparative advantage, will not benefit the least industrialized countries: while trade liberalization may bring them short-term advantages—they will increase their exports of raw commodities and pay less for their imports of manufactured goods than if they had to produce such goods themselves—the long-term consequences will be a widening of the gap between the rich and the poor countries, and an inability for the latter to climb up the ladder of development.

That, in essence, is what later came to be known as the Prebisch-Singer thesis of deteriorating terms of trade. It leads to the idea that international trade, replicating the patterns of colonialism, may in fact accentuate the dependency of developing countries on the former colonial powers and make it impossible for these countries to overcome the

obstacles to development. These views were central to the work of the United Nations Conference on Trade and Development after its establishment in 1964, and to the attempts to establish a New International Economic Order in the 1970s (Bedjaoui 1979). They are currently revived, with some variations, by economists such as Ha-Joon Chang or Erik Reinert, who note that rich countries have become rich thanks to the protection of their nascent industries, and that they now preach free trade to developing nations simply because, having climbed up the ladder of development, free trade has now become in their interest (Chang 2002, 2007; Reinert 2007). Globalization, these economists remark, has benefited the countries—such as, for example, Brazil, China, South Korea, or India—that carefully sequenced trade liberalization, and that built an industrial and a services sector behind trade barriers before opening up to trade. But for the developing countries that had not diversified their economies and whose industrial sector was still too weak at the time when the economies opened, it has meant the relegation to a permanent status of underclass nations (Stiglitz and Charlton 2007, 17). That process, in which poor countries remain poor because they are actively discouraged from diversifying their economies, was further accelerated during the 1980s and 1990s when they were forced to pursue macroeconomic policies that would reduce the size of the public sector and integrate their economies to global trade under what came to known as the "Washington consensus."[2]

The search for an alternative to the Washington consensus has now begun. Indeed, the main reason why "embedded liberalism" has come to be discredited is because of its failure to recognize that countries cannot effectively pursue progressive welfare policies at home if the international environment is not reshaped in accordance with their needs—and the infinite postponement of that objective is increasingly seen as one key reason why social progress and the realization of human rights at domestic level are so slow. *Keeping the Promise,* the outcome document on the implementation of the Millennium Development Goals (MDG) that the General Assembly adopted by consensus on September 22, 2010, notes in this regard (in para. 37):

> We recognize that the increasing interdependence of national economies in a globalizing world and the emergence of rules-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and international development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space.

This constitutes an acknowledgment of what we may call the "double-bind" problem: while countries are bound to comply with their human rights commitments at home, many of which correspond to the MDGs, they are discouraged from doing so in practice (even though they may not be prohibited from doing so in theory) because the international environment has not been transformed to favor this.

FRAGMENTATION ORGANIZED: THE "GENEVA CONSENSUS"

But what, then, are the alternatives? One has been proposed by Pascal Lamy, the director general of the WTO. Eager to dissociate himself from the discredited Washington consensus, he calls it the "Geneva consensus."[3] This view acknowledges that an increase in trade opportunities creates winners and losers, and may be disruptive, but it places its bets on a functional differentiation between the WTO, in charge of setting trade rules to ensure that markets are open and rules-based, and other international agencies or fora in charge of supporting countries and helping remedy any imbalances that may result between different groups of the population. Thus, the Geneva consensus is an understanding of international governance in which a division of labor is encouraged between the various international agencies: while the WTO should focus on trade, the International Labor Organization should

promote international labor standards, the World Health Organization support public health policies, or the Office of the High Commissioner for Human Rights and human rights bodies push for compliance with human rights.

This view is popular among many governments and international agencies alike because, rather than providing an impetus of change, it offers an elegant justification for the status quo. I am deeply suspicious. First, the idealized Geneva consensus does not take into account the very different leverage that each of these various agencies can exercise on their member states, although they differ widely among themselves both in their ability to adopt rules and to enforce them. Second, the Geneva consensus underestimates the risk of conflicts between regimes because of the strong overlaps that exist, in fact, between the different issues that are of international concern. What we need is not more separation, but instead more consistency across policy areas that cannot be considered in isolation.

We cannot say, for instance, that trade issues should be discussed in Geneva within the WTO and climate change in Bonn under the auspices of the United Nations Framework Convention on Climate Change,[4] because that would underestimate the relationship between the development of international trade and efforts to mitigate climate change by limiting greenhouse gas emissions. While trade may favor the spread of cleaner technologies that, once taken up, can lead to less carbon-intensive types of growth in the importing country (this is referred to as the "technology effect" of international trade), it also favors increased economic growth and levels of consumption, as resources are freed up from their less productive uses to be reinvested or spent elsewhere (this is the "scale effect" of trade). Studies are now converging to show that the "scale effects" of international trade outweigh "technology effects" (for a literature review, see Santarius 2009). If these studies are correct, it follows that we cannot pretend at the same time to pursue a free trade agenda leading to the expansion of North-South trade flows and to combat climate change. The development of international trade may be good for "convergence," allowing

less developed countries to grow, but it is not compatible with the aim of "contraction" in rich countries, which is unavoidable if we want to avoid the ecological catastrophe that scientists foresee.

