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December 2008  
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• **Anthony Romero**

Interview with Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU)





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**international journal  
on human rights**

Year 5 • Number 9 • São Paulo • December 2008

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SUR - INTERNATIONAL JOURNAL ON HUMAN RIGHTS is a biannual journal published in English, Portuguese and Spanish by Sur - Human Rights University Network. It is available on the Internet at <<http://www.surjournal.org>>

SUR - International Journal on Human Rights is listed in the *International Bibliography of the Social Sciences* (IBSS).

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The financial assistance of the Ford Foundation, the United Nations Democracy Fund and the United Nations are gratefully acknowledged.

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# PRESENTATION



The ninth issue of the *Sur Journal* is dedicated to the commemoration of the sixty years of the Universal Declaration of Human Rights. The articles on this subject were chosen in collaboration with the International Service for Human Rights (ISHR). Two main issues were addressed in the selected articles: the indivisibility and the universality of human rights. These two issues were initially raised sixty years ago by the Universal Declaration of Human Rights as the pillars of international human rights law. In this ninth issue of the *Journal*, they are revisited under an especially critical light.

The issue of indivisibility is analyzed by both Eitan Felner and Fernanda Doz Costa. Felner adopts a pragmatic perspective: how can economic and social rights not only be recognized as human rights, but also be effectively implemented? The author proposes a methodological framework to assess whether or not a State has violated human rights obligations related to this set of rights. He also reveals some of the challenges in identifying violations of economic and social rights. Doz Costa approaches the issue from a conceptual perspective, discussing the possible connections between human rights and poverty.

Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU), in an interview with Conectas Human Rights, sheds light on how important the human rights movement is for the protection of individuals in the currently most powerful country in the world, a country that has “seen a remarkable loss of human rights” in the last eight years. In Romero’s words: “[t]he existence of a global human rights movement is actually, for this very reason, vitally important. Even if one government of one country sets back human rights, there is a movement of leaders and human rights NGOs that can keep the pressure on and keep pushing for advances in human rights.”

Katherine Short’s paper analyzes to which extent the Human Rights Council has been successful in overcoming the over-politicized approach adopted by the former UN Commission on Human Rights. Short highlights, however, that the Council’s effectiveness has been partially “undermined by both its failure to implement mechanisms to prevent its own membership to include acknowledged human rights violators and its continuing inability to harness US support.”

This issue of the *Sur Journal* also includes an analysis of the UN human rights system from an internal perspective: the perspective of Paulo Sergio Pinheiro, former UN Special Rapporteur on the Situation of Human Rights in Myanmar (2001-2008), former UN Independent Expert for the Study on Violence against Children (2003-2006), and former UN Special

Rapporteur on the Situation of Human Rights in Burundi (1995-1999). Pinheiro is currently member of the Inter-American Commission on Human Rights.

This issue of the *Sur Journal* also includes three thought provoking articles by Barbora Bukovská, Jeremy Sarkin and Rebecca Saunders. Bukovská defends an idealistic view of human rights organizations, a view that is not content with mere normative achievements in the field. According to the author, as human rights should always result in concrete protection for victims of violations, Bukovská highlights the need to bridge the gap that frequently exists between international human rights organizations and the actual victims of violations.

Sarkin examines the historical development of African prisons from colonial to modern times, raising two issues: first, he understands that African prisons current conditions are in great part a legacy of colonialism; second, he argues that overcrowding and violence are a widespread problem in prisons all over the world.

Finally, Saunders criticizes the system of transitional justice established in South Africa after Apartheid. In her own words, her article addresses "what is gained and lost when expressions of human suffering are translated into a standardized language of human rights." The author also questions the priority given to national over individual forms of healing.

These three articles invite discussion. We therefore invite readers to respond either with another article or with a three-to-five-page essay. Articles and essays will be subjected to the *Journal's* selection process, and hopefully will encourage further discussion on these key issues.

We would like to thank the following professors and partners for their contribution to the selection of the articles for this issue: Andre Degenszajn, Andrea Pochak, Fabián Sanchez, Flavia Piovesan, Habib Nassar, Inês Lafer, Juan Amaya Castro, Kwame Karikari, Lucia Nader, Magdalena Sepúlveda, Mustapha Al-Sayyed, Olga Espinosa, and Richard Pierre Claude. We would also like to inform that Profesor Upendra Baxi (Warwick University) has accepted our invitation to join the *Sur Journal* Editorial Board.

Finally, we would like to announce that the next edition of the *Sur Journal* will be a special issue on "People on the Move: Migrants and Refugees", to be published in collaboration with the Office of the UN High Commissioner for Refugees (**UNHCR**). The journal will also carry articles on other human rights topics.

The editors.



#### BARBORA BUKOVSKÁ

Barbora Bukovská has graduated from the Law School of Charles University in Prague and has earned a doctorate degree in law in Slovakia and a LLM degree from Harvard Law School. Since 1994, Bukovská has been working with different organizations in the Czech Republic and Slovakia on cases involving equal opportunities, access to justice, rights of prisoners, and deprivation of liberty. In 1998 and 1999, she was a visiting scholar at the Columbia University Law School in New York. In 2001, Bukovská founded the Center for Civil and Human Rights in Košice, Slovakia, where she led efforts

to eliminate the practice of forced sterilization of Romani women in Slovakia as well as discrimination of Roma in access to housing, employment and public accommodation. From 2006 to 2008, she was the Legal Director at the Mental Disability Advocacy Center, an international organization based in Hungary. Bukovská has published a number of human rights reports and articles on NGOs, minorities' rights, equal opportunities, Roma rights, legal aid and other human rights related issues.

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#### ABSTRACT

The article analyzes the negative impact of popular strategies used by international human rights organizations when promoting human rights causes; namely human rights reporting, advocacy and strategic litigation. It critically assesses these strategies, and questions whether they are working and if so, for whom. At the same time, the author questions the legitimacy of international human rights organizations to represent victims of human rights violations and their lack of accountability towards the victims. The author argues that the means used by human rights advocates in their work might be damaging and counterproductive for the victims as their methods often falsify the true experience of victims of human rights violations and end up suppressing their independence, competence and solidarity. Rather than eliminating power relations and domination over those they aim to help, human rights advocates often sustain power imbalances and use human rights violations as a commodity. The article calls for broader cooperation of human rights advocates with victims, by embracing more holistic models of activism.

Original in English.

This article was first published at Barbora Bukovská. Perpetrating good: the unintended consequences of international human rights advocacy. PILI Papers n. 3, April 2008. We are thankful to the Public Interest Law Institute for having authorized its reproduction by the Sur Journal.

#### KEYWORDS

Perils of international advocacy – Accountability - Human rights organizations – Victims - Critical lawyering



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# PERPETRATING GOOD: UNINTENDED CONSEQUENCES OF INTERNATIONAL HUMAN RIGHTS ADVOCACY

Barbora Bukovská

*Half of the harm that is done in this world  
Is due to people who want to feel important.  
They don't mean to do harm—but the harm does not interest them.  
Or they do not see it, or they justify it  
Because they are absorbed in the endless struggle  
To think well of themselves.  
—T.S. Eliot, 1949*

Being a human rights advocate is noble and hard work. It means speaking truth to power. It means standing up for the other—for the oppressed, disadvantaged, marginalized, poor, and underrepresented. It means making the world—which is full of human rights abuses, repression, and inequalities—a better place. The role of human rights advocates is indeed a heroic one: they are helpful and courageous experts, who deploy their legal and advocacy skills to call attention to human rights abuses, promote justice, and make perpetrators of violations accountable. In all this, they are motivated primarily by altruism and a deep commitment to justice.

However, there are some fallacies inherent in such perceptions of human rights advocacy that I would like to confront, and contradictions I would like to expose in the ways in which human rights advocates operate. I do so through an inquiry into three popular and widely used methodologies applied by international human rights advocates in the pursuit of their well-intended goals: reporting, advocacy, and strategic litigation. A detailed examination of these methodologies focuses on their impact on human rights victims; while doing so, I am asking whether these methodologies are working—and if they are, for

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*Notes to this text start on page 19.*



whom. My assessment is a critical one: I argue that the means used by human rights advocates in their work might sometimes be damaging and counterproductive to efforts to bring the desired change, because rather than eliminate relations of power and domination over those whom they aim to benefit, they often reify and sustain them. Ultimately, I submit that these methodologies falsify the real experience of victims of human rights violations and suppress their independence, competence, and solidarity.

In my analysis, I focus on the application of the human rights methodologies solely by international nongovernmental organizations (NGOs)—that is, by organizations that have no particular “constituency” or specific group of beneficiaries, but that operate at the international level and whose experience with human rights abuses is indirect, only through projects. I am aware that these methodologies are popular among national or grassroots NGOs, and effectively applied by them, in individual countries; however, their application by international NGOs raises a specific set of questions and concerns that are significantly different from those pertaining to domestic groups. In this regard, I contest the legitimacy with which international NGOs claim to speak on behalf of defined (or undefined) classes of victims or on behalf of “international civil society”. At the same time, I reflect on the lack of genuine connection between the international world of NGOs, on the one hand, and the situation of human rights victims on the ground, on the other.

The critique in this paper does not intend to suggest that the methodologies of human rights advocates are completely incompatible with the interests of victims and should cease to be used. Certainly, they are important mechanisms in promoting respect for, and protection of, human rights worldwide. Still, I believe that if human rights advocates are to be responsible to themselves, and those they defend or represent, they need to examine honestly their activities and the practical results. Therefore, instead of offering specific solutions to issues identified here, I urge human rights advocates to embrace different and more holistic models of activism: activism that, in paraphrasing the terminology of critical scholars, I call “rebellious” or “community” activism.<sup>1</sup> By this, I mean activism that interacts with victims of human rights violations on a nonhierarchical basis, truly cooperates with them, and does not just “advocate” on their behalf. Only collective efforts that are closely connected to communities, groups, and individuals facing oppression, and that “nurture sensibilities and skills compatible with a collective fight for social change”,<sup>2</sup> can be ultimately successful in addressing human rights problems that we face at present, and may face in the future.

### **The bright side of human rights methodologies**

Human rights advocates have a broad range of tools that can be used to expose human rights violations and to seek solutions to issues conceived as problems. The most popular and effective of these tools are undeniably documenting

human rights abuses via fact-finding missions and publishing reports on findings; lobbying and otherwise advocating for recognition of their causes or identified abuses at the international, regional, and domestic levels; and taking individual cases of human rights violations to domestic or international courts. These three human rights methodologies—reporting, advocacy, and litigation—have certainly proved very successful over the years. While using them, human rights advocates have succeeded in shaming governments about serious human rights violations, or in gaining publicity and raising consciousness about neglected human rights issues. They have been very useful in pushing for law reforms in various areas of human rights protection and have brought concrete remedies to many victims of human rights abuses. Thanks to the effectiveness of these methodologies, human rights advocates have been accepted as partners by governments and intergovernmental organizations and are consulted in policy formulations or are able to participate in negotiations on various issues of public interest.

However, as the following sections of this paper show, these methodologies also have their shadowy parts and too often might be increasing, instead of reducing, the subordinated positions of victims of human rights violations.

### **Everybody wants to listen but nobody wants to help**

The first two human rights methodologies are closely linked. Gathering information and documenting human rights abuses are prerequisites for any further action: fact-finding serves as “a means of producing authoritative accounts” and evaluating situations that are later targeted via concrete action.<sup>3</sup> Facts are usually collected through fact-finding missions or research and published in the form of analytical reports, empirical studies, or personal accounts.

Reporting is followed by advocacy: the presentation of information to various actors, mainly to international bodies charged with monitoring states’ performance in implementing human rights standards, as well as to regional bodies and to transnational political organizations (such as the Organization for Security and Cooperation in Europe) and their respective governments. For example, organizations and advocates applying this methodology produce “shadow reports” that contradict governmental reports on compliance with specific international or regional human rights treaties, lobby the human rights bodies to follow up on the situation in individual countries, or send “protest” letters or “letters of concern” to governments—all accompanied by media attention. It is hoped that, as a result of the “shame” that is brought on them, violators will subsequently change their practices, amend the laws, and provide remedies, as warranted. Scholars and activists suggest that “promoting change by reporting facts” is effective because it has a universal language, moral authority, and a measure of accountability that can invigorate the struggles of

affected individuals and groups and put pressure on government to end violations.<sup>4</sup>

Undoubtedly, reporting and advocacy have provided an invaluable service to victims of human rights abuses by calling the world's attention to their conditions. However, lately these methodologies have been the subject of increasing criticism for at least three reasons: the way they portray the victims, the way the facts in the reports are obtained, and the imposition of certain interpretations of situations while suppressing victims' voices.

### *Perpetuating victimization*

In order to secure attention from an otherwise uninterested audience, human rights reports need victims. Human rights reporting, therefore, always adds "a human touch" and describes particular stories of persons "subjected to cruelty, oppression or other harsh or unfair treatment or suffering death, injury, ruin, etc. as a result of an event, circumstances, or oppressive or adverse impersonal" violator.<sup>5</sup> Typically, the victim is also described as someone who is not responsible for his or her condition and who is weak, submissive, pitied, defeated, and powerless.<sup>6</sup> Reproducing images of incompetence, dependence, and weakness, reports on human rights violations can constitute further victimization. For example, David Kennedy argues that reporting on victims is an "[i]nherently voyeuristic or pornographic practice which no matter how carefully or sensitively it is done, transforms the position of the victim in his or her society and produces a language of victimization for him or her to speak on the international stage".<sup>7</sup> Similar criticism has been formulated by Makau Mutua, who defines human rights reporting by the savage-victims-savior metaphor, in which a victim is portrayed as a "powerless, helpless, innocent whose naturalist attributes have been negated by the primitive and offensive action of the state".<sup>8</sup> He objects that this construction does not promote the rights of victims but rather serves the interests of organizations producing the reports.

This victimization can also lead the portrayed individuals to conform to the expectations and stereotypes that outsiders have about their identity, as well as entrench stereotypes about some groups (for example, women, the disabled, minorities) in the eyes of the public.

### *Collecting testimonies*

Some concerns can also be raised with regard to the way the facts for the reports are obtained. International organizations that produce those reports are based outside the countries they criticize and operate at the international level. The information collected in the reports is gathered through interviews with victims who are contacted either directly and randomly, when reporters visit places where victims live and can be found, or through

the contacts of domestic and community NGOs. Based on my experience, the approach of those conducting the fact-finding is, in many instances, disrespectful toward victims. Interviewers are unable to explain who they are, what they are doing and why, and what will happen with the information provided. Even if the interviewers honestly try to explain their mission, victims are often not in a position to comprehend the full impact of the results of the reports. Moreover, in many instances, victims are willing to provide testimonies due to growing frustrations over some problems or in the interest of distracting themselves from a monotonous life (for example, in prisons or segregated communities). The validity of these testimonies (especially when collected during a single visit and not through systematic monitoring) can sometimes be dubious. Critics also suggest that in the reporting strategy, international NGOs depend on maintaining a high public profile, and “[they] feel pinch to break the reporting stalemate by devising dramatic new angles, uncovering even greater atrocities”<sup>9</sup> or simply “seizing on issues that seem designed more to promote their own image and fundraising efforts than to advance the public interest”.<sup>10</sup>

### *Monopolizing the struggle*

Reports on human rights abuses are prepared and issued by organizations that grasp the techniques necessary for the compilation of these reports and who have sufficient funding for them. Victims, who are dealing with the problems on the ground, either do not have the personal and financial resources to publish and use these kinds of reports, or would not have the resources to work with them at the necessary international level after they are issued. Complex reports prepared by outsiders thus necessarily interpret the language of victims; the victims are not allowed to serve as subjects in the production of their own narratives but are only sources of material for the reports. In this regard, critics raise concerns that such reports might reinforce and distort the information conveyed and hamper the access of victims to the audience.<sup>11</sup> Eventually, by repackaging grievances into a legal format and using legal jargon, reports can effectively silence the lay voices of victims and create “a hostile cultural setting” for marginalized groups.<sup>12</sup>

These arguments are certainly consistent with what I have experienced in my work on human rights violations in Central and Eastern Europe. Reports are produced by international human rights organizations far from the detachment of their comfortable offices in New York, Geneva, and other such places, far from the places where violations occur. The situations described in the reports are usually the result of complicated and manifold circumstances that in the studies are only summarized and adapted into an easily understandable form for an outside audience. Moreover, regardless of who the particular victims in a given case are (for example, rural women, ethnic minorities, prisoners, refugees, disabled persons, and so on), by discussing

victims as objects of research rather than giving them the opportunity to be subjects of a whole process, the human rights reporters maintain control over them, their reports perpetuating the image of victims as incapable individuals or groups that must be saved from their misery by human rights advocates. As such, this process can represent a new form of victimization.

Many times in my experience, the contacts that international organizations producing reports have with victims stop with the end of their fact-finding missions. The victims are almost never subsequently visited and are not given help either with the documented problems or with the potential backlash that they might face because of the report. I even encountered an opinion that international organizations “[a]re focusing more on overall and systemic changes [...] There are no individual victims as far as our organization is concerned”.<sup>13</sup>

If the fact-finding is targeting a serious problem (such as genocide or another serious human rights violation), usually a large number of international organizations are documenting, reporting, and advocating the issue; later on, the number of interviews with victims is multiplied by the media covering the problem after the publication of the human rights reports. When no practical remedy is seen on the ground, communities and individuals affected by the particular problem subsequently feel disillusioned, as they conclude that everybody wants to hear their stories but nobody wants to help them. Sometimes, studies conducted by organizations disconnected from victims might even have a negative impact on the work of local groups, which—as intermediaries in contact with international NGOs—are blamed for any backlash or increased influx of media attention.

### **In whose interest?**

“Impact” or “strategic” litigation has been another powerful tool used by human rights advocates in addressing certain problems. Impact litigation is a type of lawsuit that has a wider effect than simply providing a remedy for a particular plaintiff in a specific case. It involves cases at a higher level—for example, before supreme or constitutional courts or international bodies (for example, the Human Rights Committee, the European Court of Human Rights, and other regional human rights bodies), where it aims to change the law or practice through judicial decisions. Often, it also seeks to interpret constitutional or international law, in particular in those areas where it is “difficult to achieve legislative consensus on an issue”.<sup>14</sup>

In strategic litigation, the relationship between human rights advocates and victims is even more important and sensitive than in reporting and advocacy. Strategic litigation fares better in comparison with reporting: despite its potential limitations, which I discuss below, at least some participation by victims is necessary. Minimally, there needs to be a concrete individual who comes forward with a case and lets himself or herself be represented. Moreover, in an ideal case of winning a remedy or compensation, the victim gets something

tangible out of it. Compared with reporting and advocacy, victims are not reduced to passive objects completely (without getting any material or even moral compensation), in the care of brave human rights advocates. But as with the previously discussed methodologies, litigation has been criticized for creating and maintaining a power imbalance between human rights advocates, in this case lawyers, and their clients.<sup>15</sup> Victims are often uneducated, with little or no understanding of the law, and assume a subordinated position with regard to tactics and strategy after human rights advocates decide on litigation. Once victims are confronted with a mysterious legal procedure and complicated legal language, their “fate is no longer in their hands” as legal specialists automatically take over their problems.

What I have experienced in my legal practice, and in cooperation with international human rights organizations promoting impact litigation is, again, precious little consideration of ethical responsibilities or even a basic respect for victims. In many cases, there is obviously the conflict between the interest of clients and the goal one wants to achieve with the case. I have seen that in international or other high-impact litigation, the interest and opinion of particular plaintiffs are very rarely taken into consideration; instead, they are “sacrificed” for the public interest. Usually, once the case is filed, or very often even before, the represented person is a secondary consideration, and “the individual client fades into the background”, left to deal with the consequences of litigation on her own.

The interest and involvement of victims are particularly important in cases in which litigation did not originate at all from the activities of the victims themselves. By this, I mean cases where a particular issue is identified by an outsider organization that decides the best way to address it is through litigation, then develops a case and persuades someone from an affected group to be its client. Litigation can have a great impact on a particular issue but without extensive support for victims, it can be completely disruptive for the individual. It can very easily happen that the victims are, in a sense, manipulated and abused twice when the focus of the action is not the victim but an ideology alien to them.

This problem can be demonstrated through two examples. The first is the story of the woman identified only as Jane Roe in the famous *Roe v. Wade* case.<sup>16</sup> The case is certainly one of the most important decisions of the U.S. Supreme Court. The plaintiff in the case revealed her identity several years ago and spoke about her frustration over the case. She publicly criticized her attorneys as being unable to defend her interests: what she really was after was an abortion—but she never got it, as it would not have been good for the case. She claims:

*[P]lain and simple, I was used. I was a nobody to them. They only needed a pregnant woman to use for their case, and that is it. I was chosen [to sign the affidavit in the Roe case] because [the attorney] needed someone who would sign the paper and fade*

*into the background, never coming out and always keeping silent. As long as I was alive, I was a danger. I might speak out. I could be unpredictable (...) Even after the case, I was never respected—probably because I was not an ivy-league educated, liberal feminist like they were.*<sup>17</sup>

Eventually, the woman became an evangelical Christian and an antiabortion activist and filed for a reversal of the case.

The second example is the success story in the case of *Koptová v. Slovak Republic*, brought by an international NGO under the International Convention on the Elimination of Racial Discrimination.<sup>18</sup> The case involved two municipalities in Eastern Slovakia, Ľagov and Rokytovec, that in 1997 enacted resolutions expressly forbidding local Romani families from registering permanent residencies in these municipalities. One resolution even prohibited Roma from settling there and threatened them with expulsion should they try to do so. The international organization initiated a complaint to the Committee on the Elimination of Racial Discrimination; the complainant was Mrs. Koptová, a person of Romani origin but not directly affected by the decrees—she did not reside in the municipalities and did not have any connection at all with the local communities. Under international pressure, the municipalities rescinded both resolutions, upon which the Committee recommended that the Slovak Republic “[t]ake the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated”.<sup>19</sup>

This ruling has been celebrated as a great victory of a legal strategy; however, as the international organization that initiated the case was not working on it with a local community and focused on publicizing the case internationally, it did not follow up with the situation on the ground. If it had done so, the organization would have found that the municipalities continued discriminatory policies despite a formal abolition of the municipal resolutions. When I visited Romani settlements in both towns a few years later, in 2002, none of the Romani families living there were registered as permanent residents in the municipalities, none of them were aware of any previous decision of an international body, and none of them had ever seen a lawyer to advise them on how to proceed when refused registration for permanent residency. I subsequently contacted the international organization and asked it to step in and provide legal assistance to Romani families, but I got a response that the problem had been sufficiently addressed in the international forum in 1999 and was not of interest to the organization anymore.

Measured by any standards of strategic litigation, the results in both of these cases can only be applauded. At the same time, they clearly demonstrate that the quest of the human rights advocates disregarded the wishes, opinions, or particular needs of the victims concerned, and that they sacrificed the interest of actual victims for the goal that the particular organization was pursuing.

## The right to do what they do and to say what they say

An underlying concern regarding all issues discussed so far is the fundamental question of the legitimacy of human rights advocates to do what they do and to say what they say when using these methodologies.

Legitimacy has been defined as “the particular status with which an organization is imbued and perceived at any given time that enables it to operate with the general consent of peoples, governments, companies and non-state groups around the world”, and which ensures that an organization “is accepted by antagonists as speaking for its constituency”.<sup>20</sup> As such, the legitimacy of international NGOs should be derived from their rootedness in an engaged and supportive constituency of victims.

However, with few exceptions, most international human rights NGOs purporting to speak for the masses are clearly not representatives of larger constituencies of human rights victims; their constituencies are donors, their employees, other international organizations, and governments. Most of these organizations are professional organizations that almost automatically exclude the participation of the people whose welfare they claim to advance.<sup>21</sup> Unaccountable to anyone other than themselves or their donors, international human rights NGOs often can lose touch with the “powerless and voiceless” whom they claim to represent.

Critics also point out that many human rights activists in international organizations come from elite backgrounds and form a privileged class or social group, often shuffling back and forth from organization to organization, or eventually serving stints in governmental or intergovernmental agencies.<sup>22</sup> As Chidi Odinkalu has observed, “with media-driven visibility and a lifestyle to match, the leaders of these initiatives enjoy privilege and comfort, and progressively grow distant from a life of struggle”.<sup>23</sup> As such,

*instead of being the currency of social justice or consciousness driven movement, ‘human rights’ has increasingly become the specialised language of a select professional cadre, with its own rites of passage and methods of certification. Far from being a badge of honour, human rights activism is, in some of the places [...] increasingly a certificate of privilege.*<sup>24</sup>

The negative aspects of these methodologies are certainly perpetuated by those who use them. Human rights reporting, advocacy, and impact litigation that pursue their goals without the broad support and engagement of victims, the real constituency looks like a form of “imperialism” that colonizes the real struggle of human rights victims. When international organizations use victims as a means for producing reports and initiating cases in which victims are used as objects, only fuels the critique by some that a global human rights market has emerged that understands the plights of oppressed groups



of individuals only as a commodity. The human rights field, dominated by closed networks of elites and professionals and excluding those who are directly concerned, hardly encourages the independent initiative of victims. More likely, it will “undermine the possibility of the sorts of political activity essential to any long term resolutions of the inequities that burden [the victims of abuses]”.<sup>25</sup>

### **La critique est facile, mais l’art est difficile**

This paper is definitely not intended to be a call for human rights advocates and NGOs to cease using the discussed methodologies and go home. It is instead a call for them to be more conscious of their weaknesses and to develop and implement an alternative set of practices. When considering these issues, one might find a lot of wisdom in works of critical scholarship that demand strategic innovation and critical reflection about the means they use in their work. Their approach to advocacy has been given many labels (community lawyering, critical lawyering, rebellious lawyering, and the like). Regardless of the term, the main aspect of such an approach is that it values broad participation in collective efforts for eliminating certain injustices or improving some problems. It argues that in order to make real lasting changes, advocates must reshape the ways they think about themselves and the victims or communities they serve. This approach also embraces a greater respect for the power of marginalized and oppressed individuals and communities—deeper attention to the influences of race, gender, class, and culture on human rights advocacy as well as on the relationships between professionals and their clients. As first introduced by Gerald Lopez, rebellious or community advocates “respect the energy and the commitment of community members working together and [...] with them for meaningful change, emerging from political and grass-root movements rather than from clever advocacy efforts by smart lawyers in suits”.<sup>26</sup>

Despite a certain skepticism that this form of activism has also received for its “idealized vision” or the difficulty of implementing its ideas,<sup>27</sup> I believe that this model of advocacy would not be contradictory to professionalization, as advocates would see themselves as more a part of the communities or groups for whom they work and would share with them the special knowledge and expertise they have gained through their education and expertise. They would still put the human rights violations in the spotlight, but in a way that enhances the victims’ autonomy and their rights to control their own lives and affairs.

Balancing different interests is definitely not an easy task, but international human rights advocates should not give up on finding such balance. In the end, after all, human rights instruments were designed to protect the rights of individuals, not to serve the interests of their advocates or the organizations that claim to represent them.

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## NOTES

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## RESUMO

O artigo analisa o impacto negativo de estratégias comumente usadas por organizações de direitos humanos na promoção de suas causas, nomeadamente: relatórios de direitos humanos, *advocacy* e litígio estratégico. Este artigo questiona se tais estratégias funcionam e para quem funcionam. Questiona ainda a legitimidade de organizações internacionais na representação de vítimas de violações de direitos humanos e a ausência de responsabilidade por parte daquelas organizações em relação às vítimas. A autora argumenta que os meios usados por defensores de direitos humanos podem ser prejudiciais e contra-producentes para as vítimas: seus métodos frequentemente falsificam a verdadeira experiência vivida pelas vítimas, suprimindo sua independência, competência e solidariedade. Ao invés de eliminar relações de poder e de dominação sobre aqueles que desejam ajudar, o que se faz é sustentar desníveis de poder e utilizar violações como uma mercadoria. O artigo propõe uma cooperação mais ampla entre defensores e vítimas por meio de modelos mais holísticos de ativismo.

## PALAVRAS-CHAVE

Perigos do litígio internacional – Responsabilidade – Organizações de direitos humanos – Vítimas – Advocacia crítica

## RESUMEN

El artículo analiza los efectos negativos de estrategias utilizadas por organizaciones internacionales al momento de promover causas de derechos humanos, a saber, la presentación de informes de derechos humanos, la promoción y defensa y el litigio estratégico. Se evalúan críticamente estas estrategias, y se cuestiona si están funcionando y, en caso afirmativo, a favor de quién. Al mismo tiempo, la autora pone en duda la legitimidad de las organizaciones internacionales para representar a las víctimas de violaciones de derechos humanos y cuestiona su falta de rendición de cuentas. La autora sostiene que los medios utilizados por los defensores de derechos humanos en su labor pueden ser perjudiciales y contraproducentes para las víctimas ya que a menudo falsifican la verdadera experiencia de las víctimas y terminan suprimiendo hasta su independencia, competencia y solidaridad. Bukovská afirma que en lugar de eliminar las relaciones de poder y de dominación, los defensores de derechos humanos a menudo perpetúan los desequilibrios de poder y usan las violaciones de derechos humanos como una mercancía. El artículo insta a una cooperación más amplia entre los defensores de derechos humanos a través de modelos más integrales de activismo.

## PALABRAS CLAVES

Peligros de la promoción internacional - Rendición de cuentas - Organizaciones internacionales de derechos humanos - Víctimas – Crítica de la abogacía



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#### ABSTRACT

While prisons in Africa are often considered the worst in the world many other prisons systems are worse off in terms of violence, overcrowding and a host of other problems. This is not to argue that African prisons are human rights friendly. Many are in a deficient condition and their practises are at odds with human rights standards. However, prisons in many parts of the world are in crisis. Never before have there been so many problems within penal systems and such large numbers of people in institutions of incarceration.

This article examines the historical development of African prisons from colonial times and considers the legacy that colonialism has left in prisons on the continent. The article also examines a range of issues in prisons throughout Africa including pretrial detention, overcrowding, resources and governance, women and children in prison, and rehabilitation. A substantial amount of space is devoted to the reforms that are occurring across the continent, and recommendations are made with regard to what further reforms are necessary. The role of the African Commission on Human and Peoples' Rights as well as the Special Rapporteur on Prisons and Conditions of Detention in Africa are also considered.

Original in English.

#### KEYWORDS

Africa - Human rights - Prisons - Colonialism - Pre-trial prisoners - Overcrowding - Women - Children - Governance - Resources - African Commission on Human and People's Rights - Rehabilitation - Reform



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# PRISONS IN AFRICA: AN EVALUATION FROM A HUMAN RIGHTS PERSPECTIVE

Jeremy Sarkin

## Introduction

Generally speaking, those incarcerated in African prisons face years of confinement in often cramped and dirty quarters, with insufficient food allocations, inadequate hygiene, and little or no clothing or other amenities. While these conditions are not uniform throughout the continent, their prevalence raises concern and needs to be addressed through prison reform and attention to human rights. Moreover, there are also several barriers—including state secrecy, weak civil society, and lack of public interest—that inhibit the collection of reliable data on African prisons.<sup>1</sup> This veil of ignorance as to prison conditions merely fuels the neglect and abuse of Africa's incarcerated. It is nonetheless imperative to investigate African prisons and generate information about the issues affecting the continent's penal system.<sup>2</sup>

The article outlines several key historical developments in the evolution of African prisons. It examines certain areas in which prisons throughout Africa fail to meet the minimum of human rights requirements. Recognizing that Africa is home to 53 countries of profound diversity, several common themes of human rights abuse nonetheless emerge upon continental examination, including the shortcomings of resources and good prison governance; overcrowding and poor conditions within prisons; the failure to protect the rights of pre-trial detainees, women, and children; the untapped potential of alternative sentencing; and the unfulfilled mandate of rehabilitation. The article then considers several possible sources for oversight and reform, including the African Commission on Human and Peoples' Rights as well as the Special Rapporteur on Prisons and Conditions of Detention in Africa.

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*Notes to this text start on page 46.*



It is clear that African prisons face a host of challenges, including deficits of good governance, funding, and other resources. Such shortcomings have resulted in overcrowded and otherwise abusive prison conditions. Yet it is also clear that several governments and organizations have committed themselves to improving the lot of Africa's incarcerated by promoting prisoners' rights. As a result, Africa is home to several innovative instruments and institutions aimed at protecting the rights of those behind bars. What is needed now is the political will and resources to translate these pronouncements into practice.

### **The African prison: another legacy of colonialism**

Prior to undertaking any analysis of the current state of African prisons, it is essential to cast an eye toward the past and consider the development of penal institutions throughout the continent. For the prison is not an institution indigenous to Africa. Rather, like so many elements of African bureaucracy today, it is a holdover from colonial times, a European import designed to isolate and punish political opponents, exercise racial superiority, and administer capital and corporal punishment.

Incarceration as punishment was unknown to Africa when the first Europeans arrived. While pretrial detention was common, wrongdoing was rectified by restitution rather than punishment. Local justice systems were victim-rather than perpetrator-centered with the end goal being compensation instead of incarceration. Even in centralized states that did establish prisons, the goal of incarceration remained to secure compensation for victims rather than to punish offenders.<sup>3</sup> Imprisonment and capital punishment were viewed as last resorts within African justice systems, to be used only when perpetrators such as repeat offenders and witches posed discreet risks to local communities.<sup>4</sup>

While imprisonment-as-punishment did not take root in Africa until the late 1800s,<sup>5</sup> there were two exceptions to this characterization. First, prisons were used in connection with the Atlantic Slave Trade.<sup>6</sup> Second, Southern African nations began to rely upon imprisonment much earlier than the rest of the continent, in some cases as early as the beginning of the 19th century.

Even when the colonial powers arrived in Europe, they utilized imprisonment not as a means by which to punish the commission of common crimes but rather to control and exploit potentially rebellious local populations. Therefore, Africa's earliest experience with formal prisons was not with an eye toward the rehabilitation or reintegration of criminals but rather the economic, political, and social subjugation of indigenous peoples. It was in these early prisons that even minor offenders were subjected to brutal confinement and conscripted as sources of cheap labor.

Africa's late 19th century prisons were not merely catchbasins for the victims of colonial oppression, they were also manifestations of European racial superiority. European settlers and conquerors looked upon African people as subhuman, savages who were unable to be "civilized."<sup>7</sup> For example, white

prisoners—unlike their black counterparts—enjoyed higher quality clothing, food, and shelter, as well as vocational training aimed at preparing them for release, rehabilitation, and reintegration.<sup>8</sup> Additionally, while European prisons phased out torture in the late 1800s, colonial prisons increasingly relied upon the practice as a means of suppressing indigenous peoples and reinforcing racist dogma. Torture and capital punishment were legitimized among Europeans by the characterization of Africans as uncivilized, infantile, and savage.<sup>9</sup>

Yet, despite the connection of prison brutality to the racist and colonial policies of the late 1800s, penal oppression persists at an alarming rate and appalling depth in postcolonial Africa. Moreover, attendant issues such as underdevelopment, dependence on foreign aid, political oppression, and human degradation continue to plague the continent despite the decades-old withdrawal of colonial powers. Within prisons, overcrowding, failing infrastructure, corporal and capital punishment, corruption, extended pretrial detention, gang culture, and inadequate attention to women and youth evince a startling lack of reversal notwithstanding the departure of Africa's penal architects over 40 years ago.

As the history of the African prison makes clear, incarceration was brought to the continent from Europe as a means by which to subjugate and punish those who resisted colonial authority. The employment of corporal and capital punishment to stifle political oppression was the central aim of Africa's first prisons. In light of this genesis then, it is hardly a surprise that present-day African prisons fail to meet their stated goals of rehabilitation and indeed persist in fulfilling the aims and committing the abuses set in motion centuries ago.

### **Pre-trial detention**

Before analyzing the plight of African prisoners, it is worth exploring the circumstances of African detainees. The reason for this diversion is that a large proportion of the prison population in African states is comprised of individuals awaiting trial and conviction. For example, two-thirds of the 18,000 inmates in Uganda have yet to be tried.<sup>10</sup> In South Africa's Johannesburg Prison, some inmates have not seen a judge in as many as seven years.<sup>11</sup> Such delays lead to the consolidation of the prison and detention populations and result in the phenomenon of overcrowding, which will be explored later.

