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## A HUMAN RIGHTS CRITIQUE OF THE WTO: SOME PRELIMINARY OBSERVATIONS<sup>1</sup>

PADIDEH ALA'I\*

A recent United Nations (U.N.) Report by jurists J. Oloka-Onyango and Deepika Udagama entitled *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights* (the U.N. Report) concludes that the World Trade Organization (WTO) is a “veritable nightmare” from a developing countries perspective.<sup>2</sup> This pronouncement has been dismissed by the WTO, but hailed by anti-globalization bodies.<sup>3</sup> The criticisms contained in the U.N. Report provide a glimpse of the Southern<sup>4</sup> distrust engendered by the inevitable expansion of the WTO trade mandate into areas such as labor, the environment, and human rights. The U.N. Report opposes the expansion of the

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1. This essay was written as a result of the interesting conversations and debates that took place in conjunction with the Trade Symposium organized by The George Washington International Law Review in September 2000 entitled: “Global Trade Issues in the New Millennium.” The author in her role as a moderator during the Trade Symposium mentioned the UN Report that had criticized the WTO. More broadly, the author raised the issue of human rights and the growing acceptance of “second-generation rights,” i.e., economic, social and cultural rights and its potential impact on how WTO members interpret and apply their WTO obligations. As the title indicates, this short essay is not intended to be an in depth analysis of the conflicting world-views that inform human rights activists, on one hand, and proponents of free trade and market liberalization, on the other. This latter topic is deserving of in depth analysis and will be addressed in an upcoming article.

\* Associate Professor of Law, Washington College of Law, American University. The author wishes to thank her colleagues Rick Wilson and Beth Lyon for guiding her research as well as for their work in the area of economic, social and cultural rights. The author also wishes to thank Derek Wenzel, Wakio Seaforth, Jeremy Zuba, Dirk Schrameyer, Karen Ernst, Rebecca Griffin, and Ramin Pejan for their assistance.

2. U.N. Commission on Human Rights, 52d Sess., Provisional Agenda Item 4, ¶15, U.N. Doc. E/CN.4/Sub.2/2000/13, (2000) (Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama) [hereinafter U.N. Report].

3. See Colin Relihan, *WTO: Trade Body Protests “Nightmare” Report*, UNWire, Aug. 25, 2000, at <http://www.unfoundation.org/unwire> (last visited June 29, 2001).

4. The author has struggled with the terms “developing and developed,” “East and West,” “North and South.” None of these terms are entirely satisfactory. Because the gap between the rich and poor nations in terms of economic development is most commonly referred to as the North-South divide, however, this essay has adopted the same terminology. The term “North” is used to refer to Western developed nations and the term “South” refers to developing and least developing countries, irrespective of actual geographical location in the northern or southern hemispheres.

trade mandate and, specifically, the tying of trade to human rights. Although the U.N. Report supports active participation by civil society groups at the WTO level, it remains unclear whether its opposition to the tying of trade to human rights is based solely on lack of such participation. Governments of the South, on the other hand, oppose any form of direct participation by non-governmental organizations (NGOs) and other non-state actors. They see this opposition as an inevitable extension of their continuing resistance to the tying of trade to issues of primary concern to the NGO community, such as environmental, labor, and human rights.

This short essay explores some possible reasons for the opposition to the WTO expressed in the U.N. Report. The first part reviews the criticism of the WTO as the "practical manifestation of globalization in its trade and commercial aspects,"<sup>5</sup> and the opposition of the U.N. Report to the tying of trade to human rights. It also reviews the WTO response to the U.N. Report. The second part looks at the historical opposition of the United States towards economic, social, and cultural rights. The third part contrasts the U.N. Report with the position of developing country governments on the issues of linkages and the participation of international civil society at the WTO. Finally, concluding remarks raise as future "trade" issues the possible effect of the increasing recognition of economic, social, and cultural rights on the interpretation and application of WTO obligations by member states.

#### I. WTO AS AN INSTRUMENT OF GLOBALIZATION-FROM-ABOVE

The U.N. Report was prepared pursuant to a U.N. resolution by the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission). It builds upon the two authors' prior work on globalization and human rights,<sup>6</sup> and it forms part of a general mandate by Secretary General of the United Nations Kofi Annan to look at the human rights "fall-out" of economic liberalization.<sup>7</sup> In his report to the Millennium Summit, Annan stated:

[G]lobalization is the single most important factor defining the quality of human existence. Unbridled economic liberalization has the potential to wreak havoc on human rights unless

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5. U.N. Report, *supra* note 2, ¶ 15 (quoting Ahmed Mohiddin, *Partnership: A New Buzz-Word or Realistic Relationship?*, 41 DEV. 7, 8 (1997)).

