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PRESENTATION



It is a great pleasure for us to present the 12 issue of the Sur Journal. As previously announced, this edition is the beginning of our collaboration with **Carlos Chagas Foundation (FCC)** that will support the Sur Journal in 2010 and 2011. We would like to thank FCC for this support, which has guaranteed the maintenance of the printed version of the Journal.

This issue of Sur Journal is edited in collaboration with Amnesty International.* On the occasion of the UN High-level Summit on the Millennium Development Goals (MDGs) in September 2010, this issue of Sur Journal focuses on the MDGs framework in relation to human rights standards. We are thankful to Salil Shetty, Amnesty International Secretary General, who prepared an introduction to this discussion. The first article of the dossier, also by Amnesty International, **Combating Exclusion: Why Human Rights Are Essential for the MDGs**, stresses the importance of ensuring that all efforts towards fulfilling all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability must be at the heart of all efforts to meet the MDGs.

* *Disclaimer.* With the exception of the foreword and 'Combating exclusion: Why human rights are essential for the MDGs', the opinions expressed in this collection of articles are those of the authors and do not necessarily reflect Amnesty International policy.

Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals, by Victoria Tauli-Corpuz, examines the relationship of the MDGs with the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples.

Alicia Ely Yamin, in **Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations**, examines how accountability for fulfilling the right to maternal health should be understood if we seek to transform the discourse of rights into practical health policy and programming.

Still addressing the issue of MDGs, Sarah Zaidi, in **Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?**, explores how MDGs fit within an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated with the right to health.

This issue also features an article by Marcos A. Orellana on the relationship between climate change and the MDGs, looking into linkages between climate change, the right to development and international cooperation, in **Climate Change and The Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism.**

We hope that this issue of the Sur Journal will call the attention of human rights activists, civil society organisations and academics to the relevance of the MDGs for the human rights agenda. The articles included in this edition of the Sur Journal show not only a critique of the MDGs from a human rights perspective, but also several positive proposals on how to integrate human rights into the MDGs.

Two articles discuss the impact of corporations on human rights. The first, by Lindiwe Knutson (**Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?**), analyses several cases brought before U.S. courts that have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. The article examines the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York.

The second article, by David Bilchitz (**The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**), seeks to analyze the John Ruggie framework in light of international human rights law and argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should

not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realization of such rights.

There are two more articles in this issue. The article by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, examines the functioning of the Inter-American System of Human Rights Protection in, **The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions**. The article presents the results of a quantitative study focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR).

Finally, Richard Bourne's paper, **The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association**, discusses how membership rules for the Commonwealth became crucial in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens.

We would like to thank Amnesty International's team for its contribution. Their timely input in the selection and edition of articles has been vital.

The editors.

FOREWORD



Amnesty International's recently released report, *Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya* (July 2010) documents how women and girls living in informal settlements are particularly affected by lack of adequate access to sanitation facilities for toilets and bathing. Many of the women told Amnesty International that they have experienced different forms of physical, sexual and psychological violence, and live under the ever-present threat of violence. The lack of effective policing and due diligence by the government to prevent, investigate or punish gender-based violence and provide an effective remedy to women and girls results in a situation where violence goes largely unpunished.

We also recorded testimonies from a high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. Women's experiences show that lack of adequate access to sanitation facilities and the lack of public security services significantly

contribute to the incidence and persistence of gender-based violence.

Yet, Kenya has committed to the international Millennium Development Goal (MDG) target on sanitation to reduce by half, between 1990 and 2015, the proportion of people without sustainable access to basic sanitation. The country adopted water and sanitation policies that aim to fulfill MDG targets and also the rights to water and sanitation. These policies do reflect many human rights principles. But our research shows that there are still key gaps between Kenya's MDG policies and ensuring consistency with Kenya's international human rights obligations. It also starkly illustrates how the MDG policies of governments cannot ignore gender-based violence or the specific barriers faced by women and girls living in informal settlements in accessing even basic levels of sanitation.

This is why the discussion in this issue of *Sur - International Journal on Human Rights* is so important and timely. These concerns are not unique to Kenya and around the world there are examples

illustrating how MDG efforts are most effective when they address underlying human rights issues and are truly targeted at groups facing discrimination and marginalization.

In September 2010, UN Member States will meet to agree an action plan to ensure the realization of the MDGs by 2015. With only five years left to go, it is more important now than ever that human rights are put at the centre of this action plan, in order to make the MDG framework effective for the billions striving to free themselves from poverty and to claim their rights.

The articles in this issue focus on a range of issues related to the MDGs. They illustrate the gap between the current MDG targets and existing requirements under international human rights law. They also briefly outline some of the essential elements that must be incorporated into any revised or new global framework to address poverty after 2015. I hope it will contribute to discussions on the relationship between human rights and the MDGs and be a useful resource for human

rights practitioners and others who are concerned with these issues.

Another great challenge facing governments across the world is human rights abuses committed by or in complicity with corporations. Two articles in this issue address some of the challenges as well as opportunities related to human rights in the context of corporate activities.

The issue also includes two general articles, which examine the role of the Inter-American System of Human Rights and the Commonwealth of Nations in the promotion and protection of human rights.

I had the privilege of speaking at the International Human Rights Colloquium, organized by Conectas, in 2004 and of contributing to the second issue of the SUR journal. I am extremely pleased to have the chance to collaborate again with Conectas and that they agreed to produce this edition of SUR jointly with Amnesty International.

We would like to thank them for giving us this opportunity and also thank all the authors who have contributed to this issue.

I hope you enjoy reading it.

Salil Shetty
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ABSTRACT

This article addresses one of the central concerns in current discussions surrounding the functioning of the Inter-American System of Human Rights Protection (IASPHR): its effectiveness. Several questions necessary for a richer debate regarding the strengthening of the IASPHR lack definite answers and have still not been analyzed in as much detail as possible. To illuminate some points of the problems involved, the present article details the results of a quantitative research project focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR). The information presented here is the result of a survey of all of the measures adopted in all of the final decisions of the IACHR and the Inter-American Court, within the framework of the individual petition-based system of the ACHR, during a period — either recommendations or friendly settlements approved by the IACHR or holdings of the Inter-American Court—, and observes, among other aspects, the degree of compliance that the said remedies have received as of the present date. The results of this investigation may serve as a foundation for detecting useful trends for the discussion on possible reforms for optimizing the functioning of the IASPHR and in order to make strategic use of litigation before its protection bodies.

KEYWORDS

Inter-American System – Inter-American Commission – Inter-American Court – Remedies – Repairs – Degree of compliance – Effectiveness – Individual petitions

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THE EFFECTIVENESS OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION: A QUANTITATIVE APPROACH TO ITS FUNCTIONING AND COMPLIANCE WITH ITS DECISIONS

Fernando Basch
Leonardo Filippini
Ana Laya
Mariano Nino
Felicitas Rossi
Bárbara Schreiber

1 Introduction

In a region of failing democracies and persistent violations of rights, the Inter-American Commission on Human Rights (the Commission or IACHR) and the Inter-American Court of Human Rights (the Court or the Inter-American Court) may contribute to positively shape state behavior. Both bodies, in fact, answer to thousands of victims by means of the petition-based system established in the American Convention on Human Rights (ACHR) and have set standards that, to a greater or lesser degree, have guided some important legal and political reforms in the countries of the region.

All in all, in discussions surrounding the functioning of the Inter-American System of Human Rights Protection (IASPHR) a central and constant concern is the matter of its effectiveness. For many observers, the human and financial resources of the IASPHR for providing an answer to the denial of rights are insufficient¹. Others emphasize the absence of formal mechanisms or consolidated practices that ensure state implementation of Inter-American decisions. For some years now, a debate has existed surrounding the IASPHR within the framework of the Organization of American States (OAS) Permanent Council's Committee on Political and Juridical Affairs (CPJA), and many states and organizations have drafted proposals aimed at strengthening the IASPHR (MÉXICO, 2008)². The

Notes to this text start on page 33.

widespread perception is, so to speak, that the IASPHR could or should exert greater influence on state behavior than it currently does.

This research sheds light on a matter strongly related to this widespread concern: the degrees of compliance with the decisions adopted within the framework of the ACHR petition-based system. Despite the repeated need for strengthening the IASPHR and increasing its influence, answers must still be found for several relevant questions for richer and more detailed debates and analysis. To what extent are the decisions of the IASPHR effectively observed? Is it possible to reach a shared and empirically sustainable description to provide an answer? Is it possible to consistently *measure* over time the variations in the degrees of observance of the Inter-American decisions? Of course, there is no definite answer to these questions, but an attempt may be made to conduct an exercise that would contribute to clarifying some points of the problems involved.

Here, we shall focus on the measures available to the IASPHR, within the petition-based framework, to respond to violations of rights within the ACHR. In other words, the remedies that the IASPHR offers in relation to a denial of rights declared as such through the procedures made available by the ACHR. The information presented here, in this way, surveys all the remedies adopted – whether recommended, authorized or ordered - in all final decisions of the IACHR and the Inter-American Court for a certain period of time, and observes the degrees of compliance with such remedies up to the present date³. The simple idea behind this survey is to offer modeled and quantitative information about a topic that continues to present itself through mainly narrative approaches in the literature on the IASPHR. Our task, consequently, is to contribute to answering, with the help of some quantitative tools, two central questions: What are the remedies adopted by the Inter-American petition-based system? And, to what extent are they observed?

The results of this research may serve as a foundation for detecting useful trends for the discussion on possible reforms for optimizing the functioning of the IASPHR and methods that may be advisable for making strategic use of litigation before its protection bodies.

First, we present the research. Then, we present the results obtained. Finally, we analyze said results and formulate some recommendations that may help to optimize the effectiveness of the IASPHR.

2 Research Methodology

2.1 *Sample Universe and Main Variables*

Our universe of study is composed of all of the final reports on the merits of the IACHR (Art. 51 ACHR), all of the IACHR reports of approval of friendly settlements (Art. 49 ACHR) and all of the holdings of the Inter-American Court between June 1, 2001 and June 30, 2006 with respect to state members of the ACHR who have accepted the contentious jurisdiction of the Inter-American Court. Thus, we have revised 12 final reports on the merits, 39 friendly settlements approved

by the Commission, and 41 holdings of the Court. These 92 decisions contain, in turn, 462 remedies adopted by the IASPHR: 45 of them were recommended in final reports of the IACHR, 160 were settled by friendly settlements, and 257 were ordered by the Court in judgments on the merits.

In all of the decisions surveyed, we have identified, in addition to the remedies adopted and the dates on which they were observed⁴, the litigants before the IASPHR, the state party involved and the duration of the trial from the date of the presentation of the petition until the date of the final decision on the merits⁵.

The decision to restrict the universe of cases to those decided with respect to states that have accepted the jurisdiction of the Court seeks to avoid false comparisons when showing trends of compliance. The states that have accepted the jurisdiction of the Court have demonstrated a commitment – at least a formal one – with respect to the decisions of the protection bodies of the Inter-American human rights system. Those who have not accepted such jurisdiction seem to have adopted different criteria in subjecting the rules of their legal-political system to Inter-American standards, and the comparison between them could lead to mistaken conclusions.

The survey did neither include cases in the process of reaching friendly settlements nor those friendly settlements that have not yet been approved by the IACHR. This is because friendly settlements are only made known subsequent to their approval; the friendly settlement proceedings are not public. On the other hand, while unapproved settlements have effects between the State and the petitioners, they may be appealed before the system and their state of compliance may begin to be evaluated by the Commission only after their approval.

We have also not taken into account remedies recommended in the preliminary report established in Article 50 of the ACHR. Given that it is reserved, this information may only be extracted from the account of the case's proceedings included by IACHR in Art. 51 reports, or in its claims before the Inter-American Court. Nevertheless, an exhaustive analysis of these components from the years 2001 to 2006 offers imprecise and insufficient information for determining the degree of compliance with the recommendations made by the IACHR in the preliminary report.

Finally, the time period covered by the survey is determined by the implementation, in June 2001, of the reform of the Rules of Procedure of the Inter-American Court. This, to some extent, modified the proceedings before the Court and, thus, the procedural conduct of the litigants before the system. The deadline, fixed in June 2006, obeys the need for selecting a period that is recent enough so as to reflect a practice that is as current as possible, but also far enough removed so as to analyze cases in which states have had time to adopt measures necessary for complying with the recommendations, commitments, or orders. In this sense, we consider that two and a half years is a sufficient amount of time for states to comply with the recommended, agreed or ordered measures. Thus, studying decisions made between June 2001 and the middle of 2006 allows for arriving at conclusions to which it would be difficult to raise objections, based on insufficient time for state compliance with the decisions.

2.2 Degrees of Compliance

The degree of compliance with each of the remedies adopted was surveyed up until the drafting of the present article⁶. As a result, all of the IACHR annual reports from the years 2002 to 2008⁷ and all of the resolutions supervising compliance with the Court's holdings (rulings?) up until June 30, 2009 have been surveyed⁸.

Some clarifications are necessary. In its resolutions supervising judgments, the Court evaluates the degree of compliance with each of the measures ordered. In order to define the degree of compliance of each of the remedies ordered by the Inter-American Court, this research has always followed the Court's conclusions.

On the contrary, the IACHR evaluates the degree of compliance of the group of measures accepted or recommended, without specifically referring to each one of them. This prevented us from following the criterion of the Commission to establish the degree of compliance. For the present purposes, available information about each case has been studied—whether it was brought by the state or petitioners—under the following criteria: as long as the state has taken actions that had concrete results aimed at complying with the measure, the remedy was classified as having been partially satisfied. In cases in which the state had only begun taking steps that hadn't produced concrete results, the remedy was considered as not satisfied. In some punctual cases, the IACHR made explicit statements regarding compliance with each remedy. The criteria of these cases have been followed. The same has been done in those cases in which the IACHR has declared full compliance with measures, even when petitioners have expressed their disagreement.

3 The functioning of the IASPHR

3.1 Remedies and Objectives

In the final decisions of cases processed through the petition-based system during the surveyed period, the protection bodies of the IASPHR adopted 462 remedies, the study of which suggests that the remedies that the IASPHR regularly adopts are directed towards satisfying four central objectives. First, the reparation of persons or groups. This is carried out through monetary economic compensation, non-monetary economic compensation, symbolic reparations, and the restitution of rights. Second, the prevention of future violations of rights through training public officers, raising social awareness, introducing legal reforms, creating or reforming institutions, and other preventive measures. Third, the investigation and punishment of human rights violations, an action that may occasionally require legal reforms. Finally, the protection of victims and witnesses. Within this framework, the remedies adopted by the IASPHR may be classified in 13 groups that may be distinguished both in terms of the type of action required from the State and in terms of the measure's recipient or beneficiary:

- i. **Monetary economic compensation:** a measure required of states consisting of the payment of sums of money to individuals or groups⁹.

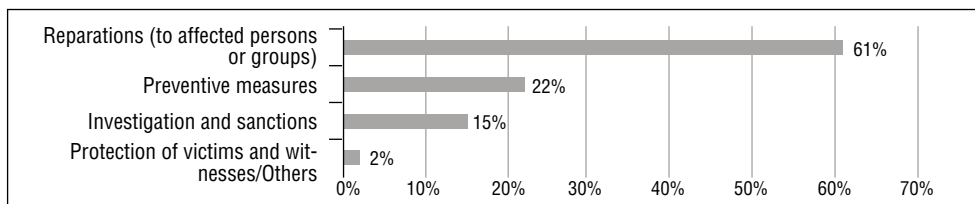
- ii. **Non-monetary economic compensation:** a measure aimed at providing access to a specific service or good or at allocating money for its provision or purchase. For example, scholarships and medical assistance, the creation of funds for productive community development aimed towards creating health, housing, and education programs, or land and real state cession.
- iii. **Symbolic reparations:** a remedy aimed at dignifying and making moral reparations to victims and making the state's recognition of its responsibility publicly known. This category includes: placing plaques, making public acts, giving the names of victims to establishments, streets, scholarships, or public spaces, publicly spreading Court rulings or IACHR reports, and other forms of commemorating the violations and their victims. The restitution and transfer of victims' remains to their family members is also included as a symbolic reparation¹⁰.
- iv. **Restitution of rights reparation:** a remedy for restoring to victims the enjoyment of their violated rights, when the action required is not of an eminently economic content. For example, reassigning an employee to the position from which he or she was terminated, replacing illegitimately removed judicial officials to their official positions, liberating detained persons, leaving sentences without effect, holding new trials with due process guarantees, excluding the victim from criminal background records, re-registering a person in pension systems or providing security measures for displaced persons to return to inhabit their land.
- v. **Prevention through training public officials:** training or educating, in specific subjects related to human rights protection, public employees and officials, such as members of police or military security forces, of the public administration or the judiciary.
- vi. **Prevention through raising social awareness:** launching programs or media or public education campaigns, seeking to generate awareness in society regarding matters necessary for the defense of human rights. They go beyond the mere commemoration of the verified violation in a case and homage to its victims to disseminate and promote human rights in general.
- vii. **Prevention through legal reforms:** legislative, administrative or decree-related reforms aimed at implementing new public policies or improvement of existing ones. The recommendations, commitments or orders to pass a law or sanction a decree with the purpose of creating or strengthening a specific public institution are excluded from this category.
- viii. **Prevention through strengthening, creating, or reforming public institutions.** For example, recommendations, commitments, and orders to do what is necessary in order to comply with domestic legislation, the violation of which undermined certain rights.
- ix. **Prevention through unspecified measures:** a recommendation or

commitment to do what is necessary to avoid the repetition of rights violations such as those of the case. These include only those recommendations that do not specify, by any means, which actions the state must take in order to be in compliance.

- x. **Investigation and punishment with legal reform:** recommendations, commitments, or orders to investigate and punish human rights violations that demand, for their fulfillment, that the state carry out legal reforms (in a broad sense) or reforms to its justice system. For example, by repealing amnesty laws or pardons, or modifying relevant legal or jurisprudential criteria to be applied to the action ruled upon or the prescription of the action.
- xi. **Investigation and punishment without legal reform:** investigating and sanctioning identified human rights violations, compliance with which does not require the modification of the law. This deals with cases where justice may be served without having to overcome legal obstacles¹¹.
- xii. **Protection of victims and witnesses:** specific protection measures for victims or witnesses based on the expectation that they will be persecuted for resorting to the Inter-American system or for having participated in internal investigation processes of human rights violations. This will be analyzed as an independent category because it demands actions that are distinct and autonomous from the central proceedings and because there could be cases in which the state completely complies with the investigation and punishment of violations without complying with the protection of witnesses, and vice versa. On the other hand, this measure does not seek reparations nor aims at generically preventing human rights violations. This is restricted to the protection of specific persons indicated by the Court or the Commission.
- xiii. **Others.** All of those measures recommended, committed, or ordered to the state that cannot be classified within any of the 12 categories above. In the surveyed universe, we have identified three: the order that a permission to leave the country be delivered to a minor (a measure not aimed at the minor's protection as a witness or victim, but rather to spare the minor's mother from distressing procedures); an order for establishing communication between specific persons and the authorities for the provision of health care, and the order to deliver a legislative CD to a person.

Out of the total of 462 remedies surveyed, the group aimed at making reparations to affected persons or groups, either through symbolic, monetary, or non-monetary economic reparations or the restitution of rights, represents 61%. The prevention of future violations represents 22%. 15% of the remedies adopted aim at investigating and sanctioning those responsible for human rights violations, and protection measures for victims and witnesses comprise 1.3% of the cases. Four remedies that represent 0.7% of the universe are grouped in the "Others" category.

GRAPH 1 - OBJECTIVES SOUGHT BY THE REMEDIES ADOPTED (IN %)

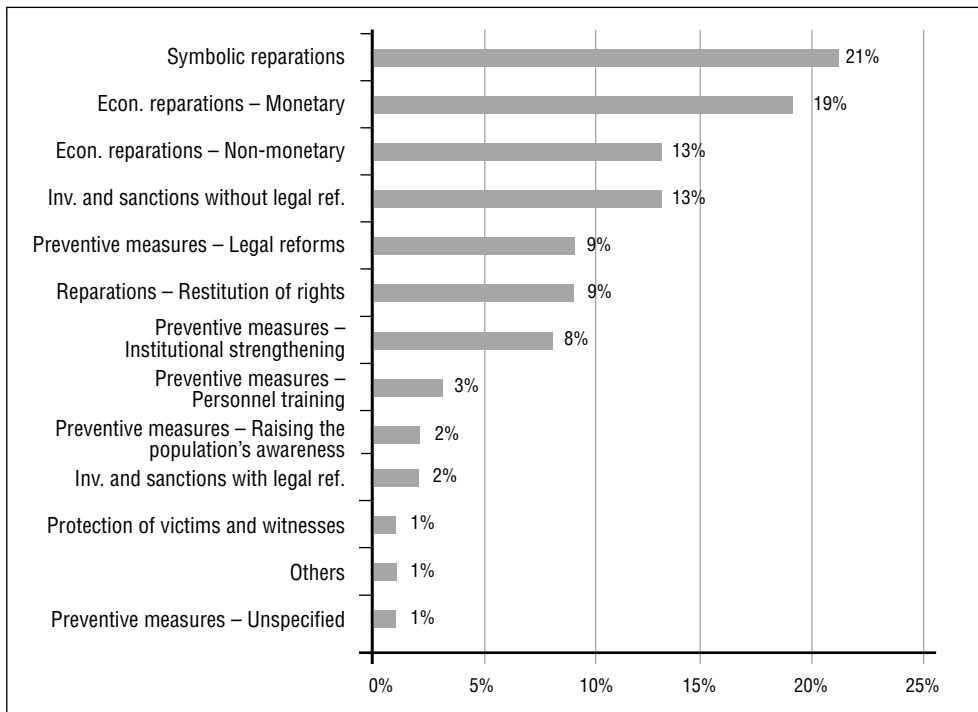


Total cases: 462 remedies adopted between June 2001 and June 2006.

Source: Original compilation based on information extracted from the IACHR annual reports and the Inter-American Court rulings. The "Protection of V&W Protection and Others" category groups the categories of "Protection of victims and witnesses" and "Others".

Upon analyzing the percentage of incidence of each one of the types of remedies, it is observed that 21% of the total remedies demanded are symbolic reparations, 19% are monetary reparations, and 13% are non-monetary economic reparations. The remedies that include the duty to investigate and sanction without legal reforms represent 13%, while those that did require reforms represent 9%. Another 9% of the remedies are reparation measures through the restitution of rights. Prevention measures through institutional strengthening, innovation, or reform represent 8% of the total, and among the remaining six categories of remedies, the three of a preventive nature (training officials, raising social awareness, and non-specific preventive measures) represent a joint 5% of the remedies, while the remaining three (investigating and punishing with legal reforms, protection of victims and witnesses, and others) represent 3.7 %.

GRAPH 2 - TYPES OF REMEDIES ADOPTED (IN %)



Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

Chart 1

OBJECTIVES AND TYPES OF REMEDIES ADOPTED (IN NUMBER OF CASES AND %)					
Objectives	Total	%	Remedies	Total	%
Investigation and punishment	67	15%	Without legal reforms	60	13%
			With legal reforms	7	2%
Prevention	101	22%	Legal reforms	43	9%
			Strengthening, creation, and reform of public institutions	35	8%
			Training public officials	12	3%
			Raising social awareness	7	2%
			Unspecified	4	1%
Protection of victims and witnesses / Others	10	2%	Protection of victims and witnesses	6	1%
			Others	4	1%
Reparations	284	61%	Symbolic	95	21%
			Monetary economic	86	19%
			Non-monetary economic	61	13%
			Restitution of rights	42	9%
Total	462	100%	Total	462	100%

Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.2 Remedies and types of IASPHR decisions

Up to this point we have detailed the objectives and types of remedies ordered by the control bodies of the IASPHR, as well as the proportions in which they have been ordered. In this section, the relationship between the types of IASPHR decisions and the different remedies adopted is analyzed. In this study, it is observed that, in reports established by Articles 49 and 51 of the ACHR, as well as in the rulings of the Court, there is a clear predominance of reparations. Of the 45 remedies recommended in the Commission's final reports, 17 require reparations (38%), of which 12 are of an economic-monetary nature, 4 are non-monetary economic reparations and 1 is symbolic. As regards the Court's rulings, of a total 257 remedies, 174 reparations were ordered (68%), of which 72 are symbolic reparations, 42 are monetary, 34 are non-monetary economic reparations, and 26 involve the restitution of rights. In friendly settlements, of a total of 160 remedies approved/

agreed, 93 are reparations (58%), among which 32 are monetary, 22 are symbolic, 23 are non-monetary economic reparations, and 16 involve the restitution of rights.

On the other hand, upon comparing the remedies agreed upon in the framework of processes of friendly settlements with those that the Court ordered, it is observed that in the former, practically no measures of legal reform have been agreed upon. No commitments to investigate and punish requiring legal reforms are found in any of the friendly settlement solutions, and only 10 remedies demanding legal reforms as a preventive measure were identified. However, in the same period, the Court ordered the investigation of human rights violations and the punishment of those responsible with the additional obligation of reforming domestic legislation on 6 occasions, and in 27 opportunities it ordered legal reforms as a preventive measure. Something similar occurs with the recommendations of the IACHR in its ACHR Art. 51 reports. The largest amount of remedies identified in them refers to the duty to investigate and punish, but without demanding legal reforms to comply with the obligation.

Chart 2

REMEDIES AND TYPES OF IASPHR DECISIONS (IN NUMBER OF CASES AND %)								
Remedy	Final Report	%	Friendly Settlement	%	Court Holding	%	Total	%
Reparations								
Restitution	-	0%	16	10%	26	10%	42	9%
Symbolic	1	2%	22	14%	72	28%	95	21%
Monetary economic	12	27%	32	20%	42	16%	86	19%
Non-monetary econ.	4	9%	23	14%	34	13%	61	13%
Investigation								
Without legal reform	13	29%	29	18%	18	7%	60	13%
With legal reform	1	2%	-	0%	6	2%	7	2%
Prevention								
Raising awareness	-	0%	3	2%	4	2%	7	2%
Officials training	1	2%	4	3%	7	3%	12	3%
Instit. Strengthening	3	7%	19	12%	13	5%	35	8%
Legal reforms	6	13%	10	6%	27	11%	43	9%
Unspecified	4	9%	-	0%	-	0%	4	1%
V&W Protection and Others								
Others	-	0%	2	1%	2	1%	4	1%
V&W Protection	-	0%	-	0%	6	2%	6	1%
General total	45	100%	160	100%	257	100%	462	100%

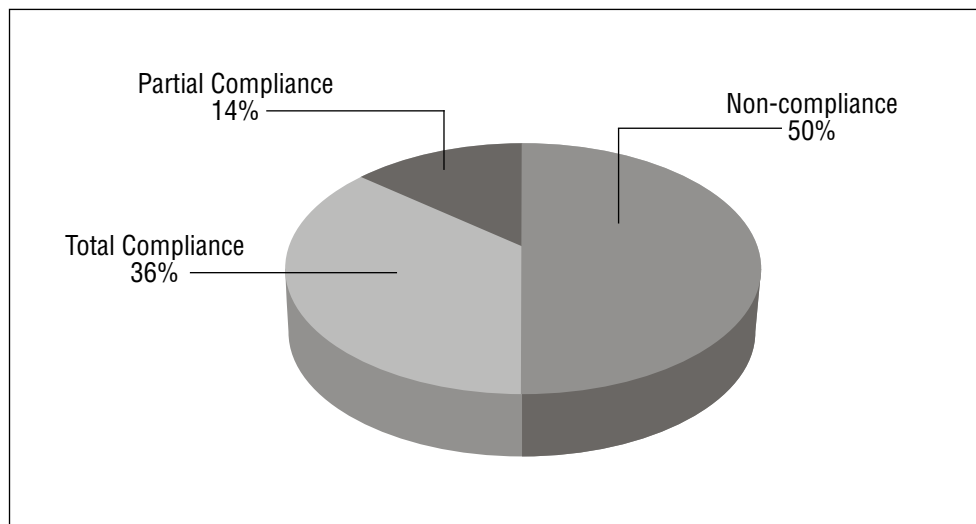
Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.3 Remedies and Degrees of Compliance

Upon analyzing the degrees of compliance with the recommended, agreed upon, or ordered remedies in the surveyed decisions, non-compliance with half of these remedies is observed. Moreover, total compliance with only 36% of the surveyed remedies and partial compliance with 14% was found.

GRAPH 3. DEGREES OF COMPLIANCE WITH REMEDIES (IN %)



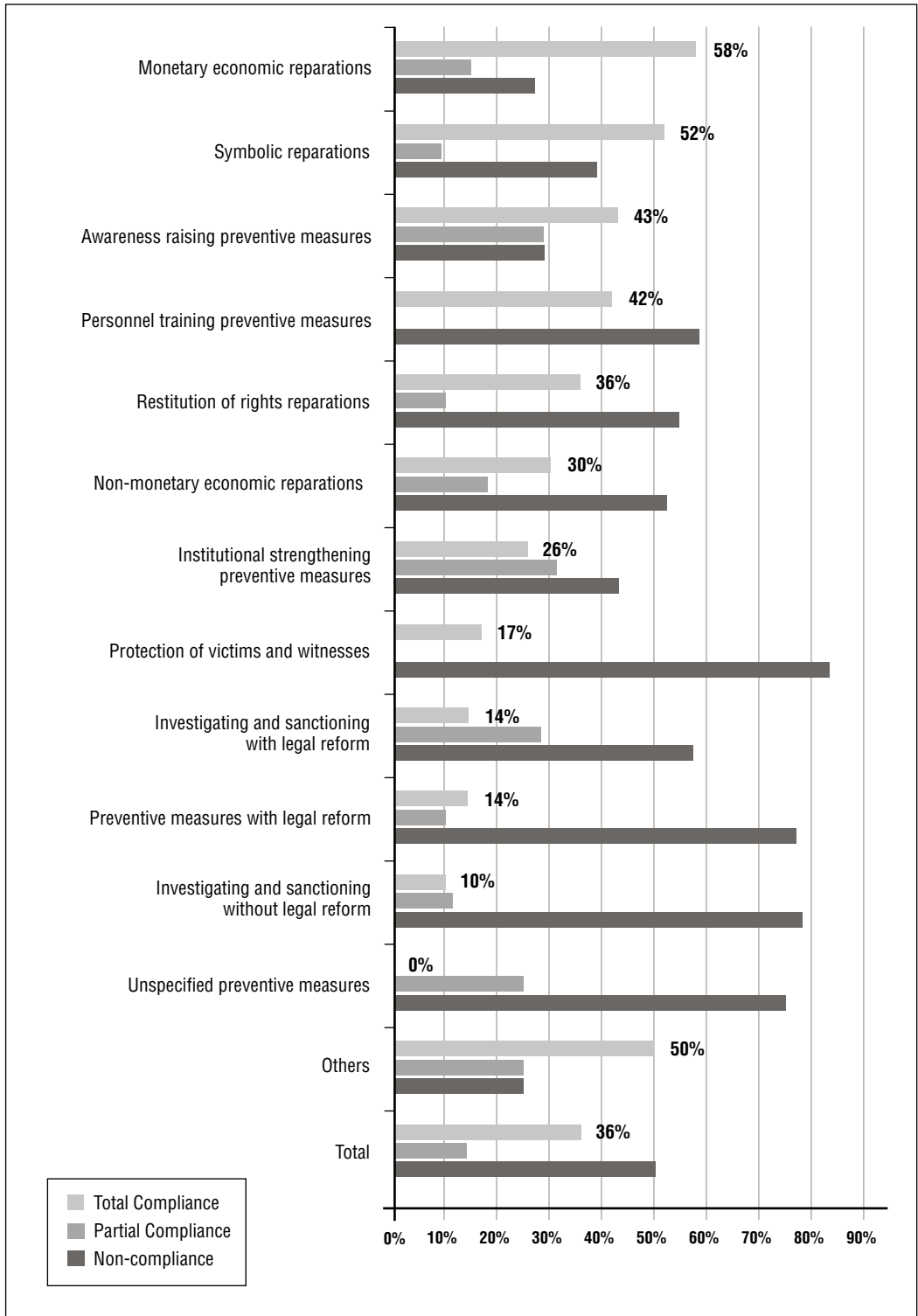
Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

The remedies with the greatest degrees of compliance are those that demand some type of reparation: total compliance is found in 47% of the cases and partial compliance in 13%. In extreme contrast, only 10% of orders, recommendations, or commitments to investigate and punish those responsible for violations were totally satisfied; 13% were partially satisfied, and 76% were not satisfied.

As regards the different degrees of compliance with the different types of remedies, the greatest degrees of compliance were registered in those which required monetary reparations (58%), followed by those of symbolic reparations (52%), preventive measures through raising social awareness (43%) and the training of public officials (42%). However, remedies with the least degrees of compliance are those requiring the protection of witnesses and victims (17%), investigation and punishment of those responsible, regardless of the need of legal reforms (14% and 10% respectively) and those requiring legal reforms (14%). In particular, in cases in which the IACHR has recommended carrying out unspecified preventive measures there has been no compliance whatsoever¹².

GRAPH 4. DEGREES OF COMPLIANCE WITH DIFFERENT TYPES OF REMEDIES (IN %)



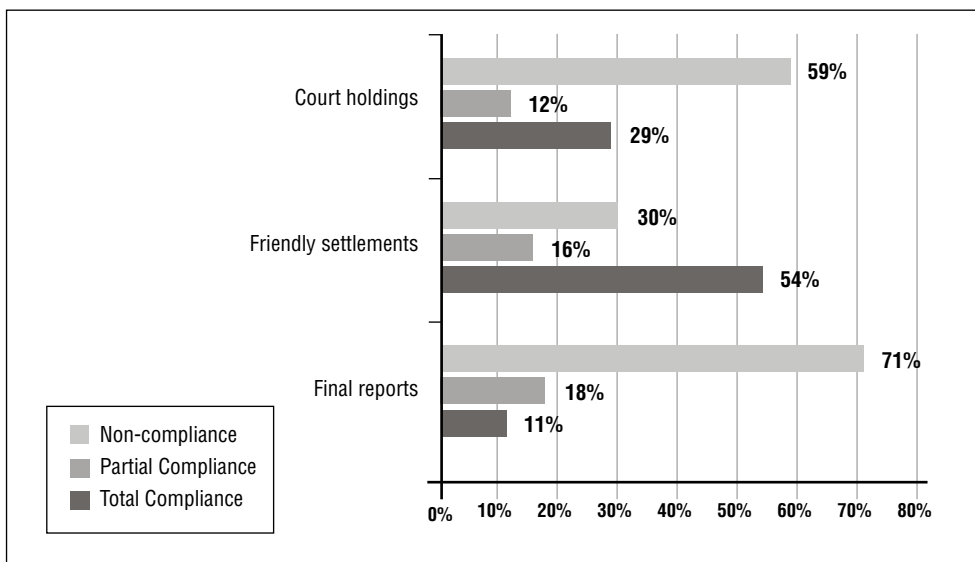
Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.4 *Types of decisions and degrees of compliance*

Remedies agreed upon in friendly settlements approved by the IACHR are those that register the greatest degree of compliance¹³. 54% received total compliance, the highest, albeit not entirely satisfactory, proportion. In contrast, only 29% of remedies ordered by the Court and 11% of remedies recommended in the Commission's final reports were totally satisfied¹⁴.

GRAPH 5 - COMPLIANCE WITH REMEDIES ACCORDING TO THE TYPE OF DECISION (IN %)



Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.
 Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.5 *Types of decisions, types of remedies, and degrees of compliance*

Upon combining the variables listed above, it is observed that the highest percentage of total compliance is verified in monetary reparations agreed upon in approved friendly settlements (88%). Non-compliance is verified at high levels, unfortunately, in all types of decisions and all sorts of remedies. As has been said already, however, a lesser degree of non-compliance tends to be verified for remedies agreed upon in approved friendly settlements. For example, 84% of institutional strengthening measures ordered in Court rulings were not satisfied, and 67% of those recommended in IACHR final reports were not satisfied, while the percentage of non-compliance in institutional strengthening measures agreed upon in friendly settlements is notably lower: 11%. The same can be said of measures aimed at raising social awareness: their level of total non-compliance is 50% in cases ordered by Court rulings and 0% in cases in which they were agreed upon in approved friendly settlements.

Finally, monetary reparations seem to be, in relative terms, the measures receiving the least amount of non-compliance of all types of decisions.

Chart 3

COMPLIANCE WITH REMEDIES ACCORDING TO THE TYPE OF DECISION (IN %)															
Final Reports															
Degree of compliance	Reparations – Monetary Econ.	Reparations – Non-monetary Econ	Reparations - Symbolic	Reparations – Restitution of rights	Prev. measures. - Training	Prev. measures. – Awareness raising	Prev. measures. – Legal Reforms	Prev. measures. – Inst. Strength.	Prev. measures. – Unspecified	Investigate – with legal reform	Investigate – without legal reform	Protection of victims and witnesses	Others	Final reports total	Total
Non-complian.	67	75	100		100		67	67	75		77			71	50
Partial complian.	17	0	0		0		0	33	25		23			18	14
Total complian.	16	25	0		0		33	0	0		0			11	36
Total	100%	100%	100%	0	100%	0	100%	100%	100%	0	100%	0	0	100%	100%

Friendly Settlements															
Degree of compliance	Reparations – Monetary Econ	Reparations – Non-monetary Econ	Reparations - Symbolic	Reparations – Restitution of rights	Prev. measures. - Training	Prev. measures. – Awareness raising	Prev. measures. – Legal Reforms	Prev. measures. – Inst. Strength.	Prev. measures. – Unspecified	Investigate – with legal reform	Investigate – without legal reform	Protection of victims and witnesses	Others	Friendly settlements total	Total
Non-complian.	6	18	31	38		0	40	11			72		0	30	50
Partial complian.	6	17	5	19		33	30	42			7		50	16	14
Total complian.	88	65	64	43		67	30	47			21		50	54	36
Total	100%	100%	100%	100%	0	100%	100%	100%	0	0	100%	0	100%	100%	100%

Inter-American Court Holdings															
Degree of compliance	Reparations – Monetary Econ	Reparations – Non-monetary Econ	Reparations - Symbolic	Reparations – Restitution of rights	Prev. measures. - Training	Prev. measures. – Awareness raising	Prev. measures. – Legal Reforms	Prev. measures. – Inst. Strength.	Prev. measures. – Unspecified	Investigate – with legal reform	Investigate – without legal reform	Protection of victims and witnesses	Others	Court holdings total	Total
Non-complia.	31	74	40	65	57	50	92	84		67	89	83	50	59	50
Partial complia.	21	21	11	4	0	25	4	16		17	11	0	0	12	14
Total complia.	48	5	49	31	43	25	4	0		16	0	17	50	29	36
Total	100%	100%	100%	100%	100%	100%	100%	100%	0	100%	100%	100%	100%	100%	100%

Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.6 State performance

The study of the degree of compliance with the remedies demanded of different states shows that the highest percentages of non-compliance correspond to Trinidad and Tobago, Venezuela, and Haiti. These three states totally failed to comply with the remedies recommended, agreed upon, or ordered by the control bodies of the IASPHR, although it should be noted that in the analyzed sample, the Inter-American Court ruled only twice against Trinidad and Tobago, once against Venezuela, and the IACHR only issued one report on the merits against Haiti. Furthermore, Suriname and the Dominican Republic have a 75% level of non-compliance with remedies, although it should also be clarified that during the period studied, each of these countries had only one Court ruling issued against them. The percentages of non-compliance with remedies following in decreasing order are Paraguay – with 69% non-compliance with remedies – and Colombia – with 68% non-compliance.

On the other hand, the highest percentages of compliance correspond to Mexico (83%), Bolivia (71%) —even though only 2 friendly settlements were approved by the IACHR in the surveyed period— and Chile (59%).

On the other hand, Ecuador, Peru, and Guatemala are the states that received the greatest amount of decisions against them by the IACHR during the surveyed period: 17, 17, and 13 respectively. Peru, Guatemala, Colombia, and Paraguay were states that received the greatest amount of rulings from the Inter-American Court: 9, 7, 5, and 4 respectively.

State performance can be broken down for each type of decision issued by the control organs of the IASPHR. The results confirm that – with the exception of Chile, which has a compliance level of 63% of the remedies ordered in Court rulings – states are more likely to comply with remedies agreed upon in approved friendly settlements than in those resulting from the remaining two types of decisions¹⁵.

In particular, upon analyzing state performance in compliance with the different remedies categorized by the objectives they pursue, the low level of general compliance with measures to investigate and punish is notorious. Nine countries have a level of complete non-compliance with this type of remedy (this is the case of Argentina, Ecuador, El Salvador, Haiti, Honduras, Nicaragua, Paraguay, Surinam, and Venezuela), while the remaining countries record total compliance only between 9 and 17% of the cases (Peru, Guatemala, Colombia, and Brazil). The sole exception is Mexico, which totally complied with remedies to investigate and punish in 67% of the cases surveyed.

With respect to preventive measures, once again, Mexico stands out with a 100% compliance. The remaining countries have a medium level of compliance (between 40 and 50%; in the cases of Ecuador, El Salvador, Brazil, and Colombia), low compliance (between 7 and 25%; in the cases of Nicaragua, Argentina, Chile, Guatemala, and Peru) or non-compliance (in the cases of Bolivia, Costa Rica, Venezuela, Honduras, and Paraguay, among others).

Bolivia, Chile, and Honduras stand out with a 100% compliance with the surveyed reparation measures. They are followed by Mexico (86%), Ecuador (67%), and Nicaragua (63%). On the contrary, countries such as the Dominican Republic, Colombia, and Paraguay registered low levels of compliance with these

Chart 4

COMPLIANCE WITH REMEDIES BY STATE AND ACCORDING TO THE TYPE OF DECISION (IN %)								
State Party	Total Cases	Final Rep.	Friend. Settle.	Court Hold.	Total Remedies	% of non-complian.	% of partial complian.	% total complian.
Mexico	3	1	2		12	17%	0%	83%
Bolivia	2		2		7	29%	0%	71%
Chile	5	1	3	1	22	18%	23%	59%
Honduras	2			2	10	50%	0%	50%
Nicaragua	3	1		2	13	39%	15%	46%
El Salvador	1			1	7	29%	29%	43%
Guatemala	13	1	5	7	90	44%	14%	41%
Brazil	6	4	2		42	36%	24%	41%
Ecuador	17	1	14	2	42	55%	5%	40%
Argentina	5		3	2	17	41%	24%	35%
Peru	17	1	7	9	94	51%	17%	32%
Dominican Republic	1			1	4	75%	0%	25%
Suriname	1			1	8	75%	0%	25%
Colombia	6		1	5	41	68%	7%	24%
Paraguay	5	1		4	29	69%	17%	14%
Costa Rica	1			1	3	33%	67%	0%
Haiti	1	1			3	100%	0%	0%
Trinidad and Tobago	2			2	10	100%	0%	0%
Venezuela	1			1	8	100%	0%	0%
General Total	92	12	39	41	462	50%	14%	36%

Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

remedies (33%, 21%, and 15%, respectively). Other states show complete non-compliance with reparation remedies included in the sample: Costa Rica, Haiti, Trinidad and Tobago, and Venezuela.

The analysis of the level of compliance of each state with different types of remedies leads to the conclusion that preventive measures demanding the strengthening, creation or reform of public institutions were only satisfied to some extent by Brazil, which had fully complied with 64% of the cases. The other eleven states to which the IASPHR bodies recommended or ordered this type of measure totally failed to comply with them in all cases.

As regards measures for legal reform, they received full compliance in all cases in which they were ordered for Mexico and Ecuador. Another 4 states had a low level of compliance with these measures (Argentina, 33%; Chile, 25%; Nicaragua, 25%; Peru, 20%) and 9 totally failed to comply.

Finally, Bolivia, Chile, and Honduras have totally complied with all reparation remedies demanded of them, while Trinidad and Tobago, Venezuela, Colombia, Paraguay, and Peru present low levels of compliance or complete non-compliance with these remedies.

Chart 5

STATE COMPLIANCE WITH REMEDIES ACCORDING TO THEIR TYPE (IN %)

	Reparations – Monetary econ.	Reparations – Non-monetary econ.	Reparations - Symbolic	Reparations – Restitution of Rights	Prev. measures. -Training	Prev. measures. –Raising awareness	Prev. measures. –Legal reforms	Prev. measures. –Inst. Strength.	Prev. measures. –Unspecified	Investigating – With legal reforms	Investigating – Without legal reforms	Protection of victims and witnesses	Others	Total
Mexico	0%	100%	100%		100%		100%				67%			83%
Bolivia	100%			100%			0%	0%						71%
Chile	100%	100%	100%	100%	0%	100%	25%	0%					0%	59%
Honduras	100%		100%		0%			0%			0%			50%
Nicaragua	33%	100%	67%	100%			25%				0%			46%
El Salvador	100%	0%	50%			100%		0%		0%				43%
Guatemala	77%	23%	73%	67%	50%	0%	0%	0%	0%	50%	8%	50%		41%
Brazil	33%	100%	100%	0%	50%	50%	0%	64%	0%		14%			40%
Ecuador	82%		20%	50%	0%		100%				0%			36%
Argentina	75%	0%	67%	0%			33%	0%		0%	0%			35%
Peru	47%	33%	45%	24%		0%	20%	0%		0%	10%		100%	32%
Dominican Republic	100%		0%				0%							25%
Suriname	100%	0%	33%				0%				0%	0%		25%
Colombia	33%	0%	27%	0%	67%			0%		0%	25%	0%		22%
Paraguay	20%	0%	29%	0%			0%	0%	0%		0%	0%	100%	14%
Costa Rica	0%			0%			0%							0%
Haiti	0%							0%			0%			0%
Venezuela	0%		0%		0%		0%				0%		0%	0%
Trinidad and Tobago	0%	0%		0%			0%	0%						0%
Total	58%	30%	52%	36%	42%	43%	14%	26%	0%	14%	10%	17%	50%	36%

Total cases: 462 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.7 Time periods of compliance

The study of the time states delay in carrying out measures necessary for totally complying with remedies (in cases in which this has happened) yields the following results: the average delay for total compliance with remedies was approximately 1 year and 8 months. Separately, the average time spent for totally complying with remedies recommended by the IACHR in final reports was approximately 2 years and 7 months, and the average time for complying with remedies ordered in Court rulings was approximately 1 year and 8 months.

In the following chart, the average time periods that each state delayed in reaching total compliance with remedies are comparatively reflected.

Chart 6

DELAY IN TOTAL COMPLIANCE WITH REMEDIES (IN YEARS)			
Denounced state	Final report	Court ruling	General average
Argentina		0,7	0,7
Chile	3,1	1,5	1,4
Colombia		2,0	1,9
Ecuador	4,0	1,9	2,4
El Salvador		1,5	1,5
Guatemala	2,6	1,6	1,7
Honduras		3,0	3,0
Nicaragua		2,3	2,0
Paraguay		2,3	2,3
Peru	0,3	1,4	1,3
Dominican Republic		1,5	1,5
Suriname		1,3	1,3
General average	2,6	1,7	1,7

Total cases: 302 remedies adopted by IASPHR bodies between June 2001 and June 2006. Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

3.8 Litigants and compliance

Litigants before the IASPHR were classified in the following categories, in accordance with who presented the petition: a) Individuals (including any person, victim, victim's family member, attorney); b) Non-governmental Organizations (NGOs) of the denounced state itself (including professional associations and

unions)¹⁶; c) NGOs acting internationally (operating in states other than the denounced state or not only in the denounced state); d) The Ombudsman Office of the denounced state; and e) University legal clinics.

In 34% of the cases surveyed, a national NGO was the litigant, in some cases, along with individual petitioners and/or legal clinics. 30% were litigated by a combination of at least one international NGO and one national NGO, at times together with individual petitioners and/or legal clinics. 12% of the cases were litigated by an international NGO, either together with individual petitioners and/or legal clinics or not. Individual petitioners litigated only 20% of the cases. In 4% of the cases, Ombudsman Offices were the litigants, but only as sole petitioners in 2% of the cases. Legal clinics presented 5% of the cases, although they were always accompanied by an international NGO and in some cases by a national NGO as well.

The remedies established in cases in which litigation was brought forward by an international NGO have a lower level of total non-compliance (40%) than the average level of total non-compliance (50%), even though this is not a significant difference.

In turn, even though the cases litigated by the Ombudsman's Office that entered into the sampling are scarce (4%), they register a level of total compliance that is noticeably greater than the average: 71.4% versus 35.7% of the total cases.

3.9 Duration of proceedings before the IASPHR

The average duration of proceedings, from when the petitions enter into the IASPHR until their resolution is approximately 7 years and 4 months. The median is 6.7 years (approx. 6 years and 8 months.), which means that half of the cases are resolved in 6.7 years or less, while the other half takes 6.7 years or more before they are resolved.

In turn, the processes solved through friendly settlements agreements have a shorter average duration than the processes completed through Court rulings or the Commission's final reports on the merits.

Grouped by time intervals, 88% of cases were resolved with a delay that is greater than or equal to 4 years. In turn, 25% lasted from 4 to 6 years, and 34.8% from 6 to 8 years, and 28.3% were resolved in more than 8 years.

42% of the cases that ended with an IACHR final report lasted from 5 to 8 years. 33% of them lasted from 7 to 11 years and 17% lasted more than 11 years. The proceedings in more than 56% of the cases finalized by a Court ruling lasted from 5 to 8 years, and 14% of them lasted from 2 to 5 years, another 15% went on for 7 to 11 years, and another 15% lasted for more than 11 years. As regards the proceedings concluded through the approval of a friendly settlement, 39.5% took around 5 to 8 years before a settlement was reached, 26% lasted from 2 to 5 years and 16% did so in less than 2 years. 10.5% of the cases delayed 7 to 11 years before a settlement was reached. Considering all the decisions that put an end to the proceedings, 47% of them took from 5 to 8 years since the proceedings started.

Chart 7**DURATION OF PROCEEDINGS ACCORDING TO THE TYPE OF DECISION (IN %)**

Number of years	Final report	Friendly settlement	Court holding	General average
Up to 2 years	0%	16%	0%	7%
Between 2 and 5 years	8%	26%	14%	19%
Between 5 and 8 years	42%	39,5%	56%	47%
Between 7 and 11 years	33%	10,5%	15%	15%
11 or more years	17%	8%	15%	12%
General total	100%	100%	100%	100%

Total cases: 92 remedies adopted by IASPHR organs between June 2001 and June 2006.

Source: Original compilation based on the information extracted from the IACHR annual reports and Inter-American Court rulings.

4 Observations

Full compliance with the decisions of the IACHR and the Inter-American Court constitutes an essential element to ensure the full force of the ACHR in the region. Furthermore, it is an obligation that the states themselves assumed upon ratifying the Convention (ACHR, 1969a, 1969b), deriving from the fundamental principle of compensating harm and the principle of good faith in the observance of treaties (VIENNA CONVENTION ON THE LAW OF TREATIES, 1969). The information surveyed in this research project, however, suggests that such actions are not as strongly implemented as the rules require.

4.1 IASPHR Objectives

The variety of the remedies adopted by the IACHR and the Inter-American Court seems to confirm the widespread vision that the objectives sought by the IASPHR are, with relatively few exceptions, to make reparations to affected persons or groups, to take measures to avoid repeating detected rights violations, and to give protection to victims and witnesses. As has already been pointed out, the objective of making reparations to affected persons or groups predominates. Not only is it the most usual type of remedy, but it is also the one that seems to receive the greatest proportion of state compliance. In particular, the means most frequently employed are measures of symbolic reparation—especially in Court rulings—and monetary and non-monetary economic reparations.

In recent years, IASPHR bodies have evolved in their determination to make reparations through broadening the type and variety of remedies ordered. This evolution is observed, above all, in the rulings of the Court, which has drafted important jurisprudence beyond the mere pecuniary aspect in the pursuit of complete reparation for the harmful consequences of rights violations. The

IACHR has also made progress in this area, especially with regards to friendly settlements. Due to its nature, this type of proceedings allows the determination of more specific measures, with the potential of better guaranteeing the complete satisfaction of victims.

4.2 Compliance with remedies

Non-compliance with measures required by the IASPHR has been shown to be notably widespread. Half of the remedies recommended, agreed upon, or ordered in the decisions surveyed were not satisfied and only 36% of them were totally satisfied. Only in exceptional cases, moreover, after a long period of time total compliance occurs. On average, Inter-American proceedings require more than seven years from when the petition first enters the system until a final decision. To this, the average period of time that states delay in complying totally or partially with the required remedies (when they do so) is approximately 2 and a half years for final reports, and a little more than a year and a half for Court rulings. These time periods are excessively long and may generate distrust and frustration among the users of the IASPHR¹⁷. If the large number of petitions and subjects received is considered, it is clear that in many cases, the IASPHR does not offer an effective and timely answer for those affected.

One possible explanation—that we have not explored in this study—for diverse levels of compliance depending on the type of measure ordered may be associated with the characteristics of the state entity in charge of its implementation. In many cases, the office responsible for state foreign relations before the IASPHR is different than the office that should be involved in implementing the required measures. For example, in the cases in which the modification of a law was required, the Executive may push for reform, but the measure will only be satisfied by means of the intervention of the Legislative, in which, in turn, diverse political forces must reach a consensus. Something similar happens with decisions that require the investigation and punishment of those responsible for human rights violations. The Executive may urge compliance with said measures, but, generally, the only branch with authority to carry out compliance is the Judiciary. If this description is realistic, it should not surprise us that the remedies that require orders from offices pertaining to different branches of government record lower levels of compliance, as compared to monetary compensation and other measures the implementation of which generally are the responsibility of the Executive Power, in charge of relations with the IASPHR.

4.3 Types of decisions

The relatively low degree of compliance with recommendations made in final reports by the IACHR leads to the conclusion that said form of resolving cases is not the most effective one, even when there are understandable reasons not to submit a case to the Court. The rate of compliance with remedies ordered in Court rulings is also low, but it is greater than the number of remedies included in final reports of the

IACHR. The relative effectiveness of friendly settlements, in turn, tends to strengthen the idea that the IACHR should dedicate the greatest amount of effort possible to promoting these agreements. This mechanism seems to provide the petitioner the possibility of a faster and more effective solution than that which could eventually be obtained through a final decision of the Commission.

4.4 Litigants before the IASPHR

The results of this research also suggest that the intervention of an international NGO in proceedings before the IASPHR has a slight yet positive influence on subsequent state compliance with recommendations. One possible explanation may indicate that an expert NGO may have, unlike an individual litigant, greater technical and structural resources for exercising pressure on states, not only at the moment of negotiating the clauses of the friendly settlement, but also when demanding effective compliance with them. Compliance also tends to increase when the litigant before the IASPHR is the Ombudsman's Office of the state party, although this has been verified by a very small sample of cases. This may perhaps be due to the greater ability of these offices to carry out the steps and lobbying necessary with different powers and state agencies with decision-making powers for implementing measures. These research results may suggest, therefore, the necessity for greater involvement of ombudsman's offices in general in litigating rights at the Inter-American level, consolidating a still incipient trend. The results also shed light on the relevance that these state bodies may have on the internal implementation stage of IASPHR decisions, independently of their prior intervention.

4.5 States involved

Finally, formulating a conclusive assessment with respect to each state's performance is a complicated task. Intuition indicates, certainly, that states have many characteristics that may make observance of an IASPHR measure more or less probable. For example, it may be thought that federal states face some additional complexities in the way to compliance. Federalism, in and of itself, therefore, may constitute a difficulty for compliance with measures required by Inter-American bodies. In fact, some states have state or province officials as part of their delegations before the IASPHR protection bodies with the objective of involving them and committing them to complying with recommendations and orders. Nevertheless, it is doubtful that this research will offer conclusive material for sustaining such an affirmation. Other state characteristics may also be considered as being associated with levels of compliance with remedies, such as the degree of consolidation and the quality of their democratic institutions, their trajectory, and commitment to the IASPHR, their economic situation, etc.

Regardless, this research offers an objective and reasonable foundation for discussing, in each case, the performance of each state in relation to the IASPHR. Of course, the IASPHR's influence is a subject that deserves a great deal of study beyond the levels of compliance with remedies adopted by its bodies and types of state behavior. It is also clear that the limited focus of this research, as in any

theoretical endeavor, may overlook some important aspects. Nevertheless, the research offers an argumentation perspective and an objective foundation cited by the specialized literature, that allows for states to be questioned: remedies adopted in the framework of the petition-based system must be obeyed and if the degree of compliance exposed in this research is not satisfactory, it is principally due to states not behaving in a satisfactory manner.

5 Agenda and final reflections

Naturally, during the development of this research, several hypotheses associated with the possibility of increasing compliance with IASPHR decisions have arisen. Below, some of them are briefly presented. Even though they are not observations that are directly linked to the statistical information presented, they are intimately related to the problem of the IASPHR effectiveness. It is possible that similar inquiries to the one presented here will contribute to a more thorough discussion surrounding this problem.

5.1 Breakdown of remedies with low levels of compliance

First, the discussion of possible reforms to the Inter-American system must include a chapter regarding the reforms necessary for increasing degrees of state compliance with the decisions of the bodies of the IASPHR. One possible approach to be explored consists in breaking down obligations with broad contents that present low levels of compliance, such as investigating and punishing. For example, the opening (or reopening) of investigations, on the one hand, and the punishment of those responsible for the crimes, on the other, could be required separately. In this sense, more specific orders or recommendations may facilitate control over the diverse mechanisms through which both obligations may be satisfied. Innovations in this field appear necessary, in the investigation and punishment of human rights violations, being one of the remedies most required by the IASPHR organs with the lowest levels of compliance.

5.2 National implementation mechanisms

It appears to be of crucial importance that states establish a national space of coordination between the different powers in order to increase the possibilities for effective and timely compliance (DULITZKY, 2007, p. 40; IDL et al., 2009, p. 16). In terms of academic research, there are no further studies focusing on the incidence of national mechanisms on levels of compliance. Similarly, it has also been suggested that states should adopt formal mechanisms for the effective implementation of international decisions, establishing through constitutional, legal, or jurisprudential means their binding nature, and that they incorporate in public-policy making and in solving legal cases the standards developed by the Commission and the Inter-American Court in the interpretation of the American Convention.

