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Publisher Routledge

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Cultural Studies

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title-content=t713684873>

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Online Publication Date: 01 May 2009

To cite this Article Erni, John Nguyet(2009)'HUMAN RIGHTS IN THE NEO-LIBERAL IMAGINATION',Cultural Studies,23:3,417 — 436

To link to this Article: DOI: 10.1080/09502380902863356

URL: <http://dx.doi.org/10.1080/09502380902863356>

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HUMAN RIGHTS IN THE NEO-LIBERAL IMAGINATION

Mapping the 'new sovereignties'

'The end of sovereignty': this has been an ominous refrain in the chorus of global political and human rights analyses aimed at reformulating a post-Cold War configuration of world power. In cultural studies, the same pronouncement is more likely made through a mix of theoretical exuberance and ambivalence toward a post-nationalist and cosmopolitan imaginary. This essay takes as a point of departure the rise of 'new sovereignties' – a fractured Westphalianism – as a rubric for understanding the political imagination about the international community today. It asks: to what dimensions of the regime of the new sovereignties can the human rights legal discourse as we know it today still exert influence, given the new configurations of globally disaggregated power? With human rights today reemerging as a bifurcation, how can cultural studies reconcile a theory of rights as subaltern claim-making with that of rights as an all-globing tool in the neo-liberal order of world justice? Through a preliminary mapping of the moral-judicial and political forces that shape the regime of the new sovereignties, this essay attempts to illuminate why rights as international deontological politics is inadvertently complicit with the reproduction of rights as something constitutive of empire and neo-liberalism.

Keywords human rights; international law; new sovereignties; global trade; neo-liberalism

Introduction

Because of globalization.

Because of the explosive popularization of new communication technologies.

Because of world capitalist restructuring aimed at flexibilizing capital, labour, geography, and politics.

Because of the shifting political nature of inter-state relations between the North and the South brought about by the end of the Cold War.

Because of reform in international law in its effort to better coordinate compliance and enforcement of world security.

We have been hearing for quite some time about the erosion of state sovereignty. Why has the system of nation-states been weakened, and the concept of sovereignty been endangered? The shorthand answers above represent some of the responses offered by sociologists, neo-liberal economists, researchers in international relations, and scholars and practitioners in international law. As we all know, for critics of the left, a highly nuanced and critical amalgamation of those perspectives arrived with the work of Michael Hardt and Antonio Negri, whose *Empire* (2000) and *Multitude* (2004) were historically situated squarely between the first and second Gulf Wars, which they rightly postulated as the paradigmatic cases not about the death of sovereignty, but about its violent rebirth.

The same historical moment has also forged an urgent reassessment of human rights and international law. To what dimensions of the 'new sovereignty' can the human rights discourse as we know it still exert influence, given the new configurations of global power? If we begin by acknowledging that the human rights movement has always been a mixed blessing in international politics, then where is its new tipping point, as it were, from being a global moral-judicial force aimed at human emancipation to being a platform for powerful states to launch their pursuit of war and exploitation? To put it concisely, what is the relationship between human rights and the politics of Empire? Needless to say, there has been an abundance of responses to Hardt and Negri's works. However, few of them connect the visionary intensity of those works (and many say, their equally robust flaws) to the politics of human rights. It is to the current re-configuration of the 'human rights imaginary' by the transformation of state sovereignty power that this essay turns. It is concerned with two central problematics: (1) how do we think about the forms of international politics through a new assessment of the question of legal state sovereignty, capable of illuminating the articulation of various levels of legal and extra-legal determinations of power?; (2) how do we rethink the form or the underlying discursive structure of human rights, that has had to respond to the changing forms of state sovereignty? Primarily, I want to offer a theoretical proposition: as the legal and economic forms of global sovereignty are being remapped today, we are witnessing an appropriation of human rights, politically and epistemologically speaking, that seems to render the reproduction of human rights as something constitutive of neo-liberalism. Neo-liberalism, or what I call the regime of the 'new sovereignties,' never disavows human rights. My proposition is about the

curious relation by which human rights are included as an outsider, as it were, to the new sovereignties.

Human rights are at a crossroads: rights-based political work has had to decide its destiny differently at a moment of profound humanitarian crises and distress. Stating this also means stating an objection to the notion of the so-called 'end' or 'death' of human rights. This seems to be a popular mantra these days. However ambivalent one may feel about human rights, especially among critical circles, whatever we think about how enforceable international law can be, we should not confuse contingency and contradiction with total failure, crossroads with dead end (see Erni, forthcoming 2009).