6. *Id.* ¶ 2 (citing S. Oloka-Onyango & Deepika Udagama, *Human Rights As the Primary Objective of International Trade, Investment and Finance Policy and Practice*, E/CN.4/Sub.2/1999/11; and Oloka-Onyango, *Globalization in the Context of Increased Incidents of Racism, Racial Discrimination and Xenophobia*, U.N. Doc. E/CN.4/Sub.2/1999/8).

7. *Id.* ¶ 55.

checked in a timely manner. It is therefore imperative that all human rights organs of the United Nations *focus heavily on the human rights "fall-out" of free market forces* and adopt appropriate mechanisms for dealing with resulting obstacles to the enjoyment of human rights, especially insofar as they relate to their respective mandates.<sup>8</sup>

The U.N. Report is the outgrowth of the Sub-Commission's interest in two areas: the realization of economic, social, and cultural rights, and the "global ramifications of various non-State actors and their influence over the realization of such rights."<sup>9</sup> The U.N. Report recognizes that the WTO, unlike its predecessor, the GATT, has a broader mandate than trade alone.<sup>10</sup> It argues, quite correctly, that the expansion of the trade mandate under the Uruguay Round agreements made the WTO a powerful institution and, for the first time, brought within the purview of international trade "broad questions of human rights and the North/South geopolitical divide."<sup>11</sup> It is no longer possible for the human rights community to ignore international trade and leave it in the hands of the trade technocracy. The U.N. Report concedes that the founding instruments of the WTO make "scant (indeed only oblique) reference to the principles of human rights."<sup>12</sup> The U.N. Report concludes that this lack of direct reference to human rights principles in the WTO agreements, coupled with the reality that all trade and commerce activities have serious human rights implications, has made the WTO a "veritable nightmare" for certain sectors of humanity in the developing South.<sup>13</sup>

Echoing the viewpoint of developing country governments at the 1999 WTO Ministerial meeting in Seattle, the U.N. Report accuses the WTO of imposing a double standard.<sup>14</sup> On the one hand, the WTO forces the developing countries to pry open their markets. On the other hand, the developed countries continue to keep in place significant trade barriers in the areas of agriculture and tex-

8. *Id.* (emphasis added).

9. *Id.* ¶ 2.

10. U.N. Report, *supra* note 2, ¶ ¶ 14-15. "[W]hile trade and commerce are indeed its principle focus, the organization has extended its purview to encompass additional areas beyond what would justifiably be described as within its mandate." *Id.* ¶ 15.

11. *Id.* ¶ 14 (stating that with the addition of intellectual property rights, government procurement, and investment measures after the 1994 Uruguay Round, the WTO assumed powers more expansive than those embodied in the GATT).

12. *Id.* ¶ 15.

13. *Id.*

14. *Id.* ¶ 14.

tiles and impose anti-dumping duties in a manner that violates the GATT anti-dumping agreement.<sup>15</sup>

A. *The U.N. Report's Criticism of the WTO*

The U.N. Report distinguishes between two forms of globalization: globalization-from-above and globalization-from-below.<sup>16</sup> Examples of globalization-from-above are in the "form of multinational firms, international capital flows and world markets."<sup>17</sup> Intrinsic to globalization-from-above is a "growing legal and institutional framework within which the regimes of contemporary international trade, finance and investment are being conducted."<sup>18</sup> International economic law as well as institutions such as the WTO and the Bretton Woods Institutions capture the legal dimensions of the globalization-from-above framework.<sup>19</sup> For Oloka-Onyango and Udagama, the WTO is the most prominent manifestation of the process of globalization-from-above and its hegemonizing tendencies.<sup>20</sup> The U.N. Report is sharply critical of the phenomenon of globalization-from-above and its anti-democratic tendencies because it leads to increasing violations of "both civil and political rights as well as to economic, social and cultural rights."<sup>21</sup> Specifically, by favoring the agendas of the North and multinational corporations, institutions of globalization-from-above such as the WTO limit the power of nation-states in the developing South to help their own people.<sup>22</sup> The WTO, as a practical manifestation of globalization, ignores the effect that its policies have on human rights. It is therefore difficult for the governments to improve the human rights of their own people should they be inclined to do so:

Developing States are, more often than not, compelled by the dynamics of globalization to take measures that negatively impact on the enjoyment of those rights [embodied in the International Covenants on Economic, Social and Cultural Rights (ICESCR)]. The result is that States cannot fulfill their interna-

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15. U.N. Report, *supra* note 2, ¶ 14 (citing Joseph P. Stiglitz, *Trade and the Developing World: A New Agenda*, CURRENT HIST., Nov. 1999, at 387).