5.3 Strengthening of friendly settlement proceedings

One possible reform for strengthening the friendly settlement proceedings is aimed at modifying the practices of the IACHR in response to non-compliance with these settlements (IDL et al., 2009, p. 15 and ss). None of the provisions of the ACHR makes reference to the consequences derived from failing to comply with the agreement or whether, under such situation, the case should be deemed as closed. In practice, if the state fails to comply with an approved friendly settlement, the case is not sent to the Inter-American Court. Therefore, it has been said that from the point of view of the petitioner, selecting the friendly settlement route may be a disadvantage in comparison with the option of the contentious route. So as to not obligate the petitioner to make a prior evaluation of risks of the case's resolution, the IACHR may similarly treat non-compliance with a report on the merits and the friendly settlement. This means that if after the fulfillment of the terms established in the friendly settlement reports, the state, or a party to the settlement, fails to comply with all or in part with the settlement, the IACHR may reopen the matter and continue with the proceedings as though a friendly settlement had not been reached and, eventually, send the case to the Court. Otherwise, the Commission must decide to issue the report established in Article 49 of the ACHR, only when the commitments assumed in the settlement have been fully satisfied. Moreover, the possibility that, in response to non-compliance with commitments the case could be sent directly to the Court would generate an additional incentive for the state to make its greatest efforts in order to find a way to comply with its obligations¹⁸. Finally, while the ACHR does not provide any guidelines regarding the manner in which the Commission and the parties should proceed at this stage¹⁹, this could be specified by means of regulations. The possibility that the IACHR could be authorized for setting the terms of the friendly settlement could even be considered, although it is not a possibility that is currently established in any provision.

5.4 Conciliation proceedings

Another suggested option is that of unpacking the IACHR's mandate – and especially, adjusting its role in the contentious stage²⁰ – which would allow it to strengthen its political role (promotional tasks and technical assistance) and its participation in friendly settlement proceedings, which seem to be the most effective²¹. In this study, it was confirmed that the percentage of state compliance with approved friendly settlements is elevated. Therefore, it is vital to insist on the need for the IACHR to carry out all the reforms that, directly or indirectly, will strengthen this case solving method. If, for example, the IACHR were able to limit its participation during the contentious stage, it would be further available to exert a more active role during the friendly settlement process, thus reinforcing its powers and capabilities as mediator and its political and diplomatic role, relevant at this stage of the process. In this way, the IACHR might also carry out a more exhaustive follow-up during the implementation stage, periodically review the commitments assumed, visit the countries regularly and hold frequent work meetings with state and petitioner representatives.

5.5 Following-up decisions

Finally, it seems fundamental to strengthen the control, monitoring, and follow-up capabilities of the system's bodies. Especially, the IACHR, in its role of political organ and main human rights protection promoter in the region, should boost the actions aimed at ensuring an compliance with its decisions as well as those dictated by the Inter-American Court. Furthermore, the General Assembly of the OAS should take a more active role in this matter, by eventually applying costly political sanctions to the states which are reluctant to comply with the measures ordered by the organs of the IASPHR.

The IACHR could issue rules with specifications regarding the level of compliance demanded by each remedy in particular. The current practice, in which the IACHR does not evaluate the level of compliance with each recommendation, generates a perception of superficial control. This especially happens with respect to recommendations drafted in terms that are vague or too broad, for example, such as those that recommend that the state "adopt the necessary measures to avoid similar events in the future". This, together with the lack of clear and uniform criteria for all cases when evaluating the level of compliance with the recommendations, may constitute an important obstacle for effective compliance with the remedies ruled by the IACHR. If the Commission declared, for example, that the state failed to comply with a recommendation, since the measures adopted were insufficient, the state could take notice of the IACHR's opinion to this respect and thus guide its actions in accordance with said opinion. The same would happen if the IACHR declared that a measure has been partially satisfied: the state would know that there are measures that still need to be adopted and it would lead its efforts to fully satisfy the recommendation. Finally, the evaluation of the level of compliance with each recommendation in particular would prevent the sorts of contradictions that often arise when, on the one hand, the petitioners consider that a specific recommendation has not been satisfied at all or it has been partially satisfied and, on the other, the state shows that it has been fulfilled. In these cases, it is fundamental that the IACHR rules on the controversy in question and makes its point clear in the matter.

The evaluation of state compliance carried out by the Court should also be based on clearer and more uniform criteria. Today, the Court limits itself to evaluating state action with respect to each measure ordered, without clearly defining each category used (total, whole, or full compliance, partial compliance, or pending observance). This is particularly important in the cases in which the petitioners express their disagreement with the way the state complied with a specific order and, nevertheless, the Court declares that it has been fully satisfied. It has been detected that in many cases, the Court does not account for the reasons of such decision. This is probably due to the fact that it does not make the criteria for determining the degree of compliance with ordered measures public. In these cases, so as to avoid feelings of injustice or frustration among the petitioners, the Court should at least account for its reasons to conclude that an order has been observed, despite the discontent expressed by the petitioner. Beyond this, specifying the content of the evaluation criteria would grant greater transparency, security, and uniformity to the follow-up process of the ordered measures.

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NOTES

1. From the OAS adjusted budget for 2009, 4.1% is set aside for the IACHR and 1.97% for the Court. Ever since the approval of the reforms to the IACHR and the Court's regulations in 2000, the percentage of the OAS total budget set aside for the two bodies has increased little more than 1% of the total, in almost ten years, going from 5% in 2000 to 6.07% in 2009. Information available at: <<http://www.IACHR.org/recursos.sp.htm>> and at <<http://www.corteidh.or.cr/donaciones.cfm>>. See also, Robles (2005, p. 23-24, Annex 1) and Ayala Corao (2001, p. 113).
2. Cfr. . On March 5, 2009, the CPJA held a special session with civil society on the Inter-American human rights system. The evolution of CJPA's work

and diverse proposals may be consulted at <<http://www.oas.org/consejo/sp/CPJA/ddhh.asp#dialogo>>.

3. We should not overlook that the concept defined herein as remedy is referred to as reparation in the practice of the IACHR. We have decided to use the term remedy, commonly used in the Anglo-Saxon legal universe, so as to avoid confusion in the description of the objectives pursued by the IACHR and the Inter-American Court when ordering or recommending conduct for states: only some and not all of those requirements pursue strictly reparatory purposes of past violations; others seek to prevent future violations or other specific purposes such as the protection of victims and/or witnesses. The use of

the term remedy instead of reparation makes a distinction between those measures seeking reparation in the strict sense, as defined in this section, and all other measures.

4. In the cases without information about the date of compliance with a determined remedy we have taken the date of the annual report of the IACHR or of the resolution of the supervision of the judgment of the Court that declared the total or partial compliance with the remedy, as this is the first date in which the compliance is mentioned. In cases of partial compliance with remedies, the date of the last concrete action adopted by the State towards compliance is entered. Therefore, the results related to the delay in complying with remedies must be red in approximate terms.

5. In cases of multiple petitions, the initial date was recorded as the date of the presentation of the first petition.

6. The closing date for the research was June 30, 2009.

7. This information has been gathered from sections from the annual reports referring to the state of compliance with the recommendations of the IACHR.

8. All of the charts with surveyed data and classification decisions are within the authority of the DC and may be requested..

9. For surveying purposes, in the cases in which the payment of sums of money for diverse compensatory matters and costs was indicated, the duties were unified as though they dealt with one sole remedy demanded of the state.

10. This category does not include measures such as campaign launching or general media programs. This type of measures corresponds to the iv category. On the other hand, these remedies are different than those classified in categories i and ii because they have a declarative rather than patrimonial content.

11. Or, at least, in which the IASPHR bodies have not made mention of the existence of this type of barrier.

12. Of course, the indeterminacy of the order generates distrust of the evaluation. How can compliance with these recommendations be verified? Is it necessary that the violation effectively not repeat itself or is it enough for the state to do something concrete, albeit inefficient, in seeking prevention?

13. To highlight the highest degree of compliance with the remedies agreed upon in approved friendly settlements is not the same as concluding that the remedies agreed upon in friendly settlements (whether or not they have been approved) are those that are satisfied the most in general terms. As indicated in section II.1., only approved settlements have been able to be surveyed, given that they are the only ones made public. Thus, the level of compliance with unapproved settlements has not been able to be evaluated. With the lacking data, more solid conclusions could be arrived at regarding the degree of effectiveness of friendly settlement proceedings as a means of resolving contentious cases.

14. The generally poor results in terms of effectiveness do not obey the low commitment of only a few states with many complaints before the system. The survey confirms that, even excluding the measures issued against the three states with the most complaints against them in

the surveyed period – Peru, Guatemala, and Ecuador – from the general calculations, there are not significant changes. Even though, by excluding these countries from the calculations, a greater percentage of total compliance with remedies agreed upon in approved friendly settlements is observed (increasing from 54% to 65%), lower levels of compliance are also recorded in compliance with the remedies ordered in Court rulings (from 29% compliance decreases to 25%) and remedies recommended in final reports (decreasing from 11% to 4%).

15. As regards the degrees of compliance with remedies recommended in final reports of the IACHR and those ordered in the holdings of the Inter-American Court, it is observed that the states that had greater degrees of compliance with remedies ordered in holdings of the Inter-American Court are Chile, Nicaragua, and Honduras, and the states that had greater degrees of compliance with remedies recommended in final reports of the IACHR are Ecuador, Guatemala, and Peru.

16. In cases in which an NGO was present in representing victims or family members, the litigant considered for statistical purposes was only the NGO. In cases in which individual petitioners as well as NGOs were present, the participation of both was taken into account.

17. We should not lose sight of the fact that most of these cases have already undergone extensive domestic proceedings.

18. The aforementioned proposal for reform also indicates that it is fundamental that the IACHR improve the factual and legal content of friendly settlement reports in order to put them on the same level as reports on the merits and thus avoid that these differences in the content of both reports discourage petitioners from turning to friendly settlements. This is because the reports of Art. 49 of the ACHR are limited to transcribing the settlement reached without presenting a determination of facts or doctrinal developments regarding the violated rights.

19. By means of the Statute and Rules of Procedure of the IACHR, essential procedural aspects of the conciliation proceedings have been regulated, but these provisions are not sufficiently precise.

20. CEJIL considers that the IACHR could cooperate more with the Court, given the debates of fact, law, and reparations that arise following the submission of a case; and respond to specific requests of the Court regarding these matters (CEJIL, 2005, p. 26). Other proposals are aimed towards considerably limiting IACHR intervention in the contentious stage; only the victim and the victim's representatives would litigate before the Court against the State; the IACHR would limit itself to fulfilling the role of an assistant in the search for justice with the authority to question the parties, present its point of view, its legal opinion, and propose a solution for the case; in the prior stage its role would only consist in adopting reports of admissibility and opening a friendly settlement process (DULITZKY, 2007, p. 37). The most radical proposals raise the need for the IACHR to directly not intervene in the proceedings before the Court. These latter proposals have received numerous criticisms from diverse actors related to the IASPHR (CEJIL, 2005, p. 25; IDL et al., 2009, p. 4).

21. See the clarification in note 16.

RESUMO

Este artigo trata de uma das preocupações centrais das discussões atuais em torno do funcionamento do Sistema Interamericano de Proteção aos Direitos Humanos: sua efetividade. Muitas das questões necessárias para um debate mais rico sobre o fortalecimento do sistema ainda não foram respondidas nem analisadas tão detalhadamente quanto possível. Para iluminar alguns pontos dos problemas envolvidos, o presente artigo apresenta os resultados de um projeto de pesquisa quantitativa com foco no grau de cumprimento das decisões adotadas no âmbito do sistema de petição da Convenção Interamericana de Direitos Humanos. A informação ora apresentada é o resultado do levantamento de todas as medidas adotadas em todas as decisões finais da Comissão e da Corte Interamericanas no âmbito do sistema de petição individual da Convenção (recomendações ou acordos amigáveis aprovados pela primeira; e decisões da segunda) durante certo período; e observa, entre outros aspectos, o grau de observância que os ditos remédios receberam até a data. Os resultados desta pesquisa podem servir como base para identificar tendências úteis para a discussão sobre reformas possíveis com vistas à otimização do funcionamento do Sistema Interamericano de Proteção aos Direitos Humanos e para a litigância estratégica perante os órgãos de proteção.

PALAVRAS-CHAVE

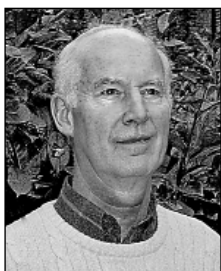
Sistema Interamericano – Comissão Interamericana – Corte Interamericana – Remédios – Reparações – Grau de cumprimento – Efetividade – Petições individuais

RESUMEN

Este trabajo aborda una de las preocupaciones centrales en las discusiones actuales acerca del funcionamiento del Sistema Interamericano de Protección de Derechos Humanos (SIDH): su efectividad. Varios interrogantes que es necesario responder para avanzar en un debate más rico acerca del fortalecimiento del SIDH carecen de respuestas definitivas y aún no han sido analizados con todo el detalle posible. Para iluminar algunas aristas de los problemas involucrados, el presente trabajo detalla los resultados de una investigación cuantitativa enfocada en el grado de cumplimiento de las decisiones adoptadas en el marco del sistema de peticiones de la Convención Americana de Derechos Humanos (CADH). La información que se presenta es el resultado de un relevamiento de todas las medidas adoptadas en todas las decisiones finales de la CIDH y la Corte IDH, en el marco del sistema de peticiones individuales de la CADH, durante un lustro –fueran recomendaciones o acuerdos de solución amistosa homologados por la CIDH u órdenes de la Corte IDH –, y observa, entre otras cosas, el grado de cumplimiento que dichos remedios han recibido hasta el presente. Los resultados de esta investigación pueden servir de base para detectar tendencias útiles a la discusión sobre posibles reformas para optimizar el funcionamiento del SIDH y para hacer una utilización estratégica del litigio ante sus órganos de protección.

PALABRAS CLAVE

Sistema Interamericano – Comisión Interamericana – Corte Interamericana – Remedios – Reparaciones – Grado de cumplimiento – Efectividad – Peticiones individuales



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ABSTRACT

Is there a role for machinery to promote and protect human rights which is neither universal, nor regional? The case of the Commonwealth of Nations, which originated in the British Empire but where the majority of members are now developing states, offers an insight into possibilities at both intergovernmental and nongovernmental levels. This article focuses on the way in which rules of membership for the Commonwealth have come to play a decisive part in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens. The progress has been uneven, driven by political crises, and limited by the small resources available to an intergovernmental Secretariat. Simultaneously, the Commonwealth Human Rights Initiative, a strong nongovernmental body, based in New Delhi and initially launched as a coalition of London-based Commonwealth associations, has been coordinating international pressure on Commonwealth governments to live up to their declarations. It has also been running programmes of its own for the right to information, and accountable policing.

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KEYWORDS

Commonwealth of Nations – Human rights



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THE COMMONWEALTH OF NATIONS: INTERGOVERNMENTAL AND NONGOVERNMENTAL STRATEGIES FOR THE PROTECTION OF HUMAN RIGHTS IN A POST-COLONIAL ASSOCIATION

Richard Bourne

The Commonwealth of Nations now consists of 54 states.¹ Its origins lie in the former British Empire, which expired in the 1960s.² It was not established by a treaty, but by a series of hortatory declarations of principle, of which the most significant were made in Singapore in 1971 and in Harare in 1991; these were combined together in a new statement from the Port of Spain summit of Commonwealth leaders in November 2009. Today, most would argue that its main political and economic aims lie in the fields of development, and governance. But it has gradually come to assume significance for the promotion and protection of the human rights of its some 2,000 million citizens (over half of whom live in just one member state, India; more than 30 of its member states have populations of less than 1.5 million). This article aims to describe how a voluntary grouping, which is neither regional nor universal, is playing a role in this field, and how there intergovernmental and nongovernmental actors have been interacting.

1 The intergovernmental Commonwealth

The increasing involvement in human rights of the intergovernmental Commonwealth, whose political and economic secretariat is based in a former royal palace in London, has been slow and cautious. This secretariat was established in 1965, a year before the two UN Covenants on political and civil rights and economic, social and cultural rights were adopted. The Commonwealth matured as a post-colonial association simultaneously with two events. First, it coincided with the arrival of a developing states majority in the UN. Second, an international Cold War compromise, under which both the civil and political

Notes to this text start on page 52.

rights dear to the West and the economic and social rights promoted by the Soviet bloc, achieved parallel recognition with the maturing Commonwealth.

In the Commonwealth, there were furious rows between developing states and the United Kingdom over racism in Southern Africa; Nigeria and Tanzania threatened at various times to withdraw over what they saw as British inaction after Ian Smith's white-led Rhodesia declared unilateral independence in 1965. But it was in 1977, at a London summit, that the Commonwealth first took a stand for human rights. Idi Amin, the barbarous dictator of Uganda, had threatened to attend. The cruelties of his regime had been widely reported, and diplomatic efforts had been exerted to prevent his arrival. The conference communiqué made plain the Commonwealth's abhorrence.

But the Commonwealth Secretariat had no capacity to fulfil a human rights mandate. The collegial air about Commonwealth leaders, meeting every two years from countries where there were many human rights abuses, was not sympathetic to finger-pointing between them.³ Nonetheless, the small West African state of The Gambia proposed that there should be a full-blown Commonwealth Human Rights Commission, with judicial powers, prior to the Lusaka summit in 1979, which was largely concerned to end the war in Rhodesia (now Zimbabwe) and which issued a declaration against racism. This scheme contrasted with the fact that newly independent states had set up their own judiciaries and were not keen on surrendering authority in such a sensitive and vulnerable area.

The Gambia's proposal was filtered through a process which included consideration by Commonwealth Law Ministers, and was drastically watered down. In 1983, at a summit in Melbourne, the Commonwealth Secretariat was authorised to set up a small Human Rights Unit (HRU), whose task was to promote human rights. It was prohibited from performing any role in investigation or active protection. It was seen as assisting governments in their own efforts for promoting human rights. Secretariat staff at the time argued that their main rights-related work lay in the campaign to end discriminatory apartheid in South Africa, and the struggle for the development of the poorest countries and the improvement of the living conditions of its citizens.⁴ Many governments were uncomfortable with any Commonwealth role which could highlight the dissatisfaction and abuse of their citizens, aid oppositions in their own countries, and give rise to bad publicity.

The official Commonwealth made little progress for human rights in the 1980s. In one year the HRU had no staff at all, and was seen as a football in a funding battle between the Secretariat and the governments which provided most of its finance – the United Kingdom, Canada and Australia. However, this led to dissatisfaction among qualified Commonwealth nongovernmental bodies, which banded together to establish a Commonwealth Human Rights Initiative (the CHRI, see below). They were concerned by apparent inaction, which was giving the apartheid propagandists a field day. White South Africans tried to divert attacks on systemic inequality in their country by pointing to dictatorships and military regimes elsewhere in the Commonwealth, and especially in Africa.⁵

The context changed drastically after the fall of the Berlin Wall in 1989, the collapse of the Soviet bloc, as well as after the release of Nelson Mandela in

1990, which led to a negotiated end to South African apartheid. There was a brief spasm of international optimism for human rights, with a build-up to the UN conference in Vienna of 1993, and a switch to a multiparty system in countries like Zambia, where Kenneth Kaunda's one-party government of over 20 years was voted out of office in 1991.

The CHRI was at the forefront of a campaign to make the Commonwealth a more powerful tool for human rights. At the Harare summit of 1991 it sought an independent Commonwealth Human Rights Commission, a special declaration for human rights, and a substantial fund for the Secretariat's HRU. None of these initiatives were achieved. Nongovernmental activists were bitterly disappointed. What the Harare conference did agree upon, however, was more modest, what became known as the Harare Principles. In reviewing and renewing the positions taken at Singapore in 1971, the heads of government agreed to uphold just and accountable government, the rule of law, and fundamental human rights. Their definition of democracy, the type of government they wished to support, was a little evasive, as it had to suit "national circumstances." Critics thought this expression could cover one-party government, guided democracy and other systems which limited the freedom of peoples to change their rulers. Subsequently the then Secretary-General, Chief Emeka Anyaoku, has explained that the wording was designed to cover the varied presidential, parliamentary and federal systems which maintain a fully democratic spirit.

The Singapore Declaration contained fine if vague sentiments, but they had been widely ignored. In paragraph 6 of that declaration the leaders had stated, "We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law which are our common heritage."

Nonetheless, the mid-nineties saw a major development for human rights in the Commonwealth, precipitated by a political crisis. The Nigerian military dictatorship, presided over by General Sani Abacha, caused an international furore in 1995 when it executed Ken Saro-Wiwa and other Ogoni leaders at the start of the Commonwealth summit in Auckland. Critics already doubted how a military regime, repressing all opposition, could continue to belong to an association professing the Harare Declaration. These executions, immediately denounced by President Mandela of South Africa and John Major, the British Prime Minister, seemed a snub to the association and to leaders which had appealed to General Abacha for clemency.

Mandela urged that the Nigerian regime be immediately expelled from the Commonwealth. The situation was fraught for the position of the current Secretary-General, Chief Anyaoku, who was himself Nigerian. If his country had been expelled he would almost certainly have had to resign. However, Chief Anyaoku and his staff, along with key governments, had already been considering how to provide the Harare Principles with teeth. He put forward specific proposals, as

did the British government. Four years after the Harare Declaration, it was being rebranded as a pioneering document for human rights.

The Commonwealth leaders came up with a Millbrook programme, whose main feature was that governments in breach of the Harare rules could be suspended by a new committee of Foreign Ministers, called the Commonwealth Ministerial Action Group (CMAG). The chief cause for suspension would be the unconstitutional overthrow of an elected civilian government. It was a move not precisely in favour of human rights, but against military coups. CMAG would then keep the suspended government under review, until it could recommend the return of the government to full membership after a transition to an elected administration. Immediately, after the Auckland conference, three West African states ruled by the military – Nigeria, Sierra Leone and The Gambia – had their membership suspended. The fact that they were not actually expelled, but suspended from official Commonwealth meetings, meant that Chief Anyaoku did not have to resign.

One aspect resulting from these decisions was that the Commonwealth, a voluntary grouping often dismissed as a club lacking cohesion, or any ability to follow up with its high-flown principles, had now established minimum requirements. A government could lose its membership. This was a sanction not available to a universal body such as the United Nations, or a regional body like the Organisation of American States, where membership has always been automatic. A voluntary club can be defined by its rules of membership.

But what did suspension really mean, either for governments or their citizens? The Commonwealth is neither a rich, aid-giving organisation, nor a military alliance. Suspended governments did not appear to lose much. They were no longer invited to ministerial meetings, or eligible for technical assistance. But as the years since 1995 have proven – seven governments have been through the suspension process⁶ – governments did not like to be “CMAGed” and usually wanted to return to full membership as soon as possible. Suspension was an affront to their status, and became part of the evidence which could adversely affect their attraction to tourists and outside investors.

The arrival of CMAG as a rules committee helped change the way in which the Commonwealth was perceived internationally, even though it was clear that its Foreign Ministers tended to judge issues politically, rather than in exact human rights terms. The example of a Commonwealth which refused membership to military leaders inspired the Organisation of African Unity (OAU) to introduce a ban on military presidents attending OAU summits at Algiers, in 1999.

For human rights advocates, the arrival of CMAG provided a space for lobbying. CMAG has, on average, met at least twice a year and the CHRI has made regular submissions. Amnesty International, Human Rights Watch and national human rights NGOs have periodically made submissions. But three issues were left open after 1995. To what extent could CMAG be made more effective for human rights? How far could the Commonwealth move from its new definition as an association of democracies to being a promoter of the rights of its citizens? And what had been and would be the consequences for the citizens of Commonwealth countries whose governments were suspended from membership?

It was obvious that there are many grievous human rights abuses in countries under civilian rule, and also that Commonwealth governments found it easier to ban military coups than to intervene in an expanding discourse of rights where there is substantial international machinery. The Harare Declaration limited its commitment to “fundamental human rights.” But within this broad mandate, CMAG’s concern was largely with political rights and free elections. However, twice running in recent years, in 2003 and 2007, Commonwealth observer groups have described Nigerian elections as woefully inadequate but “democratic” Nigerian governments have not been suspended. Fiji, where Commodore Frank Bainimarama took power in a coup in 2006, was finally suspended from the Commonwealth in September 2009 over his refusal to call elections; this meant, for example, that its athletes and sports people became ineligible to compete in the Commonwealth Games, New Delhi in October 2010. The Bainimarama military regime had also been suspended from the Pacific Islands’ Forum of South Pacific governments in May 2009. Interestingly the Forum had been influenced by the Commonwealth in adopting an increasingly hostile position towards military coups, including the setting up of its own Ministerial Action Group at its Biketawa meeting in 2000.

The Secretariat’s HRU over the last 15 years has focused on training civil servants and police, on promoting national human rights institutions, and on ratifying international conventions and covenants. It has continued to stay clear of any process of investigation in member countries. In the last two years, led by Dr Purna Sen who joined the Secretariat from Amnesty, it has published: best practice advice for governments and others on the Universal Periodic Review of human rights situations; a status report on human rights in member states; and reports on the rights of the child and the rights of disabled persons. But it has been unable to move into areas such as gay rights, and the rights of indigenous peoples, which are regarded as sensitive issues in member states.

Nonetheless, since 1995, NGOs have been pushing for a broader human rights mandate for CMAG, while some governments have wanted to rein CMAG back. This push-and-pull meant that, after 1999, the leaders agreed to a slow process for CMAG intervention – except in the case of military coups; CMAG would only come into play after the Secretary-General had tried his good offices services, and consulted regional neighbours. A nongovernmental proposal for a Human Rights Adviser to CMAG was not given serious consideration.

However, Secretary-General Don McKinnon, a New Zealander who was the vice-chairman of CMAG from 1995-9, required the HRU to provide him with advice to use in briefing CMAG. He told the Commonwealth Human Rights Forum in 2005 that only governments which had already signed key UN covenants and conventions should be admitted to the Commonwealth in future.

The worsening political, economic and human rights situation in Zimbabwe led to the suspension of President Mugabe’s civilian regime in 2003. Although highly contentious, for the Zimbabwe government argued that this was outside CMAG’s mandate and its African allies suggested that this was unfair and reflected British pressure, it was a breakthrough. It meant that egregious human rights abuse by a civilian government could also lead to the loss of Commonwealth

membership. The fact that the Mugabe regime then withdrew in protest did not alter the significance of the precedent.

The difficulty in using the drastic weapon of suspension is that it does little to promote human rights directly, and once a government is suspended, the Commonwealth's day-to-day influence is reduced. The Commonwealth's long and somewhat ineffectual engagement with Cameroon has illustrated some of these problems. Cameroon, most of which was a French colony prior to independence, joined the Commonwealth in 1995. Prior to that, a Commonwealth mission, led by Dr. Kamal Hossain of Bangladesh, had warned that Cameroon was a semi-dictatorial regime with a dominant party and long-serving president, President Biya. Cameroon was admitted to membership on the condition that there would be political and human rights improvements. But in spite of the efforts of senior Commonwealth representatives, and training workshops of various types, Cameroon still does not represent Commonwealth values and President Biya remains in power, 15 years after his country joined.

The benefit to citizens of these official Commonwealth efforts may not seem great, especially when a government has been suspended. During the 30 years that white-ruled South Africa was outside the Commonwealth there were considerable efforts, by Commonwealth governments and NGOs, to provide support and opportunities for the black majority. Putting in place such pressure, for the citizens of a country like Fiji where a government has been suspended, depends on countries' initiatives. It is only in the last year, as a result of pressure from NGOs, that a London-based committee of Commonwealth bodies has received funding from the Commonwealth Foundation to provide support for civil society in Zimbabwe. While the doctrine that the Commonwealth is an association of peoples as well as states has developed, it is not always put into practice. Indeed, the small Commonwealth Foundation, funded by governments to work for civil society, professional interaction and the arts, had earlier been ordered not to assist persons and organisations from a suspended Zimbabwe.⁷

There is also a risk that the sanction of membership suspension may lose its power if used too often. The question arises most sharply with Pakistan, which has the second largest population of Commonwealth countries, and a history of military dominance. It left the Commonwealth for 17 years after other members recognised the independence of Bangladesh – formerly East Pakistan – in 1972; ten years after its return, it was suspended again after General Musharref's military coup in 1999; it was allowed to return in 2002 after elections; and it was suspended again after Musharref's second coup in 2007, being allowed back seven months later. Many observers thought that Musharref, who was still both president and active commander-in-chief of the Army, had been allowed to re-enter too early in 2002 as a by-product of his support for the US-led "war on terror."

Nonetheless, the official Commonwealth is still bound to the Harare Principles, even if their application remains unsatisfactory. The Kampala summit, in November 2007, adopted rules for the admission of new member states which, among other things, require them to be compliant with the Harare Principles. An investigation process led by the Commonwealth Secretariat and consultation

with existing members, has to be completed before a new government can join. Compared with the European Union, whose accession conditions require changes to legislation guaranteeing the rights of minorities and other human rights, this process has been dangerously unspecific, as seen in the Rwanda case.

The issue was highlighted when, in November 2009, Rwanda joined the Commonwealth. Rwanda, a Francophone country, had no previous constitutional link to Britain or any existing Commonwealth member. It entered under a procedure of “exceptions” introduced in 2007, almost certainly to pave the way for Rwanda’s admission. This “exceptional” procedure gave significance to the interests of Commonwealth neighbours; it would have given retrospective support to the admission in 1995 of Mozambique, a former Portuguese territory, whose Commonwealth neighbours in the Southern African Development Community had at the time been keen for Mozambique to join. President Museveni of Uganda had made no secret of his desire to see his neighbour Rwanda as a member, a country which now belongs to the East African Community and which is ruled by an English-speaking elite very hostile to France, as a result of events during the genocide. President Kagame of Rwanda had actually been a commander in Museveni’s National Resistance Army which had won power in Uganda after a prolonged bush war. The United Kingdom was also keen to have Rwanda in the Commonwealth, in the belief that it would help consolidate a post-genocide democracy with development, but partly also out of support for Museveni and ancient francophobe prejudice.

But the process to verify whether or not Rwanda complied with the Harare Principles, was hardly thorough or transparent. It is understood that the Commonwealth Secretariat sent two missions, one from its political division and one from the HRU, before the Secretary-General himself visited Kigali and wrote to all governments recommending admission. The political mission, impressed by reconstruction after the genocide, supported entry. The HRU group pointed out that there were still government controls on media, civil society and freedom of association that did not match the Harare commitments. Neither report was made public.

There were also two other inquiries. The CHRI requested Professor Yash Ghai, a Kenyan, to determine in 2009 whether Rwanda met the Harare requirements. His report concluded that Rwanda’s admission to the Commonwealth would be premature, for human rights guarantees were not yet adequate. The UK branch of the Commonwealth Parliamentary Association – which is somewhat autonomous from the worldwide Commonwealth Parliamentary Association – sent a group of British parliamentarians, which recommended that Rwanda should join. However both the main political parties in the UK, Labour and Conservatives, were already committed to Rwanda’s entry.

The case seemed to illustrate that political considerations can override the formal human rights commitments of the Commonwealth. The issue may arise again if South Sudan declares independence, following the scheduled referendum in 2011, and applies to join the Commonwealth. It could also apply to Zimbabwe if it wishes to rejoin.

The issue of “realpolitik” versus its human rights commitments will continue to dog the Commonwealth. This is coming to the fore again in attempts to give CMAG a tougher mandate. At Port of Spain in 2009, Commonwealth leaders asked the Foreign Ministers on CMAG to review its terms of reference with a view to strengthening its capacity to “deal with the full range of serious or persistent violations of the Harare Principles.” Dissatisfaction with CMAG’s limited remit had grown, and came to a head in 2008-9 when Sri Lanka, despite serious allegations of widespread violations of human rights and humanitarian law, continued to sit as a member for a third two year term, which broke the two terms rule adopted at Durban in 1999.

In Durban, in fact, the leaders had come near to accepting a proposal from the then Secretary-General, Chief Anyaoku of Nigeria, which would have introduced relatively objective criteria for CMAG action to deal with errant governments: postponement of an election; interference with the judiciary and rule of law; and government control of the media. But the proposal was baulked at unexpectedly by two Caribbean Prime Ministers, arguing against a possible infringement of national sovereignty, and the chance was lost.

The current review by CMAG may well produce proposals to strengthen the Group’s mandate, but it suffers from the weakness that the governments currently on CMAG are notably more liberal than the Commonwealth’s membership as a whole, since all governments must agree to any changes.

2 The Commonwealth Human Rights Initiative and the nongovernmental Commonwealth

The Commonwealth is different from other international associations in that it is underpinned by a large range of unofficial or semi-official organisations with “Commonwealth” in their title. Definitions vary, but there are now between 60 and 80 of them. Several, such as the Commonwealth Parliamentary Association and the Commonwealth Press Union, were founded during the British Empire and predate the Commonwealth Secretariat by half a century. The Commonwealth Foundation assisted a number of professional bodies into existence, such as the Commonwealth Lawyers Association and the Commonwealth Journalists Association, in the 1970s and 1980s. Important new ones started recently, such as the Commonwealth Human Rights Initiative or CHRI (1987), and the Commonwealth Business Council (1977) and Commonwealth Local Government Forum (1995).

The nature of these bodies varies. Some are umbrella organisations of national societies, while others have an individual membership. Some, like the Conference of Commonwealth Meteorologists which has been gathering at regular intervals since the 1920s, are meeting-based, with modest capacity between their conferences. They arrange international meetings, often of high quality, but do not have the staff or resources to conduct ongoing programmes or activities. Some, like the Commonwealth Organisation for Social Work, remain entirely voluntary. Many have financial problems, servicing a membership which is overwhelmingly in the poorer developing world.

No account of the Commonwealth role for human rights would be complete without a description of the CHRI. The germ for this initiative came from a residential conference at Cumberland Lodge, in the UK, in early 1987. At the time, the Thatcher Government in the UK was in a minority in the Commonwealth in trying to block pressure on the apartheid regime in South Africa, and the previous year there had been a significant Afro-Asian boycott of the Commonwealth Games in Edinburgh. As referred to above, human rights enthusiasts also recognised that the situation in several member states was not easy to defend, and South Africa's apologists had been exploiting this weakness.

Human rights supporters in the Commonwealth never supposed that there were rights peculiar to the Commonwealth: they just wanted internationally and constitutionally recognised rights to protect citizens in all member states. Further, they saw that features which unite nearly all the members could be used to their advantage: common law, parliamentary systems, similar approaches to administration and education, and the use of the English language. Commonwealth characteristics could be used as vehicles for the enhanced promotion and protection of rights, both civil and political and economic, social and cultural, as well as third generation development and green rights.

During the course of 1987, there were two exploratory meetings in London, involving NGOs and representatives of a handful of diplomats and the Commonwealth Secretariat.⁸ Inspired by the "Eminent Persons Group" mission to South Africa it was agreed to set up an international study group, subsequently chaired by Flora MacDonald, former Foreign Minister of Canada, to conduct a survey of the human rights picture in the Commonwealth.⁹ Three bodies – the Commonwealth Journalists Association, the Commonwealth Lawyers Association and the Commonwealth Trade Union Council – made a call to the Vancouver Commonwealth summit of 1987 for a new initiative for human rights. When the summit failed to respond, these three organisations, soon joined by the Commonwealth Legal Education Association and the Commonwealth Medical Association, decided to set up the CHRI as an ad hoc nongovernmental initiative.

The MacDonald group produced a survey report, "Put our world to rights" prior to the Harare summit of 1991 (MACDONALD, 1991). It set out eight priority areas for improving human rights in the Commonwealth – detention, freedom of expression and information, indigenous and tribal peoples, refugees, women, children, workers and trade unions, and the environment. The editor was the widely respected Professor Yash Ghai, then a law professor at the University of Hong Kong.¹⁰

The CHRI achieved considerable publicity for its campaign, and worked with three Southern African organisations in a three day African human rights conference which just preceded the summit of leaders in Harare. In the summit itself Bob Hawke, then Australian Prime Minister, brandished a copy of "Put our world to rights" and asked fellow leaders what they intended to do about it. However, as recounted earlier, the summit failed to respond to the three main demands of the CHRI – that there should be a special Commonwealth declaration for human rights, an independent commission, and a significant

human rights budget. Campaigners in Harare were not only disappointed with the Commonwealth communiqué, they feared that leaders would forget what it contained the moment they boarded the plane home.

What happened next helps to explain why the Commonwealth has become, in spite of its weaknesses, an interregional force for human rights. After due consultation, the bodies supporting the CHRI decided to institutionalise it as a permanent body, and to move its head office to New Delhi, India. Having failed to win the official commission it sought, the CHRI set up an Advisory Commission of its own, led by persons of status – successively Dr Kamal Hossain of Bangladesh, Senator Margaret Reynolds of Australia, and Sam Okudzeto of Ghana.

It has published a human rights report for the Commonwealth prior to every summit since 1993, covering a wide range of issues – cultural diversity and freedom of expression, the spread of light weapons, poverty as a human rights abuse, policing, and the dangerous impact of the “war on terror” on civil liberties. The CHRI now has small offices in Accra and London in addition to its head office in New Delhi, and remains unusual in being one of the few international human rights NGOs based in the global South. Its total staff is around 50 and its Director, Mrs Maja Daruwala, is well-known internationally and has served on the board of the Minority Rights Group and the civil society advisory committee of the Commonwealth Foundation.

The CHRI has also published a critique of Commonwealth states’ performance under the universal periodic review mechanism of the UN Human Rights Council “Easier Said than Done”, (CHOGM, 2008). This compared commitments and performances of 13 member states at the start of the new process: Bangladesh, Cameroon, Canada, Ghana, India, Malaysia, Mauritius, Nigeria, Pakistan, South Africa, Sri Lanka, United Kingdom and Zambia. The report warned that human rights defenders remain vulnerable to impunity and “also highlight once again the need for the Commonwealth to have mechanisms to monitor the progress of human rights’ compliance as a means of indicating their commitment to the association.” (CHOGM: 2008, p. 127).

The CHRI has also sought to deepen commitment to human rights in the Commonwealth, by bringing together civil society groups in member countries. It runs an electronic Commonwealth Human Rights Network, serving a list of over 350, and since the Abuja summit of 2003 it has run three Commonwealth Human Rights Fora for civil society; the one in Kampala was attended by over 100 people.¹¹ However, at Port of Spain, in 2009, the forum was co-opted into the Commonwealth People’s Forum, a much larger event coordinated by the Commonwealth Foundation. The CHRI was dissatisfied with this because it considered that its issues risked being lost in a lengthy compendium statement. Subject to funding, it may revert to running its own stand-alone Human Rights Forum. Although now largely separate from the Commonwealth bodies which gave it birth, and without an individual membership, the CHRI has achieved financial stability on the basis of project funding.

In moving to India, the CHRI had to find credibility in the Commonwealth’s largest country, but it also had to maintain its advocacy towards the

intergovernmental Commonwealth. UK-based Commonwealth bodies rarely focus much of their work on the UK itself; this is justified in terms of the greater needs of developing countries, though reflecting a post-colonial world view and the weak public support for all things Commonwealth in the contemporary UK.

However, an India-based CHRI could not limit itself to international advocacy. It had to justify its existence in such a populous country, which already had well-established human rights organisations before the CHRI arrived in 1993. What the CHRI has therefore done is to ally itself with Indian bodies to campaign in certain areas – especially for access to information, and better, accountable policing – where it could draw on information from other Commonwealth countries and its own lobbying power. It has been particularly important in the coalition which persuaded the Indian government to replace a weak 2002 Freedom of Information Act with a much more robust Right to Information Act, 2005.¹² As an international NGO based in India, it was also able to carry out dangerous human rights observation duties in the state of Gujarat, following widespread murders and intimidation of the Muslim community.

The CHRI has continued to carry out programmes elsewhere, particularly in Africa, as well as advocacy towards the Commonwealth, and several governments including India's. Its persistence is a reason why the Commonwealth has come to have more salience for rights. As soon as the Harare Declaration was announced in 1991, the CHRI began pressing for serious implementation. Four years later it sent a fact-finding group to Nigeria, which published a damning account of human rights abuse under the military dictatorship – “Nigeria – stolen by generals”.¹³ Importantly, each section of this report was headed by a related excerpt from the Harare Declaration. Every government had a copy at the time of the Auckland summit in 1995, and it provided a context for the rapid adoption of CMAG, and the first rules to enforce the Harare Principles.

The CHRI also played a key part in persuading the Abuja summit in 2003 to endorse legislation for freedom of information – something which now applies in nearly half of member states. But it is not the only nongovernmental force for human rights in the Commonwealth. After a long struggle, Commonwealth bodies concerned with freedom of expression, supported by the CHRI, won a commitment at the Coolum summit in Australia in 2002. In Abuja, a coalition of the Commonwealth Parliamentary Association, Commonwealth Lawyers Association and Commonwealth Magistrates and Judges Association won leaders' recognition for what were known as Latimer House Principles – the proper spheres for executive, legislature and judiciary.¹⁴ At Kampala in 2007 it was clear that disability rights too were getting a major push forward in the nongovernmental Peoples Forum, and there has been a growing pressure to recognise gay rights, which are still criminalised in most of Commonwealth Africa, with the notable exception of South Africa.¹⁵

To what extent do decisions by Commonwealth leaders get followed up by all member governments, given that the official Commonwealth has no coercive power over states apart from suspension, and the Commonwealth Secretariat itself is small?¹⁶ In human rights also, most governments are party to significant regional

instruments such as the European Convention, the African Peoples and Human Rights arrangements, and the Inter-American system. It was striking in 1995 that, after the military regime in Nigeria had been suspended at the Commonwealth summit in Auckland, an attempt by New Zealand at the UN to lead a criticism of the Ogoni executions was blocked by the African group, with the support of Commonwealth members. A similar attempt was made in the International Labour Organisation. Once again, regional solidarity trumped Commonwealth commitments.

Hence the follow-up varies considerably. But it is facilitated by the wide range of Commonwealth interaction, use of English, and the significance of common law. At one level the Commonwealth can be seen as a continuous debate. In the field of human rights, this debate occurs between leaders and their officials; Law Ministers; the biennial Commonwealth Human Rights Forum; major conferences around the world for the Commonwealth Lawyers (their biennial conference brings together over a thousand lawyers), law professors, and magistrates and judges; and a new gathering for national human rights institutions, inaugurated by the Commonwealth Secretariat in 2007. These discussions and exchanges result in action, though not always quickly. A good example of this is the gradual spread of Freedom of Information laws, which were endorsed by Commonwealth Heads at Abuja in 2003 as mentioned above, and have been backed up by a model bill supplied by the Commonwealth Secretariat.

A continuing thread in nongovernmental analysis is one of disappointment – that the fine words of Commonwealth leaders in successive declarations do not immediately benefit citizens. The CHRI and its friends are currently fighting to improve the accountability and quality of policing throughout the Commonwealth. In an association which has no military aspect, and which is pledged to democracy, the police are crucial for good governance, and the protection of citizens and their rights. It is a field in which the CHRI and Commonwealth Policy Studies Unit have made reports, and the Commonwealth Secretariat's HRU has carried out police training.

In 2005 and again in 2007 the Commonwealth Human Rights Forum and the Commonwealth Peoples Forum were calling for a Commonwealth Expert Group on the Future of Policing. The device of an expert group, convened by the Commonwealth Secretary-General, has been successfully used for development, environmental and social issues. It allows the Commonwealth to pool its brains, build consensus, and supply evidence and recommendations for subsequent political action.¹⁷ Due to financial constraints the expert group device, energetically used during the era of Shridath Ramphal as Secretary-General (1975-90) has fallen into disuse in the last two decades.

An expert group on policing could have almost too many things to consider. It could consider traditional problems of accountability, corruption, political neutrality and poor performance. It could also consider problems of unsuitable or outdated legislation, cybercrime and the challenge of globalisation, how best to achieve inclusive, community policing, and relations between police and public. Human rights NGOs could provide support and information for such a group.

But so far the nongovernmental community has yet to succeed in persuading

governments to look at the strategic question of policing in the 21st century. There is an opportunity here for the Commonwealth, but as Shridath Ramphal said recently, “We have to persuade governments to use the Commonwealth”.¹⁸ The Commonwealth is a voluntary body and an option, not a treaty-based set of obligations.

What the Commonwealth can do for human rights also depends on the international context, and the personalities at its head. At Kampala, the leaders elected Kamallesh Sharma, an Indian diplomat who had been the UN representative in East Timor, as its fifth Secretary-General. His four year term began in April 2008. He has spoken imaginatively of the Commonwealth as a series of overlapping networks, well-adapted to globalisation. But he has not been outspoken on human rights, referring to the need for the Secretariat to give governments a helping hand rather than a pointing finger. India was one of the countries to stall an attempt to strengthen CMAG in 1999, and on a number of issues – The Gambia, Sri Lanka for instance – his voice has lacked public impact. When he has pushed forward, it has been on traditional lines, by creating a Commonwealth association of election management bodies, designed to raise electoral standards through peer group pressure.

As someone who has worked with the UN, and is aware of how the Commonwealth is seen through other international eyes, he has invested time in trying to link the Commonwealth with other processes. Hence he arranged a meeting in London in 2008 on international institutional reform, particularly in the financial sphere. Unfortunately, this has only had a behind-the-scenes influence, if that, on efforts to combat the global financial crisis that developed after the collapse of Lehman Brothers bank.

At the Port of Spain summit, in November 2009, he made a brave attempt to contribute to the debate on climate change and the environment, only a few days ahead of the upcoming Copenhagen summit. The UN Secretary-General, President Sarkozy and Mr Rasmussen, the Danish Prime Minister who chaired at Copenhagen, all came to Trinidad to speak to the Commonwealth leaders. One result was that far more leaders attended the Copenhagen gathering than would otherwise have gone, and two specific ideas – for a climate adaptation fund, and specific help for vulnerable small states – were successfully launched. However Mr Sharma himself did not go on to Copenhagen, where Commonwealth states were split according to national interest. Compared to bodies like the World Bank, or specialist agencies of the UN, the Commonwealth Secretariat has very limited human and financial resources to pursue its agendas.

3 Conclusion

Unexpectedly, in a post-colonial association, the Commonwealth is making a contribution in human rights. This is not an area of significant activity for *‘la Francophonie’*, the post-colonial French body which is now numerically larger but less coherent than the Commonwealth. The Commonwealth involvement has been driven chiefly by nongovernmental and media interests, and the residue of empire and common law – concerns about racism, development rights, and that

newly independent polities should expand rather than restrict civil liberties. New ideas for incorporating socioeconomic rights, from India and South Africa, have travelled round the Commonwealth. The organic and multilayered nature of the Commonwealth is facilitating change. But the weak commitment of governments, and the small resources available to the intergovernmental institutions, are likely to mean that civil society remains dissatisfied: the potential for Commonwealth cooperation in human rights, as elsewhere, will continue to be vaster than anything that is actually achieved. Nongovernmental bodies are themselves having to take on more responsibility. These issues are likely to be explored further in an Eminent Persons Group, set up after the Port of Spain summit, which is designed to chart new courses for the Commonwealth, with greater cooperation between its governmental and non-governmental elements. One example of such cooperation is the recently established Ramphal Commission on Migration and Development, being chaired by P J Patterson, the former Prime Minister of Jamaica, which is independent of the Secretariat but focused on the Commonwealth, and which has received funding from both the Secretariat and Foundation.¹⁹

It is possible that political changes in the UK may assist the Commonwealth to achieve more significance, including in its work for human rights. As a result of a decision at Port of Spain the UK budgetary contribution to the Secretariat was raised from 30 per cent to 31.4 per cent. The new coalition government, which emerged after an indecisive election in May 2010, has two prominent members (Vince Cable a Liberal Democrat, and Lord Howell, a Conservative) who have up-to-date views on the Commonwealth and its potential. Stronger support from the UK, coupled with heavier Indian involvement, could help the association to make a stronger global impact.

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NOTES

1. Rwanda joined the Commonwealth at the Port of Spain summit in November 2009; the Fiji Islands, were suspended from full membership in 2009 as a result of a military takeover which breached the Harare Principles described in this article, and their sporting team was prevented from competing in the 2010 Commonwealth Games in New Delhi. Until 2003 there had also been 54 member states but soon after the Abuja Commonwealth summit the Mugabe regime in Zimbabwe walked out, because of severe criticism of its human rights record.
2. The key date for transformation into the Commonwealth was 1949, when the London Declaration accepted independent India, as a republic; this began the process by which the Commonwealth became a multiracial international body, the majority of whose members are republics, no longer controlled by the United Kingdom.
3. In the early 1970s the leaders adopted the practice of a "Retreat", where they met on their own without officials and Foreign Ministers, for intimate and problem-solving diplomacy. This tactic, made easier by the fact that they all converse in English, has since been adopted by other international organisations.
4. The Commonwealth played a leading role in the international community in marshalling opposition to white South Africa, and sent an "Eminent Persons Group" in 1986 which sought a negotiated end to apartheid. In the 1980s it was consistently promoting debt write-off for the poorest countries, which resulted in the HIPC (highly indebted poor countries) initiative of the 1990s.
5. One party states – as in Tanzania, Zambia and Malawi – were commonplace. Both Nigeria and Ghana had military regimes.
6. In alphabetical order: Fiji Islands, Gambia, Ghana, Nigeria, Pakistan, Sierra Leone and Zimbabwe.
7. The Foundation, based like the Secretariat in London, only has a budget of some £4M a year.
8. Among those represented were Amnesty International, Survival International and the Canadian High Commission.
9. The Eminent Persons Group was led by the former president of Nigeria, Olusegun Obasanjo and the former prime minister of Australia, Malcolm Fraser. It aimed to find a negotiated end to apartheid and met Nelson Mandela in prison. It had to cut short its mission after the South African military bombed three neighbouring Commonwealth states.
10. Yash Ghai, a Kenyan, is probably the leading constitutional lawyer in the Commonwealth, having worked on constitutional reform in several states, including Kenya and Fiji. He is currently a constitutional adviser in Nepal, and a UN rapporteur in Cambodia.
11. The Human Rights Forum is organised by the CHRI with support from other bodies.
12. Dr Nida Kirmani has researched the Indian campaign for Right to Information, and the role of CHRI, as part of a study funded by the Economic and Social Research Council, UK (contact: nidkirm@yahoo.com).
13. The team consisted of Flora MacDonald from Canada, Enoch Dumbutshena from Zimbabwe, and Neville Linton from Trinidad and Tobago.
14. These principles, covering the separation of powers, have had an impact on the UK itself where law lords, an appellate body, are to be excluded from the second legislative chamber, the House of Lords. Several countries have had to look again at their mechanism for the appointment of judges, so that this is not a decision of the executive; one reason for the 2007 suspension of the Pakistan government from Commonwealth membership was President Musharref's dismissal of judges who opposed him.
15. The post-apartheid constitution of South African guaranteed same-sex rights and President Zuma, himself in a polygamous marriage, spoke out strongly against the recent imprisonment of two Malawian males who sought a civil marriage.
16. Since 2000 the total staff of the Secretariat has been around 270-280.
17. Debt write-off for poor developing states was originally proposed by an Expert Group in the early 1980s chaired by Harold Lever.
18. Shridath Ramphal, who was Secretary-General from 1975 to 1990, was speaking in London in 2006.
19. Other members are George Vassiliou, former President of Cyprus; Farooq Sobhan, former Foreign Secretary, Bangladesh; Will Day, Chairman of the Sustainable Development Commission, UK; Jill Iliffe, Executive Director, Commonwealth Nurses Federation; Professor John Oucho and Professor Brenda Yeoh.

RESUMO

Existe alguma função para um mecanismo de promoção e proteção dos direitos humanos que não seja nem universal nem regional? O caso da Commonwealth of Nations, a qual se originou do Império Britânico, mas cujos membros, atualmente, são, em sua maioria, países em desenvolvimento, oferece uma visão de que isso seja possível tanto no nível intergovernamental quanto no não governamental. Este artigo foca o modo como as regras de associação à Commonwealth tiveram papel decisivo em sua definição como associação de democracias e, com mais cuidado, com compromisso com as garantias dos direitos humanos para seus cidadãos. O progresso foi desigual, dirigido por crises políticas e limitado pelos poucos recursos disponibilizados para um Secretariado intergovernamental. Ao mesmo tempo, a Iniciativa de Direitos Humanos da Commonwealth, um forte órgão não governamental, com sede em Nova Delhi e inicialmente lançado como uma coalizão de associações da Commonwealth sediadas em Londres, tem coordenado a pressão internacional sobre os governos da Comunidade para que cumpram suas declarações. Tem também executado programas próprios para o direito à informação e para a formação responsável de políticas.

PALAVRAS-CHAVE

Commonwealth of Nations – Direitos humanos

RESUMEN

¿Tiene algún papel que desempeñar una institución para la promoción y protección de los derechos humanos que no sea ni universal ni regional? El caso de la Commonwealth of Nations, que se originó en el Imperio Británico pero que en la actualidad se compone de Estados en su mayoría en desarrollo, permite explorar las posibilidades a nivel tanto intergubernamental como no gubernamental. El presente artículo analiza la forma en que sus reglas de membresía se han vuelto decisivas para definir a la Commonwealth of Nations como una asociación de democracias y, con más cautela, como una organización comprometida con la garantía de los derechos humanos de los ciudadanos. El avance ha sido desigual, impulsado por crisis políticas y limitado por los escasos recursos disponibles para su secretaría. El artículo describe también las actividades de la Iniciativa de Derechos Humanos del Commonwealth of Nations, una organización no gubernamental con sede en Nueva Delhi, que coordina la presión internacional para que los gobiernos cumplan sus compromisos.

PALABRAS CLAVE

Commonwealth of Nations – Derechos humanos

AMNESTY INTERNATIONAL

Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights for all. Under the Demand Dignity campaign, which aims to end the human rights abuses that drive and deepen poverty, Amnesty International is calling on all governments to put human rights standards at the heart of efforts to meet the MDGs.

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ABSTRACT

The Millennium Development Goals (MDGs) represent a global consensus on the need to tackle poverty. While the MDGs have played an important role in focusing international attention on issues of development and poverty reduction, this article argues that the MDGs do not fully reflect the ambition of the Millennium Declaration, which promised to strive for the protection and promotion of all human rights - civil, cultural, economic, social and political - for all.

This article outlines some of the aspects in which the MDG framework, while covering areas where states have clear obligations under international human rights law such as food, education and health, fails to reflect these standards. It focuses on three main issues - gender equality (Goal 3), maternal health (Goal 5) and slums (Goal 7) - as illustrative examples of the gaps between MDG commitments and human rights standards. It argues that this gap is also one of the main factors behind the lack of equitable progress on the MDGs. The article stresses the importance of ensuring that all efforts towards all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability are at the heart of all efforts to tackle poverty and exclusion.

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MDGs – Human rights



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COMBATING EXCLUSION: WHY HUMAN RIGHTS ARE ESSENTIAL FOR THE MDGs¹

Amnesty International

1 Introduction

The Millennium Development Goals (MDGs) represent a global consensus to reduce poverty. Drawn from the Millennium Declaration which was adopted in 2000 by the UN General Assembly, they aim to set concrete, time-bound and measurable targets that governments must meet by 2015. The MDGs have played a pivotal role in helping to concentrate international attention on issues of development and poverty reduction. They have also provided a focal point for civil society, which has mobilized nationally and internationally around the MDGs to challenge poverty and exclusion.

However, they do not fully reflect the ambition of the Millennium Declaration, which promised to strive for the protection and promotion of civil, cultural, economic, social and political rights for all (UNITED NATIONS, 2000a). One of the key challenges in this regard is that states' obligations under international human rights law are not adequately reflected in the MDGs. The MDGs – while covering areas where states have clear obligations under international human rights law such as food, education and health - are largely silent on human rights.

The MDG framework established global targets, which some states have chosen to adapt to their national context. Despite the merits of time-bound targets, as a framework for tackling poverty, the targets set up under the MDGs often leave out or ignore key requirements under international human rights law. For instance, Goal 2 aims to ensure universal primary education, but neglects the obligation under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to ensure that primary education is free, compulsory and of sufficient quality. These requirements are key, not just to comply with states' legally

Notes to this text start on page 75.

binding obligations, but to ensure that all children are truly able to benefit from MDG efforts to increase access to education. They are also essential if states are serious about addressing the barriers that many children currently face in access to education and ensuring that children from marginalized communities or who face discrimination are not left out. Concerns have already been voiced in this regard about a lack of focus on children with disabilities within the MDG framework.

The MDGs contains no requirement that states integrate human rights standards into MDG policies and programmes. While the MDGs include a commitment for states to integrate the principles of sustainable development into country policies and programmes (UNITED NATIONS, 2010a), there is no similar commitment to include human rights principles. While some countries have added some aspects of human rights to their national MDG plan (Mongolia, for example, added a Goal 9 on human rights and democracy), most MDG strategies and reports fail to refer to human rights in a significant and comprehensive way.

MDG Goal 8 – intended to represent a global partnership between developed and developing countries - requires developed countries to support the achievement of the MDGs, including through their global aid, trade and debt policies. However, it fails to specify that such policies should be consistent with international human rights standards. Development assistance, both technical and financial, has an important role to play in supporting countries to tackle poverty and achieve the MDGs. The role of international co-operation and assistance in achieving universal respect for human rights is also provided for in several treaties, including the UN Charter.² The 2008 Accra Agenda for Action, a reflection of international commitment to improve the use of development assistance to support the achievement of the MDGs, has also affirmed that: “Developing countries and donors will ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability.”³ This commitment should be reflected in national and international efforts to meet the MDGs.

In September 2010, world leaders will assemble at a UN Summit to assess their progress on the Millennium Development Goals. While it may not be possible to revise the global framework for the MDGs until 2015, governments can and should commit, at the Summit and in their national plans, to take concrete steps to ensure that over the remaining five years the MDGs are implemented in a manner which is consistent with human rights standards. Real and lasting progress on the MDGs can only be achieved if governments’ efforts are focused on realizing the human rights of people living in poverty.

This article outlines some of the ways in which the MDG framework falls short of the Millennium Declaration, and fails to reflect existing and universally agreed human rights standards. The article focuses on three main issues – gender equality (Goal 3), maternal health (Goal 5) and the problems faced by people living in slums (Goal 7) – as illustrative examples of the gap between MDG commitments and human rights standards. It argues that this gap is also one of the main factors behind the lack of equitable progress on the MDGs and argues that unless human rights issues are addressed, the most disadvantaged people in the world will continue to be left out.

Obligations of states relating to economic, social and cultural rights

Under international law, states have an obligation to progressively realise economic, social and cultural rights (UNITED NATIONS, 1966, art. 2(1)). States are under a duty to take steps that are deliberate and concrete, and targeted as clearly as possible towards fulfilling these rights as expeditiously and effectively as possible (UNITED NATIONS, 1993, para. 2, 9). This is an immediate obligation, and the rate and level of progress that each state is expected to make should take into account the maximum resources available, both domestically and from the international community. This requires the adoption of national strategies and plans of action which set out how the state aims to realize these rights, and developing corresponding indicators and benchmarks (UNITED NATIONS, 2000b, para. 53).