Legal sovereignty: a 'limit concept'

The conception of sovereignty as an interactive configuration of the relationship among nation-states has always been a concern of international law, since sovereignty posits not a simple transactional kind of interaction among rulers. Instead, this interaction is governed by the legal designation of each state as an independent entity equal to all other states. According to the classical Westphalian conception, sovereignty was the juridical order that organized the supremacy of a state to claim exclusive territoriality as well as absolute property rights of that state's subjects. A sovereign is supreme or pre-eminent; its power is always already above power. In other words, to be sovereign is to be subject to no higher authority. Of course, this absolutizing of (a theologically-derived monarchic) power to claim 'private' ownership of territories and people – what is known as internal sovereignty – was predicated upon the threat of a breach of territory by other states (see Brown 2006, Douzinas 2007, pp. 269–290). Westphalianism therefore recognizes the necessity of forming 'equal' and 'friendly' relations among states, resulting in a codification of the principle of external sovereignty as a key doctrine in shaping international politics. Such a legal doctrine asserts three principal aspects of sovereignty: (1) a *prima facie* exclusive jurisdiction over a territory and the permanent population living there; (2) a duty of non-intervention; and (3) a duty of international obligations arising from customary law as well as treaties on the participating states' consent. On the first aspect, the claim of exclusive territorial jurisdiction is *prima facie* valid because the claimant must first be recognized and accepted as a state by other states and a juridical equal to them. This entails establishing the claimant as a political entity in the international system, or what is known as 'international legal sovereignty' (Krasner 1999).

It is the relation between the second and third aspects of Westphalian sovereignty – the duty of non-intervention and that of complying with international obligations – that deserves our attention. This is a relation fraught with tension. How does the right of non-intervention wrestle with the duty of

international obligations (which often necessitates intervention)? How do internal and external forms of sovereignty reconcile with each other? In other words, how do we understand the structure of sovereignty in symbolic discursive terms, which inscribe in the body of a nation-state a diacritical relation that preserves both the inside and the outside, through legal codes that both protect and violate the interiority of sovereignty? Article 2(7) of the Charter of the United Nations is a display of this diacritical relation. It reads:

Nothing contained in the present Charter shall authorize the United Nations *to intervene* in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle *shall not prejudice* the application of *enforcement* measures under Chapter VII.¹

(Charter of the United Nations <http://www.un.org/aboutun/charter/>, emphasis added)

A deliberately elliptical reading of the provision sheds light on the symbolic structure of modern state sovereignty: ‘*Nothing . . . to intervene . . . shall not prejudice . . . enforcement.*’ Here, in the abstract form of the law, the absence of a cause justifying intervention – an empty signification – is curiously the very cause that cannot be prejudiced against. ‘Nothingness’ is the very force that must be respected; it is that which authorizes the relation to the potentiality of intervention. To borrow Derrida, the law of non-intervention ‘keeps itself without keeping itself, kept essentially by a logic of [gatekeeping] that keeps nothing’ (quoted in Agamben 1998, p. 49). Non-intervention does not present us with a shut door, but an open one that lets us linger in a zone of ‘potentiality’ (in this case, the ‘open door’ is literally deposited in Chapter VII of the Charter).

Here we encounter a very interesting legal situation regarding the nature of sovereign power. Imagine if the Article were written differently: ‘There exist some potential concerns or reasons in the present Charter that may authorize the United Nations to intervene . . . and this principle shall authorize the application of enforcement measures under Chapter VII.’ As law, this alternative legal construction would radically attenuate the law’s power ironically by maximizing signification, which is to say, by minimizing potentiality.²

But let us not forget that it was the rise of human rights that made vivid the tension inherent in the legal structure of sovereignty law. Sixty-plus years of modern human rights development have essentially punctured state sovereignty and its treasured notion of self-suppositional jurisdiction and autonomy.³ As Derrida (2005, pp. 157–158) puts it succinctly, ‘[I]n the name of the universality of human rights, or at least their perfectibility . . . the indivisible sovereignty of the nation-state is being more and more called into

question, along with the immunity of sovereigns, be they heads of state or military leaders, and even the institution of the death penalty, the last defining attribute of state sovereignty.’ The modern subject has a new chance to withstand state violence, because he or she has been recast as both the victim of sovereignty and the beneficiary of human rights. Human rights use law against law, so as to institute and proliferate legal spaces of contestation within the body of the nation-state.

But it has never been human rights law alone; more powerful international organizations aimed at restructuring parts of a local economy through loans and other economic schemes have also undermined state sovereignty. There exists an entire political economy of state interference undertaken by the Bretton Woods institutions (see, e.g. Medenica 2004). For instance, the conditionality agreements issued by the International Monetary Fund (IMF), which carry direct weight due to attachment to funding provisions, is one of the most acute forms of interference. Yet they also carry indirect weight derived from the IMF’s claim to ‘technical expertise’ which positions the international funding body as the ideological arbiter of ‘universal’ values and norms of development and modernity (see Head 2004, Lee 2003). In short, Westphalian sovereignty is not dead today, but it has gradually evolved into a limit concept that holds at bay three essential components, namely territorial proprietorship, world capitalism, and humanitarian politics. Moreover, the difference among property, money, and rights is becoming less and less distinct today, when the line between human rights politics and predatory forms of neo-liberalism is increasingly blurred. I shall return to this later.