16. *Id.* ¶ ¶ 8-9 (citing Paul Streeten, *Globalization and its Impact on Development*, 42 Dev. 11, 1999).

17. *Id.* ¶ 8.

18. *Id.*

19. *Id.*

20. The WTO is the "practical manifestation of globalization in its trade and commercial aspects." U.N. Report, *supra* note 2, ¶ 15. After Seattle "no other organization has been more closely associated with the phenomenon of globalization." *Id.* ¶ 13.

21. U.N. Report, *supra* note 2, ¶ 24.

22. *Id.* ¶ 44.

tional human rights obligations, even if they are desirous of improving the human rights situation in their countries.”<sup>23</sup>

Opposing this form of globalization is globalization-from-below, spearheaded by environmental protectionists, and gender and human rights activists, among others.<sup>24</sup> The U.N. Report describes the role of those who are advancing the cause of globalization-from-below as follows:

The human rights movement has long laid claim to a universalizing (indeed some would say a *globalizing*) mission. This is evident in the assertion that the regime of rights and freedoms established through the Universal Declaration of Human Rights—and the numerous other instruments that have since been promulgated in the same spirit—extend beyond the arena of purely national concern. *The globalization-from-below activists have the potential to add a democratic dimension to the debates about globalization from above.* In this way, globalization can be brought down from the rarefied and glorified atmosphere of corporate boardrooms, and home to the daily realities of ordinary human beings. Especially important, it can help them mobilize in resistance against the hegemonizing tendencies that globalization from above may present.<sup>25</sup>

In sum, it is argued that the participation of the forces of globalization-from-below in institutions of globalization-from-above such as the WTO is important and vital as it helps “democratize” the globalization process.<sup>26</sup> To this end, the U.N. Report concludes, “the WTO must radically review its mechanisms of operation, the role and place of both developing country participation and that of non-State actors such as NGOs, and its relationship to the U.N. system as a whole.”<sup>27</sup> It is argued that, “at a minimum, the WTO needs to reform its processual mechanisms of deliberation so as to be more inclusive, and to allow for discordant (especially civil society) voices to be heard.”<sup>28</sup> The U.N. Report points out that, although the WTO is “superficially” a democratic institution with each member country having one vote, superficial equality masks the deep inequalities created by a system in which there exists severe disparities in the bargaining power of the member countries.<sup>29</sup>

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23. *Id.*

24. *Id.* ¶ 8-9.

25. *Id.* ¶ 9 (emphasis added).

26. *Id.* ¶ 10 (stating that today the vision of the global today marginalizes labor, tradition, women, and indigenous people, seeing them as “local” and against globalization).

27. U.N. Report, *supra* note 2, ¶ 19.

28. *Id.*

29. *Id.* ¶ 16.

For the WTO to overcome its bias against the South, the U.N. Report argues, there must be a "radical review of the whole system of trade liberalization and a critical consideration of the extent to which it is genuinely equitable and geared towards shared benefits for rich and poor countries alike."<sup>30</sup> However, the U.N. Report makes no substantive recommendations as to how the WTO should be reformed except to state that it should "take on board the many suggestions that have been made" by members of civil society and others to increase transparency, improve access, and create an "internal democracy."<sup>31</sup>

Interestingly, the U.N. Report's support of NGO participation at the WTO does not translate into support of linkages or the expansion of the scope of trade to include areas of interest to the NGO community, such as labor, the environment, or human rights. Although the U.N. Report does not directly address the areas of labor and the environment, it does oppose "tying" trade to human rights:

The tying of trade to human rights in the fashion in which it has so far been done is problematic for a number of reasons. In the first instance, it too easily succumbs to the charge by developing countries of neo-colonialism. Secondly, the commitment of Northern countries to a genuinely democratic and human rights-sensitive international regime is rendered suspect both by an *extremely superficial rendering of the meaning of human rights*, and by the numerous double standards that are daily observed in the relations between countries of the North and those of the South. Thus, "human rights" conditionality when applied in contexts of trade depends on a range of largely subjective elements extrapolated from the much broader human rights regime. In other words, human rights are merely used as an opportunistic fulcrum to achieve the objective of liberalized markets. For example, why is there almost always never any linkage between the demands being made and the observation and respect for economic, social and cultural rights? The short answer is because many of the measures being pursued actually undermine the progressive realization of this category of rights. However, even when the linkage is made to civil and political rights, it is fraught with inconsistencies and national subjective interests predominate.<sup>32</sup>

In other words, the objection to the linkage of trade to human rights is based on a distrust of those advocating linkages, including the United States. The increasing recognition of "second-genera-

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30. *Id.* ¶ 19.