Despite the claim of having some of the world's most overcrowded prisons, African prisons hover near to global average for pretrial detainees. The average of prisoners awaiting trial in Africa is 45 per 100,000 while the global rate is 44 per 100,000.<sup>12</sup> Whereas the global awaiting trial detention rate averages 29 percent, Africa's is 36 percent.<sup>13</sup> In some Latin American countries, such as Paraguay and Honduras, the rate is as high as 90 percent.<sup>14</sup>

Pretrial detention in and of itself does not constitute a violation of human rights, provided that it takes place under the proper conditions, for a short time, and as a last resort. While statistics on the duration of pretrial detention in

Africa are difficult to obtain, evidence suggests that waits are longest in Central and West African nations and that such detention is usually arbitrary, extensive, and under terrible conditions. Most importantly, the poor are disproportionately detained vis-à-vis their wealthy counterparts because they cannot afford the counsel or bribes necessary to secure early release. Moreover, it is not only the detained that suffer as a result of extensive pretrial detention; prisons themselves feel the burden of high detention rates. For example, nearly the highest rate of pre-trial prisoners in prison in the world is found in Liberia (97, 3 percent), second highest in the world is Mali with 88,7 percent, Benin is 4th with 79, 6 percent and Niger 5<sup>th</sup> with 76 percent.<sup>15</sup> Undoubtedly the overcrowding of such prison systems could be alleviated by reform of the detention process.

Such reform has been proposed by the African Commission on Human and Peoples' Rights, which has issued several documents containing guidelines for effective pretrial hearings. In addition the Commission has adopted several instruments to emphasize these recommendations, including the 1997 Resolution on the Right to Recourse Procedure and Fair Trial, the Kampala Declaration on Prison Conditions in Africa, the 2002 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, the 2002 Ouagadougou Plan of Action, and the 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa. While such documents hold the promise of "good practices" to come, much more needs to be done to alleviate the arbitrary, disparate, and inhumane treatment of pretrial detainees in Africa.<sup>16</sup>

### **African prisons conditions: overcrowded and under-resourced**

Overcrowding is perhaps the single most pressing concern facing African prisons. African nations such as Cameroon, Zambia, Burundi, Kenya, and Rwanda comprise the majority of the world's most overcrowded prisons.<sup>17</sup> Like many of the challenges facing African prisons today, overcrowding has its roots in the continent's colonial past. African prisons have been at or above capacity nearly since their inception. Given the many challenges facing postcolonial Africa, it is little wonder that prisons have been left off the endless development to-do lists of many postcolonial governments.

Prior to examining the size of the prison population in Africa, a word must be said about the physical conditions in which such populations are maintained. It should come as no surprise that prisons throughout Africa languish in disrepair. The buildings are old, poorly ventilated, with inadequate sewage systems. Such conditions are ripe for the transmission of communicable diseases. Prisoners often lack space to sleep or sit, hygiene is poor, and food and clothing are inadequate.<sup>18</sup> Amid such decay and deprivation, overburdened prison staff has found it difficult to supervise prisoners or provide higher standards of sanitation and nutrition.

### *Overcrowding: the causes*

In Africa, resource scarcity at several levels of the justice system results in prison overcrowding. For example, while African prisons may not house as many prisoners as their counterparts in other parts of the world, the shortage of police and judges has been credited with the surging prison population.<sup>19</sup> These personnel shortages have led to the increase in pre-trial detainees and remand prisoners who, as illustrated above, comprise the vast majority of many African nations' prison populations.<sup>20</sup>

### *Overcrowding: the consequences*

African prisons at times house "crowded cells where inmates sleep in shifts; (...) warders who 'sell' juvenile offenders for sex with other cons; and (...) guards who smuggle weapons, drugs and alcohol to paramilitary inmate gangs".<sup>21</sup> HIV/AIDS-related deaths in prison have risen exponentially in the past decade.<sup>22</sup> Confined and crowded living quarters also lead to sexual assault and suicide. While many African prisons do not suffer from such extreme violence and health problems, the presence of these trends in any prisons raises concern.<sup>23</sup>

In condemning the conditions of African prisons, journalist Michael Wines argued in 2004 that:

*[t]he inhumanity of African prisons is a shame that hides in plain sight. Black Beach Prison in Equatorial Guinea is notorious for torture. Food is so scarce in Zambia's jails that gangs wield it as an instrument of power. Congo's prisons have housed children as young as 8. Kenyan prisoners perish from easily curable disease like gastroenteritis.<sup>24</sup>*

Approximately one in 60 inmates in Malawi's Maula prison dies while serving his or her sentence as compared to one in 330 in the United States.<sup>25</sup> In addition, rape among a largely HIV-positive population is common and a suspected method of gang control within prisons.<sup>26</sup>

While there is no excuse for the inhumane conditions in which African prisoners dwell, it bears mention that such circumstances must be placed in context of the overall deprivation present throughout the continent. With poverty being the norm for far too many Africans, it is unsurprising that poor living conditions continue behind prison walls. Yet the African Commission on Human and Peoples' Rights persists in its condemnation of the state of African prisons:

*The conditions of prisons and prisoners in many African countries are afflicted by severe inadequacies including high congestion, poor physical, health, and sanitary conditions, inadequate recreational, vocational and rehabilitation programmes, restricted contact with the outside world, and large percentages of persons awaiting trial, among others.<sup>27</sup>*

While health data from African prisons is not as readily available as it is in the United States, evidence suggests that the trends are similar. Research by scholars and NGOs indicates that disease is more prevalent among African prison populations as opposed to free populations.<sup>28</sup> For example, some estimates from South Africa place the HIV infection rate amongst its prisoners at two times that of the general population.<sup>29</sup> Even the HIV prevalence rate among Ghanaian prison guards has been found to be higher than that of the population at large.<sup>30</sup>

In addition to disease, African prisoners also suffer disproportionately from abnormal deaths. In 2002, for example, at least 100 Ghanaian prisoners died of malnutrition and diseases resulting from lack of sanitation and overcrowding.<sup>31</sup> Similarly, hundreds of prisoners in Kenya, Nigeria, and Ethiopia have died as a result of similar conditions.<sup>32</sup>

### *Overcrowding: the dolutions*

Notwithstanding the threats to security and safety posed by overcrowding, African courts have been slow to enforce prisoners' rights to sufficient space. Instead, courts focus upon the time inmates spend behind bars, the level of ventilation in cells, the amount of exercise and sunlight afforded to prisoners, the quality of nutrition provided, opportunities for recreation and training, the general climate, as well as any existing work conditions.<sup>33</sup> In the absence of judicial response, "enforceable accommodations standards" should be established by "setting specific standards that can be challenged in court if necessary".<sup>34</sup> For example, a South African court's ruling that:

*the 'usual' remedies, such as the declarator, the prohibitory interdict, the mandamus and awards of damages may not be capable of remedying (...) systematic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature.*

It reveals courts' limited capacity for adjudicating overcrowding issues.<sup>35</sup> The court's order of a "structural interdict, a remedy that orders an organ of state to perform its constitutional obligations and report [to the court] on its progress in doing so from time to time;"<sup>36</sup> however, suggests that African courts can be more proactive and play a larger role in mitigating poor prison conditions.

In addition to the lack of judicial recourse for abuses resulting from overcrowding, there has been an absence of policy response to the problem. Despite the grave consequences of overcrowding in African prisons, prison capacity has not increased nor have prisons been renovated or privatized as they have in North America and Europe.

While privatisation has yet to reach Africa, other means of reform are being discussed. For example in January 2006, Nigeria released 25,000 prisoners, some of whom had been awaiting trial for a decade. The government also established boards—comprised of human rights advocates and law enforcement

representatives—in each of the country’s 227 prisons. In addition, the government also created and staffed a new position, a chief inspector of prisons, which will report to the President. Such measures were undertaken, according to former Justice Minister Bayo Ojo, because “conditions of the prisons are just too terrible. The conditions negate the essence of prison, which is to reform”.<sup>37</sup> The President of Tanzania, Jakaya Mrisho Kikwete, has also vowed to improve conditions in his country’s prisons. “The situation is terrible”, he said as he called for an investigation into prison overcrowding. “There is a lot to be done to see to it that inmates are treated like human beings.”<sup>38</sup>

At the regional level, in 1996 and 2002 the Kampala Declaration on Prison Conditions in Africa and the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa were both adopted respectively. Both instruments strive to improve the conditions of African prisons. At the international level, the Council of Europe adopted the European Prison Rules in 2006. While the rules do not bind African states, they provide useful guidance in developing transparent and consistent prison policy. However, even if the African Union were to adopt similar guidelines, insufficient resources and instability plague the implementation of any proposed reform.

### **The failure to protect the vulnerable: women and children in African prisons**

The plight of women and children in African prisons has largely been ignored by academics as well as penal policymakers. As a result, these vulnerable populations are particularly marginalized within an already substandard living environment. While some inroads are being made within the European, North American, and Australian penal systems to better accommodate women and children, the issue receives little to no attention in Africa where, as elsewhere, prison administration remains a decidedly male- and adult-dominated milieu.

#### *Women*

Africa lies in the middle of the global average of women prisoners as a percentage of the total prison population, with between 1 and 6 percent of African prison populations being comprised of women.<sup>39</sup> Even though the continental average is lower than elsewhere in the world, national averages vary from rates as high as 4.5 percent in North Africa, 5 percent in West (Cape Verde) and Southern Africa (Botswana), 3.3 percent in Central Africa (Angola) and 6.3 percent in East Africa (Mozambique), to 1.7 percent in North Africa (Sudan), 1 percent in West (Burkina Faso) and Central Africa (São Tomé e Príncipe), 1.2 percent in East Africa (Malawi), and 1.8 percent in Southern Africa (Namibia).<sup>40</sup>

Before examining the conditions in which African women are incarcerated, it is worth noting how women come to be in African prisons in the first instance. Women in African prisons are overwhelmingly poor and uneducated. They are

frequently incarcerated for crimes such as murder and attempted murder, infanticide, abortion, and theft. Sexism is apparent in the criminalization and sentencing of certain conducts. For example, in many countries abortion—which only women can obtain—is punished via life sentence.<sup>41</sup>

Once in prison, discrimination against women persists. They are often denied access to vocational and recreational programs. Prisons often lack appropriate supplies to accommodate menstruating women. Where women are incarcerated with men, they remain vulnerable to physical and psychological abuse from male prisoners, which meager prison staff cannot prevent and indeed, sometimes join.

While some prison systems provide separate facilities for the incarceration of women, in most countries, women are imprisoned in the same facilities as men.<sup>42</sup> Even in cases where women are incarcerated separately, these facilities experience violence and abuse akin to that found in male facilities.<sup>43</sup> Moreover, women prisoners are particularly vulnerable to sexual abuse by prison guards whether in female or mixed prisons.

Fortunately, the plight of female prisoners is being addressed in the move for regional penal reform. For example, the Kampala Declaration calls for improving the situation of women in African prisons. However, the declaration merely calls for “particular attention” and “proper treatment” of women’s “special needs”. Such vague aspirations—to say nothing of the wholesale omission of pregnant women—reflects a lack of political will and gender awareness towards the reform of African prisons for all of those behind bars.

### *Children*

While there are far less children in prison in Africa than women, certain individual facilities house particularly high youth populations. In addition, many penal systems deliberately underreport their youth populations to avoid closer scrutiny and critique of their policies. According to available data, children comprise anywhere from .5 to 2.5 percent of the general prison population, with the majority of those children awaiting trial for months or even years. South African prisons accommodate the highest number of child prisoners in Africa at 3,600. Namibian prisons house the largest percentage of children, at 5.5 percent of the country’s total prison population.<sup>44</sup>

Children arrive in prison by two distinct routes in Africa: they are either born to incarcerated women or they have been sentenced on account of their own allegedly criminal conduct.<sup>45</sup> Often their crimes include such minor and petty offenses as vagrancy, not carrying proper identification, loitering, truancy, begging, and being beyond a parent’s control. For these slight infractions, children can be detained pending trial during the most formative years of their development.

As is true for women, most African prison systems—aside from those in South Africa, Côte d’Ivoire, Mali, and Angola—lack the resources to house

children separately from the adult male population. The commingling of children with the general prison population can lead to disastrous consequences. First, children imprisoned with the general population must compete with adults for scarce resources such as food. Second, given that African prisons fail to meet even the most basic minimum standards for adults, it should come as no surprise that they fall far short of meeting international standards for juvenile detention. For example, overcrowding compromises child prisoners' health and hygiene and exposes them to increased risk of sexual abuse. Juvenile detainees' educational, developmental, health, and nutritional needs are left unattended.

While some progress is being made, particularly in the countries noted above, to separate child prisoners from their adult counterparts, more needs to be done. Examples can be derived from countries such as Egypt, which is experimenting with diversion and restorative justice programs as alternatives to imprisonment of youth.<sup>46</sup> Pre-release programs, as well as rehabilitation and reintegration policies can also reach child offenders before they lose their precious developmental years to prison.

### **Rehabilitation: the elusive end**

Among the many aims of incarceration—retribution, deterrence, public disapproval, incapacitation, rehabilitation, and reintegration—the last two goals remain some of the most elusive and controversial, particularly in Africa.

Rehabilitation is a difficult end point for many African prisons to achieve, in large part, due to lack of resources. Overcrowding and under-funding hamper the implementation of effective rehabilitation schemes. While rehabilitation remains the goal of many penal policymakers in Africa, lack of political will impedes its ultimate realization. This is particularly unfortunate given that, what little research is available on the subject indicates that recidivism rates in Africa drop in the presence of effective and supported rehabilitation programs.<sup>47</sup> This could be in part due to the links forged by prisoners and their families or other community members; links that help support prisoners during their reintegration processes and avoid lapses into recidivism.

Rehabilitation is part of many regional instruments aimed at improving prison conditions throughout Africa. For example, The 2002 Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa calls for the promotion of rehabilitation and reintegration of former offenders. The Declaration's accompanying Plan of Action also specified measures that governments and NGOs could take to increase the effectiveness of rehabilitation of offenders and pretrial detainees. Legislation in several African nations—including Gambia, Cameroon, and São Tomé e Príncipe—has also sought to promote the human rights of prisoners.<sup>48</sup> However, these measures fail to address rehabilitation in lieu of focusing on overcrowding, lack of personnel and training, and minimum standards for prisons.



Fortunately, countries such as South Africa, Uganda, and Botswana have taken steps to improve their rehabilitation programs. Even though these countries face challenges in implementing their rehabilitation and reintegration programs, they strive to adhere to the Plan of Action. Their programs focus on educational and vocational training, psychological support, promotion of familial contact beyond prison, access to religious services, and integration of civil society in order to rehabilitate prisoners and reintegrate them into the community.

The achievement of such efforts is difficult to measure for lack of consensus regarding the standards and measurements for gauging success. However, practice to date has revealed some key commonalities among successful programs, such as: a focus on addressing employment related skills, sufficient flexibility to cater to individually identified needs, integrated multi-dimensional services that address a wide range of factors, ongoing monitoring and follow-up, a balance between quality and quantity, collaboration with families and communities, restorative justice components where offenders accept responsibility, and minimum durations of nine to 12 months. While rehabilitation and reintegration programs are new to Africa, positive developments to date evince some success meriting increased support to such initiatives.

### **Prison resources and governance**

The conditions described above result in part of a scarcity of resources and good governance. Indeed, resource scarcity is one of the most significant challenges facing African prisons today. On a continent of so many social needs, protection of prisoners is far from the top of many priority lists. Moreover, the consensus of opinion is that prison is a locus for detention, punishment, and deterrence as opposed to rehabilitation and reintegration.<sup>49</sup> As a result, African prisons experience a high rate of recidivism, which further strains the social and financial resources of already-impoverished nations.<sup>50</sup> In addition, resource scarcity leads to deprivation of prisoners.

Good prison governance is difficult to define and measure, partly because there has been very little research on identifying good practice in Africa, particularly in the areas of administration, management, and proper function. Several international instruments outline international consensus on topics such as acceptable objectives, conditions, and treatment of criminals in prisons.<sup>51</sup> In addition, the rise of crime in Africa, the drop in resources, and the belief that imprisonment is a form of discipline have all conspired to render prison conditions outright atrocious in some nations.

The shortage of well-trained staff also hinders the governance of African prisons. Staff shortages can inflame already stressed prison staff, leading to additional challenges within problem-laden systems. Incompetent staff can worsen existing states of affairs for prison administrators. When prisons lack sufficient staff, prisoners must be confined to their cells, thus exacerbating the

problems associated with the overcrowding described above. Inadequate staff also hampers the design and delivery of rehabilitation programs, thereby adding to the challenge of overcrowding and recidivism. Finally, good governance is essential to maintaining public health baselines within African prisons. Increased staff and more efficient methods are needed to ensure waste disposal, better food, increased rations, and adequate measures to fight the spread of disease, especially HIV/AIDS. Public health educators are needed to teach prisoners how to avoid contracting HIV, condoms must be provided, and HIV-positive prisoners must receive adequate health care.

These challenges can be mitigated by implementing adequate training programs; recruiting additional staff; building intra-staff camaraderie; increasing staff pay and benefits; adequately supervising, directing, and disciplining staff; and incentivizing staff with upwardly mobile career paths. These measures will not only alleviate staffing problems and foster better prison governance but build a climate of respect for prisoners' rights as well.

Despite this dire situation of prison governance and resource scarcity in African prisons, some positive inroads have been made over the past decade to better the lives of Africa's incarcerated. For example, donors have contributed money and technical assistance to assist African penal systems.<sup>52</sup> The majority of African governments have illustrated their commitment to prisoners' rights via the adoption of regional instruments, events, and institutions such as the Kampala Declaration on Prison Conditions in Africa; the Fourth Conference of the Central, Eastern and Southern African Heads of Correctional Services; the Arusha Declaration on Good Prison Practice; and the Ouagadougou Plan of Action.

The above instruments stress the importance of effective prison administration and competent prison leadership. Prison leadership colors the entire prison system while efficient management is crucial to ensuring a smoothly-run facility. Effective staff recruiting, training, and education also improve prison governance. Unfortunately, many African prison administrations are subordinated to the police or military, which can engender authoritarian structures and harsh disciplinary policies. Decentralized prison management can also compromise prison management, particularly in the absence of a national prison authority.

### **Restoring dignity in African prisons: routes to reform**

Since the mid-1990s, prison reform's profile has risen thanks to the efforts of nongovernmental and governmental organizations that have cast the abuses resulting from overcrowding in African prisons against a human rights framework. Several strategies towards protecting prisoners' rights have been deployed throughout the continent including national trends towards alternative sentencing, regional attempts at oversight, and policy commitments to reform. Several of these initiatives are highlighted below.

*Alternative sentencing: a safety valve for overcrowding?*

One means by which overcrowding can be avoided—and hence human rights respected in African prisons—is through alternative sentencing. Several African penal systems have already begun experimenting with the practice and, while it is early to generalize from a few isolated positive experiences under particular conditions, early indications suggest that the practice warrants further application and study.

The most common form of alternative sentencing is one in which those guilty of minor offenses are sentenced to terms of community service rather than prison. Obviously, this practice would reduce the overcrowding of African prisons. Yet, alternative sentencing still requires oversight and administration, costs that resource-poor African nations cannot yet meet. As a result, fines and compensation have also been proposed as alternative sentences to incarceration.

Lack of funding is not the only obstacle to the pursuit of alternative sentencing in Africa. Several administrative hurdles remain in the implementation and integration of such a program, including the harmonization of various interests among groups such as the media, political parties, victims, criminals, and the population at large, particularly when sentences forego jail time. Clear definition of crimes and their corresponding alternative sentences can help gauge the political viability of employing alternative sentences to alleviate prison overcrowding.

Further challenges to the implementation of alternative sentencing include the lack of transparent governance and corruption present in many African states. The success of these sentencing schemes—indeed of any sentencing scheme—lies in part amid the criminal justice system's transparency and integrity. Unfortunately, many African criminal justice systems are riddled by corruption, though steps are being taken to address this problem.

To be sure, alternative sentencing is no continental-cure all to the woes that beset African prisons. However, with the contributions of international organizations, NGOs, governments, and individuals, barriers to the practice can be overcome and alternative sentencing might become an important part in mitigating prison overcrowding.

*The African Commission on Human and Peoples' Rights: potential for protection*

The African Commission on Human and Peoples' Rights, which since 2002 has operated under the auspices of the African Union, has played a significant role in improving prison conditions throughout Africa. One method by which the Commission has contributed to the betterment of prisoners' lives has been through the investigation and adjudication of rights violations. The Commission has also investigated African prison conditions through the appointment of various special rapporteurs, the establishment of working

groups, and the adjudication of individual cases. The Commission also queries governments and drafts resolutions on prison conditions throughout the continent.

Several of the Commission's special rapporteur and working group appointments hold significance for the area of prison reform in Africa. For example, the Commission has appointed a Special Rapporteur on the Rights of Women in Africa, a Working Group on the Death Penalty, a Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights, a Working Group on Indigenous Populations/Communities in Africa, a Special Rapporteur on Human Rights Defenders in Africa, a Special Rapporteur on Freedom of Expression in Africa, and a Special Rapporteur on Prisons and Conditions of Detention.<sup>53</sup> The work of the Special Rapporteur on Prisons and Conditions of Detention in Africa will be discussed in more detail below.

International and regional human rights instruments play a large role in the work of the Commission and its subsidiary organs in the course of their work on African prison conditions. For example, the Commission has made use of the UN Standard Minimum Rules for the Treatment of Prisoners, the International Covenant on Civil and Political Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the African Charter on the Rights and Welfare of the Child, and the Protocol on the Rights of Women.<sup>54</sup> Furthermore, in 1995 the Commission adopted the Resolution on Prisons in Africa, which extended the rights and protections set forth in the African Charter on Human and Peoples' Rights to prisoners and detainees.

The Commission strives to emphasize individual state accountability to care for prisoners and guarantee the minimal standard of prisoners' rights. However, the Commission has not yet established coherent standards by way of guidelines as to degrees or even elements of violations of prisoners' rights. In its cases, the Commission usually hears a complainant's evidence and evaluates a government's response. In the absence of a governmental response, the Commission simply finds in favor of the complainant.<sup>55</sup>

The Commission has, however, adopted several resolutions on the standards of prisons in Africa, including the Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa. Both of these instruments contain recommendations on reducing overcrowding, making prisons in Africa more self sufficient, promoting rehabilitation and reintegration programs, making prison administrations more accountable for their actions, encouraging best practices, promoting the African Charter on Human and Peoples' Rights, and supporting the development of a Charter on the Basic Rights of Prisoners from the UN.

There are several methods by which African nations can meet the standards set forth in the Commission's resolutions. For example, alternative sentencing, restorative and traditional justice, and connections between the customary

and formal criminal justice systems would help solve the problem of overcrowding in African prisons. Overcrowding can also be alleviated by decriminalizing some minor offenses, making attempts to accelerate trials, making cost orders against lawyers to punish for delays, and restricting time in police custody to 48 hours. Prisons could become more self sufficient if, as the Plan of Action suggests, staff were better trained. The goals of rehabilitation and reintegration might be better achieved if prisoners were involved in industries, their employment prospects enhanced through education, and their interaction with their families and communities increased. Finally, as the Plan of Action advises, prison administrators should be made accountable for their abuse of prisoners through the adoption of national legislation that is consistent with international human rights obligations and independent prison inspections.

An additional instrument, the Robben Island Guidelines, adopted by the Commission in 2002, encourages African nations to adopt minimum international standards on prison conditions and give detailed instructions on how to achieve them. The guidelines also include specific recommendations for combating many of the challenges outlined in this article, including physical conditions of prisons, the use of alternative sentencing to mitigate overcrowding, the role of NGOs, judicial independence, increasing awareness and training of staff, and the separation of such vulnerable groups as women and children. Finally, the Guidelines established an important follow-up committee to distribute information about the Guidelines within Africa.

Moreover, the Commission need not be the only institution to undertake prison monitoring and reform in Africa. For example, several countries have established national human rights institutions, which though of varying efficacy, can monitor prison conditions on the national level. The challenge facing many of these issues is one of breadth. Many national human rights institutions are charged with overseeing all human rights monitoring, not just prisons. For example, even though South Africa has appointed an Inspecting Judge of Prisons to receive and investigate prisoner complaints and an Independent Complaints Directorate to investigate allegations against police holding pretrial detainees, over 500 people have died in police custody in the country since 1994. At times, this figure has been as high as 700 pretrial detainees.<sup>56</sup> Thus, there is a need for continued and heightened oversight of prisons and other detention facilities.

The African Commission on Human and Peoples' Rights has adopted a multifaceted approach—involving special rapporteurs, cases, and resolutions—to solving the problems facing African prisons today. However, the lack of structure detracts from the Commission's overall effectiveness. More coordination among the strategies and centralization of reform efforts is needed before African prisons are to see improved conditions. The Commission has laid the foundations for the respect of prisoners' rights, they simply must be deployed more efficiently.

### *Special Rapporteur on Prisons and Conditions of Detention in Africa*

As mentioned earlier, the African Commission on Human and Peoples' Rights has appointed several special rapporteurs whose work touches upon the rights of prisoners—none more so than the Special Rapporteur on Prisons and Conditions of Detention (SRP), who was appointed in 1996. This appointment was made pursuant to Article 45(1)(a) of the African Charter of Human and Peoples' Rights, which permits the Commission to investigate and promote human rights on the continent. The Commission can fulfill this mandate under any appropriate method according to Article 46 of the Charter. The benefit of appointing the SRP pursuant to Article 45(1)(a) is that this article is associated with the Commission's promotion function, which is conducted in public.

The SRP position is filled by a member of the Commission for a two-year term. Commissioner Victor Dankwa of Ghana was the first SRP, followed by Commissioner Vera Chirwa of Malawi, and now Commissioner Mumba Malila of Zambia.

The role of the SRP is to inspect and report on prison conditions in order to protect the rights of those held therein. The SRP researches prison conditions, communicates with African governments regarding the state of their penal systems, entertains individual complaints about prison conditions, and reports to the Commission on a yearly basis. The SRP also proposes solutions to challenges facing African prisons. Lastly, the SRP also trains law enforcement personnel, police, prison guards and administrators, and lawyers to improve prison conditions.

The Special Rapporteur carries out his work by visiting countries, inspecting their prisons, and reporting on conditions found therein. Sometimes he also conducts follow-up visits. To date, the SRP has conducted 16 visits to 13 countries at a rate of two per year. All visits adhere to a similar agenda. The SRP first meets with government leaders and holds a press conference prior to visiting various prisons, police holding cells, and reform schools for approximately 10 days. At each site, he meets with administrators, tours the grounds, and meets with inmates both in and beyond the presence of prison officials. Once the SRP has concluded his visits, he again meets with government officials to make recommendations on pressing issues. After his visit, the SRP drafts a report to which the government may respond. A final draft of the report, complete with government responses, is then prepared and, while once available to the public, no longer is made widely available. This should be changed.<sup>57</sup>

Even though reports have varied from country to country, the SRP's reports have overwhelmingly called for additional resources to be dedicated to prisons. In addition, the Special Rapporteur has often called for improved training of prison officials in the area of human rights. Lastly, SRP reports often highlight the need for improved intra-prisoner relations as a means of human rights protection.<sup>58</sup>

In addition to examining prison facilities, the SRP is also charged with analyzing national penal legislation to ensure its compliance with international and African law. A report of this examination is then forwarded to the Commission, though it too, should be made public.

In theory, the SRP is a useful tool for protecting prisoners' rights. However, a number of barriers have hindered its scope and practical import. First, the SRP is strapped by virtue of under-funding and double-billing as a Commissioner. As a result, the SRP has only managed to visit a fraction of African states. Secondly, the SRP is also constrained in the number of visits because such trips require the consent of the receiving state. Admittedly, receiving the SRP requires a level of commitment that includes following the subsequent recommendations. However, if the SRP is going to reach its full potential as a human rights institution, more African states need to accommodate requests for visits.<sup>59</sup>

Despite these challenges, the SRP has achieved some success in its short existence. First, its mere creation has raised the profile of prisoners' rights in the Commission's agenda. Thus, while progress is slow, the matter remains on the Commission's agenda and will be followed for years to come. Secondly, even though the number of the SRP's visits has not been as large as possible, approximately 250 places of detention have been examined in the last decade. This is a start on the road to more visits. Thirdly, the SRP has shed light on previously-ignored issues. For example, during her term as SRP, Vera Chirwa opposed capital punishment. The current SRP, Mumba Malila has spoken out against corporal punishment.<sup>60</sup>

Still, the SRP can be strengthened by undertaking several measures, such as increasing financial resources, increasing communication between NGOs and other international organizations, increasing communication between the SRP and visited countries, better integrating the SRP into the Commission, and improving the structure and legality of the SRP's mandate.

### *Reforming African Prisons*

Fortunately, the move to reform prisons and expand prisoners' rights has received increased attention throughout Africa. Unlike in the past, when prison reform was not on the agendas of African nations, today many NGOs and governments have been actively trying to improve conditions.<sup>61</sup> However, as mentioned earlier, African states face a panoply of population-wide challenges such as disease, insufficient education, inadequate housing, unemployment, and political instability. The financial pressures posed by such conditions make it politically challenging for states to prioritize prison reform.

Nonetheless, positive gains have been made to achieve change in Africa's penal and criminal justice systems. This has been partly facilitated by international aid. In 2002 alone, donors provided US \$ 110 million to African countries to conduct justice sector reform.<sup>62</sup> As a result of this prioritization and funding, several African states have made some strides in alleviating overcrowding.

For example, South Africa has reduced the prison sentences of thousands to a mere six months. Kenya is experimenting with alternative sentencing by committing petty offenders to community service, fines, and probation rather than incarceration.<sup>63</sup> Kenyan prisons have also undertaken early release initiatives to mitigate overcrowding and are expanding health clinics to improve prisoner health.<sup>64</sup> Uganda's Community Service Act permits the use of community service in lieu of incarceration for certain offenses<sup>65</sup> as has similar legislation in Malawi. Parallel legislation is pending in Mali and Niger. Angola recently opened a women's unit in one prison.

Reform has been slower to arrive in North Africa though the UN Human Rights Committee noted several positive steps, including those in Morocco.<sup>66</sup> In addition, the UN Committee on Torture singled out the Moroccan government's provision of human rights training of prison officials there.<sup>67</sup> The government also reformed its Prison Code in 1999 and Penal and Criminal Procedure Codes in 2003. Concerns remain however, about high rates of death, overcrowding, and violence in Moroccan prisons.<sup>68</sup> Amnesty International and Human Rights Watch were recently permitted to enter Libya to examine prisons after a 15-year ban. The Libyan Ministry of Justice also accepted the assistance of the International Centre for Prison Studies in the United Kingdom in improving prison management and prisoners' rights protection. In addition, the handbook, *A Human Rights Approach to Prison Management*, was translated into Arabic in order to assist prison officials to become more aware of human rights.<sup>69</sup> In 2001, Tunisia passed a prison reform law and, a year later established a commission to examine national prisons.

In addition to law reform and monitoring, some countries have increased prisoner support. For example, prisons in Sierra Leone have seen improved conditions as a result of a reconstruction and rehabilitation program funded by the UN Development Program. The country's prisons are also permitting family visits to inmates. In addition, NGOs such as Penal Reform International have been assisting African prison systems in areas such as public education. In addition to its monitoring role, the International Committee of the Red Cross has also provided supplies such as soap to Congolese inmates; upgraded water, sanitation, kitchens and other aspects of prisons in Guinea; and aided prisons in over 40 other African countries in various ways.<sup>70</sup>

African correctional ministers recently demonstrated their commitment to alleviating prison overcrowding by forming the Conference of Eastern, Southern, and Central African heads of correctional services (CESCA). The Conference was formed as the result of a meeting between the ministers, heads of prisons, and other high-level officials of 13 African states in South Africa in September 2006.<sup>71</sup> The mission of CESCA is to promote good prison practices that comply with such international standards as humane treatment of prisoners and respecting and protecting prisoner rights and dignity.<sup>72</sup> The Conference will work on several areas critical to African prison improvement by focusing on specific areas such as "governance frameworks, technical assistance, human resource development,



education and training, research and data collection, learning and knowledge exchange and awards of excellence in correctional services”.<sup>73</sup> Of course, CESCA will also address overcrowding.

In 2007, a Strategic and Technical Working Group, comprised of officials from Namibia, South Africa, Tanzania, Kenya, and Swaziland, was established to implement CESCA. According to the South African minister of correctional services:

*African countries cannot continue to be bashed internationally for their inability to transform their prisons services, in tandem with international standards, if they are not supported and encouraged to do so by any coordinating structure at international and continental level where their views and interests could be heard, represented and pursued.*<sup>74</sup>

Thus, CESCA seeks to fill a gap in coordination and cooperation between Africa prison systems. Such cooperation is exemplified by the May 2006 agreement between South Africa and Zambia to “promote and institutionalize cooperation in various areas of management of prisons including good governance, human resources development, sharing of information and experiences, prison and agricultural industries and partnerships in addressing multi-lateral issues of common interest”.<sup>75</sup>

As evidenced above, there are a number of international, regional, and national initiatives underway to improve prison conditions and protect prisoners’ rights throughout Africa. Yet, these efforts require additional funding, support, and political will if they are to truly alleviate the abuse currently being dealt to Africa’s prisoners.

## Conclusion

Media thrives on dwelling on Africa’s challenges. A 2000 article in *The Economist* went so far as to label the continent “hopeless”.<sup>76</sup> In the area of prisoners’ rights however, the ground seems to be shifting, albeit in a slow and isolated manner. Yet, it is ironic that, in a global atmosphere of prisoner abuse, the “Hopeless Continent” is in some ways taking the lead in protecting and promoting prisoners’ rights.

Such progress is not to suggest that the problems that Africa’s prisons face are not dire. They certainly are. For example, thousands of political detainees languish in cells throughout the continent. In Algeria, “detainees are beaten, subjected to electric shocks and forced to drink dirty water, urine or chemicals”<sup>77</sup> Moreover, the gains that Africa has made in quelling prison abuse are threatened by globalization. The worldwide trend towards harsher criminal penalties, spurred on in part by the US-led War on Terror, may turn back the clock on what little reform African prison systems have adopted.

In addition, overcrowding has yet to be effectively tackled in any African

prison system. African prisoners continue to suffer violence, disease, death, and humiliation as a result of being heaped into cells with no regard to capacity. Increasing rates of imprisonment and lengths of sentences only exacerbate this phenomenon. Overcrowding threatens not only prisoners but the public at large and, as a result, the issue must be addressed more urgently and thoroughly than it has been to date.

Yet, in the face of insurmountable challenges such as resource scarcity, several African nations persist in the movement to reform their prison systems by reducing prison populations and promoting prisoners' rights. Indeed, a mindset of reform and rights is sweeping African prison systems. Good intentions alone however, will not suffice. Immediate change is needed on the ground level. The only question that remains is how to implement the policies that have thus far been pronounced.

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## RESUMO

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Embora as prisões na África sejam consideradas as piores do mundo, muitos outros sistemas carcerários são ainda piores no que concerne à violência, superlotação e vários outros problemas. Com isso, não se pretende afirmar que as prisões africanas sejam exemplos de direitos humanos. Muitas estão em condições deficientes e suas práticas estão em conflito com os padrões de direitos humanos. No entanto, as prisões em diferentes partes do mundo estão em crise. Nunca antes houve tantos problemas nos sistemas penais e uma população tão grande nas instituições carcerárias.

Este artigo analisa o desenvolvimento histórico das prisões africanas desde os tempos coloniais e avalia o legado que o colonialismo deixou nas prisões do continente. Analisa também um conjunto de questões referentes à situação das prisões na África, como detenções preventivas, superlotação, recursos e governança, aprisionamento de mulheres e crianças, e reabilitação. Um espaço substancial é dedicado às reformas que estão ocorrendo em todo o continente, e a recomendações em relação à necessidade de mais reformas. Examinam-se também os papéis da Comissão Africana de Direitos Humanos e dos Povos e do Relator Especial sobre Prisões e Condições de Detenção na África.