States also have an immediate obligation to prioritize the realization of minimum essential levels of each economic, social and cultural right for everyone (UNITED NATIONS, 1993, para. 10; 2001, para. 17). This requires them to give priority to ensuring that everyone has, at least, minimum essential levels of food, water, sanitation, healthcare, housing and education. States are required to respect human rights by refraining from interfering directly or indirectly with people's enjoyment of human rights; to protect human rights by preventing, investigating, punishing and ensuring remedies where third parties infringe rights, and to fulfil human rights by taking legislative, administrative, judicial, budgetary and other steps towards the full realization of human rights. The obligations to respect and protect human rights are immediate and not subject to progressive realization, as are obligations to ensure non-discrimination and equality. If states' efforts towards the MDGs fail to take into account these key obligations, any progress towards achieving the goals is likely to be limited and to mask ongoing human rights violations, discrimination and inequality.

2 Human Rights Gaps in the MDG framework

2.1 Addressing exclusion and discrimination

International human rights law requires all states to guarantee equality and non-discrimination.⁴ The MDGs, in contrast, contain no explicit requirement for states to comprehensively identify and redress exclusion and discrimination.

While the Millennium Declaration reiterated states' commitment to "combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women", gender equality and women's rights are only partly and very poorly reflected in the MDGs. Goal 3, to promote gender equality and empower women, has been reduced to a single

target – to eliminate gender disparity in education – and two complementary indicators on the percentage of women involved in paid employment and on political representation. This is a long way from states' obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which requires governments to address discrimination against women and guarantee equality in all areas (UNITED NATIONS, 1979, art. 1). International law also prohibits discrimination on other grounds, such as race, caste, ethnicity, disability and marital status. While those who are subject to these forms of discrimination are often among the most marginalised and disadvantaged sections of the population, the MDGs do not require states to take appropriate measures to eliminate such discrimination in law, in policy and in practice.

States are asked to disaggregate the MDG indicators on the basis of sex and urban/rural communities, as far as possible.⁵ However, there is no similar requirement to provide disaggregated data for groups who face discrimination or are disadvantaged within a particular country context, such as Indigenous Peoples or minority communities. For example, a survey of 50 MDG country reports by the UN Independent Expert on Minority Issues showed that ethnic and linguistic minorities were mentioned in only 19 reports and only in relation to certain goals. Even when they were mentioned, information on issues affecting minorities or analysis of measures directed at minority groups were not provided under each of the MDGs.⁶

The proportionate nature of targets therefore raises concerns that states can demonstrate progress while failing to focus on the most disadvantaged and vulnerable groups. Lack of specific attention to disadvantaged and vulnerable groups in targets and indicators creates a real danger that efforts to achieve the MDGs could perpetuate and entrench poverty among such groups.

The MDGs' exclusive focus on poverty reduction in developing countries also neglects pockets of poverty in developed countries, which are closely related to discrimination and marginalization. For example, Roma communities in many European countries, such as Italy, continue to live in conditions that are in stark contrast to those enjoyed by the majority of the population. Many live in grossly inadequate housing and their access to services such as water, sanitation, education and health care is often inadequate or non-existent (AMNESTY INTERNATIONAL, 2009a).

2.2 Setting effective benchmarks for real progress

The MDG framework does not require states to adopt national targets for their national context. It does not require states to adapt the MDG targets and indicators so as to reflect their obligations to prioritize the realization of minimum core obligations in relation to each economic, social and cultural right for everyone (UNITED NATIONS, 1993, para. 10; 2001, para. 17), and to give the necessary focus to the most marginalized sections of the population who face the greatest barriers in realizing their rights.

Some countries have adopted national targets, going beyond the global MDG targets. For example, Latin American countries decided to expand their MDG

commitments on education to include secondary education (OHCHR; UNICEF; NORWEGIAN CENTRE FOR HUMAN RIGHTS, 2008, p. 14). Kenya, South Africa and Sri Lanka – countries which recognize water and sanitation as human rights – have adopted national targets for increasing access to water and sanitation that are stronger than the global MDG targets (COHRE, 2009, p. 5, 7-8, 12, 20-21). However, many countries simply used the global targets and some have therefore adopted a far lower national benchmark for progress than is required under international human rights law.

Reliance on the global MDG targets alone can also give a distorted picture of progress. For example, the targets do not take into consideration the affordability and quality of services such as water. In part, the problem is due to a lack of data. For example, the Millennium Declaration specified a target of reducing by half the number of people unable to reach or afford safe drinking water (UNITED NATIONS, 2000, para. 19). However, the MDGs limited this goal to access to water as there is insufficient internationally comparable data on affordability. The indicators consider water to be safe if it is provided from a source likely to be safe, such as piped water or a protected well (WHO; UNICEF, 2010, p. 13). Therefore, piped water of poor quality that is provided from a polluted source can wrongly be counted as safe.

2.3 Ensuring participation

The current MDG framework also does not explicitly recognize the right to participate actively and meaningfully in policies and strategies to achieve the MDGs, despite widespread recognition that the active engagement of affected communities is key to ensuring successful and sustainable outcomes. Participation of people living in poverty in the planning, implementation and monitoring of MDG efforts is the best guarantee for ensuring that these efforts actually benefit people.

The International Covenant on Civil and Political Rights (ICCPR) guarantees the right of every citizen to take part in the conduct of public affairs.⁷ The UN Committee on Economic, Social and Cultural Rights has stressed that the right to participation must be an integral part of government policies, programmes and strategies (UNITED NATIONS, 2000, para. 54; 2003a, art. 11-12, para. 48). It has highlighted, for example, the vital role of participation in ensuring the effective provision of health services for all (UNITED NATIONS, 2000, para. 54).

For example, a review by the Secretariat of the UN Permanent Forum on Indigenous Issues of national MDG reports by 25 countries in Africa, Latin America and Asia/Pacific in 2006 and 2007 (UNITED NATIONS, 2006a, 2007c) found that, with very few exceptions, Indigenous Peoples' input had not been included in national MDG monitoring and reporting. The reviews also identified a lack of mechanisms through which to ensure the input and participation of Indigenous Peoples themselves in the design, implementation and monitoring of policies designed to achieve the MDGs.⁸ Its 2010 desk review concluded that: "For future reports, the direct participation of indigenous peoples and their communities should be encouraged by their respective Governments, beginning

from the planning and preparation process”. It also stressed that: “[...] the free, prior and informed consent of indigenous peoples should be sought in all development initiatives that involve them. Indigenous peoples cannot be simply objects of study or targets of development projects, no matter how well intended, but must be active participants in policy planning, implementation and review” (UNITED NATIONS, 2010b, p. 39).

In order for participation to be meaningful, states must also fulfil a number of other rights and duties, including the rights to freedom of expression and association, and the duty to ensure the conditions in which human rights defenders can carry out their work.

Economic, social and cultural rights that are excluded from MDGs

Some critical economic, social and cultural rights are not included in the MDGs, such as the right to social security and the right to health, including prevention and treatment of neglected diseases that continue to affect the lives of millions, such as river blindness, sleeping sickness, Chagas’ disease and leprosy. According to the World Health Organization (WHO), these diseases largely affect poor people living in rural areas in low-income countries (WHO, 2002). States are also required to establish national benchmarks for key economic, social and cultural rights issues which are not covered under the existing MDG framework.

2.4 Providing accountability and remedies

The current MDG accountability framework – such as voluntary monitoring and reporting at the national level, and UN reports on regional and global progress – is largely divorced from national and international human rights accountability mechanisms. As such, states can report on their progress towards the MDGs, with no reference to their human rights obligations, and without taking into account the outcomes of the scrutiny of their human rights performance as carried out by Treaty monitoring bodies. Without effective accountability for human rights, any progress on the MDGs will continue to be uneven and will not benefit the most marginalised people.

At the national level, accountability mechanisms such as judicial bodies, national human rights institutions, regulatory bodies and parliaments – can and should play a significant role in monitoring states’ efforts towards the MDGs and whether such efforts are in compliance with their human rights obligations, and in holding them to account. The judiciary should be able to monitor governments’ compliance with national and international law and require government bodies to carry out the necessary reforms to law, policy and practice to ensure obligations are fulfilled.

National human rights institutions; human rights commissions, Ombudsperson or Public Defender institutions should have the capacity and resources to be accessible to the public and to monitor national MDG plans pro-actively to ensure consistency

with a state's human rights obligations. Such bodies can also play a critical role in ensuring access to justice. They can carry out investigations on behalf of victims, call for necessary law and policy reforms, and represent claimants before courts. In order for these bodies to fulfil these roles, states must also ensure that their mandate covers all human rights, including economic, social and cultural rights. Similarly, regulatory bodies which are relevant to the MDGs – such as those dealing with water and sanitation, health and education – normally have the mandate and expertise to monitor the performance of public services and to require improvements, but often they do not explicitly assess compliance with human rights standards. National accountability would be strengthened if governments ensured that human rights standards were integrated into the mandate of such bodies and if these were required to receive individual complaints. Parliamentary bodies can also play an important role in ensuring oversight and monitoring of MDG efforts and, in particular, their consistency with a state's human rights obligations.

International accountability mechanisms play an important role in highlighting gaps in national monitoring and in areas where national systems do not comply with human rights standards. They can also help focus attention at the highest political level on human rights issues in the context of the MDGs. These mechanisms include international human rights treaty bodies, made up of committees of independent experts that periodically review performance and, in some cases, can hear complaints;⁹ and the Universal Periodic Review (UPR) process of the UN Human Rights Council, which involves peer review by states - every four years - of states' human rights performance.

The human rights monitoring system has not yet played a prominent role in monitoring MDG performance. States generally do not report on their efforts to achieve the MDGs to such bodies and international human rights mechanisms, such as the UPR and treaty monitoring bodies, do not systematically assess actions taken to reach or surpass the MDGs. However, the treaty monitoring bodies could play a very important role in scrutinising states' efforts towards the MDGs in light of their human rights obligations, thereby ensuring that states' accountability for such obligations is not divorced from their MDG promises. In addition, international human rights mechanisms could address complaints from individuals and groups about human rights violations in the context of the MDGs, where access to justice at the domestic level has been denied to them. This, however, requires states to ratify the treaties allowing these mechanisms to receive complaints, such as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UNITED NATIONS, 2008)¹⁰ and the Optional Protocol to CEDAW.¹¹

While the UN Committee on Economic, Social and Cultural Rights has questioned developed countries on the amount of their development assistance, and has also required that all state Parties take due account of the obligations under the Covenant when acting as members of inter-governmental organizations, including international financial institutions¹², there is no systematic monitoring of states' actions - as donors for example - and the extent to which these promote or hinder the realisation of human rights. In order for all states to be held accountable for their actions towards the achievement of the MDGs, they should be subject to scrutiny

by UN human rights mechanisms in order to monitor whether their actions in support of the MDGs – individually and as members of inter-governmental bodies – is consistent with their human rights obligations to respect and promote human rights for all, obligations which extend to those beyond their borders.

Consistency with human rights obligations - in all efforts to meet and surpass the MDGs – requires *all* states, both developing countries and those who provide support to them for meeting the goals, to be mutually accountable for ensuring that MDG policies and programmes are based upon human rights standards.

3 The need to integrate human rights in MDG efforts

The failure to adequately reflect human rights standards in the MDG framework can be illustrated by assessing Goals 3, 5 and 7. These Goals also show how the MDG targets and indicators do not acknowledge the human rights violations that can hinder progress on reaching the goals, and often undermine efforts to address poverty. In particular, the failure to integrate gender equality and women's human rights in all the MDG targets and indicators means that states are not required to address gender discrimination – in law, policy and practice - in their efforts towards *all* the MDGs. Goal 5 on improving maternal health and reducing high levels of preventable maternal deaths is an area that is considered the most off track, and where addressing underlying human rights issues is key to making progress. Goal 7 - intended to improve the lives of slum dwellers – is a stark example of how the MDGs fails to reflect the scale and scope of the problems faced by people living in slums, and the range of measures that are required to respect and promote their human rights.

3.1 Promoting gender equality and empowering women (MDG Goal 3)

It is estimated that, worldwide, 70 per cent of those living in poverty are women.¹³ In many countries, women and girls continue to face barriers in getting decent work; participating in public life; and obtaining access to education, health care, adequate food, water and sanitation. Women living in poverty may also face multiple discrimination because they belong to Indigenous communities or minority groups or because of their race, caste, ethnicity, disability or marital status.

The MDGs as a whole fall short of the legal obligations of states under international law to address discrimination against women and to guarantee equality under each of the goals and targets. In addition, gender-based violence, a pervasive barrier to gender equality which threatens to undermine progress on all the MDGs, is not reflected in any of the MDG targets.

Gender equality and women's empowerment are widely recognized as essential for tackling poverty (UNIFEM; UNDP, 2009). It is therefore striking that they are so poorly reflected in the MDGs and that the gender-sensitive targets and indicators are both limited and inadequate (UNIFEM, 2008). While the targets and indicators for Goal 3 capture some important issues, they overlook other key areas. These include discrimination against women in law, such as civil, penal and

personal status laws governing marriage and family relations; women's property and ownership rights; and women's civil, political and employment rights.

The failure to integrate women's human rights fully into efforts to meet all the MDG targets means that the structural inequality and discrimination experienced by women is often not addressed in states' MDG policies and programmes.¹⁴ In addition, the lack of consistency in disaggregating data on MDG initiatives means that information on gender discrimination and its intersection with other forms of discrimination are often overlooked (UNFPA, 2010a, p. 19).

Under international law, states have an obligation to prevent, investigate and punish acts of violence against women. Central to achieving this is ensuring that women who are subjected to violence can access justice and remedies for the harm they have suffered (UNITED NATIONS, 1995, para. 124). However, the MDG framework does not require states to address all forms of gender-based violence in their MDG plans, policies and programmes.

Discrimination and poverty can also make women in wealthy countries more prone to suffer from violence. In Canada, for example, AI has found that widespread and entrenched racism, poverty and marginalization put Indigenous women at heightened risk of violence; they experience significantly higher rates of violence than women in the population as a whole.¹⁵ Discrimination has also resulted in deep inequalities in living conditions and in Indigenous women's ability to access government services. For example, they are often denied access to services and support, such as emergency shelters. They have also been denied adequate protection by police and government forces; those responsible for violence against Indigenous women are rarely brought to justice (AMNESTY INTERNATIONAL, 2009b).

Lack of protection for women human rights defenders and the failure to prevent and punish attacks and harassment against them make it harder for women to participate actively. Women human rights defenders are often targeted for gender-specific forms of harassment, discrimination and violence, designed to dissuade them and other women from demanding their rights and participating in public life, especially when they challenge gender stereotyping and discrimination.¹⁶ AI has documented how women human rights defenders in Afghanistan and Zimbabwe have been targeted and attacked for speaking out against human rights violations, in order to stifle dissent and prevent others from speaking out (AMNESTY INTERNATIONAL, 2007, 2009c).

In order to ensure that they are fulfilling their obligations under international human rights law in their efforts to meet Goal 3, states are required to take a number of measures. These include: identifying and addressing gender discrimination in law, policy and practice in all their efforts towards all the MDGs, including by disaggregating data by gender and monitoring implementation to ensure that all MDG efforts explicitly tackle gender discrimination and inequality; identifying and removing the specific barriers faced by women and girls in realizing their human rights in all plans, policies and programmes to address poverty; abolishing laws that discriminate against women, and addressing traditional practices and customary laws that undermine women's rights; taking all necessary measures to

combat gender-based violence in all its forms and to ensure that women have access to justice and remedies when they have been subjected to violence; respecting and promoting women's right to participate equally and fully in all levels of decision-making and in public life, and ensuring that the rights of women human rights defenders are fully respected and promoted.

3.2 Improving maternal health (MDG Goal 5)

Although a recent study (HOGAN et al., 2010, p. 1609-1623) claims that there has been some progress in improving maternal health, Goal 5 is considered an area where it is least likely that the 2015 targets will be met.

It is estimated that, globally, a woman dies every minute from pregnancy or childbirth-related causes. In addition, an estimated 10-15 million women a year experience serious complications that leave them with injuries or permanent disabilities (UNFPA, 2010b). Women who experience complications during pregnancy and childbirth often suffer long-term physical, psychological, social and economic consequences. Unplanned or unwanted pregnancies and the lack of available safe, voluntary and effective family planning and contraception also contribute to high levels of unsafe abortions that result in maternal deaths and morbidity. Inadequate monitoring and data collection of maternal deaths and "near-misses" contributes to under-reporting of these deaths and prevents a full understanding of their direct and indirect causes.

According to the UN Population Fund (UNFPA), as many as 99 per cent of the women who die each year of pregnancy-related complications live in developing countries. Complications relating to pregnancy are said to be the single largest cause of death among girls aged between 15 and 19 and women in developing countries (UNFPA, 2010c). The direct causes of most maternal deaths are: severe bleeding, infections, hypertensive disorders (such as eclampsia), prolonged or obstructed labour, and complications from unsafe abortions.

Levels of maternal mortality and morbidity differ both between and within countries. The disparities in the levels of risk faced by women are linked to a variety of factors, including multiple discrimination, poverty and neglect. The scope, targets and indicators for Goal 5 fail to acknowledge the variety of underlying factors that contribute to preventable maternal deaths and injuries. They do not, for example, adequately address human rights issues such as early or forced marriage; violence against women and girls; how discrimination and poverty prevent women from obtaining sexual and reproductive health care services; or how women are often prevented from making decisions about their own health and lives. These issues need to be systematically and comprehensively addressed if significant progress is to be made in reducing maternal mortality.

Inadequate data on maternal deaths and injuries, especially in countries with the highest rates of maternal deaths and morbidity, means that the mortality ratio (target 5.A) risks being misleading. The fact that there is no requirement to disaggregate the data also means that apparent progress may conceal a failure to improve maternal mortality and morbidity among disadvantaged and marginalized groups – such as

women living in remote rural areas, women living in slums, Indigenous women and adolescents. Similarly, the indicator on skilled attendance at birth is important, but does not address whether obstetric services are of sufficient quality, are available, accessible and equitably distributed (WHO; UNICEF; UNFPA, 1997).

In Peru, for example, women from Indigenous, rural and poor communities face particular barriers in obtaining maternal health care services as a result of entrenched discrimination. Some do not have identity documents and so cannot get the free health provision to which people from marginalized and poorer communities are entitled. Other barriers include the lack of clear and accessible information on maternal and child health services; the fact that health facilities are located far from their homes; prohibitive transport costs; discriminatory attitudes within health facilities; the failure to provide for culturally appropriate birthing methods; and communication difficulties – many Indigenous women do not speak Spanish and few health professionals speak Quechua (AMNESTY INTERNATIONAL, 2006).

Since 2006, the Peruvian government has taken some steps towards addressing these barriers. For example, they have promoted culturally adapted birthing methods; increased the number of maternal waiting houses and health insurance cover for rural populations; and introduced a system of targeted budget allocation centred on results. However, women living in remote areas and Indigenous communities continue to face difficulties in getting access to the care they need. Among the reasons hindering progress are inadequate implementation and monitoring of policies and initiatives and a lack of clarity around responsibility and accountability (AMNESTY INTERNATIONAL, 2009d). Unless Peru takes all the necessary measures to address the specific barriers faced by Indigenous women in accessing health care, any progress it makes on Goal 5 will fail to benefit the most disadvantaged groups and so mask ongoing and systemic discrimination.

Restricting efforts towards MDG 5 to simply increasing access to services, neglects states' pre-existing commitment to ensure gender equality and promote the full range of women's rights, including sexual and reproductive rights. These rights are set out in a number of key instruments including the Platform for Action, adopted at the Fourth UN World Conference on Women in Beijing (1995); the Cairo Programme of Action of the International Conference on Population and Development (1994); and CEDAW, to which 186 states are parties.¹⁷

Progress on Goal 5 requires the realization of sexual and reproductive rights – and the full respect for the right of individuals to decide freely on matters relating to their sexuality and reproductive life. This encompasses the rights to decide whether and when to be sexually active; to freely choose one's partner; to consensual marriage; to decide freely the number, spacing and timing of one's children; and to be free from unsafe abortion and gender-based violence, including sexual violence, and harmful practices.¹⁸ Women's realization of their sexual and reproductive rights also requires other rights to be fulfilled such as the right to education; to food; to the highest attainable standard of health and the underlying determinants of health; and to equal protection before the law.

In Sierra Leone and Burkina Faso, while governments have acknowledged the need to improve maternal health and are taking positive steps to tackle it, they

have not sufficiently addressed key human rights issues that contribute to high rates of preventable maternal deaths – such as gender discrimination; early marriage and pregnancy; the denial of women’s sexual and reproductive rights; and women’s low socio-economic status (in the household and in society at large) and lack of decision-making power. In Sierra Leone, women face many barriers in obtaining necessary health care services, including long distances to health care facilities and ineffective referral services (AMNESTY INTERNATIONAL, 2009e). In Burkina Faso, financial barriers to health care contribute to high levels of preventable maternal deaths and injury (AMNESTY INTERNATIONAL, 2009f). Both Burkina Faso and Sierra Leone have acknowledged that women face significant financial barriers in accessing health care. In response to this situation, in April 2010 Sierra Leone introduced free health care for pregnant women and children under five. Burkina Faso has said that it is, in principle, in favour of removing financial barriers that prevent women from getting the healthcare they need. Both these developments are to be welcomed, and if adequately implemented could have a very positive impact on women’s access to essential care. However, the underlying violations of women’s sexual and reproductive rights must also be systematically addressed for long-term, sustained improvements in maternal health.

Barriers to healthcare also reflect disparities among different population groups and affect maternal health in developed, as well as developing, countries. In the USA, more than two women die every day from complications of pregnancy and childbirth. Approximately half of these deaths could be prevented if maternal health care were available, accessible and of good quality for all women without discrimination in the USA. For those who can afford it, the USA offers some of the best health care in the world. For many, however, that care is beyond reach. Despite the huge sums of money spent on maternal care, women, particularly those on low incomes, continue to face a range of barriers in obtaining the services they need. An individual’s ability to access health care depends on whether they have insurance and, if they do, whether it is private or public. Although members of ethnic and racial minorities make up only about 34 per cent of the population (US CENSUS BUREAU, 2008a), they constitute approximately half of the uninsured (US CENSUS BUREAU, 2008b, p. 21, Table 7), and as a result are more likely to go into pregnancy with untreated or unmanaged medical problems that pose added health risks during pregnancy.

In order to fulfill their obligations under international human rights law in their efforts to meet Goal 5, states are required to take a number of measures. These include: respecting the right to health by refraining from actions that interfere with women realizing this right, such as restricting women’s access to health care services where women do not have the consent of husbands, partners, parents or health authorities (UNITED NATIONS, 2010, para. 14). States must also ensure adequate protection of women’s right to health by preventing third parties from interfering with the enjoyment of this right. For example, states should ensure that harmful social or traditional practices do not interfere with access to sexual and reproductive health care (UNITED NATIONS, 2000b, para. 21). States are also required to take appropriate measures, whether legislative or otherwise, to ensure the realization of the right to health, including through the removal of barriers to accessing healthcare (including

financial barriers) so that all women can obtain necessary health care services – such as emergency obstetric care – when they need it (UNITED NATIONS, 1966, Art. 12). State must also identify and address gender discrimination in law, policy and practice, including in relation to women’s sexual and reproductive rights, and tackle human rights issues such as early and forced marriage, female genital mutilation, unsafe abortion and violence against women, including sexual violence.

Finally, states must ensure that there are adequate accountability mechanisms - judicial, regulatory, administrative and political - to ensure that there is effective monitoring, oversight and access to remedies for those whose sexual and reproductive rights are violated.

3.3 Improving the lives of people living in slums (MDG Goal 7)

While a 2010 report by the UN Human Settlements Programme (UN-HABITAT) claims that “227 million people in the world have moved out of slum conditions since 2000, meaning governments have collectively surpassed the Millennium Development target by 2.2 times” (UNITED NATIONS, 2010e, p. 33), the number of people living in slums and informal settlements has actually increased over this period. Data collected by UN-HABITAT indicated that close to one billion people were living in slums in developed and developing countries by 2005 (UNITED NATIONS, 2006b, p. 18-22).¹⁹ The latest data released by UN-HABITAT indicates that in the developing world alone, the number of people living in slums increased from 767 million in the year 2000 to an estimated 828 million people in 2010 (UNITED NATIONS, 2010e, p. 33). At least one in three urban residents therefore live in inadequate housing conditions that do not satisfy the requirements for adequate housing set out in Article 11(1) of the ICESCR (UNITED NATIONS, 1991, para. 8). These include 1) legal security of tenure; 2) availability of services, materials, facilities and infrastructure; 3) location; 4) habitability; 5) affordability; 6) accessibility; and 7) cultural adequacy.

UN-HABITAT’s global monitoring shows the extent to which the housing and living conditions in slums and informal settlements around the world grossly fail to meet these requirements. Examples of these failures range from the risks associated with the location of many slums and informal settlements in areas that are prone to floods, landslides and other natural disasters, to severely overcrowded, poorly constructed and inadequate housing.²⁰

States are required under international law to take immediate and progressive steps to realize the rights to adequate housing and other human rights of people living in slums and informal settlements.

It is estimated that there will be 1.4 billion people living in slums by 2020. In Goal 7, the international community has committed to improving the lives of less than 10 per cent of people who live in slums (which in 2001 stood at over 900 million) (UNITED NATIONS, 2010e, p. 47). The target is also one of the most vaguely worded and asks for “significant improvement” in the lives of slum dwellers, without identifying what constitutes an improvement. The indicator for progress is the proportion of the urban population living in slums, which makes it possible

for states to demonstrate progress even if the total number of people living in slums has increased over the monitoring period. States have also been given an additional five years, until 2020, to meet this weak target.

The target is grossly inadequate when considered in light of the obligations of states under international human rights law to prioritize the realization of minimum essential levels of shelter and housing for all; to take deliberate, concrete and targeted steps towards achieving the right to adequate housing; and to prioritize the most disadvantaged and vulnerable groups when allocating resources.

The MDG framework ignores the crucial and immediate obligation on states to provide a minimum degree of legal security of tenure (UNITED NATIONS, 1991, para. 8 (a)). This is an essential precondition for protecting people living in slums from the underlying human rights violations that continue to drive and deepen poverty. It also provides the security people need to improve their own housing and living conditions and benefit from public services and schemes.

The vast majority of people living in settlements or slums considered “illegal” or “irregular” by governments have limited or no security of tenure and are extremely vulnerable to forced evictions. This can be the case even when the inhabitants own or are renting their homes. It is estimated that between 30 and 50 per cent of urban residents in the developing world do not have any kind of legal document to show they have security of tenure (UNITED NATIONS, 2006b, p. 92).

The effects of forced evictions can be catastrophic, particularly for people who are already living in poverty. Forced evictions result not only in people losing their homes, neighbourhoods and personal possessions, but also lead to fractures of social networks and communities. For example, Operation Murambatsvina in Zimbabwe, a programme of mass forced evictions and demolitions of homes and informal businesses, destroyed 32,538 small and micro-businesses across the country, devastating the livelihoods of 97,614 people (mostly women) who were targeted indiscriminately (AMNESTY INTERNATIONAL, 2007).

Despite the central importance of security of tenure in increasing access to a range of services and reducing the risk of other human rights violations, the indicator on tenure status (proportion of households with secure tenure) was dropped from the MDG monitoring framework (OHCHR; UNICEF; NORWEGIAN CENTRE FOR HUMAN RIGHTS, 2008, p. 40).

Lack of security of tenure also increases the risk of other human rights violations and may lead to people living in slums or informal settlements being excluded from essential public services and from city planning and budgeting processes. In many countries, it limits access to public water supplies and sanitation systems and is therefore also closely linked to the targets on safe drinking water and sanitation. The MDG monitoring framework, however, pays insufficient attention to these links.

In Cambodia, for example, AI has documented how some 15,000 Phnom Penh residents living in basic housing on the shores of the Boeung Kak Lake face displacement, due to work to turn the lake into landfill. Since then, and before any adjudication of their land ownership claims, around 1,000 families have been forcibly evicted by the authorities. The affected communities, many of whom are already living in poverty, fear that the development may drive them out of the capital city to an area where thousands

of others have been resettled following eviction, and which is effectively a new slum outside the city's perimeter, which lacks sanitation, electricity and other basic services and where job opportunities are very scarce. This is one example among many and stands in sharp contrast to the poverty reduction and development policies adopted by the Cambodian government as part of its efforts to meet the MDGs.²¹

People living in slums or informal settlements may also be excluded from protective legislation which applies to other residents. In Kenya, for example, landlords failed to provide sanitation and other services to people who were renting homes in informal settlements, contravening the Kenyan Public Health Act. However, the local authorities have chosen not to apply the law to landlords or developers who build and rent homes in slums and settlements (AMNESTY INTERNATIONAL, 2009g).

Although slums are located in urban areas, which tend to have better health, education and other services than rural areas, these services are not equally distributed among the urban population. When UN-HABITAT began to disaggregate data, it found that people living in slum areas were not benefiting from the "urban advantage" (UNITED NATIONS, 2006b, p. 102-127).²² They lagged far behind urban non-slum areas in access to health care, education and employment and had rates of malnutrition and child mortality that were much closer to, or as high as, those in rural areas.

The fact that many slums or informal settlements are irregular also affects residents' access to services such as policing. As a result people may find themselves denied protection by the police and caught between the violence of criminal gangs and the police (AMNESTY INTERNATIONAL, 2005, 2008a). In *favelas* or inner-city neighbourhoods in Brazil and Jamaica the state is largely absent. The failure by the authorities to offer protection to these communities has allowed criminal gangs and drug factions to take control and dominate almost every aspect of life. For example, in some neighbourhoods gangs impose curfews and control transport systems and access to education, jobs and health care services (AMNESTY INTERNATIONAL, 2005, 2008a, 2008b).

People living in slums are also disproportionately victims of violent crime. A survey of women living in slums in six cities around the world carried out by the Centre on Housing Rights and Evictions identified violence against women as "rampant" in slums and the "strongest cross-cutting theme" of their study (COHRE, 2008, p. 14). Women experienced violence both within the home and outside, for example as they came back from work or on their way to use public toilets or communal facilities. Women have also described the difficulties of reporting domestic or other forms of violence to the police because of negative perceptions of people living in slums or just because of the absence of police stations in slum areas (AMNESTY INTERNATIONAL, 2008b; COHRE, 2008, p. 79, 103, 109).

The right of people to participate in developing and implementing slum upgrading programmes has also frequently been disregarded in MDG initiatives. In a slum upgrading programme in Nairobi, for example, residents were not given adequate information or genuinely consulted. This resulted in significant concerns for the community on issues such as whether the housing that they were being offered

was affordable and would meet their needs in terms of location and livelihoods. In 2006 the government said that it would designate slum upgrading areas as “tenure secure zones”. It also pledged to “determine appropriate secure tenure systems to be introduced in consultations with residents, structure owners and other stakeholders... and assure rights of occupancy to residents by first and foremost, eliminating unlawful evictions and providing certainty of residence” (AMNESTY INTERNATIONAL, 2009g). Four years later, these commitments have yet to be put into effect, leaving people uncertain and concerned about possible forced evictions during the project’s implementation (AMNESTY INTERNATIONAL, 2009g, p. 27).

In order to fulfil their international obligations in their efforts to meet target 7.D under Goal 7 on improving the lives of people living in slums, governments are required to take a variety of measures. They must respect the right to adequate housing by stopping and preventing forced evictions of people living in slums, including by enacting laws and policies to guarantee secure tenure. They must protect the right to adequate housing, including by ensuring protection against forced evictions and harassment by landlords and other private actors – including by extending protections in rental and housing legislation to people living in slums to enable them to challenge disproportionate rents and discrimination by private actors. They must fulfil the right to adequate housing, including by developing national housing strategies, slum upgrading, social housing and other programmes that are designed and implemented in a participatory manner and ensure that policies and programmes prioritize the most disadvantaged and vulnerable groups. They must ensure non-discrimination in laws, policies and programmes in slum upgrading or other housing programmes by, for example, ensuring that women are not excluded from slum upgrading or other housing programmes because of their marital status or other factors, or because of discriminatory inheritance or property laws. Finally they must ensure that people living in slums have access to accountability mechanisms so that they have access to a remedy where their rights have been violated.

4 Conclusion

International human rights standards provide an important framework for developing policies and programmes to achieve progress on the MDGs. Consistency with human rights obligations - in all efforts to meet and surpass the MDGs – requires *all* states, both developing countries and those who provide support to them for meeting the goals (including bilateral and multilateral development agencies and international financial institutions), to underpin their MDG strategies with human rights standards.

All states must ensure an adequate focus on the realization of minimum essential levels of economic, social and cultural rights for all, prioritizing those who are most marginalized and excluded, and must identify and address discrimination – including gender discrimination – across all the MDGs. This also requires states to adopt or modify laws, policies and practices to address all forms of discrimination. International human rights law requires governments - acting nationally and through international cooperation - to use human rights standards

to inform and guide policy dialogue and choices, poverty reduction strategies and the identification of priorities in all efforts towards the MDGs. As such, governments should review existing and planned laws, policies and programmes aimed at meeting the MDGs to ensure consistency with human rights standards, and adopt or modify laws, policies and practices to ensure greater protection for human rights. States must also ensure that those living in poverty are involved in MDG planning, implementation and monitoring at all levels. This also requires the equal participation of women and the provision of an enabling environment for the work of human rights defenders, including through guaranteeing people's rights to information, freedom of expression and association. There must also be effective national and international accountability mechanisms to ensure that all states respect, protect and fulfil human rights in all their MDG efforts and that there are effective remedies for any human rights violations.

The priority now is to focus on the implementation of the MDGs in a manner consistent with human rights by 2015. However, it is also important that any consideration of a new or revised global framework post-2015 gives due attention to the need to reflect states' existing obligations under human rights law. Any new framework should address discrimination comprehensively, establish global and national targets and timelines to fulfil minimum essential levels of economic, social and cultural rights for all, and ensure that there are effective national and international accountability mechanisms to monitor the realisation of goals aimed at addressing poverty and exclusion and to provide redress for failures to respect and promote human rights.

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NOTES

1. This article is based on Amnesty International's publication: *From Promises to Delivery: Putting Human Rights at the Heart of the Millennium Development Goals*, AI Index 41/012/2010, June 2010.
2. United Nations (1966, Art. 2(1), ICESCR) states that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (emphasis added). The importance of international assistance and co-operation to the realization of human rights is also reflected in other international and regional human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.
3. Third High Level Forum on Aid Effectiveness, September 2-4 2008, para. 13 (c), Accra Agenda for Action, Accra, Ghana, available at www.undp.org/mdtf/docs/Accra-Agenda-for-Action.pdf, last accessed 24 May 2010.
4. See for example Article 2(1), International Covenant on Civil and Political Rights (UNITED NATIONS, 1966) and Article 2, Convention on the Elimination of All Forms of Discrimination Against Women (UNITED NATIONS, 1979).
5. Revised Millennium Development Goal monitoring framework, including new targets and indicators, as recommended by the Inter-Agency and Expert Group on Millennium Development Goal Indicators, contained in Report of the Secretary-General on the work of the Organization (UNITED NATIONS, 2007a, Annex II, p. 66).
6. Report of the Independent Expert on Minority Issues, Gay McDougall, (UNITED NATIONS, 2007b).
7. The Human Rights Committee has clarified that the "conduct of public affairs ... is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive

and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels." (UNITED NATIONS, 1996, art. 25, para. 5).

8. UN Permanent Forum on Indigenous Issues website, <http://www.un.org/esa/socdev/unpfi/en/mdgs.html#_ftn5>, last accessed on: 24 May 2010.

9. In addition, the UN Human Rights Council has established Special Procedures, consisting of individuals or working groups, who can carry out independent enquiries into thematic or country human rights situations.

10. The Optional Protocol was opened for signature on 24 September 2009 and has been ratified by 2 states and signed by 33 states as of 20 August 2010.

11. Adopted 6 October 1999 and entered into force on 22 December 2000. The Optional Protocol has been ratified by 99 states as of the end of April 2010.

12. See for example, Concluding Observations of the CESCR on Germany (UNITED NATIONS, 2001b, para. 31) and CESCR, General Comment n. 14 (UNITED NATIONS, 2000, para. 39). See also Sepúlveda (2006, p. 287).

13. See Women, Poverty and Economics, available at http://www.unifem.org/gender_issues/women_poverty_economics/, last accessed 24 May 2010.

14. On the occasion of the 15th anniversary of the Beijing Platform for Action, the Commission on the Status of Women stated that "gender equality perspectives are not well reflected in the current formulation of many of the Millennium Development Goals and their targets and indicators, and are often not explicitly integrated in strategies and plans to achieve the Goals. There is insufficient coherence between efforts to implement the Platform for Action and the strategies and actions to achieve the Goals and this lack of coherence is a contributing factor in the uneven and slow performance towards realizing many of the Goals" (UNITED NATIONS, 2010c, para. 2).

15. In a 2004 survey by the Canadian government, Indigenous women reported rates of violence, including domestic and sexual violence that were three and a half times higher than non-Indigenous women (BRZOZOWSKI; TAYLOR-BUTTS; JOHNSON, 2006).

16. For example, in its report Zimbabwe: Between a rock and a hard place – women human rights defenders at risk (AMNESTY INTERNATIONAL, 2007), Amnesty International documented the government's clampdown on women human rights defenders in Zimbabwe to crush dissent and prevent other women and men from becoming active.

17. The CEDAW Committee has stated that 'access to health care, including reproductive

health is a basic right under the Convention on the Elimination of All Forms of Discrimination against Women' (UNITED NATIONS, 2010d, para. 1).

It has also said that Article 12 of the Convention 'requires States to eliminate discrimination against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period' and that 'Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women' (UNITED NATIONS, 2010d, para. 2, 11).

18. The UN Special Rapporteur on the right to the highest attainable standard of health has clarified that "In the context of sexual and reproductive health, freedoms include a right to control one's health and body. Rape and other forms of sexual violence, including forced pregnancy, non-consensual contraceptive methods (such as forced sterilisation and forced abortion), female genital mutilation/ cutting and forced marriage, all represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health" (UNITED NATIONS, 2004).

19. According to UN-HABITAT a 'slum' is an area that combines, to various extents, the following characteristics: inadequate access to safe water; inadequate access to sanitation and other infrastructure; poor structural quality of housing; overcrowding and insecure residential status (UNITED NATIONS (2003b)).

20. At least three or four in every 10 non-permanent houses in cities in developing countries are located in dangerous areas that are prone to floods, landslides and other natural disasters. In 2003, approximately 20 per cent of the world's population was living in inadequate dwellings, which were overcrowded or did not have a sufficient living area. It was also estimated that 18 per cent of all dwelling units globally are non-permanent structures and 133 million people living in cities in the developing world live in housing that lack finished materials. Because of the difficulties of collecting data on this issue and lack of systematic assessment, these numbers may be "highly underestimated" (UNITED NATIONS, 2010e, p. 58, 62, 70, 137-139; UNFPA, 2007, p. 59-61).

21. "From the adoption of the Millennium Declaration in 2000, Cambodia has expressed its full commitment to the Millennium Development Goals (MDGs). In 2003, the global MDGs have been localized in Cambodia and these are called Cambodia Millennium Development Goals (CMDGs). The CMDGs reflects Cambodia realities based on a strong national consensus." (UNITED NATIONS, 2007d).

22. For the latest data see UN-HABITAT (UNITED NATIONS, 2010e, p. 52-119).

RESUMO

Os Objetivos de Desenvolvimento do Milênio (ODMs) representam o consenso global sobre a necessidade de tomar uma atitude com relação à pobreza. Embora os ODMs tenham desempenhado um papel importante ao focar a atenção internacional em questões relativas ao desenvolvimento e à redução da pobreza, o artigo defende que os ODMs não refletem integralmente o nível de ambição da Declaração do Milênio, a qual prometeu o empenho na proteção e na promoção de todos os direitos humanos – civis, culturais, econômicos, sociais e políticos – para todos.

Este artigo descreve alguns dos aspectos nos quais o marco dos ODMs, embora compreenda áreas nas quais os Estados têm obrigações claras de acordo com o direito internacional dos direitos humanos - como alimentação, educação e saúde -, não reflete estes padrões. Três áreas principais são focadas – igualdade de gênero (ODM 3), saúde materna (ODM 5) e favelas (ODM 7) – para exemplificar as lacunas existentes entre os compromissos dos ODMs e os padrões relativos aos direitos humanos. Defende-se que tal lacuna é também um dos principais fatores por trás da falta de progresso equitativo nos ODMs. O artigo reforça a importância de garantir que os esforços para a consecução dos ODMs sejam consistentes com os padrões de direitos humanos; e que a não discriminação, a igualdade de gênero, a participação e a *accountability* estão no núcleo desses esforços para acabar com a pobreza e a exclusão.

PALAVRAS-CHAVE

Objetivos de Desenvolvimento do Milênio (ODMs) – Direitos humanos

RESUMEN

Los Objetivos de Desarrollo del Milenio (ODM) representan un consenso global acerca de la necesidad de combatir la pobreza. En el presente artículo se argumenta que si bien los ODM han desempeñado un importante papel al atraer la atención internacional hacia temas relativos al desarrollo y la reducción de la pobreza, no reflejan por completo la ambición de la Declaración del Milenio, en la que se promete luchar por la protección y promoción de todos los derechos humanos -civiles, culturales, económicos, sociales y políticos- para todos.

El presente artículo analiza algunos de los aspectos –como alimentación, educación y salud—sobre los cuales las obligaciones de los Estados en materia de derechos humanos no se encuentran debidamente reflejadas en los ODM. El artículo destaca tres temas principales: igualdad de género (Objetivo 3), salud materna (Objetivo 5) y asentamientos precarios (Objetivo 7), como ejemplos que ilustran las distancias entre los compromisos de los ODM y las normas de derechos humanos. Se argumenta que esta brecha es también uno de los principales factores que subyacen a la falta de avance equitativo en los ODM. Se hace hincapié en la importancia de asegurar que todos los esfuerzos por alcanzar todos los ODM sean plenamente coherentes con las normas de derechos humanos, y que la no discriminación, la igualdad de género, la participación y la rendición de cuentas se encuentren en el centro de todas las acciones destinadas a combatir la pobreza y la exclusión.

PALABRAS CLAVE

Objetivos de Desarrollo del Milenio (ODMs) – Derechos humanos



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various indigenous communities. From being a leader of the indigenous peoples' movement in her country she moved on to do regional and international work. She organized the Asian Indigenous Women's Network in 1993 and became the convenor. One of her involvements at the global level was in helping draft and negotiate the United Nations Declaration on the Rights of Indigenous Peoples until this got adopted in 2007 by the UN General Assembly. She was the Chairperson of the United Nations Permanent Forum on Indigenous Issues from 2005 to 2010 April. She prepared reports for the Forum on the MDGs and other development and human rights issues of indigenous peoples. Her articles have been published in several journals and books on indigenous peoples' rights, indigenous women, globalization, biodiversity, climate change, among others.

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ABSTRACT

Indigenous peoples are one of the strongest critics of the dominant paradigm of development because of how this has facilitated the violation of their basic human rights, which includes their rights to their lands, territories and resources, their cultures and identities. So-called "development" also has led to the erosion and denigration of their indigenous economic, social and governance systems. Ten years after the MDGs came into being, it is about time to see whether these have taken indigenous peoples into account and whether the implementation of these have led to changes in the way development work is done. This paper examines the relationship of the Millenium Development Goals to the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples. It analyzes whether the MDGs as constructed and implemented have the potential to contribute towards a more dignified life for indigenous peoples. It looked into some of the efforts of various actors, such as indigenous peoples, part of the UN system, including the UN Permanent Forum on Indigenous Issues, and NGOs have done in relation to the MDGs. The Permanent Forum is the highest body in the UN addressing indigenous peoples and which is mandated to look into human rights, economic and social development, education, culture, health and environment. Some recommendations which emerged from this study include the need to use the human-rights based approach to development in implementing the MDGs and the need to set up culturally-sensitive social services.

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KEYWORDS

Indigenous peoples – Human rights – Development – Discrimination – Participation



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REFLECTIONS ON THE ROLE OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES IN RELATION TO THE MILLENNIUM DEVELOPMENT GOALS

Victoria Tauli-Corpuz

1 Introduction

The UN High Level Summit in September 2010 to review the implementation of the Millennium Development Goals should be used as an opportunity to look more deeply into whether indigenous peoples have been reached by the MDGs. One of the distinct features of the MDGs is that these are time-bound with established targets and indicators, except for Goal 8. Ten years have elapsed and it is almost a foregone conclusion that most of the MDGs will not be met. Some of the reasons which are cited for the failure to meet the targets are the recent global financial crisis and even climate change. But the fact that the MDGs were constructed without linking these with the need to address the structural roots of the problems was precisely one of the criticisms of the MDGs by human rights experts and activists. Unless the MDGs are seen within the broader socio-economic, political and cultural context and addressed from human rights perspective, gains can only be transient and, therefore, not sustainable.

To fill up this gap, efforts were exerted by some human rights bodies and UN programmes, funds and agencies as well as human rights experts and indigenous peoples to converge the MDGs with the human rights framework. They tried to link the goals with the realization of specific rights contained in International Human Rights Law and standards. For indigenous peoples, this was the most relevant approach because it can happen that goals are achieved but that there will be sectors of society which will be missed out or even further marginalized. The adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007 was significant in this effort to make the MDGs more linked with human rights. The High Level Summit and

the processes leading to it should therefore be used as an opportunity to assess whether the implementation of the MDGs has made a dent in changing the situation of indigenous peoples and whether this contributed in promoting, respecting and fulfilling indigenous peoples' rights.

This paper will examine how the implementation of the MDGs took indigenous peoples into account and it will identify the positive and negative impacts of the MDGs on them. It will present some of the efforts done by indigenous peoples, the UN Permanent Forum on Indigenous Issues and other parts of the UN system to link human rights and the MDGs. A few recommendations will be made on how to address the challenges ahead.

2 Human rights as the holistic framework for development

The rights contained in the United Nations Declaration which was adopted by the UN General Assembly in 2007 "...constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Article 43, UNDRIP). Thus, the UNDRIP should serve as the framework in assessing existing development policies and operations, such as the Millennium Development Goals, on indigenous peoples. As Robert Archer, a human rights expert, expressed at a symposium on human rights and MDGs:

"... human rights are the most holistic framework for addressing development issues, including new aid modalities: the legal authority, objectivity and political legitimacy of the international human rights system means that its principles and standards provide powerful criteria for assessing development priorities, processes and outcomes. The core human rights principles of equality and accountability could also provide innovative guides for development action." (ARCHER, 2005).

Since colonization up to the present, the implementation of the dominant development model has contributed to many violations of indigenous peoples' human rights, especially the right to self-determination, right to their lands, territories and resources, to traditional livelihoods, cultural rights, among others. We called this phenomenon "development aggression". The indigenous activists who came to the United Nations in increasing numbers since the late 1970s were those whose communities were affected by so-called development projects such as mega-hydroelectric dams, logging, mining, among others. Since they cannot find redress within the national borders the United Nations became the space where they brought their complaints on how their rights are being violated in the name of development. This is one of the main reasons why we pushed for the UN Declaration on the Rights of Indigenous Peoples.

Since the MDGs are development goals agreed upon by States in 2000, it is important to ensure that their implementation does not result in the violation of indigenous peoples' rights. The poverty situation of indigenous peoples is dismal, as it is, and it will be tragic if global goals to address poverty lead to even further impoverishment of others. The UN has established that indigenous

peoples which compose around 5 percent of the total world population, make up 15% of the world's poor and represent one-third of the world's extremely poor rural people (UNITED NATIONS, 2009a). An MDG report of the Economic Commission in Latin America and the Caribbean (ECLAC, 2005) further added that indigenous peoples face huge disparities in terms of access to and quality of education and health. In Guatemala, for example, 53.5% of indigenous young people aged 15-19 have not completed primary education, as compared to 32.2% of non-indigenous youth. In Bolivia, the infant mortality rate among the indigenous population is close to 75/1000, as compared to 50/1000 for the non-indigenous population.”

3 The UN Permanent Forum on Indigenous Issues and MDGs

During the fourth (2005) and fifth (2006) sessions of the UN Permanent Forum on Indigenous Issues, MDGs were adopted as the special theme. This author, who was the Chair of these sessions, prepared a report on MDGs and indigenous peoples (TAULI-CORPUZ, 2005) to assess how Goals 1 and 2 are being implemented for indigenous peoples. In this report I examined at how development and nation-state building resulted in further exclusion and discrimination of indigenous peoples which has led to situations of impoverishment that prevail up to the present. The situation of poverty amongst indigenous peoples as documented in reports released by the World Bank, the Inter-American Development Bank and the Asia Development Bank was highlighted. The common thread in these reports is that in countries where indigenous peoples live, poverty amongst them is pervasive and severe and the poverty map coincides with indigenous peoples' territories. Indigenous peoples are disproportionately represented among the world's poor and extreme poor. The following were some statistics cited in relation to the poverty of indigenous peoples in Latin America.

A report on Mexico says that the indigenous peoples live in “alarming conditions of extreme poverty and marginality”. This study observed that being poor and being indigenous are synonymous. Virtually all of the indigenous people living in municipalities with 90 per cent or more indigenous people are catalogued as extremely poor. Statistics in Guatemala show that 50 to 60 per cent of a total population of 11 million persons belong to 23 indigenous peoples. 54.3 per cent of them are poor and 22.8 per cent extremely poor. Sixty per cent of households do not have the capacity to earn half of the cost of their minimum food needs despite spending a greater part of their earnings on it. In Ecuador's rural population, of which 90 per cent are indigenous, almost all are living in extreme poverty. Eight out of every ten indigenous children in this country live in poverty. In terms of how indigenous poverty compares with the non-indigenous populations, the UNICEF Latin America and Caribbean office shows that in Guatemala, 87 per cent of the indigenous population is poor, as compared to 54 per cent of the non-indigenous population; in Mexico, that ratio is 80 per cent vs. 18 per cent; in Peru, 79 per cent of the indigenous population is classified

as poor, compared to 50 per cent of the non-indigenous population; while in Bolivia, the ratio is 64 per cent vs. 48 per cent.

This data on the region is further reinforced by the IADB (Inter-American Development Bank) report which was highlighted in The State of the World's Indigenous Peoples' Report. This cited a study in the Latin American region by the Inter-American Development Bank which concluded "the difference between the indigenous and non-indigenous is often striking, where, for example in Paraguay, poverty is 7.9 times higher among indigenous peoples, compared to the rest of the population. In Panama, poverty rates are 5.9 times higher, in Mexico 3.3 times higher, and in Guatemala, indigenous peoples' poverty rates are 2.8 times higher than the rest of the population." (UNITED NATIONS, 2009b).

In addition, there was also a report done by the Inter-Agency Support Group on Indigenous Issues (UNITED NATIONS, 2005). This body is the cluster of more than thirty UN agencies, programmes and funds which banded together to support the work of the Permanent Forum and includes the UN Development Programme (UNDP), the International Labor Organization (ILO), FAO, World Bank, among others. It also includes other multilateral institutions like the European Commission, the International Organization of Migration, etc. The IASG held a meeting in 2004 to look into how indigenous peoples were included in the MDG related processes and reports and it also came up with recommendations for better MDG implementation. The coordinator of the Millennium Campaign and some UNDP personnel assigned to work on MDGs were present in this meeting.

A conclusion reached by the participants is that "...the general absence of indigenous peoples from much of the work being undertaken on the Millennium Development Goals. The Millennium Campaign has not yet targeted indigenous peoples; the United Nations Millennium Project pilot countries do not focus on particular marginalized groups or on issues of concern to indigenous peoples, such as land and natural resource management and culture and human rights; and the national progress reports, except for a few, have not actively included indigenous peoples' organizations in the consultation process and/or addressed indigenous peoples in their data-collection exercises" (UNITED NATIONS, 2005). This IASG report and my paper both expressed our concern that the effort to meet the targets laid down in the Millennium Development Goals can have harmful effects on indigenous peoples, such as the acceleration of the loss of the lands and natural resources on which indigenous peoples' livelihoods have traditionally depended or the displacement of indigenous peoples from those lands.

Another point raised is the fact that since the situation of indigenous peoples is often not reflected in statistics or is hidden by national averages, the efforts to achieve the Millennium Development Goals could, in some cases, have a negative impact on indigenous peoples even if national indicators are improving. Thus, we called on the need to disaggregate data so that the differential impacts of MDG implementation on those who are invisible can be made more visible. When the first session of the Permanent Forum was convened in 2002 one of the priority actions recommended by the participants if for States and UN agencies to disaggregate data. This led

the Forum to organize an International Expert Workshop on Data Collection and Disaggregation for Indigenous Peoples which was held from 19 to 21 January 2004. One recommendation from this workshop reiterated that.

Indigenous peoples should *fully participate* as equal partners, in all stages of data collection, including planning, implementation, analysis and dissemination, access and return, with appropriate resourcing and capacity-building to do so. Data collection must respond to the priorities and aims of the indigenous communities themselves. Participation of indigenous communities in the conceptualization, implementation, reporting, analysis and dissemination of data collected is crucial, at both the country and international levels. Indigenous peoples should be trained and employed by data-collection institutions at the national and international levels (UNITED NATIONS, 2004).

The Secretariat of the Permanent Forum also regularly analyzed several National MDG reports in countries where there are indigenous peoples to see how indigenous peoples and their issues were dealt with. The questions they ask in interrogating these reports are the following (UNITED NATIONS, 2006a): 1) Are indigenous peoples mentioned in the context of the overall MDGR report? If so to what extent are they discussed? 2) Are indigenous peoples addressed sectorally, meaning has each goal specific guidelines and/or benchmarks for addressing indigenous peoples within the framework of the goal? 3) Are there discussions of indigenous peoples in the process of develop next interventions and action plans to meet the goals? If so, how does the MDG report indicate that they are involved? 4) Are any proposals being made to address indigenous peoples while implementing the MDGs in each country? If so, what are the proposals listed?

The main observation which emerged from each of these yearly analyses is that the situation of indigenous peoples is not reflected in any adequate manner, at best, and not even referred to, at worst. What is even more disheartening is that, generally, indigenous peoples were not even consulted or included in the processes of designing, implementing, evaluating MDGs and in developing the MDG reports. The 2005 MDG report of the Philippines, for instance, did not even refer to indigenous peoples in spite of the fact that there exists an Indigenous Peoples' Rights' Act which recognizes the identity and rights of indigenous peoples. There is also a government agency, the National Commission on Indigenous Peoples (NCIP) which is the body in charge of ensuring the implementation of the law. The National Agency doing the report probably did not even consult the NCIP. Indigenous peoples did not participate in any significant way in the implementation and monitoring of the national MDG reports.

The 2006 and 2007 Desk Reviews of more than 30 national MDG reports recommended that "countries with indigenous peoples should incorporate the issues and challenges specifically faced by indigenous peoples directly into the framework of the MDGR by: (a) including indigenous peoples into the context of the overall report; (b) including indigenous peoples in the context of meeting each specific goal; (c) including indigenous peoples in the planning process of the overall report and each individual goal; (d) including indigenous peoples' effective participation in the planning process of proposing future interventions that will

directly affect them.” (UNITED NATIONS, 2006a). These recommendations were reiterated in the 2008 Desk Reviews.

The observations from the 2007 report which covered 11 countries in Latin America showed that (UNITED NATIONS, 2007):

“...approximately 27% of the MDGRs reviewed sufficiently include indigenous peoples (3 out of 11: Ecuador, Panama, Mexico). Another 55% address indigenous issues to varying degrees (Argentina, Chile, Costa Rica, Honduras, Peru, Venezuela), while the remaining 18% do not mention indigenous peoples at all (El Salvador, Paraguay).”

This report also concluded that with few exceptions, the reports which were produced by the UN System and governments did not indicate if they got inputs from indigenous peoples’ organizations. An exception is Peru, where a leading indigenous peoples’ network, AIDSESEP, participated in working groups for the report. In Mexico, the Comisión Nacional para el Desarrollo de los Pueblos Indígenas (a government body) was listed as a contributing agency. The need for disaggregation of data was underscored in this 2007 report. It stressed that “improved disaggregation of data is indispensable to properly monitor progress towards MDG achievement in countries with indigenous populations, and should be a key priority for Governments and the UN System.” (UNITED NATIONS, 2007).

The Permanent Forum also held an Expert Group Meeting on “MDGs, Indigenous Peoples and Governance” in 2006. Criticisms were raised by the participants on the fact that the MDGs and their related indicators do not reflect the specific needs and concerns of indigenous peoples nor do they allow for specific monitoring of progress as related to indigenous peoples. The MDG targets and indicators were seen as inadequate as they give prominence to monetary income over the indigenous traditional economies and livelihoods which have and continue to provide many of the basic needs of indigenous peoples for food, shelter and water, without necessarily generating monetary income.

As presently defined, the Millennium Development Goals do not take into account alternative ways of life and their importance to indigenous peoples, not only in the economic sense, but also as the underpinnings for social solidarity and cultural identity. Achieving the MDGs entails the risk of bringing indigenous peoples to join the army of surplus labour and become part of the global market economy to increase the numbers of the population earning more than 1 dollar a day. They have no control or say over how the globalized market economy is run but this has induced them to abandon their traditional territories to search for elusive jobs in the cities and urban centres.

4 Non-discrimination, equality, equity and the MDGs

The basic principles which underpin human rights law are non-discrimination and equality. It is worthwhile analysing if the implementation of the MDGs promotes these principles. Halving poverty means that there will be another

half which will not enjoy the achievement of the goal. Who will be these people who will not benefit? In some countries, these are the indigenous peoples. This reinforces the historical and continuing discrimination against them. In the first place, the impoverishment of indigenous peoples is without any doubt a result of discrimination embedded in colonial and national development policies and programmes. The efforts to modernize the new post-colonial nation-states resulted into the systematic marginalization and destruction of indigenous peoples' economic, social, cultural and political systems. These do not fit within the model of the feudal agricultural systems controlled by the big landlords and politicians and the modernization efforts developed under the modern market economy.