What needs to be promoted, therefore, is the expansion of developing countries and their adoption of clean technologies by means other than international trade with industrialized countries. Such means exist. They include the diversification of the economies of developing countries, regional integration, and South-South trade. Such development pathways for poor countries move away from a colonial pattern of resource exploitation in which Southern countries provide raw commodities and exploit their subsoil, and Northern countries produce higher added-value and knowledge-intensive products. In order to favor the rapid picking up of more resource-efficient technologies in developing countries, it should be combined with massive technology transfers—for example, by the establishment of a fund in which clean technologies could be treated as global public goods funded by Organization for Economic Cooperation and Development (OECD) countries.

Or consider, to take another example, the problem of "carbon leakage," also known as the problem of "virtual emissions," to refer to the emissions produced in the production processes of products that are exported, and thus "externalized"—or outsourced—by the importing country. It has been calculated that in 2001, "the EU [European Union] imported goods with virtual emissions amounting to some 992 megatonnes (Mt) CO_2, whereas only 446 Mt CO_2 emissions arose from the production of exports within the EU. Thus the EU displaced over 500 Mt CO_2 emissions overseas" (Sartarius 2009, 9). Researchers from the Carnegie Institute estimated recently that 23 percent of the greenhouse gas emissions linked to the goods consumed in developed countries—for a total of 6.4 billion tonnes of CO_2—have in fact been emitted elsewhere, and that 22.5 percent of the greenhouse gas (GHG) emissions from China are for the production of export goods to satisfy the tastes of consumers in the North (David and Caldeira 2010).

Yet, the reporting mechanism under the 1997 Kyoto Protocol does not take these "vitual emissions" into consideration. Only

emissions arising from production and consumption within one country are recorded, not emissions arising from the production of export products that one country imports in order to meet consumer demands. This allows industrialized countries to meet their obligations under the United Nations Framework Convention on Climate Change (UNFCCC) to reduce their emissions simply by outsourcing the most polluting industries in developing countries. We therefore either must reform the way reporting on emissions is organized or we must impose restrictions on developing countries, at least insofar as their export products are concerned. For the moment, the reason we in the industrialized countries can pretend to limit greenhouse emissions without changing our lifestyles is not because we are smart at developing cleaner technologies: it is because we outsource the most polluting types of production.

Similar examples exist that show how artificial it would be to separate human rights (to be dealt with, according the the "Geneva consensus," by the Office of the High Commissioner for Human Rights [OHCHR] and human rights bodies) and trade (falling under the remit of the WTO). It is manifest, for instance, that measures adopted by states to comply with the disciplines imposed under the Agreement on Agriculture (the multilateral agreement within the WTO that concerns trade in agricultural products) may conflict with the requirements of the right to food, for instance where low-income countries lower import tariffs according to their schedule of commitments and thus expose their producers to dumping from rich countries, or where they renounce stabilizing prices through the establishment of food reserves because that would go beyond the flexibilities allowed under the forms of support that fall under the "Green Box," listing measures that are not considered to introduce trade distortions (De Schutter 2011a, 2011b). More generally, WTO disciplines may restrict the policy space, particularly for countries seeking to pursue active industrial policies, and thus make it more difficult for them to follow a development path that will allow them to pursue the progressive realization of human rights (DiCaprio and Gallagher 2006; Joseph 2011).

FRAGMENTATION OVERCOME: BUILDING BRIDGES ACROSS REGIMES

The solution cannot be a division of labor between institutions because of the reality that policy areas overlap each other and we cannot maintain their artificial isolation. It does not follow, however, that the solution to the problem of the "double-bind" is simply in mechanisms aimed at reducing the risk of what international lawyers have called the risk of fragmentation of international law—that is, the differentiation of international law into a number of self-contained regimes, each with its own norms and dispute-settlement mechanisms, and relatively autonomous both vis-à-vis each other and vis-à-vis general international law (International Law Commission 2006, para. 8; Simma 1985).