### PALAVRAS-CHAVE

África - Direitos humanos – Prisões – Colonialismo - Prisão preventiva – Superlotação – Mulheres – Crianças – Governança – Recursos - Comissão Africana de Direitos Humanos e dos Povos – Reabilitação - Reforma

## RESUMEN

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Sarkin afirma que las cárceles están en crisis en diversas partes del mundo y que nunca antes han habido tantos problemas en los lugares de encierro ni tanta gente privada de su libertad. En este contexto, el artículo examina el desarrollo histórico de las cárceles de África desde la época colonial y considera el legado del colonialismo en las prisiones del continente. También examina una gama de problemas en estas cárceles, que incluyen la privación de libertad sin juicio previo, el hacinamiento, la escasez de recursos y la deficiente gestión de los asuntos carcelarios, la situación de las mujeres y los niños en las cárceles, y la cuestión de la rehabilitación. Este trabajo dedica un espacio substancial a las reformas que se están impulsando en todo el continente, y enuncia también recomendaciones sobre otras reformas necesarias. Analiza el papel de la Comisión Africana de Derechos Humanos y de los Pueblos, así como del Relator Especial sobre las Cárceles y Condiciones de Detención en África.

### PALABRAS CLAVES

África - Derechos humanos – Cárceles – Colonialismo - Presos sin juicio previo – Superpoblación – Mujeres – Niños - Gestión de asuntos carcelarios – Recursos - Comisión Africana de Derechos Humanos y de los Pueblos – Rehabilitación - Reforma carcelaria



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#### ABSTRACT

This essay examines what is gained and lost when expressions of human suffering are translated into a standardized language of human rights. I argue that South Africa's Truth and Reconciliation Commission demonstrates the ways that this translation makes human suffering both legible and illegible. While the language of human rights functioned in powerful ways to establish a previously unacknowledged history in South Africa, identify and grant dignity to victims, and occasionally designate responsibility, I argue that it also disfigured the testimony of victims in ways that alienated them from their own experience and sometimes re-traumatized them, and that it often proved more useful to perpetrators than to victims. I also contend that the promise of healing in which the Commission wrapped its human rights message prioritized national over individual forms of healing, and allowed the South African government to substitute spiritual and symbolic forms of reparation for material ones.

Original in English.

#### KEYWORDS

Truth commission – South Africa – Human rights language – Trauma – Healing – Reparation



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# LOST IN TRANSLATION: EXPRESSIONS OF HUMAN SUFFERING, THE LANGUAGE OF HUMAN RIGHTS, AND THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

Rebecca Saunders

This essay examines what is gained and what is lost when expressions of human suffering are translated into a standardized and universalized language of human rights. South Africa's formidable venture in transitional justice, the Truth and Reconciliation Commission (TRC), I argue, demonstrates the ways in which this translation makes human suffering both legible and illegible, the ways in which the language of human rights may, paradoxically, be deployed toward both liberatory and oppressive ends. I contend that while the language of human rights functioned in powerful ways to establish a previously unacknowledged history in South Africa, assign meaning to cultural trauma, identify and grant dignity to victims, and occasionally designate responsibility, it often proved more useful to perpetrators than to victims, functioned to prioritize national over individual forms of healing, and allowed the South African government to substitute spiritual and symbolic forms of reparation over material ones. The latter has, unfortunately, abetted the ANC's conversion to a neoliberal economic model, a policy shift that perpetuates and legitimizes among the most deleterious of apartheid's human rights abuses—the systematic production of poverty.

Charged with the daunting tasks of bearing witness to human suffering, facilitating some form of transitional justice, and promoting a “culture of human rights,” The TRC was both post-apartheid South Africa's primary mechanism for promoting a new national identity and an extraordinary encounter between embodied local experience on the one hand and universalized and abstract human rights principles on the other. Ultimately, however, this scene was less one of dialogue and negotiation between material particularities and abstract human rights talk than a mandatory translation of the former into the latter, an obligatory exchange of

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*Notes to this text start on page 66.*

particular facts and visceral testimony for a national idiom of reconciliation and respect for human rights. While this translation undeniably allowed for increased visibility of gross violations of human rights and a more precise adjudication of them, it was, in many instances, at the cost of appropriating and disfiguring victims' expressions of suffering for the purposes of national stability—or, a cynic might add, for an illusory “peace” sufficiently convincing to attract foreign investment. It was the Commission that translated victims' raw and fractured narratives of harm into the austere language of rights; in the final report, it is clear that this idiom is part of the analysis—of “findings”—rather than the record of testimony.

Victims' testimonies to the TRC were organized around the “dyslogic” of traumatic memory rather than the rationality of human rights principles, corresponding, in large measure, to the nature of testimony as psychoanalyst Dori Laub describes it:

*As a relation to events, testimony seems to be composed of bits and pieces of a memory that has been overwhelmed by occurrences that have not settled into understanding or remembrance, acts that cannot be constructed as knowledge nor assimilated into full cognition, events in excess of our frames of reference [...] In the testimony, language is in process and in trial, it does not possess itself as a conclusion, as the constation of a verdict or the self-transparency of knowledge.<sup>1</sup>*

Victims' testimony was often filled with forensically irrelevant—but psychologically and mnemonically highly significant—details: the kind of soup a woman was making when the security police came to the door, the moment she suspected something was amiss, what her son was wearing when she last saw him. Sometimes, testimony faltered on the aspect of anguish where memory was stranded: they set my husband's body on fire after they killed him; I watched the police carry my son's intestines to the ambulance.<sup>2</sup> Sometimes, it focused on the agony of the unknown or the missing: how was he killed? Where is the body? Where testimonies did resolve into knowledge, they were largely factual reconstructions of events rather than ethical arguments, cut of a very different cloth than codified human rights discourse: fragmented and elliptical, filled with the kinds of unwieldy memories, perceptions, opinions, and emotion regularly expunged by the rationality of law.

The TRC often admirably facilitated such testimony.<sup>3</sup> Less constrained by prosecutorial procedure, evidentiary rules, admissible forms of discourse, and conceptions of relevance than a criminal court, the Human Rights Victims' hearings regularly, and painfully, bore witness to this testimony. Moreover, in their nightly, televised version, the victims' hearings had an undeniable and significant impact on many South African minds. In the first year of the Commission, this testimony dominated televised and radio news and, as Robert Rotberg and Dennis Thompson contend, “educated the new society directly, well before [the Commission's] official findings could be represented to parliament and the president”.<sup>4</sup> These hearings were widely viewed as a kind of cathartic ritual of healing, their emotional intensity counted upon to enact a symbolic reconciliation between individuals that would

function as vicarious therapy for the nation. However, if these hearings performed certain pedagogical and cathartic tasks, they nonetheless remained primarily expressive—a kind of “emotional window dressing”, as Richard Wilson puts it—rather than structurally transformative; they had little influence on reparation proceedings, the amnesty process, or subsequent national policy.<sup>5</sup> Those more serious responsibilities were entrusted to the language of human rights.

Perpetrators of human rights abuses, moreover, were far more likely to invoke rights language than were victims. They routinely called on principles of due process, the right to counsel, the commission’s amnesty provision, and “the laws of the land” to protect themselves from prosecution.<sup>6</sup> Many appealed to tired apartheid formulae which, after all, had long been clothed in the venerable robes of law and order. Amnesty applicants successfully used the Courts to suppress their names at hearings and keep families of victims from testifying; former President F.W. de Klerk, through an eleventh hour court injunction, censored two incriminating pages of the Final Report; and the National Party formally charged the TRC with inadequately upholding legal standards, inadequate examination of testimony, “undermining the ability of a legitimate political party to participate on an equal basis in the democratic process”, illicit intrusion into areas outside its jurisdiction (such as the medical profession and media), and failure to condemn the human rights abuses of the ANC and its allies.<sup>7</sup> Indeed it is worthy of consideration that even in the Chairperson’s description of the “dual responsibility” of the Commission—to provide the space within which victims could share the story of their trauma with the nation” and to “recognize the importance of the due process of law that ensures the rights of alleged perpetrators”<sup>8</sup>—that “rights” and the protection of law are conceived as the privilege of “alleged perpetrators”, while victims are ostensibly to be content with “space for sharing”.

In addition to a translation into human rights discourse (and from multiple languages into English), victims’ testimonies to the TRC underwent a further series of selections and transformations: only a fraction of testimonies—usually of high-profile or “symbolic” cases—were chosen for inclusion in public hearings (about 8%); only certain “qualifying” submissions were selected by the Human Rights Violations Committee to be passed on to the Reparations committee; and, in the Final Report, testimony was excerpted and used as exemplary of a particular *type* of human rights violation (detention, banishment, torture, death in custody, etc.). This succession of translations meant that the majority of testimony was not publicly diffused, that some voices and themes were chosen for publicity over others, that individuals’ experiences were often broken down into apparently unrelated pieces of evidence, extracted from the messiness of their local milieu to be rearticulated in the controlled and cleanly context of abstract human rights statutes.

The technology employed to translate expressions of suffering into nationally useable human rights discourse was an information management system called Infocomm, adopted by the TRC in the latter part of 1996.<sup>9</sup> Disciplined by Infocomm’s protocol, the TRC increasingly moved toward a data processing methodology and a “controlled vocabulary” determined by information coding requirements. The TRC,

to be sure, was confronted with an awesome deluge of sundry testimony which it was obliged to translate into something else: history, justice, a useable truth, a founding narrative for the new South Africa. The Commission hence instituted a format for recording victims' narratives and this form (which was revised four times over the course of the proceedings) gradually morphed into a mass survey-like checklist that could be efficiently deciphered by data processors and converted into statistical information by analysts. In the final version of the form, the opening narrative section of the deposition was eliminated and deponents' testimony was sometimes cut off when pages were full. The form could be completed in about thirty minutes by the deponent him or herself, such that a trained and attentive interlocutor—or any listener at all—was rendered unnecessary. With the imposition of the Infocomm protocol, the TRC offered a less and less hospitable environment for bearing witness to suffering, and, as Minow rightly contends, “the benefits of truth telling depend in no small measure on the presence of sympathetic witnesses [...] Acknowledgement by others of the victim's moral injuries is a central element of the healing process”.<sup>10</sup>

While the Commission's original statement-takers had been trained by psychologists to attend sensitively to victims' testimony, function as supportive counselors, respond to psychological needs, and facilitate an intersubjective process of narrative reconstruction, this procedure was deemed ineffective at extracting the factual information necessary to establish the broad patterns of human rights abuse the Commission was mandated to document. Under the new deposition protocol, accordingly, statement-takers were trained to be specialized and efficient components of a knowledge production system rather than to be responsive witnesses to traumatized people's testimony, as Thema Kubheka, chief data processor in Johannesburg, describes:

*When we started it was a narrative. We let people tell their story. By the end of 1997, it was a short questionnaire to direct the interview instead of letting people talk about themselves [...] the questionnaire distorted the whole story altogether [...] it destroyed the meaning. [...] the emotional part of the story wouldn't go on the computer, remember it was just a machine. You'd lose a lot—we couldn't put style or emotion into the summary. We were inputting for counting purposes. We lost the whole of the narrative [...] we lost the meaning of the story. It was tragic, pathetic. It became dry facts.<sup>11</sup>*

Responses to the Commission's questionnaire (which could only grossly be called “testimony”) were subsequently passed on to data processors who translated them according to a classification system called the “controlled vocabulary”, comprised of forty-eight acts of violation and three subject positions (victim, perpetrator, or witness). Experience, perceptions, or emotion that did not conform to this classificatory system, were disregarded. This deployment of human rights language, refined and standardized into a legalistic technology of rights and the evidentiary information required to be eligible for them, ultimately rendered invisible numerous forms and aspects of suffering and was perhaps particularly deleterious precisely because it claimed to be exposing suffering. Aimed as it was at identifying *patterns* of

human rights violations, the TRC thus made visible the quantitative extent of certain categories of suffering, but left open little negotiation room for deciding what suffering would be eligible for this visibility; what “qualified” was predetermined by international standards of human rights rather than by local exigencies or something so paltry as human experience.

On the one hand, then, the TRC’s mandate to identify patterns of human rights abuse enabled acknowledgment of both the scale and systematic nature of the nation’s trauma. It also refocused analyses of the pathogenesis of traumatic symptoms, as Frantz Fanon urged a century ago, from the individual psyche to the pervasive and diffuse inhumanity of social mechanisms of oppression (such as colonialism, racism, or apartheid).<sup>12</sup> On the other hand, the rhetoric of healing on which the TRC relied, facilitated a slippery, and sometimes cruelly deceptive, substitution of this societal analysis for individual rehabilitation. In his opening address, Desmond Tutu averred that “We are a wounded people [...] We all stand in need of healing”—a formulation that, drawing on a long metaphorical tradition of an anthropomorphized body politic, expediently conflated the healing of the nation with the healing of individuals and suggested that the two would be coincident. As Martha Minow notes, such suggestions are not uncommon in the rhetoric of truth commissions. “The working hypothesis”, she writes, “is that testimony of victims and perpetrators, offered publicly to a truth commission, affords opportunities for individuals and for the nation as a whole to heal [...] Echoing the assumptions of psychotherapy, religious confession, and journalistic muckraking, truth commissions presume that telling and hearing the truth is healing”.<sup>13</sup> Depicting the nation as injured by the atrocities of apartheid and debilitated by the illness of racism, the TRC’s promise of healing nonetheless remained ambiguous on whether the recovery aimed at was that of the nation as a political unit or of individuals. In fact, the Commission’s overriding imperative of reconciliation—of healing the body politic—routinely outweighed, and sometimes even impaired, the healing of individuals, many of whom were asked to sacrifice their personal recovery for the nation’s. While this ideology enabled a political stability that, at times, could pass for national reconciliation, it did little to ameliorate individuals’ psychological or physical misery.

Human rights discourse which focuses on freedom from tyranny and oppression, friendly relations among nations, a common standard of achievement for all peoples and nations, and a social and international order in which rights and freedoms can be fully realized, is aimed at monitoring political, rather than criminal, offenses.<sup>14</sup> The U.N. Declaration of Human Rights, for example, excludes from the right to asylum “prosecutions genuinely arising from non-political crimes” and Article 29 stipulates that the exercise of rights and freedoms is subject to “the just requirements of morality, public order and the general welfare in a democratic society”.<sup>15</sup> This language emphasizes the actions and accountability of nations and political leaders, rather than of individuals, and prioritizes public order and general welfare over individual justice or well-being; it conceives persons as national citizens or members of a “people”. The TRC followed suit, identifying deponents as members of political parties or racial groups, a categorization pursuant to the Commission’s mandate that



made “political motivation” a requirement for amnesty. On the one hand, it was clearly significant to both justice and history construction to recognize individuals’ imbrication in social and political systems. As Minow contends, “By identifying individual suffering as an indictment of the social context rather than treating it as a private experience that should be forgotten, a commission can help an individual survivor make space for new experiences”.<sup>16</sup> On the other hand, the practice of sorting individuals in terms of party affiliation or apartheid-style race categories fed into a grossly inadequate historical and social analysis on several grounds: it made little attempt to understand human action outside of party and racial politics; it interpreted individuals as unalloyed manifestations of a political ideology; it failed to acknowledge and document the magnitude of suffering produced by only quasi-institutionalized forms of discrimination and injustice; it conceived of groups and individuals as bearing static identities rather than recognizing the shifting, evolving, interdependent and sometimes opportunistic processes of identity performance; and it paid little attention to local power dynamics which, in South Africa, were often more determinative than national politics.

If the TRC, then, was relatively successful at exposing and condemning the suffering produced by myopic adherence to a political ideology, it was much less adept at capturing the pervasive misery underwritten by a racist media and education system or conditioned by complex and often inextricably personal, political, familial, and/or social motivations. “In determining political motivation”, writes Wilson, “membership of a political organization came to outweigh all other factors. ‘Political’ relied on politics in the narrow liberal sense of formal membership of a political party”.<sup>17</sup> Neither did the TRC possess an adequate mechanism for analyzing the vast field of injury that was a byproduct of the elaborate negotiations of identity, ideology, and pragmatic action that take place between individuals and groups, as well as *within* groups and individuals. Indeed, as Wilson has demonstrated, the TRC took little account of community networks and local political dynamics which, for many, were far more significant than national parties or racial affiliation. It paid little attention to the hermeneutic elaboration of party policies in different regions, settings, and personal circumstances and often assumed—and sometimes explicitly requested—that individuals speak on behalf of an entire group. Thus by suggesting (however deliberately or inadvertently) that a group’s or community’s suffering had been listened to and included in the national historical record, the TRC also thereby rendered invisible the distress of many associated (by themselves or others) with that group, whose suffering may not have conformed to the exemplar, or whose ideology, social position, or experience differed.

In the Human Rights hearings, moreover, victims’ testimony was regularly and promptly translated by Commissioners into the lesson that all South Africans had suffered under apartheid, that such suffering was necessary to the liberation struggle, and that reconciliation, if not forgiveness, was the proper outcome of participation in the TRC. As Wilson observes, while “individuals often stressed the singularity and specificity of their suffering in a way that precluded any wider meaning, in contrast, the commissioners told people in TRC hearings that ‘you do not suffer

alone, your suffering is not unique but shared by others”<sup>18</sup>. It is thus little wonder that many victims felt scant affinity with either the truth or the justice produced by the Commission, and indeed felt ultimately alienated from their own testimony.<sup>19</sup> While victims’ testimony formulated justice in terms of community embeddedness and responsibility to others, and while victims constructed themselves as interdependent, emotive, and embodied subjects, the processes of translation we have been describing distilled and decontextualized that testimony into the disembodied domain of metaphysical statutes and calculability where victims, contrary to their own self-representations, became autonomous, strictly rational, and equally positioned legal subjects: forcibly removed from a home of personal relations, response, and *responsibility* to an alien place of metaphysical statutes, adequation, accounting, and *accountability*.

This alienation from one’s own words and experience is similar to the misrecognition that Julie Mertus contends is produced by tribunal justice:

*Tribunal justice may be meaningful to lawyers drafting pleonastic legal documents in The Hague, diplomats declaring success at stabilizing conflicts, and local politicians staking their claims to power amid the smouldering embers of destroyed communities. But little satisfaction will come to survivors [...] Even when the tribunal does name their crime, the survivor may barely recognize it as the process and language of law transmutes individual experiences into a categorically neat something else.*<sup>20</sup>

The language of tribunal justice, like that of human rights, makes suffering available to certain national and international power-brokers, but by no means guarantees that it will be represented, used, or responded to in the way in which the suffering person needs or desires. Indeed once that suffering has been translated into an internationally standardized language that operates by its own rules, it is no longer in the sufferer’s hands; s/he has, willingly or unwillingly, ceded power over it to distant “authorities”.

Ironically replicating the split subjectivity characteristic of traumatic experience, this sense of alienation from one’s own experience and language—a misrecognition of one’s own identity as constructed by the Commission—meant that for many testifying to the TRC was neither a healing nor a cathartic experience. “The word catharsis gets used too often within the TRC”, writes Psychologist Brandon Hamber. “There is a perception that as long as a person is crying then healing must be taking place. But for the majority, crying is only the first step and there is no follow-up after the hearings. In fact, the adrenalin of giving testimonies on national television masked psychological problems which then surfaced later.”<sup>21</sup> The Cape Town Trauma Center for Victims of Violence and Torture reported that 50 to 60 percent of the victims they had seen suffered serious difficulties after giving testimony.<sup>22</sup> In his work with political detainees who had been tortured in custody, Psychologist Ashraf Kagee found that participation in the TRC did not reduce distress or alleviate traumatic symptoms, and that many respondents expressed “considerable resentment” at the TRC “for not appropriately addressing the needs of victims”.<sup>23</sup> Ruth Picker, in

conjunction with the Centre for the Study of Violence and Reconciliation, the Khulumani Support Group, and the KwaZulu Natal Programme for Survivors of Violence, found that while victims of human rights violations who participated in the TRC appreciated the disclosure of truth, the opportunity to tell their story, and the chance to confront perpetrators, many also felt as if they had been re-traumatized by the experience and underwent a “significant deterioration of overall physical and psychological health after testifying”. Specifically, Picker’s respondents felt that the TRC had broken its promises in regard to reparations, that this failure was an “act of disrespect, breach of trust, and exploitation”, that they had been rendered vulnerable by testifying in public and having their words and experience appropriated by the Commission and other “experts” for other purposes; that perpetrators often did not tell the truth and remained arrogant and unremorseful, and that the TRC had contributed to their trauma by failing to provide either follow-up information on their cases or psychological counseling services after they had testified.<sup>24</sup> A Khulumani press release put the matter bluntly:

*The TRC has compromised our right to justice and to making civil claims. In good faith we came forward and suffered the re-traumatisation of exposing our wounds in public in the understanding that this was necessary in order to be considered for reparations. We now feel that we have been used in a cynical process of political expediency.*<sup>25</sup>

This sentiment was exacerbated by the not unreasonable perception that the TRC had rewarded perpetrators with amnesty but offered little compensation, justice, or chance of recovery to victims. Not surprisingly, the view was strongly expressed in victims’ workshops that the TRC had been more successful at a national than at a local or personal level.<sup>26</sup> What had been lost in translation was victims’ own healing; it had been sacrificed, many realized with a bitter hindsight, for the healing of the nation.

Another way of articulating the TRC’s discursive confrontation between the standardized language of human rights and individuals’ embodied and particular expressions of suffering would be through Patricia Ewick and Susan Silbey’s distinction between *hegemonic tales* “that reproduce existing relations of power and inequity” and *subversive stories* “that challenge the taken-for-granted hegemony by making visible and explicit the connections between particular lives and social organization”.<sup>27</sup> Examining how “narratives can function to sustain hegemony or, alternatively, subvert power”, Ewick and Silbey view hegemonic tales as those that not only reproduce existing ideologies and relations of power, but function as mechanisms of social control, organize experience into a coherent ideology that resists challenge, and “conceal the social organization of their own production and plausibility”.<sup>28</sup> Subversive stories they define, by contrast, as those that “do not aggregate to the general, do not collect particulars as examples of a common phenomenon or rule”, and that “recount particular experiences as rooted in and part of an encompassing cultural, material, and political world that extends beyond the local”.<sup>29</sup> From this perspective, I would argue that the language of human rights functioned initially in South Africa as an

important subversive story, but that it has, in the post-apartheid era, increasingly assumed the role of a hegemonic tale. The TRC was central to this change in status. For while it succeeded in dislodging the hegemonic tale of apartheid with a subversive story of violated human rights, it also functioned to establish a hegemonic narrative of a new South Africa based on restorative justice, reconciliation, a multiracial society, and inclusive citizenship. While an infinitely more benign hegemonic tale, this new ideology made it difficult for the TRC to incorporate and respond to stories that were non-conciliatory, that highlighted the social and economic exclusions perpetuated under the new terms of citizenship, or that provided evidence of the deep divisions and sharp inequalities that have persisted into, and in some ways been condoned by, the “new” South Africa.

The TRC was charged with “investigating and establishing ‘as complete a picture as possible of the nature, causes and extent of gross violations of human rights’ committed under apartheid between 1960 and 1994”.<sup>30</sup> While such violations were numerous and unquestionably merited investigation, exposure, and response, the Commission’s constrained focus on “gross human rights violations” and the restriction of the category of “victim” to those who had experienced exceptional acts of violence, meant that the TRC assessed only a fraction of those oppressed by apartheid and only a fragment of the harm it inflicted. The suffering validated as significant by the TRC—identified by its translatability into globally recognized standards of human rights—thus excluded the massive amount of affliction produced by the structural violence of apartheid itself. This unfortunately narrow conception of “victimhood” (and thereby of “suffering”) meant that many individuals were simply not eligible for an audience with the Commission; that numerous forms of persecution (such as detention without trial, forced removals, obstructed freedom of movement and assembly, systemic educational, economic, and legal discrimination), as well as numerous kinds of suffering (such as material deprivation and psychological trauma) were minimized if not tacitly excused; that persons were not held accountable for the acts, practices, and varieties of inaction that directly or indirectly caused such misery; that human rights were defined primarily as *freedom from* (torture or severe ill-treatment), rather than *access to* (resources, services, education, or opportunity); and that legalized oppression (which, under apartheid, as under other totalitarian regimes, comprised the major source of human suffering) fell outside the purview of accountability. A large body of the injustice and oppression of apartheid was not sufficiently translatable into the language of human rights and thus remained officially unrecognized.

Mahmood Mamdani has persuasively argued several crucial aspects of this case. He contends that turning “the political boundaries of a compromise into analytical boundaries of truth-seeking”, the TRC obscured the co-dependency of racialized power and racialized privilege, the simultaneous distinction and complicity between perpetrators and beneficiaries, and, thus, the basic structure of apartheid.<sup>31</sup> Rather than defining perpetrators as “state agents” and victims as “political activists”, an ethically sharper approach, he argues, “would have gone beyond notions of individual harm and individual responsibility, and located agency within the workings of a

system. The result would have been to explain apartheid as an evil system, not just to reduce it to evil operatives”.<sup>32</sup> He also charges the TRC with indulging in “the legal fetishism of apartheid” in such a way that it conflated the morally acceptable with the legal, discounted legalized forms of harm, and exculpated those who lawfully derived benefit from others’ suffering.<sup>33</sup> “The TRC invited beneficiaries to join victims in a public outrage against perpetrators”, writes Mamdani. “So, beneficiaries too were presented as victims.”<sup>34</sup> Not only did such a formulation absolve beneficiaries from responsibility for apartheid, it left their benefits and privileges, as well as the system that supports them, well intact.

If the TRC’s rhetoric of healing obscured its lack of ability to provide real therapeutic benefits to individuals, it also remained unclear on whether (national or individual) recovery would be accomplished by a program of psychological healing or by the restitution of lost goods and property. The word *recovery*, it bears emphasizing, signifies both (1) healing, the restoration of health and normalcy, and the process of a cure; and (2) repossession, the return of a missing object, repayment of a debt, indemnification or restitution. I would argue, in fact, that the TRC’s focus on repairing the nation’s soul has largely been at the expense of restoring its material body, as demonstrated by the Commission’s emphasis on spiritual reconciliation and the elimination of racist attitudes over providing reparations and remedying material inequity. What the TRC ultimately offered in terms of recovery for victims was a modicum of public recognition, occasionally pieces of knowledge, and a spiritual blessing, rather than psychological, medical, or material reparation. In other words, it largely substituted spiritual for material forms of justice and recovery, tacitly contending that truth would heal suffering, repair communities, and serve as compensation for victims.

The mandate and operations of the Reparations and Rehabilitation committee were clearly the frailest of the Commission’s three branches; it did not hold public hearings, could only make unbinding recommendations to Parliament, and could offer victims only a fraction of the compensation for which they would be eligible in a criminal court. Yet as the Commission’s Final Report acknowledges, when asked what they wanted from the TRC, “thirty-eight per cent of the commission’s deponents requested financial assistance to improve the quality of their lives. In addition, ninety per cent of deponents asked for a range of services which [could] be purchased if money [were] made available—for example, education, medical care, housing and so on”.<sup>35</sup> Victims further expressed strong feelings that perpetrators should be “made to contribute materially and financially toward the reparation and rehabilitation of victims. Most felt there could be no reconciliation with out reparation”.<sup>36</sup> These requests were largely unfulfilled, and victims’ disappointment, their sense that they were once again being treated with disdain, was exacerbated by the perception that perpetrators were not only *not* required to contribute to reparations, but made eligible for amnesty. “In this context”, writes Christopher Colvin, “reparations have come to mean much more than a means of support or a kind of recognition of suffering. They have become the unfulfilled answer to the question of whether or not justice has been done in the transition process”.<sup>37</sup>

The TRC, to its credit, recognized this imperative and included in its Final Report the following elegant, if impotent, statement:

*If we are to transcend the past and build national unity and reconciliation, we must ensure that those whose rights have been violated are acknowledged through access to reparation and rehabilitation. While such measures can never bring back the dead, nor adequately compensate for pain and suffering they can and must improve the quality of life of the victims of human rights violations and/or their dependants [...]. Without adequate reparation and rehabilitation measures, there can be no healing and reconciliation.<sup>38</sup>*

The Commission's recommendations included urgent interim reparation grants, community rehabilitation programs, symbolic reparations (such as monuments and the renaming of streets), institutional reforms, and individual reparation grants, as well as a once-off wealth tax on corporations to endow the reparations fund. Unfortunately, the ANC government into whose hands the TRC placed these recommendations was busy refashioning itself in the garb of neoliberal economic reforms pleasing to the gaze of transnational capitalist institutions but fundamentally at odds with the TRC's reparations proposals (as well as with longtime ANC policy).

It quickly became apparent in South Africa that neither the new nation nor the Truth Commission held a monopoly on human rights language, and indeed that the globally hegemonic neoliberal economic regime concurrently conquering the country could spout off a compulsory litany of human rights talk as well. If human suffering can be translated into a universalized idiom of human rights, so too, it appears, can a market ideology that produces widespread suffering and insouciantly tramples human rights. While membership in the global economy is made conditional upon a state's professed protection of human rights, under this regime, as Tony Evans points out, "human rights are conceptualized as the freedoms necessary to maintain and legitimate particular forms of production and exchange"<sup>39</sup> rather than as the socioeconomic rights warranted by the Universal Declaration of Human Rights to, for example, social security (Article 22), work (Article 23), education (Article 26), and a standard of living adequate for health and well-being "including food, clothing, housing and medical care and necessary social services" (Article 25).<sup>40</sup> Emphasizing property rights and freedom from governmental control (and often erroneously conflating "free trade" with the freedoms of people), this market hegemony is "rephrased into universalistic value formats"<sup>41</sup> by institutions such as the IMF and World Bank, which stress freedom, liberalization, elimination of barriers, growth, efficiency, opportunity, discipline and stability—and clearly cast those that oppose, or construct stories subversive to, such policies as reprehensibly oppressive, exclusionary, inefficient, destabilizing, anti-democratic, and unethical.<sup>42</sup>

In South Africa, it became clear that this neoliberal hegemonic tale had triumphed when, in 1996, the ANC converted from its original Reconstruction and Development Program (RDP)—which had largely followed through on the vision of the Freedom Charter and adopted a basic-needs oriented policy of growth from redistribution—to the Growth, Employment and Redistribution (GEAR)

policy which instituted aggressive neoliberal strategies of privatization, liberalization, and deficit reduction. Essentially a self-imposed Structural Readjustment Program, GEAR claimed, with the strong support of the World Bank, IMF, and South African business interests—but against overwhelming global evidence—that poverty and its attendant structures of suffering could be ameliorated through market-led economic growth and increased global competitiveness.<sup>43</sup> President Thabo Mbeki described this dramatic turnaround as “resist[ing] the temptation to succumb to a populist urge to attempt what would have been an adventurist and disastrous ‘great leap forward’”,<sup>44</sup> in language, that is, that implies that challenging the hegemonic neoliberal tale would not only be self-indulgent and irresponsible, but comparable to one of history’s most hideous scenes of human rights abuse. Yet the evidence adduced by the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP), as well as by scholars such as Patrick Bond, Fantu Cheru, and Richard Peet, demonstrate that GEAR has made only meager progress in alleviating South Africa’s suffering—the country’s Gini-coefficient remains second only to Brazil as the most unequal society in the world—and has mostly functioned to enrich a minuscule black elite.<sup>45</sup> Indeed Black involvement in the economy has made only paltry gains since 1994 and represents the success of a small group of black businessmen working in alliance with apartheid era corporate monopolies. According to the Institute for Justice and Reconciliation’s “Economic Transformation Audit” of 2004, a comparison of the 1996 and 2001 censuses reveals that both income poverty and income inequality increased for the South African population as a whole during this period, though access to some basic services improved. Since 2001, it reports, social services to the poor have increased, but so has unemployment. The largest growth in employment, moreover, has been in the informal sector, which also experienced the largest fall in real wages.<sup>46</sup>

Enacted as many South Africans had their gaze riveted on TRC proceedings, GEAR was patently ill-suited to carrying out the TRC’s reparation recommendations. As Cheru rightly insists, “heavy reliance on market forces to redress the legacies of apartheid is misguided and unsustainable in a society marked by extreme inequality and poverty. The gulf between the government’s macro-economic policy and its social policy is glaringly apparent.”<sup>47</sup> But the very fact that the government could defend GEAR with the language of human rights supports Wilson’s argument that human rights talk has become a dominant form of ideological legitimization in the new South Africa, and yet is sufficiently indiscriminate and elastic as to be able to accommodate multiple and even radically contradictory ideological positions. It also demonstrates Makau Mutua’s important critique of human rights language as a body of “frozen and fixed principles whose content and cultural relevance is unquestionable” and that “prematurely cut[s] off debate about the political and philosophical roots, nature, and relevance of the human rights corpus”.<sup>48</sup>

While the TRC can by no means be held accountable for GEAR, I do think it is arguable that the Commission’s *publicizing* of a spiritual economy was ultimately collusive with the ANC’s *privatizing* of the literal economy. Having no force to

enact its recommendations, the Commission relied on a ritual enactment of reconciliation that, decked out in human rights language, did more to impress international well-wishers and reassure foreign investors than to alleviate South Africans' suffering. The TRC's emphasis on spiritual and symbolic forms of reparation—denouncing racist attitudes, exhibiting scenes of reconciliation and forgiveness, and celebrating a rainbow nation—has, however inadvertently, abetted the ANC's embrace of neoliberal economics. The Commission's focus on healing the nation's soul has been at the expense of repairing its material body; the material agony of damaged bodies, of lack of medical care, clean water, and adequate housing, of malnutrition and the ravages of poverty are daily experiences of suffering that were largely lost in translation.

In conclusion, the TRC evinces the way in which a language of human rights makes certain forms of suffering legible, while rendering others illegible. Its formidable powers of legitimization may incorporate certain kinds of harm, victims, and expressions of suffering into a hegemonic tale that makes recognition of other kinds of harm, other classes of victims, and other modes of expressing suffering more difficult and even threatening. While the TRC's use of the idiom of human rights enabled significant progress in correcting a skewed historical record, acknowledging and documenting the gross human rights violations of the apartheid regime, assigning responsibility for some of those violations, granting dignity to victims and sometimes providing them with information, it also functioned to disfigure the testimony of victims in a way that alienated them from their own experience and sometimes re-traumatized them. In order to translate traumatic testimony into statistical data and document "broad patterns" of human rights violations, it became necessary to retell subversive stories in a "controlled vocabulary", discard information that could not be adapted to that vocabulary, treat individuals as members of (political or racial) groups, and disregard their often complex negotiations of identity and self-representations. Where testimony was not translated into human rights talk, it remained primarily expressive, with little power to influence policy, reparations, or amnesty decisions. A large body of the injustice and oppression of apartheid was, moreover, simply not visible through the lens of human rights language and thus remained officially unacknowledged.

I have also argued that the Commission's overriding imperatives of facilitating reconciliation and establishing a culture of human rights were coated in a promise of healing that attended primarily to rehabilitating the body politic rather than to healing traumatized individuals, many of whom were asked to sacrifice their personal recovery for the nation's. That idiom of healing, I've suggested, was also sufficiently slippery as to allow spiritual and symbolic forms of compensation to eclipse demands for material reparations. In inadvertent alliance with the ANC's conversion to neoliberalism, the TRC's emphasis on healing the nation's soul undermined the task of repairing its material body. In its translation of South African's suffering into the language of human rights, the TRC thus sustained serious losses, among them processes of individual psychological healing, the material repair of bodies, homes, and communities, and alleviation of debilitating poverty.



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## NOTES

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1. FELMAN, S. & LAUB, D. *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History*. New York: Routledge, 1992, p. 5.
  2. The former example is drawn from Nomonde Calata's testimony in: REID, F. & HOFFMANN, D. (directors). *Long Night's Journey into Day* [documentary]. Production of: Iris Films/Cinemax Reel Life, South Village, 2000, 94 minutes. The latter from an anonymous testimony recorded in: KROG, A. *Country of my Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*. New York: Random House, 1998, p. 40.
  3. On the differences between truth commissions and criminal trials, see HAYNER, P. *Unspeakable Truths: Facing the Challenge of Truth Commissions*. New York: Routledge, 2002, chaps. 7 and 13; and MINOW, M. *The Hope for Healing: What can Truth Commissions Do?*. In: ROTBERG, R.I & THOMPSON, D. (ed.). *Truth v. Justice: The Morality of Truth Commissions*. Princeton, 2000, p. 235-260.
  4. GUTMANN, A. & THOMPSON, D. *The Moral Foundations of Truth Commissions*. In: ROTBERG, R.I & THOMPSON, D. (ed.). *Truth v. Justice: The Morality of Truth Commissions*. Princeton, 2000, p. 5.
  5. WILSON, R.A. *The Politics of Truth and Reconciliation in South Africa*. Cambridge: Cambridge University Press, 2001, p. 38. While the TRC officially recognized four kinds of truth—

factual or forensic; personal or narrative; social or dialogic; and healing and restorative—these forms of truth were rarely brought into dialogue with each other, and it was ultimately forensic truth that was judged of the greatest epistemological value. See SOUTH AFRICA. **Truth and Reconciliation Commission of South Africa Report**. Truth and Reconciliation Commission: Cape Town, v. 1, 1998, p. 110-114.