While indigenous peoples' territories possess great wealth in terms of natural resources, they remain as the most impoverished sections in most countries. Resources are extracted by the State and by non-state entities given licenses by the State to log, mine or set up agriculture and forest plantations. A picture of the Atlantic Coast of Nicaragua can be the picture of many indigenous peoples' territories all over the world (TAULI-CORPUZ, 2005):

“As a region the Atlantic Coast is exceptionally rich in terms of natural resources. The coasts are teeming with fish, shrimp and lobster; the forests in the RAAN (Regional Autonomous in the Atlantic Coast) have extensive stands of pine and, to a lesser extent, mahogany and other hardwoods; and there are extensive deposits of minerals (gold, silver, copper and lead), especially along the headwaters of the rivers in the RAAN. Historically, however, extraction of these resources has been capitalized and directed by interests based outside the region, most of whom have had little interest in the long-term development of the Atlantic Coast. The indigenous peoples of the region have consequently had little opportunity to share in the commercial exploitation of this wealth, and gained little in terms of the development of a rationally planned and maintained infrastructure”.

Indigenous peoples have countless stories to tell about how they were displaced from their communities or are prevented from continuing their traditional livelihoods which are based on the sustainable use of natural resources in their territories. These are clear cases of discrimination against indigenous peoples' systems and cultures. In fact, cultures of indigenous peoples have been regarded by States and corporations as obstacles to modern development and nation-building. Indigenous peoples' cultures and identities are linked with their lands, territories and resources. Thus, their displacement from their territories and sacred places and the destruction of the ecosystems in their lands and waters have far-reaching adverse impacts on their diverse cultures and knowledge systems.

Assimilation into the dominant cultures, economic system and religions are highly discriminatory as this starts from the assumption that their cultures are backward and inferior and therefore the need to make them more modern. Furthermore, the illusion that there should be one nation, one state, one culture, one language within a country does not correspond at all with the realities of most countries which are multi-national, multi-lingual, multi-cultural including multiple economic systems, legal and governance systems and diverse religions.

Equality is another fundamental principle of international human rights law. Inequality and inequity are often used interchangeably but the distinction made is that “inequity is an unfair and avoidable inequality, and its definition is embedded in the value system of the society that is defining it” (ODI, 2005). The high levels of inequities based on economic status, gender, rural-urban locations and ethnicity is evidence which shows the non-fulfilment of basic social, economic and cultural rights. Since MDGs are not designed within the human rights framework, addressing inequities is incidental and not central in their implementation.

MDGs are measured at the aggregate level which makes invisible the inequalities which persist at the national and sub-national levels. Evidence has shown that the exclusion of social sectors from the benefits of the development processes leads to the unsustainability of economic, social and political gains and jeopardizes the security and sustainability of society as a whole. Thus, sustained progress on the MDGs depends on how the gap between the haves and have-nots will be addressed. It is not surprising, therefore, to see that in some countries where the general poverty goal has been achieved the poverty situation for indigenous peoples has worsened. The section that follows shows how interlinked the economies of the different countries are and why poverty reduction in some areas may mean poverty increase for others.

5 Globalization and development

The example of coffee production demonstrates the problems of indigenous peoples with the mainstream development model and with the globalization of the market economy. The following section describing how the globalization of coffee production and trade affected indigenous peoples worldwide came from the report I prepared for the Permanent Forum (TAULI-CORPUZ, 2005).

Coffee production for export has been taking place in indigenous communities in Guatemala since the late nineteenth century. Seasonal migration of indigenous peoples to work in coffee farms has been one of their survival strategies. Some indigenous peoples opted to permanently migrate, such as the Q'eqchi and the Poqomchi. This is also the case in Mexico. The profits from coffee are dependent on the exploitation of cheap labour of indigenous peoples, who live in bunkhouses, without privacy or clean water and toilets.

When Viet Nam opened up its economy to the world market it built irrigation canals and provided subsidies for farmers to migrate to the central highlands and other upland areas in the 1980s and 1990s. In 1990 it only produced 1.5 million bags of coffee. This increased to a phenomenal 15 million bags in 2000, making Viet Nam the second largest coffee producer in the world. Large tracts of land, including well-preserved forests in the territories of the indigenous peoples/ethnic minorities, were converted to coffee plantations. Most of these are now owned by rich lowlanders based in Saigon.

Massive deforestation and environmental devastation resulted from this economic project. The indigenous peoples of Viet Nam, who are called ethnic

minorities, were displaced from their lands, owing to the migration of tens of thousands of lowlanders into their communities to engage in coffee production. The overproduction of coffee worldwide brought the prices tumbling down.

Among those who suffered the most are indigenous peoples, not only from Viet Nam, but from various parts of the world. Coffee prices dropped from \$1,500/ton in 1998 to less than \$700/ton in 2000, largely owing to the flooding of Vietnamese coffee onto the world market. This has made it less economical to grow the “black gold” and has slowed the immigration somewhat, yet the problem of land tenure remains.

In Mexico, coffee cultivation has been an important source of income for the indigenous communities of Chiapas and Oaxaca. Nationwide, over 70 per cent of coffee farmers have plots of less than two hectares. And in Chiapas, Mexico’s most important state for coffee production, 91 per cent of producers have less than five hectares. These coffee farmers now find themselves in extreme poverty, as the cost of the coffee beans they are exporting is much more expensive than the cheap coffee beans from Vietnam which are now much more in demand. Their access to the global market has significantly dropped. The World Bank says that in Central America 400,000 temporary coffee workers and 200,000 permanent workers lost their jobs after the collapse of the coffee prices.

Viet Nam is one of the few countries on track to achieve the Millennium Development Goals. This was achieved, however, at the expense of the indigenous peoples in that country. Pamela McElwee, an anthropologist from Yale University, who presented a paper on Viet Nam in a globalization conference held in December 2004, concluded that

“Although the opening of Viet Nam’s economy to market forces in the 1980s and 1990s has reduced poverty levels and increased personal freedoms for much of the population, minorities continue to face many hardships... Most upland ethnic minorities have little benefited from these changes. They suffer from disease, lack clean water, and have low literacy rates and low incomes, despite many government efforts at upland development.”

When the Secretariat of the Forum reviewed the 2008 Fourth Viet Nam National MDG Report, it found out that there were references to the ethnic minorities:

“The poverty rate for the ethnic groups was three times higher than for the Kinh. The section provides disaggregation of the poverty target by ethnic group and by region, demonstrating that indigenous peoples or ethnic minorities in the remote and mountainous regions are disproportionately among the poorest in Vietnam. The report notes that despite the significant disparities between ethnic minorities and the Kinh majority, and its efforts to address this in its policy framework, the poverty incidence for the ethnic minority groups remained the highest and the pace of poverty reduction was the slowest”.

There was not much explanation from the Viet Nam report on why this was so.

6 Poverty and Social Situations of Indigenous Peoples in Developed Countries

It is bad enough that poverty and health situations of indigenous peoples in developing countries are disproportionately high compared to the general populations. What is even worse is that indigenous peoples in the richest countries of the world, the so-called developed countries have similar situations. The recently released “State of the World’s Indigenous Peoples Report” revealed the realities of poverty amongst indigenous peoples in these rich countries. Another report called “Rethinking Poverty: Report on the World Social Situation 2010” further confirmed these findings (UNITED NATIONS, 2009a, 2009b).

Australian Aborigines are expected to die 20 years earlier than the non-indigenous populations. The underemployment rate among indigenous peoples in the Canadian provinces of Manitoba, British Columbia, Alberta and Saskatchewan is as high as 13.6 percent compared to only 5.3 percent among the non-indigenous populations. This even increased further due to the 2008 global financial and economic crisis because tens of thousands of aboriginal persons working in the timber industry were laid off.

Almost a quarter of Native Americans and Alaska Natives live under the poverty line in the United States, compared to about 12.5 percent of the total population. Native American life expectancy is on average 2.4 years lower than that of the general population. “They suffer poverty at a rate three times higher than that of non-Hispanic white populations.” (UNITED NATIONS, 2009b). Moreover, Native Americans and Alaska Natives have higher death rates than other Americans from tuberculosis (600 per cent higher), alcoholism (510 per cent higher), motor vehicle crashes (229 per cent higher), diabetes (189 per cent higher), unintentional injuries (152 per cent higher), homicide (61 per cent higher) and suicide (62 per cent higher).

Disproportionately high rates of incarceration of aboriginals are also common in Australia, Canada, United States and New Zealand. In Canada where indigenous peoples represent only 4.4 percent of the total population they are 19 percent of those in prison. Even worse, in New Zealand the Maori who are 15 percent of the total population represent 40 percent of the convictions in court and 50 percent of the prison population.

7 Goal 8 and its Implications for Indigenous Peoples

One of the major weaknesses of the MDGs is the fact that there is no target date for the achievement of Goal No. 8 which is the need to develop a Global Partnership for Development. This is a very broad goal that relates to increasing and improving official development assistance (ODA), ensuring fairer trade and achieving substantial debt relief for borrower countries. Yet, it has been agreed that the MDGs cannot be achieved without an enabling environment which means

the adherence of donor countries to meeting the goal of providing 0.7 percent of their total national budget for official development assistance (ODA) to developing countries. This was reiterated in Goal 8.

Target 12 under MDG 8 calls for the further development of an open, rule-based, predictable, non-discriminatory trading and financial system and a commitment to good governance, development and poverty reduction – both nationally and internationally. Most indigenous peoples' territories have and continue to serve as resource bases for the extraction of natural resources for export to other countries. These include oil, gas, minerals and metals, as well as logs and other biological resources including genetic resources. Unfortunately, indigenous peoples do not enjoy any substantial benefits from these extractivist activities and much worse, their free, prior and informed consent is not obtained when such activities are carried out in their territories. What is left over are devastated ecosystems which they are left on their own to rehabilitate and restore. The export of these raw materials are also meant to increase foreign earnings which will be used to pay for the debts incurred by the States and private corporations from foreign and multilateral banks.

The Permanent Forum deems it crucial to ensure that there are opportunities for genuine partnerships that reaffirm indigenous peoples' fundamental human rights and effective participation of indigenous peoples in the implementation of this goal. There is a need to undertake more studies on impacts of ODA, the debt problem and trade and finance agreements on indigenous peoples and appropriate recommendations be made to address adverse impacts and replicate good practices.

8 Challenges Ahead

Admittedly this report cannot represent the width and breadth of what is happening to indigenous peoples in relation to the MDGs. More research work needs to be done to be able to do this. With the information available, however, it is safe to say that in the majority of countries where there are indigenous peoples adequate consultations with participation of indigenous peoples in the MDG processes have not been done. Even in the few countries where the majority of the population are indigenous peoples, e.g. Bolivia and Guatemala, the reviews done by the Permanent Forum Secretariat observed that the participation of the indigenous peoples was still very inadequate.

Clearly, discrimination and the unequal treatment of indigenous peoples are the key factors to explain why in spite of the persistent recommendation of the Permanent Forum that they should be included in the implementation and monitoring of the MDGs, the situation remains largely unchanged. Including indigenous peoples in decision making processes or at least, consulting them when development programmes such as the MDGs are designed and implemented, should always be the first step. Excluding them is one form of discrimination and this is in violation of Article 2 of the UN Declaration on the Rights of Indigenous Peoples which states: "Indigenous peoples and

individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”. The right to participate is a basic human right which is taken for granted by States and other actors most of the time. Social inclusion is mentioned as one of the principles for the MDGs but this is not seen in the way the MDGs have been implemented and reported, so far.

In light of the weaknesses in linking MDGs with the rights of indigenous peoples, the UN Permanent Forum has identified several recommendations on how the MDGs can be implemented to benefit indigenous peoples (UNITED NATIONS, 2006b). These include the following:

- a. The human rights-based approach to development should be operationalized by states, the UN system and other intergovernmental organizations. The recognition of indigenous peoples as distinct peoples and the respect for their individual and collective human rights is crucial for achieving a just and sustainable solution to the widespread poverty that affects them.
- b. Policies must be put in place to ensure that indigenous peoples have universal access to quality, culturally-sensitive social services. Some areas of particular concern are inter-cultural/bilingual education and culturally sensitive maternal and child healthcare.
- c. MDG-related programmes and policies should be culturally sensitive and include the active participation and free, prior and informed consent of indigenous peoples so as to avoid loss of land and natural resources for indigenous peoples and the accelerated assimilation and erosion of their cultures.
- d. States, the UN System and other intergovernmental organizations must make greater efforts to include indigenous peoples in MDG monitoring and reporting, including the production of national MDG reports, as well as in the implementation, monitoring and evaluation of MDG-related programmes and policies that will directly or indirectly affect them. The basic principles and values of democratic governance such as participation, equity, non-discrimination, inclusiveness, transparency, accountability and responsiveness should underpin the design, implementation and monitoring of the MDGs.
- e. Improved disaggregation of data is indispensable to properly monitor progress towards MDG achievement in countries with indigenous populations, and should be a key priority for Governments and the UN System.

9 Conclusion

This cursory review of how the MDGs are implemented in indigenous peoples' territories shows that indigenous peoples, generally, are still excluded from the MDG processes of implementation, evaluation and reporting. As well, since the human rights based approach to development is not central to the design and implementation of the MDGs (even if this framework is alluded to in the Millennium Declaration), the specific situations of indigenous peoples both in the developing and developed countries remain largely invisible and therefore not addressed in any satisfactory manner.

This is a glaring gap not only for the MDG processes in Latin America but in the whole world. While there is much more progress in Latin America in terms of disaggregation of data on indigenous peoples, much more remains to be done. The poverty situation in the Latin American and Caribbean region of indigenous peoples is still disproportionately high compared to the non-indigenous populations. Discrimination and racism which are still very much embedded in the dominant structures of society remain as the major root causes of the problem.

Unless, the MDG processes are restructured significantly to address the structural roots of poverty, hunger, environmental destruction, dismal health and education indices among indigenous peoples, in particular, and within society, in general, it is difficult to see real and long-term progress in meeting the goals. With the continuing global economic and financial crisis which hit not only the rich countries but affected the economic, social, cultural and political situations in developing countries and the global ecological crisis, it is time to call for a major paradigm shift in development thinking and practice. The world cannot continue with business as usual. Indigenous peoples' worldviews, practices and values of reciprocity, equilibrium, solidarity, collectivity, sustainability and harmony with nature or Mother Earth, can contribute in reshaping the ways towards achieving the MDGs. It is crucial, therefore, to include indigenous peoples in redesigning development of which the human rights based approach and the ecosystem approach will be some of the major frameworks which should underpin the new sustainable development models.

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RESUMO

Os povos indígenas estão entre os críticos mais contundentes do paradigma dominante de desenvolvimento, uma vez que este facilitou a violação de seus direitos humanos básicos, dentre os quais se incluem o direito a suas terras, territórios e recursos, sua cultura e identidade. Aquilo que se convencionou chamar “desenvolvimento” também levou à erosão e difamação dos sistemas econômicos, sociais e de governança indígenas. Dez anos após a elaboração dos Objetivos de Desenvolvimento do Milênio (ODMs), é hora de se verificar se estes levaram os povos indígenas em conta e se sua implementação conduziu a mudanças no modo como o trabalho para o desenvolvimento é realizado. Este artigo analisa a relação entre os ODMs e a proteção, o respeito e a concretização dos direitos dos povos indígenas, tal como concebidos pela Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas. Analisa-se se os ODMs, tal como construídos e implementados, têm o potencial de contribuir para uma vida mais digna dos povos indígenas. Foram examinados os esforços de vários atores, como os povos indígenas, parte do sistema das Nações Unidas, incluindo o Fórum Permanente das Nações Unidas para Questões Indígenas, e organizações não governamentais, para a consecução dos ODMs. O Fórum Permanente é o órgão mais elevado das Nações Unidas a tratar de povos indígenas e recebeu mandato para examinar direitos humanos, desenvolvimento econômico e social, educação, cultura, saúde e meio ambiente. Algumas recomendações que resultam deste estudo incluem a necessidade de utilizar uma abordagem baseada em direitos humanos para o desenvolvimento na implementação dos ODMs e a necessidade de se oferecer serviços sociais culturalmente adaptáveis.

PALAVRAS-CHAVE

Povos indígenas – Direitos humanos – Desenvolvimento – Discriminação – Participação

RESUMEN

Los pueblos indígenas se cuentan entre los más fuertes críticos del paradigma dominante del desarrollo debido a cómo éste ha facilitado la violación de sus derechos humanos fundamentales, que incluyen sus derechos a la tierra, territorios y recursos, a la cultura y a la identidad. El así llamado “desarrollo” también condujo a la erosión y denigración de los sistemas económicos, sociales y de gobierno de los pueblos indígenas. Pasados diez años del establecimiento de los ODM, es hora de examinar si estos objetivos han tenido en cuenta a los pueblos indígenas y si su implementación produjo cambios en la forma en que se lleva a cabo el trabajo de desarrollo. El presente artículo analiza la relación de los Objetivos de Desarrollo del Milenio con la protección, respeto y cumplimiento de los derechos de los pueblos indígenas establecidos en la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas. Se analiza si los ODM, tal como están diseñados e implementados, tienen el potencial de contribuir hacia una vida más digna para los pueblos indígenas. Se examinan algunos de los esfuerzos realizados en relación con los ODM por diversos actores, como los pueblos indígenas, parte del sistema de Naciones Unidas, incluso el Foro Permanente para las Cuestiones Indígenas de Naciones Unidas, y algunas ONG. El Foro Permanente es el órgano de mayor jerarquía de las Naciones Unidas que atiende a las cuestiones indígenas y tiene el mandato de investigar cuestiones relativas a los derechos humanos, el desarrollo económico y social, la educación, la cultura, la salud y el medio ambiente. Algunas recomendaciones surgidas del presente estudio incluyen la necesidad de implementar los ODM con un enfoque de desarrollo basado en los derechos humanos y la necesidad de establecer servicios sociales sensibles a la cultura.

PALABRAS CLAVE

Poblaciones indígenas – Derechos humanos – Desarrollo – Discriminación – Participación



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ABSTRACT

Meaningful and equitable progress on reducing maternal mortality and meeting Millennium Development Goal 5 calls for the adoption of a human rights-based approach which emphasizes 'accountability.' This article focuses specifically on how to promote accountability for fulfilling the right to maternal health if we seek to transform the discourse of rights into practical health policy and programming tools that can affect development practice—and in turn to transform health systems to better meet women's maternal health needs.

After briefly discussing the concept and purpose of accountability in the context of fulfilling women's rights to maternal health, the article then sets out a circle of accountability at the national level that includes: development and implementation of a national plan of action; budgetary analysis; monitoring and evaluation of programs based on appropriate indicators; and mechanisms for redress, as well as facility-level initiatives. In the final section the article addresses donor accountability.

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KEYWORDS

Maternal health – Right to health – Rights-based approach (RBA) – Accountability – Millennium Development Goals (MDGs)



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TOWARD TRANSFORMATIVE ACCOUNTABILITY: APPLYING A RIGHTS-BASED APPROACH TO FULFILL MATERNAL HEALTH OBLIGATIONS¹

Alicia Ely Yamin

1 Introduction

The great majority of women who die as a result of pregnancy-related complications have lived lives marked by poverty, deprivation and discrimination. From the moment of their births, these girls and women often face a funnel of narrowing choices whereby they are unable to exercise meaningful agency with respect to what they will do with their lives, how much they will be educated, with whom they will partner, when they will have sex, whether they will use contraception, and finally what care they will get when they are pregnant or delivering, even when their lives hang in the balance. Adopting a rights-based approach to women's health demands opening spaces for women to exercise choices and subverting the social – and power –relations that deny them their full humanity (YAMIN, 2008). With respect to maternal morbidity and mortality (MMM)² in particular, a rights-based approach calls for challenging the structural discrimination women face in health systems, as well as in other spheres of public and private life.

As it has become increasingly clear that meaningful and equitable progress on Millennium Development Goal (MDG) 5, which relates to maternal health, will require more than adding funding to existing technocratic approaches, there has been increasing attention to rights-based approaches to maternal mortality. In June 2009, the UN Human Rights Council (HRC) issued a historic resolution that explicitly recognized preventable maternal mortality as a human rights issue, and signaled the important role that could be played by treaty-monitoring committees and special procedures (UNITED NATIONS, 2009a). The HRC is now in a position to adopt a meaningful follow-on resolution based upon the recommendations of a study by the UN Office of the High Commissioner on Human Rights (OHCHR),

Notes to this text start on page 120.

which further elaborates the connections between human rights and MMM (UNITED NATIONS, 2010a).

Initiatives calling for rights-based approaches to MMM all emphasize accountability, which has been lacking in the MDGs process (UNITED NATIONS, 2010b, para. 116). For example, the OHCHR publication relating to the MDGs process overall, *Claiming the Millennium Development Goals: A Human Rights Approach*, explains “the *raison d’être* of the rights-based approach is accountability” (LANGFORD, 2008, p. 15). The UN Special Rapporteur on the right to health underscored the importance of accountability in human rights approaches to maternal mortality (UNITED NATIONS, 2006a). Further, non-governmental organizations (NGOs) also explicitly focus on the centrality of developing effective accountability (IIMMHR, 2010, p. 3; HUMAN RIGHTS WATCH, 2009, 2010; CRR, 2009).

Accountability in a human rights-approach to maternal health relates to obligations to “respect, protect and fulfill” a wide array of civil and political rights, as well as economic and social rights, and goes far beyond the health sector³ (UNITED NATIONS, 2000). Not only is maternal mortality fundamentally linked to women’s social and economic status in society, but gender inequality and violations of women’s sexual and reproductive rights constitute grave injustices even when they are not directly related to women’s deaths or morbidity (ICPD, 1994; UNITED NATIONS, 1999). A comprehensive rights-based accountability framework with respect to MMM requires the explication of these multiple obligations relating to all relevant rights.

However, this article focuses on the specific issue of how to promote accountability for fulfilling –for taking proactive steps to progressively realize– women’s rights to maternal health if we seek to transform the discourse of rights into practical health policy and programming tools that can affect development practice—and in turn to transform health systems to better meet women’s needs. Revisiting how we understand ‘accountability’ in the context of fulfilling rights to maternal health is especially urgent given the opportunities presented by the upcoming MDG 2010 Review, the deliberations underway at the HRC, and incipient efforts to explore a post-2015 development agenda that includes a robust human rights dimension.

I begin by briefly setting out the concept and purpose of accountability in the context of fulfilling women’s rights to health and suggesting that pursuing effective accountability in this arena requires moving beyond the traditional human rights model of punishing individual perpetrators, to focus on institutional and systemic factors. The article then sets out a circle of accountability at the national level that includes: development and implementation of a national plan of action; budgetary analysis; monitoring and evaluation of programs based on appropriate indicators; and mechanisms for redress. I also discuss measures that can be taken at the facility level to increase “constructive accountability.” Throughout the article I argue that accountability is closely linked to meaningful popular participation. In the final section I specify aspects of accountability for “international assistance and cooperation,” which require donors to refrain from certain policies as well as to contribute greater resources.

2 Accountability in the Context of Fulfilling the Right to Health: Beyond Individual Cases and Sanctions

In general, the concept of accountability refers to holding actors responsible for their actions in light of standards of behavior and performance. In a human rights framework, those standards are derived from both so-called “hard” and “soft” law sources, including *inter alia* binding international treaty norms and statements from quasi-judicial international bodies relating to the adjudication of pertinent cases, as well as authoritative interpretations of relevant norms by treaty bodies, statements by UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, and international conference declarations and programmes of action. They are also informed by domestic constitutional frameworks, legislation and regulations. However, fostering accountability in practice requires more than setting out norms in the abstract and establishing enforcement mechanisms. It requires a dynamic process of clarifying legal standards for actors at various levels, from health service providers to policy-makers, and engaging with those actors with respect to the implications for their roles and responsibilities (UNITED NATIONS, 2006b; GEORGE et al., 2010).

In a human rights framework, accountability combines elements of responsiveness, answerability and redress. Moreover, accountability is necessarily relational—*i.e.*, there can be no human rights accountability without specifying ‘to whom?’—and therefore it is closely linked to the effective participation of people affected by health policies and programs (POTTS, 2008, p. 7). In the context of reforming health systems to meet maternal health needs, accountability entails financial, administrative, regulatory, political and institutional dimensions, as well as legal recourse (UNITED NATIONS, 2006b). As Amnesty International’s 2010 Report states, accountability “allows us to look ahead” as well as back (AMNESTY INTERNATIONAL, 2010, p. 10). An effective framework of accountability serves as the basis for promoting systemic and institutional changes that create conditions under which women can enjoy their rights to maternal health, and not just for punishing identified lapses in performance.

Indeed, the traditional model of human rights advocacy, which seeks to identify a violation, a violator and a remedy is poorly suited to advancing accountability for improvement of maternal health. This is true for both practical and conceptual reasons. In practice, many health systems in which patients face abuses are extremely punitive with respect to front-line healthcare workers as well. For example, it is routine in many countries for health professionals who are associated with a maternal death to be summarily dismissed, without any procedure to discern whether they were in fact responsible for the death. These often unwritten policies are ostensibly intended to promote “accountability” and quality care in obstetric cases; they have the opposite effect. They create perverse incentives for health professionals to avoid dealing with obstetric emergencies, both as individuals and as institutions.

This does not mean a license for impunity. As Lynn Freedman (2003, p. 112) writes, “Of course, individual punishment (and knowledge that professional standards will be enforced) has an appropriate place in a constructive accountability system. The important point here is that individual sanctioning has not been used to scapegoat a

doctor, pacify the public, and cover up wider, deeper problems”. When an individual provider could have done nothing to save a woman placing blame on him or her not only distorts incentives; it also diverts attention from the systemic problems that resulted in the woman’s death. For example, the health center may lack the necessary supplies or drugs, or transportation. As Leslie London (2008, p. 72) argues, “frontline health workers are frequently unable to provide adequate access to care because of systemic factors outside their control and because of management systems that disempower them from acting independently and effectively”. Focusing on individual health practitioners’ conduct divorced from context in such a situation, as London (2008, p. 73) writes, “frequently makes little headway and gives a human rights approach a bad name”.

“Maternal death audits” and “reviews”, whereby individual deaths of women are investigated with the aim of promoting reflection on institutional and systemic failures as well as individual failures, have been advanced by some as a means to promote “human rights based accountability” (HUNT, 2008; WHO, 2004). Such reviews are done in myriad ways and therefore it is difficult to generalize. However, in general, as Human Rights Watch notes in its report on India, these reviews have a place in a broader accountability system, provided that they meet the following criteria: 1. they are conducted under strict confidentiality; 2. they provide for due process; and 3. the scope of the investigation extends beyond the facility (HUMAN RIGHTS WATCH, 2009). When these conditions cannot be guaranteed there is a serious risk of backlash against human rights-based approaches by those health workers we most need as allies. Additionally—and critically—these reviews should be used to complement, rather than substitute for, the continuous use of process indicators that evaluate how the health system is functioning, e.g., to measure the use and availability of emergency obstetric care.

The model of identifying a violation, a violator and a remedy is conceptually inadequate as well. That is, it implicitly assumes that there is an equilibrium that is broken by the violation; an investigation can then be launched to determine culpability and provide redress to return the situation to equilibrium. This paradigm was developed to address violations of civil rights, such as abuses in police custody, where human rights advocates assumed (often incorrectly) that exposing and denouncing abuses could lead to punishment of perpetrators and deterrence of future harms. If this is often an invalid assumption with regard to civil rights abuses, it can be counterproductive with respect to fostering accountability with respect to fulfilling the right to maternal health.

In situations of high maternal mortality we are confronting dysfunctional health systems where deaths may be attributable neither to negligence nor to lack of oversight at the facility level, but to the lack of available blood, supplies, transport, communications and the like –which all call for systemic changes. Thus, grievance redressal mechanisms that do not go beyond the facility-level are likely to be ineffective, and in turn to foster even more disillusionment with unresponsive and poorly functioning health systems. True deterrence– which as Amnesty International’s 2010 Report notes is a principal goal of accountability (AMNESTY INTERNATIONAL, 2010) – requires transforming the underlying, untenable situation that gives rise to widespread MMM, not restoring a prior equilibrium. The rest of this article discusses what concrete ways in which to promote such transformation.

3 A Circle of Accountability

A comprehensive accountability framework for fulfilling the right to maternal health at the national level shapes the initial design of policies and programs to address maternal mortality, their implementation and evaluation, and the remedies provided in the event of violations. In this section, I draw out important elements of accountability that are promoted at each of these stages. Although I focus on actions to be taken at the national level, I suggest the adoption of simple steps at the facility level that empower both frontline health workers and community members to identify obstacles to and solutions for improving maternal health services as a means of promoting “constructive accountability.”

3.1 National Plan of Action: The Importance of Public Justification and Participation to Rights-Based Accountability

Although the right to health is subject to progressive realization and cannot be realized from one day to the next, States parties to relevant treaties undertake some immediate obligations, including the development of a national strategy and plan of action in respect of their public health goals (UNITED NATIONS, 2000, para. 43). The UN Committee on Economic, Social and Cultural Rights (ESC Rights Committee) establishes the creation of a national public health strategy and plan of action, which is evidence-based and sets out deliberate targets, as one of a set of basic or core obligations that all states undertake as parties to the ICESCR (UNITED NATIONS, 2000, para. 43). Addressing maternal and reproductive health is an obligation of comparable priority and there is no country in the world where a national plan of action should not include attention to maternal health (UNITED NATIONS, 2000, para. 44).

All such plans of action should be based upon a robust situational analysis regarding sexual, reproductive and maternal health in the country, as well as the best evidence of what interventions are required to address maternal morbidity and mortality (UNITED NATIONS, 2000, para. 43f). The four pillars of reducing maternal mortality are now well-understood: skilled birth attendance, access to emergency obstetric care (EmOC), and a functioning referral network, together with family planning (FREEDMAN et al., 2007). Therefore, every national plan of action on maternal health must prioritize these four pillars in the context of strengthening the overall health system, as the “appropriate” measures to be adopting pursuant to international law, although legislative and programming measures will vary contextually based upon the situational analysis (UNITED NATIONS, 1966, art. 2; UNITED NATIONS, 2000; YAMIN; MAINE, 1999). In keeping with international law, a national plan of action should also include a broad range of services related to sexual and reproductive health, which are aimed at enabling women to exercise agency with respect to their bodies and, in turn, their lives (ICPD, 1994, para. 7.2; UNITED NATIONS, 2000, para. 20-21; UNITED NATIONS, 1999).

Under international law, the process of devising a national plan must be transparent and participatory, and its implementation must be subject to periodic evaluation, which is also public (UNITED NATIONS, 2000, para. 43f). If maternal

health is a matter of rights, the women who use health services are not objects of governmental charity or targets of a development policy designed elsewhere; they and their families are agents who have a role to play in the definition of programs and policies that structure the possibilities for their well-being. Therefore, participation cannot be hollow consultation; it must be linked to the policy decisions taken by a government (often in conjunction with a donor or multilateral institution). For example, the public is entitled not only to know whether health facilities are being required to provide for traditional birthing positions and other culturally appropriate care; civil society should be entitled to influence the definition of what constitutes culturally appropriate care.

Requiring policy decisions that affect people's rights, including women's rights to maternal health, to be justified and subjecting those justifications to public scrutiny is fundamental to accountability, and goes well beyond curbing patently arbitrary policies. There will always be questions that arise in the interpretation of a situational analysis or design of a national plan that are not technical in nature, but reflect profound value judgments. For example, although human rights requires non-discrimination and General Comment 14 calls for the national plan of action to give "particular attention to the vulnerable and marginalized," (UNITED NATIONS, 2000; para 43f) there is no single answer to exactly how much priority should be placed on remote and under-served areas in comparison with impoverished and heavily populated peri-urban areas. In conventional, utilitarian public health or development programming, such decisions might be made based upon cost-utility calculations by groups of experts. However, in a human rights paradigm, such planning and budgeting must be subject to meaningful public deliberation.

The Rawlsian ethicist, Norman Daniels, proposes "accountability for reasonableness," to ensure the justness of processes to set priorities in health (DANIELS, 2008). To meet the standards of accountability for reasonableness, which is broadly consistent with human rights concerns, the process of devising a plan of action and setting priorities must be 1. subject to public justification; 2. reasonably related to the end of reducing maternal mortality and promoting maternal health; 3. enforceable; and 4. afford some form of appeal in certain circumstances, such as the evident neglect of a minority population (DANIELS, 2008; GRUSKIN; DANIELS, 2008).

3.2 Budgetary Analysis: Tracing Expenditure and Allocation as Fundamental to Accountability

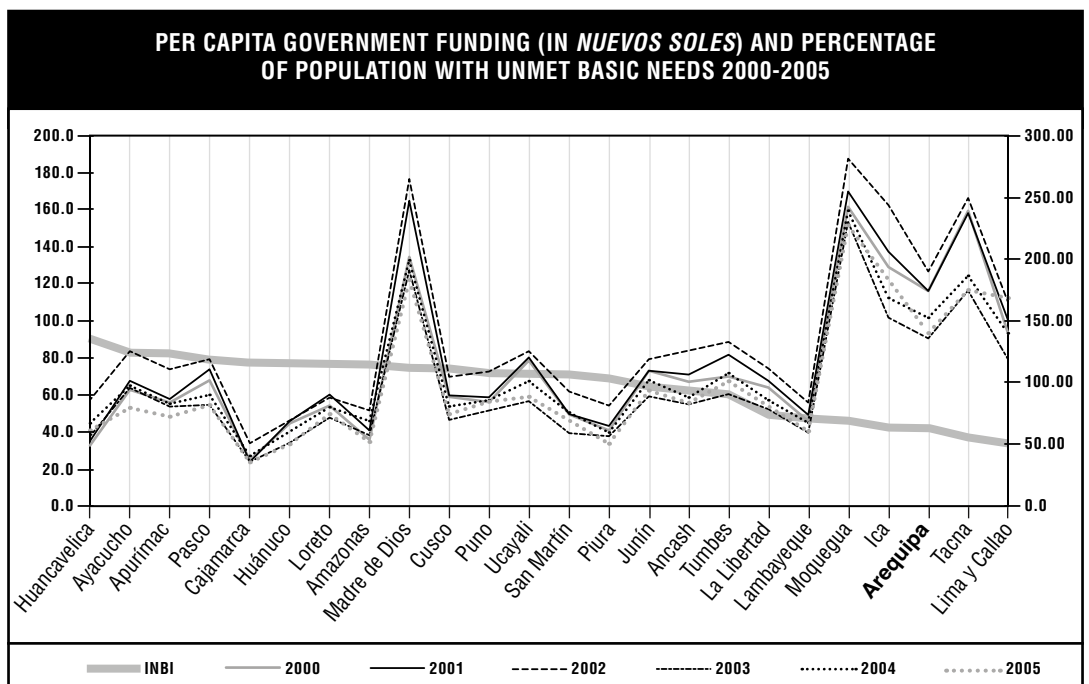
Plans of action can be suffused with rights-based principles but progress toward fulfilling the right to maternal health requires expenditure. Budgets often offer the best evidence of whether governments are actually making maternal health a priority (KGAMPHE; MAHONY, 2004). Therefore, demanding transparency and accountability in budgets is a key to transforming health systems to meet women's needs.

An innovative example of international advocacy around budgetary accountability is the "6 Question Campaign" whereby through the International Budget Partnership civil society organizations in 85 countries are assessing their governments' commitment to MDG 5 among other issues. Two out of the six questions relate to maternal health,

and specifically to expenditures for uterotonics and magnesium sulphate and the training of skilled midwives (INTERNATIONAL BUDGET PARTNERSHIP, 2010). The results of the campaign are to be released just before the MDGs summit in September 2010, and in all likelihood will reveal as much about whether governments are willing to and capable of providing this information as how much money is being spent.

At times the budgetary issue is whether a state is devoting the “maximum extent of its available resources” to the right to health and to efforts to address maternal mortality in particular, in accordance with international human rights obligations. In *The Missing Link: Applied budget work as a tool to hold governments accountable for Maternal Mortality Commitments*, the International Initiative on Maternal Mortality and Human Rights (IIMMHR) draws on examples from Mexico, Tanzania and India to “underscore that the lack of real progress in reducing maternal mortality is unquestionably linked to the failure of governments to make maternal health a budgetary priority” (IIMMHR, 2010, p. 7).

However, it is sometimes the case that substantial resources exist and may even be going into the health sector, but results are poor due to a wide ranging series of factors. These factors include: lack of capacity to absorb resources, ineffective investment of funds, weak financial management, poor procurement practices, limited oversight, and poor district level management in decentralized health care systems (INTERNATIONAL BUDGET PARTNERSHIP, 2001; KEITH-BROWN, 2005). It is essential to go beyond the design of budgets to pinpoint accountability gaps in terms of allocation and implementation, in order to design targeted strategies, whether for corruption or for ineffective investment.



Source: SIAF-MEF in Portocarrero AG. La Equidad en la Asignación Regional del Financiamiento del Sector Público de Salud. 2000-2005. CIES: 9. (YAMIN et al., 2007).

Among the most valuable information that budgetary allocation reveals from a human rights perspective relates to, “understanding *who* among the population is prioritized” which, in turn, “allows us to demonstrate whether the government is fulfilling its obligation of non-discrimination” (IIMMHR, 2010, p. 7). For example, a 2007 report I wrote for Physicians for Human Rights, *Deadly Delays: Maternal Mortality in Peru*, showed that the government of Peru was misallocating federal health spending toward departments with fewer unmet basic needs. Thus, Huancavelica, a department with over 90% of the population with unmet basic needs, was receiving a fraction of the federal health spending per capita that other, largely urbanized coastal and wealthier departments were receiving.

Moreover, the departments below the black line—that is, lower federal health spending per capita in comparison with unmet basic needs—had generally higher proportions of indigenous population than those departments above the black line.

In turn, the *Deadly Delays* report showed that, predictably, fewer resources resulted in fewer of the interventions necessary to save women’s lives. Huancavelica had a very low proportion of births attended by skilled personnel (21%), in comparison with other departments that received more health spending (YAMIN et al., 2007). Peru’s own progress report on the MDGs at the time highlighted the unequal achievement of progress on MDG 5 (UNITED NATIONS, 2004a, p. 62). Using a human rights framework that included budgetary analysis, however, enabled a recasting of those persistent disparities as substantive discrimination resulting from a misallocation of resources—discrimination which was entitled to redress (YAMIN et al., 2007).

In a 2009 report on maternal health and other economic and social rights in Guatemala, the Center for Economic and Social Rights (CESR) also found misallocations of resources that correlated to ethnic lines and resulted in *de facto* discrimination. The CESR report went a step further by exposing the connections between Guatemala’s regressive and inadequate tax policies and its poor record on social spending, including on maternal health (CESR, 2009).

Requiring governments to publicly justify their budgetary allocations as well as the policies that lead to insufficient available resources to spend on social policies, including maternal health, constitutes an important step in fostering systemic accountability. So does providing the public with the tools and information necessary to assess whether expenditures have been effective.

In order to open budgets, the promulgation of freedom of information laws is crucial. However, generating a culture of participation, accountability and transparency at all levels of government is necessary to make budgets more responsive to people’s, and in particular women’s, needs. In order to assure such a culture, capacity- building for civil society organizations in budget monitoring is essential. Moreover, donor states should be held to the commitments they have made in keeping with the Paris Principles and the Accra Agenda for Action to ensure transparency with respect to the way monies they provide or facilitate are spent, and similar requirements should be made of private donors (OECD, 2008).

3.3 Monitoring: The Critical Role of Indicators in Measuring Progress and Establishing Priorities

Holding governments accountable for fulfilling the right to maternal health under international legal obligations requires monitoring “progressive realization.” Human rights advocacy groups are expert at assessing the adequacy of policy measures States are taking, as well as determining when they are adopting legislation or policies that indicate retrogression, such as restrictions on contraception availability or draconian abortion bans (AMNESTY INTERNATIONAL, Nicaragua, 2009a). It is critical to identify such laws and policies, which constitute social determinants of MMM.

However, for both governments and advocacy groups, evaluating whether a state is making adequate progress on improving maternal health requires applying appropriate quantitative indicators. For example, as we are concerned with disparities as much as aggregate progress from a human rights perspective, it would be helpful to have disaggregated maternal mortality ratios (MMRs)—the indicator for whether states will achieve MDG 5(a). However, MMRs alone are inadequate as they rely upon data that is generally difficult to collect and interpret, for both statistical and practical reasons (MAINE, 1999). Thus, for example, estimates of Sierra Leone’s MMR range from a low of 857 per 100,000 live births in the government’s latest Demographic and Health Survey (DHS) in 2009 to a high of 2,100 per 100,000 (SIERRA LEONE, 2009; AMNESTY INTERNATIONAL, Sierra Leone, 2009b). The truth is that we do not know what Sierra Leone’s actual MMR is, or what it will be in 2015, let alone actual regional disparities within the country. Moreover, MMRs alone do not tell us what the priorities are in terms of addressing MMM.

Therefore, in order for governments to measure their own progress— as well as for advocacy groups to hold them accountable for progressive realization—we need process indicators that: (1) can be measured continuously, so as to permit an assessment of the performance of a given administration; (2) are objective, and comparable across time and countries and/or sub-regions of countries; and (3) relate to the programmatic interventions that we know to be linked to reducing maternal deaths.

For example, data on met need for contraception and skilled birth attendance are critical, as are indicators such as access to anti-retroviral medications, especially in regions where there is a deadly synergy between the HIV epidemic and MMM (HOGAN et al., 2010). All of these indicators should be disaggregated by income quintile, race/ethnicity and region.

Indicators that measure the availability, distribution and use of emergency obstetric care (EmOC indicators) are also not only crucial, but can be being directly linked to requirements under international law that governments make the appropriate care available, accessible, acceptable and of adequate quality (the so-called AAAQ framework) (UNITED NATIONS, 2000, para. 12). A 2009 (WHO et al., 2009) handbook sets out these updated EmOC indicators, which were devised by the WHO, Unicef, and UNFPA, in conjunction with the Averting Maternal Death and Disability program at Columbia University (AMDD). Importantly, the EmOC indicators can be monitored at both the district and the national level,

as monitoring at a level “where there is power to effectuate change” is the key to transforming health systems (FREEDMAN et al., 2005).

Further, in the face of multi-factorial causes underpinning high maternal mortality, the EmOC indicators can prove extremely useful to governments in setting priorities and, insofar as these are made publicly available, to advocates in holding governments accountable for adopting the appropriate priorities. For example, the AMDD Handbook contains an exercise that presents three scenarios. In Scenario 1, there are three functioning EmOC facilities for nearly 1 million people rather than the 10 that is set as a minimum acceptable level, and they are mostly in urban areas. Although the other indicators are poor as well, the lack of availability of care stands out. When made publicly available, as it should be, this information allows advocates, as well as government program planners, to give first priority to accountability for upgrading facilities to provide available care, especially in rural, underserved areas (WHO et al., 2009, p. 41). From a human rights accountability standpoint, ethnographic information should be supplemented to the distribution of facilities to discern possible patterns of discrimination in accessibility (UNITED NATIONS, 2000, para. 12).

In Scenario 2, there are nine functioning EmOC facilities, including some in rural areas, and two of these provide comprehensive care. However, very few women who require EmOC are being cared for in these facilities (met need for EmOC is 8%) (WHO et al., 2009, p. 42). Low use of EmOC could be attributable to lack of accessibility (whether geographic, economic in the form of user fees or other barriers and/or lack of accessible information) as well as to lack of cultural acceptability, and/or perceived/actual lack of quality. All of these point to failures of accountability. However, they require distinct solutions. In order to discern the nature of the accountability gaps underlying low use, a number of investigative methods might be used by the government or advocacy groups, including community-based surveys, community focus groups, interviews with staff, direct observation of the operation of the facilities and a review of the record-keeping systems (WHO et al., 2009, p. 42).

In Scenario 3, there are 13 EmOC facilities including three comprehensive ones (which includes blood storage and surgical capacity), and they seem to be well-distributed in terms of rural-urban areas. Fully a quarter of births take place in facilities and met need for EmOC is almost two-thirds. However, the direct obstetric case fatality rate is very high at 15% (with a maximum acceptable level of 1%). In this scenario, the quality of care in the EmOC facilities must be the first concern in terms of identifying accountability gaps (WHO et al., 2009, p. 42). Furthermore, in this case, maternal death audits and verbal autopsies can prove extremely useful in discerning whether high case fatalities relate to late presentation or to the management of care, provided that they meet the conditions laid out above.

The selection and application of indicators is far from a technical issue; dignity includes access to blood and sutures and we need a way to measure that access if accountability is to be meaningful. By linking the government responsibility for AAAQ, with the evidence we find regarding specific obstacles to women getting the necessary care, we can see that maternal deaths are the foreseeable result of systematic failures with respect to policy, programming and budgeting decisions, in addition to social and cultural factors. Thus, to the extent this information is made

publicly available, donors, advocates and governments need no longer discuss abstract accountability for realizing the right to maternal health. Rather, it becomes possible to identify very concrete ways in which ministries of health can operationalize their legal obligations to fulfill the right to maternal health.

It is a substantial positive step toward accountability that Countdown to 2015 now includes an indicator on the availability of EmOC facilities in its global tracking. However, such tracking requires needs assessments and ongoing measurements of EmOC facilities, which have not been done in all countries, including many with high levels of maternal mortality. Although the EmOC indicators have been applied in approximately 50 countries (WHO et al., 2009), they have not always been used at the national level or on a continuing basis. A major step toward accountability would be to institute the continuous gathering and use of this data in health systems around the world, including both public and private facilities, and to ensure that the information is widely accessible.

Governments bear the primary responsibility under international law for selecting and using appropriate indicators, as well as for providing the public with transparent access to information regarding their measurement and implications. However, as donors and international agencies often drive the use of indicators, this is an area in which they can play an especially important role, through bilateral health assistance as well as the MDGs process. For its part, the HRC could promote meaningful accountability by having states report on the availability of EmOC facilities, if not all of the EmOC indicators, as part of universal periodic review, and encouraging states that have not done so to adopt the EmOC indicators. UN treaty-monitoring bodies could take similar measures to emphasize the importance of monitoring the use and availability of EmOC in addition to family planning, skilled birth attendance and other areas, in meeting maternal health-related obligations under relevant human rights treaties.

4 Fostering “Constructive Accountability” at the Facility Level

National and district-level initiatives are crucial but the importance of regular monitoring and evaluation, and initiatives taken at the facility-level should not be overlooked to increase transparency, responsiveness and participation in the health system, which are all crucial to a human rights-based approach to accountability (GILL et al., 2005, p. 192). Changes as simple as requiring that prices for any services or medications be posted clearly, and not subject to negotiation, or that staff wear name tags so patients can identify them by name can shift attitudes and relationships between providers and patients markedly. Such reforms are not just important for maternal health, but for all of the health issues addressed within the facility and through its community outreach.

Facility-based accountability initiatives should be implemented in such a way as to be respectful of the staff’s rights, as well as the rights of patients. Not only should health workers not be scapegoated for institutional failures, they should also not be subject to unreasonable demands. For example, no single staff member can be expected to work ‘24/7’ so that there is always coverage; nor can they be expected to

dip into their own salaries to pay for medicines or supplies for women experiencing obstetric emergencies. On the contrary, front-line health workers can be encouraged to participate in resolving the accountability-deficits in their facilities by creating incentives for both the reporting and addressing of issues. Personal and institutional leadership has proven instrumental in implementing rights-based approaches to accountability at the facility level (SCOTTISH HUMAN RIGHTS COMMISSION, 2009).

However, the users of health facilities, whether private or public, also need to be able to file grievances when they face mistreatment, discrimination, or inadequate care (HUMAN RIGHTS WATCH, 2010). Grievance redressal mechanisms must be accessible to all users and family members, including illiterate persons who cannot file written complaints. Moreover, in order to be effective they must permit addressing systemic issues that go beyond the facility.

Further, community participation in oversight of the facility should go beyond grievance redressal. In Peru, for example, the CLAS (Local Committees for Administration in Health) facilities involve local community members in managing councils that engage in planning, financial auditing and oversight of the facilities, along with the professional staff. Similar schemes exist in other countries, and are sometimes coupled with community-based human rights education. Such schemes should be studied to discern best practices in making facilities accountable to local communities for maternal and other health care, and for enabling local community members, and women in particular, to appropriate their sense of being rights-holders demanding legal and social entitlements (YAMIN et al., 2007).

The objective is to establish what Lynn Freedman (2003) refers to as “constructive accountability”—a new dynamic of entitlement and obligation. Implemented effectively, facility-based accountability can foster fundamental changes in attitudes among both community members as well as health staff about their rights and responsibilities, and the role of the health system.

4.1 Remedies: The Role of Courts and Quasi-Judicial Bodies as Integral to Transforming Health Systems

Monitoring alone is insufficient to produce human rights-based accountability (POTTS, 2008). Fundamental to the force of rights is their binding legal nature. Judicial and quasi-judicial remedies therefore have a key role to play in at least four areas related to the right to health, and to maternal, sexual and reproductive health in particular: implementation of existing laws and policies; reform of policies and budgets that fail to take reasonable account of health rights; removal of legal restrictions on care; and challenges to systemic violations of women’s maternal and reproductive health rights in practice.

First, remedies should be available to ensure accountability for the implementation of existing laws and policies. It is unfortunately all too common for legislation and policies relating to reproductive and sexual health not to be implemented through adequate regulations. For example, in the case of *Paulina Ramirez v Mexico* (IACHR, 2007), the Center for Reproductive Rights together with the Reproductive Choice Information Group (GIRE, for its Spanish acronym)

brought a petition to the IACHR in 2002 involving the failure of the government to enact adequate regulations relating to the access to abortion in rape cases, which was provided for under law (IACHR, 2007). The case was settled with the Mexican government through an amicable resolution procedure, whereby the government agreed not only to compensate the named petitioner but also to issue a decree regulating guidelines for access to abortion for rape victims (IACHR, 2007). Moreover, the process of litigation and the surrounding mobilization on the issue played an important role in changing the public debate around abortion in Mexico and leading to the eventual liberalization of the abortion law in Mexico City.

In March, 2010, the Delhi High Court not only ordered a maternal death audit to be carried out in relation to the death of Shanti Devi, a woman from a scheduled caste who had faced severe discrimination in the health system, but also called for the proper implementation of state-sponsored schemes relating to maternal and child health care for the poor. Citing both international law and prior orders of the Supreme Court, the Delhi High Court called for eliminating onerous burdens of proving indigence to access reproductive health services, ensuring the portability of benefit schemes across states and guaranteeing cash assistance to women in need (INDIA, *Laxmi Mandal v Deen Dayal Haringer Hospital & Ors Writ Petition*, 2010).

Second, remedies can achieve reforms of policies and budgets that do not adequately protect health rights. In the now well-known *Treatment Action Campaign* case (SOUTH AFRICA, *Minister of Health v. Treatment Action Campaign*, 2002), the South African Constitutional Court found the restriction of Nevirapine treatment for prevention of mother-to-child transmission (PMTCT) to 18 pilot sites to be unreasonable in light of its constitutional obligations relating to the right to health. The Court not only ordered the extension of PMTCT to the whole country, but also called for a national plan of action with regard to PMTCT and established itself as guardian of the implementation of that plan of action.

The Colombian Constitutional Court has held that reducing the national budget for the subsidized health insurance scheme, which provides coverage to the poor, was inconsistent with the government's obligations relating to the right to health. The Court considered such budgetary reductions to constitute impermissible retrogression, especially as they would affect the most vulnerable sectors of Colombian society (COLOMBIA, 2000, 2004).

Third, remedies must be available to challenge legal barriers to care that are discriminatory or directly violate health rights. Abortion restrictions have produced substantial litigation of this type. For example, in a pair of important cases, the Colombian Constitutional Court declared unconstitutional the prohibition of therapeutic abortions as violating women's rights to health and life with dignity (COLOMBIA, 2006). The Court later mandated that all health institutions ensure access to providers who would perform such abortions, noting that conscientious objection was a right of individuals and not institutions (COLOMBIA, 2009). Importantly, the Court's ruling in this case as in others (COLOMBIA, 2008) applies to both private and public providers. Indeed, judicial intervention has been important in setting out the scope of private actors' obligations with respect to providing care in a number of countries.

After Nicaragua revised its penal code in 2008 to include a total ban on abortion, even when a woman's life is at risk, a coalition of non-governmental organizations in Nicaragua and around the region brought a case to the IACHR (IACHR, "*Amelia*", *Nicaragua*, 2010) challenging the provisions of the law as violating *inter alia* the rights to life and health. The IACHR issued precautionary measures in the case, ordering the Nicaraguan government to ensure that the petitioner had access to appropriate medical treatment for her condition. The case has been accompanied by mobilization around the issue, at both the national level and through Amnesty International at the international level (AMNESTY INTERNATIONAL, *Nicaragua*, 2009a).

Fourth, legal remedies are essential in cases where there are systemic violations of women's health rights in practice. For example, legal recourse proved a pivotal part of a larger strategy of accountability in Peru when between 1996 and 1998 an estimated 260,000 overwhelmingly indigenous women were sterilized without fully informed consent and under conditions where their rights to health and lives were at risk. A coalition of Peruvian NGOs litigated the emblematic case of Maria Mamérita Mestanza Chávez (IACHR, *Peru v. Maria Mamérita Mestanza Chávez*, 2000), in which a woman was involuntarily sterilized and later died as a result of the operation as emblematic of a pattern of violations of fundamental rights and discrimination against indigenous women in Peruvian society. After the case was dismissed in the Peruvian legal system, these NGOs successfully resolved a petition in the Inter-American system.

Similarly, in 2008 the Center for Reproductive Rights brought a petition to the Committee on the Elimination of Discrimination against Women (CEDAW) against Brazil in relation to an emblematic case of systematic *de facto* discrimination against Afro-descendants in maternal health care in that country (UNITED NATIONS, *Alyne da Silva Pimentel v. Brazil*, 2007). In the first maternal mortality case to be brought before CEDAW, the Center, together with Brazilian partner Advocaci, asked for the government not only to compensate the petitioner's surviving family, but also to prioritize the reduction of maternal mortality in practice, including by training providers, establishing and enforcing protocols, and improving care in vulnerable communities.

In short, the use of remedies in these ways goes far beyond restitution of a pre-existing equilibrium or promises of non-repetition. Rather, judicial and quasi-judicial interventions can play important roles in a larger accountability strategy aimed at transforming discriminatory and exclusionary health systems and practices that bear on women's maternal and reproductive health and well-being.

In addition to judicial remedies, National Human Rights Institutions (NHRIs) can sometimes promote systemic accountability for the progress of maternal health goals, as well as for violations of maternal health-related rights. Over the past decade in Peru, for example, the *Defensoría del Pueblo* (Human Rights Ombuds Office) has actively pursued monitoring and oversight of reproductive and maternal health rights. This has led, *inter alia*, to revised regulations and policies relating to issues ranging from informed consent to regulations regarding traditional birthing positions (PERU, 1999; YAMIN et al., 2007; PERU, 2005). Unfortunately, Peru

is an exception. Given the current interest from donor states and foundations in NHRIs, it would be important to address systematically limitations on budgets, human resources, skill sets and mandates that are currently preventing the majority of NHRIs from being effective accountability mechanisms in the realm of maternal health and other areas (SRIPATI, 2000).

5 Donor Accountability: Promoting Compliance with Obligations of “International Assistance and Cooperation”

Many of the decisions that affect the scope of women’s rights to maternal health in the global South are taken by governments in the North and in international organizations controlled by member states from the North. The ESC Rights Committee has been clear: “For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfill their core and other obligations [including their core obligations relating to maternal and reproductive health]” (UNITED NATIONS, 2000, para. 45).

Nevertheless, the contours of such obligations are not clear and international declarations regarding obligations of international assistance and cooperation remain extraordinarily weak. The Paris Principles on Aid Effectiveness, for example, emphasize “harmonization” and “alignment” without binding commitments based on rights (OECD, 2008). The Accra Agenda for Action is somewhat stronger than the Paris Principles, calling for assistance to be done “in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability.” (OECD, 2008). However, this wording is not followed by the elaboration of specific obligations of support.

Moreover, unlike the other MDGs, MDG 8, which calls for actions from donor countries sets no targets. In general “the global partnership for development” envisioned in MDG 8 has not materialized around maternal and reproductive health, and basic health systems improvements (UNITED NATIONS, 2010b). Meaningful inclusion of human rights in the MDGs, and into development practice more broadly, demands that targets and corresponding indicators be established through which to hold donor states accountable, as well as national governments in the global South. Those indicators should relate not merely to increasing sustained support for child and maternal health (MDGs 4 and 5, respectively) and health systems more broadly, but also to changes in a wide array of other policies that affect the possibilities of women to enjoy their rights to maternal health.

But such indicators alone are insufficient. Promoting accountability of donor states and international financial institutions requires concerted efforts to raise the costs of non-compliance with both obligations to refrain from policies and actions that undermine the right to health and to provide affirmative economic, as well as technical, assistance (UNITED NATIONS, 2004b; UNITED NATIONS, 2006a). Those costs can be financial, political and social. For example, the HIV/AIDS movement has been particularly effective in shifting the cost-benefit calculus of

international actors, including donor states and transnational corporations, as well as governments regarding policies and funding relating to access to anti-retrovirals and HIV/AIDS generally. It is still unclear whether increasing engagement by human rights NGOs, including Amnesty International's important global campaign on maternal mortality, will lead to mobilizing a sustained international movement on maternal health that could exert substantial pressure on donor states. Such pressure would relate to refraining from doing harm, as well as to economic and technical assistance. An obvious example with respect to the obligation to "do no harm"—to refrain from actions that undermine maternal health—relates to the recruitment of health care workers from countries in the global South which are facing dire shortages of health care personnel to meet their right to health obligations. As a policy briefing on MDG 5 from *Realizing Rights* states: "Donor countries must ensure policy coherence in this respect. Moreover, not addressing health worker migration undermines donor credibility – why build up health systems in developing countries just to take away precious human resources from them? Policy coherence on this is critically important." (REALIZING RIGHTS, 2010). In May, 2010, the World Health Assembly unanimously adopted a global Code of Practice on the international recruitment of health personnel (WORLD HEALTH ASSEMBLY, 2010). The Code calls for voluntary commitments to adopt responsible recruitment policies, but its existence now provides a framework that may encourage cooperation as well as potentially be used to raise the political costs of non-compliance for any individual country that fails to adopt and abide by such commitments.

Second, donor governments must increase economic assistance, as well as technical support. MDG 5 has been the most underfunded MDG and, not surprisingly, has shown very uneven progress (OECD, 2006; FREEDMAN, L.P. et al., 2007, p. 1133; UNITED NATIONS, 2010b). Although a 2010 *Lancet* study shows some promising evidence of improvement, it remains clear that enormous increases in global health funding over the last decade have not translated into the necessary investments in basic health services and reproductive health (HOGAN et al., 2010; THE WORLD BANK, 2009; OECD, 2009). Even the most optimistic picture presents great disparities in progress, and global levels of maternal mortality are far higher than that required to achieve the 75% overall reduction since 1990 levels called for under the MDGs (HOGAN et al., 2010; HILL et al., 2007, p. 1311; COUNTDOWN TO 2015, 2010, p. 10).