New sovereignties

With the war on terror (still) looming large, it is easy to collapse an understanding of state sovereignty in the new world order into the specters of firearms, martial orders, and bombs. But let us not forget that the scope of new sovereignties is never limited to the political or the militaristic. Rather, what characterizes the new sovereignties is a paradigmatic reorientation of power into the form of *networked legal and economic governance*. Today, legal scholars have updated Westphalianism by turning our attention to the new and variegated forms of linkage enacted between sovereign states. Increasingly, absolute sovereignty has given way to networked sovereignty. As Gopal Balakrishnan (2003, p. ix) puts it, ‘The term “Empire” . . . refers not to a system in which tribute flows from peripheries to great capital cities, but to a more Foucauldian figure – a diffuse, anonymous network of all-englobing power.’ Before Hardt and Negri, political theorists Abram Chayes and Antonia Handler Chayes (1995) have already offered in their book *The New Sovereignty* a new vocabulary of state power that postulates a high level of inter-penetration

of world economic and political relations. They offer the by now familiar assertion that 'sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life' (Chayes & Chayes 1995, p. 27). If international standing is the norm, then the operational logic of the new sovereignty is derived from 'the active role of the [new sovereignty] regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime' (Chayes & Chayes 1995, p. 229).

I pluralize Chayes and Chayes' term – from 'new sovereignty' to 'new sovereignties' – because understanding this new formation means grasping the complex relations or articulations of various overlapping modalities as well as techniques of sovereignties. What are those overlapping modalities and techniques, spreading while consolidating the political, economic, cultural, legal, and human dimensions of the new sovereignties? Let me offer three propositions to illustrate the main themes of the new sovereignties.

- 1 *The regime of the new sovereignties intensifies a renewed apparatus of flexible capital accumulation beyond borders.*

This much is obvious. Nonetheless, it is important to note that such flexibility is understood in both positive and negative terms. On the one hand, the new sovereignties intensifies the network apparatuses that facilitate capital accumulation via speculative free-flowing of finance and assets. This apparatus is networked, not anarchic. States are involved in this apparatus, albeit in a transborder structure and in a process of perforating their sovereignty. Yet on the other hand, such a multilayered apparatus can accrue considerable risks, depositing potentially infinite points of vulnerability as capital jumps and is traded from locale to locale, financial system to financial system, political environment to political environment. While this retains the shadow of 'interdependence sovereignty,' it does magnify the potential of a loss of control over transborder movements, and by extension, a loss of balance in the rights/duties matrix of state sovereignty. It is important to realize that a flexible sovereignty regime does not – in fact never could – imply the end of state sovereignty.

- 2 *The regime of the new sovereignties forges a managerialist re-configuration of inter-state and supra-state relations.*

A fundamental issue underpinning this re-configuration of international relations is that there has evolved among government elites a new way of doing business, so to speak. World governments see the need to transform the international society of states into a decentered form of global

governance. Empirical evidence suggests that where previously unitary states were the key actors in the global political system, now we have new institutions and forms of international relations that represent components of the state armed with a corresponding set of techniques and protocols in their exercise of transnational governance. Finance ministers, securities commissioners, environmental agencies, armed forces representatives, and other para-governmental representatives, are now forming units of transgovernmental operatives. The horizontal operatives link what Anne-Marie Slaughter (2004) calls the 'new diplomats' in functional transnational channels who work more or less independently without representation of the state as a singular body. Meanwhile, the vertical networks of national and their supranational counterparts, such as judges, antitrust regulators within a regional bloc (e.g. the European Union), and other legal professionals are increasingly entering into various forms of 'international judicial negotiation' at a functional level, again with no required reference to the state as a unitary artifice.⁴ As a result of the horizontal and vertical linkages involving the transnational technocratic professional class, '[t]he network structure of interaction is allegedly based on the disaggregation of the state and its sovereignty: it enables officials in each domain to solve common problems, share information, harmonize rules, generalize normative expectations, coordinate policy, and punish violators of global law without claiming to do so in the name of the state as a whole' (Cohen 2005, p. 164). What emerges, therefore, is a powerful global matrix of networked units made up of new actors in a system of perforated sovereignties. The Foucauldian analytic expands governmentality into a planetary project.