31. *Id.*

32. *Id.* ¶ 17 (emphasis added).

tion rights," i.e., economic, social and cultural rights globally as well as the U.S. perspective on those rights will be discussed at more length in Part II.<sup>33</sup>

### B. *The WTO Response to the UN Report*

The reaction of the WTO to the UN Report has been dismissive and patronizing. In a letter sent from the WTO Deputy Director General, Miguel Rodriguez to the U.N. High Commissioner for Human Rights Rodriguez expressed "deep" concern over the U.N. Report and communicated the Director-General's "surprise" that the report had been written without seeking the WTO's input.<sup>34</sup> The letter invited the U.N. Report's authors "to meet informally with WTO senior officials and have the opportunity to understand the procedural and substantive context of the WTO and its functioning."<sup>35</sup> In addition, Rodriguez referred to some general statements made by former South African President Nelson Mandela in support of the WTO and stated that "it is difficult to understand why the more than 130 current WTO members, as well as the some 30 developing countries and countries in transition, that are actively in the process of acceding to the WTO would be willing to be bound by 'unfair' rules."<sup>36</sup> The WTO response to the U.N. Report is far from satisfactory and does not set the ground work for constructive dialogue between the WTO and the human rights organs of the U.N.

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33. Economic, social and cultural rights are commonly referred to as "second generation" rights. See, e.g., R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205, 216 (Edith Brown Weiss, ed. 1992) (stating that the International Covenant of Economic, Social and Cultural Rights refers to "second generation" human rights.) The expression "second generation" does not signify that first generation civil and political rights have been superseded, but rather to point out a distinct development in the domain of human rights. *Id.*

34. Someshwar Singh, *U.N. Human Rights Commissioner Responds to the WTO*, THIRD WORLD NETWORK (Aug. 29, 2000) at <http://www.twinside.org.sg/title/responds.htm> (last visited June 29, 2001); see also Robert Evans, *WTO Officials Concerned About U.N. Criticism*, (Aug. 24, 2000).

35. Chakravarthi Raghavan, *WTO Concerned Over Human Rights Appraisal Report*, THIRD WORLD NETWORK (Aug. 27, 2000) at <http://www.twinside.org.sg/title/appraisal.htm> (last visited June 29, 2001).

36. Relihan, *supra* note 3; see also Evans, *supra* note 34.

## II. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### A. *Economic, Social and Cultural Rights on the World Stage*

Human rights are divided into civil and political rights<sup>37</sup> as well as economic, social, and cultural rights.<sup>38</sup> Civil and political rights, such as rights to free expression and fair trials, are well known and recognized and protected by international law. Economic, social, and cultural rights (such as the right to work, food, health, education and housing) are being increasingly recognized as "rights," but have not traditionally enjoyed the same level of recognition as civil and political rights. One hundred forty-three countries ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) as of December 21, 1999, with the notable exception of the United States.<sup>39</sup> The European Union is far ahead of the United States in its recognition of economic, social, and cultural rights. On February 24, 2000, the European Union unanimously approved a draft annual report on human rights by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs.<sup>40</sup> In its report the Committee pointed out that human rights include economic and social rights such as the right to housing, education and health care, and argued that those rights should also be incorporated into the new Charter of Fundamental Rights of the EU (the Charter).<sup>41</sup> Indeed, these rights were incorporated into the Charter approved on October 2, 2000. The Charter includes such economic and social rights as the right to education, healthcare, social security and social assistance, environmental protection, and consumer protection.<sup>42</sup>

The increasing international recognition of economic, social, and cultural rights is also evidenced by a recent landmark ruling by

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37. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR].

38. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 933 U.N.T.S. 3 [hereinafter ICESCR].

39. *Id.*

40. *Civil, Political, Economic and Social Rights to be Included in the EU Charter*, (Feb. 29, 2000), available at [http://www.europol.eu.int/charter/press/n000229\\_2\\_en.htm](http://www.europol.eu.int/charter/press/n000229_2_en.htm) (last visited June 29, 2001).

41. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, available at <http://www.europol.eu.int> (last visited June 29, 2001) [hereinafter E.U. CHARTER]. The Charter which was drawn pursuant to a decision by the European Council meeting in June 1999. See *Annex IV to Cologne European Council: Conclusions of the Presidency*, available at [http://www.europol.eu.int/summits.kol2\\_en.htm](http://www.europol.eu.int/summits.kol2_en.htm) (last visited June 29, 2001).

42. The EU CHARTER, *supra* note 41, art. 14 (right to education), art. 35 (health care), art. 34 (social security and assistance), art. 37 (environmental protection) and art. 38 (consumer protection).

the Supreme Constitutional Court of South Africa in *Government of South Africa v. Irene Grootboom*, which recognized the right to shelter. In its decision, the South African Court stated:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the South African Constitution which contains the Bill of Rights].<sup>43</sup>

In sum, despite the fall of communism and the victory of the forces of capitalism in many parts of the world (including the developing world), economic, social, and cultural rights (such as the right to health, education, and housing) are being recognized as rights, not simply aspirations. This raises the question: what effect, if any, this increased acceptance will have on the WTO?