Although most maternal and newborn care is funded domestically, many poor countries are simply not in a position to provide the necessary services to save women's lives. For example, in late 2009, donor agreements made possible the establishment of a free care policy for pregnant and lactating women and infants in Sierra Leone, where Amnesty International had documented that user fees posed one of the greatest barriers to access to care (WAKABI, 2010; AMNESTY INTERNATIONAL, Sierra Leone, 2009b).

Overall, however, while the MDGs have coincided with marked increases in global health funding, this has been largely around HIV/AIDS (OECD, 2009). Whereas from 1990 to 1998 12% of all donor funding (12% of DAC) was allocated

to HIV/AIDS and STI control, over the 1999 to 2004 period, this percentage had risen to 25% (24% DAC) in 2007. In contrast, family planning decreased over the same period from 10% to 6% (14% to 6% DAC), and reproductive health care donor funding showed slight dips from 8% to 6% total donors (7% to 6% DAC) (OECD, 2006). ODA for maternal, newborn and child health accounted for only 31% of all ODA for health in 2007 (COUNTDOWN TO 2015, 2010, p. 36).

The issue is not cutting up the ODA pie differently; the issue is increasing the pie. A 2009 UN Report concludes: “Without political will and a firm commitment to population, reproductive health, and gender issues, it is unlikely that the goals and targets of the International Conference on Population and Development and the Millennium Summit will be met” (UNITED NATIONS, 2009b, p. 20).

A number of authors have argued that the consensus on the need to address the global HIV/AIDS pandemic—because in part the financial, political and social costs of not doing so would be too high for countries in the North, as well as those in the South—has been more important in increasing funding than the targets set out in MDG 6 (CROSSETTE, 2005, p. 77; HULME, 2009, p. 24). Moreover, the creation of the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) and the United States President’s Emergency Plan for AIDS Relief created important institutional mechanisms through which to establish donor state commitments. The March 2010 UN Secretary General’s Report on the MDGs states that, in light of the need to improve the quality, predictability and durability of aid, in addition to the quantity, “Pooling of donor resources into multi-donor funds has proved time and again to be a fruitful approach, with great successes, for example, in the control of several infectious diseases” (UNITED NATIONS, 2010b, para. 85).

In this regard, a number of authors argue that the Global Fund’s mandate might be expanded to include maternal and child health, or health systems broadly (THE LANCET EDITORIAL BOARD, 2010; STARRS; SANKORE, 2010; STARRS, 2009; CORNETTO et al., 2009). Such proposals go significantly beyond integrating maternal and reproductive health into HIV/AIDS programs, which is feasible under the current mandate.

The Global Fund, which was established in 2002, is far from a perfect mechanism. Criticisms regarding sustainability, inefficiency and lack of transparency have plagued it, resources have not been allocated equitably among HIV/AIDS, tuberculosis and malaria, and interventions have at times undermined rather than strengthened health systems (HALL, 2005). Moreover, the creation of a mechanism cannot stand alone; constant pressure from the HIV/AIDS movement in different countries has played an important role in sustaining financial commitments to the Global Fund.

Nevertheless, expansion and adaptation of the Global Fund presents the possibility of engaging donor states in long-term commitments to maternal health and health systems more broadly. The framework established through the Global Fund critically does not assume that addressing critical health needs be done in a “sustainable” way—*i.e.*, that aid is for a time certain and efforts should be directed at making poor governments fend for themselves despite a lack of financial, material and human resources and a global architecture that stacks the odds

against them (CORNETTO et al., 2009; THE GLOBAL FUND, 2007). Instead, there is an assumption of some international responsibility and a concomitant ongoing international commitment for funding activities to address HIV, TB and malaria (UNITED NATIONS, 2006a, para. 41). There desperately needs to be a similar global commitment for investing in health systems, and maternal health in particular. Expanding and adapting the Global Fund, or creating a similar mechanism, would demonstrate serious donor commitment as well as potentially raise the political and social costs of erratic suspensions of aid for health systems in the long term.

6 Conclusions

Maternal mortality is not principally a medical problem; it is primarily a social problem and a problem of political will at both the national and international level. The reason that hundreds of thousands of women and girls are still dying every year is not because we do not know how to save them. Women are still dying in massive numbers around the world because women's lives are not valued, because their voices are not listened to, because they are discriminated against and excluded in their homes and communities—and by health care systems that do not prioritize their needs.

I have argued here that promoting transformative accountability with respect to fulfilling the right to maternal health requires more than decrying the scandalous injustice of those deaths, and more than demanding that states act consistently with their international legal obligations. It requires translating the powerful normative discourse of human rights into operational guidance and concrete tools for development practitioners, health planners and service providers, as well as the users of health systems. Transformations of health systems are unlikely to occur with punitive approaches that lead to, intentionally or otherwise, a focus on individual sanctions. They are far more likely to occur by putting into place measures that promote systemic and institutional changes, which in turn foster different relations between providers and users of health services.

National governments should be held accountable for decisions from the initial situation analysis and design of plan of action regarding maternal health to budgeting, monitoring and evaluation, and the provision of remedies. At every stage, transparency, access to information and meaningful public participation are crucial to rights-based accountability. Additionally, donor governments need to be held responsible for policy coherence and increased financial assistance for health systems and maternal health, which will require innovating mechanisms as well as political and social mobilization to raise the economic, political and social costs of non-compliance.

Further, there is an important relationship between international bodies and mechanisms and national ones in terms of promoting accountability. UN treaty-monitoring bodies and special procedures, together with the Human Rights Council and other regional bodies such as the IACHR and the African Commission, have key roles to play in ensuring that laws and policies are consistent with governments' human rights obligations, that adequate progress is being made consistent with appropriate indicators on a non-discriminatory basis; that sufficient resources are being allocated effectively; that

efforts to reduce maternal mortality give special attention to marginalized populations; and that adequate mechanisms of redress exist at the national level.

A human rights approach to MMM calls for subverting a wide range of the “pathologies of power” that systematically marginalize women and their health needs (FARMER, 2005). However, challenging the power structures that prevent women from having choices over their lives must include those in the health system that condemn women to needless suffering and death. As Paul Hunt and Gunilla Backman write: “In any society, an effective health system is a core institution, no less than a fair justice system or democratic political system. . . . It is only through building and strengthening health systems that it will be possible to secure sustainable development, poverty reduction, economic prosperity, improved health for individuals and populations, as well as the right to the highest attainable standard of health” (HUNT; BACKMAN, 2008). Improving health systems cannot be seen as a technocratic exercise; by bringing human rights to bear, transforming health systems can and should be understood as a means of constructing social citizenship for women in a society—and most critically for poor, rural and marginalized women (FREEDMAN, 2005). In a world where women’s reproduction is so heavily cathected, so intimately bound up with religious and cultural power, it is radical indeed to demand that health systems take women’s suffering— and rights— seriously (YAMIN, 2008).

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NOTES

1. The title of this article echoes that of the MDG Task Force Report on Child and Maternal Health: *Who's got the power?: transforming health systems for women and children*. I have benefited from the thinking of so many colleagues in relation to this piece that it would be impossible to acknowledge them all. I am especially grateful to Paul Hunt and Lynn Freedman for their insights about operationalizing human rights approaches in the context of maternal health; to Siri Gloppen, whose ideas regarding the utility of different forms of litigation are very much reflected here; and to Deborah Maine, who has shown me what kinds of programming really make a difference to the millions of women around the world who risk dying in pregnancy and childbirth. All views expressed are personal and do not necessarily reflect those of Amnesty International or the International Initiative on Maternal Mortality and Human Rights.

2. Maternal death is defined as "the death of

a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes." For every woman who dies from obstetric complications, approximately 30 more suffer from debilitating morbidities which include conditions such as uterine prolapse and obstetric fistulae. <http://www.unfpa.org/mothers/morbidity.htm>.

3. 'The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.' (UNITED NATIONS, 2000, para. 33).

RESUMO

O progresso equitativo e significativo na redução da mortalidade materna e na realização do objetivo de desenvolvimento do milênio 5 (ODM 5) demanda a adoção de uma abordagem baseada em direitos humanos que enfatize a *accountability*. Este artigo foca, especificamente, em como promover *accountability* para a concretização do direito à saúde materna se buscamos a transformação do discurso de direitos em políticas públicas de saúde práticas e em ferramentas de planejamento que afetam a prática do desenvolvimento – e, assim, transformam os sistemas de saúde de modo a responder melhor às necessidades de saúde materna das mulheres.

Depois de uma breve discussão sobre o conceito e o objetivo da *accountability* no contexto da concretização dos direitos da mulher relativos à saúde materna, este artigo elabora um ciclo de *accountability* no nível nacional que inclui: desenvolvimento e implementação de um plano de ação nacional; análise orçamentária; monitoramento e avaliação de programas com base em indicadores apropriados; e mecanismo de reparação, bem como iniciativas de base. Na última seção, o artigo trata da *accountability* de doadores.

PALAVRAS-CHAVE

Saúde materna – Direito à saúde – Abordagem baseada em direitos – Accountability – Objetivos de Desenvolvimento do Milênio (ODMs)

RESUMEN

El avance significativo y equitativo en la reducción de la mortalidad materna y el logro del Objetivo 5 de Desarrollo del Milenio requiere la adopción de un enfoque basado en los derechos humanos que ponga énfasis en la rendición de cuentas. El presente artículo se concentra específicamente en cómo promover la rendición de cuentas para la realización del derecho a la salud materna si buscamos transformar el discurso de los derechos en política sanitaria y herramientas programáticas que puedan afectar la práctica del desarrollo, y al mismo tiempo transformar los sistemas de salud para satisfacer mejor las necesidades de las mujeres en términos de la salud materna.

Después de analizar brevemente el concepto y la finalidad de la rendición de cuentas en el contexto de la realización de los derechos de la mujer a la salud materna, el artículo propone un círculo de rendición de cuentas a nivel nacional que incluye el desarrollo e implementación de un plan nacional de acción; análisis presupuestario; monitoreo y evaluación de programas sobre la base de indicadores adecuados; y mecanismos de reparación, como así también iniciativas a nivel de los centros de salud. En la última sección, el artículo aborda la rendición de cuentas de los donantes.

PALABRAS CLAVE

Salud materna – Derecho a la salud – Enfoque basado en los derechos (EBD) – Rendición de cuentas – Objetivos de Desarrollo del Milenio (ODMs)



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ABSTRACT

The MDGs are the world's biggest promise on how to reduce global poverty and human deprivation. Formulated as goals to be implemented at national level and based on result-oriented outcomes, they appear devoid of all human rights commitments. This paper explores how MDGs fit into an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated into the right to health. The discussion determines whether the MDG 6 can be re-cast or readjusted to foster real participation, non-discrimination as well as equality, accountability, and access to health. Can the leading proponents from both sides chart a new route that could integrate rights and anti-poverty strategy through the MDGs?

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KEYWORDS

Human Rights – Health – MDGs



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MILLENNIUM DEVELOPMENT GOAL 6 AND THE RIGHT TO HEALTH: CONFLICTUAL OR COMPLEMENTARY?

Sarah Zaidi

1 Introduction

The eight Millennium Development Goals (MDGs), endorsed by 189 governments, are a careful restatement of development challenges related to poverty set to be achieved by 2015. Announced with great enthusiasm by Secretary-General Kofi Annan, the MDGs cover topics in key social and economic issues: eradication of extreme poverty (admittedly a proportion of only 50 percent of the people living on less than US\$ 1 per day), universalization of education promotion of gender equality, reduction of child mortality, improvements in maternal health, fight against HIV/AIDS, malaria and other diseases, advancement of environment sustainability, and elaboration of a global partnership for development. They focus on how to tackle and improve the lives of the 1.2 billion persons who live on less than US\$ 1 per day. The eight goals are associated with 21 targets and over 60 indicators, which represent societal averages of mainstream outcomes reflecting the processes of classic development sector measurements (NELSON, 2007, p. 2041).

The MDGs, seen to represent the human development agenda initiative of the United Nations Development Programme (UNDP), bypassed altogether a rights-based approach to addressing issues of poverty in the developing world as discussed in the UNDP-Human Development Report of 2000 (UNITED NATIONS, 2000a) and instead embraced the key income poverty monitoring measures of the World Bank (SAITH, 2006). The final MDG document sidestepped not only the 1997 Program for Reform which had human rights at the core of its activities (these reforms were designed by Kofi Anan's office and human rights were reflected in the Millennium Declaration) (UNITED NATIONS, 1997, 2000b), but also ignored the protracted struggle for economic, social and cultural rights and the right to

Notes to this text start on page 142.

development waged by civil society and Southern states (NORMAND; ZAIDI, 2008, p. 239). The formulation of the MDGs targets, outcomes, strategies, and policies lacked the recognition of substantive rights enshrined in the International Bill of Rights (the Universal Declaration and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) as well as procedural rights such as the right to information, non-discrimination, and participation. Rather than building on mechanisms of accountability, internationally recognized human rights standards and principles to which governments are obliged to adhere, the MDGs focused on operational goals, indicators, and benchmarks aiming at showing international donors such as the G8¹ the effectiveness of foreign aid in poverty reduction (HULME, 2009). Nonetheless, the goal-oriented framework of MDGs has yielded limited results. Nearly four million more children survive each year, four million HIV positive persons now receive treatment compared to 400,000 in 2000, and many more children are in schools, with many countries crossing the 90 percent threshold since 2000 (UNITED NATIONS, 2010a). However, the MDG Report (UNITED NATIONS, 2009a) observed that many low-income countries especially across Africa still remain off track, and were unlikely to meet the 2015 targets. Moreover, the grim repercussions of the economic crisis were either stalling progress, or reversing the gains that had been made.

Would the progress on MDGs have been better under a human rights framework? Might it have been possible for states to be accountable for failures in meeting set targets? Human rights are a normative claim that human dignity entitles each person to certain kinds of treatment and protections from others, particularly the state. Rights are universal (same for everyone, everywhere); they are inalienable (cannot be taken away or given up); and indivisible (no hierarchy amongst different sets of rights - civil, political, and socioeconomic ones²). International human rights law has established legal obligations to respect, protect, and fulfil the rights of all people under their jurisdiction.

In theory, human rights appear a logical foundation upon which to build a more cooperative and just world, linking notions of freedom with social justice. Philip Alston comments that while the MDGs and the human rights agenda have a great deal in common, “neither the human rights nor the development community has embraced this linkage with enthusiasm or conviction,” instead appearing to “resemble ships passing in the night, even though they are both headed for very similar destinations” (ALSTON, 2005, p. 755). Alston, however, is optimistic about the marriage between MDGs and human rights, suggesting that the human rights community needs to be more engaged in the realization of MDGs as it is the single most important and pressing initiative on the international development agenda and noting that there are a great many possible points of mutual reinforcement. Perhaps, MDGs and human rights are complementary so that the former lays out operational indicators and benchmarks while the latter provides a framework with a set of principles and standards. At the ten-year marker, the Secretary-General’s report on the MDGs mentions the words “human rights” seven times in the text: as a foundation for the MDGs (UNITED NATIONS, 2010a, p. 2), references to the Millennium Declaration (UNITED NATIONS, 2010a, p. 3, 15, 28), as the

guiding principle of action (UNITED NATIONS, 2010a, p. 28), and with respect to affirmation of right to development and economic, social and cultural rights (UNITED NATIONS, 2010a, p. 32). But in the action agenda, human rights language is generally missing. The present article explores why there continues to be this disconnection between MDGs and human rights, examining the MDG 6 dealing with the combat against HIV/AIDS, tuberculosis, malaria and other infectious diseases and how it might have looked different in a human rights context.

Over the past quarter century, the link between health and human rights has been clarified best due to concerns regarding the HIV/AIDS epidemic and reproductive and sexual health, largely through raising issues of discrimination that prevent an individual from accessing health services, challenging the legal system and corresponding legislative reform, and by guaranteeing participation and the building of partnerships by different sectors of civil society. Gruskin, Mills and Tarantola (2007) comment that the HIV AIDS response has best exemplified these links between health and human rights through advocacy, application of legal standards, and programming including service delivery (GRUSKIN; MILLS; TARANTOLA, 2007, p. 451). This paper explores the role of human rights vis-à-vis MDG 6; explicitly measuring what steps states are required to take from the perspective of the right to health. Section two presents briefly the health and human rights frameworks, and section three examines MDG 6 and its relationship with the right to health. For example, are the outcomes of halting and reversing HIV/AIDS, malaria, and other infectious diseases anchored in human rights principles and standards? Does the MDG goal-oriented framework either through its targets or indicators consider issues of discrimination, participation, effective remedy and the right to information? What are the mechanisms of accountability if MDG 6 is not met? In the conclusion, the author explores whether the normative framework of international human rights can form the basis for a new construct to tackle poverty and inequality, after 2015.

2 The Right to Health

The human rights framework is based on the foundation of an International Bill of Rights, which includes the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and its Optional Protocols (1966), the International Covenant on Economic, Social and Cultural Rights (1966), and several core treaties including but not limited to the International Convention on the Elimination of All Forms of Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Rights of the Child, and several optional protocols.³ The optional protocols aim at strengthening the implementation and monitoring of the Convention by establishing, first, a mechanism for individual communications through petitions, and, second, by empowering the treaty bodies to undertake inquiries of systematic violations of the Convention. These international treaties are meant to protect individuals from violations by the state, and also to place obligations on the state to respect, promote and fulfil rights as described (UNITED NATIONS, 2005).

The roots of the right to health are in the public health movement of the 19th century (TOEBES, 1999, p. 12-13). The first health conferences held under the auspices of the League of Nations identified the need for primary services for the population as a whole. The International Labour Organization, established in 1919, predominantly dealt with work-related health issues. However, it was through the creation of the United Nations and its human rights system that the right to health⁴ was enshrined in legally binding treaties. The Constitution of the World Health Organization (WHO), whose provisions were later adapted to the Universal Declaration of Human Rights (UDHR), mentions health as part of the right to an adequate standard of living (article 25⁵), which, however, is not particularly well-defined. Nonetheless, the UDHR is well known and represents customary international law and is therefore considered binding on states by some experts (STEINER; ALSTON; GOODMAN, 2007, p. 133).

Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and article 24 of the Convention on the Rights of the Child (CRC) formulate the right to health in similar manner as the WHO constitution: *everyone's right to enjoy the highest attainable standard of physical and mental health.*⁶ The Director-General of WHO was deeply involved in drafting the ICESCR article, and noted that governments should create systems of health professionals and services (TOEBES, 1999, p. 43).

The right to health as part of an economic, social, and cultural rights framework, has to be read in conjunction with articles 2 and 3 of the ICESCR. Article 2(1) of the ICESCR is on *progressive realization* and reads (UNITED NATIONS, 1966):

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

The above clause allows governments to give insufficient resources as an excuse for not meeting their treaty obligations, and secondly, alleging progressive realization they can postpone their obligations ad infinitum (TOEBES, 1999, p. 294). General Comment number three by the Committee on Economic, Social and Cultural Rights (CESCR) tried to plug this loop hole by suggesting that steps must be taken within a reasonable period of time and that, regardless of their level of economic development, States are to ensure a minimum core obligation of these rights, the so-called core content of the right (UNITED NATIONS, 1990). Moreover, Article 2(1) already mentions the role of international assistance to some extent and recognizes that meeting these rights also involves international development cooperation (CRAVEN, 1995, p. 144).

Articles 2(2) and Article 3 are non-discrimination clauses, the latter regarding sex discrimination. Both are considered to have immediate effect, and discrimination of any type is prohibited under the Covenant. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

includes direct reference to the right to health by giving each person a right (without any discrimination) the right to public health and medical care. The International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) also obligates states to end discriminatory practices in health care and provide adequate health services and counselling. The right to health is also included in the constitutions of many states (KINNEY; CLARK, 2004). The Constitution of the WHO, the Declaration of Alma-Ata, and other important documents recognize the right to health (UNITED NATIONS, 2008a).

The Committee on Economic, Social and Cultural Rights has further elaborated upon and clarified the nature of the right to health and how it can be achieved through its General Comment number 14. Although not legally binding, some salient concepts from the general comment include the requirement that health facilities and services be available, accessible, culturally acceptable, and of appropriate scientific and medical quality. In addition, the general comment notes that the right to health requires not only that certain minimum standards of care be met or exceeded, but that basic preconditions such as food, housing and sanitation, adequate supply of safe and potable water, education, and essential drugs as defined under WHO, also be met (UNITED NATIONS, 2000c).

In terms of **availability**, governments must ensure a functioning health-care system and programs for all sectors of the population, including the underlying determinants of health (food, potable water, sanitation, hospitals, clinics, trained medical staff, and essential drugs). However, the precise nature of the facilities, goods, and services provided can vary depending on the developmental level of the State party. **Accessibility** requires that basic health care services, goods, and facilities be physically accessible, affordable, available without any discrimination, including also the right to information concerning health issues as long as personal health data be treated with confidentiality. In General Comment 14, **acceptability** is defined as health care that meets ethical standards and is also culturally appropriate, i.e. respectful of minorities, marginalized communities, and sensitive to gender and lifecycle requirements. The quality of health care implies skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation as part of health services.

In addition to these substantive elements, there are several procedural protections. For example, discrimination of any sort - individual or systemwide - is a human rights violation and requires the state to provide remedies to redress the abuse either through civil or criminal penalties or by introducing changes in policy or governing legislation. States must also ensure participation of patients and affected communities when it comes to decisions about their own health. Information about health care and health issues should be presented in a public manner and be accessible to everyone. The state should not backslide in terms of its obligation once the right is recognized, and, if it does, then the burden of demonstrating that retrogression was unavoidable lies with the state.

Over the past two decades, increasing intellectual attention has been paid to the right to health. Since 1994 the Harvard School of Public Health has produced a journal exclusively dedicated to health and human rights with the focus “on

challenging - through conceptual analysis and practical action - the interlocking orthodoxies that defraud poor people of the minimal requirements for a healthy life, while fortifying privileged minorities in their lifestyles” (FARMER, 2008, p. 8). The Commission on Human Rights (now replaced by the Human Rights Council) created in 2002 the mandate for a Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Paul Hunt, the first person to serve in this role between 2002-2008, produced several key documents on better understanding the right to health.⁷ In 2004, he published a report highlighting the contribution that the right to health can make to the realization of health-related MDGs that noted:

The right to health involves an explicit normative framework that reinforces the health-related Millennium Development Goals. This framework is provided by international human rights. Underpinned by universally recognized moral values and backed up by legal obligations, international human rights provide a compelling normative framework for national and international policies designed to achieve the Goals (UNITED NATIONS, 2004).

3 MDG 6 and the Right to Health

3.1 MDG 6 Overview

Millennium Development Goal 6 is one of three health goals, and its focus on the fight against HIV/AIDS was expanded to include ‘malaria and other major infectious diseases’, an inclusion that appears to have been the result of successful advocacy of health lobbyists who argued that focusing exclusively on HIV/AIDS created the danger of distorting health budgets, aid flows and health plans in a manner that could negatively impact on health status (HULME, 2009, p. 30-31). The other two health-related goals include MDG 4, on reducing child mortality, and MDG 5, on improving maternal health. In addition, it must be pointed out that Goal 7, on reducing by half the proportion of people without sustainable access to safe drinking water, Goal 1, on eradicating extreme poverty and hunger, and Goals 2 and 3, on education and empowerment of women, are social determinants of health. It is well documented that educated girls and women provide better care and nutrition for themselves and their children. Underpinning the MDG paradigm is the global partnership for development, which facilitates access to financial resources, market access and debt restructuring, as well as access to essential medicines. Eight of the 16 MDG targets and 17 of the 60 indicators are health-related as well. Recent evidence is emerging on how dependent the MDGs 4, 5, and 6, are of each other. For example, an increase in access to AIDS treatment has been linked to a reduction of maternal mortality (HOGAN et al., 2010) and child mortality (RAJARATNAM et al., 2010).

The global progress on MDG 6 on combating HIV/AIDS, malaria, and other diseases reveals that much has been achieved but it is not yet enough to reverse the trajectory of the HIV epidemic: for every two people started on treatment, there are five new HIV infections (UNITED NATIONS, 2010a, p. 7). The burden of tuberculosis

remains high, but of greater concern is the emerging epidemic of multi-drug-resistant tuberculosis and of extensively drug-resistant tuberculosis, and, while great progress has been made in distribution of bed nets to reduce the incidence of malaria (200 million out of the 340 million nets needed were delivered to countries in Africa during 2004 to 2009), there are still 140 million nets needed to achieve universal coverage (defined here as one net for every two people) (UNITED NATIONS, 2010a, p. 8). An effective response to MDG 6 extends well beyond the health sector, as most of these diseases are facilitated by and exacerbated by conditions of poverty, vulnerability, discrimination, and social marginalization or exclusion. Therefore millions of individuals faced health-related disadvantages prior to the introduction of the HIV virus due to their economic and/or social situation (MANN; TARANTOLA, 1998, p. 7).

The HIV/AIDS epidemic often affects those in the prime of their economic productive and sexually reproductive period, and therefore was seen to pose an imminent threat to social and economic development, a formidable challenge to human life and dignity and the effective enjoyment of human rights. The UN Declaration of Commitment on HIV and AIDS, signed by 189 countries, established time-bound targets on HIV AIDS prevention, treatment, care and support as well as human rights to which governments and the UN could be held accountable (UNITED NATIONS, 2001). These targets were seen to support MDGs as governments were concerned that the continuing spread of HIV/AIDS would constitute a serious obstacle to their achievement.

The Declaration of Commitment stated that governments by 2003 would enact and enforce laws, regulations and other measures that prohibit discrimination on the grounds of HIV/AIDS; and ensure to people living with HIV/AIDS and members of vulnerable groups the full enjoyment of human rights, including access to education, inheritance, and health care. Nonetheless, the framing of goal six, its targets and indicators are stated in neutral terms and do not refer to human rights principles or the right to health framework. There are no indicators on discrimination, participation, and equality, right to information, informed consent in testing and treating or legislation protecting those from violations. Even when the target and indicators⁸ for meeting goal six were revised in 2008 by the Inter-Agency and Expert Group on the MDG Indicators, the only inclusion was the need to achieve universal access to treatment for HIV/AIDS for all those who needed it by 2010. No concrete obligations was spelled out, including how governments should address discrimination, social exclusion, violence against women, and economic and social rights in measuring and/ or monitoring indicators.

The current targets and indicators are formulated in terms of societal averages, part of a traditional development paradigm having nothing to do with the human rights framework (SARELIN, 2007, p. 465). Even in the statement of this general goal, there is no mention of health systems or a call for a rights-based universal access to decent health services and medicines (SAITH, 2006, p. 1189). The most vulnerable groups, economically marginalized, mentally or physically disabled, or key vulnerable groups such as men-who-have-sex-with-men (MSM), transgendered, injecting drug users (IDUs) or sex workers are not even mentioned as groups that need special consideration. Take, for example, the target and indicators for malaria.

Malaria is an illness for which there is evidence that, in the presence of poverty, its prevalence is elevated and access to treatment diminished. Furthermore it is known that malaria can increase poverty (BRENTLINGER, 2006, p. 17). However, in the MDGs there is no specific indicator on facilitating treatment for the most at risk. The most effective treatment of artemisinin-based combination is outpriced for use by poor countries. Under MDG 6, the issues referring to the availability or accessibility to affordable essential drugs could be addressed but, as Nelson (2007, p. 2049) notes, the trade rule-making process at the World Trade Organization is at odds with human rights-based prescriptions for improved health care and access to medicines. The next section discusses how a human rights perspective can explicitly add to measures that states are required to take in order to tackle Goal 6.

3.2 What a right to health perspective can add to MDG6?

As noted above, the human rights framework is premised on the rights of an individual (rights-holders) vis-à-vis the state (duty-bearers). There are a number of steps that a state can take to make the MDGs framework rights-based. First, the state can recognize that MDGs are rights-based goals with targets subject to state obligations. In the current reaffirmation of the MDGs by the UN General Assembly (September 2010) this should be a key objective. How would the addition of human rights language, or specifically the right to the health framework, change MDG 6? In this connection, below I discuss only three human rights concepts: non-discrimination and equality; participation; and accountability. There are other key concepts such as accessibility, availability, acceptability and affordability of services.⁹ Which shall not be taken into consideration.

Non-Discrimination and Equality: A rights-based approach to MDG 6 would begin with addressing issues of discrimination and stigma.¹⁰ There is evidence suggesting that those with HIV face discrimination that jeopardizes testing and the adherence to treatment (HORN, 2010; UNITED NATIONS; THE WORLD BANK, 2009). As is often the case, those groups already marginalized tend to experience more severe discrimination and stigma. The People Living with Stigma Index reports that people living with HIV in diverse settings affirm being excluded from social and family events, being denied health care, sexual and reproductive health care, and family planning services, as well as being insulted, threatened or subject to physical attack. Many reported that their children (who were not necessarily HIV positive) have been forced to leave school (ICRW; UNAIDS, 2009). Often these groups are marginalized because of their sexual orientation, drug use, sex work, being a prisoner, or other high-risk characteristics that makes them vulnerable. For example, the close connection between TB and HIV, often referred to as co-epidemics, such that a person with HIV progresses from TB infection to death more frequently and rapidly than those who are not infected (HARRINGTON, 2010), makes it urgent that discrimination and discriminatory practices must be addressed to achieve MDG 6.

As a first step, it would be important to disaggregate the data by gender, minority groups, and social class, and their situation in the context of those most at risk for HIV, key vulnerable groups such as men-who-have-sex-with-men (MSM),

transgender, intravenous drug users (IDUs), sex workers, and other high risk groups such as those with co-infections (in particular tuberculosis). It is important to gather this knowledge so that materials and information for education and communication can be appropriately developed for communities, legislators, and policymakers. Second, a review and revision of current laws and legislation must be made, to protect people living with and at risk of HIV or other infectious disease from discrimination, violence and vilification, and the lack of due process. Laws related to HIV or those at risk of HIV are highly punitive. A report to be released at the International Aids Conference in Vienna notes that 19 of 48 countries in the Asia Pacific region criminalize male-to-male sex (APCOM, 2010). In fact, legislation and law enforcement protecting key vulnerable groups often lag behind national HIV policies undermining the effectiveness of programs. One of the key targets for MDG 6 could include an agenda for legal reform to establish better protection from discrimination and to remove punitive laws, policies and practices.

Furthermore, women and girls - as a result of harmful gender norms regarding social expectations, stereotypes, lack of status and power, and lack of resources - often face discrimination and discriminatory policies that make them more vulnerable to HIV. Often structural and deeply embedded attitudes put women and girls at higher risk of violence and faced with discrimination at work, in education, in marriage, reproductive choice, and sexual decision-making. Women living with HIV are often counselled to avoid pregnancy or forced to terminate pregnancy or coerced into forced sterilization (ICW, 2009; UNITED NATIONS; THE WORLD BANK, 2009, p. 16). In addition, women sex workers have reported that they face threats of increased violence not only from their clients for requesting the use of condoms but also of being raped by men in uniform such as local police tasked to protect them (HUMAN RIGHTS WATCH, 2003). Therefore, a focus on women and girls is necessary in designing of targets and indicators.

Profound gender inequalities represent one of the key drivers of the HIV epidemic, and also contribute to the high maternal mortality rate as noted by a recent study in *The Lancet* (HOGAN et al., 2010). Addressing gender inequality is an effective strategy for reducing HIV impact and transmission and enhancing the status of women. MDG 5 on maternal health can be associated with HIV and mutually re-enforcing benefit of treatment can be seen in reducing maternal deaths as well as prolonging life and reducing transmission. In the political arena, when more women are engaged in the process there is greater benefit. For example, in Rwanda where women occupy 56% of parliamentary seats, legislation has been passed to prevent gender-based violence, to recognize women's right to inheritance, and to grant women the right to work without her spouse's authorization (UNITED NATIONS, 2010b, p. 15).

Participation: In a rights-based framework, participation is essential and necessary for the expression of human agency, instrumental to self-determination, and allows the individual to challenge socio-political, economic, and other forms of exclusion particularly in decisions and processes that affect health (YAMIN, 2009, p. 6). In terms of MDG 6, participation would imply not only an active involvement of people living with HIV and affected communities in the agenda-setting and decision-making but also challenging power hierarchies in communities

and society at large. Sarelin (2007, p. 477) notes that “the process of challenging and transforming power relations and creating new relations is often described as empowerment...[that] implies a participatory process that engages people in reflection, inquiry and action...[not only for] expanding people’s opportunity but empowerment in relation to the possibility to claim and realize their human rights”. Civil society involvement in formulating and implementing the MDGs has been limited. In our network on HIV treatment preparedness, most community groups have no idea how the MDG process works or why it is important. The Millennium Development initiative, while highly commendable, continues to exhibit features of non-participatory approaches to development programming at national levels, in which people are viewed as programmatic targets, and passive recipients of international aid and national programs (SAITH, 2006). What is required is a shift in development thinking to include the participation of disadvantaged individuals and communities, groups for whom such policies are formulated and are intended beneficiaries of development programs. In terms of MDG 6, there is already the Joint United Nations Programme on HIV/AIDS (UNAIDS) concept of the Greater Involvement of People Living with AIDS (GIPA) that could be brought into the process of policy formulation and implementation. In addition, the Global Fund to Fight AIDS, TB, and Malaria (GFATM) has at the domestic level coordinating mechanisms (CCMs) to address these diseases and, while there are community delegates on this body, it might consider adding human rights representatives, and also coordinating its plans with the national MDGs strategy.

Accountability: While the principles of empowerment and participation have been part of the development agenda, the added value of a human rights approach is the principle of accountability that has been conspicuously absent. A rights-based framework demands accountability as the approach emphasizes obligations and requires that all duty-holders be held accountable for their conduct. If the system lacks an accountability mechanism then it becomes no more than window-dressing. The human rights framework has generally lacked enforceability and that has been an issue. At the national level, individuals have used the judicial system to gain access to health care or medicines. In 2004, an HIV/AIDS-positive person submitted an “Amparo” action against Peru’s Health Ministry requesting full medical care, including permanent supply of drugs and periodical testing, as well as CD4 and viral load tests. The petitioner alleged lack of financial resources to face the high cost of treatment. The Court accepted the “*Amparo*” action and ordered government agencies to comply with Article 8 of Law 26626, which set forth that a Plan to Fight AIDS should have top priority in the budget. In addition, the Court also noted that social rights as true guarantees of protection of citizens before the State (information on this case along with other HIV AIDS case law examples can be found on www.escri-net.org). The Treatment Action Campaign (TAC) based in South Africa brought a case against the Minister of Health challenging the South African government’s prevention of mother to child transmission of HIV policy that limited the provision of a drug, Nevirapine, known to prevent transmission, to a small number of pilot sites. While TAC relied on litigation, it also launched an intensive public mobilization campaign in the form of rallies, vigils, and marches across the country. Activists,

health professionals, and media showed up in TAC's trademark 'HIV-positive' t-shirts. By the time the judgment was handed down, the people had already won the claim to essential drug for PMTCT (quoted in POTTS, 2007, p. 31).

In addition, to the legal or judicial mechanisms of accountability there are also a number of non-judicial means such as ombudsmen, treaty bodies, parliamentary processes, or watchdogs (UNITED NATIONS, 2008b, p. 15). In addition, there is the traditional strategy of 'naming and shaming' with respect to human rights violations. Monitoring and evaluation mechanisms have also been used to determine the performance of the health sector. Furthermore, civil society has demanded better services from the state or private actors. Potts (2007, p. 4-5) discusses mechanisms of accountability for the right to health, noting that:

Accountability in the context of the right to the highest attainable standard of health is the process which provides individuals and communities with an opportunity to understand how government has discharged its right to health obligations. Equally, it provides government with the opportunity to explain what they have done and why. Where mistakes have been made, accountability requires redress. It is a process that helps to identify what works, so it can be repeated, and what does not, so it can be revised.

In the MDGs Framework the accountability mechanisms are weak, but evidence gathering of targets and indicators with respect to each goal can be used for more than monitoring purposes (FUKUDA-PARR, 2004, p. 394). The targets indicators can be applied to an accountability framework that holds the duty-bearer, in this case the state and international donors, responsible for meeting these goals. What is unclear is how (or through which mechanism) can national citizens and communities hold the state responsible, and by extension donor countries, for the failure to meet the MDG targets or regress from achieved gains. Furthermore, it needs to be determined how states and citizens can hold non-state actors accountable under this framework. Despite these shortcomings, there are innovative ways to ensure some level of accountability. At the moment, there are over 60 national level reports, based on which one could discern and evaluate which health policies and institutions are working and which are not, and why, with the objective of improving the realization of the right to health for all (UNITED NATIONS, 2004, p. 9). The Human Rights Council or the treaty bodies could evaluate these reports with the criteria of minimum standards of human rights core standards. Special Rapporteurs could be invited for visits to monitor the situation. Additionally, the national HIV/AIDS body or citizens' watchdogs could be involved in monitoring the MDGs. Notwithstanding, the issue of accountability would remain, as well as the problem of defining what effective remedy or redress should be activated in case of violation or inability to meet the targets of Goal 6. The recent global economic crisis poses a threat to the fulfilment of the MDG objectives as it is already affecting the scale up of HIV prevention and treatment, as donor funds are becoming scarcer (UNITED NATIONS; WHO, 2009). UNAIDS observes that households may experience increased mortality and morbidity if the commitments pledged by the international community to sustain and increase access to anti-retrovirals are not honoured or if governments reduce expenditures on

AIDS. Slight interruptions in treatment access or failure to enrol new AIDS patients in treatment will have devastating and costly effects which will result in unnecessary loss of lives and contribute to resistance to anti-retrovirals.

The last two points in this section address the importance of MDG 8 on a global partnership and other MDGs linked to MDG 6.

Relationship with Other MDGs: MDG 6 is related to other MDGs as discussed earlier, and the relationship is mutually re-enforcing with other health MDGs. Recent studies published in the *Lancet* have demonstrated a strong association between maternal mortality and HIV, MDG 5 (HOGAN et al., 2010). Moreover, Rajaratnam et al. (2010) demonstrate a steep decline in mortality of children attributing it to immunization, insecticide-treated bed-nets for malaria, treatment of HIV positive women in preventing vertical transmission, and the availability of antiretroviral drugs. In addition, hunger or under-nutrition included under Goal 1 is strongly linked to MDG 6, in particular for those with HIV and TB. Those who are ill need better nutrition, and impediments to accessing food affects their illness. Sarelin (2007) observes the importance of a rights-based framework in the context of Malawi, a highly HIV AIDS endemic country with national adult prevalence of 15 to 18 percent, with 81 percent of the population classified as subsistence farmers. In this case, the national government under the human rights framework has taken steps to protect the most disadvantaged. While these linkages are emerging in the literature, they are not reflected in the MDGs, which continue to exist independently of each other in terms of strategies and policies.

Although the health-related MDGs do not specifically mention health systems, the synergies between the response to these vertically initiated goals and programs and broader health policies and structures are becoming apparent. In 2009, the Global Fund solicited proposals for broad-based strengthening of health care systems. In addition, educational systems will also need to be strengthened, and in particular MDG 3 on equal access for women and girls in education, economic benefits, and sexual and reproductive health issues. Policy-makers or planners are failing to make linkages, mutually reinforcing or jeopardizing achievement, across the eight MDGs, their targets and indicators.

MDG 8: MDG 8 calling for a global partnership for development resonates strongly with the human rights concept of international assistance and cooperation. While the parameters of the MDG 8 are not yet clearly drawn, it is certain that this MDG is critical for the poor in terms of realizing their right to health. For MDG 8, there is a lesson to be learned from the global HIV response which gave rise to pioneering partnerships in health through the 2001 Declaration of Commitment and led to the establishment of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, a path-breaking source of funding. The GFATM, supported by the G8 countries, promised to give \$10 billion a year but so far have delivered only about \$3 billion a year (GLOBAL FUND, 2010a). In March 2010 the GFATM estimated that it needed \$20 billion for three years (2011-2013) to help meet the health related MDGs (GLOBAL FUND, 2010b), but donors are backtracking on raising even the minimal needs of \$13 billion for three years using the global economic crisis as an excuse. Nonetheless, the GFATM has emerged as an effective channel

for health care financing and its investment in these three specific diseases has paid back substantial dividends in terms of averting deaths (GLOBAL FUND, 2010c). Another interesting example of global partnership is the funding from the international airline tax for UNITAD, supporting HIV treatment for more than 226,000 children and supplying second-line antiretroviral drugs to 59,000 patients in 25 countries (UNITED NATIONS, 2010a, p. 17).

The accountability mechanisms in relation to Goal 8 are especially weak. For a long time there were no targets or indicators, and very few countries report on MDG 8. A few developed States, including the Netherlands, Denmark and Sweden, have published reports on their progress towards Goal 8, and although self-report is a step in the right direction it does not constitute an adequate form of accountability. While official development assistance has increased to about 0.30 percent of developed countries combined income but it remains well below the UN target of 0.7 percent of gross national income (HISTORY..., 2002; FUKUDA-PARR, 2006, p. 966). In 2008, the only countries to have reached the UN target were Denmark, Luxembourg, the Netherlands, Norway, and Sweden. The accountability arrangements for all MDGs, and MDG 8 in particular, are of critical importance. Otherwise, the MDGs are in danger of being classified as yet another failed attempt at addressing poverty. Unfortunately, the manner in which the MDGs story is unfolding confirms the long-standing perception among developing nations that accountability arrangements are imbalanced and only applicable to them, while developed countries can escape any measures to hold them accountable when failing to fulfil their international commitments (UNITED NATIONS, 2009c).

3.3 Additional Considerations

Meeting a minimum core obligation and non-retrogression are the other two key concepts part of a rights-based health framework. The Committee on Economic, Social, and Cultural Rights in General Comment 3, regarding the interpretation of article 2(1) on progressive realization notes that there is a minimum obligation to protect the most vulnerable in society, and there is a further obligation upon the state not to regress on progress that has already been made (UNITED NATIONS, 1990). One of the key targets of MDG 6 is 'universal access' to HIV treatment. The commitment to universal access was made in the 2006 Political Declaration and established a mutually re-enforcing bond with MDG 6 (UNITED NATIONS, 2006a). Therefore any deviation from this target is a violation that needs to be immediately addressed by the duty-bearer (i.e. state and other related parties). Human rights jurisprudence can assist practitioners and policy makers in planning and evaluating MDGs initiatives according to human rights standards at the national level through special committees or tribunals, or the country reporting mechanisms of the Human Rights Council, set up not only to measure progress but also to provide remedy. The HRC could possibly even convene a special session over the next five years.

The United Nations Office of the High Commissioner on Human Rights have gone further in their thinking and developed four indicators explicitly named as human rights indicators for MDG 6, in order to establish whether countries

have: laws to protect against discrimination of people living with HIV/AIDS; laws to protect against discrimination of groups of people identified as being “especially vulnerable to HIV/AIDS”; policies to ensure equal access for men and women to prevention and care, with an emphasis on “vulnerable groups”; and policies to ensure that HIV/AIDS research protocols are reviewed and approved by an ethics committee. Additionally, gender should be mainstreamed throughout Goal 6, its targets and indicators, and issues of discrimination and exclusion particularly of key vulnerable groups are addressed immediately, ensure that existing indicators are rights-sensitive. While broad in scope, these indicators have limitations. For example, they measure whether or not policies are in place and do not attempt to explore the quality or degree of implementation.

The basic question remains: will the countries that have formulated the MDGs and who are meeting this September 2010 in New York at the United Nations High-level Plenary Meeting on the Millennium Development Goals¹¹ with an objective of leading to concrete strategies for action incorporate human rights into their plan of action for the remaining five years?

4 Conclusion

The Millennium Development Goals have clear communicable outcomes. They are ideologically neutral and results-based. They set out a strategic vision for the United Nations to address poverty and offer an opportunity to realize promises made through a series of world conferences on environment, nutrition, women, population, and social development over the preceding three decades. The MDGs also provide the vehicle to bring together many separate organizations of the United Nations, including the World Bank, under a singular banner, allow governments to prioritize national development policies protecting the most vulnerable in society, and provide a means to channel international aid into the social sector with an assessment of its impact. While this is the sunny-side view of the MDGs, the reality, ten-years into the agenda, is mixed (UNITED NATIONS, 2009a). Moreover, the *Global Monitoring Report* co-published by the World Bank and the International Monetary Fund observes that with the recent financial crisis the situation will worsen with 53 million more people falling into extreme poverty, mostly in sub-Saharan Africa, a continent that is already far off-track from achieving the MDGs. The authors note that the global recession combined with the 2008 food and fuel crisis will have a lasting, negative impact on critical human development indicators and, unless international efforts are redoubled to mitigate the damaging effects, it is likely that many countries, in particular those with greatest need, will fail to achieve any significant progress in meeting the MDGs (WORLD BANK, 2010).

Modest progress has been made towards achieving MDG 6, largely for tuberculosis and malaria (UNITED NATIONS, 2009a, p. 32). For TB better diagnosis of the disease has helped to initiate people into early treatment, but new cases continue to rise with multi-drug resistant TB posing a huge challenge and TB co-infection with HIV leading to early death. For malaria the progress has been

good because of the increase in use of bed nets. Progress in HIV/AIDS has been insufficient in meeting targets across all regions. The number of people newly infected with HIV peaked in 1996 and has since declined to 2.7 million in 2007, but infection rates continue to rise in Eastern Europe and Central Asia, where the numbers of people living with HIV has doubled since 2001 to 1.6 million over six years (UNITED NATIONS; THE WORLD BANK, 2009, p. 48). The continent of Africa, particularly southern Africa, continues to be worst affected with one third of new HIV infections and 38 percent of AIDS deaths. Gender inequities continue to put women at higher risk of infection and death. Women account for 60 percent of those infected in sub-Saharan Africa and for over half the people living with HIV worldwide. AIDS orphans, specifically mentioned in the Millennium Declaration and not even included in the MDGs, continue to pose a tremendous challenge for families, communities and states. Many of the AIDS-affected children face discrimination and early death impacting upon other MDGs such as MDG 2 on education and MDG 4 on child mortality. In sub-Saharan Africa, less than a third of young men and just over a fifth of young women demonstrated a comprehensive and correct knowledge of HIV (UNITED NATIONS, 2007a, p. 20). The use of anti-retrovirals (ARVs) in the past five years has resulted in a dramatic decline in the number of AIDS deaths. Although an estimated four million people are on ARVs, the need is closer to 10-12 million (roughly 69 percent of people who need treatment do not have access to the required drugs). A new study by the Treatment Monitoring and Advocacy Project reports that funds from major donors such as the U.S. President's Emergency Plan for AIDS relief (PEPFAR) and the Global Fund are flat lining, resulting in cut-backs in domestic funds and availability of treatment and prevention programs in developing countries (ITPC, 2010). Stalling on the AIDS response will impact upon not only on MDG 6 but also all the related MDGs, and also affect the building of stronger health systems.

In *Pathologies of Power*, Farmer argues that gross social inequalities that ravage communities and countries create a pattern of ill health and disability and also limits the ability of people to fully participate in society (FARMER, 2008). Health is not only a reflection of a person's biology or behavioural factors but also contextualized within society and prevailing norms and power relations. Diseases such as HIV/AIDS or TB have additional layer of discrimination and stigma such that individuals and group who are perceived as sick are even more vulnerable—in other words, having HIV or TB itself is a main factor of vulnerability in society. Therefore, a human rights response and inclusion in the MDGs framework is not only essential but also ethically necessary. Human rights framework allows for one global standard but gives room for state particularities through *progressive realization to the maximum available resources*. It also does not permit retrogression on achievements. Finally, it does not let high - or middle - income countries off the hook with respect to their obligation for a global partnership. The MDGs agenda is again on centre-stage, and unless this opportunity is taken to shift the direction of MDGs towards a more nuanced approach such as human rights, then the world will continue in its trajectory of addressing poverty in a rather *ad hoc* manner without any moral or normative underpinnings.

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NOTES

1. Hulme (2009) discusses in detail the history of the formulation of the MDGs in his paper. He observes that the overseas development agencies of rich countries wanted to draw up an authoritative list of concrete development goals that could be used to reduce poverty and demonstrate the effectiveness of foreign assistance to developing countries. The big players in the conceptualization of the MDGs included the U.S., U.K., Japan, E.U., IMF, World Bank, and U.N.
2. I have purposefully excluded a reference to cultural rights, as it is under this category that many states have asked for reservations with respect to certain rights expressed in treaties.
3. There are currently nine international treaties, and in addition to those mentioned above there is the Convention on Torture, the Convention on Protection of All Forms of Migrant Workers and Their Families, the Convention on the Protection of All Persons From Enforced Disappearances, and the Convention on the Rights of Persons with Disabilities (all text of treaties are available through the OHCHR offices at: <http://www2.ohchr.org/english/law/index.htm>).
4. The recognition of health as a human right is attributed to President Franklin D. Roosevelt (USA) in his Four Freedoms Speech which states that the third freedom, freedom from want, "will secure to every nation a healthy, peacetime life for its inhabitants (1941, Four Freedoms Speech)."
5. Article 25(1) of the UDHR states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." (UDHR, 1948).
6. Article 12 of the ICESCR states: "1. The State Parties to the present Covenant recognize the right to everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall be include those necessary for: (a) The provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." Article 24 of the CRC states: "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services. 3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries".
7. For a complete reference to the work of the two Special Rapporteurs thus far see the International Federation of Health and Human Rights Organisations at <<http://www.ifhhro.org/main.php?op=text&id=27>>.
8. The five indicators for HIV/AIDS focus on (1) HIV prevalence among population aged 15-24; (2) condom use at last high-risk sex; (3) proportion of population aged 15-24 years with comprehensive correct knowledge of HIV/AIDS; (4) ratio for school attendance of orphans to school attendance of non-orphans aged 10-14 years; and (5) proportion of population with advanced HIV infection with access to antiretroviral drugs. In addition, there are four indicators for reversing the incidence of malaria and other major diseases as follows: (6) incidence and death rates associated with malaria; (7) proportion of children under-five years sleeping under insecticide-treated bed nets; (8) proportion of children under-five with fever who are treated with appropriate anti-malarial drugs; (9) incidence, prevalence, and death rates associated with tuberculosis; (10) proportion of tuberculosis cases detected and cured under directly observed treatment short course (DOTS). The full revised list is available on the DAC website at: <<http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm>>.

9. Several resources can be found on the website for the journal Health and Human Rights available at: <<http://www.hhrjournal.org/index.php/hhr>>. In addition, the Office of the High Commissioner and the World Health Organization published a resource on the right to health available at: <http://www.who.int/hhr/news/hrba_to_health2.pdf>. The Harvard School of Public Health has a short manual on the topic found at: <http://www.hsph.harvard.edu/pihhr/files/homepage/program_resources/HIVHR_nutshell-english.pdf>.

10. The principle of non-discrimination, based on recognition of the equality of all people, is enshrined in the Universal Declaration of Human Rights and other human rights instruments. These texts prohibit discrimination based on race,

color, sex, language, religion, political or other opinion, property, birth or other status. In 1996, the Commission on Human Rights including HIV/AIDS in the 'other status' category, and noted that discrimination based on actual or presumed HIV status is prohibited. Although the term stigma does not appear in any international treaty, the UN Human Rights Treaty Bodies recognize the link between stigma and discrimination in the context of HIV.

11. The United Nations High-level Plenary Meeting on the MDGs will take place from 20-22nd September at UN Headquarters in NY. It's primary objective is to accelerate progress towards the MDGs. Information on the Summit is available at: <<http://www.un.org/en/mdg/summit2010/>>.

RESUMO

Os Objetivos de Desenvolvimento do Milênio (ODMs) são a maior promessa mundial para redução da pobreza global e da privação humana. Formulados como objetivos nacionais e baseados em resultados, os ODMs aparentam não incluir qualquer compromisso com os direitos humanos. Este artigo explora como os ODMs se encaixam num marco de direito internacional e como o objetivo 6 de combate ao HIV/AIDS, à malária e à tuberculose pode ser integrado no direito à saúde. A discussão determina se o ODM 6 pode ser utilizado ou deve ser reajustado para promover participação real, não discriminação e igualdade, *accountability* e acesso. Poderão os principais proponentes de ambos os lados criar um novo caminho que integre direitos e estratégia de redução da pobreza por meio dos ODMs?

PALAVRAS-CHAVE

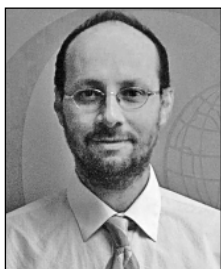
Direitos humanos – Saúde – Objetivos de Desenvolvimento do Milênio (ODMs)

RESUMEN

Los ODM son la mayor promesa mundial para reducir la pobreza en el mundo y las privaciones de los seres humanos. Formulados como metas nacionales y con un enfoque basado en los resultados, parecen carecer de todo compromiso con los derechos humanos. El presente artículo explora de qué modo los ODM cuadran dentro del marco del derecho internacional y cómo el ODM 6 sobre la lucha contra el VIH/SIDA, el paludismo y la tuberculosis puede integrarse al derecho a la salud. El artículo analiza si el ODM 6 puede ser reformulado o adaptado para promover una participación real, la no discriminación y la igualdad, la rendición de cuentas y el acceso a la salud. ¿Pueden los principales propulsores de ambas partes –derechos humanos y los ODM– trazar un nuevo camino que pueda integrar los derechos y la estrategia contra la pobreza a todos los ODM?

PALABRAS CLAVE

Derechos humanos – Salud – Objetivos de Desarrollo del Milenio (ODMs)



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ABSTRACT

This paper explores the linkages between human rights and the MDGs, international cooperation regarding climate change, and the Clean Development Mechanism (CDM). The paper uses criteria of the right to development to analyze CDM. CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. The CDM is thus directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change. In addition, a focus on the CDM also raises issues concerning investments and resource flows, technology transfer, environmental integrity, and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the attainment of the MDGs.

Original in English.

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KEYWORDS

MDGs – International cooperation – Climate change – Clean Development Mechanism



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CLIMATE CHANGE AND THE MILLENNIUM DEVELOPMENT GOALS: THE RIGHT TO DEVELOPMENT, INTERNATIONAL COOPERATION AND THE CLEAN DEVELOPMENT MECHANISM¹

Marcos A. Orellana

1 Introduction

Greenhouse gas (GHG) emissions from anthropogenic sources, primarily fossil fuel use, have increased dramatically, causing an increase in Earth's average temperature. The Intergovernmental Panel on Climate Change, in its Fourth Assessment Report (2007), raised its estimate of warming in this century to a possible range between 2.4°C to 6.4°C (IPCC, 2007). The impacts of this unprecedented warming – *e.g.*, increased floods and drought, rising sea levels, spread of deadly diseases such as malaria and dengue fever, increasing numbers of violent storms – threaten to be more severe and imminent than previously believed.

The impacts of climate change have direct implications for the efforts of the international community in achieving the Millennium Development Goals (MDGs). At the same time, as the UN Secretary-General has observed, the MDGs should also contribute to the capacities needed to tackle climate change by providing opportunities for broader improvements in economies, governance, institutions and intergenerational relations and responsibilities (UNITED NATIONS, 2010a, para. 37). Capturing these opportunities, however, will require “a global new deal capable of raising investment levels and channeling resources towards massive investment in renewable energy, and building resilience with respect to unavoidable climate changes.” (UNITED NATIONS, 2010a, para. 39) In this regard, the Clean Development Mechanism (CDM) established by the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) is an example of a mechanism deployed to raising investments and channeling resources into the Global South.

Notes to this text start on page 168.

The relationship between climate change and the MDGs involves both threats and opportunities and works in both directions, with each impacting the other in positive and negative ways (UNITED NATIONS, 2009a). The UN Development Programme (UNDP) has analyzed the ways in which climate change affects the MDGs, concluding that climate change threatens to exacerbate current challenges to the achievement of the MDGs.² In this regard, major issues of concern for MDGs resulting from climate change include population displacement, forced migration, conflict and security risks, food insecurity, and the human rights impacts of climate change response measures (ORELLANA; KOTHARI; CHAUDHRY, 2010).

More particularly, climate change impacts have obvious repercussions on MDG 7 regarding environmental sustainability, including with respect to access to safe drinking water and basic sanitation, as well as biodiversity loss. Climate change impacts on agricultural production and water availability are also relevant for MDG 1 regarding extreme poverty (GELBSPAN, 2010) and hunger eradication (COLUMBIA LAW SCHOOL, 2009). MDG 2 regarding universal primary education is affected given the potential destruction of schools and other infrastructure, as well as pressures on family livelihoods that may keep children from school. MDG 3 regarding gender equality is affected by the increased degradation of natural resources upon which women are particularly dependant. MDGs 4, 5 and 6 regarding child mortality, maternal health, and combating malaria, HIV and other diseases are affected by increased vulnerability to poor health due to reduced food and water security, in addition to the spread of water-borne, vector-borne and air-borne diseases. Finally, MDG 8 regarding global partnerships and technology transfer also directly concerns climate change and the CDM, as examined by the High Level Task Force on the Implementation of the Right to Development (HLTF).³

Against this background, this paper explores the linkages between human rights and the MDGs, international cooperation regarding climate change, and the CDM. The paper uses criteria of the right to development to analyze CDM. CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. The CDM is thus directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change. In addition, a focus on the CDM also raises issues concerning investments and resource flows, technology transfer, environmental integrity, and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the attainment of the MDGs.

2 Human Rights & Climate Change

Climate change impacts, and measures taken to mitigate or adapt to it, are already seriously affecting individuals, communities, and peoples.⁴ At the extreme, climate change and mitigation and adaptation measures threaten to destroy the cultures of

individuals and peoples around the world, render their lands uninhabitable, and deprive them of their means of subsistence. Particularly vulnerable to the physical impacts of climate change are peoples whose way of life is inextricably tied to nature, and low-lying coastal or island nations that lack the economic resources necessary to adapt to severe changes.

Increased attention to the human dimension of climate change, including in the current negotiations, can improve the likelihood that climate change-related measures respect human rights. Accordingly, understanding and addressing the human consequences of climate change lies at the very heart of the climate change challenge. Moreover, linking the climate change negotiations and structures to existing human rights norms enables States to use indicators and mechanisms anchored in the well established human rights system to address the challenges posed by the changing climate and response measures.