3 *The regime of new sovereignties produces new forms of decentered legal cosmopolitanism.*

As underscored in proposition 2, the regime of new sovereignties is in part formed through vertical networks of legal professionals who have the capability to enact new jurisprudence, without embedding it in local or national courts or referencing it in domestic laws (see, e.g. Habermas 2001). This amounts to an acute reinvention of legal Westphalianism; a 'society of equal states' is no longer perceived as the necessary basis for law making. Replacing it is a global political constitutionalism involving various levels of communication and exchange, such as a partnership between national courts and a supranational tribunal. 'Global law,' 'global legal resolves,' 'constitutional cross-fertilization,' 'cosmopolitan justice': these are some of the terminologies underwriting the new decentered legal sovereignties (see Slaughter 2004, pp. 65–103). To the network of supranational judiciaries, this amounts to a trend of developing a 'global political constitution.' Jean Cohen explains:

[There is] the thesis that we have entered a postsovereign, decentered world order – namely, the claim that a cosmopolitan legal system regulating global politics actually exists and that is *already* constitutionalized . . . The global political constitution is produced not by legislation but through decentered legal self-reflection and through a global community of courts, which ascertain legal validity and legal violations. The emphasis here is on the emergence of a global political constitution and a global legal system through *polycentric*, plural, autological processes that produce valid legal norms that regulate actors connected through complex *networks* bounded not by territory but by functions, communicative codes, and particular practices.

(Cohen 2005, pp. 167–168, original emphasis)

But there are two difficulties associated with this regime. First, legal cosmopolitanism is difficult to achieve given the holding power of national constitutions that can still circumscribe law making within the confines of the state. Unlike cultural cosmopolitanism, the hybridization of law which might lead to some kind of global constitution, while not impossible, takes a much longer time to evolve (see Fischer-Lescano & Teubner 2004). It is also much harder to enforce. Second, the very idea of a ‘global rule of law’ has been endangered in recent times. After 9/11, an overzealous claim of legal transcendence under the new sovereignties regime has played into the hand of unilateralist politics disguised as cosmopolitan global law. Profoundly skeptical of the transcendent view of legal cosmopolitanism, Jean Cohen warns:

The risk is that of ‘symbolic constitutionalism’ – that is, the invocation of the core values and legal discourse of the international community to dress up strategic power plays, self-interested regulations, and interventions in universalistic garb. The Bush administration’s justification of its invasion of Iraq as an enforcement of human rights law and Security Council resolutions, despite the failure to win Security Council authorization for this action, is a case in point.

(Cohen 2005, p. 169)

In other words, the global enforcement networks buttressed by some kind of nebulous ‘global law’ may be exactly what Empire needs to assert its global authority.

With these propositions, I hope to have outlined a tentative framework for grasping the regime of the new sovereignties in neo-liberal economic, legal, spatial, and political terms. With this outline, let us now consider how the new sovereignties regime and the human rights regime interact. How might we think about the impact that the networked sovereignties have on the equally networked apparatus of international human rights?

Moral efficiency

When considering the direct and indirect forms of interface between new sovereignties regime and human rights, we are indeed posing a key question about global governance in the contemporary epoch. Many in the human rights organizations today are positing a 'global civil society' as their ultimate political and humanitarian model for cosmopolitanizing international politics. However, arguably, any form of enmeshment that those organizations have with the new sovereignties of Empire might mean a tacit agreement that the two networks are co-exercising a post-governmental kind of governance at a global scale. The result is an even denser web of networks, interconnecting global capital formation and humanitarian movements. The often celebrated notion of global governance as a regime of networked practice through which we can articulate collective interests on the global plane, establish rights and obligations, and mediate differences, may entail imagining a new theory of human rights as a component of the new sovereignties. Here, I suggest that global neo-liberal governance allows not only capital assets to operate across borders, but also a second kind of thing: what I call 'rights assets' to be produced and distributed across borders. Global neo-liberal governance opens economic markets as well as what can be crudely called 'humanitarian markets.' A 'rights asset' is something a state or a group of networked states can invest in, such as setting up inter-state environmental protection agreements, cooperative HIV prevention schemes, or coordinated programs to accept and accommodate refugees. The rights asset so accumulated is thus a result of enmeshment between the dominant players of the new sovereignties and human rights bodies and other monitoring organizations, committees, or non-governmental organizations (NGOs), even as those human rights actors work to resist the power of the new sovereignties. As such, the norm of international standing as a primary element in any form of sovereignty becomes something that can be measured according to the level of rights assets held.