6. Many South Africans saw amnesty as an obstruction of their right to a fair trial and the families of Steve Biko and Griffiths Mxenge et. al. legally, albeit unsuccessfully, challenged its constitutionality. While the Commission was perceived as handing out a better deal to perpetrators than to victims, the vast majority of amnesty applications were, in fact, denied (5,287 denied to 568 granted).

7. See TRC Report, 1998, v. 1, p. 185; TRC Report, 1998, v. 5, p. 225-6; and SOUTH AFRICA. **Second Submission of the National Party to the Truth and Reconciliation Commission**. 23 Mar. 1997. Available at: <<http://www.doj.gov.za/trc/submit/np2.htm>>. Last accessed on: Sept. 2008.

8. TRC Report, 1998, v. 1, p. 2.

9. Ibid, p. 158-164 and Wilson, 2001, ch. 2.

10. MINOW, 2000, p. 245.

11. Qtd. Wilson, 2001, p. 46.

12. See FANON, F. **The Wretched of the Earth** (trans. Constance Farrington). New York: Grove, 1963; and Idem, **Black Skin, White Masks** (trans. Charles Lam Markmann). New York: Grove, 1967. See also SAUNDERS, R. **Lamentation and Modernity in Literature, Philosophy, and Culture**. New York: Palgrave, 2007, p. 13-15.

13. MINOW, M. **Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence**. Boston: Beacon Press, 1998, p. 61.

14. This language is drawn from the United Nations: UNITED NATIONS. **Universal Declaration of Human Rights**, 1948. Available at <<http://www.un.org/Overview/rights.html>>. Last accessed on: Aug. 2005.

15. Ibid.

16. MINOW, 2000, p. 246.

17. WILSON, 2001, p. 86.

18. Ibid, p. 111.

19. A further problem with this construction, as Wilson and others have pointed out, is the moral

equalizing of pain, which sometimes met with fierce resistance at HRV hearings. See WILSON, 2001, p. 111-114.

20. MERTUS, J. Truth in a Box: The Limits of Justice through Judicial Mechanisms. In: AMADIUME, I. & AN-NA'IM, A. (ed.). **The Politics of Memory: Truth Healing and Social Justice**. New York: Zed Books, 2000, p. 142-150. On the translation of visceral testimony into abstract value, disembodied meaning, and immaterial recovery, see also SAUNDERS, R. *Disgrace in the Time of a Truth Commission*. **Parallax - Special Issue on Visceral Reason**, New York, Routledge, v.11, n.3, 2005, p. 99-106.

21. Qtd. WILSON, 2001, p. 121.

22. GUTMAN & THOMPSON, 2000, p. 30.

23. KAGEE, A. Conducting Research with South African Survivors of Human Rights Violations: Some Considerations. **International Journal for the Advancement of Counselling**, New York, v. 26, n. 2, 2004, p. 196. See also KAGEE, A. The relationship between statement giving at the South African Truth and Reconciliation commission and psychological distress among former political detainees. **South African Journal of Psychology**, South Africa, v. 36, n. 1, 2006, p. 10-24.

24. PICKER, R. Victims' Perspectives about the Human Rights Violations Hearings. **Research report written for the Centre for the Study of Violence and Reconciliation**, 2005. Available at: <[www.wits.ac.za/csvr/papers/pappick.htm](http://www.wits.ac.za/csvr/papers/pappick.htm)>. Last accessed on: July 2005. Similar results are arrived at by HAMBER, B.; NAGENG, D. & O'MALLEY, G. 'Telling it Like it Is (...)': understanding the truth and reconciliation commission from the perspective of survivors. **Psychology in Society**, Congella (South Africa), v. 26, 2000, p. 18-42.

25. Qtd. WILSON, 2001, p. 22.

26. See HAMBER, B. **Repairing the Irreparable: Dealing with Double-binds of Making Reparations for Crimes of the Past**. **Ethnicity and Health**, New York: Routledge, v. 5 n. 3-4, 2000, p. 215-226.

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28. EWICK & SILBEY, 1995, p. 214.

29. Ibid, p. 219.

30. SOUTH AFRICA. Office of the President. **Promotion of National Unity and Reconciliation Act. 1**, 1995. Available at: <<http://www.doj.gov.za/trc/legal/act9534.htm>>. Last accessed on: July 2003.

31. MAMDANI, M. The Truth According to the TRC. In: AMADIUME, I., and AN-NA'IM, A. (eds.), *The Politics of Memory*. London: Zed Books, p. 177-78. Neville Alexander develops a related and equally important point, arguing that the TRC's dogma of nonracialism functioned as an instrument of the bourgeoisie, obscuring and impeding the class interests of workers. See ALEXANDER, N. The 'Moment of Manoeuvre': 'Race,' Ethnicity, and Nation in Postapartheid South Africa. In: KAIWAR, V. & MAZUMDAR, S. (eds.). *Antinomies of Modernity: Essays on Race, Orient, Nation*. Durham (US): Duke University Press, 2003, p. 180-195.
32. MAMDANI, 2000, p. 180.
33. Ibid, p. 181.
34. Ibid, p.182.
35. TRC Report, 1998, v. 5, p. 68.
36. See Centre for the Study of Violence and Reconciliation & Khulumani Support Group. *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report*, 1998. Available at: <[www.csvr.org/za/papers/papkhul.htm](http://www.csvr.org/za/papers/papkhul.htm)>. Last accessed on: Aug. 2005. See also BORAINÉ, A. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press, 2000, p. 333-339.
37. Qtd BUFORD, W. & van der Merwe, H. Reparations in Southern Africa. *Cahiers d'études africaines*, Johannesburg, v. 444, n. 1-2, 2004.
38. TRC Report, 1998, v. 5, p. 174-5.
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40. *Universal Declaration of Human Rights*, 1948. It is perhaps worth noting that Section 184(3) of the South African constitution includes rights of access to housing, water, nutrition, and health that have been successfully litigated through the Constitutional Court in three recent cases. See KLAAREN, J. A Second Look at the South African Human rights commission, Access to Information, and the Promotion of Socioeconomic Rights. *Human Rights Quarterly*, Baltimore, v. 27, 2005, p. 539-561.
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43. Following consultations with President Thabo Mbeki in 2000, both the World Bank and IMF gave the ANC government high marks on its macroeconomic policy, advising it to intensify the pace of reform through reduced government spending, increased wage restraint, and abrogation of the labor law. The World Bank has been giving South Africa policy advice since the early 1990s and before leaving office, De Klerk commissioned numerous "planning documents" that, as Patrick Bond has shown, not only emphasized stability, resisting populist pressure, achieving consensus, but became a discursive device for implanting long term neoliberal economic ideas. See BOND, P. *Elite Transition: From Apartheid to Neoliberalism in South Africa*. London: Pluto Press, 2000.
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45. See BOND, 2000; Peet, 2002 and Cheru, F. Overcoming apartheid's legacy: the Ascendancy of Neoliberalism in South Africa's anti-poverty strategy. *Third World Quarterly*, London, v. 22, n. 4, 2001, p. 505-527.
46. See Institute for Justice and Reconciliation. *South African Reconciliation Barometer*, Cape Town, v. 2, n. 4, 2004. Available at: <[www.ijr.org.za/politicalanalysis/reconbar/newsletters](http://www.ijr.org.za/politicalanalysis/reconbar/newsletters)>. Last accessed on: Aug. 2005.
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## RESUMO

Este ensaio analisa os prós e contras decorrentes da tradução de demonstrações de sofrimento humano para uma linguagem padronizada de direitos humanos. Defendo que a experiência da Comissão de Verdade e Reconciliação da África do Sul evidencia de que maneira tal tradução torna o sofrimento humano tanto inteligível, quanto ininteligível. De fato, a linguagem de direitos humanos se mostrou significativamente útil ao viabilizar o reconhecimento, outrora inexistente, de eventos pertencentes à história sul-africana, além de ter identificado as vítimas, proporcionado-lhes dignidade e, eventualmente, reconhecendo a responsabilidade de certos agentes. Não obstante, defendo que esta mesma linguagem desfigurou o depoimento das vítimas de tal maneira que as afastou de suas próprias experiências, além de, por vezes, tê-las traumatizado novamente, o que se revelou, freqüentemente, mais conveniente aos perpetradores do que às vítimas. Afirmo, ainda, que a promessa de reabilitação, sob a qual se reveste o discurso de direitos humanos apresentado pela Comissão, priorizou formas nacionais ou coletivas de reabilitação, em detrimento de reabilitações de caráter individual, bem como possibilitou que o governo da África do Sul substituísse mecanismos incorpóreos e simbólicos de reparação por mecanismos materiais.

## PALAVRAS-CHAVE

Comissão de verdade – África do Sul – Linguagem de direitos humanos – Trauma – Reabilitação – Reparação

## RESUMEN

Este ensayo analiza lo que se gana y lo que se pierde cuando las expresiones referidas al sufrimiento se traducen al lenguaje normalizado de los derechos humanos. La autora sostiene que la Comisión de Verdad y Reconciliación de Sudáfrica demuestra de qué manera esta traducción torna tanto legible como ilegible el sufrimiento humano.

Mientras que el discurso de derechos humanos fue muy importante para establecer en Sudáfrica una historia no reconocida antes, identificar y garantizar dignidad a las víctimas y hasta para determinar responsabilidades en algunos casos, la autora afirma que, a la vez, este lenguaje desfiguró el testimonio de las víctimas en el sentido de que las alienó de su propia experiencia y, en ocasiones, las retraumatizó; por lo que a menudo resultó ser más útil a los autores que a las víctimas. También sostiene que la promesa de sanación —en la cual la Comisión envolvió su discurso de derechos humanos— priorizó lo nacional por sobre las necesidades individuales y permitió que el gobierno sudafricano sustituyese las medidas simbólicas y espirituales de reparación por las materiales.

## PALABRAS CLAVES

Comisión de verdad – Sudáfrica – Lenguaje de derechos humanos – Trauma – Sanación – Reparación



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#### ABSTRACT

Taking his work experience in the UN and in the Inter-American System of Human Rights into account, Pinheiro highlights some of the main achievements and challenges in the development of International Human Rights Law in the last 60 years.

Original in English.

#### KEYWORDS

Universal Declarations – Inter-American System of Human Rights – Human Rights Council – Special Rapporteurs – Universal Periodical Review



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## SIXTY YEARS AFTER THE UNIVERSAL DECLARATION: NAVIGATING THE CONTRADICTIONS

Paulo Sérgio Pinheiro

*For Paulo de Mesquita Neto, in memoriam.*

Where are we now after 60 years after the Universal Declaration of Human Rights?<sup>1</sup> Do we have anything to commemorate? Celebrations of declarations and treaties are often exercises in frustration, which is inevitable when we compare the ideals enshrined therein with the appalling contemporary reality. If we consider the process of setting standards and establishing legally binding conventions, the obvious answer is that there has been progress. As my former colleague Absjorn Eide recognized, “the Universal Declaration, by inspiring and shaping the conception of common values, has contributed more than any other document to open up those possibilities”.<sup>2</sup> The establishment of the UN Commission on Human Rights (CHR) in 1946 and later the Human Rights Council (HRC) in 2006, the International Criminal Court, and the *ad hoc* international tribunals were extraordinary accomplishments. From the perspective of the democratic state and civil society, there were decisive changes. Some categories of victims – workers, women, children, gays, indigenous peoples, migrants, people with special needs and peoples of African descent – have seen their rights recognized, even if not yet fully protected.

But if we put ourselves in the shoes of the victims, there are 4 billion people excluded from the rule of law, ignorant of their rights, as the Commission on Legal Empowerment of the Poor has indicated, with many of the victims submitted to multiple human rights violations, and robbed of the chance to climb out of poverty. In fact, “only a minority of the world’s people can take advantage of legal norms and regulations. The majority of humanity is on the outside looking in, unable to count on the law’s protection”.<sup>3</sup> Estimates of the *World Report on Violence against Children*<sup>4</sup> suggest that 5.7 million children are forced into bonded labour, 1.8 million into prostitution and 1.2 million are victims of trafficking. While it is commonly thought that slavery ended

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*Notes to this text start on page 78.*



decades ago, today there are more slaves than at any moment in history. Only 2.4% of the world's children are legally protected from corporal punishment. Out of the 11 million babies born every year in Latin America and the Caribbean, 2 million – mostly among the poor, Afro-Latinos, rural and indigenous – will never be registered. They are born but do not exist in legal or administrative terms.

In retrospect, the 20th century was not just a period of war and conflict, holocaust, genocide, ethnic cleansing, apartheid, terrorism, and natural catastrophes - grey shadows that continue to threaten mankind. Amid those horrors, nevertheless there was unexpected progress in the struggle for human rights.

How could we imagine at the beginning of the 20th century that the supreme power of the Leviathan, the sacrosanct principle of sovereignty, could be eroded by international bodies and challenged by special rapporteurs, weakening the shield of sovereignty to protect national human rights violations? Even if this evolution has been outstanding, it has always been affected by the opposing dimension of the modern state, with its monopoly of legitimate physical violence. The state is both the major perpetrator of violations and the *defensor pacis*, the protector of the vulnerable. But the state is also one form of contradictory social relations; its actions and its morphology reflect this contradiction,<sup>5</sup> very much present in the area of human rights protection.

We were under the illusion that these contradictions in a certain way had been solved at the World Conference on Human Rights held in Vienna in 1993 by the Declaration and Programme of Action, when democracy was enshrined as the regime most conducive to promoting human rights. But democracy, we have learned *à chaud* in Latin America, is not a panacea that automatically dissolves authoritarianism and prevents human rights violations.

Democracy more easily promotes human rights, but both in consolidated democracies as well as in the newer ones, it is not necessarily a guarantee against human rights violations. In the South, the political transitions from dictatorship to democracy have to a considerable extent preserved the status quo instead of guaranteeing real change. Democracies in South America and Eastern Europe are often a disguise for the oppression of the poor, corruption and collusion of politicians and State agents with organized crime. In the North, the US government has condoned the use of torture against terrorist suspects and prisoners.<sup>6</sup> Democratic states in Europe have *sotto voce* collaborated with the rendition of prisoners to be tortured by third countries.<sup>7</sup> Right now those governments are implementing directives on the repatriation of economic and illegal migrants these host countries have economically exploited for more than a century, confining families with children in detention centers (I sadly must say that I visited some of these centers) for a period of up to 18 months.<sup>8</sup> Rich countries pay more than \$300 billion dollars a year in agricultural subsidies, six times the value of their aid to developing countries, not complying with the spirit of the WTO agreements and dumping cheap produce in poor countries.<sup>9</sup> The struggle for human rights must confront these contradictions.

Having provided the context for the commemoration of the Universal Declaration, I will limit my remarks in the second part of this article to a brief

analysis of two institutions I have been involved with over the last thirteen years, one regional, the Inter-American Commission on Human Rights, IACHR, where I have sat since 2004, and the other, the UN Human Rights Council (HRC) and its predecessor, the Commission on Human Rights (CHR) that I have served on from 1995 to 2008. In my conclusion, I will dare to deal very briefly with the way forward.

We are celebrating the Universal Declaration, but we must include in the commemoration the *American Declaration on the Rights and Duties of Man*, approved three months before by the unanimous vote of the then-recently formed Organization of American States (OAS). Despite this precedence, for 11 years no effort was made to translate the American Declaration into practice. However, in 1959, perhaps motivated by the Cuban Revolution, the OAS decided to establish the IACHR following the model that the founding states of the CHR had rejected: the members are not the representatives of state members of the OAS, but seven independent expert-selected by the general assembly of the OAS, although in the first twenty years the “Commissioners” (a title with some Soviet flavour) behaved as delegates of their respective governments, protecting them from accusations. Fortunately, nowadays the Commissioners can no longer participate in any deliberations about their countries of origin.

The Commission is a quasi-judicial organ performing the role of public prosecutor of the Inter-American system. When countries fail to comply with the Commission’s recommendations, the case is referred to the Inter-American Court for Human Rights, a judicial body. In 2007, 115 cases were sent by the Commission to the Court. The binding sentences of the Court aim to vindicate the rights violated and to impose reparations and indemnities on the States that have recognised the jurisdiction of the Court, with which the governments usually comply.

There are great similarities between the Inter-American and the European Human Rights systems, but the issues considered by them in their evolution were different: most cases in the Inter-American system concerned disappearances, massacres, summary executions in the 1970s and 1980s – characteristics of *the absence of the rule of law* that prevailed until the middle of the 1980s in almost the entire region. By contrast, in Europe the issues typically brought before the Court involved an improvement upon the *existing* rule of law. Since the creation of the Inter-American Commission, there have been successful modifications in the Inter-American human rights system that have broadened the guarantees for the population in the region. Nowadays among the 35 members of the OAS, 25 have ratified the American Convention on Human Rights, drafted in 1969, the basic document of the system, and 22 have recognized the jurisdiction of the Court. But even among those that have ratified the Convention and recognized the jurisdiction of the Court, many have been ambivalent and sometimes even hostile to them.

Only after the consolidation of authoritarian military regimes in the Southern Cone, did the IACHR begin to monitor human rights, under the pressure of reports of gross human rights violations presented to the Commission.<sup>10</sup> This development was very similar to what happened at the CHR; only after the denunciations of torture by the Pinochet military dictatorship and of apartheid in South Africa did

the CHR begin to monitor human rights, at the end of the 1970s. The IACHR has also been inspired by the practice of the former CHR and has created posts for thematic and country rapporteurs who follow their country's cases under discussion by the Commission or who are devoted to specific themes, make visits and prepare reports.

The real challenge for the Commission *vis-à-vis* the new democracies across the South American continent is that most political guarantees have been restored, and still there is a persistent lack of respect in regard to civil, economic and social rights for the majority of the population. Thus, the governments responsible must engage in a dialogue due to the continuation of patent human rights violations in the cases admitted by the Commission.

I would like now to discuss how the contradictory dimensions of the modern state have been reflected in the CHR and later in the HRC. It is too early to compare the Commission on Human Rights (CHR) a body which has evolved during 60 years, with the HRC, which is in its second year and 8<sup>th</sup> regular session.

During the last decade of the CHR it was common to see some states accusing others of politicizing the Commission. But as my most dear friend Sergio Vieira de Mello observed critically in his last address to the 59th session, in April 2003, a few months before being killed in Baghdad: "most of the people in this room work for government or seek to affect the actions of government. That is politics. For some to accuse others of being political is a bit like fish criticizing each other for being wet. It has become a way to express disapproval without really saying what is on our mind". Considering that the HRC as well as the CHR are multilateral bodies constituted by representatives of States which continue to protect their interests, the political nature of the HRC is an essential element for its functioning. It would be naive to expect that this political behaviour of the member States would change only because the structure of the body has changed.

In fact, the Commission was *politicized* immediately after its creation in 1946 and particularly in the 1970s and 1980s, profoundly divided between the Western and Socialist blocs. Since those times a growing abyss between the developed and developing countries became evident. Observing the votes in the HRC, this division has remained and has sometimes been more pronounced than in the case of its predecessor, the UN Commission on Human Rights (CHR). There is a generalized and increasing suspicion from the countries of the South towards any initiative from the Western European and Others regional group (WEOG).

Another preferred target for criticism have been the special rapporteurs, the "jewel of the crown" of the CHR, as Kofi Annan rightly once said, a unique mechanism in the UN, able to monitor human rights and to have some impact on the lives of the victims. Of course they have operated in a very contradictory framework and on thin ice because at the same time they are obliged to make public what they see and to try to convince the governments to comply and establish some kind of cooperation with the CHR (and now with the HRC). In a certain sense this contradiction is analogous to the other contradiction between the "repressive" face of the state, which commits human rights violations, and its "benevolent" face,

which implements human rights policies: the rapporteurs are compelled to report *prima facie* and to try to establish a constructive dialogue with the “benevolent,” positive face. The work of the special rapporteurs is delicate and often thankless, to put it mildly, but it is essential and the system itself a great achievement which must be protected. The fight is ongoing and success is not assured.

There is now some concern about the role of civil society organizations in the HRC. During the last and 8<sup>th</sup> session of the Council, there were repeated attempts by some countries to shut down NGOs, depending on their viewpoint. Their goal is no longer merely to challenge the principle of NGO participation or even to reduce their speaking time, but to muzzle them and to request the interruption of their speakers and the deletion of entire paragraphs from the records of the meetings.

The role of the HRC in strengthening dialogue and cooperation on human rights issues has also been reinforced, in particular “towards the prevention of human rights violations and to respond promptly to human rights emergencies,”<sup>11</sup> with the possibility of holding Special Sessions. Up to now, there have been seven Special Sessions: three dealt with Israel and the Palestinian Occupied Territories while the others dealt with Lebanon, Darfur, Myanmar and the right to food. It seems that the choice by the Human Rights Council to hold Special Sessions also includes criteria related to humanitarian international law, opening a more active role for the Council after natural disasters.

But the results of those Special Sessions were very meagre. For instance, the 5<sup>th</sup> Special Session on Myanmar was a quick response to the crackdown by the military junta against the formidable protests by monks and the general population. Despite a notable consensus on adopting the resolution, the government of Myanmar merely invited the special rapporteur to make a country visit but did not implement any of the HRC’s recommendations, with no consequence at all. I think that this apparent irrelevance will be a strong stimulus for other authoritarian countries not to fear special sessions or resolutions passed by the HRC.

Undeniably there was an upgrading in the main UN interstate forum dealing with human rights. The CHR was just a functional commission (as the Commission on the Status of Women) and a subsidiary body to the UN Economic and Social Council (ECOSOC) but its successor body, the HRC, has been elevated to the status of a subsidiary body of the UN General Assembly. The most innovative mechanism established by the HRC is, of course, the Universal Periodic Review (UPR) seen as the best tool for highlighting critical human rights problems in all member states. The UPR hopefully will push the HRC to look at the degree of cooperation with human rights mechanisms and of implementation of human rights norms and standards in a universal manner. This is a fairly long-term endeavour, so one must wait to see how it will turn out.

Up to this point, I have dealt with the past and the present. What has the Angel of History foreseen for us?

*A [Paul] Klee painting named Angelus Novus shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his*

*mouth is open, his wings are spread. This is how one pictures the Angel of History. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The Angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the Angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.<sup>12</sup>*

This thesis IX on history by Walter Benjamin can be a metaphor of the struggle for human rights, from the ruins of the past towards progress and perhaps with new catastrophes, even more destructive, in the future.

Of course my contact with the Angel of History is fairly limited and it would be too risky to make predictions about the events of the next 60 years. Let us be modest and think only about the next 10 years.

In the next decade, perhaps we will continue to navigate the contradictions, taking advantage of all of the “constructive ambiguities” in the institutionalisation of the HRC, to quote an expression of Ambassador Luis Alfonso de Alba,<sup>13</sup> the first president of the HRC, to implement human rights. We must never lose sight of the four billion people excluded from the joys of our celebration. It is time that the principles of the Universal Declaration and the other great human rights instruments contributed to the creation of a global safety net of rights be applicable to all persons, everywhere and beyond any cultural “exceptionalism”.<sup>14</sup> There are issues that must be urgently confronted all over the world such as lack of implementation of judicial decision, detention, migration, climate change, and organized transnational crime. The human rights systems in the UN or the regional bodies in the Northern and Southern Hemispheres will never be fully effective for those excluded if the countries cannot overcome the deficit in domestic legislation, the inefficiency of the judiciary, of the repressive apparatuses and the precarious implementation of rights at the national level. The obstacles to the protection of human rights will continue if the right of development and the elimination of extreme poverty and the right to food and to health, are not seriously tackled as crucial issues for the four billion in need but also for the developed world, which also contains a third world, continuously immobilized by fear, discrimination and racism. Social deprivation and economic exploitation must be considered serious violations of human rights, on a par with political oppression, torture and racial discrimination.<sup>15</sup> Only the indivisibility of human rights can reinforce their universality.

Definitively, as Daw Aung Sang Suu Kyi once said,

*It is not enough to call for freedom, democracy and human rights. There has to be a determination to persevere in the struggle, to make sacrifices in the name of enduring truths, to resist the influences of desire, ill will, ignorance and fear [...] It is man's vision of a world fit for rational, civilized humanity which leads him to dare to suffer to build societies free from want or fear.<sup>16</sup>*

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## NOTES

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1. Another version of this text was presented at High-Level Panel on the 60th Anniversary of the Universal Declaration of Human Rights, "Where are we now? Development in the International Protection of Human Rights" 7 July 2008, Human Rights: Interpretation and Implementation, An Alumni Conference on the occasion of the 25th Anniversary of the Human Rights Centre, University of Essex.

I would like to thank my friends Michael Hall, department of history, State University of Campinas, UNICAMP and Professor John Packer, director of the Human Rights Centre, University of Essex, for their comments and suggestions to this text. Of course, I am responsible for the last version. This text was prepared with the support of FAPESP and the CNPq, Brazil.

2. EIDE, A. The Historical Significance of the Universal Declaration. **International Social Science Journal**, UNESCO, v.50, n. 158, p. 475-97, Dec.1998, p. 497.

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6. See HUMAN RIGHTS WATCH. **The Road to Abu Ghraib**, New York, 2004. Available at: <<http://hrw.org/reports/2004/usa0604/>>. Last access on: 21 Sept. 2008. And: GOUREVICH, P. & MORRIS, E. **Standard Operating Procedure Inside Abu Ghraib**. New York: The Penguin Press, 2008, p. 368.

7. See COUNCIL OF EUROPE. Parliamentary Assembly. Committee on Legal Affairs. **Secret Detentions and illegal transfers of detainees involving Council of Europe Member States: Second Report**, 7 June 2007. Available at: <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/marty\\_08\\_06\\_07.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/marty_08_06_07.pdf)>. Last access on: 1 Oct. 2008.

8. See ORGANIZATION OF AMERICAN STATES (OEA). Inter-American Commission on Human Rights. **Resolution 03/08 Human Rights of Migrants, International Standards and the Return Directive of the EU**, June 2008.

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10. This evolution is magnificently documented in the book of Professor James Green to be published shortly: GREEN, J. **We cannot remain silent: opposition to the Brazilian military dictatorship in the United States, 1964-85**. Durham: Duke University Press, 2009. And in Portuguese: GREEN, J. **Apesar de vocês: a oposição à ditadura militar nos Estados Unidos, 1964-85**. São Paulo: Companhia das Letras, 2009.

11. ICC POSITION PAPERS/NATION HUMAN RIGHTS INSTITUTIONS AND THE UNHRC. **GA Resolution 60/251**, 22 Sept. 2006, par. 5-f.

12. See BENJAMIN, W. *Theses on the Philosophy of History. Illuminations*. New York: Schocken Books, p. 257-258, 1969; LÖWY, M. *Walter Benjamin. Avertissement d'incendie. Une lecture des thèses Sur le concept d'histoire*. Paris: PUF, 2001, p. 75.

13. Ambassador Luis Alfonso de Alba is the Permanent Representative of Mexico to the United Nations and International Organizations in Geneva and he was the first president of the Human Rights Council, chairing with great skill the process of definition of the institutionalization of that body in 2006.

14. FRANCK. *Are Human Rights Universal?*. *Foreign Affairs*, New York, v. 80, n.1, Jan.-Feb. 2001.

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## RESUMO

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Pinheiro ressalta alguns dos pontos principais no desenvolvimento do Direito Internacional dos Direitos Humanos no últimos 60 anos, a partir de sua experiência de trabalho tanto no Sistema Interamericano quanto no Sistema das ONU de Direitos Humanos.

### PALAVRAS-CHAVE

Declaração Universal - Sistema Interamericano de Direitos Humanos – Conselho de Direitos Humanos – Relatores Especiais - Revisão Periódica Universal

## RESUMEN

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A partir de su experiencia en el Sistema Interamericano y en el Sistema ONU de protección de los derechos humanos, Pinheiro destaca los aspectos principales del desarrollo del derecho internacional de los derechos humanos durante los últimos 60 años.

### PALABRAS CLAVES

Declaración Universal – Sistema Interamericano de Derechos Humanos – Consejo de Derechos Humanos – Relatores Especiales – Revisión Periódica Universal





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#### ABSTRACT

There is still lack of conceptual clarity in the notion of poverty as a violation of human rights. This is a problem for human rights practitioners that take the indivisibility of human rights seriously, understand the centrality of poverty in the plight of many human rights victims and want to work professionally, through binding internationally recognized human rights obligations, in the fight against poverty. This paper tries to clarify the conceptual gap. It presents a critical summary of the most important attempts to conceptually clarify the connection between poverty and human rights from an international human rights law perspective. It analyzes different conceptual frameworks, their strengths and weaknesses. The paper identifies three different models for linking both concepts: (1) theories that conceive poverty as *per se* a violation of human rights; (2) theories that conceptualize poverty as a violation of *one specific human right*, namely the right to an adequate standard of living or to development; and (3) theories that conceive poverty as a *cause or consequence of human rights violations*. The paper concludes that the third approach is the most useful in the current state of development of international human rights law and jurisprudence, but that the second approach has a lot of potential to push the poverty and human rights agenda forward and it should be developed further.

Original in English.

#### KEYWORDS

Poverty - Human rights - Development - Adequate standard of living - Legal obligations.



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# POVERTY AND HUMAN RIGHTS: FROM RHETORIC TO LEGAL OBLIGATIONS A CRITICAL ACCOUNT OF CONCEPTUAL FRAMEWORKS<sup>1</sup>

Fernanda Doz Costa

*This world, that offers a banquet to all and closes the door in the noses of so many, is, at the same time, equalizer and unequal: equalizer in the ideas and the customs that it imposes, and unequal in the opportunities that it offers. (Eduardo Galeano)<sup>2</sup>*

## Introduction

The often quoted statement that “*poverty itself is a violation of numerous basic human rights*”,<sup>3</sup> expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are victims of a fundamental injustice.<sup>4</sup> This is reinforced by another intuition, which is that the average opulence in most societies, and definitely so in developed countries, is more than sufficient to eradicate poverty from the face of the Earth.<sup>5</sup> Although those intuitions may be true, such a broad statement may fall into the so-called “*fallacy of exaggeration*”. This fallacy calls every situation of deprivation (i.e. every situation where a basic human need is not satisfied) a violation of human rights.<sup>6</sup> However, from an international human rights law perspective, not every denial constitutes a violation of human rights. The extent to which it does, is an underdeveloped conceptual discussion in the human rights literature and practice. This gap has a historic and ideological reason.

Immediately after the drafting of the Universal Declaration of Human Rights -which proclaimed both freedom from want and freedom from fear- the human rights and the poverty reduction -or development- movement proceeded on separate conceptual tracks. This was strongly influenced by cold war politics. Human rights and development experts worked through parallel sets of intergovernmental institutions without overlapping and so did the majority of non-governmental organizations in both fields.<sup>7</sup>

Since the mid 1990s, there has been increasing recognition of poverty as a

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*Notes to this text start on page 101.*

human rights problem. The human rights movement has begun to take economic, social and cultural rights seriously and to recognize the centrality of poverty and their worst consequences in many human rights violations. The development movement on the other hand, have adopted rights-based approaches to their work. Within the United Nations (UN) this happened particularly after the World Conference on Human Rights in Vienna in 1993, where the indivisibility, interdependence and interrelation of all human rights were affirmed.<sup>8</sup> This was followed by several declarations and resolutions acknowledging the international preoccupation with global poverty as a human right issue.<sup>9</sup>

However, these were very broad claims that did not help to clarify the complex problem of classifying poverty or extreme poverty as a violation of human rights. The major attempts in this regard were made in the United Nations (UN) by the UN Development Program (UNDP), the former Commission on Human Rights (replaced by the Human Rights Council), the Office of the High Commissioner for Human Rights (OHCHR), and the Educational, Scientific and Cultural Organization (UNESCO).<sup>10</sup> Almost all these efforts were made within the framework of the reforms introduced by the Secretary-General in 1997 of “mainstreaming human rights”<sup>11</sup> and the UN common understanding on the Human Rights Based Approach to Development.<sup>12</sup>

Consequently, UN materials are mainly addressed to poverty reduction and development officials explaining how the mainstreaming human rights approach should apply to their real life job.<sup>13</sup> However, international human rights practitioners still lack conceptual clarity in what is exactly meant by the statement that *poverty violates human rights*, especially from an international human rights law perspective. Is it a rhetorical declaration expressing moral condemnation or is it a legal claim? If the latter, what would be the legal consequences for states and other duty holders? Can the denial of certain rights be described as poverty? Are those rights codified under human rights law? Do they entail binding obligations for identified duty-bearers? Are those duties of plausible compliance?

All these questions are complicated, and if they cannot be solved both in theory and practice, “the notion of poverty as a violation of human rights cannot be taken as more than an empty and ineffective slogan”.<sup>14</sup> This is a problem for human rights practitioners that take the indivisibility of human rights seriously, understand the centrality of poverty in the plight of many human rights victims and are worried about working professionally, through internationally recognized binding human rights obligations, in the fight against poverty. There is a notable lack of literature addressed to human rights defenders and practitioners to help them in their work.<sup>15</sup> There are also many uninformed or ideologically biased oversimplifications that have contributed to the confusion.<sup>16</sup>

This paper tries to clarify this conceptual gap, presenting a critical summary of the most important attempts to conceptually clarify the connection between poverty and human rights from a human rights law perspective. Its objective is to analyze different conceptual frameworks, their strengths and weaknesses and to suggest which one is the most accurate approach from an international human rights law perspective. Chapter I will address definitions of poverty and human rights, as a first step to build conceptual clarity. Chapter II will explore the conceptual frameworks developed

to explain poverty as a human rights violation or denial and will give a critical account of each of them. These are going to be divided into three groups for reasons of clarity. The first group will contain the theories that conceive poverty as *per se* a violation of human rights. The second group will include the conceptualization of poverty as a violation of *one specific human right*, namely the right to an adequate standard of living or to development. Here I will divide the claims between moral and legal human rights. Finally, the third group will include those theories that conceive poverty as a *cause or consequence of human rights violations*. I will conclude that the third approach is the most useful in the current state of development of international human rights law and jurisprudence, but that the second approach has a lot of potential to advance the human rights and poverty agenda forward and should be developed further.

## **I. Towards conceptual clarity: the notions of poverty and of human rights**

At a conceptual level, one can define the work towards poverty reduction and towards human rights protection with a sufficient degree of abstraction as to be virtually identical.<sup>17</sup> A closer view will show that there are significant overlaps and common objectives but that they are in fact distinct though intersecting endeavors.<sup>18</sup> Thus, part of the conceptual confusion is based in this lack of clarity of what is meant by the term *poverty* and by the term *human rights*. In this section I will analyze the main possible meanings of both terms that should be taken into account by human rights practitioners when analyzing and understanding the three different approaches to poverty and human rights that will be developed in the next section.

### ***I.A. The concept of poverty***

Some of the most eminent social scientists have been trying to define poverty for more than 200 years.<sup>19</sup> The significant divergences between the different concepts of poverty have an impact on the alleged conceptual link between poverty and human rights. When some people talk about poverty they refer to *income poverty*, others to *capability deprivation* and others to *social exclusion*.

#### **I.A.1. Income poverty**

Poverty has been conventionally viewed as the lack of income or purchasing power.<sup>20</sup> According to Jeffrey Sachs, there is agreement on the distinction of three different types of income poverty: Extreme (or absolute) poverty, moderate poverty, and relative poverty.