Increasingly, the separate international regimes have built "bridges" to other regimes, reducing the risks of fragmentation. For instance, investment treaties may make it clear that the prohibition of indirect expropriation (or "regulatory takings") or the guarantee of "fair and equitable treatment" shall not be construed as imposing obstacles to the adoption by parties of nondiscriminatory regulatory actions that seek to protect legitimate public welfare objectives, such as public health, safety, and the environment.[5] Arbitral tribunals deciding on investment disputes opposing the investor of one party to the host state may decide that the protection due, under the investment treaty, to the investor, should not be granted to "investments made in violation of the most fundamental rules of protection of human rights," as noted by an International Center for the Settlement of Investment Disputes (ICSID) arbitral tribunal in a case concerning the Czech Republic (*Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 78).

Similarly, commitments under the WTO framework must be interpreted, to the fullest extent possible, so as to be compatible with general international law, as well as with the rules of any treaty applicable in the relationships between the parties to the dispute giving rise to the question of interpretation, as such rules may develop, in particular, through adjudication. In the WTO system, the requirement that the

agreements be interpreted in accordance with the other international obligations of the members is further strengthened by the fact that the authoritative interpretation of the agreements lies in the hands of the members themselves, within the ministerial conference or the general council, and the members cannot ignore their human rights obligations in providing such interpretations. The climate change regime too has recently acknowledged the need to implement adaptation and mitigation strategies that take human rights into account: at the sixteenth session of the Conference of Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) that met in Cancún between November 29 and December 10, 2010, referring to Resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, the parties recognized that climate change had "a range of direct and indirect implications for the effective enjoyment of human rights" and that "the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability."

Yet while an improvement, this still is not satisfactory. First, these stopgaps do not provide a satisfactory answer to situations of real conflict which no conform interpretation of the treaties could avoid. Nor do they address the "chilling effect" that the stipulations of trade or investment agreements may cause when states do not know whether or not any specific measure they take, in order to comply with their human rights obligations, will be considered acceptable by the other parties or instead expose them to retaliation—particularly when they seek to adopt measures that, although not strictly required by human rights treaties, nevertheless would contribute to the progressive realization of human rights.

But there is a further, and deeper, reason why this approach—overcoming fragmentation by building bridges—fails. It is one thing to avoid the risk of conflicts between regimes. It is quite another to reshape international law to enable states to achieve objectives, such as human development or the realization of human rights, that we deem para-

mount. For instance, when Christian Barry and Sanjay Reddy discuss how, under certain conditions, they identify with great care a linkage between trade and labor rights might be justified, they are not simply stating that trade law should not stand in the way of countries complying with their obligations to uphold basic labor rights. They are saying, rather, that the trade regime could serve to enforce compliance with labor standards (Barry and Reddy 2006, 2008). Access to export markets, they show, while of course not prohibiting states from complying with such standards, may still encourage states to achieve competitiveness in global markets—even if this is at the expense of the rights of workers. Yet if adequately reformed, the trade regime could be shaped to achieve the exact opposite: provide incentives to comply rather than reduce the level of protection of these rights. Reducing or even eliminating the risk of conflicts is not enough. What we must achieve is change in the incentives structures that states face.

BEYOND FRAGMENTATION: CONSISTENCY AT HOME

But on which level should we focus our efforts? One popular view is that all that is required is to strengthen democratic processes at the national level to ensure that countries behave, in international negotiations, in a way that truly reflects their interests. The main locus of legitimate governance today remains the nation-state, we are told, and provided the processes by which each nation determines where its interests lie are sufficiently transparent and allow for well-informed deliberation, we should trust the outcomes. If negotiators really were held to account to their populations, the argument goes, rather than to the narrow elites that generally influence the position of governments in international negotiations, they would contribute to building the sort of regimes that are best attuned to the world's needs. We should therefore expect consistency across regimes to be achieved at the domestic level, even though it may not be achievable at the level of global governance. Three arguments are put forward in favor of this view. These arguments fail, however, and there are in fact strong counterarguments that can and should be opposed to this minimalist approach.

Dani Rodrik (2011) provides the first argument in favor of this position. In an elegant demonstration, he notes that international regimes may take the form of what he calls "semi-private goods." Trade would provide the paradigmatic example: if each country truly did what was in its interest, as defined through transparent and well-informed democratic deliberation, it would abandon policies that reward a narrow group within their constituency (the "special interests" that benefit from protectionist policies) and move toward trade policies that, because they would be more open, would in fact contribute to the global economy. Specializing into whatever it has a comparative advantage in, after all, is in the interest of each country, although it so happens that an international division of labor according to comparative advantage also is generally seen to be in the interest of the world economy, because it promotes allocative efficiency, thus expanding the size of the pie for all. This is a version of the classic idea that private vices result in public virtue, that private and public interest converge: it is the invisible hand writ large.