#### B. *Economic, Social and Cultural Rights: The U.S. Perspective*

The interdependence of civil and political rights, on one hand, and economic, social, and cultural rights, on the other, was recognized by President Roosevelt as early as 1944 when he argued in his State of Union Address for the adoption of a second "Bill of Rights" that included those same rights that have been adopted in the ICESCR.<sup>44</sup> In providing justification for the maintenance of those rights, President Roosevelt said:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.<sup>45</sup>

Notwithstanding President Roosevelt's remarks, for the next 50 years following World War II, the United States has been, for the most part, opposed to the recognition of economic, social, and cultural rights as "rights." This opposition has been due to the fact that during this time promotion of economic, social, and cultural rights in the United States was associated with "disruptive" political and economic change in America.<sup>46</sup> This view was expressed by

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43. *South Africa v. Grootboom*, 2000 (vol) reporter 1, 16 (CC).

44. See 90 CONG. REC. 55-57 (1944).

45. *Id.* at 57.

46. NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 35 (1990). The post-WWII environment in the United States has been

the position of the ABA committee on Peace and Law through the U.N. during the early 1950s, which argued that economic, social, and cultural rights would "diminish basic rights, abrogate states' rights, enhance Soviet and Communist influence, and imperil U.S. sovereignty."<sup>47</sup> This opinion was consistent with the U.S. position at the U.N. during the drafting process of the Covenant on Human Rights. While countries such as Australia, Yugoslavia, and the Soviet Union called for economic, social, and cultural rights to be included, the United States argued that such inclusion would "prevent the completion of the commission's work."<sup>48</sup> In later negotiations, Eleanor Roosevelt, U.S. representative to the U.N., stated that "economic, social, and cultural rights were of a different nature from the other rights enunciated in the Covenant, since they were not justiciable, and therefore could not be enforced in the same way."<sup>49</sup> Finally, the U.N. created two separate treaties: one dealt primarily with civil and political rights<sup>50</sup> and the other with social, economic, and cultural rights.<sup>51</sup>

In the 1970s the Carter administration increased the U.S. leadership role in promoting universal human rights. In 1974, the Subcommittee on International Organizations and Movements adopted a report called "Human Rights in the World Community: A Call for U.S. Leadership."<sup>52</sup> From 1973 until 1975 the United States participated in the Conference on Security and Cooperation in Europe, during which several principles were adopted, including Principle VII, which states that the participating countries would be determined to "promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity

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described as a time when "the fear of communism at home and abroad, the fear of a Communist-controlled world government, [and the fear of a] change in the traditional American way of life" dominated the American psyche. *Id.*

47. *Id.* at 65.

48. *Id.* at 74 (noting that the United States was supported in its position by the United Kingdom and India in drafting for those civil and political rights "most ripe for codification").

49. *Summary Record of the Two Hundred and Thirty-Sixth Meeting*, U.N. Commission on Human Rights, 7th Sess., at 5, U.N. Doc. E/CN.4/SR236 (1951).

50. ICCPR, *supra* note 37.

51. ICESCR, *supra* note 38. "[T]he division was seen as simplifying domestic acceptance and solidifying an international definition of human rights more clearly in the Western tradition." KAUFMAN, *supra* note 46, at 78.

52. See John P. Salzberg, *A View from the Hill: U.S. Legislation and Human Rights*, in *THE DIPLOMACY OF HUMAN RIGHTS* 13, 14-19 (David D. Newson ed. 1986).

of the human person and are essential for his free and full development."<sup>53</sup>

In 1977 President Carter signed *both* the Covenant on Civil and Political Rights (ICCPR) and the ICESCR. The U.S. Senate eventually ratified the ICCPR on September 8, 1992. The U.S., however, has never ratified the ICESCR<sup>54</sup>

The surge of human rights activity in the United States was cut short by the election of President Reagan. Throughout the 1980s and early 1990s, the dominant U.S. viewpoint on human rights was that civil and political rights are essential prerequisites for economic development and that "economic and social rights" are suspect because they are "easily abused by repressive governments." A State Department internal memorandum, leaked early in the Reagan Administration, stated that the United States defined human rights as *only* political rights and civil liberties.<sup>55</sup> In 1981, the Assistant Secretary of State Elliot Abrams stated that: "the rights that no government can violate, i.e., civil and political rights, should not be watered down to the status of rights that governments should do their best to secure, i.e., economic, social and cultural rights."<sup>56</sup> In the same year, the State Department stated:

[T]he idea of economic and social rights is easily abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic rights to the integrity of the person, as well as civil and political rights. This justification for repression has in fact been extensively used. No category of rights should be allowed to become an excuse for the denial of other rights. For this reason, the term economic and social rights are, for the most part, not used in this year's Reports.<sup>57</sup>

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53. FINAL ACT OF HELSINKI, reprinted in ARIE BLOED, *THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS*, 1972-1993, 146 (1993).