“*Extreme poverty* means that households cannot meet their basic needs for survival. They are chronically hungry, unable to access health care, lack the amenities of safe drinking water and sanitation, cannot afford education for some or all of the children, and perhaps lack rudimentary shelter and basic articles of clothing, such as shoes. Unlike moderate and relative poverty, extreme poverty occurs only in developing

countries. *Moderate poverty* generally refers to conditions of life in which basic needs are met, but just barely. *Relative poverty* generally construed as a household income level below a given proportion of average national income. The relative poor, in high income countries, lack access to cultural goods, entertainment, recreation, and to quality health care, education, and other prerequisites for upward social mobility”.<sup>21</sup>

The World Bank uses this paradigm by measuring a person’s income and establishing a “poverty line” (US\$1 a day measured in purchasing power parity), which represents an income level below which a person is held to be in extreme poverty.<sup>22</sup> Another World Bank category, income between US\$1 per day and US\$2 per day, can be used to measure “*moderate poverty*”.<sup>23</sup>

### I.A.2. Capability poverty

In the last two decades, the poverty discourse has moved much beyond the income criterion to the concept of well being.<sup>24</sup> This was mainly due to UNDP *Human Development Report* (HDR), clearly influenced by Amartya Sen’s “*capability approach*”, where poverty is seen as “*capability deprivation*”. This approach relates the notion of poverty to the notion of “impoverished lives” and to deprivations in the basic freedoms that people can and do enjoy. These deprivations include the freedom to be adequately nourished, the freedom to enjoy adequate living conditions, the freedom to lead normal spans of life, and the freedom to read and write.<sup>25</sup> It recognizes that deprivations in basic freedoms of this type are associated not only with shortfalls in income but also with systematic deprivations in access to other goods, services and resources necessary for human survival and development as well as with interpersonal and contextual variables.<sup>26</sup>

The UNDP’s Human Poverty Index (HPI) for example, is an average of three measures of deprivation: vulnerability to death, deprivation in knowledge and lack of decent living standards.<sup>27</sup>

### I.A.3. Social exclusion

In the 1970s the concept of social exclusion came into the literature to analyze the condition of those who are not necessarily income-poor –though many are too- but who are kept out of the mainstream of society.<sup>28</sup> The European Foundation described it as “the process through which individuals or groups are wholly or partially excluded from full participation in the society in which they live”.<sup>29</sup> In the HPI, the indicator for social exclusion is unemployment and it is exclusively measured in industrialized countries.

### I.B. *The concept of human rights*

Another difficulty when trying to clarify the links between poverty and human rights is the confusion between referring to human rights in the moral or in the legal sense. This is of the utmost importance for human rights practioners. Although the rhetoric

of human rights is very powerful, most of their work is based on emphasizing the legally binding obligations of states and other actors regarding international human rights law. However, the human rights movement is much broader than the international legal arena. There is an increasing trend to use human rights language as a legitimating moral discourse that evokes universality and consensus of fundamental values among otherwise competing traditions on a shared minimum standard of human dignity.<sup>30</sup>

Although both notions of human rights can coexist in harmony, it is clear that the consequences of calling poverty a violation of human rights in the moral or in the legal sense are different. The discrepancies are often recalled with regard to economic and social rights discussions, mainly because of the well known position of the USA and other international actors who haven't accepted economic and social rights as legally binding rights, despite the several international declarations of the indivisibility of all human rights and the legally binding Covenant on Economic, Social and Cultural Rights (ESCR) among other legally binding instruments. However, most of the institutions and states that do not accept such legally binding obligations do not deny the morality of these claims as ethical entitlements of all civilized members of the community.<sup>31</sup>

While poverty can not be seen as a denial of economic and social rights exclusively (because also civil and political rights are compromised), its connection with human rights is mainly addressed through them. As a consequence, the discussions about whether economic and social rights create legal or moral obligations are particularly relevant to the poverty and human rights discussion. Unfortunately this is not always clear in the positions of those who worked on the issue, particularly in the UN context. Those positions often mix political declarations with legal binding norms when referring to the links between poverty and human rights, creating more confusion than clarification.<sup>32</sup>

Thus, it is important to keep in mind that confusion when analyzing the different approaches to poverty as a human rights violation. In my analysis, I will always refer to human rights in the legal sense, as a set of internationally legally binding norms based on international treaties as well as agreed and/or authorized interpretations of those instruments.

## **II. The link between poverty and human rights: three conceptual frameworks**

When experts and scholars refer to links between poverty and human rights, they hardly ever refer to poverty as exclusively "lack of income", but to a complex concept of poverty which also involves "capability deprivation". This is so because the 'capability approach' is widely recognized as the conceptual "bridge" between poverty and human rights, since it incorporates new variables to economics that reflect the intrinsic and instrumental value of fundamental freedoms and human rights.<sup>33</sup>

While exploring the literature on poverty and human rights, I found different approaches that can roughly be classified into three conceptual frameworks. One is

to consider poverty *per se* as a violation of all or several human rights. The second is to consider freedom from poverty as an independent human right. Finally, poverty is seen as a cause or consequence of the violation of some human rights. These three approaches are not incompatible. In fact, sometimes they overlap. However, there are clear differences among them, especially in relation to the legal obligations of states and other actors. Thus, for the sake of conceptual clarity, I have considered it useful to divide their analysis into three categories.

### *II.A. Poverty itself as a denial (or violation) of human rights*

This approach sees poverty as incompatible with human dignity. Given that human dignity is the foundation for human rights, poverty is therefore a denial of all human rights. In Mary Robinson's words:

*[e]xtreme poverty to me is the greatest denial of the exercise of human rights. You don't vote, you don't participate in any political activity, your views aren't listened to, you have no food, you have no shelter, your children are dying of preventable diseases - you don't even have the right to clean water. It's a denial of the dignity and worth of each individual which is what the universal declaration proclaims.<sup>34</sup>*

The UNDP has also followed this approach, stating that “[p]overty is a denial of human rights’ and that the “*elimination of poverty should be addressed as a basic entitlement and a human right – not merely as an act of charity*”.<sup>35</sup>

The most developed version of this approach was done by the Office of the High Commissioner for Human Rights (OHCHR); so I will concentrate my analysis in their account of this approach. “Poverty can be defined equivalently as either the failure of basic freedoms – from the perspective of capabilities- or the non-fulfillment of rights to those freedoms – from the perspective of human rights.”<sup>36</sup> However, according to the OHCHR non-fulfillment of human rights constitutes poverty only when:

- The human rights involved are those that correspond to the capabilities that are considered *basic* by a given society; and
- Inadequate command over economic resources plays a role in the causal chain leading to the non-fulfillment of human rights.<sup>37</sup>

The OHCHR argues that the widespread use of Sen's “capability approach” is an appropriate conceptualization of poverty from a human rights perspective and that there is a “*natural transition from capabilities to rights*”.<sup>38</sup> The focus on *human freedom* is the common element that links the two approaches according to them.<sup>39</sup> They explain that under the capability approach, poverty is “the *failure of basic capabilities* to reach certain minimally acceptable levels”<sup>40</sup> and it is also “the absence or *inadequate realization of certain basic freedoms*”.<sup>41</sup> Under this explanation, it would seem logical to assume “*basic capabilities*” and “*basic*

*freedoms*” as equivalent terms. Consequently, being freedom the common element that links the two approaches, there is a conceptual equivalence between *basic freedoms* (or *basic capabilities*) and *rights*, according to them.

I find some difficulties in this theoretical correspondence. First, the concept of basic capabilities is contingent (i.e. what is basic in one society may not be basic in another), while human rights are not. Second, the content of each basic capability is also contingent (i.e. what is basic shelter in one society may be less or more than basic in another), while international human rights law and jurisprudence is defining universal minimum core content of rights.<sup>42</sup> I will analyze those difficulties in more detail below.

According to the OHCHR “since poverty denotes an *extreme* form of deprivation, only those capability failures would count as poverty that are deemed to be *basic* in some order of priority”.<sup>43</sup> The OHCHR argues that different communities may *of course* have a different understanding of what would qualify as “basic” capabilities.<sup>44</sup> There is a tension here with the human rights discourse which jeopardizes the alleged conceptual equivalence. The “capability set” that each society will list as basic can’t be equivalent to human rights; because the universality of the catalogue of human rights is beyond any political discussion and communities preferences. The OHCHR implicitly recognize this conflict arguing that although there is some degree of relativity in the concept of poverty; from empirical observation it is possible to identify certain basic capabilities that would be common to all.<sup>45</sup> But still here there is a conceptual pitfall, because the human rights discourse does not claim universality based on an empirical observation but rather on a moral and legal imperative.

Anticipating some of these criticisms, the OHCHR argues that the human rights definition of a social phenomenon does not need to be made in reference to all human rights in order not to violate the principle of indivisibility.<sup>46</sup> Thus, the characterization of poverty does not necessarily have to include all human rights to be compatible with the indivisibility of these rights. This is perfectly logical. But this is precisely another reason to avoid considering the concept of *basic capabilities* as equivalent to the notion of *human rights*.

In my opinion, the proposed conceptual equivalence between *basic capabilities* and *human rights* is both inaccurate and too risky. Having a contingent definition of the basic capabilities that constitute poverty is acceptable. However once you have entered into the human rights discourse, the catalogue of rights is not contingent upon different community preferences, life styles or resources. If what is deemed “basic” in one society is not “basic” in another, then it is too risky to make this contingent concept of “basic capabilities” equivalent to human rights without further clarification.

My second concern with the proposed conceptual equivalence refers to the definition of the content of basic capabilities and human rights. According to the OHCHR the capability approach “people living in different cultural environments might feel that they need different amounts of clothing in order to have the capability to be clothed at a minimally acceptable level [...] It would, therefore, be a mistake to define and measure poverty in terms of a uniformly low level of command over economic resources, when the fundamental concern is with a person’s capabilities”.<sup>47</sup>



The human rights movement is, on the other hand, struggling to define and create consensus on the *minimum core content* of economic and social rights. The using of this relative concept of basic capabilities as equivalent to human rights may be counterproductive in this attempt.

In this respect, the OHCHR argue that while the human rights approach imposes an obligation on duty-holders to work towards poverty reduction, it does not make the unreasonable demand that all human rights must be realized immediately, but progressively and subject to the availability of resources. Accordingly, the precise obligations arising from some human rights vary over time in relation to the same State (progressive realization) and from one State to another (because of differing resource availability).

Although this is true, I still find a conceptual difficulty here. There is a difference between the *content* of a human right and the *obligations* that arise for the State. The concept of progressive realization does not mean that the content of the rights are variable. The rights have different components, some of them characterized as “minimum core content”, which are defined as the “minimum essential levels of each right”<sup>48</sup> and which constitute the nature or essence of the right. This minimum core content must be immediately ensured by each state party of the ICESCR.<sup>49</sup> However, all the components of the right are important and the ultimate goal is full implementation. This is why states have *progressive obligations* towards the full realization of the right. Those progressive obligations are the ones that may vary from state to state. However, the nature and core content of the rights are not contingent upon a state’s resources nor do they vary within or between states as suggested.

My view is that this valuable intent to close the gap between the language of both movements goes too far and can be counterproductive for the claim of universality and equal enforceability of economic, social and cultural rights. “From the human rights perspective, it is of the outmost importance to clarify (vague) treaty norms in order to make clear to governments and other actors involved the precise meaning of treaty obligations.”<sup>50</sup> Linking human rights with an essentially contingent concept of ‘basic capability’ without further clarification seems to move exactly in the opposite direction. As we will see below (in II.B.2.3: Poverty as the violation of the right to an adequate standard of living), there is another possible way of linking capabilities and human rights without compromising human rights law developments towards clarification of state obligations and instead strengthening that effort.

### *II.B. A human right to be free from poverty*

This proposal comes from the idea that poverty is a distinct violation of one specific human right, the ‘right to be free from poverty’. This is the main thesis underlying UNESCO’s draft document “*Abolishing Poverty Through the International Human Rights Framework*”.<sup>51</sup> Although it is very similar to the previous paradigm, the main difference is that here poverty is not considered the denial of all or several human rights but the violation of *one specific human right*. It is different from the third

conceptual framework as well, since the latest considers poverty as a *cause* or as a *result* of human rights violations, while here poverty is *itself* the human right violation.

This proposal focuses on the so called *absolute (or extreme) poverty*, defined as a deprivation of what is required to live a life that is worth living.<sup>52</sup> In this sense, it expounds that everyone has the right to the means of basic subsistence. In this approach, the moral claim is clearly differentiated from the legal claim; so I will analyze them separately.

### II.B.1. Freedom from poverty as a moral human right

Vizard argues that many influential political theories -both in the libertarian and the liberal traditions- failed to include poverty in the characterization of human rights.<sup>53</sup> According to her, such theories have searched for impartiality in ethics (as a response to the relativist critique) and claimed to be independent from any conception of good or from any particular view of the ends freedom can serve. They have built an exclusively negative theory of freedoms and human rights. Although freedom from poverty could fit within a theory of negative freedom (e.g. Pogge's thesis explained below), traditionally it was rejected, basically because the theory was extended to necessarily require negative obligations of non-intervention and non-interference, while freedom from poverty also requires positive freedoms.<sup>54</sup> This is clearly the basis upon which was built the categorical differentiation between civil and political rights (the so called negative-rights) and economic and social rights (or so called positive-rights).

The liberal tradition very much influenced human rights practice and theory, and it is not surprising that poverty was conceived, in the best case scenario, as a national problem of social injustice but not as a violation of universal human rights. However, liberalism is not the unique philosophical foundation of human rights. Indeed, it is not possible to find one specific philosophical foundation of human rights. Not even its cornerstone, the universal Declaration of Human Rights, has an unique philosophical foundation because it was the result of a political compromise not a self-evident truth.<sup>55</sup> However, the influence of the liberal tradition in the human rights discourse can not be denied. In this sense, the theories grouped here are of utmost importance to contest the liberal assumptions related to poverty and to advocate the inclusion of freedom from poverty as a fundamental human rights concern.

In this context, Pogge's thesis in *World Poverty and Human Rights* is a major attempt to move this debate forward, locating his theory within the traditional liberal idea of negative obligations. In this collection, including several of his essays on global justice, he argues in favor of a *moral human right that everyone has to a standard of living adequate for health and well being*.<sup>56</sup> He goes further to give meaning to this right, positing that governments and citizens of affluent democracies have a *negative duty* towards the global poor, namely a duty not to uphold a global structure that violates human rights.<sup>57</sup> Pogge contests Rawls' thesis that equality is a political demand that only applies to the Nation State,<sup>58</sup> arguing that the global order in which all

national governments participate, along with international and supranational institutions, generates injustice.<sup>59</sup> Indeed, he argues that poverty in developing countries cannot be seen as disconnected from industrialized countries' affluence.<sup>60</sup>

Amartya Sen has also contributed to the debates in ethics and political theory to overcome the theoretical obstacles to viewing global poverty as a violation of human rights.<sup>61</sup> His 'capability approach' departs from many other frameworks and moves beyond Rawls position in many ways.<sup>62</sup> Particularly relevant here is that Sen, unlike Pogge, contests the liberal assumption that freedoms only imply negative obligations. Sen builds a broad theory that incorporates positive obligations of assistance and aid towards the global poor and supports a sub-class of fundamental freedoms and human rights that focuses directly on the valuable things that people can do and be.<sup>63</sup>

Both Pogge and Sen have developed political and moral theories that include freedom from poverty as a major human rights concern. There is not doubt that those theories will have a major impact in the development of a legal human right to be free from poverty in the future. Especially since, as I will argue in the following section, the legal human right to be free from poverty needs further development.

## II.B.2. Freedom from poverty as a legal human right

Because the "*right to be free from poverty*" is not recognized as such in international human rights law; the legal dimension of this approach is built from one or several legally binding obligations that have already been recognized in international human rights law. There are several versions of this approach that I will summarize below. On the one hand, those who build a right to be free from *extreme* poverty with *several* already recognized human rights law obligations (see II.B.2.1). On the other hand, those who argue that the right to be free from poverty is the logic flip side of the *right to an adequate standard of living* (see II.B.2.2) or the *right to development* (see II.B.2.3).<sup>64</sup>

### II.B.2.1. A legal human right to be free from extreme poverty

The former UN Independent Expert for Human Rights and Extreme Poverty argued that poverty is not to be defined as the absence of human rights, as these two concepts are not equivalent (this position will be analyzed in the third approach, poverty as a cause or consequence of human rights violation). However, when the analysis is narrowed to extreme poverty, he argues that there is a legally binding obligation upon states to end poverty.<sup>65</sup> This is why his position towards *extreme* poverty will be analyzed under this second approach.

Extreme poverty is extreme deprivation of income, capabilities and social exclusion.<sup>66</sup> By narrowing the analysis, he is trying to constrict the number of people involved in the concept, with a pragmatic view.<sup>67</sup> According to him, the international community will be more willing to accept this binding obligation if there is a more manageable number of people (the extremely poor), who are clearly and demonstrably most vulnerable to suffering from all forms of deprivation.<sup>68</sup> He strengthens his

position arguing that the denials related to extreme poverty are easily identified with already recognized human rights law obligations<sup>69</sup> and that poverty eradication procedures would qualify as customary law.<sup>70</sup> “Removing conditions of extreme poverty then should be treated as a ‘core’ obligation which should be realized immediately and not subjected to progressive realization.”<sup>71</sup>

Although very appealing, I find this position problematic from a human rights perspective because there is an assumption that although many human rights of poor people are being denied or violated, to achieve results it is necessary to make a compromise. Thus, to convince the international community (which is a euphemism for donor-countries) to accept this legally binding obligation, he is prepared to “leave outside the deal” a group of people who are also suffering human rights violations. This is problematic in two senses. First, because it is far from clear that by reducing the number of people involved in the concept of a human right violation, governments will be more willing to accept their obligations. In fact in the same report the Independent Expert recognizes that the main reason why poverty eradication programs have not been adopted is that countries have shown no political will and because of groups pressing for competing objectives.<sup>72</sup> Second, I agree that poverty reduction strategies need to involve tradeoffs and the human rights movement should acknowledge this. However, I think it is unacceptable if the tradeoffs are made in a normative claim such as here. It is acceptable to recognize the need to prioritize when allocating resources as a matter of policy, but it is unacceptable to make the definition of a human rights violation dependant on this tradeoff. Even in the hypothesis that his definition of extreme poverty is accurate from a human rights perspective, I do not think it is acceptable to justify a normative claim for doubtful pragmatic reasons.

I am not convinced by the idea that the best way to eradicate poverty, and the human rights violations connected to it, is to establish a new definition of poverty. I agree that making a human rights claim and defining legally binding obligations for states and other actors is desirable and a compelling resource to the fight against poverty. However, I think what is needed here is conceptual clarity of the links between two already developed fields and not a re-definition of them.

### *II.B.2.2. Poverty as the violation of the right to development*

In a recent paper, Sengupta<sup>73</sup> argued in favor of considering poverty as a violation of the human right to development. That right has been recognized by the international community in the 1986 UN Declaration on the Right to Development and in the Vienna Declaration of 1993, but it has not been codified in a legally binding document.<sup>74</sup> “This is the *right to a process of development* in which all human rights and fundamental freedoms are realized, and is seen as an evolving social arrangement and international order that facilitates the realization of, and actually realizes in a progressive manner, all those rights.”<sup>75</sup> In this definition, the right to development is a human right in itself but it is also a composite right, constituted by other human rights that form the core of its content. Thus, “the composite right improves, that is, is increasingly realized, if some rights are improved, but no right regresses or is violated”.<sup>76</sup>

This last characteristic of the right to development is viewed as the comparative advantage of recognizing poverty as a violation of a specific but complex human right. It helps to determine that the right to development is violated when some of the component rights have regressed or deteriorated. At the same time, it avoids defining poverty in unreasonably large human rights terms (i.e. like a violation of all human rights), making the claim virtually useless. Lastly, the obligation of the duty-holder (which is to undertake a development policy that will progressively realize the component rights without regressing any of them) is realizable in a progressive way and it is more clearly identifiable.

Although this is a very compelling argument, the problems with this position are straight forward. It is already difficult to reach international consensus regarding the scope, core content and nature of many economic and social rights which are codified in international human rights law and have monitoring bodies which are slowly building their substance. It is therefore much more difficult to make the case for the right to development, a discussion which is not without difficulties in the international community and has been extremely politicized. However, it is clear that there is a right to development recognized in international human rights law and; given that in the future agreement is reached about its scope, clear obligations, duty bearers and duty holders this approach has an important potential to explain the link between poverty and human rights.

### *II.B.2.3. Poverty as the violation of the right to an adequate standard of living*

Vizard also makes a legal claim about poverty as a human rights violation.<sup>77</sup> Her work is a valuable and useful attempt to justify a legally binding obligation on states and other actors to eradicate poverty. According to her, the capability approach provides a framework in which “the capability to achieve a standard of living adequate for survival and development- including adequate nutrition, safe water and sanitation, shelter and housing, access to basic health and social services and education- is characterized as a basic human right that governments and other actors have individual and collective obligations to defend and support”.<sup>78</sup>

She justifies a broad conception of legal human rights that takes into account global poverty in several international norms,<sup>79</sup> as well as regional and national ones. She also points to authoritative international standards and other “soft law” principles. Vizard claims that the capability approach can be used as a conceptual framework by international human rights law practitioners to deal with the complexities of poverty and its implications for the enjoyment of human rights.<sup>80</sup> She reinforces this claim pointing out eight correlations between the “capability approach” and evolving standards in international human rights law and jurisprudence.<sup>81</sup>

Unlike the paper of the OHCHR discussed in chapter II.A, she concedes that her proposal is not a *necessary* consequence of the ‘capability approach’ and that Sen himself has often downplayed the necessity of international human rights law in codifying and reinforcing human rights.<sup>82</sup> Acknowledging that the ‘capability

approach' is substantially incomplete and that it can be consistent and combinable with several different theories of value, she proposes to use international human rights law and standards as a *background theory*.<sup>83</sup> The practical consequences of this proposal would be to give to the contingent concept of 'basic capabilities set' a normative background. In this way, both the list of basic capabilities and their content would have universality through international human rights norms. If this proposal is adopted, the list of basic capabilities will not be contingent upon different states preferences any more but will be specified by the human rights catalogue which is binding on that state. The content of those basic capabilities in turn, will be specified by international human rights law standards.

I believe that this is a very attractive proposal and one that should be developed forward. However, the obvious difficulty here is that the set of standards and indicators to measure state compliance in relation to economic and social rights, which are necessary to give universal content to some basic capabilities, is notably underdeveloped. The political and ideological reasons for this reality have been pointed out several times, just as the different intellectual "obstacles" to give these rights full enforceability have also been successfully contested.<sup>84</sup> However, given the current state of affairs, it is unfortunately an underdeveloped field. Vizard's proposal thought, could be instrumental in putting pressure on the monitoring bodies and other relevant actors to fully develop clear standards and indicators. Another issue to be developed further in this theory is the link of poverty with the violation of several civil and political rights.

Vizard's work is addressed to human rights and development communities. She highlights that international human rights law and the "capability approach" have complementary and reinforcing elements and that these elements provide the basis for a cross-disciplinary framework for analyzing poverty as a human rights issue. I believe she provides an important framework and conceptual clarity to the actual links between the idea of a "basic capability set", international human rights law and international machinery for monitoring and enforcement.

This is particularly important for the human rights community. It should be acknowledged that one of the main difficulties for human rights specialists is the lack of analytical tools to deal with complicated policy questions related to social and economic rights. Such questions call for interdisciplinary work, incorporating notions of economics, sociology and public policy into a human rights analysis. In this respect, Vizard's monograph is an important conceptual work for human rights practitioners, which helps to understand how to apply some basic economic concepts.

### *II.C. Poverty as a cause or consequence of human rights denials (or violations)*

This third conceptual approach conceives poverty as the cause of many human rights violations, mainly economic and social rights, but also civil and political rights. The difference with the first approach is that poverty is not considered *a priori* a human rights violation but a *cause* of human rights violations (because it socially excludes a group of people whose human rights are then systematically violated). Neither is it

considered a necessary result of human rights violations, pointing out however that some human rights violations lead to poverty.<sup>85</sup> The difference with the second approach on the other hand; is that poverty is not the violation of *one human right* such as the right to development; the right to an adequate standard of living or a combination of several others; but as a factual situation that may cause or be the result of several human rights violations.

The Vienna Declaration has characterized *extreme poverty as a violation of human dignity*<sup>86</sup> but avoided calling it a violation of human rights, arguably because of the reluctance of governments to accept legal responsibility.<sup>87</sup> It observes that the “existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights”.<sup>88</sup>

It seems that poverty is conceptualized as a situation where human rights are unlikely to be fulfilled and the fight against poverty as a beneficial atmosphere to the achievement of human rights. However poverty is not *per se* a violation of human rights, since there are several conceptual steps before naming poverty as a human rights violation. Philip Alston for example, considers that poverty is a violation of human rights only:

- to the extent that a government or other relevant actor has failed to take measures that would have been feasible (“to the maximum of its available resources”, as the language of the ICESCR puts it); and
- where those measures could have had the effect of avoiding or mitigating the plight in which an individual living in poverty finds him or herself.<sup>89</sup>

In a similar vein, the former UN Independent Expert on Human Rights and Extreme Poverty argued that poverty cannot be defined as the absence of human rights as these two concepts are not equivalent.<sup>90</sup> According to him, the link between the two concepts is not straight forward, since the space of ‘capability’ (the denial of which constitutes poverty) is much broader than human rights.<sup>91</sup> Poverty can be alleviated and human rights still violated. However, if human rights are realized there may not be any poverty.<sup>92</sup> He suggested that it would be more accurate to consider poverty eradication as playing an *instrumental role* in creating conditions of well-being for the rights holder<sup>93</sup> He pointed out that here the policy discussion will be centered on the fulfillment of those rights that may or may not be sufficient to eradicate poverty. He defended this proposition arguing that “[i]t can be demonstrated, both empirically and logically, that a violation of human rights would cause and be instrumental in creating a state of poverty”.<sup>94</sup> Thus, there are several steps from denial to violation:<sup>95</sup>

- First, identify concrete programs of action that are technically possible and institutionally viable (such as resource constraints and rules of international transactions).
- Second, identify duty holders and their specific duties, which if fully carried out would implement those programs (even if they do not have direct

responsibility for creating conditions of poverty it would be possible to say that the duty bearers are violating their obligations to fulfill the rights if there are feasible programs and they are not implementing them).

This position seems to be more realistic and legally accurate than the two previous ones. The complexities of the phenomenon of poverty, especially the diverse causes which are not always within the state's control, make it very difficult to assume that poverty implies human rights violations without further inquiries. It is clear that civil, political, economic and social rights will not all be fulfilled in a poverty scenario. However, with the present development of international human rights law and standards, it seems reasonable to require empirical and analytical evidence to establish that one specific deprivation, which is clearly characterized as poverty, is at the same time a human rights violation. The analytical effort needed is to prove that the state had violated a concrete human rights obligation that was feasible and could have had a positive impact.

## Conclusion

The different approaches summarized in this paper share the conviction that poverty is not only a deprivation of economic or material resources but also a violation of human dignity too. In that respect, it is indisputable that there are links between human rights violations and the complex social, cultural, political and economic aspects of the phenomenon of poverty. As a consequence, the development and the human rights field are beginning to overlap. For moral, legal and practical reasons that are beyond the scope of this paper; there is a consensus between the different conceptual frameworks analyzed here that a rights-based approach to poverty reduction is the best way of approaching the issue and will reinforce the fight against poverty in many significant ways. That is the main rationale behind the UN efforts to mainstream human rights into all their activities, particularly in the work of development agencies. With different degrees of success, ranging from UNDP unconditional adherence to this principle to IMF absolute ignorance, it is true that the discussion is alive and many interesting conclusions have been reached. In particular, the OHCHR *Draft Guidelines*<sup>96</sup> and a recent UNDP work on indicators,<sup>97</sup> as well as the work of several scholars, are important efforts to give concrete shape and guidelines to the claims of a human-rights based approach to development.

However, it is less clear what the implications for human rights practitioners of this human rights-based approach to development are. There is still a lack of clarity on basic conceptual notions relating to human rights violations which are somehow related or caused by poverty. As stated in this paper, this was mainly due to a political bias of the human rights community, exacerbated by Cold-War false dichotomy between civil and political rights on the one hand, and economic and social rights on the other.

Thus, there is a compelling need to develop analytical and strategic materials



that will link the phenomenon of poverty to human rights violations. This is especially important for human rights practitioners that takes the indivisibility of rights seriously and have empirical evidence of the range of human rights violations that people living in poverty suffer in a disproportionate way, compared to those who are not living in poverty. From that point of view; this paper summarized three different approaches that explain the link between poverty and human rights. They were critically analyzed not only according to their conceptual accuracy from a human rights law perspective; but taking into account how useful they are for human rights practitioners.

In my view, the first one is the least accurate and helpful; i.e. to consider poverty as a *per se* violation of human rights. It contains the risk of oversimplifying the issue and loosing clarity and impact in the attempt to link both fields. In the current state of affairs the third approach, which is to consider poverty as a cause of human rights violations, seems to be the safest and clearest. It does not require further elaboration by the international community given the consensus that has been expressed, at least rhetorically, many times. It also presents challenging questions such as defining clear obligations of duty holders, and presents an opportunity to further develop indicators, standards and other analytical tools to measure the compliance of obligations regarding economic and social rights. However, the second approach -to consider poverty as the violation of one specific human right- is normatively feasible and is the most ambitious. Among the different proposals, I believe Vizard's effort to conceptualize poverty as the violation of the human right to an adequate standard of living is the most powerful and promising one. In this respect, since human rights law is an evolving discipline and the human rights movement was effective and powerful in setting far reaching goals that will push the social change forward, this is an approach that should be developed and which the human rights movement should pay attention to.

More research needs to be done. In particular, some of the questions on definition of legal obligations, duty-holder and duty-bearer need to be answered. Also, whether there is a right to a particular action or to a reasonable policy and how that reasonableness should be defined. Moreover, we need to scrutinize whether the traditional human rights outcome-focus policy analysis needs to be revisited, particularly when a reasonable policy is not producing the fulfillment of human rights because of other social (or international) arrangements, which are outside the state's control. Finally, the donor-countries, intergovernmental agencies and private actors all have strong influence in the efforts to eradicate poverty and in associated policy decisions and their responsibility needs to be address. As such a central issue is to develop the nature of their obligations.

In today's world, the human rights movement is risking its credibility and moral strength if it fails to take account of the suffering of millions of people living in poverty and to name that suffering as a human rights violation. Intellectual obstacles cannot be used as an excuse anymore. The powerful human rights machinery needs to be put to the service of those who are still waiting to be invited to the banquet of this opulent world.

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## NOTES

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1. The present paper was first written as a directed research project undertaken under the supervision of Professor Philip Alston in his seminar "Human Rights Accountability" at New York University Law School, in August 2006. I would like to thank professor Alston for his guidance and support. The present version was corrected after the insightful comments of Maria Juarez, Andrew Hudson and Eitan Felner, to whom I would also like to thank. Especial thanks to Gabriel Pereira, for his support and encouragement and for being a constant inspiration and to my colleagues from ANDHES, who teach me every day the value of human rights militancy with commitment and professionalism. As it is usually said, all the views expressed are my exclusive responsibility. Please send comments to fernandadozcosta@hotmail.com.
2. From his book: GALEANO, Eduardo: *Upside Down: A Primer for the Looking-Glass World*, New York: Metropolitan Books, 2000.
3. ROBINSON, M. In: VIZARD, P. *Poverty and human rights, sen's capability perspective explored*. Oxford University Press, 2006, p. vi.
4. BEETHAM, D. *What Future for Economic and Social Rights?*. *Political Studies Association*, Sheffield v. XLIII, p. 41-60, 1995, p. 44.
5. SENGUPTA, A. *Poverty Eradication and Human Rights*, In: *Freedom from poverty as a human right – Who owes what to the very poor?*. POGGE, T. (ed.). Oxford, Oxford University Press, 2007, p. 323
6. KUNNEMANN, R. *A coherent Approach to Human Rights*. *Human Rights Quarterly*, Baltimore, Maryland v. 17, 1995, p. 334.
7. NELSON, P. J., *New rights advocacy: changing strategies of development and human rights NGOs*, Washington DC: Georgetown University Press, 2008, p. 14.
8. Vienna Declaration and Programmed of Action (U.N. GAOR). *World Conferences on Human Rights*, 1993, UN DOC A/CONF.157/24.
9. Resolutions of the Commission on Human Rights on Extreme Poverty: E/CN.4/RES/2004/23, E/CN.4/RES/2003/24, E/CN.4/RES/2002/30, E/CN.4/RES/2000/12, E/CN.4/RES/1999/26, E/CN.4/RES1998/25, E/CN.4/RES/1997/11, E/CN.4/RES1996/10, E/CN.4/RES1995/16, E/CN.4/RES1994/12, E/CN.4/RES/1993/13, E/CN.4/RES/1992/11, E/CN.4/RES/1991/14, E/CN.4/RES/1990/15, E/CN.4/RES/1989/10, E/CN.4/RES/1988/23. Relevant resolutions of the General Assembly: A/RES/57/211, A/RES/53/146, A/RES/47/196, A/RES/46/121. Cited in Vizard, supra note 2, FN 12.
10. UNDP set the basis for conceptually linking human rights and poverty mainly through *The Human Development Reports* (HDR), a series of independent reports commissioned by the UNDP and written by experts. A second attempt in the UN was made by the UN Commission on Human Rights who appointed an *independent expert on the question of human rights and extreme poverty*. The position was originally held by Ms. A. M. Lizin (Belgium), from April 1998 to July 2004. Since 2004 is held by Mr. Arjun Sengupta (India), who was previously the UN Independent Expert on the Right to Development from 1999 to 2004. This new expert produced two interesting and much more sophisticated reports, which also tried to fill the conceptual gap. On the other hand, in 2001, the Chairperson of the United Nations Committee on Economic, Social and Cultural Rights requested the Office of the High Commissioner for Human Rights (OHCHR) to develop the "*Draft guidelines: A Human Rights Approach to Poverty Reduction Strategies*", which aim to provide practitioners involved in the design and implementation of poverty reduction strategies (PRS) with operational guidelines for the adoption of a human rights approach to poverty reduction. After their preparation, three experts -Professors Paul Hunt, Manfred Nowak and Siddiq Osmani- prepared a *discussion paper* that identified some of the key conceptual and practical issues which arise from the application of human rights principles to poverty reduction strategies (HUNT, P., NOWAK, M. & OSMANI, S. *Human Rights and Poverty Reduction, a conceptual framework*, OHCHR, HR/PUB/04/1. 2004). Finally, UNESCO launched a major project in 2001 called "*Poverty Dimensions Relatives to Ethics and Human Rights: Towards a New Paradigm in the Fight Against Poverty*" (UNESCO. *Poverty Dimensions Relatives to Ethics and Human Rights: Towards a New Paradigm in the Fight Against Poverty*, 2001). The project is aimed at developing the conceptual framework for the consideration of poverty as a human right violation (a compilation of main papers discussed on that project were published: POGGE, T. (ed.). *Freedom from poverty as a human right – Who owes what to the very poor?*. Oxford, Oxford University Press, 2007.
11. In 1997 the Secretary-General designated

human rights as a cross-cutting issue in his reform programme (UNITED NATIONS Secretary-General. **Renewing the United Nations: A Programme for Reform, A/51/950**, 14 July 1997. Available at: <<http://www.unhcr.ch/development/mainstreaming-01.html>>, last access on August 2008 ). Mainstreaming human rights refers to the concept of enhancing the human rights programme and integrating it into the broad range of United Nations activities, also in the areas of development and humanitarian action.

**12. UNITED NATIONS.** The Human Rights Based Approach to Development: Towards a Common Understanding Among UN Agencies. **Inter-Agency workshop on Human Rights Based Approach in the context of UN Reform**, Stamford, May 5-7 2003.

**13.** See for example "*Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*", prepared by Paul Hunt, Manfred Nowak and Siddiq Osmani for the Office of the United Nations High Commissioner for Human Rights (OHCHR); UNDP. **Indicators for human rights based approaches to development in UNDP Programming: a user's guide**, Mar. 2006.

**14. SENGUPTA, A.** Poverty eradication and human rights. UNESCO project entitled "Ethical and human rights dimensions of poverty: towards a new paradigm in the fight against poverty". Paper produced for a philosophy seminar, Sept. 2003, New Delhi. Available at: <[http://www.hsph.harvard.edu/xfbcenter/No.20\\_Sengputa.pdf](http://www.hsph.harvard.edu/xfbcenter/No.20_Sengputa.pdf)>. Last access on: 18 Nov. 2008, p. 4.

**15.** In the academic literature, although many scholars discussed the issue, there are two main attempts to overcome this difficulty and to construct a coherent theory of poverty and human rights. One was made by Thomas Pogge: Pogge, T. **World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms**. Cambridge, Polity Press, 2002. Pogge argues that Western government and citizens have a negative duty to relieve the deplorable situation of the globally worst-off, because they imposed a coercive global order that perpetuates severe poverty for many who cannot resist this imposition, "depriving them of the objects of their basic rights". The other attempt was made by Vizard, 2006.