Examples of how the new sovereignties networks increase their holding of rights assets are numerous. Turning to the global humanitarian field, networks of finance ministers and central bankers have positioned themselves as the efficient responder to global and regional economic crises. The network of finance ministers who form the G-8, for instance, are the ones who make key decisions on debt relief for poor countries. Even the G-20, composed of finance ministers of 20 developed and developing states, can be said to be doing 'humanitarian work' by setting up policies to deal with the collapse of markets. Needless to say, networks of national officials have also worked to coordinate environmental protection policies across borders. In addition, virtually every inter-state trade compact today would include a provision for setting up an environmental enforcement network across trade partners, which endeavors to build the capacity of individual nation's environmental protection

agency, provide technical assistance, exchange emission figures, and sponsor training.⁵ On the judicial front, there have been national constitutional judges as well as parliamentarians who liaise with their counterparts across borders to adopt and publicize common positions on free speech, the death penalty, religious freedom, and other rights issues (Slaughter 2004, p. 290).

The production of rights assets should ideally correspond with an increase in humanitarian actions and a decrease of violence. Charting the relationship between the two, especially on a global scale, will not be easy. There is no map, graph, or chart that has yet quantified rights assets and showed their global spread; rather, there are only cross-border events and decision-making points. What we can postulate is that the networked powers of the new sovereignties present their human rights concerns as if they were properties that can be traded among partners in the network. There arises a new human rights imaginary whereby economic capital and 'rights capital' form a trade nexus, and that what mediates this trading are various practices of collective learning, technical knowledge transfer, and rule-making.

Let us imagine this scenario: a young person is hoping to become a pianist.⁶ She practices her piano every day, which is really very tentative music making. She lives in an apartment of a residential building. Because she is only playing at an entry level, her piano practice generates noise to her neighbors. In trade terms, she is causing 'externality' if she is not paying some form of damage to the neighbors. Let's assume, for the moment, that a certain kind of amateur piano playing does constitute a negative social capital which we commonly call noise. Let's also assume that the noise so generated does cause nuisance, or a kind of 'environmental pollution,' to her neighbors. In other words, for the moment, let's bracket from our discussion the creative potential and subtle aesthetic or any other socially affirmative qualities of amateurism in the artistic pursuit.

The residents of this building have already formed a homeowners' management association, which has clearly stated that excessive and perpetual noise is a nuisance and that residents have a right not to be disturbed. If the 'right to peace and tranquility' has clearly been established, then the young pianist must either stop practicing or voluntarily pay 'money' to the neighbors to purchase the right to generate noise. Piano practice therefore becomes expensive due to this purchase, the number of practice sessions will thereby likely decrease, and thus noise decreases as well until it reaches an economically efficient level. It is noted in this scenario that 'money' here need not refer to the everyday currency we use; it can be in the form of service, neighborly congeniality, even manners of self-restriction.

Yet if the homeowners' association also states clearly that practicing musicians have the right to generate noise, then it means the neighbors must either move to another building to live, or voluntarily pay the pianist so that she may purchase some kind of noise reduction device. In either manner, the

sum effect of noise will decrease to an economically efficient level. And if there are many aspiring pianists and other noise-generating amateur musicians in the building, they can form a network to either pool their money to pay their neighbors or to collectively assert their right by demanding their neighbors to pay them. Of course, this same network logic can of course be similarly adopted by the non-music playing, tranquility-defending neighbors.

This hypothetical scenario presents to us an analogy to what Jeffrey Dunoff and Joel Trachtman (1999) call the 'international political market.' The utilitarianism underscored in the scenario shows that networked states can trade their properties in order to maximize their development, or minimize externalities. Piano playing is analogous to state interest, as typified by security interests, capital accumulation, and military interests. The externality of noise is analogous to the social, political, or moral cost brought about by capitalist advancement. The musician, acting alone or in a network, pays her neighbor to purchase the right to play: her money is analogous to a state's, or networked states', asset. In international politics, human rights performance can be thought of as an important type of state asset – what I have earlier dubbed the 'rights asset.' In order to establish national security, maximize capital accumulation, or advance military interests, powerful networked states must deal with externalities. The new sovereignties must therefore produce a vicissitude of human rights assets, by improving the environment, releasing poor states' debt, reducing the rate of capital punishment, providing humanitarian aids, and so on.

What needs to be noted is that international human rights institutions may well have occupied a key role in helping to *sustain* the new sovereignties regime. Their role is three-fold. First, international human rights agencies often provide the networked states with technical assistance and training, in order to help the latter achieve a better balance between market goals and humanitarian interests. In other words, they help the networked states to realize harmonization between capital gain and rights asset gain. Second, they are the monitoring agencies of the level of externalities, both internal to the states concerned and external in the global field. Third, much like the role played by the management association in our hypothetical scenario, the United Nations and other supranational human rights agencies define the normative rules and rights, and then get the constituent parties to respect those rules. It is an open assumption that even though human rights abuses cannot be totally eliminated, but through inter-state negotiations they will someday be reduced to what might be deemed a 'morally efficient' level. In short, a utilitarian view of international law under the rubric of an international political market will work to ensure that (a) there will not be an undersupply of 'human rights goods' and (b) the distribution of those human rights goods will be 'morally optimal' in the global political market.