54. The expanding definition of human rights was also emphasized by the United States during the Carter administration by Secretary of State Cyrus Vance's statement that human rights includes "the right to fulfillment of such vital needs as shelter, food, health care and education." Jeffrey L. Dunoff, *Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Does Globalization Advance Human Rights?*, 25 *BROOK. J. INT'L L.* 125, 135 (1999).

55. *Excerpts from State Department Memo on Human Rights*, N.Y. TIMES, Nov. 5, 1981, at A10.

56. *Review of the State Department Country Reports on Human Rights Practices for 1981: Hearing before the Subcommittee on Human Rights and International Organizations for the House Committee on Foreign Affairs*, 97th Cong. 7, 16 (1982).

57. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981*, at 6 (1982).

This viewpoint was expressed consistently in State Department reports throughout the years.<sup>58</sup>

Another expression of the U.S. attitude toward economic, social, and cultural rights is also found in a 1988 statement by U.S. Ambassador Byrne to the U.N.:

[R]esponsible adults select their own careers, obtain their own housing, and arrange for their own medical care. It is true that the state must establish a legal framework, which encourages fairness and prohibits fraud; but, having done so, the state must then get out of the way and permit individuals to live their own lives as they see fit.<sup>59</sup>

Ambassador Byrne also criticized the U.N. for moving away from the "traditional concern for civil and political rights"<sup>60</sup> and into the realm of economic, social, and cultural rights.

With the end of Cold War there has been an incremental move by the United States towards greater recognition of economic, social, and cultural rights. The transition away from opposition to gradual acceptance of these rights was first expressed at the Vienna Meeting of the Conference on Security and Co-operation where the United States, as a participating country, agreed to the Vienna Declaration that recognizes "the promotion of economic, social, cultural rights as well as of civil and political rights is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual."<sup>61</sup> In 1999 Harold Hongju

58. In 1988, for example, the State Department stated:

We have found that the concept of economic, social and cultural rights is often confused, sometimes willfully, by repressive governments claiming that, in order to promote these "rights," they may deny their citizens the right to integrity of the person as well as political and civil rights.

DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, at 4 (1989).

59. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 374 (1990) (citing Press Release, Dep't of State 1 (Nov. 9, 1988) (statement by Ambassador Patricia M. Byrne to the Third Committee of the U.N. General Assembly)). During that same time period, Assistant Secretary of State Schifter stated:

Critics of the Western democracies used to contend that, while emphasizing free speech and a free press, the democracies ignored such basic needs as food, jobs, housing and medical care. These critics, particularly those affiliated with the Soviet bloc, stressed that their governments guaranteed citizens the right to obtain these basic needs. Supporters in democracies responded that, people needed, not *guarantees* of food, jobs, housing and medical care, but *delivery* of these benefits.

*Id.* at 375 (citing Schifter, *Building Firm Foundations: The Institutionalization of the United States Human Rights Policy in the Reagan Years*, 2 HARV. HUM. RTS. Y.B. 3, 16 (1989) (emphasis in original)).

60. *Id.* at 374.

61. Conference on Security and Co-Operation in Europe: Concluding Document from the Vienna Meeting, Nov. 4, 1986 – Jan. 17, 1989, 28 I.L.M. 527, 534 ¶ 114 (1989).

Koh, Assistant Secretary for Democracy, Human Rights and Labor, referred to the Vienna Declaration in stating that civil and political rights, and economic, social, and cultural rights are “universal, indivisible, interdependent, and interrelated.”<sup>62</sup> Notwithstanding this recognition, the United States has not fully embraced economic, social, and cultural rights. Instead it has emphasized the need for democracy and democratic institutions with the understanding that democracy is the appropriate path towards both civil and political rights as well as economic, social, and cultural rights.<sup>63</sup>

In view of the traditional hostility of the United States towards economic, social, and cultural rights, it is not difficult to conclude that the U.N. Report’s opposition to the “tying of trade and human rights” is rooted in the U.S. role in advocating such a linkage. Until the election of President Bush, the United States had taken the lead in arguing for the expansion of the trade mandate to include labor, environment, and human rights. At the 1999 WTO Ministerial meeting in Seattle, President Clinton stated:

I believe the WTO must make sure that open trade does indeed lift living standards—respects core labor standards that are essential not only to worker rights, but to *human rights*. That’s why this year the United States has proposed that the WTO create a working group on trade and labor.<sup>64</sup>

The U.N. Report’s conclusion that such a tying has been based on “superficial renderings” of human rights may be referring to, amongst other things, the U.S. reluctance to recognize second-generation rights. So long as the arguments for linking trade and human rights and labor are being made primarily by the United States, advocates of economic, social, and cultural rights may continue to oppose tying trade and human rights.