Unfortunately, the argument fails for predictable reasons. First, it underestimates the bargaining logic behind international negotiations: even where it would be in the interest of each country to abandon mercantilist trade policies, countries may not be willing to do so unilaterally because they see import tariffs as a bargaining chip that can allow them to obtain concessions from other countries in favor of their exporters. Second, the argument does not recognize the interdependency between "semi-private goods" (such as free trade regimes) and truly "public goods" (such as the reduction of greenhouse gas emissions that contribute to climate change). For such goods that are truly "public" in nature, of course, the idea that each state would unknowingly conspire for the overall good if only it defined its interest in an enlightened way does not hold. But the two, we have seen, cannot be so easily separated: how trade is organized has an impact on economic growth and on the ability for climate change mitigation strategies to succeed. And Rodrik's proposal that we should focus on improving the quality of deliberation at domestic level begs the question of

how the global public goods will be provided at all: in this "two-steps" approach, in which countries define their national interest first and seek to conclude international agreements afterward, there is hardly any possibility for such global public goods to emerge because by definition it will always be in the interest of each nation to free ride on the contributions of other nations, rather than commit to joining the collective effort. Indeed, by Rodrik's own admission, this is true even in the area of trade, otherwise the classic example of the "semi-private good": China's mercantilist policies. These policies, based on a weak renminbi and repressed wages, are working for China and would only have a chance of being reversed (thus reducing the macroeconomic imbalances these policies are presently causing) if China were insured against the risks it would take at domestic level in changing course.

Third, the hopes placed in democratic deliberation at the national level seem highly unrealistic. Such choices are not made in a vacuum; they always take into account the constraints of the international context in which a nation defines its "national interest." In fact, the interdependency of countries has become such that nations may be called "semi-sovereign": their trade, monetary, fiscal, and social policies, and to a large extent their environmental policies, are defined on the basis of the policies pursued by the other nations, with which they share the global marketplace and the atmosphere.

This is not to say that states will systematically prioritize their economic interest in increasing their exports or in attracting investors over other values, such as in ensuring a high level of protection of workers or of the environment. This view of a "regulatory competition" between states, whose sole objective would be to enhance their competitiveness in the global marketplace and to attract capital by lowering standards applied domestically (Simmons et al. 2006) is highly reductionist, and it oversimplifies how the "national interest" is defined as the product of a struggle for its definition at domestic level (De Schutter 2010; Scharpf 1997, 524). Nor can we ignore the reality of the incentives that influence deliberations at domestic level. The need to attract capital or at least to avoid outsourcing of production, to maintain an

adequate balance of payments, or to create opportunities for exports, are not *the sole* preoccupation of the citizens that contribute to define the national interest, but is would be naive to think they are not *a* preoccupation. (Incidentally, this is also why the concern expressed by John Rawls [1999] that attempts to improve global justice by relying on international institutions are incompatible with respecting the collective autonomy of national communities, is unconvincing: this presupposes that strengthening international institutions necessarily results in weakening democratic self-determination at national level, when in fact it may do the exact opposite: allow people to decide, without being hostage to any international environment given once and for all.)

There is a second argument in favor of strengthening of democratic deliberation at the national level, which sees this route as a "second best." The argument goes as follows: because the reshaping of international regimes would be fraught with dangers or too difficult to achieve, we should refocus our efforts on what seems, after all, to be both achievable and promising—building the capacity of national decision-making processes so they can meaningfully serve to define the state's position in the international arena. The skepticism toward the reshaping of international regimes can stem from the idea, most forcefully articulated by Richard Miller (2006, 503), that these regimes are systematically being captured by the most powerful states: attributing "new powers for institutions linking the strong and weak," he argues, is a risky strategy, because "the domineering influence of the top participants may make the new institutional powers further tools for domination."[6]

However, for all the risks involved in attempting to reshape global regimes in order to make them more "just," these risks may pale in comparison to those involved in the current status quo. For what do we have at present? We have a general international law that has been gradually developed largely as a product of the imperial powers' interests and that is not generally responsive to the needs of the poorest countries (Anghie 2005; Rajagopal 2003). Largely the result of interactions between states that gradually solidify into expectations about conduct in international relations and then, once a sense of legal obli-

gation accompanies such conduct, into custom, general international law systematically favors the states that are the largest and the most powerful, since it is these states whose interests will be considered to be paramount in the formation of new rules. It is also these states who are best equipped to enforce those rules of international law that they care most about, because the countermeasures they adopt, in the decentralized type of enforcement that international law depends on for its effectiveness, are generally more effective than those that weaker or smaller states would like to take—and often cannot. Nor is the conclusion of treaties a particularly promising alternative to the rules of general international law that would apply by default, as clearly illustrated by the case of investment treaties (Guzman 1998; Hallward-Driemeier 2003; see, however, Yackee 2008a and 2008b): the smaller a state's economy, the weaker its bargaining position in trade negotiations or in negotiations that define the balance of rights and obligations between the state and the investor of the other party. As noted by Christian Barry under the explicit title "The Unattractive Alternative: Bilateral Bullying," "a world without global institutions or with only weakened institutions is not an attractive prospect. Powerful countries will do their very best to 'divide and rule' weaker and poorer countries, bullying them in ways that could be difficult to resist, unless these countries acted collectively" (Barry 2006, 534).