The UN Human Rights Council has affirmed that climate change “poses an immediate and far-reaching threat” for the “full enjoyment of human rights.” (UNITED NATIONS, 2008b, 2009c). The Office of the High Commissioner on Human Rights (OHCHR), in its March 2009 study on climate change and human rights, concluded that “global warming will potentially have implications for the full range of human rights”, and particularly the rights to life, adequate food, water, health, adequate housing, and the right to self-determination (UNITED NATIONS, 2009d). Moreover, the study found that most at risk are the rights of already vulnerable peoples, such as indigenous peoples, minorities, women, children, the elderly, persons with disabilities, and other groups especially dependent on the physical environment.

The linkages between climate change and human rights are thus beyond dispute. The challenge now lies in introducing a rights-based approach to the negotiation and implementation of an effective and equitable solution to climate change. In this light, this paper uses the criteria of right to development to examine the CDM, including its institutional design and project cycle, with a view to drawing out linkages between climate change and the realization of the MDGs.

2.1 The right to development

The Declaration on the Right to Development (DRD), adopted by the UN General Assembly in 1986, was the first instrument that formally recognized the right to development.⁵ Before the DRD, the UN Charter,⁶ the International Covenant on Civil and Political Rights⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁸ (ICESCR), had already acknowledged the close relationship between development and human rights. During the 1990s, this linkage was affirmed in world summits, including the 1992 Earth Summit in Rio de Janeiro,⁹ the 1993 World Conference on Human Rights in Vienna,¹⁰ and the 2000 UN Millennium Declaration, which led to the MDGs (UNITED NATIONS, 2000a). Despite the recognition of the linkages between development and human rights, however, the right to development remains one of the most controversial rights, often along North-South divides.

According to the DRD, the right to development is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” (UNITED NATIONS, 1986, Art. 1(1)). The Independent Expert on the Right to Development commented that the “process of development” should be carried out on the basis of a rights-based approach, in accordance with international human rights standards, such as transparency, participation, non-discrimination, and accountability.¹¹ Closely connected to this process is the “partnership approach” to development, based on shared responsibilities and mutual commitments between industrialized and developing countries and international organizations (PIRON, 2002).

Certain core elements of the right to development acquire special importance in the climate change context, namely: respect for all human rights, equity, and international cooperation. First, the DRD places the human person at the center of development, and provides that the development process must respect all human rights and fundamental freedoms, and contribute to the realization of rights for all (UNITED NATIONS, 1986, at Preamble, para. 12, Art. 1, 2(1), 6). Also, the realization of the right to development may not justify violations of other human rights.¹² This is the basis for a human rights-based approach to development,¹³ which is particularly relevant in the climate change context (ORELLANA, 2009).

Second, the right to development requires that considerations of equity and justice determine the whole structure of the development process. For example, poverty has to be eradicated and the structure of production has to be adjusted through development policy (SENGUPTA, 2002, p. 837, 849). In this connection, the UNFCCC recognizes equity as one of the central principles that must guide the Parties’ actions to achieve its objective and implement its provisions (UNITED NATIONS, 1992b, Art. 3).

2.2 International Cooperation and Assistance

Development assistance both technical and financial, has an important role to play in supporting countries to achieve the MDGs. The UN Secretary-General’s report on progress in achieving the MDGs observes that the switch to low greenhouse gas emitting, high-growth pathways to meet the development and climate challenges is both necessary and feasible, but will require much greater international support and solidarity (UNITED NATIONS, 2010, p. 38).

The UN Charter and several treaties recognize the role of international cooperation and assistance in achieving universal respect for human rights.¹⁴ UN treaty monitoring bodies have also emphasized the role of international co-operation and assistance in the realization of economic, social and cultural rights.

Similarly, the Declaration on the Right to Development (DRD) identifies international cooperation as a key element to assist developing countries to secure the enjoyment of basic human rights (SALOMON, 2007, p. 3-6). In this light, the OHCHR analytical study on climate change and human rights concluded that

measures to address climate change should be informed and strengthened by international human rights standards and principles, and noted that climate change is a truly global problem that can only be effectively addressed through international cooperation, as climate change disproportionately affects poorer countries with the weakest capacity to protect their populations (UNITED NATIONS, 2009d).

3 International Cooperation and Climate Change

To respond to growing scientific concern, the international community under the auspices of the United Nations has come together to tackle the climate change problem. Its efforts have led to the development of the UNFCCC and the Kyoto Protocol, as well as a number of financial arrangements to address the costs associated with climate change.

3.1 The UN Framework Convention on Climate Change

The UNFCCC was signed and adopted in the 1992 Rio Conference on Environment and Development, and entered into force in 1994. The UNFCCC acknowledges that the global nature of climate change calls for the widest possible cooperation by all countries.¹⁵ The ultimate objective of the UNFCCC is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁶

Development considerations, and by implication the MDGs, play a central role in the design and implementation of the UNFCCC. Already the preamble of the UNFCCC affirms that “responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter” (UNITED NATIONS, 1992b, Preamble). More significantly, the ultimate objective of the Convention should be achieved within a time-frame sufficient, *inter alia*, “to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner” (UNITED NATIONS, 1992b, Art. 2). Furthermore, the UNFCCC articulates the principle of “common but differentiated responsibilities and respective capabilities”, which underscores that industrialized countries are to “take the lead in combating climate change.” (UNITED NATIONS, 1992b, Art. 3-4).

Evaluating the effectiveness of international cooperation in addressing climate change is a complex undertaking. From one perspective, the fact that States have negotiated and are implementing two major international treaties on the topic, namely the UNFCCC and the Kyoto Protocol, in addition to undertaking a significant negotiating effort over the past several years to define the post-Kyoto climate framework, would suggest that they have clearly sought to cooperate. From another angle, if the duty to cooperate requires effective solutions to the climate change problem, then the fact that the actual and impending consequences of climate change are increasing in intensity due to the failure to arrive at a binding agreement providing for effective mitigation, adaptation and other climate measures could be regarded as a failure of States to effectively cooperate.

3.2 The Kyoto Protocol

In line with the objective and principles of the UNFCCC, the Kyoto Protocol was finalized in 1997 and entered into force in 2005.¹⁷ Under the Protocol, 37 industrialized countries and countries in transition to a market economy, plus the European Community, made legally binding commitments to reduce their overall emissions of the six-major GHGs¹⁸ by at least 5% below 1990 levels in the commitment period 2008-2012. As the emission reduction targets of the Protocol expire in 2012, what happens next remains unknown and is subject to ongoing international negotiations.

The fifteenth Conference of the Parties to the UNFCCC (COP 15) and the fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) took place in Copenhagen, Denmark, December 7 to 18, 2009. Despite two years of intense negotiations, the Parties were unable to reach agreement on all the issues (BODANSKY, 2010, p. 230). Instead, the main outcomes from the negotiations include a number of COP decisions that, *inter alia*, have mandated negotiations to continue, and the Copenhagen Accord,¹⁹ a non-binding agreement drafted by certain heads of State. However, the fact that the COP took “note” of the Copenhagen Accord rather than “adopting” it introduces significant ambiguity regarding its legal status and implementation.

The Kyoto Protocol’s CDM has provided a mode of cooperation between industrialized and developing countries. However, the CDM still needs to be improved in order to secure a rights-based approach to development while promoting sustainable development in developing countries.

3.3 Financial Arrangements for Climate Change

The costs associated with climate change, both in respect of mitigation of GHGs and of adaptation to a changing climate, pose a severe challenge to the international community. Developing countries in particular generally lack the resources to address this new environmental and social threat. Consequently, developing countries are especially vulnerable to climate change, since their budget is stretched to meet basic needs, such as access to food, water, and housing.

International cooperation in the form of financial assistance acquires critical relevance in light of the development challenges and vulnerabilities aggravated by climate change, especially in developing countries. While, financial arrangements for climate change are numerous and dispersed,²⁰ efforts by the international community to address the costs associated with climate change have fallen short of what is necessary to ensure that progress towards achieving the MDGs is not undermined by climate change.

The UNFCCC and the Kyoto Protocol have established mechanisms to channel financial assistance to developing countries. The UNFCCC assigns the Global Environment Facility as the operating entity of its financial mechanism on an on-going basis, subject to review every four years. The Kyoto Protocol establishes two main financial arrangements.²¹ First is the operation of the market

mechanisms, including the CDM, creating economic incentives for the reduction of emissions of the six-major GHGs. Second is the specific Adaptation Fund to assist developing countries to adapt to the adverse effects of climate change.²² The Adaptation Fund is replenished through, *inter alia*, contributions from the CDM.

This cursory overview of international cooperation and the climate change regime shows the CDM's relevance to encouraging investment and technology transfer to developing countries. Similarly, the CDM provides financial resources for the Adaptation Fund, which is critical in building community resilience in developing countries. These features already highlight the CDM's significance in the interface between climate change and the MDGs. Concerns, however, have been raised as to the CDM's environmental integrity, its ability to ensure respect for human rights, as well as its actual contribution to sustainable development. In light of its importance, the CDM is analyzed in further detail next.

4 The Clean Development Mechanism (CDM)

The CDM, created under the Kyoto Protocol to the UNFCCC, was designed to achieve cost-effective emissions reduction and promote sustainable development in developing countries. It does so by encouraging investments in developing countries that achieve emission reductions additional to what would otherwise have occurred. CDM projects have so far generated more than 365 million Certified Emission Reductions (CERs) and are anticipated to generate more than 2.9 billion CERs within the first commitment period of the Kyoto Protocol (2008-2012). The CDM has passed more than 2000 projects registered (UNITED NATIONS, 2010b).

This section first provides a brief background on the CDM and its structure. It then analyzes the CDM's requirements, scope, and actors. The last part addresses certain criticisms that have been leveled to the CDM, concluding with an analysis of options for its improvement.

4.1 Background

Under the Kyoto Protocol, industrialized Annex I Parties²³ must reduce their GHG net emissions by an average of 5% below 1990 levels over a five-year reporting period, 2008-2012 (UNITED NATIONS, 1997, Art. 3(1)). The CDM is one of the three market-based mechanisms created by the Kyoto Protocol to assist industrialized country Parties to meet their emissions reduction target (UNITED NATIONS, 1997, Art. 12).²⁴ Under the CDM, Annex I Parties (or private entities from those countries) may fund activities in non-Annex I Parties that result in CERs. Industrialized countries are then able to apply CERs toward their emissions targets.

The CDM has a two-fold purpose. First, it aims at promoting sustainable development in developing countries. Accordingly, the CDM is expected to lead to investments into the developing world and to the transfer of environmentally safe and sound technology (UNITED NATIONS, 2001). Second, the CDM is critical to addressing GHG mitigation by assisting industrialized countries in achieving compliance with their quantified emission reduction commitments under the Kyoto

Protocol. In this context, the main rationale behind the CDM is cost effectiveness, which means that CDM projects will take place where GHG emissions reductions are cheaper (VAN ASSELT; GUPTA, 2009, p. 311, 331).

4.2 Basic Requirements of a CDM project

Under Kyoto Protocol Article 5, CDM projects have to fulfill three basic requirements:²⁵

- a) ***Voluntary participation by each Party.***²⁶ Written approval of voluntary participation is a requirement for validation (UNITED NATIONS, 2005b, Annex, para. 40).
- b) ***Real, measurable, and long-term mitigation of climate change.*** CDM projects must lead to real, measurable reductions in GHG emissions, or lead to the measurable absorption (or “sequestration”) of GHGs in a developing country (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003, p. 4-5). The “project boundary” defines the area within which emissions reductions occur.²⁷
- c) ***Additionality.*** The “additionality” element requires emission reductions that are additional to any that would occur in the absence of a certified project activity (UNITED NATIONS, 1997, Art. 12(5)). Stated differently, “additionality” requires that GHG emissions from a CDM project activity must be reduced below those levels that would have occurred in the absence of the project.²⁸ In fact, it must be shown that the project would not have been implemented without the CDM.

A CDM project should also contain a “sustainability” element. All CDM projects must contribute towards sustainable development in the host country and must also be implemented without any negative environmental impacts (UNITED NATIONS, 2001, para. 4). To ensure that these conditions are met, the host country determines whether the CDM project meets its sustainable development objectives, and also decides whether an environmental assessment of the project is required (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003). The prerogative of the host country to define sustainable development has not been devoid of question, however, given the linkage between human rights and development and the need for external accountability of the State with respect to human rights issues.

4.3 Core Actors of the CDM

CDM projects involve several participants (PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, 2003):

- a) ***Project Proponent.*** This is the entity that develops and implements a CDM project.

- b) **CER Purchaser.** This invests in the project and/or purchases the project's CERs.
- c) **Stakeholders.** These include the public, or any individuals, groups or communities affected, or likely to be affected, by the proposed CDM project activities (UNITED NATIONS, 2001, Annex A (e)).
- d) **Host Country.** This is the developing country in which the CDM project takes place. The host country approves the project prior to its implementation.
- e) **Executive Board.** This supervises implementation of the CDM and reports to the COP/CMP. It is comprised of ten members representing Kyoto Protocol Parties (UNITED NATIONS, 2001, Annex C (5)). It also maintains the CDM registry for issuance of CERs, approves methodologies for measuring baselines and additionality, and accredits DOEs (UNITED NATIONS, 2001).
- f) **Designated National Authority (DNA).** The DNA is established by the host country and decides whether the proposed CDM is consistent with the country's sustainable development goals. The DNA serves as a focal point for consideration and approval of CDM project proposals (UNITED NATIONS, 2005b, Annex, para. 29). The DNA accepts or rejects the CDM component of particular projects (UNITED NATIONS; ENERGY AND ENVIRONMENT GROUP; BDP, 2003, p. 26).
- g) **Designated Operational Entities (DOEs).** DOEs are accredited by the CDM Executive Board as such (UNITED NATIONS, 2005b, Annex G; WOLD; HUNTER; POWERS, 2009, p. 234). They have varying responsibilities during different stages of the CDM project cycle, including: reviewing and assessing the Project Design Document (PDD); certifying the projects proposed methodology for measuring emissions reductions; validating project proposals; and verifying the emissions reductions resulting from the project that could be considered for issuance of CERs. There are two DOEs involved in the CDM process. The first DOE prepares a validation report evaluating the PDD against the CDM requirements, which it submits to the Executive Board for registration (NIGOFF, 2006, p. 249, 257-258).²⁹ The second DOE verifies and certifies the emissions reductions, and then provides a report to the Executive Board for CER issuance.

4.4 Stages in the CDM Project Cycle

Several steps must be undertaken to obtain CERs (STRECK; LIN, 2008, p. 409):

- a) **Design and formulation of the proposed project-by-project participants.** Project proponents submit a PDD to the host country's DNA. The PDD should include the technical and financial details of the project, including: proposed baseline methodology for calculating emissions reductions; project's estimated operational life time; description of the additionality requirements; documentation of environmental impacts; stakeholder comments; sources of

funding; and a monitoring plan (UNITED NATIONS, 2005b, Annex B; WOLD; HUNTER; POWERS, 2009, p. 14).

- b) **Approval by the DNA.** The DNA approves the development of the proposed CDM project. The DNA also confirms whether a CDM project activity will contribute to the sustainable development of the host State.
- c) **Validation.** The project design, expressed in the PDD, must be evaluated by the first DOE against the requirements of the CDM. Validation also includes assurance that the host country agrees to the following: that the project contributes to sustainable development; that any required environmental assessment has been carried out; and that there has been adequate opportunity for public comment on the project.
- d) **Registration.** The validated project must be formally accepted and registered by the Executive Board, based on the recommendations from the first DOE.
- e) **Verification.** Once the CDM project is underway, the monitored emissions reductions that result from it must be reviewed periodically by the second DOE.
- f) **Issuance of certification.** Upon written assurance provided by the second DOE, the CDM Executive Board issues the CERs. The CERs are then assigned to the Annex I country where the CER purchaser is located.

4.5 Project Types

Current CDM statistics (January, 2010)³⁰ show more than 2000 registered CDM projects, of which large-scale projects represent 55.43% and small-scale projects represent 44.57%.³¹ Most CDM projects involve energy industries (renewable and non-renewable sources), energy efficiency, waste handling and disposal, agriculture, manufacturing industries, fugitive emissions from fuels (solid, oil and gas), chemical industries, afforestation and reforestation, mining production, among others.³² China, India, Brazil, Mexico, and Malaysia are the major countries hosting CDM projects, accounting for approximate 80% of the total number of projects (UNITED NATIONS, 2008c).

Although the CDM does not have an explicit technology transfer mandate, it contributes to technology transfer by encouraging investments that use technologies currently not available in the host countries. According to a UNFCCC Secretariat report on technology transfer in CDM projects, technology transfer is more common for larger projects involving agriculture, energy efficiency, landfill gas, nitrogen dioxide (N₂O), hydro-fluorcarbon (HFC) and wind projects (SERES, 2008). Also technology transfer is more common for projects that involve foreign participants. The report concludes that the technology transferred mostly originates (over 70%) from Japan, Germany, the USA, France, and Great Britain. Although technology transfer from Non-Annex I countries is less than 10% of all technology transfer, Brazil, China, India, South Korea and Chinese Taipei are the main sources

of equipment (94%) and knowledge (70%) transfers from Non-Annex I sources (SERES, 2008).

4.6 Critiques of the CDM

Critiques of the CDM in the scholarly literature³³ concern, *inter alia*, governance practices, environmental integrity, and contribution to sustainable development (STRECK, 2009, p. 67).

- a) ***A rights-based approach (RBA) to CDM.*** The current CDM's emphasis on emissions reductions does not ensure that its projects minimize impacts deleterious to the rights of people or conservation (ORELLANA, 2009). Measures and projects adopted under the CDM can have direct and indirect impacts on human communities and livelihoods. For example, dam projects may involve displacement of communities and cause irreversible environmental impacts.
- b) ***No requirement of prior informed consent.*** The CDM requires only that affected communities be consulted, and not that they give their prior informed consent (or free, prior and informed consent in the case of indigenous and tribal peoples) (ORELLANA, 2009). This can result in a direct violation of human rights.
- c) ***Lack of equitable geographical distribution*** exists between developing countries that are eligible and those that are favored for project development. In other words, countries like China, India, and Brazil are receiving the lion's share of project investment, while African countries, for instance, are languishing.³⁴
- d) ***Equity.*** Market systems, such as the CDM, seek technological solutions and efficiency. The unequitable distribution of access to technologies, however, reinforces power and wealth disparities (BURKETT, 2008, p. 169, 234; KASWAN, 2009, p. 48). In addition, market-based systems treat pollution as a commodity to be bought or sold, raising complex ethical issues (KASWAN, 2009, p. 50-51).
- e) ***Failure to promote sustainable development or green technology transfer.*** As a market mechanism, the CDM searches for the cheapest emissions reductions. In that regard, while the CDM has been effective in reducing mitigation costs, it has not been equally effective in contributing more broadly to sustainability (STRECK, 2009). The greatest amounts of CERs are being generated by projects with low or negligible contribution to sustainable development. For example, most of the non-renewable energy projects that are now flooding the carbon market do not score high on certain sustainable development indicators (VAN ASSELT; GUPTA, 2009, p. 350). Similarly, renewable energy, energy efficiency and transport project activities—smaller in scale and more diffuse by nature—are less competitive in the CDM market (BURKETT, 2008, p. 210-212).
- f) ***Lack of access to remedies and jurisdiction.*** There is no accountability mechanism at the CDM, such as the World Bank's Inspection Panel (CLARK;

FOX; TREAKLE, 2003). In addition, the CDM rules do not provide recourse to private parties to challenge Executive Board decisions. Instead, the Executive Board, as is the case with other international institutions, has immunity to enable it to exercise its functions or fulfill its purposes without the threat of litigation.³⁵

- g) *Lengthy CDM process.*** The bureaucratic CDM process significantly slows an already strained project pipeline. The steps along the pipeline substantially increase the transaction costs of moving from the design and formulation of a project to issuance of CERs (BURKETT, 2008, p. 210). Moreover, the approval process is considered by some to be guided by political considerations rather than factual competence (STRECK, 2009, p. 71).
- b) *Lack of transparency.*** The lack of transparency is associated to DOEs' role in verifying emissions reductions, as DOEs are composed of private consultants (BURKETT, 2008, p. 236). In addition, lack of transparency relates to deficiencies of the regulatory process to guarantee the private sector's confidence in the CDM (STRECK, 2009, p. 71; STRECK; LIN, 2008).
- i) *Additionality.*** Most CDM projects are non-additional and therefore do not represent real emissions reductions. The additionality screening is criticized for being imprecise and subjective, as well as for being unable to prevent non-additional projects from entering the CDM (HAYA, 2009).
- j) *Limited use.*** The use of CDM is limited to reducing emissions on a single project-basis, and is not designed to address whole sectors of the economy.

Despite the criticisms, the CDM is mobilizing large amounts of funds from the private sector towards mitigation in developing countries. In addition, it can contribute to building institutional capacity and keeping developing countries engaged in the Kyoto Protocol's process. The CDM thus remains an important mechanism under the climate change regime for GHG mitigation and for promoting sustainable development and technology transfer. Therefore, one of the questions facing the climate change regime is how to reinvigorate and improve the CDM, including enhancing its effectiveness and ensuring its social and environmental integrity. In this sense, there is room for enhancing the CDM's role within the climate change regime, including post-2012.

4.7 CMP 5 Decision relating to the CDM

CMP 5 provided further guidance relating to the CDM, some elements of which are particularly important in informing an assessment of the CDM under criteria pertaining to the right to development. CMP 5 set in motion a process of study of baseline and monitoring methodologies and additionality to increase CDM projects in under-represented project activity types or regions (UNITED NATIONS, 2010c, para. 23, 25). This is relevant to increasing investments in projects that may

achieve significant sustainable development benefits and emissions reductions, as well as to channeling investments to more developing countries, including LDCs, instead of just a few.

CMP 5 also addressed the need for a wider distribution of CDM projects in developing countries. It adopted several measures to encourage CDM projects in countries with minor CDM participation, including a request to the Executive Board to use interest accrued within the Trust Fund for the CDM (and any voluntary contributions) to provide loans to countries with fewer than ten registered CDM projects to cover the costs of the development of PDDs, validation, and the first verification of project activities (UNITED NATIONS, 2010c, para. 47-50). In addition, CMP 5 took note of the work of the DNA Forum, given its potential contribution to achieving broader participation in the CDM, including through the sharing of information and experience, and encouraged the Executive Board to follow up on issues raised by the DNA Forum (UNITED NATIONS, 2010c, para. 44-45).

5 The CDM under Right to Development Criteria

Assessing the CDM under criteria pertaining to the right to development is helpful for evaluating proposals regarding CDM reform. The HLTF at its fifth session (2009) revised the right to development criteria and organized them under the three components of the right to development, namely: comprehensive human-centered development; enabling environment; and social justice and equity. In addition, the HLTF has identified operational clusters of criteria within each of these three components.

This section will focus on the following clusters of criteria, as defined by the HLTF: (1) human rights-based process and outcomes (criteria c, d & e); (2) sustainable development (criterion f); (3) international cooperation and assistance (criteria g, h, i & j); and (4) rule of law and governance (criteria l & m).

5.1 Human Rights-Based Process and Outcomes

The right to development criteria concerning human rights-based process and outcomes calls for particular attention on the principles of equality, non-discrimination, participation, transparency, and accountability in the design of development strategies. With respect to the CDM, these criteria call for attention on the CDM's ability to define sustainable development objectives in an inclusive and participatory process, on the one hand, and on the CDM's ability to ensure that the rights of stakeholders are respected, on the other.

The question of the definition of sustainable development objectives is left by CDM design in the hands of the host State. The host State's DNA will determine whether a proposed CDM projects contributes or not to its sustainable development. The CDM regards this determination as an expression of the sovereignty of the host State, and it does not provide for international scrutiny of it. Therefore, the CDM does not require that the DNA establish an open and participatory process

when defining sustainable development criteria, or when making determinations regarding the contribution of projects to sustainability.

The question of the CDM's ability to ensure that CDM projects respect the rights of stakeholders calls for analysis of the procedural safeguards in the CDM project cycle, in connection with the role of the Executive Board in that regard. Current CDM modalities and procedures already contain certain tools necessary to apply certain steps of a rights-based approach (RBA), although more could be done to ensure human rights protection (ORELLANA, 2009, p. 37-61). Similarly, it remains possible that the CDM Executive Board will exercise its authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In the exercise of this authority, the CDM Executive Board could conclude that no CERs shall be issued in connection with projects involving negative social and environmental spillovers, especially if such impacts involve infringements of rights.

An RBA to the CDM can be used to ensure that its future operations improve its contribution to sustainable development, including respect for human rights. An RBA will ensure that people's rights will not be affected by CDM projects, and will ensure environmental and procedural integrity. An RBA involves a series of steps oriented towards adequate consideration of the rights of individuals and communities that may be adversely affected by mitigation projects. In this respect, undertaking a situation analysis, providing adequate information on the project, and ensuring participation of rights-holders and other stakeholders are initial steps that enable early identification of the rights and interests that may be affected by the project. In addition, a process for taking reasoned decisions would ensure that adequate consideration is given to the rights at issue, which is central to avoid interference with protected rights as well as to balance competing rights where necessary. In addition, mechanisms for monitoring, evaluating, and adequate enforcement are important for operationalizing the RBA throughout the life of a project and for learning from the experience during implementation (ORELLANA, 2009).

5.2 Sustainable Development

The criteria concerning sustainable development call for an evaluation of, *inter alia*, the fair distribution of development benefits, both within and among countries. As noted above, the CDM is a market mechanism driven by investments in the cheapest opportunities for reducing emissions. Whether these projects also contribute to sustainable development raises two issues: the process and outcomes pertaining to the host State DNA's determination of sustainable development criteria and contributions; and the extent of participation of developing countries in the CDM (addressed below in connection with international cooperation and assistance).

In addition to the discussion above concerning a rights-based process to the determination of sustainable development criteria and contributions, the CDM does not explicitly require that human rights considerations be taken into account

in relation to sustainable development determinations. In the CDM's design, sustainable development determinations are the prerogative of the host State, which will thus determine whether and to what extent it considers human rights. While it could be argued that this design maximizes national policy space and autonomy, it is, however, in opposition to the notion that human rights issues are a matter of international concern, and that they are directly and indirectly implicated in sustainable development. In this regard, the right to development criterion concerning national policy space stresses that the determination of development policies should be conducted in a manner that is consistent with realizing all human rights (UNITED NATIONS, 2009b, Annex IV, Criterion (k)).

5.3 International Cooperation and Assistance

The criteria concerning international cooperation and assistance call for an examination of, *inter alia*, to the extent of participation of developing countries in the CDM. In this respect, as noted above, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria stressing equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community. Moreover, this situation aggravates international inequities pertaining to financial flows and transfer of technology for GHG mitigation.

Accordingly, a more equitable geographical distribution of CDM projects, in numbers and volume of investments, would enhance the CDM's ability to contribute to the right to development. Similarly, the implementation of a sectoral CDM initiative, in addition to individual CDM projects, could enhance the ability of smaller developing countries to participate in the CDM. As noted above, CMP 5 has taken certain steps in this direction.

5.4 Rule of Law and Governance

Regard to rule of law and governance as a cluster of right to development criteria calls for attention on the national and international institutions active in the CDM, including with respect to accountability, access to information, and effective measures for redress.

At the national level, the CDM can contribute to the host State's ability to establish institutional mechanisms to facilitate green investments and technology transfer. The creation of DNAs as a pre-requisite for CDM projects reflects the CDM's potential contribution to institutional improvement. To ensure that this contribution materializes, however, the CDM must establish adequate tools to ensure accountability of DNAs.

At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed. It has been noted that a grievance mechanism could allow the

CDM project to address and remedy situations before disputes aggravate or entrench opposing positions or result in violence. A grievance mechanism available to the various actors participating in the CDM could also lift the process to the level of an administrative procedure that meets due process standards, thereby enhancing good governance and the rule of law (STRECK; CHAGAS, 2007, p. 53, 61-62).

With respect to CDM governance, there are no mechanisms established for affected individuals to challenge Executive Board decisions. It has been suggested that CDM administrative procedure must meet international due process standards, enhance the predictability of its decisions, and promote private-sector confidence in the system. In this vein, it has been proposed that a review mechanism of the decisions of the Executive Board should be established, in order to give project participants and stakeholders the right to obtain review of Executive Board decisions (STRECK; CHAGAS, 2007). In this regard, CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work, including through, *inter alia*, publishing detailed explanations of and the rationale for decisions taken and enhancing its communications with project participants and stakeholders (UNITED NATIONS, 2010c, para. 6-15).

5.5 Improving Right to Development Criteria

Improving right to development criteria with climate change in mind would not only contribute to the effectiveness of global partnerships (MDG 8), but would also contribute to reinvigorate the developmental dimensions of the climate change regime, thereby enabling progress toward the achievement of the MDGs generally.

For example, a new criterion could be added regarding the scientific basis for decision-making, *e.g.*, “adopt a science-based approach to decision-making, including application of the precautionary approach”. The 2002 Johannesburg World Summit on Sustainable Development (WSSD) endorsed a science-based approach to decision-making. Specifically, the WSSD Plan of Implementation establishes science-based decision-making as the preferred approach for making regulatory decisions (UNITED NATIONS, 2002b, para. 109). Moreover, as explicitly noted in the WSSD Plan of Implementation, a science-based approach to decision-making includes the application of the precautionary principle or approach, which states that the lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation.³⁶

The application of a science-based approach to decision-making is particularly important with respect to climate change. In order to evaluate the effectiveness of international arrangements established to channel international cooperation to address climate change, this criterion enables the utilization of scientific evidence. It thus avoids subjective evaluations of effectiveness by focusing on whether the measures established in the climate change regime are capable, on account of the scientific evidence, of achieving the objective of the UNFCCC (discussed above).³⁷

Similarly, a new criterion could be added regarding common but differentiated responsibilities, *e.g.*, “recognize common but differentiated

responsibilities, in view of the different contributions to global environmental degradation". The principle of common but differentiated responsibilities (CBDR) is central to the climate change regime and affirms that all States have common responsibilities to protect the environment and promote sustainable development but with different burdens due to their different contributions to environmental degradation and to their varying financial and technological capabilities (HUNTER; ZALMAN; ZAELKE, 2002, p. 495).

The endorsement of CBDR as a criterion regarding the right to development allows for an evaluation of particular climate change arrangements that may be established. Further, this criterion re-affirms the central importance of the CBDR principle in the climate change regime, including with respect to its sustainable development dimension. This criterion could also reinvigorate the necessary financial and technological flows into developing countries, which has been identified by the UN Secretary-General as key elements of the global new deal required to address climate change and achieve the MDGs (UNITED NATIONS, 2010a).

6 Conclusion

Over the last decade, the UN has devoted substantial resources to promoting efforts to meet the Millennium Development Goals (MDGs). Given the direct impact of climate change on the ability of the international community to achieve the MDGs, this paper has looked into certain linkages between climate change, the right to development and the MDGs. In this light, international cooperation is critical both to tackling climate change and achieving the MDGs. The UN Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol stand out as the principal legal response by the international community to the climate change threat. They provide avenues through which international cooperation occurs, including with respect to financial and technology transfers.

The linkages between the right to development and climate change are reflected in both the UNFCCC and the Kyoto Protocol. The UNFCCC noted that the largest share of historical global emissions of GHGs has originated in industrialized countries and recognized that the share of global emissions originating in developing countries will grow to meet their social and development needs. The Kyoto Protocol set targets for greenhouse gas (GHG) emissions reductions for industrialized countries (Annex I Parties), and created three market mechanisms, including the Clean Development Mechanism (CDM), to reduce the costs of reducing emissions.

The CDM is unique in light of its two-fold objective: mitigating climate change and contributing to sustainable development. In this regard, the CDM reflects a climate change partnership whereby investments from the North are channeled to the South in order to capture opportunities for the reduction of GHG emissions where they may be most cost-effective. The CDM thus promotes financial flows and technology transfer into developing countries, which, as the UN Secretary-General has observed, are central to channeling resources towards

investment in renewable energy, and building resilience with respect to unavoidable climate changes.

When examined using right to development criteria, however, the CDM reveals certain weaknesses that limit its contribution to the implementation of the right to development. Key points include the following.

- *Criteria pertaining to human rights-based processes and outcomes* calls on the CDM to ensure that the host State's determination of whether a proposed CDM project contributes to sustainable development follows an inclusive and participatory process. In addition, human rights considerations should also be taken into account in relation to sustainable development determinations. Furthermore, CDM projects need to respect the rights of stakeholders, which call for strengthened procedural safeguards and Executive Board authority to supervise the CDM to exact compliance with all terms of the CDM modalities and procedures. In this vein, a rights-based approach should be adopted to ensure that people's rights will not be negatively affected by CDM projects.
- *Criteria pertaining to sustainable development and international cooperation and assistance* call on the CDM to ensure the equitable participation of developing countries. Currently, most CDM projects are implemented in just a few developing countries, which thus receive the lion's share of CDM investment. This situation is at odds with right to development criteria that stress equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community.
- *Criteria pertaining to rule of law and governance* call on the national and international institutions active in the CDM to ensure access to information and transparency, public participation, accountability, and effective measures for redress. At the national level, the CDM lacks explicit tools to ensure accountability of Designated National Authority (DNAs), as this is an issue within the domain of the host State. At the international level, the CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed.

The fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) in December 2009 adopted certain decisions that begin to address some of these issues by providing further guidance relating to the CDM. CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency, and impartiality in its work. CMP 5 also set in motion a process to increase CDM projects in under-represented project activity types or regions. Moreover, CMP 5 addressed the need for a wider distribution of CDM projects in developing countries, and adopted several measures to encourage CDM projects in countries with minor CDM participation.

More generally, given the linkages between the right to development, the

MDGs and climate change, the design and experience of the CDM in channeling investments and technology transfer to developing countries provides valuable lessons in structuring and improving global partnerships to address both climate change and sustainable development. In this regard, the CDM is directly relevant to MDG 8 regarding global partnerships and technology transfer, as well as to the other MDGs directly affected by climate change.

In the end, the linkages explored in this paper, coupled with the findings of the examination of the CDM under right to development criteria, evidence the need for a rights-based approach to climate change, in order to ensure that climate change mitigation and adaptation does not compromise efforts directed at implementing the right to development and achieving the MDGs, as well as to capture opportunities provided by the MDGs in enhancing capacities needed to tackle climate change.

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NOTES

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2. See UNDP, *Climate Change and the Millennium Development Goal*. Available at: <http://www.undp.org/climatechange/cc_mdgs.shtml>.
3. The High Level Task Force on the Implementation of the Right to Development (HLTF) was established by the Open-ended Working Group on the Right to Development (Working Group) created by the (former) Commission on Human Rights See United Nations (2004, para. 9). The HLTF was convened to act as an advisory body to the Working Group and to render operational the terms of the Declaration on the Right to Development. See also United Nations (1998a, 1998b). The HLTF's mandate was to "examine the Clean Development Mechanism (...)" from a right to development perspective. See United Nations (2005a, 2008a, 2009b).
4. See generally, Center for International Environmental Law & Friedrich Ebert Stiftung (CIEL; FES, 2009). See also, Cameron (2009); Limon (2009); Global Humanitarian Forum (2009); International Council on Human Rights Policy (2008); Baer, Athanasiou and Kartha (2007).
5. The DRD [hereinafter DRD or Declaration] defines the meaning of development as "a comprehensive economic, social and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from." (UNITED NATIONS, 1986, Annex 41).
6. Charter of the United Nations (June 26, 1945), entered into force October 24, 1945, 59 Stat. 1031; TS 993; [hereinafter UN Charter] (UNITED NATIONS, 1945, Preamble, Art. 55-56).
7. International Covenant on Civil and Political Rights (December 19, 1966), entered into force March 23, 1976 [hereinafter ICCPR] (UNITED NATIONS, 1966a).
8. International Covenant on Economic, Social and Cultural Rights (December 16, 1966), entered into force January 3, 1976 [hereinafter ICESCR] (UNITED NATIONS, 1966b).
9. "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." (UNITED NATIONS, 1992a, principle 3).
10. The Vienna Declaration sanctioned the right to development as an "integral part of fundamental human rights" (UNITED NATIONS, 1993, Art. 10). The Vienna Declaration reiterated the commitment contained on Article 56 of the UN Charter, which determines all States to cooperate with each other in ensuring development and eliminating obstacles to development (UNITED NATIONS, 1993, Art. 10-11).
11. Study on the current state of progress in the implementation of the right to development submitted by Mr. Arjun K. Sengupta, Independent Expert (SENGUPTA, 1999, para. 47).
12. "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." (UNITED NATIONS, 1993, para. 10).
13. See United Nations (2002a, para. 46). The Working Group, at its Sixth Session in 2005, recognized the "multi-faceted nature of the right to development [and] agreed that a rights-based approach to economic growth and development contributes to the realization of the right to development while it does not exhaust its implications and requirements at both the national and international levels." See United Nations (2005a). See also, Nwauche and Nwobike (2005).
14. Article 2(1), ICESCR states that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (UNITED NATIONS, 1966b, emphasis added). The

importance of international assistance and cooperation to the realization of human rights is also reflected in other international and regional human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

15. In this vein, the duty to cooperate in the climate change context requires States to negotiate and implement international agreements under the auspices of the UNFCCC, which features the necessary membership and expertise. See Knox (2009, p. 163, 213).
16. United Nations Framework Convention on Climate Change (May 9, 1992) entered into force March 21, 1994 (UNITED NATIONS, 1992b, Art. 2).
17. See Kyoto Protocol to the United Nations Framework Convention on Climate Change (December 11, 1997), entered into force February 16, 2005 [hereinafter Kyoto Protocol] (UNITED NATIONS, 1997).
18. CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆.
19. COP 15 took "note of the Copenhagen Accord of 18 December 2009" (UNITED NATIONS, 2009e).
20. A number of international organizations are actively engaged in administering and/or operating climate change funds, including the UNDP, United Nations Environment Programme (UNEP), and the United Nations International Strategy for Disaster Reduction (UN-ISDR). Similarly, a number of multilateral development banks have set up dedicated funds to address climate change. Further, several industrialized countries have established climate change funds to assist climate change mitigation and adaptation in the developing world.
21. See UNFCCC, **About Clean Development Mechanism (CDM)**, <<http://cdm.unfccc.int/about/index.html>>.
22. See UNFCCC, **Adaptation Fund**, <http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php>. The Adaptation Fund Board supervises and manages the Adaptation Fund and has sixteen members and sixteen alternates who meet no less than twice a year. In December 2008, the Parties to the Kyoto Protocol established rules of procedure, priorities, policies, and guidelines for the Adaptation Fund.
23. Annex I Parties includes OECD member countries and countries undergoing the process of transition to a market economy.
24. The two other mechanisms are Joint Implementation and Emissions Trading. See United Nations (1997, Art. 6, 17).
25. Beyond these requirements, the Kyoto

Protocol provided almost no guidance for operation of the CDM. To develop the necessary institutional framework to operate the CDM, the Parties have adopted a substantial body of Decisions at meetings of the Parties. See Wold, Hunter and Powers (2009, p. 233).

26. See, United Nations (2005b, Annex, para. 28): "Participation by Parties in a CDM project activity is voluntary."
27. See, Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001 [hereinafter Marrakesh Accords] (UNITED NATIONS, 2001, Annex G (52)).
28. "A CDM project activity is additional if anthropogenic emissions of GHG by sources are reduced below those that would have occurred in the absence of the registered CDM project activity". See United Nations (2001, Annex G (43)).
29. In small-scale projects the same designated operational entity can carry out both the validation (at project outset) and verification (during project operation), in order to avoid expenses of using two DOEs. See also United Nations, Energy and Environment Group and BDP (2003, p. 20-22).
30. See United Nations Framework Convention on Climate Change (UNFCCC), CDM-Home, <<http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScalePieChart.html>>.
31. The definition of small scale projects is provided by the COP/CMP as: (I) renewable energy project activities with a maximum output capacity equivalent of up to 15 megawatts; (II) energy efficiency improvement project activities which reduce energy consumption by up to the equivalent of 15 gigawatt hours per year; and (III) other project activities that both reduce anthropogenic emissions by sources and directly emit less than 15,000 kilotons of CO₂ equivalent per year. See Decision 17/CP.7 (UNITED NATIONS, 2001, para. 6(c), amended by 1/ CMP.2, para. 28). A project which is eligible to be considered as a small-scale CDM project activity can benefit from the simplified modalities and procedures. See Decision 4/CMP.1 (UNITED NATIONS, 2005c, Annex II).
32. See <<http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScopePieChart.html>>. The energy industries sector represents 60.31% of the total projects registered under the CDM.
33. This section is based on the scholarly debate. Moreover, the discussion does not purport to evaluate the merits of the various critiques.
34. According to the UN Environment Programme (UNEP), the number of CDM

projects that are being planned or have been registered across the African region is increasing. UNEP reports that a total of 112 CDM projects in Africa are at the stage of validation, requesting registration or have been registered. This is an increase from previous years, with 78 projects in 2008 and two in 2004. See UNEP (2009).

35. See Wold, Hunter and Powers (2009, p. 236), citing Ernestine E. Meijer (2007, p. 873). See also Streck and Lin (2008).

36. See United Nations (1992a, Principle 15). See also Convention on Biological Diversity (June 5, 1992), entered into force December 29, 1993 (UNITED NATIONS, 1992c); Cartagena

Protocol on Biosafety to the Convention on Biological Diversity (January 29, 2000), entered into force September 11, 2003 (UNITED NATIONS, 2000b).

37. In this connection, the Copenhagen Accord agrees that "deep cuts in global emissions are required according to science." (UNITED NATIONS, 2009e, para. 2); It further underlines that "to achieve the ultimate objective of the UNFCCC," and "recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius," the Parties shall enhance cooperative action to combat climate change.

RESUMO

Este artigo explora ligações entre os direitos humanos e os Objetivos de Desenvolvimento do Milênio (ODMs), a cooperação internacional em mudança climática e o Mecanismo de Desenvolvimento Limpo (MDL). O artigo utiliza critérios do direito ao desenvolvimento para analisar o MDL. O MDL oferece um exemplo claro de parceria internacional entre o Sul global e o Norte industrializado para alcançar os objetivos duplos de promover o desenvolvimento sustentável e mitigar as mudanças climáticas. O MDL é, portanto, diretamente relevante para o ODM 7 relativo a parcerias globais e transferência de tecnologia, bem como para outros objetivos de desenvolvimento do milênio diretamente afetados pela mudança do clima. Ademais, o foco no MDL também levanta questões sobre investimentos e fluxos de recursos, transferência de tecnologia e integridade ambiental, bem como o significado e a operacionalização de uma abordagem do desenvolvimento baseada em direitos humanos, todos centrais para a mitigação efetiva e equitativa das mudanças climáticas e para a consecução dos ODMs.

PALAVRAS-CHAVE

ODMs – Cooperação internacional – Mudança climática – Mecanismo de Desenvolvimento Limpo

RESUMEN

El presente trabajo explora los vínculos entre los derechos humanos y los ODM, la cooperación internacional en materia de cambio climático y el Mecanismo de Desarrollo Limpio (MDL). Se usa el criterio del derecho al desarrollo para analizar el MDL. El MDL ofrece un claro ejemplo de una asociación internacional entre el Sur global y el Norte industrializado para alcanzar el doble objetivo de promover el desarrollo sostenible y mitigar el cambio climático. El MDL tiene, por lo tanto, una relevancia directa para el ODM 8 respecto de las asociaciones globales y la transferencia de tecnología, como así también para los demás ODM que se ven directamente afectados por el cambio climático. Asimismo, al analizar el MDL, surgen cuestiones relativas a las inversiones y el movimiento de recursos, la transferencia de tecnología, la integridad del medio ambiente, y el sentido y la operacionalización de un enfoque de desarrollo basado en los derechos, todas cuestiones centrales para una mitigación efectiva y equitativa del cambio climático y para el logro de los ODM.

PALABRAS CLAVE

ODMs – Cooperación internacional – Cambio climático – Mecanismo de Desarrollo Limpio



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ABSTRACT

Over the last decade a growing number of cases brought before U.S. courts have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. These cases concern one of the most disputed questions in international human rights litigation, namely, the availability of secondary or indirect liability and aiding and abetting liability in particular. While the U.S. Supreme Court has yet to address the issue, many District and Circuit Courts have held that aiding and abetting liability is available under the Alien Tort Claims Act ('ATCA').

This paper aims to examine the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York and argue in favour of the court's opinion that aiding and abetting liability is available, necessary and desirable and does not conflict with the political question and international comity doctrines. It will be argued that submissions against recognizing this kind of liability, such as those by the Bush administration and South African Mbeki government, are misguided, illogical and damaging and that without the threat of liability, which the ATCA can afford, multinational corporations face no consequences for aiding or abetting the very abuses which U.S. foreign policy claims it seeks to prevent.

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KEYWORDS

Alien Tort Act/Statute – Aiding and abetting liability – Apartheid victims – Reparations – Multinational corporations – Political question – International comity



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ALIENS, APARTHEID AND US COURTS: IS THE RIGHT OF APARTHEID VICTIMS TO CLAIM REPARATIONS FROM MULTINATIONAL CORPORATIONS AT LAST RECOGNIZED?

Lindiwe Knutson

1 Introduction

Can multinational corporations be held liable for helping foreign governments commit human rights abuses? Should such indirect liability be available? Could policy arguments be employed to dismiss such cases?

Over the last decade a growing number of cases brought before U.S. courts have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments.¹ Plaintiffs in these cases have relied, at least in part, on the Alien Tort Claims Act ('ATCA') (UNITED STATES OF AMERICA, 1992)² which allows U.S. courts to hear cases brought by 'aliens' or foreigners for violations of established and defined international law norms.³ Some of the most fascinating and disputed questions in international human rights litigation concern the availability of secondary or indirect liability and aiding and abetting liability in particular. While the U.S. Supreme Court has yet to address the issue (STEPEHNS, 2005, p. 535; HOFFMAN; ZAHEER, 2003, p. 47) many District and Circuit Courts have held that aiding and abetting liability is available under the ATCA.⁴ However, these lower courts have failed to lay down a clear doctrine and so it remains controversial as to whether such liability should be available, how it should be defined and whether it should be based in federal common law or international law.

On 8 April 2009 in the case of *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a)⁵ (commonly referred to as the *Khulumani* case) Judge Shira Scheindlin of the Southern District Court of New York in a 144 page opinion refused to dismiss civil damages claims brought under the ATCA by a class of South African citizens alleging that Ford, General Motors, IBM, Fujitsu

Notes to this text start on page 193.

Ltd., Barclays National Bank Ltd. and the Union Bank of Switzerland aided and abetted torture and other atrocities committed by the Apartheid regime (UNITED STATES OF AMERICA, 2009a, p. 28).⁶ The *Khulumani* case and the highly technical debate which surrounds it illustrates the complex task judges are faced with when litigation involves foreign plaintiffs, multinational corporations, federal and foreign governments and domestic and international law. ATCA cases require a court to balance the need to promote justice with the duty to uphold the separation of powers and not interfere with executive decisions and foreign policy (NEMEROFF, 2008, p. 286). It is argued that establishing a clearer doctrine for aiding and abetting liability under the ATCA will go a long way in assisting judges to decide such cases and would also assist victims in deciding whether they can bring such claims and how to structure them as well as send a message to U.S. and foreign corporations that they could be held liable and on what bases (NEMEROFF, 2008, p. 286).

This paper aims to examine these issues in light of the most recent *Khulumani* decision by Judge Scheindlin and argue in favour of the court's opinion that aiding and abetting liability is available, necessary and desirable in contributing 'to ensure that laws govern the behavior of non-state actors in a world where, more than ever before, they have the power, and sometimes the interest, in enabling mass violations of human rights.' (UNITED STATES OF AMERICA, 2009a). In advancing this argument it will be shown that the submissions by the Bush administration and South African Mbeki government against recognizing such liability were misguided, illogical and damaging and that without the threat of liability, which the ATCA can afford, companies face no consequences for aiding or abetting the very abuses which U.S. foreign policy claims it seeks to prevent.

Part II presents a brief overview of the background to and evolution of the ATCA focusing on the availability of aiding and abetting liability under the statute and its use against corporations in U.S. courts.

Part III outlines the procedural background to the *Khulumani* case and the most recent ruling by Judge Scheindlin in the Southern District Court of New York. It recounts the arguments against imposing liability made by the Bush administration that the potential of aiding and abetting liability will discourage investment in developing countries, which conflicts with their foreign policy of 'constructive engagement' and that of the South African Mbeki government that a ruling would infringe upon their sovereignty and discourage foreign investment.

Part IV examines the level of judicial deference required when governments submit policy arguments as grounds for dismissal. It outlines the doctrines of judicial deference, political question and international comity as understood in the context of ATCA litigation as well as Judge Scheindlin's reasons for finding that they do not merit dismissal of the *Khulumani* case.

Part V evaluates how U.S. courts in general have treated executive submissions and argues in favour of a more substantive analysis in looking at why the foreign policy, foreign investment and sovereignty arguments fail. Such an analysis seeks to go beyond a factual examination of the submission itself to assess the wider legal and practical implications liability could have. Doing so, demonstrates that aiding and abetting liability under the ATCA actually supports, rather than undermines

U.S. foreign policy, encourages positive investment and does not infringe on the principle of sovereignty. The analysis also shows aiding and abetting liability under the ATCA to be a necessary and valuable tool.

Part VI outlines recent developments since Judge Scheindlin's opinion. These include drastic turnabouts in the views' submitted by the respective governments. In September 2009, the South African government submitted a letter to the District Court now seeming to support the litigation. Similarly in November 2009, the United States government submitted an amicus brief to the Court of Appeals for the Second Circuit in favour of the plaintiffs' dismissal of the defendants' appeal. Some conclusions are drawn as to what this means for the *Khulumani* case and the development of the doctrine of aiding and abetting liability generally. The paper concludes with an overview of the doctrine's subsequent success or lack thereof and stresses the significance of the outcome of the *Khulumani* case in light of this.

2 Background to the ATCA

The ATCA was enacted in 1789 and remained largely unused for almost two hundred years until 1980 (BRADLEY, 2002, p. 588).⁷ The case of *Filartiga v. Pena-Irala* (UNITED STATES OF AMERICA, 1980, p. 887)⁸ was the first to use the ATCA to hold human rights abusers accountable for torture and murder through civil claims for 'a tort...committed in violation of the law of nations.' However, its use against corporate defendants was first granted in 1997 by a District Court in the case of *Doe I v. Unocal* (UNITED STATES OF AMERICA, 1997). The plaintiffs were Burmese villagers alleging that Unocal was complicit in gross human rights violations, such as rape and torture, committed by the Burmese military tasked on behalf of Unocal to secure the natural gas pipeline project there (UNITED STATES OF AMERICA, 2004a, p. 729-732).⁹ This case paved the way for similar corporate defendant claims in Federal and District Courts where plaintiffs relied on the ATCA to pursue litigation based on indirect liability.¹⁰

Finally, in 2004, the U.S. Supreme Court addressed the ATCA in the case of *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a) (referred to as *Sosa* below). The court affirmed the preceding line of cases in so far as it held that violations of international norms which were 'specific, universal and obligatory' would be actionable under the ATCA (UNITED STATES OF AMERICA, 2004a, p. 732). The court went on to note that 'practical consequences' could be considered as part of 'the determination [of] whether a norm is sufficiently definite to support a cause of action.' (UNITED STATES OF AMERICA, 2004a, p. 732-733). It was also stated in a footnote that a 'possible limitation' upon the application of the ATCA could be 'case-specific deference to the political branches' so as to avoid interference with U.S. foreign policy (UNITED STATES OF AMERICA, 2004a, p. 733, footnote 21).¹¹ Critically, the court did not consider whether the statute encompassed aiding and abetting liability specifically.

Numerous District and Circuit Courts have held that corporate aiding and abetting liability is available under the ATCA. However, a clear doctrine has yet to be established for the definition of and basis for such liability, which remain

controversial. This paper does not seek to add to the debate, however, a brief summary is warranted highlighting the conclusions reached by Judge Scheindlin.

In terms of the *basis* for aiding and abetting liability the debate is whether it should be governed by federal common law or international law or whether it even makes a difference (BRADLEY; GOLDSMITH; MOORE, 2007, p. 120). The Supreme Court created uncertainty by stating that while ATCA claims are 'claims under federal common law'; to be actionable 'a specific, universal and obligatory' norm of international law had to be violated (UNITED STATES OF AMERICA, 2004a, p. 729-732). Judge Scheindlin, acknowledging uncertainty in the law, interpreted the Supreme Court's statement as requiring courts to look to international and not federal law as the basis for liability in determining both the 'existence of substantive offences' and the 'contours of secondary liability as well.'¹² Some writers argue that courts should apply international law through the ATCA cautiously and incrementally (DHOOGE, 2009, p. 280).

In terms of the *definition* of aiding and abetting liability the debate is whether the required mental or subjective element is knowledge or intent. The uncertainty in the law is evident as three judges of the Second Circuit Court hearing the *Khulumani* case had different views on the issue.¹³ It is argued that Judge Hall's opinion requiring 'knowledge' would open the door more widely for liability to be imposed while Judge Katmann's opinion requiring 'purposeful' conduct would make liability difficult to prove but discourage suits against corporations for merely doing business in countries where human rights abuses are committed (NEMEROFF, 2008, p. 283-284). Judge Scheindlin emphasized that 'knowledge' was required for aiding and abetting liability under the 'vast majority' of international law.¹⁴ She concluded that in the absence of other relevant legal materials requiring specific intent, customary international law required 'that an aider or abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations' and that this was the standard to be applied in deciding whether conduct amounted to aiding and abetting liability under the ATCA.¹⁵

3 Background to the *Khulumani* Case

The preceding section outlined the history of ATCA litigation and the points of contention surrounding aiding and abetting liability. The next section summarizes the procedural background to the *Khulumani* case as well as the arguments against liability submitted by the U.S. and South African governments. The case originally comprised of ten separate actions by three groups of plaintiffs against about fifty major multinational banks and corporations that did business with the Apartheid government. The plaintiffs instituted their initial claims under the ATCA, Torture Victims Protection Act and Racketeer Influenced and Corrupt Organizations Act.¹⁶ The bases for their allegations are summarized as follows: the defendants knew of the racist policies of the Apartheid government and the human rights violations committed as a result but never the less did business there, the defendants made a profit from cheap labour and provided the government with resources such as technology, oil, money and vehicles which were used to maintain and enforce

Apartheid policies; had the defendants not done this Apartheid would have ended sooner and the plaintiffs would not have suffered some or all of their injuries.¹⁷

In 2004 the claims were consolidated before Judge John E. Sprizzo in the Southern District Court of New York who dismissed all the claims and contrary to a large body of law held that the ATCA did not provide a basis for aiding and abetting liability (UNITED STATES OF AMERICA, 2004c, p. 550). The plaintiffs appealed the dismissal upon which the Second Circuit Court partially vacated the dismissal in terms of the ATCA claim, finding that aiding and abetting liability may be pleaded under the statute and allowing the claim to proceed.¹⁸ The defendants appealed to the U.S. Supreme Court, which issued an order on 12 May 2008 affirming the Second Circuit's decision (UNITED STATES OF AMERICA, 2008). The circumstances of the affirmation were that four justices had recused themselves and so the court lacked the necessary quorum to issue an opinion.¹⁹

The Supreme Court order affirmed the Second Circuit's order vacating the denial of leave to amend and declining to dismiss the case on the policy grounds of international comity and political question and directed that the District Court consider these doctrines in light of the amended pleadings.²⁰ Before the District Court, the defendants again sought to rely on these doctrines together with the submissions of the South African government and Bush administration calling for dismissal of the claims.²¹ In short, the U.S. government argued aiding and abetting liability would discourage investment in developing countries and that this conflicted with their foreign policy of constructive engagement. The South African government argued the litigation would infringe upon their sovereignty and discourage foreign investment. These arguments are outlined below.

3.1 The submissions of the United States government

In 2003, under the Bush administration, the Department of State advised the District Court that 'continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the U.S.'²² It also argued that South Africa 'is broadly representative of the victims of the Apartheid regime [and] is uniquely charged with a popular mandate to deal with the legacy of Apartheid.' (UNITED STATES OF AMERICA, 2009a).

The submission also stated that such litigation would hamper foreign investment in South Africa and other developing countries, a goal which was central to the U.S. foreign policy of 'constructive engagement' (UNITED STATES OF AMERICA, 2009a).

The U.S. government similarly argued in an amicus brief submitted to the Second Circuit Court that '[o]ne of the practical consequences of embracing aiding and abetting liability under ATCA claims would be to create uncertainty that would in some cases interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing

aiding and abetting liability... would generate significant uncertainty regarding private liability, which would surely deter many businesses from such economic engagement.²³

3.2 The submissions of the South African government:

In 2003 former president Thabo Mbeki in a public announcement stated ‘we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our Constitution of the promotion of national reconciliation.’²⁴ He further stated that the litigation interfered with the ‘sovereign right to determine, according to internal political and constitutional order, how best to address Apartheid’s legacy.’ (UNITED STATES OF AMERICA, 2009a, p. 91). Shortly after, the Minister of Justice at the time, Penuell Maduna filed a declaration with the U.S. District Court stating the litigation had the potential to discourage foreign investment in South Africa and that the court should not hear the case as doing so would ‘interfere with [a] foreign sovereign’s efforts to address matters in which it has predominant interest.’²⁵

3.3 The submissions of the Truth and Reconciliation Commission (‘TRC’):

The arguments advanced by the South African government were not supported by the TRC Commissioners. The chairman of the TRC, Desmond Tutu, submitted an amicus brief to the Second Circuit Court stating: ‘[t]here was absolutely nothing in the TRC process, its goals or the pursuit of the overarching goal of reconciliation, linked with truth that would be impeded by this litigation. To the contrary, such litigation is entirely consistent with these policies and with the findings of the TRC.’ (UNITED STATES OF AMERICA, 2009a, p. 94). This is so because nothing in the TRC Act or Commission Reports amounted to the explicit or implicit granting of amnesty to corporations. The Promotion of National Unity and Reconciliation Act 34 of 1995 which established the TRC stated in its preamble that amnesty could be afforded to ‘persons who make full disclosure’ the implication being that corporations did not qualify for amnesty under the Act nor did any apply for such amnesty (UNITED STATES OF AMERICA, 2009a, p. 95). In light of this, in its final report, the TRC stated that business ‘must be held accountable’ outside of the amnesty mechanisms of the TRC (UNITED STATES OF AMERICA, 2009a).²⁶

4 Policy considerations as a basis for dismissal

The next section considers whether, and if so on what bases, the arguments outlined above merit dismissal of the case and whether such policy arguments should preclude aiding and abetting liability under the ATCA in general. This was the issue on remand for Judge Scheindlin to decide. The task is a complex one as a judge is not only faced with questions surrounding the relationship between

international and domestic law but also the relationship between the judiciary and the executive branches of government. This is further complicated by executive submissions requesting dismissal or expressing disapproval. The submissions in the *Khulumani* case outlined above are an example of this. Courts have had to address the question of how to treat executive submissions in human rights litigation and in doing so have relied largely on the political question doctrine and to a lesser extent the international comity and act of state doctrines.²⁷ In applying them a court is tasked with balancing the need to preserve judicial independence while giving executive submissions due deference and being mindful not to ‘undermine the constitutional balance of power’ (STEPHENS, 2004, p. 170). The following section will outline the political question and international comity doctrines as understood in the context of ATCA litigation followed by Judge Scheindlin’s opinion as to their application in the *Khulumani* case.