What we are witnessing is essentially a blending of the juridical model of new sovereignties with one of the most basic models in neo-classical economics underpinning the new sovereignties regime. The way that human rights are weighed into the purview of global capitalism confirms what Richard Steinberg (2004) calls the model of 'behavioral sovereignty.' This model suggests firstly that there is a scale or gradation to the way states transact political and rights assets with one another. The decision to comply with human rights regulations, how much effort goes into the compliance, and what level of human rights 'output' to produce: these are forms of state behavior that have bearing on their relative sovereign power. Yet this notion of behavioral sovereignty also suggests something else. To use our hypothetical scenario again, in the transaction between the young musician and her neighbors, it is quite possible that they are negotiating the noise level on unequal footing with respect to inter-apartment relations. The young pianist's length of residence might be longer than the other residents; she may be occupying a larger apartment and thus paying a larger share of the building's management fee; she could be successful in forming an 'amateur pianist's club' with other fellow noise-making young musicians living in the building; or even more powerfully, her parents may well be the elected officials running the building's management association. Under any combination of these forms of leverage, she will be in a more powerful position to set the terms of noise control regulation favorable to her interest. Because of these factors, she may even brand other types of noise, such as dog barking from another resident's apartment, as 'true noise.' 'Rogue residents,' she calls them.⁷ In the end, the amount of money transacted becomes a matter of behavioral leveraging according to the relative differentials in residential status and power among neighbors.

Righting trade? Trading rights?

There is no better paradigmatic example to illustrate the phenomenon of the economic re-articulation of human rights, than in trade laws under neo-liberal globalization today. What we need to point out first is that in the literature on trade laws today, there is a lack of moral agreement over whether there is a positive correlation between free trade and improvement of human rights. But this has not halted the suffusion of both the North and the South with a generalized logic of market rationality over all matters that tie the North and the South together. In other words, the lack of *moral convergence* over the good or bad value of free trade nonetheless leaves open the door for a *structural convergence* in the form of a global governmentality that tends to re-compute all values in terms of market rationality, choice, trade-offs, and so on. In global

trade laws, neo-liberalism routinely trumps unadulterated humanitarianism, even as the former includes the latter into its fold.

Human rights analysts commonly conceive of the entanglement between global trade and human rights through the figure of a troubled 'interface,' implying separation and conflict. Frank Garcia (1999, p. 53), for instance, argues that '[t]he regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law.' This view about the normative conflict between two regimes of international law, however, easily obscures the symbolic *merger* of the two at a more fundamental level. In so far as real disputes do occur between trade laws and human rights laws, it is vital for our analysis of those disputes to not falsely treat the two planes of law as if they were of equal preeminence. Both the broad regulations over development issues in the global South, as well as economic growth issues in the North, fall under the jurisdiction of global institutions like the World Trade Organization (WTO) and the World Bank, and not international human rights or labor organizations. The fact is that with trade being advanced as the neo-liberal *raison d'être* of global stability and growth, the moral imperative of human rights has been re-calibrated *vis-à-vis* trade.

As Wendy Brown reminds us,

Neo-liberal rationality, while foregrounding the market, is not only or even primarily focused on the economy; it involves *extending and disseminating market values to all institutions and social action*, even as the market itself remains a distinctive player ... The political sphere, along with every other dimension of contemporary existence, is submitted to an economic rationality, or put the other way around, not only is the human being configured exhaustively as *homo economicus*, but all dimensions of human life are cast in terms of a market rationality.

(Brown 2005, pp. 39–40, original emphasis)

Brown adds that there is more than a classical Marxian analytic here, where capital is said to penetrate and reorganize every aspect of life in its image, and then subject all values and activities to its cold calculation. In addition to that, the reality is that however much neo-liberal rationality produces all sorts of social and economic stratifications, the general cloak of liberal democratic rights still exist to challenge the social harm brought about by neo-liberal capitalism. The difference is that liberal rights-based values are now made Janus-faced *vis-à-vis* neo-liberal capitalism. Human rights appear to consent to and oppose neo-liberal trade values simultaneously. It is more and more difficult to distinguish an order of rights that is linked to economic wellbeing

(imagined along a utilitarian line of thinking) from an order of rights that is articulated to non-economic, deontological values (see Garcia 1999). The crucial question, it seems, is to understand the nature of this indistinction, and how it is operationalized in the neo-liberal order today.