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62. Harold Hogju Koh, *Remarks of the U.N. Commission on Human Rights, 55<sup>th</sup> Session*, April 1999, available at [http://www.state.gov/www/policy\\_remarks/1999/990401\\_koh\\_geneva.html](http://www.state.gov/www/policy_remarks/1999/990401_koh_geneva.html) (last visited June 29, 2001).

63. Harold Koh also remarked:

As President Franklin Delano Roosevelt recognized long ago, freedom from want is not just an economic right, but a right deeply connected to political freedom. The surest road to ensure economic rights is an open and transparent political system that respects all the rights of all its citizens. . . . To protect political and economic freedom, we must first recognize the indissoluble link between human rights and political democracy.

*Id.*

64. *Remarks by the President to the luncheon in honor of the ministers attending the meetings of the World Trade Organization, Four Seasons Hotel, Seattle, Washington, Dec. 1, 1999*, available at <http://www.pub.whitehouse.gov/uri-.../oma.eop.gov.us/1999/12/3/3.text.1> (last visited on June 29, 2001) (emphasis added).

### III. WTO AND INTERNATIONAL CIVIL SOCIETY

Developing country governments have consistently opposed international civil society participation at the WTO, as expressed by the Indian Minister of Trade & Industry at the Seattle Ministerial:

The international civil society has shown keen interest in the activities of the WTO. While they have a vital role to play in any democratic polity, it is really for national Governments to deal with civil society within their domestic domain. This responsibility cannot be and should not be transferred to the WTO. What we can and should do is to spread greater global awareness about WTO's activities.<sup>65</sup>

Similar remarks have been made at the Seattle Ministerial Meeting by representatives of the Governments of Thailand<sup>66</sup>, Hungary, Cuba, Morocco, Korea, Ecuador and the Philippines, amongst others.<sup>67</sup>

At the same time, developing country governments have rejected any attempts to tie trade to labor rights and environmental issues. These governments have argued that such linkage would only be used to the detriment of the South, and that opposition to linkages has nothing to do with how the governments of the South see the issues of labor and environment. For example, the Indian Minister for Commerce and Industry has stated:

Much has been said about inclusion of non-trade issues such as environment and labour standards on the WTO agenda. India is second to none in its commitment towards environmental protection and sustainable development. The very ethos of India's culture and history is not only to respect but also to worship nature. The issue here, however, is different. The multilateral trading system has been designed to deal with issues involving trade and trade alone. India in good faith had agreed at Marrakesh to the establishment of a WTO Committee on Trade and the Environment. We would, however, strongly oppose any attempt to either change the Committee's structure or mandate which can be used for legitimizing unilateral trade

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65. *Statement of Shri Murasoli Maran, Minister for Commerce and Industry, at the Plenary Session of the Third Ministerial Conference of the WTO in Seattle, Nov. 30, 1999, available at [http://www.indianembassy.org/policy/WTO/maran\\_wto\\_nov\\_99.htm](http://www.indianembassy.org/policy/WTO/maran_wto_nov_99.htm) (last visited June 29, 2001) [hereinafter Maran].*

66. *Statement of H.E. Dr. Supachai Panitchpakdi, Deputy Prime Minister and Minister of Commerce of Thailand at the Third WTO Ministerial Conference, Dec. 1, 1999, available at [http://www.thaiemdc.org/pressctr.statemnt/others/wto\\_120199.html](http://www.thaiemdc.org/pressctr.statemnt/others/wto_120199.html) (last visited June 29, 2001).*

67. For video recordings of these statements by country representatives, see [http://www.wto.org/wto/seattle/english/ibs\\_e/ibs\\_e.htm](http://www.wto.org/wto/seattle/english/ibs_e/ibs_e.htm). See also Statement by the Honorable Jose J. Pardo, the Philippines Secretary of Trade & Industry at the WTO Ministerial Conference, Third Session, Seattle (Nov. 30-Dec. 3, 1999). WT/MIN (99)/ST/630 (99-5195).

restrictive measures. Attempts aimed at inclusion of environmental issues in future negotiations go beyond the competence of the multilateral trading system and have the potential to open the floodgates of protectionism.<sup>68</sup>