A third argument in favor of strengthening national-level decision-making rather than improving global institutions is based on the fact that we would be lacking a convincing metric at global level allowing us to judge the equity of existing arrangements, because different societies hold very different views about the requirements of (substantive) justice or even (procedural) fairness (David Miller's [2007] work is representative of this view).

The response here is that we do in fact have a "global metric" that transcends national sensitivities and that allows us to assess the fairness of global regimes. That metric is universally recognized human rights. Indeed, our best chance may be to move human rights beyond the position they now occupy—as norms that impose duties that a state

owes to its population under (relatively weak) international supervision—to what, in fact, was the position they were originally occupying in international law: the position of the lodestar, defining the objective that all international regimes should contribute to fulfilling.

For the reasons just indicated, the status quo is untenable for poor countries. International law has been developing without them and sometimes against them, and the current international regimes are not sufficiently supportive of their efforts at improving their condition. The opportunity, however, is that interdependency is *mutual*, and the status quo is also untenable for rich countries: the new fears of today—from failed states where transnational crime can operate to climate change, from the dwindling of natural resources to "unfair competition" from jurisdictions with lax labor or environmental standards—are fears that can only be addressed by more international cooperation, not by unilateral action. In fact, rich countries collectively have a considerable interest in reducing poverty in developing countries. This will reduce population growth and the resulting pressure on natural resources; it will mean growing markets to which to export; it will mean improved governance and a stronger ability to tackle international crimes; and it will mean reducing the temptation for poor countries to seek their comparative advantage on global markets in low standards and low wages rather than in the production of goods and the provision of services that allow them to diversify their economies. But while the promotion of development is in the collective interest of rich countries, no individual rich country has an interest in working toward this alone. It is cheaper, and easier, to ride freely on the efforts of others. Human development objectives and human rights are global public goods and we must draw the institutional consequences of that fact. As Barry (2006) has noted, we must accept the duty of global institutional reform.

THE ROLE OF HUMAN RIGHTS IN SHAPING INTERNATIONAL REGIMES: THE ROME MODEL

Reshaping international regimes so they converge toward the full realization of human rights corresponds, in fact, to what is required

by the right to development. The idea of a right to development was first expressed by Kéba M'Baye in his 1972 inaugural lecture to the International Institute for Human Rights. It was then explored in a detailed study authored by Philip Alston for the UN secretary-general in 1978, prepared at the request of the Commission on Human Rights.[7] The study emphasized both that measures adopted at domestic and the international levels should be mutually supportive and should go hand in hand, and that the realization of the right to development should be based on participation at all levels. In 1986, after five years of discussions within a working group established by the Commission on Human Rights, the UN General Assembly adopted the Declaration on the Right to Development, defining it as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[8] Since then, various working groups, task forces, and independent experts have been trying to identify ways to overcome obstacles to the realization of the right to development and to define criteria that would allow the measurement of progress toward its fulfilment. It is unnecessary here to recount this history in detail (see Marks 2011): whichever advances were made stumbled on the apparently insurmountable oppositions between rich and poor countries on issues such as the need for a new international instrument or the use of indicators. We need not abandon the vision of the right to development. But we may need to redefine how to get there.

Three components, I suggest, could define the way forward. First, there is the substantive component: the reference to human rights and the use of indicators based on human rights to measure progress done both at national and at international levels. Second, there is the institutional component: the establishment of fora where all relevant actors could strengthen coordination in order to ensure that the policies they adopt converge toward the full realization of human rights. Third, there is the governance component: the adoption of action plans that ensure that we make progress, at reasonable speed, toward that objective.

The Substantive Component

First we need to reestablish human rights as the reference through which we measure progress at the national and international levels. This means relying on human rights indicators rather than, for instance, macroeconomic indicators or development indicators alone. To a large extent this is already the task performed by various human rights bodies and experts; building on what exists should therefore be achievable. Where more needs to done, however, is in bringing about the position shift referred to above, from human rights imposing duties on states toward their populations to human rights reshaping the international regimes. This means identifying which human rights duties can be imposed on international organizations, both within and outside the United Nations system, and developing mechanisms that can hold them accountable (Wouters et al. 2010). It means developing tools to ensure that transnational corporations are aware of their human rights responsibilities (De Schutter 2006). And it means ensuring that states comply not only with their human rights obligations toward individuals and groups on their national territory, but also with their so-called "extraterritorial" human rights obligations.