Frank Garcia (1999, pp. 64–65) suggests that the global neo-liberal imperative today re-constitutes trade laws with a particular vision of justice linked to a certain view of human nature and privileging a particular approach to moral reasoning:

[T]rade law is exclusively concerned with the twin values of economic efficiency and welfare. The goal of trade law is to improve the economic well-being of human beings through the facilitation of efficient exchanges. This approach has several important implications for the viability of human rights law within a trade-based regulatory regime. First, there is a marked tendency for other values besides efficiency and welfare to be viewed as outside the scope of trade law, and even inimical to its purposes . . . Second, economic analysis and methodology will exert a dominant, if not overweening, influence on trade and non-trade policy formed or implemented within trade institutions operating on an Efficiency Model.

Taking Garcia's first point, we are left with the impression that human rights law is external to the scope of trade law. Yet taking his second point, we are reminded of the existence of a presumptive order exerted by the logic of economic computation that extends from the empire of trade into the non-trade legal and social spaces. Garcia's split vision illustrates an important point: in considering 'the viability of human rights law within a trade-based regulatory regime,' the insolent logic, concepts, reasoning, and models of trade may externalize human rights institutionally and operationally, it nonetheless enfoldes human rights by redefining them epistemologically.

Within the ambit of trade laws, the epistemological redefinition of human rights is demonstrated in international economic laws as they are revised by the WTO. Through a series of enhanced operations, the WTO has installed a regime that is capable of defining the *condition of possibility* for articulating rights-related concerns in global trade. For instance, important aspects of the global economy are increasingly regulated through treaty-based rules that subject human rights to the service of neo-liberal trade. Treaty rules spell out when and how human rights interests are permitted to be raised in the event of trade disputes and when and how they are, by doctrine, rejected from view. Trade rules also define the very terms under which human rights are conceived. Arguably, trade has become the epistemological source for rights. Andrew Lang (2007, p. 393) offers an insightful analysis of the concrete reality in a trade negotiation over human rights:

[In international fora,] it is common to talk as if human rights are in some sense the source of ... ultimate policy prescriptions ... that human rights rules provide the criteria by which to arbitrate between alternative policy proposals. In fact, it takes only a moment's thought to realize that precisely the opposite is occurring: human rights commentators are drawing on work produced by trade policy experts in the context of contemporary trade policy debates as a source of policy ideas and arguments ... When it comes to the analysis and evaluation of concrete policy proposals ... the discussion invariably tends to reproduce and rehearse precisely the same kinds of arguments which characterize trade policy discussions in other arenas and which are perfectly familiar to trade policy experts. At this point, the human rights language recedes into the background, and we are presented with a series of argumentative steps, sets of data, and ultimately policy prescriptions, which almost exactly reproduce those emanating from more traditional trade policy circles.

In other words, human rights actors lobby for the inclusion of rights-based provisions in trade rules by deploying the type of professional expertise that is not only recognizable and familiar to, but also discursively mandated by, trade doctrines and the neo-liberal ideology underwriting those doctrines (see also Aaronson & Zimmerman 2006, Dommen 2002, Dunoff 2001).

The point is that the argumentative gymnastics undertaken in formulating treaty-based rules is not sourced by human rights norms. Ironically, neo-liberal debates about the benefits and potential harm of global trade do not need human rights actors to state the importance of the protection of rights. Neo-liberal trade is more than capable of generating its own concern for human rights. But the human rights concerns so generated do not emanate from human rights law or ideology. For instance, trade rules do recognize the need for private providers of essential services, like food and health care, to be subjected to strict regulatory oversight. But the technical calculation for that regulatory oversight is a built-in feature of trade, and not a specialized feature of human rights norm. Moreover, when there is recognition that domestic agricultural subsidies ought to be reduced so as not to disadvantage smaller nations in agricultural trade, the foundation of that recognition is derived from the econometric models inherent within the trade logic, and has little to do with the justice-based human rights logic. Likewise, in TRIPS agreements (Trade Related Aspects of Intellectual Property Rights), the establishment of what is called 'flexibility rules' that allow developing countries to bypass patent laws in times of public emergency (such as the case of Thailand or Brazil to develop generic HIV drugs), resulted from the technical calculation of permissible profit thresholds more than from altruistic humanitarian motives (see Ho 2007, Joseph 2003). As a result, human rights norms have a radically minor role to play in the formulation of trade laws. Instead, replacing human

rights norms and obligations are broad and non-descript ‘human rights issues’ erected, ironically, through a disconnection from human rights ethos.