In this book she analyses how Amartya Sen's work advanced international thinking about global poverty and human rights. Her main thesis in this respect is that Sen's development of the 'capability approach' provides a framework in which the capability to achieve a standard of

living adequate for survival and development is characterized as a basic human right that governments and other actors have individual and collective obligations to defend.

**16.** For example the magazine *The Economist* have said that giving to economic and social rights a similar status to civil and political ones would produce a "morally distasteful" outcome because "some nations would be subject to condemnation simply because of their poverty, while others would be arraigned for the policy outcomes of decisions taken democratically". Righting wrongs. **The Economist**, London, 16 August 2001.

**17.** Marks, S.P. The Human Rights Framework for Development: Seven Approaches. In: BASU, M., NEGI, A. & SENGUPTA (eds.). **Reflections on the Right to Development**. New Delhi: Sage Publications, 2005, pp. 23-60. Available at: <<http://www.hsph.harvard.edu/xfbcenter>>. Last access on August 2006.

See also ALSTON, P. Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals. **Human Rights Quarterly**, vol. 27, n. 3, Aug. 2005, 755-829 p., p. 799.

**18. SACHS, J.** **Human Rights Perspectives on the Millennium Development Goals: Conference Report**. Center for Human Rights and Global Justice/New York: NYU School of Law, 2003, 10-11 p. Available at <<http://www.nyuhr.org/images/NYUCHRGMJDGREPORT2003.pdf>>. Last access on August 2006.

**19. SAUNDERS, P.** Towards a Credible Poverty Framework: From income Poverty to Deprivation. **Social Policy Research Center Discussion Paper**, Sydney, University of New South Wales, n. 131, Jan. 2004, p. 7.

**20. COMMISSION ON HUMAN RIGHTS.** Economic, Social and Cultural Rights, Human Rights and extreme poverty. **Report of the independent expert on the question of human rights and extreme poverty by Arjun Sengupta**. UN DOC: E/CN.4/2005, 11 Feb. 2005, § 3. From now on cited as "*Independent Expert Report 2005*". Even within this usual definition of poverty, there are several disagreements in conceptual terms and even greater ones regarding how to measure it; the analysis of which exceeds the scope of this paper.

**21. SACHS, J. D.** **The end of poverty, economic possibilities for our time**. New York, The Penguin Press, 2005, p. 20.

**22. ALLEN, T. & THOMAS, A. (eds.).** **Poverty**

and Development into the 21<sup>st</sup> Century. Oxford: Oxford University Press, 2000. p. 10.

23. SACHS, 2005, p. 20. Although the WB poverty line is very well known, both in scholars and popular circles, it was also critiqued. See for example REDDY, S.G. & POGGE, T. **Unknown: The Extent, Distribution, and Trend of Global Income Poverty**. Available at: <<http://www.socialanalysis.org/>>. Last access on August 2006.

(arguing that an arbitrary international poverty line unrelated to any clear conception of what poverty is, employs a misleading and inaccurate measure of purchasing power 'equivalence' that creates serious and irreparable difficulties for international and inter-temporal comparisons of income poverty, and extrapolates incorrectly from limited data and thereby creates an appearance of precision that masks the high probable error of its estimates). Allan Thomas has also acknowledged that "what it is regarded as poverty is not absolute but depends on the value system of a particular society." Allen & Thomas (eds.), 2000, p.20.

24. "Income poverty is only one constituent element of well-being and plays an instrumental role determining the enjoyment of other elements constituting well being." UN DOC: E/CN.4/2005, 11 Feb. 2005, § 8.

25. VIZARD, 2006, p. 3.

26. DRÈZE, J. & SEN, A.K. **India: Development and Participation**. New Delhi: Oxford University Press, cited in VIZARD, 2006, p. 3.

27. There are two HPIs, one for developing countries and another one for industrialized ones. They use different standards for measure those three dimensions and the latest includes a fourth dimension: social exclusion. UNDP. **Human Development Report 2003: Millennium Development Goals: a Compact Among Nations to End Human Poverty**. New York: Oxford University Press, 2003, p. 61.

28. UNDP. **Human Development Report 1997: Human Development to Eradicate Poverty**, p. 17. Available at <<http://hdr.undp.org/reports/global/1997/en/>>. Last access on August 2006.

29. European Foundation for the Improvement of Living and Working Conditions. **Public welfare Services and Social Exclusion: the Development of Consumer Oriented Initiatives in the European Union**. Dublin, 1995, cited in ALLEN & THOMAS (eds.), 2000, p.14.

30. RAWLS, J **The Idea of Public Reason Revisited**. In: **The Law of Peoples**. Cambridge: Harvard University Press, 1999, p. 133. See also

RAWLS, J. **Political Liberalism**. New York: Columbia University Press, 1996, ch. *Xviii* and *xx*, pp. 227-230.

31. Commission on human rights. Economic, Social and Cultural Rights, Human Rights and extreme poverty. **Report of the independent expert on the question of human rights and extreme poverty by Arjun Sengupta**. UN DOC: E/CN.4/2005, 2 Mar. 2006 and COMMISSION ON HUMAN RIGHTS. Economic, Social and Cultural Rights, Human Rights and extreme poverty. **Report of the independent expert on the question of human rights and extreme poverty by Arjun Sengupta**. UN DOC: E/CN.4/2006/43; 2 March 2006, § 55.

32. At a conceptual level, the moral discussion about why and how poverty is a human rights violation – as well as a violation of the economic and social rights usually primarily compromised by poverty - is particularly important, because of the rudimentary development of the field, in comparison with the ethical and political justification for civil and political rights. A brief summary of this difficulty and the main answers is discussed on chapter II.B.

33. VIZARD, 2006, p. 103.

34. ROBINSON, M. BBC NEWS, Thursday, 21 Nov. 2002. Available at <[http://news.bbc.co.uk/2/low/talking\\_point/forum/1673034.stm](http://news.bbc.co.uk/2/low/talking_point/forum/1673034.stm)>. Last access on August 2006.

This approach is re-stated in her preface to the OHCHR. **Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies**, Preface, 2002. Available at <[www.unhchr.ch/development/povertyfinal.html](http://www.unhchr.ch/development/povertyfinal.html)>. Last access on August 2006.

35. UNDP. **Poverty reduction and human rights: a practice note**, 2003. Available at: <<http://www.undp.org/poverty/practicenotes/povertyreduction-humanrights0603.pdf>>. Last access on August 2006.

36. OHCHR, **Human Rights and Poverty Reduction, a conceptual framework**, New York and Geneva, 2004, available at <http://www.unhchr.ch/html/menu6/2/povertyE.pdf>. Last access on August 2008.

37. *Ibid*, p. 10.

38. *Ibid*, p. 6. As it will be shown bellow, it was argued that the transition from capabilities to rights is not "natural" or necessary.

39. Freedom here is conceived in a broad sense, to encompass both positive and negative freedoms. Thus, a person's freedom to live a healthy life is contingent both on the requirement



that no one obstructs her legitimate pursuit of good health – negative freedom, and also on the society’s success in creating an enabling environment in which she can actually achieve good health – positive freedom. *Ibid*, p. 7.

40. *sen, A. Inequality Re-examined.*

Cambridge: Harvard University Press, 1992, p. 109, cited in HUNT, NOWAK & OSMANI, HR/PUB/04/1, 2004, p.7.

41. OHCHR, *Human Rights and Poverty Reduction, a conceptual framework*, New York and Geneva, 2004, p. 9. Available at <<http://www.unhcr.ch/html/menu6/2/povertyE.pdf>>. Last access on August 2008.

42. “The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.” UNITED NATIONS. Committee on Economic, Social and Cultural Rights. *The nature of States parties obligations*. General Comment 3, UN Doc. HR1/GEN/1/Rev.1 at 45, 1990, § 1 and 10.

43. HUNT, P. NOWAK, M. & OSMANI, S. *Human Rights and Poverty Reduction, a conceptual framework*, OHCHR, HR/PUB/04/1. 2004, p. 7. Emphasis added.

44. *Ibid*, p. 6.

45. *Ibid*, p. 8.

46. *Ibid*, p. 11.

47. *Ibid*, p. 9.

48. UNITED NATIONS. Committee on Economic, Social and Cultural Rights. *The nature of States parties obligations*. General Comment 3, UN Doc. HR1/GEN/1/Rev.1 at 45, 1990, par.10.

49. *Ibid*.

50. CHAPMAN, A. & RUSSELL, S. (eds.). *Core Obligations: building a framework for economic, social and cultural rights*. Brussels: Intersentia, 2002, p. 16.

51 International Social Science Council. Comparative Research Programmed on Poverty (CROP), UNESCO Sector for the Social and Human Sciences/CROP consultation on the Draft Document *Abolishing Poverty Through the International Human Rights Framework: Towards an Integrated Strategy for the Social and Human Sciences*. *Draft V.3 24.03.03*, Report, 2003, p. 3.

52. CAMPBELL, T. Poverty as a violation of Human Rights: Inhumanity or Injustice? In: *Freedom from poverty as a human right – Who*

*owes what to the very poor?*. Pogge, T. (ed.). Oxford, Oxford University Press, 2007, page 55.

53. VIZARD, 2006, *supra* cited.

54. *Ibid*.

55. MORSINK, J. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Philadelphia, PA, University of Pennsylvania Press, 1999, p. 88-91.

56. POGGE, T. *World poverty and human rights: Cosmopolitan responsibilities and reforms*. Cambridge: Polity Press, 2002, p. 53.

57. *Ibid*, p.145 and 172.

58. Rawls influential thesis of justice as fairness argues that the liberal requirement of justice includes a strong component of equality among citizens, because of the importance of a person’s real opportunity to pursue his or her objectives. Thus, Rawls’ famous principles of justice, aim to (1) equalize the basic liberties enjoyed by all people and (2) maximize the value of equal basic liberties of the least advantaged by regulating inequalities in primary goods according to the ‘difference principle’.

RAWLS, J. *Political Liberalism*. New York: Columbia University Press, 1993). However, according to Rawls the component of equality is a political demand, not a moral one, and thus applies only to the nation state (NAGEL, T. *The Problem of Global Justice*. *Philosophy and Public Affairs*, v. 33, n. 2, 2005, p. 144, citing RAWLS, J. *The Law of Peoples*. Cambridge: Harvard University Press, page 37, 1999). As a consequence he argued that although we might have a duty to assist ‘burdened societies’ to overcome their ‘unfavorable conditions’, we have no responsibility for poverty in many developing countries because it is caused by the incompetence, corruption and tyranny entrenched in their governments, institutions and cultures (according to TSAGOURIAS, N., POGGE, T. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Book Review). *Leiden Journal of International Law*, The Hague, v. 17, p. 631-644, 2004.

Thus, under Rawl’s theory then, there is not an universal human rights to be free from poverty.

59. TSAGOURIAS, 2004, *supra* cited, p. 631-644.

60. Pogge describes a proposal in which governments must pay a small part of revenues for using or selling the natural resources extracted from their territory to a ‘global resources dividend’ (comparable to the Tobin Tax). These revenues then are redistributed to the globally worst-off to ensure that they can meet

- their own basic needs. POGGE, 2002, p. 196-7.
61. VIZARD, 2006, *supra* cited, p. 25.
62. Vizard argues that Sen has moved forward the Rawlsian position by contesting the concept of 'primary goods' of Rawls' second principle of justice, because of its failure to capture the interpersonal differences and the valuable ends of different people. Sen argues that this variable can be taken into account without losing objectivity and that it is in fact critical to the characterization of someone's lack of freedoms. He proposes to replace the 'primary goods' concept with the 'capability of functions', which is better suited to achieve real or substantive opportunity. VIZARD, 2006, p. 65-70.
63. VIZARD, 2006, p. 81. "On the other hand, Sen is contesting some of the basic assumptions of both the libertarian and liberal tradition, specially through the support of a system of ethical evaluation that are sensitive to consequences, outcomes and results; support for positive obligations of assistance and aid, including the relaxation of the condition of 'co-possibility' and support for the general class of meta rights; support for human rights in the context of 'imperfect obligations and support for universalism against the relativist and culture-based critiques." For a complete account of Sen's contributions to the ethical and political debate see VIZARD, 2006, ch. 2 and 3.
64. ICESCR, 1966, articles 1.1 (right to development) and 11 (right to an adequate standard of living). See for example Campbell, 2007, p. 60.
65. UN DOC: E/CN.4/2006/43, 2 Mar. 2006, §41.
66. *Ibid*, §60.
67. *Ibid*, §62.
68. *Ibid*, §70. He argues that "the principal reason why poverty eradication has not become a general objective of social policy in all societies, superseding all other objectives, as the case would be for human rights norms, would be the unmanageability of the total number of people suffering from such poverty. The definition of extreme poverty set out in this report would meet this problem by reducing the total number of people affected". *Ibid*, §62
69. Such as the right to food, health, education, social security and an adequate standard of living from the ICESCR; and the right to association, information and freedom of expression from the ICCPR. *Ibid*, §49.
70. *Ibid*, §61.
71. *Ibid*, §70.
72. *Ibid*, §§ 31,33 and 43.
73. Arjun Sengupta was UN Independent Expert of Extreme Poverty and human Rights from August 2004-April 2008. His position as UN expert was summarized above. He was previously the Independent Expert for the Right to Development. In this recent paper, prepared for the mentioned UNESCO international seminars, he presents his own views which have some differences from his position expressed as Independent Expert in his reports of 2005/6.
74. See UNITED NATIONS. **Declaration on the Right to Development**, Adopted by United Nations General Assembly resolution 41/128 of 4 December 1986 and **Vienna Declaration and Programme of Action**, adopted by the World Conference on Human Rights on 25 June 1993 (UN DOC: A/CONF.157/23). See also SENGUPTA, A. *The Theory and Practice of the Right to Development*. **Human Rights Quarterly**, The Johns Hopkins University Press, Volume 24 Number 4 pages 837-889, Nov. 2002.
75. SENGUPTA, A. *Poverty Eradication and Human Rights*, In: **Freedom from poverty as a human right – Who owes what to the very poor?**. Pogge, T. (ed.). Oxford, Oxford University Press, 2007, page 338.
76. *Ibid*.
77. VIZARD, 2006.
78. *Ibid*, p. 66.
79. United Nations Charter, articles 55 and 56; the Universal Declaration of Human Rights (UDHR), articles 1(1), 25 and 26; the International Covenant on Civil and Political Rights (ICCPR), preamble and article 6; the International Covenant of Economic, Social and Cultural Rights (ICESCR), preamble and articles 11, 12, 13 and 14; International Convention on the Elimination of All forms of Racial Discrimination, article 5 (e); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), articles 11, 12, 13, 14(1-2) and the Convention on the Rights of the Child, articles 1, 24, 26, 27, 28, 29. VIZARD, 2006, p. 143.
80. In this sense, although her position is categorized in this third group of conceptual proposals, which defends the notion of an independent human right to be free from poverty, her work is much broader and more useful in clarifying the consequences of any of the previous approaches. Moreover, her monograph is

important for the much needed clarification of the content and scope of many economic and social rights.

81. The connections are: (1) a broad conception of human rights that takes account of global poverty (2) Rejection of 'absolutism' and the view that resource constraints represent a theoretical obstacle to the establishment of international legal obligations in the field of global poverty and human rights; (3) Recognition of positive obligations of protection and promotion; (4) Recognition of general goals (as well as specific actions) as the object of human rights; (5) Assessment of the 'reasonableness' of state actions; (6) Importance of rights to policies and programs (or 'meta rights') when resource constraints are binding; (7) Recognition of collective international obligations of cooperation, assistance and aid; (8) Recognition of the importance of outcomes and results to the evaluation of human rights. VIZARD, 2006, p. 141.

82. Ibid, pp. 242-3.

83. Ibid, p. 244.

84. Particularly useful is BEETHAM, D. What Future for Economic and Social Rights?. *Political Studies*, Sheffield, v. XLIII, p. 41-60, 1995.

For a complete critical account and response to all the obstacles to economic and social rights justiciability see ABRAMOVICH, V. & CURTIS, C. *Los Derechos Sociales como Derechos Exigibles*. Buenos Aires: Trotta Ed., 255 p. 2002.

85. Campbell, 2007, p. 60.

86. VIENNA DECLARATION AND PROGRAMME OF ACTION, adopted by the World Conference on Human Rights on 25 June 1993 (UN DOC: A/CONF.157/23).

87. ALSTON, 2005, p. 787.

88. UN DOC A/CONF.157/24, 1993, cited in Alston, 2005, p. 786.

89. ALSTON, 2005, p. 787.

90. UN DOC: E/CN.4/2006/43, 2 Mar. 2006, §41.

91. Ibid, §27.

92. Ibid.

93. Ibid.

94. UN DOC: E/CN.4/2005, 11 Feb. 2005, §29. Nonetheless, in his 2006 report he argues in favor of considering *extreme poverty* as a violation of a human right to an adequate standard of living (UN DOC: E/CN.4/2006/43, 2 Mar. 2006, §48.). This approach was analyzed above in the second group of theories: A human right to be free from poverty.

95. UN DOC: E/CN.4/2005, 11 Feb. 2005, §27.

96. OHCHR, *Draft guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Geneva, 2002. Available at <[www.unhchr.ch/development/povertyfinal.html](http://www.unhchr.ch/development/povertyfinal.html)>. Last access on August 2008.

It aims to provide practitioners involved in the design and implementation of poverty reduction strategies (PRS) with operational guidelines for the adoption of a human rights approach to poverty reduction.

97. UNDP, *A Users's Guide*, Mar. 2006. This practical guide addressed to UNDP Country Offices contain different aspects relating development and use of indicators across the key elements of human rights programming, summarizing the main existing indicators for human rights and discussing their limitation for development programming.

## RESUMO

Definir a pobreza como uma violação de direitos humanos envolve conceitos ainda pouco claros. Isto é especialmente problemático para aqueles que trabalham em direitos humanos e levam a sério a indivisibilidade própria destes direitos; para aqueles que procuram entender o papel central da pobreza no sofrimento de muitas vítimas de direitos humanos e se preocupam em atuar de maneira profissional neste tema, utilizando como ferramenta na luta contra a pobreza as obrigações de direitos humanos já reconhecidas internacionalmente. O presente artigo procura esclarecer esta lacuna conceitual, apresentando um resumo crítico das principais propostas para elucidar, a partir de uma perspectiva jurídica dos direitos humanos, os conceitos pertinentes à relação entre pobreza e direitos humanos. Este artigo identifica três formas distintas de relacionar estes conceitos: (1) teorias que concebem a pobreza, *por si só*, como uma violação de direitos humanos; (2) teorias que definem a pobreza como uma violação de *um direito humano específico*, a saber, o direito a um nível de vida adequado ou o direito ao desenvolvimento; e (3) teorias que consideram a pobreza como *causa ou consequência de violações de direitos humanos*. Defenderei, em minha conclusão, que a terceira abordagem é a mais útil diante do atual estágio do direito e da jurisprudência internacionais de direitos humanos. A segunda perspectiva, no entanto, tende fortemente a promover o debate sobre pobreza e direitos humanos e, portanto, deveria ser melhor elaborada.

## PALAVRAS-CHAVE

Pobreza – Direitos humanos – Desenvolvimento – Nível de vida adequado – Obrigações jurídicas

## RESUMEN

La autora afirma que no existe aún claridad conceptual en la noción de la pobreza como violación a los derechos humanos. El artículo intenta clarificar este vacío conceptual. Presenta un resumen crítico de los intentos más importantes de clarificar la conexión entre pobreza y derechos humanos desde la perspectiva del derecho internacional de los derechos humanos. Analiza diferentes marcos conceptuales, sus fortalezas y sus debilidades. El artículo identifica tres modelos diferentes para vincular ambos conceptos: (1) teorías que conciben a la pobreza como una violación de derechos humanos *en sí misma*; (2) teorías que conceptualizan a la pobreza como una violación a *un derecho humano específico*, a saber el derecho a un nivel adecuado de vida o al desarrollo; y (3) teorías que conciben a la pobreza como una *causa o consecuencia de violaciones a los derechos humanos*. El ensayo concluye que el tercer enfoque es el más útil en el estado actual de desarrollo del derecho y la jurisprudencia internacional, pero que el segundo enfoque tiene mucho potencial para avanzar la agenda de pobreza y derechos humanos que debe continuar siendo desarrollada.

## PALABRAS CLAVES

Pobreza - Derechos humanos - Desarrollo - Nivel adecuado de vida - Obligaciones legales



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#### ABSTRACT

In spite of positive developments in the last 60 years, the worldwide promotion and protection of economic and social rights remains a daunting challenge. While millions of people are deprived of clean water, primary health care and basic education, most states do not recognize economic and social rights as more than abstract declarations of principles. Also, governments and international organizations usually tackle these questions exclusively as development challenges, ignoring their relation to human rights obligations. In this article, there is an initial attempt to set out a methodological framework to illustrate how some simple quantitative methods can be used in concrete situations to assess whether a state is violating its human rights obligations. Quantitative tools can help us, as human rights advocates, not only to persuasively show the scope and magnitude of various forms of rights denial, but also in revealing and challenging policy failures that contribute to the perpetuation of those deprivations and inequalities.

Original in English.

#### KEYWORDS

Human rights accountability – Quantitative methods – Economic and social rights – Center for Economic and Social Rights



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# A NEW FRONTIER IN ECONOMIC AND SOCIAL RIGHTS ADVOCACY? TURNING QUANTITATIVE DATA INTO A TOOL FOR HUMAN RIGHTS ACCOUNTABILITY

Eitan Felner<sup>1</sup>

## Introduction

### *Taking stock on economic and social rights*

Milestones are often an occasion for introspection. This year the international community is celebrating the 60th anniversary of the Universal Declaration of Human Rights. It is also 15 years since the UN World Conference on Human Rights in Vienna, in which all States affirmed the indivisibility and interdependence of human rights and called for renewed efforts to ensure recognition of economic, social and cultural rights at the national, regional and international levels.

This is therefore a timely opportunity to assess the progress made in the field of economic and social rights since then. The international community has given increasing recognition to the indivisibility and interdependence of all human rights: civil, political, economic, social and cultural. At the same time, extraordinary progress has been made by academics and human rights advocates in articulating both the content of economic, social and cultural rights (ESC rights), and the nature of the corresponding state obligations.

In spite of these positive developments, the worldwide promotion and protection of economic and social rights remains a daunting challenge. While millions of people are deprived of clean water, primary health care and basic education, most states do not recognize economic and social rights as more than abstract declarations of principles. When governments and international organizations address problems of health, education, clean water and housing, they usually tackle these exclusively as development challenges, ignoring their relation to human rights obligations. This

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*Notes to this text start on page 139.*

was the case over a decade ago at the World Summit for Social Development and is still the case today, as demonstrated by the Millennium Development Goals, to which links to human rights have been made only as an after-thought.

The limited inroads human rights advocates have made in development debates is in part due to states' reluctance to accept legal accountability in areas of economic and social policy. But the failure of the human rights movement to develop effective monitoring tools in this field may also be a contributing factor.

### *The challenge of making economic and social rights operational*

Developing rigorous monitoring tools has been an uphill battle for human rights advocates working on economic and social rights. A major obstacle in developing such tools has been the manner in which state obligations have been defined with respect to economic and social rights. Under international law, states are required to take steps "with a view to achieving progressively the full realization" of economic and social rights "to the maximum of their available resources".<sup>2</sup>

Some state obligations of immediate effect have also proven difficult to monitor. These include core obligations to ensure at least "minimum levels" of enjoyment of the essential elements of economic and social rights, such as access to essential foodstuffs, basic health care and primary education.<sup>3</sup> Another is the obligation to guarantee the exercise of rights without discrimination, particularly to reduce disparities **resulting from the unfair distribution of goods and services**.

Monitoring these various dimensions of state obligations requires a methodology not based exclusively on qualitative research; the methodology should also include quantitative tools. These tools are not typically part of human rights organizations' research toolkits, which in many cases were originally developed to monitor civil and political rights.<sup>4</sup> As Michael Ignatieff and Kate Desormeau point out,

*Even where relevant data is available over time we are uncertain how to interpret it, how to use it to guide our human rights arguments. Many practitioners are unsure how to conduct their own studies; many too are uncertain where to find relevant statistics and unsure what to do with them once they have found them.*<sup>5</sup>

Given the difficulties of monitoring the dimensions of ESC rights obligations that require the use of quantitative tools, measuring progressive realization according to maximum available resources, both the UN Committee on Economic, Social and Cultural Rights (CESCR) and human rights NGOs have usually refrained, when monitoring specific countries, from addressing issues of ESC rights that are bound to the requirements of progressive achievement and resource constraints,<sup>6</sup> focusing instead on various immediate obligations related to ESC rights which are not dependent on resource availability.<sup>7</sup> These obligations include the *duty to respect*, which requires the state to refrain from interfering with people's exercise of a right; the *duty to protect*, which requires the state to

ensure that third parties do not interfere, primarily through effective regulation and remedies,<sup>8</sup> as well as the most tangible aspects of the *duty to guarantee the exercise of rights without discrimination*, particularly discrimination formally enshrined in law or discriminatory practices carried out by public officials, such as doctors, teachers, etc.

For example, in recent years, international NGOs have documented violations such as denying access to health and education for minority communities,<sup>9</sup> failing to enact or enforce laws on women's property rights,<sup>10</sup> carrying out arbitrary forced evictions,<sup>11</sup> or restricting humanitarian agencies' access to refugee camps to deliver food in emergencies.<sup>12</sup>

While this focus has been effective in many ways, sidestepping the standards of resource availability and progressive realization - and to some extent, also the standard of minimum core obligations -<sup>13</sup> have severely constrained the ability of the human rights movement to address broader issues of public policy that have a huge impact on the realization of ESC rights. Millions of people around the world are victims of avoidable deprivations such as illiteracy, preventable diseases, malnutrition and homelessness, which are not necessarily the result of interference by the State or third parties in the exercise of their ESC rights. These avoidable deprivations cannot be attributed to violations of the duties to respect or protect human rights. Nevertheless, whether these people can enjoy their ESC rights often depends on whether they have access to adequate health care or quality education and these largely (albeit not only) depend on the availability of resources.<sup>14</sup>

Moreover, without a monitoring methodology to address these crucial issues, advocacy efforts are severely undermined. Governments can easily claim, for instance, that the lack of progress is due to insufficient resources when, in fact, the problem is often not the *availability*, but rather the *distribution*, of resources.

### *Using indicators to monitor economic and social rights*

In recent years, there has been a growing recognition of the value of using indicators for human rights monitoring.<sup>15</sup> The idea has been the subject of numerous international academic conferences and a myriad of articles. Meanwhile, the UN human rights machinery has increasingly called for the production and use of human rights indicators, and various UN human rights mechanisms have responded by laying out a set of indicators to monitor compliance with human rights norms pertaining to economic and social rights.<sup>16</sup>

All these efforts have helped lay the groundwork for using quantitative data to monitor ESC rights. In particular, these efforts have contributed to clarifying the potential benefits of applying indicators for monitoring economic and social rights, setting out a typology for the development and selection of human rights indicators and proposing specific indicators related to specific rights.

However, despite all this progress made at the conceptual level, these various



sets of proposed indicators have only rarely been used in the assessment of specific countries.<sup>17</sup> So far, there are more conferences and articles about human rights indicators than actual use of indicators in monitoring the compliance of a specific state on ESC rights.

What may be missing to turn indicators into an operational tool to monitor economic and social rights in specific situations is a methodology toolbox that would explain more specifically how and when to use these indicators. Much the same way as having a grocery shopping list is not sufficient to make a meal, having a list of human rights indicators is not sufficient to assess compliance. As with cooking, what is also needed is a set of recipes, or a toolbox of simple methods that explains how indicators could be used in order to assess the compliance of specific countries with regard to the multiple dimensions of rights obligations. Only after such tools are developed, will it be possible to actually apply the multiple sets of indicators that have been proposed in recent years to monitoring specific rights in specific countries.

In the remaining of this article, I will make an initial attempt to set out a methodological framework for this toolbox and to illustrate how some simple quantitative methods, both alone and combined with qualitative research, can be used in concrete situations to assess whether a state is violating its human rights obligations. The quantitative tools presented in this article are just a few examples of the Center for Economic and Social Rights' current efforts to develop a methodological toolbox to monitor economic and social rights. At this stage this toolbox is being developed for only two rights – the right to education and the right to health – both because they are prominent in many monitoring and advocacy efforts and because these are two areas of public policy related to ESC rights in which there is more data available. It should be stressed that the tools presented here reflect only the initial efforts in developing the toolbox. They are illustrations of a work in progress and should be treated as such. CESR invites critiques of the underlying assumptions, methodological tools and conclusions in order to correct or refine the tools for future use.

Talk of quantitative tools may raise some concern among many human rights advocates that what is proposed in this article is a set of complicated methods that are beyond the reach of most human rights NGOs or international monitoring mechanisms and that they turn human suffering and injustice into rarefied statistical techniques, thereby diminishing the potential of numbers as a powerful advocacy tool. But quantitative methods do not necessarily have to be complex in order to be effective monitoring and advocacy tools. To take the cooking analogy further, just as it is possible to make both sophisticated and simple food recipes, it is also possible to measure states' efforts to comply with their human rights obligations using either sophisticated tools (such as benefit incidence analysis, public expenditure tracking surveys or complex costing exercises) or simple tools.

Accordingly, this article presents some simple quantitative tools based on descriptive statistics that any human rights advocate could use without advanced technical knowledge.

## Conceptual and methodological issues

Before discussing the specific tools that can be used to monitor ESC rights, it is necessary to clarify some conceptual and methodological issues related to the nature of human rights indicators and to the various purposes for which they could be used.

### *Human rights indicators –multiple uses and users*

The differences between the various frameworks proposed to use indicators in the monitoring of economic and social rights might be partially attributed to differences in conceptual and methodological premises, but it is also related to the different end goals of each of these initiatives. In the field of economic and social rights, as in other fields, indicators and data are often used for more than one purpose and by more than one type of user (be it an organization or an individual).

For example, the quantitative tools that a UN Human Rights Treaty Body would use to monitor compliance with an international convention would probably be very different than those used by an international development agency interested in assessing human rights progress by individual countries to help them determine their aid priorities.<sup>18</sup> Furthermore, the use of quantitative tools by a government committed to integrating human rights principles into its public policies<sup>19</sup> would be quite different than that of an advocacy human rights NGO that is interested in exposing, and perhaps “naming and shaming,” a government that is unwilling to adopt policies in line with its human rights obligations.

The tools presented here are meant primarily to serve national and international NGOs as well as international monitoring bodies to monitor compliance of state obligations related to economic and social rights. Nevertheless, it is our hope that the tools will also serve other users and might be adapted for different purposes.

### *A focus on accountability for avoidable deprivations*

Most indicators proposed by various authors to monitor ESC rights are in fact development indicators, commonly used by international agencies such as the World Bank, UNICEF or WHO to monitor and conduct research on issues such as health, education and food security. This is not only the case with ‘outcome indicators’ which measure the extent to which a population enjoys a specific right such as chronic malnutrition rates or illiteracy rates, but also with ‘process indicators,’ measure various types of efforts being undertaken by the State, as the primary duty-holder of ESC rights, in implementing its obligation, such as the proportion of births attended by health skilled personnel.<sup>20</sup> Both of these types of indicators are the bread and butter of any analysis done by development economists, epidemiologists and other social scientists who conduct public policy research and analysis.

Although indicators to monitor ESC rights might be the same ones commonly

used in the field of development, it is the purpose for which they are used that can transform indicators such as child mortality rates or pupil-teacher ratios into genuine human rights indicators. This purpose should reflect the unique contribution that a human rights perspective can bring to the development field.

It is widely recognized that one of the key contributions of a human rights perspective to the development field is its focus on accountability.<sup>21</sup> Human rights can help hold national governments – the primary duty bearer of human rights – accountable for avoidable deprivations of basic needs.

Clearly, there are numerous reasons why millions of people around the world are deprived of basic education, health care, shelter or food. Some of these reasons, such as natural disasters, humanitarian crises or scarcity of resources are often beyond the control of governments, and as such, cannot be deemed human rights violations. Nonetheless, using a human rights approach calls attention to the fact that widespread deprivations are all too often not inevitable; rather, they are frequently generated or exacerbated by the lack of political will of governments

A government's failure to prevent or rectify avoidable deprivations can take many forms. In some cases, these failures are the result of deliberate policies of government agents, such as corrupt practices that reduce the resources available for the progressive achievement of economic and social rights, or discriminatory distribution of social services resources, for example providing less to those areas where the majority of people belong to an ethnic minority group. In other cases, marginalized groups are deprived of programs and resources they need to enjoy their economic and social rights simply as the result of the willful indifference of political and economic elites.<sup>22</sup>

Addressing avoidable deprivations in food security, health care, education or housing is crucial to making economic and social rights relevant to ordinary people around the world, as a primer by Amnesty International on this set of rights aptly puts it: "Much skepticism about economic, social and cultural rights is the result of feelings of helplessness or resignation in the face of overwhelming statistics on deprivation".<sup>23</sup>

The overarching challenge is how to distinguish between deprivations that are the result of factors beyond the control of national governments, and deprivations in which government policies are a major contributing, if not causal, factor. In other words, one must distinguish between cases in which governments are unable to meet their duties and those in which governments lack the political will to do so.<sup>24</sup>

## Methodological framework

Quantitative tools can play a crucial role in holding governments accountable for policies and practices which lead to avoidable deprivations, thus breaching their human rights obligations. Such tools could help assess whether high levels of deprivations or inequalities in the fields of education, health, housing, and food security are created, perpetuated or exacerbated by specific actions or omissions<sup>25</sup> of state policy.

To be able to analyze data for monitoring economic and social rights, it is not sufficient to have only a set of indicators. Data about a sole indicator generally does not indicate much. For instance, if one never heard any statistics about maternal mortality and learned that country X has a *maternal mortality ratio of 76* per 100,000 live births, one could intuitively say that it is 76 women too many who died, but would not be able to say anything else significant. It wouldn't be possible, for instance, to tell if 76 is a very high or very low number in relation to the country's development level, or whether the country has made progress in reducing maternal mortality. Therefore, the basic tools proposed here compare an indicator with various types of reference points or objective benchmarks against which it can be judged.<sup>26</sup> For the purposes of human rights monitoring, I suggest using one of the following types of benchmarks against which to compare human rights indicators:

- (1) *International human rights standards.* For example, the obligation of universal primary education sets a benchmark of 100% primary education completion rate. Comparing rates in the focus country with the relevant international human rights obligation can reveal shortfalls in the enjoyment of a right in the focus country.
- (2) *A commitment taken either by a state or by a specific government.* This can include a legal commitment enshrined in a state's constitution or basic education law to spend a certain percentage of its government budget on education; the commitment assumed by a state when adopting the MDGs of reducing under-five mortality rate by two-thirds between 1990 and 2015; or a publicly-made commitment by the current president of a state to increase public housing by 20% in two years. Such comparisons would reveal the disparities of the relevant indicator in the focus country with the commitment taken by the state or the specific government. The commitment itself should also be scrutinized, as it could be flawed from a human rights perspective.
- (3) *A past value of an outcome indicator or a process indicator.* In the case of an outcome indicator, these comparisons reveal if the state has made progress or has regressed in the level of ESC rights enjoyment. In the case of a process indicator, it reveals whether a state has made progress or has regressed in the proportion of people in the country who make use of a good or service deemed essential for enjoying a right.
- (4) *Countries with similar levels of development as the focus country.*<sup>27</sup> These cross-country comparisons could reveal whether the levels of deprivation of the focus country are lower than expected given the country's development level. This could be related to an aspect of an ESC right (outcome indicator) or to the proportion of people who make use of some good or service deemed essential for enjoying a right (process indicator).

(5) *Disaggregated national data (male/female, indigenous/non-indigenous, poor/non-poor, etc)*. This type of comparison could help identify disparities, and therefore possible discrimination, among population groups in the access to and enjoyment of economic and social rights.