Over the past 10 years, significant progress has been made on all these fronts. International organizations are increasingly developing mechanisms to ensure their accountability toward human rights, and the independent experts of the Human Rights Council have occasionally contributed to ensuring that international organizations take human rights into account in their operations. Transnational corporations are aware that they are now expected to respect human rights and ensure that they have a positive impact on the realization of those rights: the OECD Guidelines on Multinational Enterprises were revised in 2000 and again in 2011 in order to refer to human rights, to which they now dedicate a detailed section; and the Human Rights Council has adopted a set of Principles on Business and Human Rights, implementing the framework proposed by the special representative of the UN secretary-general on the issue of human rights and transnational corporations and other business enterprises. Most recently, on September 28, 2011,

a group of experts adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social, and Cultural Rights. These principles contribute to the progressive development of the international law of human rights by clarifying the human rights obligations of states both as they relate to their conduct that produces effects on the enjoyment of human rights outside of the states' territories and as they relate to "obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally" (Maastricht Principles 2011). It is also to this enterprise that the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements seek to contribute (De Schutter 2011c): while human rights treaty bodies as well as independent experts of the Human Rights Council have regularly called on states to prepare human rights impact assessments of the trade and investment agreements that they conclude, emphasizing that states should take into account their human rights obligations when negotiating or ratifying such agreements, the guiding principles aim at providing guidance as to how to go about preparing such assessments, focusing on the methodological and procedural aspects.

As these norms and procedures develop, human rights gradually can turn into what Buchanan and Keohane call a "global public standard" to assess the normative legitimacy of global governance institutions—that is, the "right to rule" of these institutions, which cannot ensure compliance with their decisions unless they are perceived as legitimate by those, including states, to whom such decisions are addressed.[9]

Even apart from the preeminent position that they occupy in the original project of the United Nations, human rights possess three features that make them particularly suited to this goal. First, they are *relatively incomplete*. They are sufficiently precise to provide a focal point (on this notion see Schelling 1960, chap. 3) for deliberations as to how to build international regimes—how to regulate trade, how much to protect foreign investors, or how to allocate the responsibilities in

combating climate change—yet they are vague enough not to preempt the result of these deliberations. They thus allow true ownership by the actors, primarily states, who contribute to the establishment of international regimes. As Buchanan and Keohane note, any standard of legitimacy should allow for a "principled, informed deliberation about moral issues into the standard of legitimacy itself" (2006, 421). "Because what constitutes appropriate accountability is itself subject to reasonable dispute, the legitimacy of global governance institutions depends in part upon whether they operate in such a way as to facilitate principled, factually informed deliberation about the terms of accountability" (427). That is precisely what human rights allow, at least as adequately than other potential candidates such as, today, "sustainable development," "green growth," or "development goals."

A second advantage of human rights is that they are both *legal rules*, binding upon states and, in some respects, on nonstate actors, and *ideals*. The legitimacy that human rights confer therefore includes the element of legality without being reducible to that element. Human rights are violated or they are complied with, but that simple dichotomy, which is the language of lawyers, never exhausts their significance, for human rights can always be improved upon. Our quest for the full realization of human rights is one in which we permanently learn and test the means we use against the ends that human rights are supposed to define.

A third advantage of human rights is that they effectively correspond to the requirements of moral cosmopolitanism, the idea that citizens in rich countries owe duties to those living in poor countries. Human rights are not simply norms that regulate the relationships between states, built on states' interests. Rather, they are the legal embodiment of the idea that, as Thomas Pogge writes, "every human being has a global stature as the ultimate unit of moral concern" (2002, 169). Human rights are held by each individual, wherever he or she finds him- or herself to be, and all states are duty-bound to refrain from conduct that might lead to a violation of the rights of that individual. Because they can form the basis of an obligation to support each

individual's access to certain basic needs, a condition for the effective enjoyment of human rights, human rights provide a foundation for a duty of states to work collaboratively toward the fulfillment of these basic needs—a foundation that is much more solid than, for instance, those that David Miller puts forward in his *National Responsibility and Global Justice*, which are based on certain ethical intuitions rather than on well-established legal norms.[10]