Conclusion

An analysis of the structure of the global instrumentalization of human rights suggests that international law designed to constrain state conduct appears publicly to champion a moral-juridical ethos, but in reality it has inadvertently instituted a fundamental re-configuration of human rights as network effects of market forces. Human rights therefore incorporate at their heart a secret relation to capital which they claim to oppose. Former WTO Director-General Mike Moore (2003, pp. 249–250) asserts that democratic global trade will lead to ‘longer and more sustained peace, longer and more sustained economic growth, and a fairer and better society.’ As a result, ‘[t]here is no outside to this harmonious whole, no need or desire that can or should disrupt the workings of the WTO as a “linkage machine.” Human rights can be conceived as just one more link in a chain made larger to accommodate this set of interests’ (Orford 2006, p. 158). Similar to Foucault’s assertion of how the biopolitical project of the modern state places life at the center of the state’s administrative calculations, the networked and disaggregated states of today seem to institute a tie uniting capital and rights.

We must interrogate the new mode of articulation of human rights as a possible *telos* of capital. Moreover, we must also ask a more fundamental question: what is the conceptual structure of the new sovereignties, in which human rights present themselves as simultaneously included in and excluded from networked capitalism? Is it not by chance, then, that the notions of security, freedom from arbitrary arrest or detention, due process, freedom of movement, self-determination, and so on are pledged *by means of* a possible disavowal, guaranteed *via* a foreseeable derogation, included *through* a potential exclusion?⁸ If it is true that human rights dwell in a structure of speculative, behavioral governmentality, then justice must be rethought. To gesture toward Agamben here, justice has a new curious epistemological location: it is something that dwells *within* the sphere of the new sovereignties *as a potential exception*. Justice, as the public objective of human rights, settles inside the space of the new sovereignties as an outsider.

From this perspective, the structure of neo-liberal biopolitics is necessarily a violent structure, because it manages to put human rights into play in the very predicament that marks the subjection of human rights. Behind the new sovereignties that lead to more and more allegedly rights-based policies, programs, and initiatives, stands a new image of humanity that possesses a strange double quality: a humanity whose lingering sense of dignity and justice (however defined) *must always be enshrined, yet may nevertheless be sacrificed*. To

become conscious of this strange doubleness of humanity is not to belittle the aspirations and accomplishments of the human rights movement. It is, rather, to try to understand why the global human rights movement, at the very moment in which its moral and juridical authority around the world is being mainstreamed, cannot seem to save humanity from unprecedented ruin.

To speak about this predicament with another register, it seems to me that one of the fundamental questions today is that if the international counter-sovereignty activist movement is indeed rising (e.g. WTO protests and the World Social Forum), and international law can indeed be more eagerly enforced than ever before (e.g. establishment of the International Criminal Court), how will human rights abusing states and non-state actors alike calculate the market transaction cost needed to protect their interests in the face of resistance? When the transaction cost, that is, the international market price for morality and peace, is higher than the cost of violence, is it any wonder that so many states choose violence? And is it any wonder that this calculation of rights versus capital is so often enacted in, and targeting, what are called second generation rights, which are precisely social, economic, and cultural rights (the weakest point in the human rights structure)? In this picture, human rights are indeed at a crossroad. They are indeed a mixed blessing. On the one hand, there are a lot of them. On the other hand, there are a lot of them.

Notes

- 1 Chapter VII of the United Nations Charter contains specific provisions that simultaneously allow and limit intervention, with the effect of rendering the very notion of state sovereignty into a 'limit concept.'
- 2 Giorgio Agamden (1998, pp. 51–52) argues that the awesome force of law is derived from it 'being in force without significance.'
- 3 Matthew Weinert (2007) has an opposing view. He argues that a model of democratic sovereignty allows for the compatibility between sovereignty and human rights.
- 4 For instance, Anne-Marie Slaughter (2004, p. 67) discusses the distinct doctrine of 'judicial comity,' which is 'a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed judges by judges, rather than of the more general respect owed by one nation to another.'
- 5 The North American Free Trade Agreement (NAFTA), for instance, has been touted as the pioneer agreement that links trade with sustainable development.
- 6 This hypothetical scenario is inspired by Pae (2006). See also Maassarani (2005).
- 7 'Rogue' here is not merely a reference to the Bush administration. It has another reference to Derrida (2005), who suggests that sovereignty is

'rounded sovereignty,' meaning that sovereignty includes the figure of a 'rogue,' whose lawlessness comes before democracy but, precisely for that reason, grants democracy the possibility of autonomous self-determination (see Minkkinen 2007, p. 46). 'Rogue,' after all, is not absolute otherness to be rejected from view.

- 8 Article 4(1) of the International Covenant on Civil and Political Rights states: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' And Article 4(2) states: 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.' This means that under the Article, there are many provisions that *can* be derogated, including freedom from arbitrary arrest or detention, due process, freedom of movement, self-determination, etc.

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