### *A three-step methodology*<sup>28</sup>

The proposed approach consists of three basic steps: firstly using quantitative data to identify economic and social rights deprivations and disparities of outcome, from the perspective of core obligations, progressive realization and non-discrimination; secondly analyzing the main determinants of these outcomes so as to identify the policy responses that can reasonably be expected of the state; and thirdly using quantitative data combined with qualitative information, to assess to what extent deprivations, disparities and lack of progress can be traced back to failures of government policy.<sup>29</sup>

#### **Step #1 - Identifying deprivations and disparities in the enjoyment of economic and social rights**

The first step of the proposed methodology uses *outcome indicators*, such as primary completion rates, maternal mortality rates or child malnutrition rates, to identify deprivations and disparities in the enjoyment of economic and social rights. The selection of relevant outcome indicators should be determined primarily based on the legal or normative standards of each right, but should also take into account data availability.

Examining outcome indicators not only provides a snapshot of the level of enjoyment of economic and social rights in a given country, but also helps evaluate *whether states – the primary duty-holders of human rights – are complying with* key aspects of their human rights obligations. Specifically, they can help assess whether a state is complying with its “minimum core obligations”, since they reveal the extent to which the population is deprived of the most basic elements of the right to health, education, food and other economic and social rights. International comparisons provide a useful benchmark of what has been achieved in countries with similar resources.

This step also serves to measure progressive achievement according to maximum available resources since it enables one to measure human rights progress or retrogression over time according to the level of a country’s development. Furthermore, disaggregated data can reveal wide disparities in the enjoyment of economic and social rights by gender, ethnicity, socio-economic status or geographic location (e.g. urban/rural) which may be result from the discriminatory effects of government policy.

The following table provides an illustrative list of simple tools that use outcome indicators to monitor the various dimensions of state obligations pertaining to economic and social rights.

Table 1

Identifying deprivations and disparities in outcomes: Illustrative Methods		
Measurement	Methods	Illustrative Questions
1. Measuring essential minimum levels of enjoyment of ESC rights	Examine key outcome indicators relevant to each right (health, education, housing, etc) against GDP per capita, making a comparison of the focus country with other countries of same region. Show as scatter plot. Compare key outcome indicators with relevant legal or political commitments made by the focus country.	Are the levels of the relevant outcome indicator in the focus country below the level typically observed in other countries with similar levels of GDP per capita? Has the focus country achieved the levels of child malnutrition or maternal mortality promised by the government? If not, how big is the shortfall?
2. Measuring progressive realization over time	Examine the focus country's rates of progress in improving outcome indicators compared with other countries in same region. Compare rates of progress with goals to which the focus country has committed. Predict time necessary to reach desired benchmark, on basis of existing rate of progress (and adjusting for population growth) in order to demonstrate inadequacy of progressive realization <sup>1</sup> .	Has the focus country made progress, or has it regressed, over time in achieving the desired outcome indicators? If the focus country has made progress overtime, has the progress made been bigger or smaller than that of other countries in same region? Will the focus country achieve its MDG goal of child mortality reduction by 2015 if it continues at this rate of progress? How long will it take to reach the desired benchmark (e.g. internationally agreed benchmark or average level among countries in same region) on basis of existing rate of progress?
3. Measuring available resources in relation to progressive realization	Compare outcome indicators over time against GDP per capita growth in the focus country and the other countries in the region.	Why has the rate of progress in outcome indicator (e.g. decline in child mortality rates) has been so slow in the focus country compared to poorer neighboring countries, especially when contrasted with its (impressive) economic growth?
4. Measuring inequality in enjoyment of economic and social rights along different social cleavages, including: Gender groups Ethnic groups Indigenous/ Non-indigenous Rural/Urban Regions or departments Economic groups (wealth quintiles)	Compare disaggregated outcomes for each different social group to identify disparities and inequalities. Compare disparity levels over time. If disparity levels of the outcome indicator in the focus country are being reduced, compare rate of progress with those of other countries of same region. Examine compounded forms of inequality <sup>2</sup> by comparing levels of outcome indicators of several groups of people in the focus country at the same time. Identify countries which, on average, have similar levels of outcome indicators than those found among people in the focus country belonging to several groups.	Are the chances of boys finishing school much higher than those of girls? How much higher is (on average) the risk of poor children dying before the age of five in the focus country than those of rich children? Are these inequalities higher or lower than in other countries in the region? Are disparities in the focus country getting worse? Has the progress made by focus country in reducing inequality been bigger or smaller than that of other countries in same region? What is the rate of child malnutrition in the focus country among urban, non-indigenous boys compared to that of rural, indigenous girls? Are those rates similar to the national average of child malnutrition in other countries?

It should be stressed that evidence of deprivation or disparities in the enjoyment of ESC rights does not provide in and of itself conclusive evidence that a state has violated a right. This is because, as noted above, deprivations or disparities could be the result of factors beyond the control of a government. In some cases, a state may have made more effort to reduce deprivations or inequalities in education, health, food security than its neighbors, and yet because of circumstances beyond its control, the levels of deprivation or inequalities have worsened.<sup>32</sup>

Similarly, disparities in outcome indicators by gender or ethnicity are not in themselves proof of discrimination. In some cases, they might be the result of economic, historic or other factors and they might exist in spite of a government's genuine efforts to close those enduring gaps. Nevertheless, evidence of deprivation or disparities may be suggestive of specific human rights violations and can serve as a crucial first step in a more comprehensive human rights assessment.

## **Step #2 – Identifying main determinants of deprivations and inequalities<sup>33</sup>**

A second step is to identify the various causes of those deprivations and inequalities in the enjoyment of economic and social rights. Understanding the nature and extent of the obstacles preventing the enjoyment of economic and social rights is necessary to assess the adequacy of policy interventions undertaken by the state to address those obstacles. While the first step is more directly related to the realization of the right from the perspective of the right-holder, this step and the following one help to assess the extent to which the state, as the primary duty-bearer, is complying with its human rights obligations.

Many factors combine to affect the level of enjoyment of economic and social rights. In the case of health, the human rights framework explicitly acknowledges that the right to health extends not only to timely and appropriate health care, but also embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. This extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>34</sup> Similar factors affect also other rights. For instance, socio-economic and cultural factors, as well as a range of underlying determinants related to other rights, affect the enjoyment of the right to education, the right to food, and the right to adequate housing.

A vast literature on the determinants of social outcomes has been produced over the years by economists, educational specialists, health experts and other social scientists. It is beyond the scope of this article to review this literature, but it is worth pointing out some basic distinctions found in the literature about the different types of factors that affect key areas of education, health or food security, leading to high levels of school drop-out rates, of maternal or child mortality, and of chronic malnutrition.

i. Supply-side and demand-side factors:<sup>35</sup> Health and education determinants can be broadly classified as supply or demand factors. Supply-side factors are associated with the *provision of* health and educational services. They are directly related to government policies and interventions, and include government-provided inputs like clinics and schools, medical and school supplies and equipment, teachers and physicians, etc. Indicators of supply typically measure one of the elements defined by the, defined as the essential features or elements of a right, namely *availability* of goods and services, physical *accessibility* of services and facilities (e.g. distance to schools and clinics) and *affordability* (economic accessibility) of services, *adaptability* or cultural acceptability of services (e.g. gender sensitivity and cultural adequacy of the services) and quality of services.<sup>36</sup>

At the same time, provision of goods and services are not sufficient to ensure the use of essential inputs necessary for the enjoyment of ESC rights. Services or goods may be available, but they may not be used often because of the demand-side factors that determine the *utilization* (or use) of health and educational services. Although their influence on health and educational outputs is more indirect than that of supply-side factors, demand factors are nonetheless critical elements of what may be “a long and complex causal pathway” leading to a given outcome.<sup>37</sup>

The two main determinants of service demand are poverty and cultural barriers. *Income poverty* may determine whether a household can afford to pay for medical services or send its children to school. The costs associated with going to school – including both the direct costs of attending school, such as uniforms, books, school supplies and transportation, and the indirect cost of sending children to school rather than to work – are often prohibitively high for the poor. These costs are the primary reason why children fail to enroll or end up abandoning school in many poor countries.

The effects of low income, however, go beyond limited ability to pay for healthcare and education. For example, it both increases exposure and reduces resistance to disease: poor people cannot afford clean water and sanitation, or non-polluting heating and cooking fuels, thereby increasing levels of exposure to unsanitary conditions. They are also likely to be malnourished, thereby reducing their resistance to sickness.<sup>38</sup> At the same time, income poverty is typically associated with malnutrition and poor housing conditions, both of which generally inhibit the ability of children to learn.

*Cultural beliefs or barriers* can sometimes be strong determinants of who demands and uses health and educational services. This is particularly notable with culturally-defined roles between males and females. For instance, girls' engagement in household chores and care economy (i.e. taking care of siblings, sick and the elder) adversely affect girls' school participation. Similarly, concerns such as perceived unsafe school environment, son preference, lack of female teachers that can serve as role models, etc, are all factors that influence household decisions to send their girls to school. Cultural barriers may also prevent women from using health care services because health care providers are men, or because

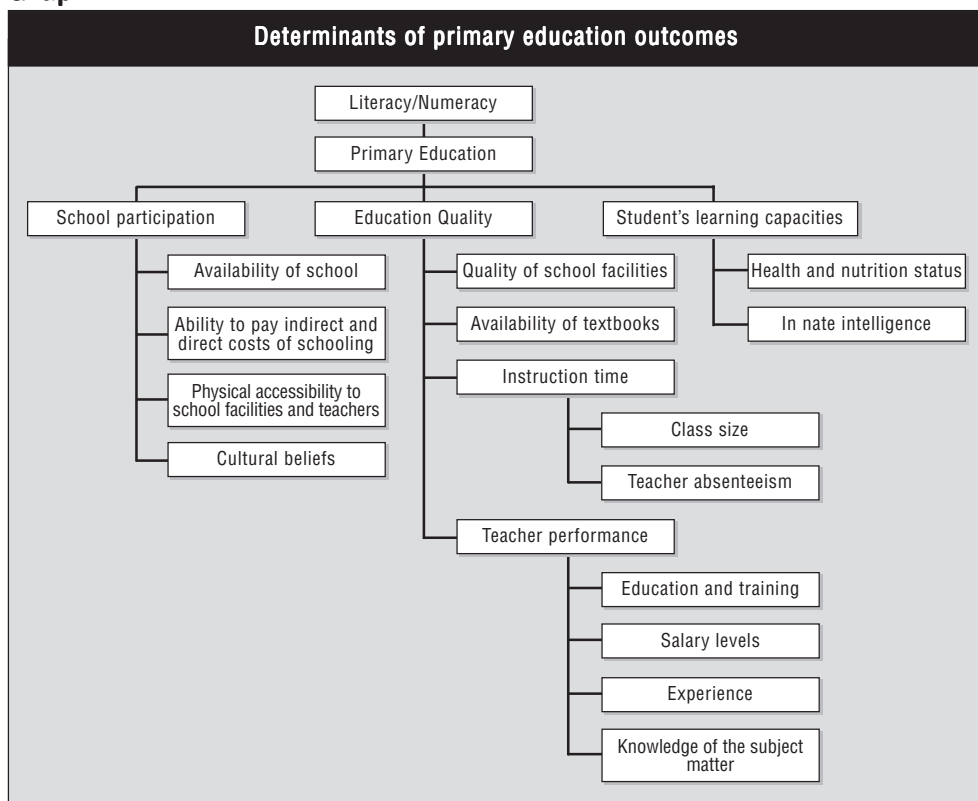


women have limited mobility. Similarly, son preference often implies that households do not invest in healthcare for girls and women.

ii. Direct and indirect determinants: Not all factors affecting these social outcomes (causing or exacerbating levels of deprivation or inequality in the rights enjoyment) do so directly. In fact, various authors talk about a long sequence of interlinked causes leading to a given output or outcome. Several conceptual frameworks have been developed to understand the relation between various determinants. Depending on the proximity of the effect they have on the outcome, we could distinguish between *direct determinants* (those determinants that directly affect a social outcome) and *indirect determinants* (those determinants that affect the outcome through their effect on a direct determinant or another indirect determinant).<sup>39</sup>

The following diagram illustrates these various types of determinants on one desired social outcome. If acquiring literacy and numeracy is a desired outcome of primary education – which certainly constitutes a key aspect of the enjoyment of the right to education – one could say, based on the literature on the determinants of primary education outcomes, that the *direct determinants* of this desired outcome, affecting each student differently depending on her or his circumstances, are school participation, education quality and student’s learning capacities.

**Graph 1**



In turn, each one of these immediate determinants is influenced by a set of indirect determinants. School participation depends not only on the availability and physical accessibility of students to school facilities and teachers, but also to demand factors, such as the ability of poor families to pay the direct and indirect cost of schooling, the cultural beliefs of households (such as bias of parents against investing in girls' learning). Education quality depends on a whole set of factors, including the quality of school facilities,<sup>40</sup> the availability of textbooks,<sup>41</sup> instruction time and teacher's performance. Students' learning capacities depend, among other factors, on their health and nutrition status<sup>42</sup> and student's specific characteristics, such as innate intelligence.

Each of these indirect determinants or factors is in turn influenced by other indirect factors. Thus, instruction time is affected by class size, as well as by teacher's absenteeism,<sup>43</sup> and teacher performance is affected by their education and training, their salary levels, their experience, and their knowledge of the subject matter.

As reflected in this brief and incomplete account of determinants on primary education outcomes, navigating through the web of determinants that may affect a single outcome is a complex undertaking. In reality, things are even more complicated because the extent to which any factor has an impact may change from country to country, and different outcomes may have an impact on each other and on inputs. Moreover, the lack of significant progress in the reduction of deprivations is sometimes the result of a confluence of factors, only some of which can be attributed – in total or in part – to the state. For instance, in its 2005 World Health Report, the WHO pointed out that the lack of significant progress of many countries in maternal and child health was related to both contextual issues such as humanitarian crisis and the direct and indirect effects of HIV/AIDS, as well as to failures of health systems to provide good quality care and services to all mothers and children.<sup>44</sup>

Because of these and other complexities, a complex analysis of the causes of deprivation or disparities in any given country (why, for instance, country X has such a high incidence of children not completing primary school and the relative impact of each factor, or the extent to which different underlying factors can explain the wide disparities between various groups of the population in maternal mortality rates in country Y) generally entails a rather sophisticated use of technical knowledge and tools (such as complex statistical analysis) that most actors within the human rights movement working on ESC rights – whether advocates in national or international NGOs, members of a Treaty Body or Special Rapporteurs – are unequipped to carry out.<sup>45</sup>

But fortunately, for the purposes of human rights advocacy, there is no need to establish firm causal links between an outcome and a whole web of determinants, nor is there necessarily a need to estimate very accurately the exact impact of specific factors on certain outcomes. Advocates can instead rely largely on the myriad studies conducted by social scientists that have already identified the main reasons for existing deprivation and inequalities in areas such as nutrition, maternal mortality and schooling.

### Step #3 - Assessing the adequacy of policy efforts to address these determinants

This step in the proposed methodology identifies and exposes cases in which specific actions or omissions of state policy contribute to the creation, perpetuation or exacerbation of high levels of deprivations or inequalities in the enjoyment of economic and social rights, as identified in Step #1. The tools proposed in this step could help identify cases in which the government had the capacity to deal with some of the determinants of specific deprivations and inequalities identified in Step #2, but failed to do so. Thus, this step is crucial for building the case that there has been a violation of economic and social rights.

The proposed tools focus on the main determinants of deprivations and inequalities: (A) supply-side factors and (B) demand-side factors. They also assess the state's commitment to providing the adequate and equitable resources that are often needed to address these factors (C).

#### *A. Identify policy failures in providing essential goods and services (supply-side factors)*

The adequacy of government goods and services affecting health and educational outcomes can be assessed with reference to the essential features of a right that, as mentioned above, the CESCR has defined for several ESC rights, namely availability, accessibility, quality and acceptability.

The following is a list of illustrative quantitative tools that could be used for this purpose.

##### *a. Measuring availability of services*

The CESCR established that educational institutions and programs, as well as healthcare facilities, goods, services and the underlying determinants of health, must be available in sufficient quantity within a state. The goods and services essential for the realization of the right to education include, for instance, school buildings, sanitation facilities for both sexes, safe drinking water, trained teachers, teaching materials, etc. The underlying determinants of health necessary for the realization of the right to health include safe and potable drinking water, adequate sanitation facilities, hospitals and clinics, trained medical and professional personnel, and essential drugs.

With some of these goods and services, determining whether they are available “in sufficient quantity within a state” might be relatively easy, since “in sufficient quantity” would mean that person or household has them. That is the case, for instance, with services such as adequate sanitation facilities and potable water. But with many others services, such as the number of hospital beds per 1,000 people or the proportion of *births attended by skilled* health personnel, simply knowing the total number or the percentage of those services per X inhabitants may not be sufficient to assess whether they are “available in sufficient quantity within a state”. Two simple tools might be helpful for this purpose:

Internationally accepted benchmarks: One simple tool to use, when available, is an objective benchmark related to specific education or health services. This is

typically based on empirical evidence about the effectiveness of the benchmark on a desired education or health outcome. Examples of these benchmarks include:

- a) The “Education For All Fast Track Initiative”: a global partnership launched by the World Bank to help low-income countries meet the education MDGs has an indicative benchmark of one trained teacher for every 40 primary school-age children and another of between 850 and 1000 annual instructional hours for pupil.<sup>46</sup>
- b) The guidelines developed by WHO, UNICEF and UNFPA to monitor the availability and use of obstetric services consider that for every 500,000 people, there should be at least four basic emergency care facilities and at least one comprehensive emergency facility.<sup>47</sup>
- c) Joint Learning Initiative, an enterprise engaging more than 100 global health leaders in landscaping human resources for health suggest, based on empirical evidence, that a density of 2.5 workers per 1,000 may be considered a threshold of worker density necessary to attain adequate coverage of some essential health interventions and core MDG-related health services. These interventions and services can include 80 percent measles immunization coverage, and 80 percent births attended by skilled professionals.<sup>48</sup>

Cross-country comparisons: Comparing the levels of goods and services in the focus country with those of other countries in the same region. For instance, if the focus country has a much lower proportion of immunization rates, fewer hospital beds per 1,000 people, lower proportion of people with access to an improved water source, lower percentage of textbooks per pupil, or higher pupil-teacher ratio than most of the countries in the region, it would suggest that these levels are insufficient given its level of development, and that the focus country has failed to ensure the availability of these essential services in sufficient quantity. Similar to the cross-country comparisons of outcome indicators made in Step #1, cross-country comparisons over time can also be useful for assessing whether the progress the focus country made has been bigger or smaller than that of other countries in same region.<sup>49</sup>

#### *b. Measuring accessibility of services*

Quantitative tools can be used to assess inequalities in the accessibility of various sectors of a population to essential services needed for the enjoyment of economic and social rights.

The simplest method is to examine whether any underprivileged or marginalized societal group, such as women, ethnic minorities, indigenous peoples, rural residents or poor people, has less access to an essential service or good than their relevant counterpart (i.e. men, ethnic majority, non-indigenous peoples, urban residents or rich/non-poor people). For instance, a study of the determinants of parasitic infections in school-age children in Western Ivory Coast showed that schoolchildren from poorer households lived significantly further away from healthcare facilities compared to schoolchildren from richer households<sup>50</sup> and another study has shown that the

inequality in immunization coverage between rich and poor children in India is higher than for any other Asian country for which there is data available.<sup>51</sup>

*c. Measuring quality of services*

Quantitative indicators could also be helpful for measuring the quality of services provided. For instance, data about conditions of health clinics or school facilities could reveal that a country has a high proportion of health clinics or school facilities in poor conditions (e.g. with leaking roofs, without proper sanitation or access to potable water, etc). Reviewing standardized tests for teachers, one could learn about some key aspects of teacher qualifications, a primary determinant of the quality of education. Similarly, one could review assessments of health professionals.

Disparities in the quality of the services provided can also be identified using quantitative tools. Although there might not always be data available explicitly showing that vulnerable or marginalized sections of the population receive poorer quality services than other segments of the population, it is often possible to reach this conclusion by comparing disaggregated data by region or municipality about the quality of an essential service (e.g. quality of teachers or health professionals, conditions of school facilities or clinics, etc.) with population data about the same regions or municipalities disaggregated by ethnic groups or poverty levels. This could show, for instance, that the conditions of health clinics in the areas mostly populated by an ethnic minority or by poor people are worse than those enjoyed by the ethnic majority group or the non-poor.

*B. Identify policy failures in tackling obstacles in the utilization of goods and services essential for the enjoyment of economic and social rights (demand-side factors)*

As discussed above, the reasons for avoidable deprivations and for inequalities in the enjoyment of ESC rights are often also related to demand factors, such as the cost of schooling and health care. Therefore, monitoring of state policy efforts must go beyond monitoring the adequacy of the *supply factors* to analyze the extent to which a state has adequate policies and programs addressing the demand factors possibly preventing people from using the good and services necessary for enjoying economic and social rights.

Addressing demand-factor problems can be undertaken by adopting various types of policy interventions or programs, often implemented by different agencies of a government. For instance, when the costs of education and health prevent poor people from utilizing essential education and health services, the state could address this problem through a type of *direct policy intervention* (e.g. subsidizing the costs of education for the poor through scholarships, or providing school meals as a means to tackle child malnutrition) or through an *indirect policy intervention* (e.g. adopting macroeconomic policies aimed at reducing poverty).

*a. Direct policy interventions:*

Direct policy interventions to tackle demand-side obstacles to the enjoyment of economic and social rights are specifically aimed at removing a particular demand-side

obstacle. This type of interventions are usually carried out through focused programs by the government agency that has overall responsibility for the relevant sector (i.e. the Ministry of Education to tackle a demand-side obstacle to the right to education or the Ministry of Health to tackle a demand-side obstacle to the right to health).

Empirical evidence shows that direct interventions addressing demand-side problems are often effective when adequately funded and well-targeted to those most in need. For instance, programs meant to mitigate the effects of poverty on educational outcomes, such as providing scholarships or free textbooks to disadvantaged children, or offering school meals to encourage children to attend or remain in school, have proven to be effective in many countries in offsetting the direct costs (uniforms, exercise books, textbooks, transport, etc.) and indirect costs (the opportunity cost to households of sending their children to school rather than out to work) of education.<sup>52</sup>

Following are some initial suggestions of quantitative tools that can be helpful to assess whether the manner in which the focus country has implemented such programs has been adequate in key aspects such as coverage, funding and distribution of benefits.

*Identifying inadequate coverage:* It is simple to assess the sufficient coverage of a program aimed at addressing a demand-side obstacle to the enjoyment of economic and social rights: compare the number of people covered by the program with the number of people affected by that specific demand-side obstacle. For instance, if a scholarship program meant to offset the costs of education is reaching only 10% of the poor families not sending their children to school because of those costs, then the program coverage is patently insufficient.

*Identifying underfunded programs:* An international comparison can show whether the focus country is spending sufficient resources in a program aimed at addressing a demand-side obstacle. This is done by a double comparison of the resources a country devotes to a specific program with those spent on similar programs in other comparable countries of the same region, related to levels of the relevant deprivation in these countries that these programs are supposed to address.<sup>53</sup>

*Measuring whether program benefits are unfairly distributed:* Analyzing distribution of the benefits of a program aimed at boosting demand by group (e.g. indigenous/non-indigenous, poor/non-poor) or location (e.g. provinces or municipalities) and contrasting them with levels of deprivation that program is supposed to address across the same groups or locations, can help identify unfair distribution patterns that benefit people who do not need these programs the most.<sup>54</sup>

#### b. *Indirect policy interventions*

Indirect policy interventions are aimed at changing the socio-economic or cultural factors that gave rise to the demand-side factor to begin with. Unlike direct policy interventions that are typically very focused on a specific program carried out by the

government agency that has overall responsibility for the relevant sector, indirect policy interventions, which are meant to address broader socio-economic or cultural factors, often require a whole set of programs carried out by a whole set of government agencies. For instance, a comprehensive strategy for poverty reduction requires a multi-sectored approach in order to undertake a whole set of macroeconomic, structural and social policies and programs.

Determining which indirect policy interventions to examine when monitoring state's efforts to comply with their economic and social rights obligations largely depends on which factors are preventing people from realizing their rights in a specific circumstance

Imagine for instance that during Step #1 of the proposed methodological framework, one finds that in the focus country, a large proportion of girls are dropping out of school, while most boys complete primary school. If in Step #2, one finds that customs and social norms may be influencing parents' decisions not to send girls to school, then in Step #3, one should see whether the government has made efforts to counteract these entrenched social norms that have proven to be useful in other circumstances. This could include legislative reforms such as marriage rights and inheritance,<sup>55</sup> or public awareness campaigns about the benefits of girls' education. But in Step #2, one may find that the primary reason that many parents are not sending their girls to school is not due to cultural or social norms, but rather due to economic reasons. For example, in that country, educated boys can expect to receive more future income than equally educated girls, and poor households without the means to send all their children to school, thus choose to send boys rather than girls. In such a case, during this step, one should assess whether governments have made specific efforts to change labor market circumstances, so that it does not discriminate against women, and so that opportunities and advantages faced by all children at given levels of education and achievement are broadly equal.<sup>56</sup>

### *C. Monitoring resource allocation*

The appropriate measures which a state should take as part of its policy efforts include legislative, administrative and financial measures.<sup>57</sup> A key area of policy effort success is the degree to which sufficient resources are allocated to social sectors, such as the educational or health system, and whether this allocation is distributed in line with need.

An in-depth budget analysis is optimal for this purpose. Some pioneer NGOs have made important inroads in this regard, integrating rigorous budget analysis into a human rights framework.<sup>58</sup> But many human rights activists may not have the technical skills, time or resources required to undertake complex budget analysis. It is nevertheless possible to adopt simple quantitative tools helpful in assessing the adequacy and distribution equity of resources devoted to the realization of economic and social rights.

A basic framework of expenditure and resource allocation ratios can be used to conduct a basic analysis of expenditure patterns. This framework is adapted from a set of four ratios proposed by UNDP to analyze public spending on human

development.<sup>59</sup> UNDP suggests that these ratios are “a powerful operational tool that allows policy makers who want to restructure their budgets to see existing imbalances and the available options”.<sup>60</sup> But these ratios could also be a powerful monitoring tool allowing human rights advocates to identify when:

- a government devotes insufficient resources to an area related to a specific right, such as education, health, food security, etc;
- a government appears not to raise sufficient revenues to be able to adequately fund the competing needs the state has.
- Within a sector related to ESC rights, a government allocates disproportionately little resources to those budgetary items that should be a priority, in that they could have more impact on ensuring minimum essential levels of rights enjoyment in areas related to core elements of the right to health, education etc (e.g. disproportionate spending on tertiary versus primary education, or on metropolitan hospitals as opposed to rural primary health care services

### Definitions of ratios

1. **Expenditure ratios** refer to the percentage of GDP spent on public, social or education/health expenditure. Examples:

Public expenditure as % of GDP = public expenditure ratio

Social expenditure as % of GDP = social expenditure ratio

Education expenditure as % of GDP = education expenditure ratio

Health expenditure as % of GDP = health expenditure ratio

2. **Allocation ratios** refer to % of public expenditure allocated to social, education, health etc spending. Examples:

Social expenditure as allocated share of public expenditure = social allocation ratio

Education expenditure as allocated share of public expenditure = education allocation ratio

Health expenditure as allocated share of public expenditure = health allocation ratio

3. **Core obligation priority ratios** refer to the share of spending on education, health or other social sector that is assigned to minimum core obligations, such as primary education or maternal health care. Examples:

Primary education spending as share of education expenditure = primary education priority ratio

Maternal health as share of health expenditure = maternal health priority ratio

4. **Core obligation expenditure ratios** refer to spending on these areas of core obligation as a % of GDP. Examples:

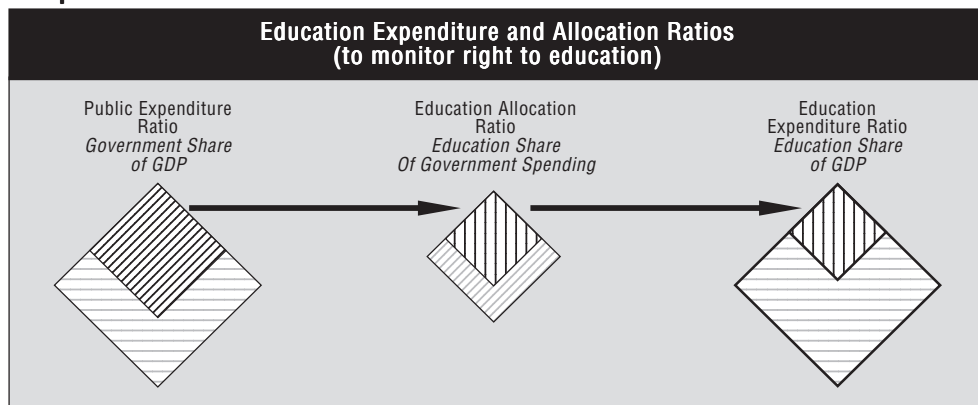
Primary education spending as share of GDP = primary education expenditure ratio

Maternal health spending as share of GDP = maternal health expenditure ratio

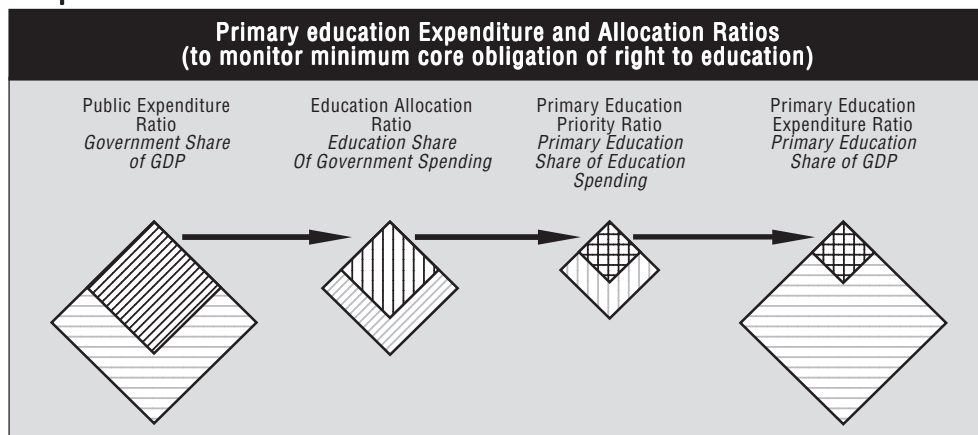


The right to education could be used to explain the usefulness of this set of ratios.

**Graph 2**



**Graph 3**



### **1. Public expenditure ratio – Government share of GDP**

This ratio determines the size of a government’s budget in relation to the size of its economy (using GDP as a proxy). It indicates the “size of the cake” of resources a government has at its disposal to undertake all its functions. Since taxation is generally a major funding source for public expenditure, this ratio often depends largely on investing in taxation levels. Although possibilities for raising taxes may partially depend on state capabilities,<sup>61</sup> they also depend in varying degrees on state policy decisions.

If this ratio is too high, this might cause problems for economic growth, which in turn could jeopardize the sustainability of economic and social rights realization.<sup>62</sup>

If this ratio is too low, it would make the state too weak and unable to adequately provide resources for the many competing and often essential functions of a state. A persistently low ratio can reflect a state structural problem – for instance, state capture by an economic elite resisting any substantial tax increases or strengthening of the state –<sup>63</sup> that could seriously impair the state’s ability to realize its economic and social rights obligations.

## ***2. Education expenditure ratio – Education share of GDP***

This is the most basic expenditure ratio related to the right to education. It provides a snapshot of the extent of state commitment to the provision of education, reflecting the level of resources a state is willing to invest in its realization. If there were only one ratio to monitor government expenditure related to the right to education, it would probably be this one.

A low education expenditure ratio would mean that resources may be insufficient for the educational system as a whole to effectively address the various obstacles, both supply and demand factors, that may be inhibiting children's access to quality education. Moreover, when this ratio is very low, it could seriously undermine any state effort or program to improve the availability, affordability or quality of the educational system, and could severely diminish the effectiveness of any program adopted to address the demand-factors related to school desertion.

## ***3. Education allocation ratio – Education share of government spending***

This ratio reflects the relative priority given to education among competing budgetary needs.

The extent to which a low education allocation ratio is problematic from a human rights perspective depends on the circumstances. The level of enjoyment of a specific right is crucial. A state that has fulfilled its minimum core obligations regarding the right to education (meaning that most of the population is literate and practically all children enjoy access to primary education) might be justified in reducing its education spending to reallocate it to another social sector in which there might still be a significant proportion of people deprived of essential levels of health care or shelter, for example. Even if these other sectors are not worse off than the education sector, it could still be legitimate for a state to invest relatively more on housing than on education, or more on education than health. According to international law, national sovereignty implies that governments have a large margin of discretion in selecting the appropriate measures necessary for realizing economic, social and cultural rights. This of course includes spending priorities.<sup>64</sup>

But if there is a high level of illiteracy or yawning disparities in the primary completion rates of boys and girls in the state, a low education allocation ratio would not be justified. It would also be necessary to search for any type of extravagant spending that squanders state resources on unnecessary areas.<sup>65</sup>

## ***4. Primary education priority ratio – Primary education share of education spending***

This ratio reflects priorities within the educational system. Interpreting low levels of this ratio depends once again on the circumstances. In countries where a significant proportion of the population is illiterate or many children are deprived

of the most basic forms of education, a low primary education priority ratio could be interpreted as a violation of a state's minimum core obligations regarding the right to education. As Philip Alston points out, in a country with very limited resources the maxim that "poverty is a denial of human rights" would be often valid in legal terms if the government "has failed to take possible steps to improve the situation and instead has opted to devote scarce resources to other objectives that do not address directly the realization of basic rights".<sup>66</sup> This is precisely what is happening in many poor countries, where the most impoverished people lack primary health care and basic education, but the state allocates most of its social spending on the non-poor.

This regressive pattern of spending may also be considered a covert form of discrimination, where, for example, investments "disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population".<sup>67</sup> On the other hand, countries that have already achieved high standards of primary education may be well justified in prioritizing higher education levels.

### ***5. Primary education expenditure ratio – Primary education share of GDP***

This ratio reflects the level of resources a state is willing to invest in its minimum core obligation to ensure the satisfaction of the most basic form of education, out of the "maximum of its available resources", using GDP as a proxy). It is the result of three key policy decisions: 1) the size of the government's budget (the public expenditure ratio) 2) Educational sector allocation (Education Allocation ratio) 3) Primary education allocation (Primary Education Priority ratio).

Choosing which ratio or combination or ratios to use in the monitoring process depends on a set of factors:

- The focus of the monitoring: Is it the whole gamut of economic and social rights, only one right, or one specific aspect of a right (such as primary education or maternal mortality)?
- The scope and purpose of the monitoring exercise: Is it in-depth research on a specific right, a shadow report, or is it carried out by a Treaty Body?
- The type of obligation being monitored: Minimum core obligations, the duty of progressive realization according to available resources, or the obligation to ensure no discrimination in the enjoyment of rights?
- The availability of data.

#### **i. How to Use the Ratios**

There is no universal prescription for using each of these ratios, and they depend largely on the circumstances. But there is a basic method for determining if ratio levels in a given country are relative high or low.

Once again, this approach compares the ratio level with a reference point or objective benchmark against which it can be judged. Specifically, the insufficiency of key budget items for the realization of economic and social rights can often be identified with simple tools, by comparing them with:

- (a) State commitment, such as the constitution, national plans, or political agreements. For instance, in its 1996 Guatemala Peace Agreements, the government committed itself “to step up public spending on education as a proportion of gross domestic product by at least 50 per cent over its 1995 level”.<sup>68</sup>
- (b) The level of the same ratio of other countries in the same region.<sup>69</sup>
- (c) A suggested benchmark based on empirical evidence. For instance, when originally suggesting these ratios as a means to analyze public spending from a human development perspective, UNDP provided certain benchmarks or guidelines about what the levels of these three ratios should be, namely: 25% for the public expenditure ratio, 40% for the social allocation ratio, and 50% for the social priority ratio,<sup>70</sup> leading to a human expenditure ratio of 5%.<sup>71</sup> Similarly, the WHO has set a global minimum target of 5 percent of Gross National Product (GNP) for health expenditure.<sup>72</sup>

#### IV. Challenges and limitations of proposed methodology

The proposed quantitative tools are subject to a number of important challenges and limitations which need to be recognized and addressed if these tools are to be useful for monitoring a wide variety of countries.