The Institutional Component

A second component of this strategy consists in creating fora where different international actors—governments, of course, but also international agencies and transnational networks of civil society organizations—can work together to ensure that their policies converge rather than undermine each others' efforts. It is this kind of forum that has been established following the global food price crisis of 2007–2008, when the Committee of World Food Security (CFS) was transformed in order to become, in the words of the document defining this reform, "the foremost inclusive international and intergovernmental platform" to combat hunger and malnutrition and realize the right to food for all (Committee on World Food Security 2009, para. 4).[11] The CFS includes as members all governments, which are encouraged to participate at ministerial level, "insofar as possible representing a common, interministerial governmental position" (para. 9). Participants in the mechanism, which have the same rights as members except with respect to voting and decision taking, include the representatives of UN agencies and bodies with a specific mandate in the field of food security and nutrition, along with representatives of other relevant UN system bodies whose overall work is related to attaining food security, nutrition, and the right to food, such as the Special Rapporteur on the Right to Food, the Office of the High Commissioner on Human Rights, the World Health Organization, UNICEF, the UN Development Program, and the Standing Committee on Nutrition (SCN); civil society and nongovernmental organizations; international agricultural research systems; the World Bank, International Monetary Fund, regional devel-

opment banks, and the WTO; and the private sector and philanthropic foundations active in the area of food security (para. 11).

The CFS is expected to provide a platform for discussion and coordination to strengthen collaborative action among its members and participants; "promote greater policy convergence and coordination, including through the development of international strategies and voluntary guidelines on food security and nutrition on the basis of best practices, lessons learned from local experience, inputs received from the national and regional levels, and expert advice and opinions from different stakeholders"; and provide support and advice to countries and regions (para. 5). In a second phase of its work, it should, in particular, promote accountability by "developing an innovative mechanism, including the definition of common indicators, to monitor progress towards these agreed upon objectives and actions" and develop a *Global Strategic Framework for Food Security and Nutrition*, conceived as a flexible, "rolling" document that can be regularly updated on the basis of new information and new priorities "in order to improve coordination and guide synchronized action by a wide range of stakeholders" (para. 6). As advocated during the preparatory stages of the reform (Special Rapporteur on the Right to Food 2009), collective learning and monitoring for results are thus two key aspects of the work of the CFS.

The Governance Component

A third component of a comprehensive strategy to ensure that international regimes are gradually reshaped in accordance with the requirements of human rights consists in the adoption of action plans defining a calender of actions to be taken, allocating responsibilities across actors, and defining indicators allowing progress to be measured and increasing accountability. This is what, in the context of the realization of the right to food at a global level, the *Global Strategic Framework for Food Security and Nutrition* should achieve. This matters because what is needed is more than the ad hoc reaction to discrete violations of rights by specific measures. What is needed is sustained effort to channel

existing regimes in a direction more conducive to the full realization of human rights. Action plans are a way to overcome the gap between the "what" and the "how." They are important not just for the end vision they propose but for the identification of pathways toward that vision. They bridge the gap between relatively small changes to the system that, in isolation, are unable to make a significant difference, and changes so broad that they seem impossible to achieve.

For such action plans to succeed, they should include appropriate indicators and benchmarks and a monitoring of the choices made by policymakers. This can constitute a powerful incentive to integrate long-term considerations into decision making, and to effectively implement the roadmap that has been agreed upon. It is always tempting for the proponents of business as usual to dismiss as utopian proposals that are so far-reaching as to seem to be revolutionary in nature, and to dismiss other proposals as so minor and insignificant that they will not really make a difference. We must move beyond this false opposition. What matters is not each of the policy proposals considered in isolation, whether reformist or more revolutionary. It is the pathway that matters: the sequence of measures that, step by step, may lead to gradually move beyond the existing fragmentation of international law and of global governance.

Such action plans should not be seen simply as a new form of rule-making, prescribing objectives and how to get there. They are also a learning device. They should be permanently revised in the light of the implementation problems faced by governments. In this iterative process, in which implementation feeds back into the formulation of guidelines set at global level, the tools that are recommended should be gradually improved in order to achieve effective results; the very definition of the objectives may have to be revisited; and the paradigms under which actors operate shall, in time, be challenged and revised. Learning and monitoring become indistinguishable in a process that is both top-down and bottom-up, and in which any recommendations addressed to states or other actors are provisional, formulated subject to the reservation that other ways of making progress toward agreed-

upon objectives may in fact be more appropriate in certain settings, and that the objectives are amenable to change.[12]

CONCLUSION

When human rights initially developed as a new branch of international law, it was seen as introducing a Copernican revolution: through human rights, international law was regulating the state-citizen relationships that hitherto were shielded almost entirely from international scrutiny. We now need another Copernican revolution in the three directions I have indicated: to make it possible for human rights to guide the exercise of their powers by international organizations; to ensure that transnational corporations use their influence to support human rights; and to monitor the impact that measures adopted by states have outside their national territory. We also need to develop forms of coordination at the international level that have been discouraged by the specialization of regimes and organizations the recent past. It is not enough to mitigate the negative impacts of fragmentation; we must move toward improved convergence. And finally, we must be impatient with the status quo. Guarding against violations of human rights in the global economy will not do. We must plan a transition, and gradually change the structure itself, piece by piece.