4.1 Deference and the Political Question Doctrine

The political question doctrine seeks to uphold the separation of powers and operates when ‘a court declines to hear a case that deals with issues more properly belonging before one of the “political” branches of government’ (BAXTER, 2006, p. 826). The Supreme Court in *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) held that its application involves a ‘case by case’ inquiry of whether one or more of six factors are present.²⁸ It was stated in *Kadic v. Karadzic* (UNITED STATES OF AMERICA, 1995, p. 249)²⁹ that the first three factors did not apply to litigation dealing with international law but the latter factors could be applicable where the impact of litigation on foreign relations needed to be assessed (SUTCLIFFE, 2009, p. 301). It has been noted that executive submissions on how litigation will impact policy decisions on foreign relations fall within at least one of the required factors and so trigger the application of the doctrine. Despite the Supreme Court’s warning that not ‘every case or controversy which touches on foreign relations lies beyond judicial cognizance’ (UNITED STATES OF AMERICA, 1962, p. 211) lower courts initially applied the doctrine automatically where executive submissions against litigation were presented. The first ATCA case involving the evaluation of executive submissions was *Sarei v. Rio Tinto* (UNITED STATES OF AMERICA, 2002b, p. 1208-1209)³⁰ where the District Court automatically dismissed all the claims under the political question doctrine. The courts’ deference to the views of the executive has been attributed to a lack of case law on the issue and the vague and ambiguous factors laid down in *Baker v. Carr* (UNITED STATES OF AMERICA, 1962; BAXTER, 2006, p. 836).

In response to the growing number of ATCA cases and the ambiguity surrounding the proper treatment of executive submissions against such litigation the Supreme Court attempted to offer some guidance. First in *Republic of Austria v. Altmann* (UNITED STATES OF AMERICA, 2004d, p. 701-702) where the court distinguished between questions of law and policy stating that questions of statutory interpretation ‘merit no special deference’ but submissions by the executive on a question of foreign policy ‘*might* well be entitled to deference [emphasis added]’.

Second in *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a) the court noted two possible limitations on the statute's application the one involving a question of law, the other a question of policy. First that the recognition of an actionable norm (that is a tort in violation of customary international law) involved 'an element of judgment about the practical consequences of making that cause available to litigants' that is 'whether a norm is sufficiently definite to support a cause of action.' (UNITED STATES OF AMERICA, 2004a, p. 732-733). Second (as stated in footnote 21) that certain cases may require 'a policy of case-specific deference to the political branches' and that 'courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.' (UNITED STATES OF AMERICA, 2004a, footnote 21). However, it must be noted that in both these cases, the question of deference was not an issue the court had to decide and so the statements are not binding on lower courts. While the two possible limitations rightly affirmed the principle that courts and not the executive should decide questions of law and that the application of the doctrine requires evaluation and not automatic application no guidance was provided to lower courts on how to conduct such an assessment.

Judge Scheindlin made three comments in this regard: 'First, footnote 21 merely provides guidance concerning the need for deference with regard to foreign policy matters; it does not mandate summary dismissal...[s]econd, the Executive Branch is not owed deference on every topic; rather this court will give serious consideration to the Executive's views only with regard to the case's 'impact on foreign policy', [t]hird, deference does not mean delegation; the views of the Executive Branch - even where deference is due - are but one factor to consider and are not dispositive.' (UNITED STATES OF AMERICA, 2009a, p. 99). Further, 'judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.' (UNITED STATES OF AMERICA, 2009a, p. 102).³¹

Regarding the *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) factors courts have more recently held that they 'appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.' (UNITED STATES OF AMERICA, 2009a, p. 100).³² As noted by Judge Scheindlin courts have generally moved away from an automatic application of the doctrine to instead assess the executive submission itself (UNITED STATES OF AMERICA, 2009a, p. 102). In doing so courts have dismissed submissions 'presented in a largely vague and speculative manner [or not] severe enough or raised with the level of specificity required to justify...a dismissal on foreign policy grounds.' (UNITED STATES OF AMERICA, 2009a).³³

4.2 The International Comity Doctrine:

The international comity doctrine has been understood differently in different contexts and is thus difficult to define (RAMSEY, 1998, p. 893). In the context of ATCA litigation it is generally understood as 'the recognition which one nation

allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.’ (UNITED STATES OF AMERICA, 2009a, p. 103).³⁴ In its narrowest sense the doctrine operates as a basis for dismissal ‘only when there is a true conflict between American law and that of a foreign jurisdiction.’ (UNITED STATES OF AMERICA, 2009a, p. 104).³⁵ This strict formulation has since been relaxed as in addition to looking at whether a conflict would arise; courts have assessed the degree of offense to the foreign sovereign, steps taken by them to address the issue in dispute and the U.S.’s interest in the issue (UNITED STATES OF AMERICA, 2009a, p. 104-105). Thus understood, the application of the doctrine is a matter of discretion requiring the court to weigh the interests of the foreign nation and the international community in deciding whether adjudication would be improper (RAMSEY, 1998, p. 894).

The political question and international comity doctrines differ in that the former aims to uphold the separation of powers while the latter focuses more directly on international relations. However, the two are similar as both can and have been used to assess the impact of litigation on foreign affairs (SUTCLIFFE, 2009, p. 326).

Commentators in favor of the flexibility of the more relaxed international comity doctrine and the ‘balancing test’ it requires, have argued it should be used to inform the application of the political question doctrine to assist in avoiding undue deference (SUTCLIFFE, 2009, p. 326).

4.3 Application by the court:

In the *Khulumani* case the issue on remand by the Supreme Court was whether the political question and international comity doctrines merited dismissal in light of the submissions of the U.S. and South African governments. Judge Scheindlin held that the political question doctrine did not provide a basis for dismissal for three reasons. First the claims did not contradict U.S. foreign policy in a way that ‘would seriously interfere with important governmental interests’ and so the latter three *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) factors did not apply (UNITED STATES OF AMERICA, 2009a, p. 105). Second the claims did not challenge the political branch’s foreign policy of ‘constructive engagement’ with Apartheid-era South Africa nor seek to hold defendants liable for acting in line with this policy (UNITED STATES OF AMERICA, 2009a, p. 105). Third the argument of the U.S. government as relied on by the defendants was based on the false premise that the plaintiffs sought to allege ‘wrongful commerce’ as a basis for liability and that the political question doctrine was automatically invoked (UNITED STATES OF AMERICA, 2009a, p. 105). For these reasons Judge Scheindlin noted that the submissions required ‘considerably less deference.’ (UNITED STATES OF AMERICA, 2009a, p. 105).

On the other hand, to survive dismissal the plaintiffs had to claim ‘that the defendants “substantially assisted” violations of the law of nations and knew that their assistance would be substantial’ as merely engaging in commerce did not

attract liability (UNITED STATES OF AMERICA, 2009a, p. 106). Liability properly understood as ‘knowingly providing substantial assistance to violations of the law of nations’ would only compromise foreign policy in so far as it actually deterred investment (UNITED STATES OF AMERICA, 2009a, p. 106-107). In this regard no real evidence was found to have been presented (UNITED STATES OF AMERICA, 2009a, p. 107).³⁶

Lastly, it was noted that the case did not involve allegations against the acts of the U.S. government itself as ‘[a]t no point did the Government instruct or authorize the defendant’s conduct’ and that ‘resolution of the case neither requires this court to pass judgment on the policy of constructive engagement or the United State’s relationship with apartheid-era South Africa.’ (UNITED STATES OF AMERICA, 2009a, p. 108).³⁷ Thus the political question doctrine did not require dismissal of the suit.

It was also held that international comity did not provide a policy basis for dismissal based on ‘[t]he absence of conflict between this litigation and the TRC process.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). The reasons advanced included that the defendants did not appear before the TRC nor were they granted amnesty and ‘a policy of blanket immunity for corporations’ was never given by the South African government (UNITED STATES OF AMERICA, 2009a, p. 109-110). There was found to be no bar to holding the defendants legally liable under civil law with the TRC Report itself calling for corporate liability outside the TRC Process (UNITED STATES OF AMERICA, 2009a, p. 109-110). Further neither the defendants nor the South African government argued that ‘an adequate forum existed in the objecting nation.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). Lastly the litigation did not conflict with the goals of the TRC and so would not require dismissal even in the absence of an alternative forum (UNITED STATES OF AMERICA, 2009a, p. 109-110). Judge Scheindlin concluded that ‘the purposes of the TRC and this lawsuit are closely aligned: both aim to uncover the truth about past crimes and to confront their perpetrators.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). Therefore the international comity doctrine did not require dismissal of the suit.

Since neither doctrines provided a basis for dismissal Judge Scheindlin held that the views of the U.S. and South African governments did not require resoliciting for the case to proceed (UNITED STATES OF AMERICA, 2009a, p. 111).

5 The evaluation of Executive submissions

The decision by Judge Scheindlin to dismiss the views of the executive has formed part of an emerging trend in U.S. courts particularly in the context of ATCA litigation (STEPHENS, 2008, p. 773). Since the first case of *Doe I v. Unocal* (UNITED STATES OF AMERICA, 1997) in 1997 allowing the use of the ATCA against corporations, approximately fifty ATCA cases have been filed against corporate defendants (STEPHENS, 2008, appendix B). The Bush administration has filed letters or amicus briefs in ten of them stating such litigation would undermine U.S. foreign policy (STEPHENS, 2008, p. 773-774, appendix C).³⁸ In eight of these the objections

were considered by the court.³⁹ In only two cases was the foreign policy argument accepted as a basis for dismissing the suit.⁴⁰

This trend shows that despite a historically deferential approach, in the context of ATCA litigation U.S. courts have since permitted almost all the cases to proceed despite arguments that it would interfere with foreign policy or deter investment. This shift indicates that courts do not find the submissions reasonable or convincing. Reasons for rejection include undue claims for deference, unfounded predictions of harm, unsupported economic claims and perceived bias toward corporations (STEPHENS, 2008, p. 802). Judge Scheindlin similarly based dismissal of the submissions upon a lack of evidence as well as the presence of incorrect assumptions. The reasons given by the courts support the argument that ‘the shift is not the result of a change in the way the courts have exercised their authority, but rather a judicious recognition that the Bush Administration’s views are unreasonable, and therefore undeserving of deference.’ (STEPHENS, 2008, p. 809).

Most courts have focused largely on the text of the submission itself and engaged in a factual enquiry as to its correctness, specificity and the evidence submitted to support it.⁴¹ In favour of this approach some commentators have argued that courts are under a constitutional duty to assess the credibility of the executive’s factual claims and to reject them where not supported by the evidence (STEPHENS, 2004, p. 170). Others have argued that this can be problematic as courts are ill-equipped to make factual findings as to the correctness of policy decisions as they have limited access to evidence and could be vulnerable to manipulation in this regard (SUTCLIFFE, 2009, p. 315). It is agreed that an assessment which focuses only on the factual validity and specificity of submissions is undesirable and too superficial. Indeed the Supreme Court’s view that executive submissions need to be ‘weighed’ implies that a range of factors and not just the submission itself should be taken into account.

In this regard, some commentators have argued that the problem lies in the fact that the political question doctrine is too limited and vague a standard by which to assess executive submissions and that ‘a more fluid balancing test’ should be developed by the courts (SUTCLIFFE, 2009, p. 320). Multi-layered guidelines or standards for assessing whether a submission merits deference have been proposed. These includes that ‘in order to merit deference, an administration submission must: (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts.’ (STEPHENS, 2008, p. 775). While such a doctrinal discussion is beyond the scope of this paper the next section takes this criticism into account by undertaking a more substantive analysis in looking at how the foreign policy, foreign investment and sovereignty arguments raised in favour of dismissal of ATCA suits have failed. This approach goes beyond the submission itself to look at some of the legal and practical implications aiding and abetting liability could have. Doing so demonstrates just how unconvincing and unreasonable the arguments against such liability in fact are.

5.1 The argument that liability would undermine U.S. foreign policy:

The argument is that the mere existence of aiding and abetting liability will deter investment in foreign countries and thereby undermine the U.S. foreign policy of 'constructive engagement'. To evaluate the merits of this argument and so also the correctness of its dismissal, it is necessary to outline the 'constructive engagement' model and examine the effect aiding and abetting liability would have on it. The model is largely based on the idea that foreign investment by corporations in countries with repressive regimes will encourage reform and promote democracy and human rights.⁴² The model is highly controversial and has generated much debate which goes beyond the scope of this paper. There have been contradictory empirical studies, one concluded that in some cases constructive engagement and investment actually had the opposite effect by encouraging and increasing repressive behavior (FORCESE, 2002, p. 10-17) while another concluded that foreign investment was associated with increased respect for civil and political rights (RICHARDS, 2001, p. 231-232).

What is of relevance is that since one of the purported goals of constructive engagement is to promote freedom and democracy; a corporation which aids or abets human rights violations would undermine the model and further the very abuses it claims to help eradicate. Moreover, complicit corporations may have huge legal and economic interests in maintaining or supporting oppressive regimes and without the threat of liability as incentive to encourage reform face no consequences.

In this regard aiding and abetting liability could be used as a tool to ensure that individual corporations who defy the policy of constructive engagement are held accountable. It could also encourage corporations to conduct business in ways which promote the goals of democracy and human rights in general. Thus aiding and abetting liability could actually facilitate rather than undermine the model and the argument of the U.S. government must fail.

The commentator Richard Herz has presented similar arguments and noted further inconsistencies. First, the U.S. government seems to be applying a 'double standard' by criticizing oppressive regimes but protecting corporations for aiding or abetting abuses committed by them and that this casts doubt on how committed the government in fact is to bringing about reform in advancing democracy and human rights.⁴³ Second, by protecting corporations from liability on foreign policy grounds the government may in fact 'encourage or subsidize' complicity. This is so as without the possibility of being held accountable corporations could decrease costs involved with taking measures to avoid complicity and without the possibility of litigation avoid being liable for compensating successful victims. Such corporations could have a competitive edge over other corporations who refuse to operate in countries with oppressive regimes.

It could be argued that the risks of litigation are too marginal to deter corporations from being complicit in abuses where comparatively huge economic profit is at stake. However, as Herz correctly points out, the U.S. government's argument is that the risk of liability under the ATCA would be so substantial so as to deter investment. Assuming that the risks of liability would be too marginal to

deter complicity, the underlying rationale of the government's argument would fall away. On the other hand if the risk of potential litigation were substantial enough to deter corporations from being complicit in abuses committed by oppressive regimes, the U.S. government's opposition of liability could reward and encourage investment which directly undermines the model upon which their foreign policy is based. These inconsistencies as noted by Herz provide additional convincing support for rejecting the views of the U.S. government (HERZ, 2008, p. 207).

The preceding section argued that aiding and abetting liability could promote rather than undermine U.S. foreign policy. By opposing liability corporations would be shielded and perhaps even encouraged to engage in practices which would undermine the purported goals of the 'constructive engagement' model. For these reasons Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would undermine U.S. foreign policy.

5.2 The argument that liability would deter foreign investment:

The argument is that corporations will refuse significant investment opportunities or pull out of existing projects, based on the possibility that they may be held liable for aiding or abetting human rights violations. Judge Scheindlin concluded that since no evidence was given to support this argument it had to be dismissed. Commentators have argued that liability would not deter foreign investment and could in fact encourage positive growth. Joseph Stiglitz, a Nobel laureate and former Chief Economist of the World Bank, filed a letter with the court rejecting the economic analysis relied on by the U.S. and South African governments (UNITED STATES OF AMERICA, 2009a, p. 88). He argues that corporations should be held liable and that doing so would contribute to confidence in the market system, create a more favourable business climate and encourage positive growth and development in South Africa.⁴⁴ Stiglitz is widely regarded as one of the world's foremost economists and since his views directly contradict those of the U.S. and South African governments they assist in presenting a stronger argument in favour of rejection.

The commentator Beth Stephens similarly argues that liability would promote rather than undermine positive investment (STEPHENS, 2008, p. 773). Since merely doing business in a country where abuses are being committed does not attract liability under the ATCA, the argument that liability will deter foreign investment only applies to corporations who may aid or abet violations of established international norms (STEPHENS, 2008, p. 806). There is also the possibility that companies will continue to invest and adopt policies and procedures which seek to avoid aiding and abetting such abuses (STEPHENS, 2008, p. 806). Stephens argues this kind of reform is more likely than deterrence as most ATCA cases have involved corporations in the extraction industry⁴⁵ who have already made large investments and are highly unlikely to pull out based on the possibility of liability (STEPHENS, 2008, p. 806). In other words the costs of litigation compared with the large profits multinational corporations are making will not likely deter or decrease investment (STEPHENS, 2008, p. 807).

The argument is not that no corporation will be deterred from investing; presumably only those with dubious human rights practices will refuse. As already stated this would promote the policy of constructive engagement and human rights in general. Thus even if some potentially beneficial investment is deterred this must be weighed against the greater benefits ATCA liability may achieve by assisting to deter the aiding and abetting of human rights violations. In short and as noted by commentators, over deterrence of the serious human rights abuses attracting liability under the ATCA surely outweighs the marginal possibility that innocent yet beneficial companies will refuse to invest. It has been argued that courts are left with two options: either under-deterrence which will allow more investment which encourages human rights abuses or over-deterrence which will discourage investments where corporations may run the risk of participating in human rights violations, even if the investments would not encourage abuses, given the seriousness of alleged offenses under ATCA cases the latter option is clearly preferable (HOFFMAN; ZAHEER, 2003, p. 81).

The preceding section demonstrates not only that the foreign investment argument lacks supporting evidence but suggests that aiding and abetting liability could be used to encourage positive investment and growth. Thus Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would deter foreign investment.

5.3 The argument that liability would infringe upon sovereignty:

The South African and U.S. government argued that the litigation would infringe upon South Africa's sovereignty. This argument falls broadly within the doctrine of international comity outlined above. As suggested in *Sosa* (UNITED STATES OF AMERICA, 2004a), a court should consider 'whether the exercise of jurisdiction under the ATCA is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.' (UNITED STATES OF AMERICA, 2004a, p. 73). However, as noted by the Second Circuit Court in *Khulumani* 'although the views of foreign nations are important under the doctrine of international comity, we have not held them to be dispositive.' (UNITED STATES OF AMERICA, 2007a, p. 265). In other words the weight given to the views of foreign governments under the comity doctrine is not as great as the weight given to the views of the U.S. executive under the political question doctrine. On the other hand the argument that judges must be careful not to act in ways which undermine legitimate political and legal process appears stronger in cases such as *Khulumani* where a democratically elected government decides not to allow similar liability claims domestically (NEMEROFF, 2008, p. 283).

What is fatal to the sovereignty argument is that the conduct being adjudicated is that of defendant corporations and not sovereign principals. In their submissions both governments failed to appreciate this distinction and in so doing confused the extraterritoriality argument with the doctrine of comity (KEITNER,

2008, p. 101). Since claims under the ATCA seek to hold corporations liable as accomplices, and not sovereign principals, the litigation does not directly infringe the principal's sovereignty under the Foreign Sovereign Immunities Act of 1976 (KEITNER, 2008, p. 102). Finally, while an agent of a foreign government would also be immune under this Act, courts cannot be deprived of jurisdiction over defendant corporations under this doctrine as they have no agency relationship with the foreign government in whose country they are operating (KEITNER, 2008, p. 102).

The preceding section demonstrates that the sovereignty argument while falling broadly with the doctrine of international comity was conceptually confused. Thus Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would infringe upon the sovereignty of South Africa.

6 The South African and U.S. governments' turnabout and subsequent developments

The preceding analysis reflects the recent trend in courts' dismissal of executive submissions upon finding their opposition to ATCA suits to be unreasonable and unfounded. Judge Scheindlin's opinion further solidified this by not only dismissing the submissions but allowing the suit to continue without requiring the government's views to be resolicited as requested by the plaintiffs.⁴⁶ While the plaintiffs may have requested resubmission in the hope that the new Zuma and Obama administrations would be more sympathetic to their cause, Judge Scheindlin effectively ruled that it did not matter what either government thought.

On 22 April 2009, the defendants filed a motion for reconsideration. This was denied upon which the defendants then filed a notice of appeal on 25 June 2009 with the Court of Appeals for the Second Circuit for the interlocutory review of Judge Scheindlin's decision to allow the litigation to proceed to trial.⁴⁷ The review was set for hearing on 11 January 2010.

On 1 September 2009, under the recently elected Zuma government, Justice Minister Jeff Radebe sent an unsolicited letter to Judge Scheindlin with a copy to the Court of Appeals for the Second Circuit. The letter in effect reversed the South African government's opposition of the litigation under former President Thabo Mbeki. In this regard, the Justice Minister observed that the suit no longer involved claims against corporations that merely did business in South Africa during that time and instead limited the claims to those 'based on aiding and abetting very serious crimes, such as torture, [and] extrajudicial killing committed in violation of international law by the apartheid regime.' (MATABOGE, 2009). The Minister also informed the court that '[t]he government of the Republic of South Africa, having considered carefully the judgment of the...Southern District of New York, is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.' (MATABOGE, 2009). However, the letter also stated that the government would be 'willing to offer counsel to the parties in pursuit of a settlement.' (MATABOGE, 2009). Justice Department spokesperson Tlali Tlali said the government's turnabout was based on the realization that there was no 'appropriate forum' in South Africa for such

litigation and that 'the US court is an appropriate forum to hear these matters' but that the 'government is, however, available to facilitate [out-of-court] settlements if the litigants are amenable to that option.' (MATABOGE, 2009).

On 30 November 2009, the U.S. government as *amicus curiae* submitted to the Court of Appeals for the Second Circuit a brief supporting the plaintiffs as appellees (UNITED STATES OF AMERICA, 2009e). In short, the brief argues that since the U.S. did not explicitly request that the case be dismissed on foreign policy grounds (UNITED STATES OF AMERICA, 2009e, p. 2)⁴⁸ and since Judge Scheindlin did not deny defendants' motion to dismiss despite such request, the collateral order doctrine was not satisfied and the court should dismiss the appeal by the defendants for lack of jurisdiction (UNITED STATES OF AMERICA, 2009e, p. 12).⁴⁹

Both recent submissions clearly indicate a drastic turnabout. The effect of these new submissions remains uncertain as judgment from the 11 January 2010 hearing by the Court of Appeals as to whether the litigation may proceed remains reserved until later this year. Another uncertainty is that while Judge Scheindlin's opinion effectively excluded executive submission on the issue, it is unclear whether the Supreme Court if faced to hear the case will follow a similarly undeferential approach. If not, the new statements issued by the Zuma and Obama administration may well assist the plaintiffs' case provided an out-of-court settlement does occur before the matter can be heard. It is argued that such an outcome would be disappointing and undesirable.⁵⁰

7 Conclusion

The possibility of indirect liability for aiding and abetting violations of international law under the ATCA not only has the potential to promote U.S. foreign policy and encourage beneficial investment but also to afford justice to litigants who are entitled claimants. Litigating in U.S. courts is particularly beneficial as many multinational corporations have sufficient ties with the U.S. allowing plaintiffs to establish jurisdiction (NEMEROFF, 2008, p. 251). Corporations are also more likely to have sufficient assets to pay successful claimants and are unlikely to abandon their operations in the U.S. to avoid paying damages (NEMEROFF, 2008, p. 251). Defendant corporations should be held liable where they have knowingly participated in a violation of an international norm. Upon Judge Scheindlin's formulation for imposing liability, which this paper supports, plaintiffs would bear the onus of showing that a corporation knowingly provided substantial assistance to a regime that committed human rights violations which infringed established international norms (UNITED STATES OF AMERICA, 2009a, p. 54). Under this standard it is highly unlikely nor has it ever been the case, that a company will be held liable for merely doing business in a country with a poor human rights record.⁵¹

Establishing a clearer doctrine for aiding and abetting liability under the ATCA will provide better guidance to potential plaintiffs as to whether they have a claim as well as how to structure it and thereby avoid unnecessary litigation. It has been noted that 'critics of ATCA suits have long complained that courts have used the statute to make decisions based more on personal preference than legal

principle. This critique has been fueled by most American lawyers' lack of familiarity with international law and by courts' failure to produce a clear methodology for adjudicating ATCA cases...courts can and should define a specific methodology for deciding issue of international law in U.S. courts...[as] a forum for the settlement of disputes involving foreigners...ATCA litigation need not consist of the application of amorphous standers and judicial fiat. Instead the litigation of international norms in U.S. courts can be grounded in well-established legal doctrine' (HOFFMAN; ZAHEER, 2003, p. 83). So too it could provide guidance to corporations in ensuring that they take preventative measures to reduce exposure to litigation. However, despite current uncertainty corporations are not left without defences (some not discussed in this paper), such as *forum non conveniens*, exhaustion of local remedies and properly founded arguments under the political question and international comity doctrines. The high evidentiary burden plaintiffs carry in such cases also operates in favour of corporate defendants (DHOOGHE, 2009, p. 289).

The doctrine of aiding and abetting liability under the ATCA appeared to be gaining momentum culminating in Judge Scheindlin's opinion however, since then; various federal courts have handed down decisions pointing the other way.⁵² Perhaps most significantly, the Second Circuit's ruling in *Presbyterian Church of Sudan v. Talisman Energy Inc* (UNITED STATES OF AMERICA, 2009e) that in order to establish aiding and abetting liability under the ATCA, a plaintiff must show 'that a defendant purposefully aided and abetted a violation of international law.' In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATCA claims.

It should also be noted that despite the Bush administration's submissions, the U.S. Congress has never sought to amend the ATCA to either expressly include or exclude indirect liability. This congressional silence could be from a lack of interest or consensus or a desire to defer to the Supreme Court. It has been argued that Congress's failure to amend the ATCA to include aiding and abetting liability despite judicial precedent does not indicate legislative intention in favour of liability and that the lack of Congressional approval combined with the absence of explicit reference to aiding and abetting liability in the statute itself should prevent the imposition of aiding and abetting liability against corporate defendants (DHOOGHE, 2009, p. 282). The limited guidance provided by the Supreme Court in this regard has forced lower courts to make decisions as to the application of the ATCA. Since the more recent federal court decisions appear to be closing the door and limiting the statute's application in favour of defendants, the outcome of the *Khulumani* case will prove to be crucial.

In this regard, an out-of-court settlement would prevent the setting of further precedent and frustrate the process of crystallization set in motion by Judge Scheindlin at a most crucial period. While Judge Scheindlin provided much needed clarity to the political question and international comity doctrines as well as the standard of intent required, the issue of aiding and abetting liability under the ATCA still needs to be addressed by the Supreme Court. Whether the litigation is allowed to proceed and whether it will reach a Supreme Court with the necessary quorum to hear the matter remains to be seen.

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NOTES

1. The total number of such corporate defendant cases from 1960 to present is approximately 85 with 61 of these being brought after 1996. Alleged abuses include, for example, in *Doe I v. ExxonMobil* (UNITED STATES OF AMERICA, 2005a) that ExxonMobil in seeking to protect their natural gas facilities had abetted genocide and crimes against humanity by the Indonesian military and in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2003) that Talisman Energy in seeking to clear areas surrounding their oil concessions had assisted the Sudanese government in committing genocide.

2. 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations...'. Also known as the Alien Tort Statute 'ATS'.

3. The U.S. Supreme Court finally affirmed this reading of the ATCA in *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a, p. 732).

4. See *Doe I v. Unocal* (UNITED STATES OF AMERICA, 2002a); *Khulumani v. Barclay National Bank* (UNITED STATES OF AMERICA, 2007a); *Presbyterian Church v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2005b); *In re Terrorist Attacks on September 11, 2001* (UNITED STATES OF AMERICA, 2005c); *Bowoto v.*

Chevron Texaco (UNITED STATES OF AMERICA, 2004b). Only two decisions have held that aiding and abetting liability is not actionable: *In re South Africa Apartheid Litigation* (UNITED STATES OF AMERICA, 2004c), (which was overturned by the Second Circuit decision in *Khulumani*) and *Doe I v. Exxon Mobil* (UNITED STATES OF AMERICA, 2005a) which in fact relied on the overturned 2004 decision of the Southern District court in *In re South Africa Apartheid Litigation*.

5. The case consists of two consolidated class actions. Plaintiffs in the first action, *Ntsebeza v. Daimler A.G. et al* brought a class action on behalf of 'themselves and all black South African citizens (and their heirs and beneficiaries) who during the period from 1973 to 1994 suffered injuries' as a result of the defendant's direct and secondary violations of the law of nations. Plaintiffs in the second action, *Khulumani v. Barclays National Bank Ltd. et al* (UNITED STATES OF AMERICA, 2005d) include *Khulumani* (a South African organization that 'works to assist victims of Apartheid-era violence') and other individuals.

6. The court dismissed the claims seeking direct liability for the tort of apartheid by non-state actors, stating that 'although the establishment of state-sponsored apartheid and the commission of

inhumane acts needed to sustain such a system is indisputably a tort under customary international law, the international legal system has not thus far definitively established liability for non-state actors who follow or even further state-sponsored racial oppression.'

7. From 1789 to 1980, twenty-one cases asserted jurisdiction under the ATCA, with only two judgments for the plaintiffs.

8. The plaintiffs were the family of Joelito Filartiga, a seventeen year old Paraguayan citizen, tortured and murdered by a Paraguayan police Inspector General who the family then sued. The Second Circuit Court reversed the District Court's decision and allowed the claim, stating that modern international law clearly prohibits state-sponsored torture (UNITED STATES OF AMERICA, 1980, p. 884).

9. On the evidence presented the court concluded that Unocal: knew the military had a record of committing human rights abuses and using forced labour and hired them anyway to provide security for the project, benefited from the forced labour carried out and knew or should have known that abuses were and would continue to be committed by them. The court then dismissed the case concluding that Unocal could only be liable if they wanted the military to commit the abuses, which the plaintiffs had not shown. On 18 September 2002 the United States Court of Appeals for the Ninth Circuit reversed the decision on the basis that the plaintiffs need only show that Unocal knowingly assisted the military to commit the abuses. This having been shown, the case was found to have enough evidence to go to trial. A jury trial date was set for June 2005. However in March 2005 Unocal agreed to compensate the plaintiffs and thereby end the historic lawsuit. See *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e).

10. Since 1997, of the approximately 52 cases launched against corporations using the ATCA, only *Jama v. Esmor Corr. Serv* (UNITED STATES OF AMERICA, 2007b) resulted in a jury verdict in favour of the plaintiffs. Excluding the cases still pending, approximately 3 have been settled the most famous being *Doe I v. Unocal* (UNITED STATES OF AMERICA, 2002a), 32 have been dismissed including *Presbyterian Church v. Talisman Energy, Inc* (UNITED STATES OF AMERICA, 2005b) where the District Court held that the plaintiffs had failed to provide sufficient evidence showing Talisman had provided 'substantial assistance' to the Sudanese government in committing violations of international law.

11. Since this decision approximately 104 cases have asserted ATCA jurisdiction in federal courts. Approximately one-third of these involved claims against the U.S. government, its officials and/or government contractors all of which were dismissed, another one-third involved claims against foreign governments all of which were dismissed under the doctrine of sovereign immunity. The remaining third have involved corporate defendants.

12. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 37-39) 'the ATCA is merely a jurisdictional vehicle for the enforcement of universal norms...[i]deally the outcome of an ATCA case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations.'

13. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 39). Judge Katzmann (held that aiding or abetting liability requires proof of purpose or intention to assist in the commission of the violation, relying on Article 25(3)(c) and (d) of the Rome Statute of the International Criminal Court. Judge Hall (at 60) held liability should be based on federal common law, not international law and could only exist by 'facilitating the commission of human rights violations by providing the principal with tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those, instrumentalities, or services will be (or only could be) used in connection with that purpose.' Judge Korman (UNITED STATES OF AMERICA, 2007a, p. 68-69) endorsed Judge Katzmann's view of intention as the test for liability and so similarly rejected Judge Hall's opinion that federal common law and knowledge were the determinants.

14. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 45) relying on the ICTY decisions as reflecting international law on the issue, see fn 161 of the opinion for a list of the cases relied upon by the court.

15. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 54 after acknowledging p. 49), that Article 25(3)(c) of the Rome Statute as interpreted by Judge Katzmann presents 'the most difficult question concerning the universality of the knowledge standard for aiding and abetting under customary international law' but that it should be interpreted to conform to pre-Roman Statute customary law, see *United States of America* (2009a, p. 50-53).

16. *Torture Victims Protection Act* (UNITED STATES OF AMERICA, 1991, p. 106 Stat. 73), enacted in 1992, ('TVPA') and *Racketeer Influenced and Corrupt Organizations Act* (UNITED STATES OF AMERICA, 1970), codified as Chapter 96 of 18 U.S.C. § 1961-1968 ('RICO').

17. As summarized by the Second Circuit in *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 294). The examples of assistance cited by the plaintiffs include automobiles by Daimler-Benz from which South African police shot at protestors, computers manufactured by IBM used to implement racist policies, and loans with favorable repayment terms from numerous financial institutions. See also *In re South Africa Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 544-545).

18. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 260) (per curiam). The Second Circuit affirmed the dismissal of the TVPA claims on the same basis as the lower court namely, that the plaintiffs' failed to establish a connection between

the defendants' actions and the conduct of South African officials.

19. *American Isuzu Motors, Inc. v. Ntsebeza* (UNITED STATES OF AMERICA, 2008) the order being in terms of Supreme Court Rule 4(2) and 28 U.S.C. § 2109. The recusals undoubtedly were due to the four justices (Chief Justice Roberts and Justices Kennedy, Breyer and Alito) holding investments in or having family ties with some of the defendant corporations.

20. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 260-264). Judge Sprizzo died on 16 December 2008 leaving Judge Scheindlin to hear the case.

21. The governments of Germany, Switzerland, Canada and Britain expressed similar views although not by formal submission to the court as no British, Canadian or Swiss defendants remained.

22. 10/30/03 Submission of Interest of the U.S. at 1, cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 88).

23. Brief for the United States of America as amicus curiae supporting Respondents as cited in *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 13).

24. 4/15/03 Submission of Thabo Mbeki as cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 91).

25. 7/23/03 Declaration of Penuell Mpapa Maduna, Minister of Justice, Republic of South Africa at para 3.3 as cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 92).

26. See also Final Report of the Truth and Reconciliation Commission (TRC, 2003).

27. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 262, footnote 10), both parties to the dispute 'agreed that Sosa's reference to 'case-specific deference' implicates either the political question or international comity doctrine.'

28. The six factors being: [1] textually demonstrable constitutional commitment of the issue to coordinate a political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] potential embarrassment from multifarious pronouncements by various departments on one question (UNITED STATES OF AMERICA, 1962, p. 217).

29. Cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 105).

30. The plaintiffs were a group of Bougainvillian

citizens alleging that the mining corporation was liable for human rights violations and environmental damage in the area. The court also dismissed claims under the international comity and act of state doctrines.

The decision was reversed on appeal in *Sarei v. Rio Tinto PLC* (UNITED STATES OF AMERICA, 2007b, p. 1205-1207) where the court held that although 'serious weight' had to be given to executive submissions which raised foreign policy concerns, this did not mean a court was bound to dismiss the case.

31. Citing *Kadic v. Karadzic*, (UNITED STATES OF AMERICA, 1995, p. 249).

32. Citing *Id. Accord Veith v. Jubelirer* (UNITED STATES OF AMERICA, 2004e).

33. Citing *City of New York v. Permanent Mission of India* (UNITED STATES OF AMERICA, 2006a, p. 376).

34. Citing *Hilton v. Guyot* (UNITED STATES OF AMERICA, 1895).

35. Citing *In re Maxwell Comm. Corp.* (UNITED STATES OF AMERICA, 1996).

36. The Submission of Interest never states that this litigation will necessarily deter such investment, and there is no reason to believe based on the pleadings that these cases – viewed in light of the applicable law – will have such an effect.

37. Citing *Baker v. Carr* (UNITED STATES OF AMERICA, 1962). In contrast, see the case of *Corrie v. Caterpillar Inc.* (UNITED STATES OF AMERICA, 2007d) where *Caterpillar Inc.* was sued for aiding and abetting extrajudicial killing by selling bulldozers to the Israeli Defense Force. The United States Government had in fact paid for the bulldozers. In light of this, the Ninth Circuit dismissed the case based on the political question doctrine, reasoning that a decision would amount to questioning the political branch's decision to provide military assistance.

38. The ten cases are the following: *Arias v. Dyncorp* (UNITED STATES OF AMERICA, 2007e), *Bowoto v. Chevron* (UNITED STATES OF AMERICA, 2004b), *Corrie v. Caterpillar* (UNITED STATES OF AMERICA, 2007d), *Doe v. Exxon Mobil Corp.* (UNITED STATES OF AMERICA, 2007f), *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e), *In Re Agent Orange Product Liability Litigation* (UNITED STATES OF AMERICA, 2005f), *Khulumani v. Barclay National Bank, Ltd.*, *Mujica v. Occidental* (UNITED STATES OF AMERICA, 2005d), *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2006b), *Sarei v. Rio Tinto*, (UNITED STATES OF AMERICA, 2002b, 2007b).

39. The two exceptions being: *Bowoto v. Chevron* (UNITED STATES OF AMERICA, 2004b) where the judge has not yet responded to the executive submission and *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e) where the parties settled before the court could address the issue.

40. *Corrie v. Caterpillar* (UNITED STATES OF

AMERICA, 2007d) and *Mujica v. Occidental Petroleum Corp* (UNITED STATES OF AMERICA, 2005g) in both, the political question doctrine was found to apply.

41. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 105-107), see also for example *City of New York v. Permanent Mission of India* (UNITED STATES OF AMERICA, 2006a, p. 377, footnote 17) where the court stated that the foreign policy concerns were not sufficiently severe, lacked a sufficient 'level of specificity' and were too 'speculative'.

42. For an in depth discussion on the policy of constructive engagement and how it promotes freedom see USA Engage 'Economic engagement promotes freedom' (available at <<http://archives.usaengage.org/archives/studies/engagement.html>> Last accessed on 30 June 2010). The model posits that Western business officials and corporations impart democratic values through interaction with the government officials and local employees of that country and that Western governments can use such interactions to bring about reform. Further, that investments create a middle class in that country who then push for similar reform. South Korea is used as an example of the first test case for constructive engagement. The U.S. government claims that its decision to continue economic relations and engagement despite South Korean Special Forces killing 200 civilians on May 18, 1980 contributed to bringing about democracy.

43. See for example in *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e) the Bush Administration's criticisms of and imposition of sanctions against the Burmese military while at the same time arguing against liability for corporations complicit in human rights abuses committed there.

44. See also 'Nobel laureate endorses Apartheid reparations' (TERREBLANCHE, 2003).

45. Such as oil, gas or mining operations, which cost corporations large amounts to establish, *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e); *Wiwa v. Royal Dutch Petroleum* (UNITED STATES OF AMERICA, 2000); *Doe v. Exxon Mobil* (UNITED STATES OF AMERICA, 2005a); *Mujica v. Occidental Petroleum* (UNITED STATES OF AMERICA, 2005g); *Bowoto v. ChevronTexaco* (UNITED STATES OF AMERICA, 2004b); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2003).

46. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 111, 286) where the court explained that doing so was unnecessary in light of its 'determination that the political question doctrine and international comity do not require dismissal.'

47. Federal Rule of Appellate Procedure 4 requires filing a notice of appeal within 30 days of the 'judgment' appealed. The 30-day time period runs from the day that the district court denied defendants' reconsideration motion on May 27 2009, see Federal

Rule of Appellate Procedure 4(a)(4)(A) and so the notice of appeal on 25 June 2009 was timely.

48. Stating that 'when a defendant seeks dismissal of a suit predicated on the suit's interference with the United States' foreign relations, a district court's denial of the motion to dismiss is subject to interlocutory appeal under the collateral order doctrine only if the United States explicitly informed the court that the case should be dismissed on that ground. At no time in this litigation has the United States made such a representation to the courts. Because defendants' appeal therefore does not come within the limited reach of the collateral order doctrine, this Court should dismiss the appeal for lack of jurisdiction.' The statement acknowledged but distinguished that previous U.S. briefs in this litigation made legal arguments under the ATCA and supported dismissal on this basis at 10.

49. Citing the Supreme Court case of *Will v. Hallock* (UNITED STATES OF AMERICA, 2006c, p. 349), that for an order to qualify as a collateral order subject to immediate appeal, the order must '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.' The Supreme Court went on to explain that the third criterion referred to an order that would impair a right to avoid trial (UNITED STATES OF AMERICA, 2006c, p. 350-351) and more specifically 'of a trial that would imperil a substantial public interest' (UNITED STATES OF AMERICA, 2006c, p. 353).

50. For the most recent and controversial settlement see *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e).

51. This is evident from what remains of the consolidated actions first filed in 2002 and 2003 in *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a) at 134-135 now vastly different and much narrower after 5 years of litigating motions to dismiss. The most recent order dismissed claims against corporate defendants who merely did business with the Apartheid government (claims against Barclays Bank Ltd. and Union Bank of Switzerland) and dismissed claims that a corporation which aided and abetted particular acts could be held directly liable for the tort of apartheid.

52. Recent decisions contributing to the reining in of the application of the doctrine include *Turedi v. Coca-Cola Company* (UNITED STATES OF AMERICA, 2009b) (7 July, 2009) and *Aldana v. Del Monte Fresh Produce* (UNITED STATES OF AMERICA, 2009c) (13 August, 2009) where the courts have been willing to affirm ATCA dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola Company* (UNITED STATES OF AMERICA, 2009d) (11 August, 2009) the court relied on heightened pleading standards enunciated by the Supreme Court in other cases to impose a higher standard of pleading on ATCA claimants.

RESUMO

Na última década, um crescente número de casos apresentados perante cortes dos EUA continha a alegação de que grandes empresas multinacionais foram cúmplices de violações de direitos humanos cometidas por agentes de governos estrangeiros, dos quais teriam se beneficiado. Estes casos relacionam-se a uma das questões mais controversas da defesa internacional dos direitos humanos, qual seja, a previsão da obrigação de reparação secundária e indireta e, em particular, a obrigação de reparação por cumplicidade. Enquanto a Suprema Corte dos EUA deverá ainda tratar do assunto, muitas Cortes do Circuito e Distritais decidiram que a obrigação de reparação por cumplicidade está incluída no escopo da Lei de Reclamação sobre Danos Estrangeiros (Alien Tort Claims Act, ATCA). Este artigo visa a examinar a decisão mais recente do caso *In re Apartheid da África do Sul* (usualmente conhecido como o caso *Khulumani*), decidido pela Corte Distrital Sul de Nova Iorque, e argumentar a favor da decisão da Corte de que a obrigação de reparação por cumplicidade está prevista, é necessária e desejável e não entra em conflito com questões políticas e doutrinas de convivência harmônica internacional. Argumentar-se-á que as propostas contra o reconhecimento deste tipo de obrigação, como as da administração Bush e do governo sul-africano de Mbeki, são baseadas em julgamentos errôneos, ilógicas e prejudiciais, e que, sem esta ameaça, prevista pela ACTA, empresas multinacionais não enfrentariam as conseqüências por colaborar com os mesmos abusos que a política externa dos EUA alega procurar evitar.

PALAVRAS-CHAVE

Lei sobre Danos Estrangeiros (ACTA) – Obrigação de reparação por cumplicidade – Vítimas do Apartheid – Reparação – Empresas multinacionais – Questão política – Convivência harmônica internacional

RESUMEN

En la última década, en una cantidad cada vez mayor de casos presentados ante la justicia de los Estados Unidos se afirma que grandes corporaciones multinacionales fueron cómplices y se beneficiaron de violaciones a los derechos humanos cometidas por agentes de gobiernos extranjeros. Estos casos tienen que ver con una de las cuestiones más debatidas en los litigios internacionales por los derechos humanos: la responsabilidad secundaria o indirecta, y en particular la responsabilidad por complicidad. Si bien la Corte Suprema de Estados Unidos aún debe abordar la cuestión, muchos tribunales de primera y segunda instancia han decidido que la responsabilidad por complicidad está prevista en la Alien Tort Claims Act - 'ATCA'.

El presente trabajo procura examinar el fallo más reciente en el caso *In re South African Apartheid Litigation* (comúnmente citado como el caso *Khulumani*) del Tribunal de Distrito Sur de Nueva York, y argumenta a favor de la opinión del tribunal en el sentido de que la responsabilidad por complicidad está prevista, es necesaria y deseable, y no entra en conflicto con las doctrinas de la cuestión política y la cortesía internacional. Se argumentará que las manifestaciones en contra del reconocimiento de esta responsabilidad, como las de los gobiernos de Bush y de Mbeki en Sudáfrica, son equivocadas, ilógicas y perjudiciales y que sin la amenaza de la responsabilidad, que puede ofrecer la ATCA, las empresas multinacionales no enfrentarán las consecuencias por ser cómplices de los mismos abusos que la política exterior de Estados Unidos dice querer evitar.

PALABRAS CLAVE

Alien Tort Claims Act (ATCA) – Responsabilidad por complicidad – Vítimas del Apartheid – Reparaciones – Corporaciones multinacionales – Cuestión política – Cortesía internacional



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ABSTRACT

John Ruggie, Special Representative to the Secretary-General of the United Nations on Business and Human Rights, has released a framework in which he contends that the key responsibility of corporations is to respect human rights. This paper first seeks to analyse this contention in light of international human rights law: it shall be argued that whilst Ruggie's conception of the responsibility to respect effectively includes a responsibility to protect as well, the nature of the responsibility remains largely 'negative' in nature. The second part of this paper argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realisation of such rights. A normative argument will be provided for this contention. This understanding of the nature of corporate obligations is of particular importance to developing countries and will be illustrated by considering the duties of pharmaceutical companies to make life-saving drugs available at affordable prices to those who need them.

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KEYWORDS

Ruggie Framework – Corporations – Human rights – Positive obligations – Obligations to respect, protect and fulfil – Developing countries



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THE RUGGIE FRAMEWORK: AN ADEQUATE RUBRIC FOR CORPORATE HUMAN RIGHTS OBLIGATIONS?

David Bilchitz

Human Rights advocates are increasingly realising the importance of ensuring that responsibility for the realisation of such rights is not the responsibility of states alone (see HUMAN RIGHTS WATCH, 2008; PAUST, 2002, p. 817-819).¹ The traditional focus of international law has been upon states as the primary subjects of international law: yet, in recent years, greater focus is being placed both in academia and in the United Nations ('UN') upon the legal obligations of non-state actors such as non-governmental organisations, liberation organisations, and corporations (ALSTON, 2005, p. 4-6). In particular, given the power of corporations to impact upon the realisation of fundamental rights, there have been a range of initiatives, mostly voluntary ones, seeking to outline the responsibilities of corporations in this regard.²

In 2005, the United Nations Human Rights Council asked the UN Secretary-General to appoint a Special Representative ('the SRSG') to investigate a number of important issues relating to business and human rights. The mandate of the SRSG arose from the failure by the Council a year earlier to adopt a document known as the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (henceforth, 'Norms').³ The appointee – Prof John Ruggie of Harvard University – has conducted wide-ranging research in this area and released a series of important reports.⁴ In April 2008, he made public his proposed framework for the imposition of human rights responsibilities upon corporations (what I shall term 'the Ruggie framework'). This article seeks to evaluate Ruggie's conception of the nature and extent of the responsibilities of corporations for the realisation of fundamental rights.⁵

Part I of this paper is concerned with recognising the importance of this

Notes to this text start on page 224.

issue within the work of the Ruggie mandate as well as with capturing accurately what Ruggie in fact envisages as being the nature of the responsibilities of corporations in relation to fundamental rights. First, a brief history of the mandate is outlined which, as is suggested in the concluding section of this article, may provide some explanation for the conservative positions that Ruggie adopts. After outlining the key components of Ruggie's 2008 framework, the focus is shifted on to Ruggie's claim that corporations essentially have only a 'responsibility to respect' fundamental rights. Principles of international human rights law are used to help clarify what Ruggie means by the 'responsibility to respect' which, it shall be argued, includes a 'responsibility to protect' as well. Despite Ruggie's wider interpretation of this responsibility, it is argued that the core of Ruggie's position is that corporations generally only have 'negative obligations' to avoid harming the fundamental rights of others either through their own actions or those they are associated with.

Part II of this paper critically evaluates Ruggie's conception of the scope of corporate obligations. A normative argument is provided for the claim that corporate obligations should not only involve 'negative' obligations to avoid harm but also include a 'duty to fulfil': obligations to contribute actively to the realisation of fundamental rights. The argument involves engaging with Ruggie's claims concerning the differential responsibilities of states and corporations. Whilst sympathetic to the need for such a distinction, I argue that this difference does not track the distinction between positive and negative obligations. I go on to consider an example which highlights the importance of recognising that corporations have positive obligations for the realisation of fundamental rights. The example relates to the duties of pharmaceutical companies to make life-saving drugs (such as anti-retroviral treatments) available at an affordable price and provides a clear illustration of the large impact that corporate positive obligations may have upon individuals, particularly those in developing countries.

The concluding part of this paper considers a possible explanation for the key problem that I have identified in Ruggie's work. Many of his conclusions, I argue, are motivated by a desire to achieve consensus in the global community which ultimately has entailed making a number of pragmatic compromises to achieve this end. Whilst human rights advocates should be sensitive to the difficulties of attaining a global consensus, Ruggie's framework goes too far in sacrificing principle for the purposes of achieving agreement. As it stands, the flaws in Ruggie's framework – particularly his reduction of corporate obligations to a 'responsibility to respect' – could threaten the realisation of fundamental rights (particularly in the developing world) and imperil the development of a more adequate framework for the protection of fundamental rights in the longer term. Accepting Ruggie's minimalist framework as it stands would mean reducing widely our expectations of business and the very possibility of transforming our world from the current status quo of vast differentials in well-being into one that offers the possibility of realising the rights of all.

Part I

The Ruggie Mandate and the Nature of Corporate Responsibilities

(i) Context

In 2003, the United Nations Sub-commission on Human Rights adopted a document known as the ‘*UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*’ (henceforth, ‘the Norms’). These Norms sought “definitively to outline the human rights and environmental responsibilities attributable to business” (NOLAN, 2005, p. 581). Those responsibilities were designed to be mandatory obligations imposed upon corporations by international law.⁶ The rights which the Norms identify as being applicable to corporations include a number of unsurprising candidates such as labour and environmental rights as well as a general catch-all provision that corporations may be responsible for the full range of human rights within their ‘sphere of influence’ (UNITED NATIONS, 2003a, para. 1). As such, the Norms went beyond the voluntary initiatives that had until this point been the dominant framework in which corporate responsibility for the realisation of human rights had been articulated. They imposed wide-ranging responsibilities upon business for the realisation of fundamental rights whilst also outlining the contours of an international legal regime that would govern transnational corporations and other business enterprises in this area. The Norms, it was claimed, derived their legal authority ‘from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies’ (WEISSBRODT; KRUGER, 2003, p. 915).⁷

The reaction to the Norms was mixed. Many international human rights nongovernmental organisations (NGOs) endorsed the draft Norms (RUGGIE, 2007, p. 821). However, the business community, represented by the International Chamber of Commerce and International Organisation of Employers, was strongly opposed. The Norms were submitted to the Commission on Human Rights where they received a largely hostile reception from a range of states (BACKER, 2006, p. 288). The Commission eventually declared that the Norms had ‘no legal standing’ and that the Sub-Commission ‘should not perform any monitoring function in this regard’ (UNITED NATIONS, 2004b).

Though the Norms were divisive and failed to garner wide-ranging support, many states still felt that the responsibilities of business for the realisation of human rights were important and required further investigation. A year after the resolution on the UN Draft Norms, the UN Human Rights Commission asked that the UN Secretary-General appoint a Special Representative (the SRSG) to investigate further some of the outstanding issues relating to business and human rights (RUGGIE, 2007, p. 821). The appointee – Prof John Ruggie of Harvard University – was initially appointed for a two year period and was given a mandate that defined the terms of reference for his activities.

(ii) The Mandate and its Key Features

The mandate of the SRSG required that he was to present his views and recommendations for consideration by the Commission on the following issues:

- (a) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights including through international co-operation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises (UNITED NATIONS, 2005, para. 1).

It is clear that the mandate is a wide-ranging one and is meant to engage with a number of key questions in the field of business and human rights. Clearly, in many ways, the mandate emerged from the discussions surrounding the UN Draft Norms which provided the impetus for the consideration of certain key issues.⁸ Considering the various components of the mandate, its work can conceptually be divided into two key areas: first, the SRSG must seek to clarify what may be termed the ‘content question’: what in fact are the obligations that corporations have (or should have) for the realisation of human rights?; secondly, there is the institutional question: what institutions and forms of control can best ensure that corporations realise the responsibilities that they have concerning fundamental rights? The latter question raises a further issue as to who bears the responsibility for ensuring that corporations meet their responsibilities: the mandate is required to investigate the role of the state in this regard as well as the role of corporations themselves in this process.⁹

Whilst some of the tasks of the mandate are evidence-based and require descriptive research, the ultimate import of the mandate – at least in relation to the ‘content question’ - must be normative. Its starting point is that there is a lack of clarity concerning the responsibilities of corporations for human rights protection and the task of the SRSG is to provide clarification in that regard. The notion of clarification suggests that existing standards are unclear and lacking in definition. Yet, the process of clarifying standards is not simply a descriptive process: rather, it requires interpretation of the existing international legal position as well as choices to be made concerning the standards that ‘ought’ to govern a particular area.¹⁰ This is something that has been recognised by the SRSG in his very first report where, describing his mandate, he states that “insofar as it inevitably will entail assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgements” (UNITED NATIONS, 2006, para. 81).

(iii) The Execution of the Mandate and the Framework

Since the beginning of his mandate, Ruggie has stimulated much discussion in this area and produced a number of important documents. He has, together with his team of researchers and advisors, organised consultations with the most important stakeholders in this area and has conducted wide-ranging academic research in this field (RUGGIE, 2007, p. 822). He has also produced four important reports that have been placed before the Commission on Human Rights each year. The focus of this paper will be on the Ruggie framework, a report released in 2008, which contains a proposed ‘conceptual and policy framework, a foundation on which thinking and action can build’ (UNITED NATIONS, 2008a, para. 8). To the extent that his prior and subsequent reports have influenced the nature of the framework, these too will be considered.

Ruggie’s framework rests upon what he terms ‘differentiated but complementary responsibilities’ (UNITED NATIONS, 2008a, para. 9) and comprises three main principles. First, the report emphasizes the state’s duty to protect individual rights against abuse by non-state actors.¹¹ To this end, states are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and business, as well as to provide mechanisms for the enforcement of such obligations (UNITED NATIONS, 2008a, para. 18).

Secondly, businesses are said to have the responsibility to respect human rights. Ruggie claims in his framework that corporate responsibility extends to all internationally recognised human rights. He also contends that it is necessary to focus on the specific responsibilities of corporations in relation to fundamental rights and to distinguish these from the responsibilities of states. “To respect rights essentially means not to infringe on the rights of others – put simply to do no harm” (UNITED NATIONS, 2008a, para. 24). The report proposes a ‘due diligence’ approach whereby companies are expected to ensure that the impact of their activities does not cause adverse human rights impacts.

Finally, the third principle is that there must be access to remedies where disputes arise concerning the impact of corporations upon fundamental rights (UNITED NATIONS, 2008a, para. 26, 82). This involves ensuring that investigative processes take place where violations are alleged, as well as making provision for redress and punishment where required. The report proposes a variety of judicial and non-judicial mechanisms to improve and strengthen enforcement.

Despite Ruggie’s presentation of the three prongs of the framework as equally important components thereof, it is important to consider whether this is so and the relationship between them. When we consider the state duty to protect, it becomes evident that this forms part of the state’s function as an enforcement agent at international law: this means that the state is itself tasked with ensuring that other entities understand and comply with their responsibilities concerning fundamental rights. The actual detail of the state duty to protect – what enforcement measures it must take, for instance – will be guided by the obligations that non-state actors have and the ways in which they can impact upon fundamental rights. These obligations are dealt with in the second part of Ruggie’s framework which outlines the corporate responsibility to respect.

A similar point can be made about the third part of the framework - dealing with access to remedies - which is not about the content of the obligations that corporations have but the remedies that must be provided if such obligations are not met. The first and third parts of the framework thus work together: if the state is the primary enforcement agent, then it will be responsible for ensuring that remedies are available when fundamental rights are violated. In fact, the third part of the framework can be seen largely as a sub-section of the state duty to protect, determining what remedies the state must create in the case of a violation (though the remedies need not be the sole preserve of the state).

This analysis of the various parts of the Ruggie framework indicates that the conceptual heart of the mandate must relate to clarifying the obligations of corporations for the realisation of human rights. The first and third parts of the framework are dependent upon achieving an adequate conception as to the ambit of corporate obligations. It is to this question that I now turn.

(iv) The Corporate Responsibility to Respect

The key normative part of Ruggie's framework is, in many ways, his claim that corporations have the specific responsibility to respect human rights. The scope of this duty he claims is defined largely by 'social expectations' and the notion of a company's 'social license to operate' (UNITED NATIONS, 2008a, para. 54). The responsibility to respect involves effectively 'doing no harm'. This goes beyond a passive responsibility and can entail taking positive steps.¹² Discharging the responsibility requires reference to the notion of due diligence.¹³ "This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts' (UNITED NATIONS, 2008a, para. 56). The scope of the duty can be highlighted by three sets of factors. First, consideration must be given to the contexts in which business activities take place and the particular human rights challenges that may arise. Secondly, the impact of business upon human rights within these specific contexts must be taken into account. Finally, the potential for business activities to contribute to abuse through relationships with other agents – such as business partners, suppliers, State agencies, and other non-State actors – must be considered. The substantive content of the due diligence process involves reference to the International Bill of Rights and conventions of the International Labour Organisation which embody the benchmarks against which 'social actors judge the human rights impacts of companies' (UNITED NATIONS, 2008a, para. 58).