Similarly, at this George Washington International Law Review Symposium, H.E. Supachai Panitchpakdi has eloquently expressed the uniform developing country view on the inclusion of labor and environmental issues within the mandate of the WTO. This is consistent with the statements made by His Excellency at the Seattle Ministerial where he stated:

And finally, it needs to be made clear that the ultimate goal of the WTO is the enhancement of the multilateral trading system by serving as a negotiating forum advancing multilateral trade relations. As such, we need to ensure that the WTO focuses mainly on trade issues. . . . Certainly, by linking trade issues with non-trade issues we will not only create additional burden to the already complicated negotiations process, but also jeopardize our ultimate goal of establishing a freer global trading environment.<sup>69</sup>

Other developing country governments were also uniformly opposed to expanding the trade mandate and tying trade to human rights, the environment, and labor.<sup>70</sup>

Both the U.N. Report and the vast majority of the WTO membership distrust the motives of those who advocate linkages or expansion of the trade mandate to include labor, environment, and human rights. Developing country governments mistrust the motives of *all* those who advocate such linkages, including NGOs and international civil society. The U.N. Report is not as consistent since it advocates a far greater role for international civil society at the WTO. Such inconsistency raises the question: how can the WTO allow for participation by the NGO community, which advocates linkages, without also expanding its trade mandate? Furthermore, it is unclear whether the U.N. Report's opposition to the tying of trade and human rights is based primarily on the lack of civil society participation at the WTO or is rooted in ideological

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68. Maran, *supra* note 65.

69. WT/MIN (99)/ST/331 December 1999 (99-5246) (Statement of H.E. Dr. Supachai Panitchpakdi, Deputy Prime Minister and Minister of Commerce of Thailand).

70. The list includes numerous statements made by developing country governments at the Seattle Ministerial in November-December 1999. See, for e.g., WT/MIN (99)/ST/281 December 1999 (99-5223) (Statement by Mr. Asmat Kamaludin, Secretary-General, Ministry of International Trade & Industry of Malaysia); WT/MIN (99)/ST/130 (99-5186) (November 1999) (Statement by H.E. Mr. BG (NS) George Young-Boon Yeo, Minister for Trade & Industry, Singapore); WT/MIN (99)/ST/630 (99-5195) November 1999 (Statement by Honorable Jose T. Pardo, Secretary of Trade & Industry, the Philippines).

opposition to the economic principles animating the multilateral trading system and its dispute settlement mechanism. If the latter is the underlying reason motivating the U.N. Report, increased civil society participation is unlikely to prove satisfactory, unless and until such participation transforms the WTO to such an extent that it ceases to exist in its current form.<sup>71</sup>

#### IV. CONCLUDING OBSERVATIONS AND SUGGESTIONS

The human rights community, and particularly the Southern advocates of economic, social, and cultural rights, should learn to engage in a constructive dialogue with the WTO. Moreover, the WTO should take seriously the criticisms such as those expressed by Oloka-Onyago and Udagama. The authors of the U.N. Report should be criticized for failing to recognize the implications of their positions for the multilateral trading regime. For instance, the U.N. Report gives no indication of how the WTO can open itself up to the forces of globalization-from-below, which includes human rights advocates, without expanding the scope of the WTO beyond trade and not tying the issue of trade to human rights. The U.N. Report also leaves the WTO in the unenviable position of being “damned if it does and damned if it doesn’t.” If the WTO allows extensive participation by the rights advocates, it will be accused of introducing non-trade issues into the trade agenda, to the detriment of the South. On the other hand, if the WTO does not allow participation by rights advocates, it will be accused of being undemocratic ignoring the human rights “fall out” of trade agreements, again to the detriment of many in the South.

The U.N. Report, as it is currently written, lacks clarity and as a result fails to address fundamental questions such as: how should the WTO accommodate and respond to increasing recognition of economic, social, and cultural rights on the world stage? How will increased acceptance of economic, social and cultural rights affect the manner in which WTO members interpret and apply their rights and obligations under the WTO agreements? Irrespective of the extent to which members of international civil society are allowed to participate, how can human rights groups trust the

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71. “All of us desire good governance, environmental protection and core labour standards. . . .The key is to see clearly the motivations behind the proposals. When the motivations are protectionist, let us recognize them for what they are. Where the motivations are well-intentioned, we should in our own interest listen carefully and adjust our policies.” See WT/MIN (99)/ST/130 (99-5186) (November 1999) (Statement by H.E. Mr. BG (NS) George Young-Boon Yeo, Minister for Trade & Industry, Singapore).

WTO, so long as, its *raison d'être* continues to be the removal of all forms of barriers to trade? Both human rights advocates and trade specialists must address these and related issues in the near future.