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NOTES

1. The United Nations Monetary and Financial Conference was held in Bretton Woods, New Hampshire, on July 1–22, 1944, leading to the establishment of the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), and the General Agreement on Tariffs and Trade (GATT). The United

Nations Conference on International Organization took place in San Francisco between April 25 and June 26, 1945, leading to the adoption of the Charter of the United Nations.

2. The expression was coined by the economist John Williamson, who has since repudiated it (Williamson 1996).
3. The notion of a "Geneva consensus" was inaugurated by Pascal Lamy in a speech he delivered in Santiago de Chile, on January 30, 2006 (http://www.wto.org/english/news_e/sppl_e/sppl16_e.ht, accessed on November 4, 2011). See also the speech of Pascal Lamy upon being conferred the doctorate honoris causa by the University of Geneva at its 450th anniversary on June 5, 2009 (http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm, accessed on November 4, 2011).
4. The UNFCCC was signed by 154 countries on June 12, 1992. It entered into force on March 21, 1994 (1771 UNTS 107; 31 ILM 851 (1992)). As of December 2009, it had 192 states as parties.
5. See, e.g., Annex B to the United States Model Bilateral Investment Treaty (2004) (according to which "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations," as prohibited under Article 6 [Expropriation and Compensation](1) of the Model BIT: see Annex B, para. 4, (b)); or the Canadian Model Bilateral Investment Treaty, Annex B.13(1), Article (1)(c) (providing a similar interpretation of the prohibition on expropriation provided for in Article 13 of the Model BIT).
6. It should be noted, however, that Richard Miller places his hopes not on a strengthening of domestic political processes but rather on that of global social movements: I return to this point below.
7. See UN (1979). The report is by Philip Alston but is presented in the name of the UN secretary general.
8. UN General Assembly, resolution 41/128 of December 4, 1986 (adopted with only one negative vote [United States], and eight abstentions).
9. In their contribution, Buchanan and Keohane refer to human rights as one of the substantive criteria that are relevant in assessing the

legitimacy of global institutions. Such institutions, they write, "must not persist in committing serious injustices. If they do so, they are not entitled to our support. On our view, the primary instance of a serious injustice is the violation of human rights" (Buchanan and Keohane 2006, 419). That refers to what they call the "minimal moral acceptability" of global institutions. My position places the bar higher: global governance institutions should be assessed primarily by the contribution they make to the realization of human rights. Buchanan and Keohane presumably would not accept that position as overlapping with theirs, although they express some hesitation on this point. They write,

> For many global governance institutions, it is proper to expect that they should *respect* human rights, but not that they should play a major role in *promoting* human rights. Nonetheless, a theory of legitimacy cannot ignore the fact that in some cases the dispute over whether a global governance institution is legitimate is in large part a disagreement over whether it is worthy of support if it does not *actively promote* human rights. A proposal for a standard of legitimacy for global governance institutions must take into account the fact that some of these institutions play a more direct and substantial role in securing human rights than others (Buchanan and Keohane 2006, 420 (emphasis added).

10. David Miller notes that there are three channels through which citizens of rich nations may be said to have responsibilities toward the global poor: the remedying of past injustices, such as those stemming from the colonial period; the inequity of the current terms of cooperation between nations, which increase inequalities rather than abolishing them; and "the bare fact of poverty itself, independently of any prior interaction between rich and poor countries" (Miller 2007, 249).

11. The full quote is:

> The reformed CFS [will be] the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger and ensuring food security and nutrition for all human beings. The CFS will strive for a world free from hunger where countries implement the voluntary guidelines for the progressive realization of the right to adequate food in the context of national food security.

The voluntary guidelines were adopted on November 23, 2004, by the Council of the FAO, following two years of negotiations in an intergovernmental working group of the CFS. They provide a detailed set of recommendations to states as to how to move toward the full realization of the human right to adequate food.

12. There is an ample literature on learning in organizations on which this paragraph draws, and to which my contribution to the reform process of the CFS was heavily indebted (for a review, De Schutter and Lenoble 2010; for an illustration of the how such an approach can shed light on the approach of an international organization, see Sabel and Zeitlin 2010). While learning can consist in one actor simply improving the instruments he uses to pursue certain objectives, "double-loop" learning consists in the objectives themselves being re-examined (Argyris 1976, 1982); "triple-loop" learning would consist in an actor rethinking the core values by which he defines his identity and project (Swieringa and Wierdsma 1992).

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