In order to grasp what he means by the responsibility to respect, it is important to distinguish the language Ruggie uses from that employed in the Norms. It is noticeable that the Norms place a much wider range of obligations upon corporations to 'promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law' within their sphere of activity and influence (UNITED NATIONS, 2003a, para. 1). Ruggie begins his discussion of the nature of corporate obligations by criticising

the approach taken by the Norms. The Norms, he claims, attempt to identify a specified list of rights for which corporations may be responsible. In relation to those rights, the Norms extend the entire range of duties that States have with the proviso that corporations only have such duties where they fall within a corporation's 'sphere of influence' and that such duties are 'secondary' rather than 'primary'. Ruggie criticises this framework for attempting to define a 'limited list of rights linked to imprecise and expansive responsibilities' rather than 'defining the specific responsibilities of companies with regard to all rights' (UNITED NATIONS, 2008a, para. 51).¹⁴ In order to capture accurately the differences between Ruggie's position and that outlined in the Norms, it is necessary to investigate in particular the technical meaning of the obligations to respect, protect and fulfil in international human rights law.

Henry Shue (1996, p. 52) famously criticised attempts to distinguish between 'negative rights' and 'positive rights' on the grounds that the former give rise largely to obligations to avoid infringing the rights of others whilst the latter give rise to obligations actively to take steps to realise the rights of others.¹⁵ According to Shue, it is more accurate to recognise that the 'complete fulfilment of each kind of right involves the performance of multiple kinds of duties' (SHUE, 1996, p. 52). Thus, each right – whether a civil and political right or a socio-economic right – does not have only one type of correlative duty but rather can be seen to have at least three types of derivative duties emanating from it, if the right is to be successfully realised.¹⁶ These duties include duties to avoid depriving an individual of a right (these are largely 'negative' in character); duties to protect individuals from the deprivation of their rights (these arise largely in order to ensure that duties to avoid depriving and to aid are enforced); and duties to aid the deprived (these are largely 'positive' in character and require active steps to be taken to fulfil the rights) (SHUE, 1996, p. 52-55).

Shue's typology of duties has influenced the analysis of the obligations imposed by the human rights treaties upon State parties.¹⁷ It has thus been mirrored in international human rights language by recognising that states have a duty to respect (avoid depriving); a duty to protect (protect from deprivation); and a duty to fulfil (aid the deprived). In recent years, some of the treaty bodies have expanded upon this framework to take account of further obligations that may be necessary for the effective implementation of a right.¹⁸

Seen in this light, Ruggie's claim that corporations only have a responsibility to respect would appear *prima facie* to involve a severe contraction of the obligations that corporations may be required to perform in comparison to those imposed by the Norms.¹⁹ Indeed, the comparison would seem to suggest that, on Ruggie's account, corporations largely have responsibilities to refrain from violating rights but are not required actively to contribute towards their realisation. Some of Ruggie's statements concerning the responsibility to respect, however, cast some ambiguity as to whether it is to be understood in the restrictive manner that international human rights law would suggest. The next section attempts to gain further clarity on the nature of the responsibility to respect in Ruggie's work prior to engaging critically with it.

(v) The 'Negative' Core of the Responsibility to Respect

The key element of the responsibility to respect does appear to be the negative duty to avoid infringing the rights of others, 'put simply, to do no harm' (UNITED NATIONS, 2008a, para. 24). Ruggie claims that this is the 'baseline expectation for all companies in all situations' (UNITED NATIONS, 2008a, para. 24). Yet, he claims that there may be additional responsibilities that corporations have in particular circumstances: Ruggie recognises that these may arise where companies perform certain public functions or have undertaken additional commitments voluntarily. These responsibilities do not, however, apply in all situations: it is only the negative responsibility to respect that applies across the board (UNITED NATIONS, 2009c, para. 48).

Moreover, in exploring the ambit of the responsibility to respect, Ruggie does state that 'doing no harm' can require that positive steps be adopted to ensure that negative consequences do not result from corporate action (UNITED NATIONS, 2008a, para. 24).²⁰ How does this impact on the nature of the duties that are encompassed by the responsibility to respect?

The example Ruggie uses is important in helping to understand the ambit of the responsibility to respect: a workplace anti-discrimination policy, he claims, might require that a company adopt specific recruitment and training programmes (UNITED NATIONS, 2008a, para. 55). If we try to draw out what he could mean by this statement, presumably, the training component of such programmes would be designed to shift discriminatory attitudes within a firm.²¹ Recruitment programmes would, it seems, at least have to be based upon equal opportunity principles and could perhaps also involve some form of affirmative action to redress past discriminatory practices. This example, however, highlights the fact that any positive steps that a company must take are ultimately designed to prevent violations of fundamental rights: in the example Ruggie gives, the violation would involve the infringement of equality rights through discriminatory practices. The positive duties of a company in this context simply flow from its general 'negative' obligation to avoid violating rights and essentially are designed to guard against any such violations.

Corporate obligations for Ruggie are also not simply confined to taking positive steps to avoid violating rights through its own actions. In the due diligence enquiry that he proposes, Ruggie supports the position that a corporation must also consider how it could contribute to human rights violations through the abuses of third parties.²² He is clear that the corporate responsibility to respect would involve avoiding 'complicity' which 'refers to the indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors' (UNITED NATIONS, 2008a, para. 73).

What Ruggie says here can be likened to the positive duties a state would have to protect individuals against the abuse of their rights by third parties. Take, for instance, its obligations in relation to the right to freedom and security of the person. In fulfilling this right, the state would be required, amongst others things, to protect individuals against violent criminal activity. This would entail the state setting up proper enforcement agencies, seeking to understand the causes of crime and addressing these through carefully designed policies. The state could also be

required to educate its citizens about ways of avoiding criminal activity as well as to provide advice on how to avoid becoming the victim of crime.²³

In the context of the state, such a duty would usually form part of what is referred to in international human rights law as the ‘duty to protect’. In relation to corporations, it would seem then that Ruggie envisages moving beyond the traditional meaning of a responsibility to *respect* in human rights law. In fact, his views seem to imply that corporations also have a responsibility to *protect* individuals against abuses by third parties with whom they have some form of contact.

His conflation of these two duties within the responsibility to respect framework is likely to lead to confusion given the different taxonomy in human rights law. Given his views on this matter, it would have been desirable thus to recognise explicitly that corporate responsibilities include both duties to respect and protect as they are conceived of currently in human rights law. However, even with this deeper analysis of what Ruggie’s framework envisages for corporate obligations, it is still evident that his framework narrows the focus of corporate obligations to the largely ‘negative’ task of avoiding harm to fundamental rights – whether it is the corporation’s own actions or those it is associated with – rather than requiring that corporations assume positive obligations actively to take steps to assist in the realisation of human rights.²⁴ In the next part of this article, this contention about the distinctive ambit of corporate obligations for the realisation of rights is examined critically and a normative argument provided for expanding the range of these responsibilities to include a ‘duty to fulfil’.

Part II Developing Corporate Duties Beyond the Responsibility to Respect

(i) The Role of the State and the Role of the Corporation

One of the central criticisms that Ruggie lodges against the Draft Norms is the fact that they ‘extend to companies essentially the entire range of duties that States have’ (UNITED NATIONS, 2008a, para. 51). Whilst the Norms recognise that certain rights may not pertain to companies, they ‘articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations’ (UNITED NATIONS, 2006, para. 66). Whilst corporations may be ‘organs of society’, Ruggie claims they are ‘specialised economic organs, not ‘democratic public institutions’ (UNITED NATIONS, 2008a, para. 53). The differing nature of corporations and states thus means that corporate ‘responsibilities cannot and should not simply mirror the duties of States’ (UNITED NATIONS, 2008a, para. 53). Consequently, Ruggie asserts, ‘by their very nature, corporations do not have a general role in relation to human rights like states but a specialised one’ (UNITED NATIONS, 2006, para. 66). Ruggie thus attempts in his framework to identify the ‘distinctive responsibilities of companies in relation to human rights’ (UNITED NATIONS, 2008a, para. 53). His claim that corporations have only a responsibility to respect reflects this attempt to capture the particular role they should play in relation to fundamental rights.²⁵

The argument here is of central importance in determining the role that corporations should play in realising fundamental rights. It is uncontroversial that the state and the corporation are distinctive entities with differing roles in the social order. Yet, recognising this point does not entail that the obligations of corporations are limited to the largely ‘negative’ duties encompassed by the responsibility to respect. In order to understand the nature of the obligations that corporations should have in relation to fundamental rights, we need a normative theory that is capable of relating the distinctive nature of the corporation to the forms of obligation that they should be subject to. I shall now attempt to provide a brief outline of such a theory which provides support for the view that corporate obligations are not confined to the responsibility to respect but also include positive obligations to promote and fulfil fundamental rights.²⁶

(ii) Rooting Obligations in the Social Function of the Corporation

Businesses are conducted through a range of legal forms: however, the dominant structure in the modern world has been the corporation.²⁷ The major distinctive feature of the corporation has been what is often termed its ‘separate legal personality’ which allows the company to be the bearer of its own rights and liabilities.²⁸ This is clearly a construct as the corporation cannot in reality act other than through the individuals who make it up and are the brains behind it. Nevertheless, conceiving of a corporation as a separate legal person has a number of legal advantages, foremost amongst which is the notion of limited liability (MILLER; JENTZ, 2005, p. 519): the corporate form separates out the shareholders from bearing full responsibility for the fate of the company and thus “the risk carried by the contributors of capital extends no further than the loss of the amount which they have contributed to the venture as capital” (CILLIERS, 2000, p. 66).²⁹ Corporations also gain the benefit of perpetual succession in that they continue to exist irrespective of changes in their shareholding (or for that matter their staff). These legal benefits clearly were developed to attain a number of social advantages: they encourage people to take more risk, stimulate innovation and provide a catalyst for greater competition.³⁰ Much of corporate law has evolved so as to ensure that these benefits are obtained and that the risks that arise out of the creation of a structure such as the corporation do not materialise (BACKER, 2006, p. 298-300).

It is clear therefore that corporations are essentially entities created and regulated through law in order to attain a number of social and individual benefits that flow from their separate legal personality.³¹ Clearly, should the advantages of corporate personality be accompanied by grave social harms, then there would be a need for legal restrictions to be placed on corporations to guard against those harms.³² Such harms may in fact arise from the very fact that the focus of corporate activity has often been upon achieving value for its shareholders without imposing full responsibility for its actions upon those very shareholders: some have argued that “this creates a structure which is pathological in the pursuit of profit” (CORPORATE WATCH, 2006; BAKAN, 2004). The need for regulation to guard against harms that arise from the creation of a corporate structure could provide

a normative basis for the obligations that would flow from Ruggie's responsibility to respect. Since every individual must have his or her rights respected and the corporate form could function as a method through which responsibility for such violations could be avoided, it is of critical importance to ensure that corporations are required at least to avoid harming such fundamental rights.

However, once we conceive of the aim of providing corporations with separate legal personality as being the creation of certain social advantages, the question is why we need to confine our conception of such benefits to the traditional ones outlined above. If corporations may be able to attain these benefits and yet be capable of contributing to other social goods of vital importance, why should we not require that they actively promote such goods as well?³³ Moreover, given that the existence of separate legal personality provides many advantages to those who invest in the corporation, why should society not require that corporations pay a form of social dividend in order to attain those very advantages?³⁴ Seeing that law effectively creates the corporate form for social purposes, it is unclear why it may not impose obligations upon corporations actively to realise certain social goods, provided this does not fundamentally prevent the corporation from realising its economic purposes.³⁵ Moreover, the realisation of fundamental rights is not just any type of social good. It is (or should be) a central norm of the international legal order as well as the national legal systems in which corporations are registered. It plays such an important role in legal systems for a very good reason: fundamental rights are about the protection of the most vital interests of individuals, without which the possibility of living a decent life becomes meaningless.³⁶

As it stands, Ruggie's framework seems to give expression to what might be termed a 'libertarian vision' of the corporation. Ultimately, the social role he has articulated for the corporation is a limited one focused on the benefits of having an entity oriented towards profit maximisation without creating strong social harms. Libertarianism is generally only in favour of regulation and the imposition of obligations by the state where this is necessary to prevent the violation of individual rights (typically conceived of as 'civil rights') and where this is necessary to protect individuals against such harms as force, fraud and theft (see, for instance, NOZICK, 1972, p. 26-28). In relation to business, this view was defended strongly by Milton Friedman who famously stated that 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.' (FRIEDMAN, 1972, p. 133). The rules of the game for Ruggie would go further than those envisaged by Friedman and involve respecting human rights.³⁷

However, it is unclear what grounds of principle we have for limiting the rules within which corporations are required to operate only to negative obligations. The harms individuals may suffer are not limited to ones where their rights are actively violated by corporations: indeed, lack of access to food, water, health-care, and legal representation may severely impact upon the lives of individuals.³⁸ Corporations may have the capacity to assist with the realisation of these rights for a large number of individuals. If the point of enabling corporations to function

as separate legal persons through law is to create certain social benefits, then it seems that corporations may be required to play their part in helping to fulfil these important social goods.

Most societies do not seem to consider it illegitimate for states to tax corporations on the basis of their activities for wider social purposes, and, indeed, Ruggie at no point appears to question the validity of taxation.³⁹ If this is so, then why could we not regard positive obligations upon corporations for the realisation of fundamental rights as a form of tax on their activities that require certain active contributions to realise fundamental rights in both money and in kind?

The reasoning I have proposed here can be seen to take further the notion that Ruggie employs in his framework, namely, that companies require a 'social license' in order to operate (UNITED NATIONS, 2008a, para. 54). When as a society we grant a company the license to operate, it is not simply a license to create as much wealth for its shareholders as possible. It can also involve the requirement that the company actively assist in the fulfilment of the fundamental rights of individuals. Understanding the social context in which corporations operate shows that they cannot be considered in purely individualistic terms but need to be considered as part of a co-operative social order.⁴⁰

Yet, does this not confuse the social roles of the corporation and that of the state? Whilst the state should be under no illusion concerning its responsibility to realise the rights of individuals, I have attempted to show in the argument presented above that the reasons underlying the creation of the corporation in law do not provide any strong justification for excluding positive obligation being placed upon corporations actively to contribute to the realisation of fundamental rights.⁴¹ When we consider the power of corporations to impact upon fundamental rights and their having been created in order to achieve benefits for society, a case begins to emerge for the imposition of positive obligations upon corporations. This does not mean that corporations must assume the same range of responsibilities as the state in realizing fundamental rights: we thus need some principled basis upon which to determine the allocation of responsibilities between corporations and the state.

Henry Shue provides a plausible account of what the criteria should be for determining who should be the bearers of positive obligations. In his view, two factors must be considered in this regard: first, means-end reasoning must establish what needs to be done in order for a right to be fulfilled and, in light of this, it must be determined who best can perform those tasks (SHUE, 1996, p. 164).⁴² Secondly, the allocation of duties also depends upon what burdens are reasonable and fair to place upon specific agents. In relation to the first factor, it is clear that, in many instances, corporations will be able to play an important role in helping to realise fundamental rights.⁴³ This appears to provide an important justification for the allocation of obligations to corporations where particular interventions that could have a large potential impact upon fundamental rights fall within their area of speciality, and their capacity to assist. The second factor identified by Shue provides a justification for limiting the role of corporations in this regard: it would require, for instance, that the burden of positive obligations be spread equally amongst corporations and require that corporations still be able to realise their economic

goals. The second factor does not, however, provide any general reason in principle why corporations cannot have positive obligations for the realisation of rights.

No doubt it will be important for these factors to be developed so as to specify the guiding principles that will determine the positive obligation that corporations have in particular circumstances. The Norms attempted to use the vague concept of 'sphere of influence' to try and capture some of these complexities. Ruggie has successfully highlighted a number of the inadequacies of this notion and done much to try and disentangle various elements of the concept.⁴⁴ There is clearly still much work needed to flesh out the ambit and scope of the positive obligations that corporations have.

Nevertheless, the absence of a fully worked out theory in this regard does not mean we can reach the conclusion that there are no general positive obligations that corporations have for the realisation of fundamental rights. Nor does it provide a justification for omitting such obligations from an international framework that is designed to be the point of reference for determining the ambit of corporate obligations. As has been argued, there are in fact strong reasons to recognise the existence of such positive obligations even if we do not as yet have a full understanding of their exact scope.⁴⁵ If we accept this point, then the Ruggie framework is fundamentally incomplete. It also forecloses the possibility of achieving an adequate allocation of legal duties to fulfil fundamental rights by creating a general exclusion for corporations in relation to these obligations. Given the large capacity that corporations have in our current world to help states realise fundamental rights, this exclusion can be seen seriously to undermine the possibility of realising a wide range of human rights. In particular, this is of great importance in the developing world, where placing positive obligations upon corporations has the potential to assist these societies to meet the fundamental interests of individuals living therein.⁴⁶ I now provide an example that seeks to illustrate this point in a more concrete manner.

(iii) Positive Obligations and their Impact on Fundamental Rights in the Developing World

The example in question concerns whether pharmaceutical companies have obligations to make anti-retroviral drugs available at affordable prices to those suffering with HIV. According to United Nations statistics, at the end of 2007 there were 33.4 million people living with HIV.⁴⁷ The main treatment that has been developed for HIV is in the form of anti-retroviral drugs which are largely effective in increasing life expectancy and the quality of lives of individuals who suffer from the disease.⁴⁸ In terms of the law of many countries, and more recently in terms of the international trade regime established by the World Trade Organisation, pharmaceutical companies are allowed to obtain strong intellectual property rights known as patents for a limited period that allows them exclusively to profit from the development of drugs such as these.⁴⁹ Until recently, these drugs were extremely expensive and largely accessible only within developed countries (CULLETT, 2003, p. 143). Due to a range of initiatives, the price of these drugs has come down and, these

drugs have become more accessible within a wider range of developing countries (SLEAP, 2004, p. 170). The United Nations Declaration of Commitment on HIV/AIDS, has clearly recognised that pharmaceutical companies are central to reducing the cost of ARV drugs and increasing the availability thereof.⁵⁰ The question, thus, arises as to whether there should be any *obligation* upon pharmaceutical companies to make such drugs available to individuals at an affordable rate.⁵¹

It is important to analyse what the nature of any such obligation would be. The corporation here is not actively creating the harm in this instance: whether actively engaging in risky behaviour or accidentally being infected, it is an individual's contraction of HIV that may lead to his or her illness and death.⁵² It also clearly seems possible for an ethical corporation to manufacture and develop these drugs without causing any harm to other human beings.⁵³ Thus, in producing anti-retroviral drugs, a corporation may avoid doing harm and so comply with the responsibility to respect individual rights in terms of the Ruggie framework. Yet, this framework effectively fails to address the most pressing and relevant question in this context which concerns whether a corporation that produces life-saving medication such as anti-retroviral drugs and has a patent covering such medication actively has a duty to help ensure that individuals are able to have access to it at an affordable rate.⁵⁴ To recognise such a duty would require that we place an obligation upon corporations in this field actively to promote and fulfil individual health rights rather than simply having to respect such rights.⁵⁵ By limiting the ambit of corporate obligations to his 'responsibility to respect' framework and asserting that this responsibility is sourced in societal expectations, Ruggie would essentially be claiming that, in the context of the current example, our societal or moral expectations of pharmaceutical companies do not extend to a duty to help render such life-saving medicines affordable to those who need them.

It is important to recognise, as has been argued above, that pharmaceutical companies are allowed to operate and make profits for the purpose of creating certain social benefits: the traditional argument is that the possibilities of financial reward would lead to innovation and large investment in the production of new and more effective drugs which will ultimately make all individuals better off.⁵⁶ Yet, once life-saving medicine is developed and patented, it may be that only the wealthiest individuals can afford it, at least in the short-term whilst the company's patent is in force. The existence of the drug may benefit humanity in the abstract sense that a treatment to a life-threatening illness is available; however, a large number of people who cannot afford the drug may be in no better position than if the drug had not existed at all. In order to ensure that all individuals are equally able to access the very social benefits that are meant to flow from enabling corporations to profit from new medications that they develop,⁵⁷ it is necessary to place positive obligations upon them to ensure that the life-saving treatments that result from their research are made available to individuals at an affordable rate.⁵⁸ The point is that medicine should not be treated like a commodity in the same way as other goods (COHEN; ILLINGWORTH, 2003, p. 46):⁵⁹ this industry has the potential to affect the most vital fundamental rights of individuals to life and to health. Given the critical nature of these interests and the capacity of corporations to impact upon such interests, there is a strong reason to impose positive obligations

upon corporations operating within this industry to ensure that life-saving medication is made available to individuals at a reasonable rate.⁶⁰

The example provided demonstrates the large number of people whose lives may be improved through positive obligations being placed upon corporations for the realisation of fundamental rights.⁶¹ It also provides a good instance in which reliance on philanthropy from corporations would not have been enough: strong social pressure and potential harm to their good-will have been critical in ensuring that corporations reduce the costs of ARVs. During 2001, for instance, 39 pharmaceutical companies took the South African government to court for adopting legal measures that would have increased the availability of anti-retroviral drugs and reduced the price thereof.⁶² The case provoked large demonstrations around the world against the action of these companies, suggesting that many people are of the view that such life-saving medicines – even if they had been developed by a private company – should be made available to individuals in the developing world at an affordable rate.⁶³ Companies left to their own devices focused upon defending their own commercial interests without regard to the human cost: a large number of people around the world helped to pressure corporations into reducing the price of drugs.⁶⁴ But, what happens in the case of many other drugs, where there is a lack of such widespread mobilisation?

The principled case for access to life-saving drugs does not differ between HIV/AIDS and medications designed to treat other life-threatening illnesses. To ensure that individual rights are realised, it would be entirely ineffective to rely on the contingencies of social pressure or corporate good-will. It is thus of great importance that the international framework governing corporate responsibility for human rights allow for the recognition of binding positive obligations that can render corporations obligated to ensure the availability and affordability of life-saving medicines that they develop.

(iv) Objections to Imposing a 'Duty to Fulfil' upon Corporations

Whilst illustrating the great importance that placing positive obligations upon corporations can have, and the critical gap that currently exists in Ruggie's framework, the example also provides a real-life context in which to engage with certain of the objections that Ruggie has raised against the imposition of such obligations. First, he raises the problem that the imposition of positive obligations may, he suggests, 'undermine corporate autonomy, risk taking and entrepreneurship' (RUGGIE, 2007, p. 826). Quoting Philip Alston, he asks '[w]hat are the consequences of saddling [corporations] with all the constraints, restrictions and even positive obligations which apply to government?' (RUGGIE, 2007, p. 826). The question is itself a misnomer as the imposition of *some* positive obligations upon corporations would not saddle them with *all* of the obligations (or even the same obligations) that apply to government.

Nevertheless, the example I have given does highlight some concerns in this regard and suggests a number of competing tensions that may exist in relation to the social benefits that flow from the corporation being recognised as a separate legal person. For instance, it may be that wider social benefits – such as increasing the availability of life-saving medication to all – may conflict with the social benefits

that result from allowing a relatively free market in drugs – which, it is claimed, include a large investment in research and development.⁶⁵ At a certain point, a corporation may claim that it has no reason to continue to invest in research and development (or even to operate) if it is faced with overly onerous positive obligations that force them to lessen their profits through a reduction in pricing.

However, this argument does not provide a case against imposing positive obligations upon pharmaceutical corporations for the realisation of health-care rights. Instead, what it shows is that if we wish to gain the traditional benefits of the market-place as well as additional social advantages for the realisation of fundamental rights, it is necessary to balance a number of factors that determine the extent of the positive obligations we can impose upon a corporation. Such balancing is not unique to this context and would involve many of the factors often used to determine the tax rate, for instance, applicable to corporations.⁶⁶

Consider, for instance, the fact that most companies produce a wide-range of drugs. In certain circumstances, the benefits of such medicines – such as a new pain-killer with fewer side-effects - are important yet they are not critical.⁶⁷ In other cases, the medicine that is produced – such as in the case of ARVs – has the potential to improve the life expectancy and quality of lives of millions of people. Considering the differential impact that the different types of drugs have on fundamental rights, it is clear that there is a stronger case for the imposition of hard positive obligation upon corporations to ensure that the life-saving medication is made available to individuals at an affordable rate. The case is weaker for such an obligation to exist in the case of the new pain-killer. This could allow such a company to make large profits from the new pain-killer, whilst placing stronger positive obligations upon corporations in respect of life-saving medication.

Some may claim, however, that imposing strong positive obligations in the case of life-saving medication would create a perverse incentive for corporations to focus their efforts upon less important types of drugs from which they can make large profits.⁶⁸ However, to avoid such effects, a range of policy options exist including ‘push programmes’ through which government may help subsidize such research and ‘pull programmes’ which reward developers for producing a product with strong social benefits (JOHRI et al., 2005). If stricter measures were required, it could also be possible to regulate pharmaceutical companies through provisions that required that they invest a certain percentage of their profits made from drugs like the pain-killer into the production of life-saving medication. There would thus be various methods of ensuring that there remain incentives to produce life-saving drugs even though it would be recognised that unrestricted profit maximisation would not be permissible in this area.⁶⁹ It thus seems eminently possible to impose some positive obligations whilst still retaining the benefits of a more limited but still significant degree of corporate autonomy, risk-taking and entrepreneurship.

Ruggie is also clearly worried about the possibility that weak governments will attempt to shift their positive obligations for the realisation of rights onto corporations. He claims that the recognition of corporations as co-equal duty bearers for the broad spectrum of human rights obligations ‘may undermine

efforts to build indigenous social capacity and to make governments responsible to their own citizenry' (UNITED NATIONS, 2006, para. 68). It is important to recognise that the imposition of positive obligations upon corporations need not render them equal duty bearers with the state and it could still be of importance to differentiate between their respective obligations. Nevertheless, whether Ruggie's fears are realised is not a necessary consequence of positive obligations being imposed upon corporations but an empirical matter that will depend upon the institutional setting for the co-ordination of government and corporate initiatives. For instance, it could be argued that, with a co-operative approach, corporations could indeed help increase indigenous social capacity and aid governments in responding to their citizenry in many areas. Arguably, for instance, the provision by Boehringer Ingelheim of free ARVs to the government in South Africa for the prevention of mother-to-child transmission of HIV helped to highlight the existing inadequacies in public provision. It was also instrumental in the outcome of the *Treatment Action Campaign* case in which the Constitutional Court eventually ordered the government to make the drug available across the public health care system (SOUTH AFRICA, *Minister of Health vs Treatment Action Campaign*, 2002, para. 135). What is needed is thus a movement away from the traditional assumption embedded in the Ruggie framework that only governments are responsible for the realisation of rights and the recognition that, in many cases, it will be necessary to involve wider social actors - that often will include corporations - in this task. Ruggie's mandate could assist in developing principles according to which such co-operation can take place that would minimize the problems he raises: to do so, however, would mean first recognising that corporations do indeed have such positive obligations to assist in the realisation of fundamental rights.

Conclusion: the Relationship Between Consensus and Principle

This article has sought to offer a detailed consideration and critique of the Ruggie mandate's conclusions concerning the ambit of the responsibilities that corporations have for the realisation of fundamental rights. Some may argue that the critical appraisal of his framework has failed adequately to take account of the difficult context in which his mandate came about and in which it operates. As has been outlined in Part 1, the mandate resulted from the failure of the Norms to command the support of the Human Rights Commission, and the virulent opposition of business as well as many states. In his 2006 interim report, after recognising the history that led to the creation of his mandate, the SRSG expressed his desire to adopt an approach that would involve consensus building: he has as a result held many workshops and extensive consultations. Moreover, at the end of that report, the SRSG refers to his approach in dealing with the normative claims he is required to determine as involving a 'principled form of pragmatism: an 'unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people.' (UNITED NATIONS, 2006, para. 81).

The framework of the SRSG could thus be understood as an attempt to create a compromise between what principle dictates and the pragmatic demands of achieving a world-wide consensus on the ambit of corporate obligations.⁷⁰ The SRSG has indeed had a number of important pragmatic considerations to contend with. First, the initial mandate was set up only for a very brief period of two years which was eventually extended for a further year. With the release of the framework for business and human rights in 2008, the Commission has decided to extend the mandate for another three years. The SRSG thus had a short period of time in which to show sufficient progress to justify the extension of his mandate by the Commission.

Secondly, should the mandate have failed to function in a consensual manner and made recommendations that were clearly inimical to the views held by members of Commission, it could easily have been terminated. The continuation of the mandate was of importance not for its own sake but, amongst other reasons, in order to keep the whole issue of business and human rights on the agenda of the United Nations ('UN'), to ensure discussion on the issue at the elevated level of the Human Rights Commission and to assist in the development of standards in this area.

Finally, much work had gone into preparing the Norms which had taken five years to complete and yet they had not succeeded in being adopted by the Commission. Their status and very relevance were placed in question by the Commission and thus their possible impact seemed to be severely curtailed. If the SRSG mandate was to succeed in having an impact and developing the responsibilities of business at an international level, then it needed to be concerned with garnering as wide a consensus around its work as possible. The reaction to his proposed framework indicates that the SRSG's consultative approach has indeed been largely successful in achieving a greater degree of consensus on the issue of business and human rights.

Human rights advocates cannot afford to ignore the importance of real-politik in the development of international law and normative standards.⁷¹ The mere assertion of standards and responsibilities that rest in a vacuum and have no possibility of being enforced may reflect certain utopian ideals but in the end may have no real-life impact if they are not widely accepted. Yet, at the same time, it should be recognised that, as has happened in relation to the Norms, business will naturally resist any attempt to assert binding international human rights obligations upon them or, where such obligations are accepted, they will want to restrict them to the minimum degree possible.⁷²

Consequently, the attempt to achieve consensus in such circumstances may lead to an acceptance of standards that represent the lowest common denominator and could lead to concessions that undermine the basic normative commitments involved in accepting fundamental rights.⁷³ It may be popular, for instance, at the international level to ignore the rights of lesbian and gay people given the virulent controversy this may cause in certain countries: yet, to do so, for a human rights advocate would be to give up on a foundational commitment to respect the interests and dignity of all individuals equally.⁷⁴ Moreover, international actors may be tempted to accept a minimalist framework that can achieve consensus in the short-term, yet in the longer term this may imperil the possibility of achieving substantive improvements in the realisation of fundamental rights.

Unfortunately, in Ruggie's quest for consensus, it appears that he has fallen into some of these traps and made compromises of principle that human rights defenders should refuse to accept. One of the most controversial elements of the Norms was its assertion of binding legal responsibilities upon corporations for the realisation of human rights. Ruggie attempts to assuage corporate concern in this regard by denying that corporations have international legal obligations to realise human rights and by providing that any responsibilities that they do have are only a matter of social expectation. He then goes even further and holds that the responsibilities that corporations have are severely curtailed and involve only a requirement that they avoid harming fundamental rights.

Understood in light of the desire to achieve consensus, Ruggie's minimal proposal may be likely to garner more support than would a recognition of binding and more expansive duties, such as were contained in the Norms.⁷⁵ Yet, the costs involve accepting a very serious reduction in what we can expect of corporations or hold them accountable for. And indeed, in respect of a world suffering from severe economic inequality and deprivation, this can impact negatively on the human rights and well-being of millions of individuals. This is a cost that human rights defenders should not assent to.

This article has sought to focus upon Ruggie's assertion that corporations only have a responsibility to respect fundamental rights. Yet, it has been argued that corporations in fact should be subject to the full range of human rights obligations at international law, including obligations to protect and fulfil. The existence of positive obligations upon corporations is supported by the normative arguments that have been made as well as recognition of the importance of imposing such obligations in a world characterised by severe economic deprivation and vast corporate power.

Ruggie has at points suggested that his framework might constitute simply a starting point upon which to build wider obligations in time. He refers to the responsibility to respect as a 'baseline obligation' (UNITED NATIONS, 2008a, para. 24): this is ambiguous between the idea that this is simply a starting point or the main fundamental obligation. Ruggie often uses it in the latter sense with the notion that any further obligations are exceptional. Whilst it has been argued that Ruggie is mistaken in this regard, it is also important to recognise that focusing on the responsibility to respect alone is also a mistaken starting point. For it attempts to cast the division of labour between corporations and the state for the realisation of fundamental rights in terms of the distinction between 'negative' and 'positive' obligations. Yet, the allocation of duties for the fulfilment of fundamental rights to particular actors cannot convincingly be based upon the distinction between these two forms of obligation. Rather, such allocative decisions must be based on other factors which include the capacity of an actor to perform certain obligations, the importance of such obligations and the fairness of imposing such obligations upon them. Moreover, an obligation to respect is a very minimal one and could easily curtail the development of wider obligations upon corporations. At a time in which the international norms relating to the nature of corporate obligations for the realisation of fundamental rights are being developed and where such norms can have large implications for the rights of many individuals, the starting point

should be one that is more expansive and that could allow corporations to share some of the burdens of realising fundamental rights more equitably.

The starting point should thus be that businesses do not only have a responsibility to avoid harming fundamental rights but are actively required to assist in their realisation. There is no strong principled reason why a society should not require that corporations do business on condition that they play a part in realising fundamental rights where they are able to. Ruggie is currently busy working on developing the concrete implications of the responsibility to respect. Given the argument in this paper, it is important that his mandate be widened to include an investigation into corporate obligations to protect and fulfil as well and to develop guiding principles for the determination of the exact scope and nature of corporate obligations in this regard. Through recognising the full range of human rights obligations that can fall upon corporations, it will be possible to allocate responsibilities for the realisation of rights to those often in the best position to meet them. It will also hopefully provide the basis for re-shaping the nature of corporations so that they are not simply regarded as entities focused upon the self-interested maximisation of profit but that they are structures whose activities are designed to advance and benefit the societies and individuals with whom they interact.

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NOTES

1. Human Rights Watch, for instance, has released a report that outlines the impact that corporations can have on a whole range of fundamental rights. In order to deal with these abuses, the report stresses the need for global intergovernmental standards on business and human rights.
2. The voluntary initiatives include the following: the Organisation for Economic Development and Co-operation (OECD) Guidelines for Multinational Enterprises; the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; and the United Nations (UN), The United Nations Global Compact. The focus of this article will be on the attempts to assert more binding obligations upon corporations.
3. For a fuller description of the process leading to the mandate, see John Ruggie (2007, p. 821.).
4. The central reports under consideration in this article are the 'Interim Ruggie Report'; the '2007 Ruggie Report'; the 'Ruggie Framework'; and the '2009 Ruggie Report' (UNITED NATIONS, 2006, 2007, 2008a, 2009c).
5. Ruggie's mandate, as is outlined below, is expressed to cover 'transnational corporations and other business enterprises'. Business is in fact conducted through a range of different structures including sole proprietors, partnerships and corporations. Given the fact that the corporation has certain particular features and has become the most important structure for conducting business in the modern world, the focus of this article is upon the responsibilities of corporations for the realisation of fundamental rights. Given the focus of this paper, I often use the responsibilities of 'business' for human rights realisation and the responsibilities of 'corporations' in this regard interchangeably. The extension of these responsibilities to other structures through which business is conducted lies beyond the scope of this paper.
6. Weissbrodt and Kruger (2003, p. 913) explain that the Norms were not simply a 'voluntary initiative of corporate social responsibility' though they recognize that determining the exact source of the legal authority of the Norms is complex. See also, Campagna (2003).
7. Weissbrodt and Kruger make this statement but add the qualification that 'they have room to become more binding in the future'. Considering the way in which the Norms could have been binding in more detail lies beyond the scope of this paper.
8. For instance, the mandate requires the SRSR to examine the concept 'sphere of influence' which was used in the Draft Norms and which required further specification. See, in this regard, Olivier De Schutter (2006, p. 12-13).
9. The mandate at paras (d) and (e), appears to envisage some form of corporate self-regulation as well. Ruggie has in his 2007 Report also considered models of corporate self-regulation though that will not be the focus of this article.
10. Indeed, at international law, the process of clarification of norms generally leads to their development at the same time. See, for instance, Malcolm Shaw (1997, p. 89) on the confusion between 'law-making, law-determining and law-evidencing'.
11. A good example of the violation of a state duty to protect occurred in Nigeria where the government apart from actively violating human rights, allowed oil companies to degrade the environment, impacting on the right to health, the right to housing and the right to food of the Ogoni people in this area. This was found to be a violation of Nigeria's duties under the African Charter in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*.
12. The example given is of anti-discrimination policy which might require the company to adopt specific recruitment and training programmes: see (UNITED NATIONS, 2008a, para. 55).
13. Ruggie's mandate has been renewed for three years with one of the tasks he has been set being to 'elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders' (see UNITED NATIONS, 2008c, para. 4(b)). In fulfilling this mandate, Ruggie has released a preliminary work plan in which he expresses the intention to develop 'a set of guiding principles on the corporate responsibility to respect and other accountability measures': see Special Representative of the Secretary-General, Preliminary Work Plan (UNITED NATIONS, 2009c, p. 3).
14. Ruggie's comments are though in some ways puzzling for, whilst the Norms do identify a limited set of rights that are mentioned directly, there is a general recognition therein that corporations can have obligations in relation to the full range of human rights. The Preamble acknowledges 'the universality, indivisibility, interdependence, and interrelatedness of human rights, including the right to development that entitles every person and all peoples to participate in; contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised'. In the first substantive section of the Norms relating to general obligations, as quoted in the text, the obligations appear to relate to all human rights in 'international as well as national law'. Ruggie seems to overstate the case against the Norms: this could be, as is suggested in the concluding part of this paper, for purposes of distinguishing his work from the Norms so as to achieve greater consensus on his framework even where the similarities between the two are evident.
15. Often civil and political rights were seen to be largely 'negative' in nature and socio-economic rights 'positive' in nature. Shue attempts to show that each right – whether civil and political or socio-economic – involves both 'negative' and 'positive' duties if it is to be realised effectively.

16. For a way in which to retain the correlativity of rights and duties in Shue's framework, see Bilchitz (2007, p. 90-91).
17. His analysis has, in large measure been adopted by the treaty bodies charged with oversight of the treaties: see, for instance, Human Rights Committee, General Comment No 31 (UNITED NATIONS, 2004a, para. 6), where the committee recognises that the obligations under the ICCPR are both 'negative and positive in nature'. The Committee on Economic, Social and Cultural Rights has expressly recognised this in The Right to Water, General Comment no 15 (UNITED NATIONS, 2002, para. 20) where it states that '[t]he right to water, like any human right, imposes three types of obligations on State parties: obligations to respect, obligations to protect, and obligations to fulfil'.
18. The UN Committee on Economic, Social and Cultural Rights, for instance, in its General Comment no. 14 (UNITED NATIONS, 2000) has further divided the duty to fulfill into a duty to facilitate, a duty to promote and a duty to provide.
19. Indeed, Ruggie seems actively to support such a reduction in the range of duties and sees this as a virtue of his framework (RUGGIE, 2007, p. 825-827). See also Ratner (2001, p. 517-518) who argues for a limitation of corporate responsibility to negative obligations to avoid harm.
20. See also Ratner (2001, p. 517) who is also prepared to allow that positive measures may be required to give effect to these negative duties.
21. An additional example could be the one given by Ratner (2001, p. 516) who seems to think that there is a positive duty upon a company to train its security personnel such that they do not infringe the prohibitions against torture.
22. In the Ruggie Framework (UNITED NATIONS, 2008a, para. 81), it is stated that 'the relationship between complicity and due diligence is clear and compelling: companies can avoid complicity by employing their due diligence processes described above – which, as noted, apply not only to their own activities but also to the relationships connected with them'.
23. For an example of where a state body has been required by a court to take positive steps to protect individual safety, see South Africa, Rail Commuters Action Group vs Transnet Ltd t/a Metrorail (2005).
24. Indeed, in his Report (UNITED NATIONS, 2009c, para. 62), he persists in contending that activities that go beyond the responsibility to respect may be 'desirable for companies to do' but 'should not be confused with what is required of them'. This is a strange statement given that the whole of the Ruggie framework rests upon 'social expectations' rather than law and so the notion that corporations are 'required' to do something seems to involve the notion of being morally bound rather than being legally bound.
25. Ruggie (2007, p. 826) lays out certain additional policy reasons against placing further responsibilities on corporations. I shall consider some of these later on in this article.
26. I shall argue for the existence of such positive obligations without specifying the exact scope or extent thereof: this enables me to support the claim that the Ruggie framework as it stands is an inadequate one for capturing the nature of corporate obligations. In the same way that Ruggie proposes to develop guidelines concerning the responsibility to respect in his coming work (UNITED NATIONS, 2008d) there will be a need to go beyond the position in this paper and develop more determinacy surrounding the positive obligations that corporations have in specific circumstances. This is a large project and one of great import for political philosophy and both international and domestic human rights law which I shall seek to develop in forthcoming work.
27. Janet Dine (1999, p. 221-229) outlines a number of theories concerning the nature of the corporate entity that she employs to reach certain conclusions about governance models for corporations. Instead of proceeding from an analysis of these theories, I shall instead attempt to derive a conception of corporate obligation from a consideration of what I take to be a distinctive feature of the corporation: separate legal personality. The argument here might be extended to other legal forms through which business is conducted by considering the way in which law facilitates their operation though a detailed consideration of this lies beyond the scope of this paper.
28. The most important contribution of corporate law has been said to be the creation of a legal person, 'a contracting party distinct from the various individuals who own or manage the firm, or are suppliers or customers of the firm' (HANSMANN; KRAAKMAN, 2004, p. 7). See also Stephens (2002, p. 54).
29. As Stephens (2002, p.54-55) points out, limited liability only became widespread in the early nineteenth century in the United States and some fifty years later in England but is currently seen to be a 'core element of the corporate form'.
30. This view of the function of business and corporations is linked to the broader justification concerning the benefits arising from free market capitalism and private property: see, for instance Nozick (1972, p. 177). In relation to the rationale behind limited liability, in particular, see Easterbrook and Fischel (1985, p. 93-97). Of course, in recent years, the corporate form has been changed and is often used by non-profit organisations to create separate legal personality as well. This often occurs to encourage individual involvement in such organisations without the risk of personal liability if things go wrong. The corporate form here again assists as a way of shielding individuals from full liability for problems that may occur with the organisation. The focus of this piece, however, shall be on corporations that are formed for the purposes of conducting business and thus have economic aims at their root.
31. Lewis Kornhauser (2000, p. 88) states that 'a conception of corporate and commercial law unconnected to increasing the general level of well-being is completely implausible'.
32. Indeed, the current global financial crisis is

leading to calls for greater regulation of corporations – particularly banks – to prevent a recurrence of the problems that are affecting millions of lives. See, for instance, IMF (2008)) where Dominique Strauss Kahn, managing director of the International Monetary Fund, stated that ‘it’s because there were no regulations or controls, or not enough regulations or controls that this situation was born. We must draw conclusions from what has happened – that is to say regulate, with greater precisions, financial institutions and markets’.

33. Backer (2006, p. 298-302) traces this kind of reasoning back to the views of E. Merrick Dodd in the 1950s that he expressed in an engagement with Adolph Berle in the Harvard Law Review concerning corporate social responsibility. According to this school of thought, corporations are created to serve a social purpose and for the public good and, as such, ‘corporations might be made to serve other constituencies, or might seek to serve such constituencies within a broader context than that of mere shareholder profit maximization’ (Backer, 2006, p. 299).

34. In the English case of *Re Rolus Properties & Another*, the judge recognised, for instance, that ‘[t]he privilege of limited liability is a valuable incentive to encourage entrepreneurs to take on risky ventures without inevitable personal total financial disaster. It is, however, a privilege which must be accorded upon terms...’. The question is why those very ‘terms’ need be focused only upon the regulation of shareholder interests and do not also involve the creation of wider social benefits. See also Parker (2002, p. 3-4) who refers to a ‘concession theory’ of the corporation that sees ‘the legal qualities of limited liability and/or separate legal personality as a privilege granted from the state and therefore inherently justifying state intervention’. This rationale would essentially be rooted in the notion of reciprocity.

35. I shall deal with the objection that such wider social obligations cannot co-exist with the traditional free market benefits of the company when I engage with objections to the example I provide in part II (iv) below.

36. Shue (1996, p. 19) states that ‘[b]asic rights, then are everyone’s minimum reasonable demands upon the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept.’

37. Indeed, Weissbrodt and Kruger (2003) say that ‘[i]t is doubtful, however, that even Friedman would argue that corporations could pursue profit by committing genocide or using slave labour’.

38. Part of the critique of libertarianism would involve asserting that it fails to capture why it is only ‘freedom rights’ that matter and not rights to the resources necessary to enjoy this freedom: Rawls (1999, p. 179), for instance, distinguishes between ‘liberty’ (the system of liberties available within a state to individuals) and the ‘worth of liberty’ (the capacity of individuals to advance their ends within this system of liberties).

39. Murphy and Nagel (2002, p. 6) state that ‘[i]t is

now widely believed that the function of government extends far beyond the provision of internal and external security through the prevention of interpersonal violence, the protection of private property, and defence against foreign attack’. I cannot in this piece provide a detailed critique of libertarianism but the above authors locate the fundamental mistake of libertarianism in the idea that individuals’ (and by extension corporations’) ‘pretax income and wealth are theirs in any morally meaningful sense. We have to think of property as what is created by the tax system, rather than what is disturbed or encroached on by the tax system. Property rights are the rights people have in the resources they are entitled to control after taxes, not before’.

40. Backer (2006, p. 299) states the school of thought originating with Dodd, ‘sees the corporation as embedded in the social and political fabric of society, in which corporations are expected or permitted to participate’.

41. This view thus seeks to rebut the claim made by Ratner (2001, supra note 68 at 518) that ‘to extend their duty away from a dictum of “doing no harm” – either on their own or through complicity with the government – towards one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise’. Sadly, Ratner does not develop this point any further.

42. Bilchitz (2007, p. 92) also states that ‘[e]ffectiveness would require that duties be allocated within a society to those particular individuals and institutions most suitably placed to fulfil these duties’.

43. Tomuschat (2003, p. 91) states that ‘[i]t is true that, particularly in developing countries, transnational corporations bear a heavy moral responsibility because of their economic power which may occasionally exceed that of the host state’.

44. See Ruggie Sphere of Influence Report (UNITED NATIONS, 2008b). His researchers have also published a brief but interesting piece in which they attempt to separate out various elements that are conflated within the ambit of this concept: see Lehr and Jenkins (2007).

45. Indeed, it is widely accepted in international human rights law that the state has positive obligations even though the exact scope thereof, particularly under the ICESCR, is still being developed. Ruggie also outlines the responsibility to respect though he proposes to provide more detail on the nature of this responsibility in the forthcoming work of his mandate. A similar position could have been taken in relation to positive obligations.

46. See Ssenyonjo (2007, p. 111) who states that ‘by virtue of the increasing powers of NSAs (non-state actors), they are uniquely positioned to affect, positively and/or negatively, the level of enjoyment of ESC (economic, social and cultural) rights’) (my explanation of abbreviations inserted).

47. These statistics are drawn from the 2009 United Nations report on the HIV/AIDS epidemic (UNITED NATIONS, 2009a).

48. For a short description of anti-retroviral drugs, see Slep (2004, p. 154-155). See also <<http://www.unaids.org/en/PolicyAndPractice/HIVTreatment/default.asp>>. Last accessed on: 31 Mar. 2010.
49. The agreement in terms of which intellectual property rights are protected by the World Trade Organization is the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol.31, 33 I.L.M. 81 (1994) (hereinafter, TRIPS). See also, Ferreira (2002, p. 1138-1148).
50. The UN Declaration of Commitment on HIV/AIDS was passed unanimously by the General Assembly in 2001 and is available at: <<http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html>>. Last accessed on: 31 Mar. 2010. Its Preamble recognises that 'there is a need to reduce the cost of these drugs and technologies in close collaboration with the private sector and pharmaceutical companies'. Article 55 that deals with treatment is vague but again recognises the importance of affordability and pricing of anti-retrovirals and the role of the private sector in this regard. Whilst it stops short of imposing an obligation upon corporations to reduce drug prices, it is clear that they are key players in rendering drugs more accessible to people in the developing world.
51. For a discussion of whether a moral responsibility rests upon corporations in this regard, see Resnik (2001, p. 11-32) and Brock (2001, p. 33-37). This is relevant to Ruggie's framework as he does not claim that the responsibility to respect is a legal duty but one sourced in social expectations or morality.
52. There are good reasons to provide access to anti-retroviral treatment for individuals who contract HIV/AIDS even if we accept that they have some degree of responsibility for their contraction of the virus: see the useful analysis in Metz (2008).
53. There may be harms caused to certain animals if drugs are tested upon them which generally happens in the development process but I leave aside here the debate concerning the permissibility of violating the rights of animals in these instances.
54. This important question has recently been addressed in the report of Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health (UNITED NATIONS, 2009b). The Special Rapporteur, Paul Hunt, recognises a number of extensive positive obligations upon corporations including conducting research and development of drugs for diseases of the developing world, ensuring prices are affordable (and putting in place differential pricing regimes), packaging material differently for different climates, and making information concerning drugs easily accessible to all.
55. Of course, it could be argued that harm is not only caused by actions but also by omissions: allowing an individual to die where one can save them could, in some sense, be said to 'cause' them harm. Ruggie could potentially increase the ambit of the responsibility to respect by including omissions in this way. However, although we may recognize moral culpability in such instances, most countries do not impose legal liability upon someone for harming another where one was not under a special duty to care for them and one omitted to provide them with what they needed: see Feinberg (1984, p.126-186). Moreover, the widening of the responsibility to respect to include omissions to fulfill rights would simply reproduce all the questions relating to the ambit of duties to fulfill under the responsibility to respect. It would also essentially blur the difference in human rights law between obligations to respect, protect and fulfill. As I have argued above, the thrust of Ruggie's work suggests that he does not envisage such a broadening of the responsibility to respect nor does he see this as desirable. However, if this is not done, then the responsibility to respect framework cannot include an obligation upon corporations to ensure that life-saving medicine is affordable and accessible to poorer individuals. For, in such instances, it is not that companies must refrain from actively causing harm to individuals who are ill but rather that they must actively do what is within their power positively to promote their right to life and to health.
56. These financial rewards would usually flow from the patents that are placed on new drugs, allowing the corporation a monopoly for a set period over production of the drug and which allows them to charge higher prices for these drugs: see Ferreira (2002, p.1138). The problem, however, is that the financial incentives produced by the operation of the market may be of the wrong kind or inadequate to cover the full range of human illnesses. Thus, companies may invest large amounts in dealing with ailments of the rich in which they believe they can maximise profit rather than innovating in an area which may have maximum social benefits: see Resnik (2001, p. 16).
57. The United Nations Committee on Economic, Social and Cultural Rights has used similar reasoning to address the question of the relation between intellectual property rights and fundamental rights: '[u]ltimately, intellectual property is a social product and has a social function. The end which intellectual property protection should serve is the objective of human well-being, to which international human rights instruments give legal expression': (UNITED NATIONS, 2001).
58. This would apply particularly in the case of a strong system of intellectual property rights though, even if such rights did not exist, it might still be necessary to impose some positive obligation upon a drug inventor to disclose the composition of a drug in order for it to be produced by others.
59. This point was essentially accepted in a declaration issued by the WTO's Ministerial Council in Doha in 2001 where it was asserted that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 'can and should be interpreted and implemented in a manner supportive of WTO Member's right to public health and, in particular, to promote access to medicines for all':

see Declaration on the TRIPS Agreement and Public Health (WTO, 2001).

60. Ferreira (2002, p. 1177) argues that there is a 'soft' law obligation upon corporations not to 'obstruct the efforts of developing countries to promote and fulfil human rights to health, life, medical treatment, development and an equitable distribution of the benefits of scientific progress'. Since this involves drug companies not interfering with the policies of their host countries and not challenging measures that limit their patents in order to render the medicine more accessible, effectively, this will entail an obligation upon corporations at least to allow prices in drugs to reduce to a level where they are affordable. She does explicitly say at p.1176 that 'the drug companies may also violate their obligation to respect and cooperate with state policies to promote the right to medical treatment when they charge prices so high that only one-tenth of one percent of worldwide HIV/AIDS sufferers can buy their drugs'. Resnik (2001, p. 20) also provides arguments for his conclusion that in general, 'pharmaceutical companies have moral responsibilities to develop drugs that benefit society and to make such drugs available to participant populations at a reasonable price'.

61. Of course, this is not the only example that can be given: private hospitals in developing countries may have positive obligations to assist in the provision of medical care where they have available beds; private law firms may have a duty to assist in the realisation of the right to have adequate legal representation and so on.

62. For a more in-depth discussion of this case and its ramifications, see Ferreira (2002, p. 1148-1158). The measures the legislation would have allowed the government of South Africa to adopt included compulsory licensing (the government granting a license to third parties to manufacture generic versions of medicines under patent without the patent holder's authorisation) and parallel importing (where the government imports patented drugs from other countries where those same patented drugs are cheaper).

63. Sleaf (2004, p. 166) states that '[j]ust as significant as the legal implication of the South African victory is the fact that it showed that public opinion was not prepared to accept that these lifesaving drugs be priced out of the reach of those who need them most in order to ensure that pharmaceuticals maintain their profit margins'. The effect of the government action would have been to force the company to reduce prices.

64. That this resulted from public pressure can be gathered from comments such as those of J.P. Garnier, Chief Executive of GlaxoSmithKlein (one of the litigants) who when asked about this case, said 'We don't exist in a vacuum. We're a very major corporation. We're not insensitive to public opinion. This is a factor in our decision-making': quoted in Swarns (2001).

65. Critics of the industry claim that the industry inflates its research and development costs and that this often takes place through publicly-funded institutions: see Cohen and Illingworth (2003, p. 46).

66. See Murphy and Nagel (2002, p. 135-139) for a brief discussion of the economic literature on the setting of optimal tax rates and their relation to social justice.

67. Cohen and Illingworth (2003, p. 46) state that '[m]any of the drugs the industry spends money on have little to do with saving lives and much to do with improving quality of life'.

68. Indeed, it appears that just such incentives currently exist for corporations to focus their energies on drugs for the developed world: see De Feyter (2005, p. 178).

69. Resnik (2001, p. 26) distinguishes between 'morally reasonable profits' (the profit a company should be allowed to realize) and 'economically reasonable profits' (the profit a company can realize).

70. Indeed, in Ruggie's defence, it could be said that even courts that are often seen to be the most important fora of principle often act pragmatically at times: see, for instance, the recent analysis of the record of the South African Constitutional Court in Roux (2009).

71. Donnelly (1989, p. 205-228) in his analysis of the development of international human rights regimes, recognises the role of politics and power in this process. Kennedy (2006, p. 132) argues, in the context of international humanitarian law, for humanitarians to be 'pragmatic': '[d]espite a century's work of pragmatic renewal, humanitarianism still wants to be outside of power, even if the price is ineffectiveness'. Some argue that a recognition of pragmatic factors relating to our global world places in question the usefulness of international law as a means of securing the realisation of fundamental rights: see Evans (2001, p. 55).

72. As George (1999, p. 29) states '[t]he system's chief beneficiaries cannot be expected or, under present circumstances, forced to act against their immediate interests, against the very principles of profit and self-advantage upon which the free market and their own success are founded. To imagine that these beneficiaries might, in large or even significant numbers, recognise in time the need for external regulation is to deny all the known laws of human behaviour. This contradiction must be underscored and faced'.

73. This is not only a problem raised in the context of corporations but also surfaces in relation to states taking on further human rights responsibilities themselves. As Evans (2001, p. 53) points out, treaties are often drafted in accordance 'with the principle of the "lowest common denominator"', which attracts the widest possible number of ratifications but avoids arduous obligations that might restrict future action'.

74. Persistence in this regard has in fact led recently to the adoption of a ground-breaking declaration by the UN General Assembly condemning human rights violations based on sexual orientation and gender identity: see International Lesbian and Gay Association (2008).

75. Indeed, Ruggie might point to the fact that even his minimal proposals have garnered some opposition from the business community.

RESUMO

John Ruggie, Representante Especial do Secretário Geral das Nações Unidas para Empresas e Direitos Humanos, divulgou um marco no qual defende que a principal responsabilidade das empresas é respeitar os direitos humanos. Na primeira parte, este artigo procurará analisar a afirmação à luz do direito internacional dos direitos humanos: argumentar-se-á que, embora o conceito de responsabilidade de respeitar elaborado por Ruggie inclua também a de proteger, sua natureza é preponderantemente “negativa”. A segunda parte do artigo demonstrará que o conceito da natureza das obrigações das empresas elaborado por Ruggie está enganado: as empresas não deveriam apenas evitar violações dos direitos fundamentais, mas também ser obrigadas a contribuir ativamente para sua concretização. Um argumento normativo será utilizado para fundamentar esta afirmação. Esta interpretação da natureza das obrigações das empresas tem importância especial para os países em desenvolvimento e será exemplificada pela análise dos deveres das indústrias farmacêuticas de disponibilizar drogas que salvam vidas a preços acessíveis àqueles que delas necessitam.

PALAVRAS-CHAVE

Marco Ruggie – Empresas – Direitos humanos – Obrigações positivas – Obrigação de respeitar, proteger e realizar – Países em desenvolvimento

RESUMEN

John Ruggie, Representante Especial del Secretario General sobre la Cuestión de los Derechos Humanos y las Empresas Transnacionales, elaboró un marco en el que sostiene que la responsabilidad principal de las empresas es la de respetar los derechos humanos. El presente trabajo procura, en primer lugar, analizar esta afirmación a la luz del derecho internacional de derechos humanos. Argumenta que mientras que la concepción de Ruggie de la responsabilidad de respetar incluye efectivamente una responsabilidad de proteger, la naturaleza de la responsabilidad sigue siendo en gran medida ‘negativa’. En la segunda parte de este trabajo se sostiene que la concepción de Ruggie acerca de la naturaleza de las obligaciones de las empresas es errónea: se debe exigir a las empresas no sólo que eviten el daño a los derechos fundamentales sino que contribuyan activamente a la realización de tales derechos. Se presentará para esta aseveración un argumento normativo. Este entendimiento de la naturaleza de las obligaciones de las empresas es de particular importancia para los países en desarrollo y será ilustrado considerando las obligaciones de las empresas farmacéuticas de producir medicamentos que salven vidas a precios accesibles para quienes los necesitan.

PALABRAS CLAVE

Marco Ruggie – Empresas – Derechos humanos – Obligaciones positivas – Obligaciones de respetar, proteger y cumplir – Países en desarrollo

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