The first challenge is that these simple tools work best in extreme cases, where the outcome deprivations and disparities are much bigger than those in neighboring countries, while the resources allocated to the health and education sectors are much lower. These tools may be less useful in their conclusions about countries not doing exceptionally badly. For such middle-ranking countries, simple tools may still be helpful in flagging possible concerns which arise when development statistics are analyzed in light of international human rights standards, but not for providing conclusive evidence of a country's compliance with these obligations.<sup>73</sup> In order to reach the more nuanced judgments required in such cases, more sophisticated tools are needed. Tools commonly used in the development field to measure equality-related issues (such as benefit incidence analysis used to evaluate equity of public expenditure)<sup>74</sup> can be particularly relevant for countries performing reasonable well at the aggregate level, but still suffering from serious inequalities in the enjoyment of ESC rights among various groups in its population.

The second challenge of the proposed methodology is that, as with any quantitative tools, its applicability hinges on data availability, which varies significantly by country. This problem is particularly acute for disaggregated

data by gender, ethnicity, socio-economic status and geography, such as rural and urban areas. Scarcity of data is obviously a problem not only for this particular methodological framework, but for almost any monitoring effort. This is why human rights Treaty Bodies frequently call upon State Parties to produce more data, without which, any monitoring exercise is severely weakened.

Although there is a serious problem of data availability to make a proper assessment of a government's compliance with its ESC rights obligations in many countries, the human rights movement has not yet made use of all already available relevant data. An example the reports on ESC rights on specific countries that typically do not use and analyze household surveys, which usually contain a wealth of relevant data for human rights analysis.

Clearly, the analysis of household surveys or the use of more sophisticated quantitative methods than the simple ones proposed here – possibly necessary for conclusions on countries that are not extreme cases of underperformance – requires considerable training. But efforts in this regard by the human rights community may be worth it: as shown in recent years with some successful cases of using budget analysis for monitoring ESC rights, the ability of human rights activists to be able to use such tools for monitoring ESC rights could significantly strengthen the collective ability to make governments (and eventually other powerful actors) accountable for human rights violations.

## **V. Potential impact of quantitative tools for economic and social rights advocacy**

Combining the strengths of traditional human rights advocacy methodologies with those of a socio-economic analysis used by economists and other social scientists could contribute to transforming the ability of the human rights movement to hold governments accountable for violations of economic and social rights.

Once tested and refined, a framework methodology for using quantitative tools, along the lines suggested above, could be potentially used more extensively by a whole range of actors within the human rights movement. For example, national and international NGOs could adopt it for monitoring and advocacy on a range of issues; monitoring treaty bodies and Special Rapporteurs could use it to promote more substantive dialogue with countries that claim not to have enough resources to address an issue;<sup>75</sup> and public interest legal advocates could make use of more data in national and regional courts to enforce economic and social rights.

One of the strengths of this multidisciplinary approach to monitoring economic and social rights, is its versatility, which enables it to be further developed and adapted to different types of issues of various levels of complexity. The next challenge would be to set out tools for a human rights analysis of additional relevant indicators relevant to other ESC rights (such as the right to food, the right to housing or the right to decent work), adding to those for

which the methodology toolbox was initially developed (the right to health, the right to education, etc). Then it would be useful to explore how this monitoring toolbox can be used to monitor ESC rights violations in developed countries, helping to critically address complex issues such as the health system in the United States, or the effects of social policies of countries in the European Union on the enjoyment of economic and social rights of the Roma people or the immigrant population from a human rights perspective.

Those with expertise in assessing the human rights impact of international economic relations could further develop such methodologies to address the impact of external actors, such as international financial institutions and industrialized nations in the global North, on the realization of ESC rights in developing countries. Topics may include agricultural subsidies, foreign debt or the effects of intellectual property laws on access to medicine. Combining rigorous economic research with human rights analysis, this multi-disciplinary approach would be useful to explore the human rights implications of trade agreements, to analyze the impact on worker's rights of unregulated financial flows in a globalized economy, and to explore how structural adjustment programs have led to drastic cuts in social spending, impeding the ability of the state to provide basic needs such as health care and education.

To gradually being able to analyze such complex issues with rigour – critical for any effective advocacy – will require a concerted effort from people from various disciplines. No one discipline has the expertise or holistic perspective required to implement this approach alone. It requires interdisciplinary collaboration, to which there is often little more than a rhetorical commitment in the area of ESC rights advocacy. But the potential of these efforts for being able to show the value-added of a 'rights-based approach' to development issues could be immense.

## VI. Conclusions

### *1. Using quantitative tools to forge new frontiers in economic and social rights advocacy*

Quantitative tools are not a panacea for monitoring economic and social rights. When people are not treated by doctors because they belong to an ethnic minority, women are not informed of their reproductive rights or a whole village is forcibly evicted without any due process, the traditional monitoring methods that have served us so well in the human rights movement - of fact-finding investigations based on testimony gathering and legal research – may be more effective building a case of a violation than analyzing outcome and process indicators.

But quantitative tools are indispensable to assess the impact of broad public policies on the realization of ESC rights. When used strategically – and combined with qualitative research – quantitative tools can be particularly crucial to make governments accountable for the failure to prevent or rectify avoidable

deprivations and inequalities in the enjoyment of economic and social rights. They can help us as human rights advocates not only to persuasively show the scope and magnitude of various forms of rights denial, but also in revealing and challenging policy failures that contribute to the perpetuation of those deprivations and inequalities.

Equipped with this type of tools, we can expand the range of issues that we can address as human rights advocates, and the areas of government policy that we can submit to human rights scrutiny and accountability. In particular, quantitative tools are crucial for monitoring the impact of public policies related to resource allocation and distribution on the enjoyment and realization of economic and social rights.

At the same, by interpreting the data obtained by these methods through a human rights lens that focuses on accountability, we furnish new meaning to these methods. They become powerful tools to expose multiple manifestations of social injustice. Thus, by exposing arbitrary cutbacks in social services or discriminatory policies depriving wide sectors of the population access to basic goods, this methodology can help identify, expose and challenge problems related to poverty that are usually perceived as irredeemably structural and therefore unsolvable –to causes that can be assigned to the actions (or inactions) of state agencies.

## *2. Joining the measurement revolution*

In 2005, Michael Ignatieff and Kate Desormeau noted that a measurement revolution has been underway in the fields of development and governance. By measurement revolution, they meant the exponential diffusion and rising influence of standardized and quantifiable measures of performance in international public policy. Yet, they noted that as this quantitative revolution has spread— increasingly measuring all aspects of human wellbeing, changing the way the way international organizations monitor governments' behavior, and the way governments assess each other and target their aid and development policies—the human rights movement has stood aside.<sup>76</sup>

The pitiful failure of many governments to make significant strides in eradicating abysmal levels of inequality and deprivation, demands renewed efforts to demonstrate when and how these phenomena can be traced back to specific actions or omissions of state policy, and how they can be categorized as violations of internationally recognized human rights obligations.

Sixty years on from the Universal Declaration, it is time we joined the revolution and opened new fronts of struggle in the battle against economic and social injustice.

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## NOTES

1. I would like to thank my colleagues at the Center for Economic and Social Rights for their valuable feedback on earlier versions of this article, and, in particular Shira Stanton for the language editing and the graphs, Maria Jose Parada for her editorial suggestions and Ignacio Saiz for countless helpful conversations and for his invaluable editorial input. This article does not necessarily reflect the views of the Center for Economic and Social Rights.

2. UNITED NATIONS. **International Covenant on Economic, Social and Cultural Rights**, 16 Dec. 1966, article 2; UNITED NATIONS. **Convention on the Rights of the Child**, 25 Nov. 1989, article 4.

3. UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. **General Comment 3**, Fifth session, 1990.

4. A few notable exceptions include the work of several NGOs that have been engaged in assessing

economic and social rights using budget analysis, such as Fundar in Mexico, the Children's budget Project at the Institute for Democracy in South Africa, and DISHA in India, as well as the use of epidemiology in research conducted by Physicians for Human Rights.

5. IGNATIEFF, M. & DESORMEAU, K. **Human Rights and the Measurement Revolution**. Working paper presented at the conference "Measuring Progress, Assessing Impact", Cambridge: Harvard University, May 2005.

6. According to Audrey Chapman, the UN Committee on Economic, Social and Cultural Rights "rarely uses 'progressive realization' as a standard in reviewing states parties' reports". CHAPMAN, A. The status of efforts to Monitor Economic, Social and Cultural rights. In: HERTEL, S. & MINKLER, L. (eds.). **Economic Rights: Conceptual, Measurement, and Policy Issues**. Cambridge University Press, 2007, p.145.

7. This approach was coined several years ago by Audrey Chapman as a "violations approach" for monitoring economic, social and cultural rights (see CHAPMAN, A. A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*, The Johns Hopkins University Press, v. 18, 1996).

8. In addition to these two types of obligations, states are also bound to fulfill economic and social rights. This third type of State obligation, which includes promoting rights, facilitating access to rights, and providing for those unable to provide for themselves, requires active intervention on the part of the State and is subject to progressive realization according to the maximum of available resources.

9. See AMNESTY INTERNATIONAL. *Serbia and Montenegro (Kosovo/a) "Prisoners in our own homes": Amnesty International's concerns for the human rights of minorities in Kosovo/Kosova*, 2003, and *Idem. Myanmar: The Rohingya Minority – Fundamental Rights Denied*, 2004.

10. HUMAN RIGHTS WATCH. *A Dose of Reality: Women's Rights in the Fight against HIV/AIDS*, 2005.

11. See AMNESTY INTERNATIONAL. *Angola: mass forced evictions in Luanda – a call for a human rights-based housing policy*, 2003; HUMAN RIGHTS WATCH. *Demolished: forced evictions and the tenants' rights movement in China*, 2004 and generally COHRE – CENTRE ON HOUSING AND RIGHTS AND EVICTIONS. *Program on monitoring, preventing and documenting forced evictions* (on file with author).

12. HUMAN RIGHTS WATCH. *Not Eligible: The politicization of food in Zimbabwe*, 2003; AMNESTY INTERNATIONAL. *Democratic People's Republic of Korea: starved of rights- human rights and the food crisis in the democratic people's republic of Korea*, 2004.

13. Although this is an immediate obligation, it has not been used that frequently by NGOs when monitoring specific rights or countries. May be this is partly due to the lack of conceptual clarity about this standard (see CHAPMAN, 2007, op.cit.) and the ambivalence of the human rights movement about using this standard (see e.g. *International Human Rights Internship Program (Ihrp)* and the *Asian Forum for Human Rights and Development (FORUM-ASIA)* and *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource*, 2000) but may be also related to the fact that assessing whether a state may have failed to prioritize minimum core obligations requires using quantitative tools.

14. Avoidable deprivations are often related to the obligation to fulfill ESC rights, the type of duty most

closely dependent on resources. This entails taking legislative, administrative, budgeting and other steps toward the full realization of human rights.

15. For a review of the literature on the subject, see MALHOTRA & FASEL. *Quantitative Human Rights Indicators - A survey of major initiatives*. Paper presented at a seminar in Turku, Finland, 2005.

16. See, for instance, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. *Report on indicators for promoting and monitoring the implementation of human rights*, UN Document HRI/MC/2008/3, June 2008. Available at: <<http://www2.ohchr.org/english/bodies/icm-mc/docs/HRI.MC.2008.3EN.pdf>>. Last accessed on: 11 Oct. 2008. TOMAŠEVSKI, K. *Report of the Special Rapporteur on the right to education to the Commission on Human Rights*, UN Document E/CN.4/2002/60, 2002. HUNT, P. *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Commission on Human Rights*, UN Document, E/CN.4/2006/48, 2006. INTER-AMERICAN COMMISSION FOR HUMAN RIGHTS, *Guidelines For Preparation Of Progress Indicators in The Area Of Economic, Social And Cultural Rights*, OEA/Ser.L/V/II.132, 2008.

17. See for example the country case studies in WORLD HEALTH ORGANIZATION. *National level monitoring of the achievement of universal access to reproductive health: conceptual and practical considerations and related indicators*, 2008. Available on: <[http://www.who.int/reproductivehealth/publications/universalaccess/national\\_level\\_monitoring.pdf](http://www.who.int/reproductivehealth/publications/universalaccess/national_level_monitoring.pdf)>. Last accessed on: 11 Oct. 2008.

18. For instance, this has been a major motivation for the Canadian International Development Agency (CIDA) to become increasingly involved in initiatives related to human rights measurement.

19. For this purpose, such government might want to undertake a costing exercise to assess the cost of additional steps that it could take to raise the status of realization in ESC rights and calculate what would be the indirect effects of raising the revenue required to take these additional step. For a proposal on this direction, see ANDERSON, E. *Using quantitative methods to monitor government obligations in terms of the rights to health and education*. Paper commissioned by the Center for Economic and Social Rights, forthcoming.

20. These are two of three types of human rights indicators proposed originally by Paul Hunt, while serving as Special Rapporteur on the right to health and then further developed by the Office of the High Commissioner for Human Rights as a framework for

the UN Treaty Bodies to monitor compliance with the corresponding International Treaties (Interim report to the General Assembly of the Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health: HUNT, P. **Interim report to the General Assembly of the Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health**, UN A/58/427, Oct. 2003 and UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS. **Report on indicators for promoting and monitoring the implementation of human rights**, UN Document HRI/MC/2008/3, June 2008. Available at: <<http://www2.ohchr.org/english/bodies/icm-mc/docs/HRI.MC.2008.3EN.pdf>>. Last accessed on: 11 Oct. 2008.

21. SEN, A. Human Rights and Human development. In: UNDP. **Human Development Report 2000**. ROBINSON, M. What Rights can Add to Good Development Practice. In: ALSTON, P. & ROBINSON M. (eds.). **Human Rights and Development**. Oxford University Press, 2005.

22. As Len Rubenstein writes, "Ministries, for example, are more likely to focus on urban centers than on rural areas and are likely to ignore vulnerable populations because of their weakness as a political constituency; and a bureaucrat charged with implementing one program only rarely will see the task as to fulfill everyone's rights," (RUBENSTEIN, L. Economic, Social, and Cultural Rights: A Response to Kenneth Roth. **Human Rights Quarterly**, The Johns Hopkins University Press, v. 26, 2004).

23. AMNESTY INTERNATIONAL. **Human Rights for Human Dignity: A primer on economic, social and cultural rights**, 2005.

24. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights stated: "In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations," (COMMISSION OF JURISTS THE FACULTY OF LAW OF THE UNIVERSITY OF LIMBURG AND THE URBAN MORGAN INSTITUTE FOR HUMAN RIGHTS UNIVERSITY OF CINCINNATI. **The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights**. Publisher: The United Nations, 1997).

25. The "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" state: "Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations," (MAASTRICHT GUIDELINES, 1997).

26. This idea is taken from Desmond I. Nuttall, who

writes that "To be an indicator, an educational statistic must also have a reference point against which it can be judged," (NUTTAL, D. The functions and limitations of international educational indicators. **International Journal of Educational Research**, v. 14, 1990).

27. When making such comparisons, one may want to control for other factors that could have an impact on the social outcome independent of GDP. For instance, when studying the effect of governance on poverty, Mick Moore controlled for population density, figuring that a country with a higher population density can more efficiently provide services than a larger country with small population density MOORE, M. (with Jennifer Leavy and Howard White). How governance affects poverty?. In: HOUTZAGER, P. P. & MOORE, M. (eds.). **Changing Paths**. International Development and the New Politics of Inclusion, Ann Arbor: University of Michigan Press, v. 1, 300 p., 2004. In another study, Frances Stewart controlled for whether or not a country was heavily dependent on oil extraction for its economic well-being STEWART, F. **Planning to meet basic need**. London: Macmillan, 1985. To avoid controlling for a whole set of possible relevant factors (such as weather/climate reasons, conflict spillovers, population density and cultural beliefs) which would require making the quantitative tools proposed here more complex (because of the use multiple regressions), it is instead suggested here to only use comparisons across countries of the same geographic region, a standard practice used as a simple alternative to controlling for these potentially relevant factors.

28. For a set of examples illustrating how the following tools in assessing compliance with human rights obligations can be used in a concrete situation see the Appendix of this article in the web-based version, based on an in-depth research project on Guatemala that the Center for Economic and Social Rights is currently undertaking together with the Central American Institute for Fiscal Studies: [www.surjournal.org](http://www.surjournal.org).

29. NGOs may sometimes want to add an optional fourth step that explores whether those policy failures are related to political, economic or other types of interests (e.g. political clientelism, corruption, state capture by economic elites, etc). This step may be crucial for showing that the inadequacy of policy efforts are often not just a matter of lack of effectiveness in government policies and programs, but related to lack of political will. CESR is currently working on fleshing out what this fourth step would entail.

30. For instance, Jean Dreze points out that in India, if the child undernourishment figures continue to decline at the sluggish rate of one percentage point per year, it will take another *forty* years before India

achieves nutrition levels similar to those of China today," (DREZE, J. Democracy and the Right to Food. In: ALSTON & ROBINSON, op. cit.).

31. Compounded or intersecting forms of inequality are those situations in which people belong to several disadvantaged groups at the same time. As a result, they suffer aggravated forms of inequality and/or discrimination. For an analysis of the various types of compounded discriminations and their relevance for human rights, see MAKKONEN, T. **Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore**. A research report produced for the Ministry for Foreign Affairs of Finland. Åbo Akademi Institute for Human Rights Research Reports 11, 2002. Available at: <[www.abo.fi/institut/imr/norfa/timo.pdf](http://www.abo.fi/institut/imr/norfa/timo.pdf)>. Last accessed on: 1st Nov. 2008.

32. The case of the right to health in Botswana is instructive to show the inadequacy of using only levels of deprivations (measured by outcome indicators) as the sole yardstick of a state's compliance with its human rights obligations. Since the HIV/AIDS epidemic reached Botswana, life expectancy in the country has plummeted, and its rank in the Human Development Index has dropped significantly as a result. Looking at these outcomes alone, one might conclude that the government of Botswana has neglected its human rights obligations. In fact, Botswana has been widely applauded for its response to the HIV/AIDS crisis, but has nonetheless been unable to prevent the disease from having a major impact on health outcomes in the country (HINES, A. **A collaborative human rights measurement regime**. Working paper presented at the conference 'Measuring Progress, Assessing Impact'. Cambridge: Harvard University, May 2005.

33. Those monitoring efforts that, given time constraints or lack of capacity, don't entail extensive research, might actually skip this step and move straight from step #1 to step #3. But even if they do so, the identification of determinants would be implicit in the monitoring exercise, since it wouldn't be possible to determine the adequacy of policy efforts (the focus of step #3) without presuming what are the obstacles (i.e. the determinants) that those policy efforts are supposed to tackle.

34. UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. **General Comment 14** (the right to the highest attainable standard of health). 11 Aug. 2000.

35. This section is taken from QUINTANA, E. **Measuring inequity and discrimination in health and education: a human rights perspective**. Paper commissioned by the Center for Economic and Social Rights, forthcoming.

36. UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. **General Comment 13** (the right to education). 8 Dec.1999, par. 6 and Idem, **General Comment 14**, par. 12.

37. BRAVEMAN, P. Monitoring Equity in Health and Healthcare: A Conceptual Framework. **Journal of Health, Population and Nutrition**, Calverton/USA, v. 3, p. 181-192, Sept. 2003.

38. VICTORIA, C.G.; WAGSTAFF, A.; SCHELLENBER, J.; GWATKIN, D.; CLAESON, M. & HABICHT, J.P. Applying an equity lens to child health and mortality: more of the same is not enough. **The Lancet**, London, v. 362, n. 9379, 19 July 2003.

39. This is a simplified version of the models for understanding of determinants found in the literature. For an example of a more sophisticated model, regarding determinants of child mortality, see MOSLEY, H. & CHEN, L. An Analytical Framework for the Study of Child Survival in Developing Countries. **Population and Development Review**, New York: Population Council, v. 10, 1984.

40. For example, schools in Ghana would often lose days of instruction due to leaking roofs (WHITE, H. **Books, Buildings, and Learning Outcomes: An Impact Evaluation of World Bank Support To Basic Education in Ghana**. OED World Bank, 2004).

41. According to a review of studies on primary educational outcomes, the lack of textbooks in many developing countries stands out as an input variable that consistently has an effect on poor academic performance of students (BOISSIERE, M. **Determinants of Primary Education Outcomes in Developing Countries** - Background Paper for the Evaluation of the World Bank's Support to Primary Education World Bank 2004).

42. "It has been documented that illness of various sorts, for example, malaria in tropical countries, can cause absenteeism, as well as reduced energy levels in class. Lack of nutrition at home can lead to poor performance, even if attendance is regular. In addition, there are the various physical and mental disabilities that occur in all societies," (Ibid).

43. "A review of studies for developing countries shows that there is a large difference between official and the actual instructional time in the classroom. Although there is much variation by context, the overall reduction in time on task is fairly large, perhaps as much as 30-50% is his rough guess. The reasons for this can vary, but teacher absenteeism is one major factor," (Ibid, referring to BENAVIDOT, A. **A Global Study of Intended Instructional Time and Official School Curricula, 1980-2000'**. Background paper commissioned by the International Bureau of Education for the UNESCO- "EFA Global Monitoring Report (2005): The Quality Imperative", 2004.

44. WORLD HEALTH ORGANIZATION. *World Health Report 2005*, ch. 5.

45. Econometric studies using multiple regressions indicate, for instance, how much the differences in child mortality rates among various countries can be explained by higher government health spending, how much by higher female literacy rates, and how much the changes in child mortality rates are due to levels of income inequality in each of those countries.

46. FTI SECRETARIAT. *Guidelines for assessment and endorsement of the primary education component of an education sector plan*, 2005.

Available at: <<http://www1.worldbank.org/education/efacti/documents/assessmentguidelines.pdf>>. Last accessed on: 1st November 2008.

47. WHO, UNICEF and UNFPA. *Methodological Issues in Measuring Maternal Mortality. Guidelines for Monitoring the Availability and Use of Obstetric Services*, 1997, ch. 2. Available at <[http://www.who.int/reproductive-health/publications/unicef/monitoring\\_obstetric\\_services.pdf](http://www.who.int/reproductive-health/publications/unicef/monitoring_obstetric_services.pdf)>. Last accessed on: 1st November 2008.

48. JOINT LEARNING INITIATIVE. *Human Resources for Health: Overcoming the Crisis*. Boston, Harvard University Global Equity Initiative, 2004.

49. For instance, the Center for Economic and Social Rights has produced short reports ("fact sheets") on countries appearing before the UN Treaty Bodies, showing that, for instance, while India had a much higher income growth than its neighbors in South Asia, its reduction in the child mortality rate during the same period was one of the lowest in this sub-region or that the proportion of urban Kenyans with access to an improved water source has been declining since 1990, in contrast to many of Kenya's neighbors that have made progress during the same period. See CENTER FOR ECONOMIC AND SOCIAL RIGHTS. *Fact Sheet # 1 (India)*, figures 4 and 5 and *Idem*, *Fact Sheet # 4 (Kenya)*, figure 15.

50. RASO, G. et al. Disparities in parasitic infections, perceived ill health and access to health care among poorer and less poor schoolchildren in rural Côte d'Ivoire. *Tropical Medicine and International Health*, v. 10, n. 1, p. 42-57, Jan. 2005.

51. *Fact Sheet #1 (India)*, figure 7.

52. BIRDSALL, N.; LEVINE, R. & IBRAHIM, A. *Toward universal primary education: investments, incentives and institutions*. Task Force on Education and Gender Equality, UN Millennium Project 2005.

53. An example of this technique is shown below, with regards to the resources devoted by Guatemala to its school meals program.

54. Often the development literature characterizes these skewed patterns of distribution as a problem of

inefficiency. But squandering these programs' resources on people who do not need them most can deprive underprivileged people of the only opportunity they have to get an education or of not being chronically malnourished. This is not simply a matter of inefficiency in the focalization of these programs.

55. In many societies, patrilineal principles of inheritance, where family property is transmitted through men, and patriarchal structures of authority, where most resources are under the control of the senior male, women are denied access to resources of their own and their ability to provide for themselves is restricted. In such societies, women tend to be regarded as economic dependents. The opportunity costs of sending girls to school is smaller than sending boys, since they cannot be expected to produce independent income in the future. In such circumstances, parents may prefer sending only the boys to school. (UNESCO- *Education for All Global Monitoring Report 2003/4: Gender and Education for All – The leap to Equality*, 2003/2004).

56. *Ibid*.

57. CESCR, General Comment 3.

58. See footnote 2, above, for examples of such organizations.

59. The difference between the expenditure ratios proposed by UNDP and those proposed here is that the UNDP's focus consolidates all types of social services into one single ratio, aggregating together different social service expenditures such as health, the education system, and the water and sanitation system. To be useful for the human rights framework, these ratios should be analyzed separately for each sector (i.e. health, nutrition, housing, etc.). This has two advantages for human rights purposes. First, expenditure analysis can monitor state compliance of a single right (e.g. the right to education or the right to health). This is not possible if all social services are analyzed in one category. Second, data on budget expenditure related to the right to education and the right to health is usually easily available, while data on social sectors (including other services such as water supplies and housing) is often not easily available. This makes it much more difficult to practically apply these ratios. This is one possible reason why the UNDP framework has not been used as much as one would expect. UNDP. *Human Development Report*, 1991 and *Idem*, *Human Development Report*, 1996.

60. UNDP, 1991.

61. As UNDP points out: "The possibilities for raising tax revenue will obviously vary among countries, depending, among other thing, on the structure of the economy, on the stage of development and on the country in institutional capacity". UNDP, 1991.

62. The relation between promoting ESC rights and



promoting economic growth is a complex one, worthy of a separate analysis beyond the scope of this article.

63. See for instance, CENTER FOR ECONOMICAL AND SOCIAL RIGHTS (CESR) AND INSTITUTO LATINOAMERICANO PARA ESTÚDIOS FISCALES (ICEFI). *Rights or privileges? Health and Education in Guatemala: time to decide*, forthcoming.

64. See for example UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. **General Comment 12** ( on the right to adequate food), 1999, par. 21; Idem, **General Comment 14**, par. 53.

65. One example was analyzed by the Kenya National Commission on Human Rights in its report **Living Large: Counting the Cost of Official Extravagance in Kenya** (2005). This report showed that Kenya's government has spent more than \$12 million on new cars for senior government officials – enough money to send 25,000 children to school for eight years. Similarly, the UNDP cites a notorious example of a project whose principal aim is to enhance the prestige of its national leadership through the construction of the \$250 million basilica to rival St. Peters, in a country where only 10% of the population is even nominally of that religious denomination, and where 82% of people lack access to safe water (UNDP 1991). [ the country referred to is Ivory Coast ]

66. ALSTON, P. *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*. **Human Rights Quarterly**, The Johns Hopkins University Press, v. 27, n.3, 2005.

67. General Comment 14, 2000, par. 19.

68. PRESIDENTIAL PEACE COMMISSION OF THE GOVERNMENT OF GUATEMALA AND THE UNIDAD REVOLUCIONARIA NACIONAL GUATEMALTECA. **Agreement on Social and Economic Aspects and Agrarian Situation**, 6 May 1996.

69. According to a study on the nature of the obligations under the International Covenant on Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights compared the money spent by a state in the implementation of a specific Covenant right and that which is spent for the same item by other states with

the same level of development to assess its compliance with its obligation of using the maximum available state resources. For example, when examining the Second Periodic Report of the Dominican Republic, the Committee noted with great concern that State expenditure on education and training as a proportion of total public spending was less than half the average in Latin America (SEPULVEDA, M. **The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights**. Intersentia, 2003).

70. Social allocation ratio and "social priority ratio" are two of the four ratios introduced originally by UNDP in 1991. The first one refers to social services share of government spending and the second refers to human priority [explain] share of social sector spending.

71. UNDP, 1991.

72. WORLD BANK. **World Development Report 1993**.

73. An example of this is the Country Fact Sheet produced by the Center for Economic and Social Rights about Kenya, a country that overall, when compared with its neighbors in Sub-Saharan Africa, is not doing exceptionally badly. See Country Fact Sheet #4, op. cit.

74. For more details see QUINTANA, op. cit., forthcoming.

75. Thus, some of the methods set out in this article might be helpful for the IBSA (Indicators, Benchmarking, Scoping and Assessment) procedure currently being developed by Eibe Riedel (member of the Committee on Economic, Social and Cultural Rights (CESCR) and Chair at the University of Mannheim) in co-operation with FIAN International, as a tool for Governments and UN treaty bodies to monitor the realisation of human rights treaties (see <http://ibsa.uni-mannheim.de/html/ibsa.html>) In particular, these methods might be helpful for the discussion between the UN treaty body and the relevant State Party on the State Party's established Benchmarks, in order to arrive at a consensus about them (scoping stage) and the dialogue stage between the State Party and the treaty body in preparation for the drafting of the latter's Concluding Observations (assessment stage).

76. IGNATIEFF & DESORMEAU, 2005, op.cit.

## RESUMO

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Não obstante tenham ocorrido avanços positivos nos últimos 60 anos, a promoção e a proteção dos direitos econômicos e sociais continuam, em todo mundo, a constituir um desafio preocupante. Enquanto milhões de pessoas não possuem acesso à água limpa, tratamento básico de saúde e educação primária, a maior parte dos Estados considera os direitos econômicos e sociais tão-somente como declarações abstratas de princípios. Governos e organizações internacionais, igualmente, enfrentam essas questões, em geral, como desafios relacionados apenas com o desenvolvimento, ignorando a sua relação com as obrigações de direitos humanos. Neste artigo, procura-se iniciar a formulação de um arcabouço metodológico, com o objetivo de elucidar de que forma alguns métodos quantitativos podem ser usados em situações concretas para determinar quando um Estado viola as suas obrigações de direitos humanos. Além de nos auxiliar, como defensores de direitos humanos, a revelar de maneira convincente o escopo e a magnitude de várias formas de negação de direitos, as ferramentas quantitativas também nos ajudar a expor e contestar políticas malsucedidas que contribuem para a perpetuação dessas privações e desigualdades.

### PALAVRAS-CHAVE

Responsabilização em direitos humanos – Métodos quantitativos – Direitos econômicos e sociais – Centro para os Direitos Econômicos e Sociais

## RESUMEN

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A pesar de los progresos positivos de los últimos 60 años, la promoción y protección de los derechos económicos y sociales en todo el mundo siguen siendo un desafío desalentador. Aunque millones de personas carecen de agua potable, cuidado médico primario y educación básica, la mayoría de los Estados no reconoce los derechos económicos y sociales como algo más que una declaración abstracta de principios. Por otra parte, los gobiernos y los organismos internacionales consideran estos problemas generalmente como retos del desarrollo, ignorando su relación con las obligaciones de derechos humanos. Este artículo, intenta establecer un marco metodológico para ilustrar cómo algunos métodos cuantitativos simples pueden usarse en situaciones concretas para determinar si un Estado está violando o no sus compromisos en materia de derechos humanos. Las herramientas cuantitativas pueden ayudarnos a los defensores de derechos humanos no sólo a demostrar persuasivamente el alcance y la magnitud de las diversas formas de negación de los derechos, sino también a revelar y enfrentar las fallas de las políticas que contribuyen a perpetuar esas privaciones y desigualdades.

### PALABRAS CLAVES

Responsabilidad y rendición de cuentas de los derechos humanos - Métodos cuantitativos - Derechos económicos y sociales - Centro de Derechos Económicos y Sociales



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#### ABSTRACT

In 2006 the United Nations underwent its greatest reform since its foundation in 1945, showing a renewed commitment to human rights protection. The replacement of the Commission on Human Rights with the Human Rights Council signifies the growing strength of the international human rights regime. However, this change has not been without criticism. In particular it has been alleged that the Council suffers from various political biases to the detriment of its effectiveness: for example, disproportionately focusing on the Occupied Palestinian Territories while failing to swiftly respond to abuses in Darfur. Further, the Council is arguably undermined by both its failure to implement effective mechanisms to prevent its own membership consisting to include acknowledged human rights violator and its continuing inability to harness US support. This paper analyses such criticisms.

Original in English.

#### KEYWORDS

United Nations – Human Rights Council – Commission on Human Rights – Politicisation.



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# FROM COMMISSION TO COUNCIL: HAS THE UNITED NATIONS SUCCEEDED IN CREATING A CREDIBLE HUMAN RIGHTS BODY?

Katherine Short

## 1. Introduction

### *Failing to fulfil?*

At the 59th Session of the Commission on Human Rights, (“the Commission”), the then incumbent Secretary General of the United Nations (“UN”), stated that:

*[w]e should be proud of the work of the United Nations in developing international human rights norms and standards. However, we cannot move forward without restoring the credibility and effectiveness of our human rights mechanisms and refocusing ourselves on the protection of individual rights.<sup>1</sup>*

This recognition typified and gave motivation to the belief that the UN human rights protection machinery was failing to fulfil its mandate to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”,<sup>2</sup> and to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and “to promote social progress and better standards of life in larger freedom”.<sup>3</sup> As it entered the last stages of its life, the Commission was criticised by a wide spectrum of the international society including states, NGOs and academics. This criticism targeted a range of perceived failures from unwarranted politicisation and ineffectual decision making to a lack of appropriate standing within the UN. The Commission was undoubtedly suffering from a severe credibility deficit

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*Notes to this text start on page 168.*

which threatened to undermine the entire UN human rights system. Kenneth Roth, executive director of Human Rights Watch, captured popular feeling towards the Commission when he described it as, “a jury that includes murderers and rapists, or a police force run in large part by suspected murderers and rapists who are determined to stymie investigation of their crimes”.<sup>4</sup> Primarily as a consequence of such persistent heavy criticism, in June 2006 the Commission was superseded by the Human Rights Council, (“the Council”) in an attempt to create a credible UN human rights body.

The primary aim of the Council is to debate human rights issues and to address and condemn human rights violations. This article will argue that, while the Council has attempted to address the many issues that led to its predecessor’s loss of credibility, nevertheless, it can still be accused of a political bias, which jeopardizes its credibility. There have been many causes attributed to this failing. Firstly, that the Council is undermined by its failure to implement effective mechanisms to prevent its own membership, to include globally acknowledged human rights violators. Secondly, that the Council is broadly seen as suffering from political selectivity, exemplified by a perceived obsession with the human rights violations in the Occupied Palestinian Territories. Thirdly, that it has been accused of being as ineffective as the Commission before it was in responding quickly to violations, due to a lack of political will. The aim of this article is to assess how the Council has attempted to rectify the Commission’s failures and to evaluate its success in doing so. It will conclude by analysing the future of the Council, analyzing how it could succeed and avoid the failures of its forerunner.

### *The mandate and genesis of the Commission*

The Commission was established under article 68 of the Charter of the United Nations as a Commission to the Economic and Social Council (“ECOSOC”) and given the initial mandate of submitting proposals for:

- an international bill of rights;
- international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters;
- the protection of minorities; and
- the prevention of discrimination on grounds of race, sex, language or religion.<sup>5</sup>

From its inception after World War Two, the UN established human rights as one of the three most important pillars for international society alongside economic and social development and international peace and security.<sup>6</sup> The establishment of the Commission signalled triumph for those petitioning for universal human rights standards to be recognised and enforced by world bodies. It was deployed in an era of high expectations and initially fulfilled its standard-setting mandate. Although eventually disintegrating into disrepute, the formation of the body was

an immense achievement, contributing to a growing norm that states are externally accountable for the internal treatment of their citizens.

The Commission outlived the Cold War where an ideological approach to human rights created a heightened conflict between prioritising the civil and political rights,<sup>7</sup> favoured by the Western bloc or economic and social rights,<sup>8</sup> favoured by the Eastern bloc. Debates over the definition of “a human right” stifled numerous attempts by the Commission to widen its mandate towards effective condemnation and human rights enforcement. Furthermore, the nature of the ideological divide of the world into Communist and Capitalist blocs meant that voting was predictable in line with ideology. The Commission was unable to fully overcome the ideologically opposed approaches to human rights even after the Cold War; Tomasevski noted that “the Cold War has not ended within the Commission. It colours much of what the Commission does in economic, social and cultural rights”.<sup>9</sup> After 1990, countries continued to vote in support of their former alliances, for example, as Kirkpatrick asserted, “Russia voted almost exactly as it had during the Cold War”.<sup>10</sup> This is evidence of a wider problem experienced by the Commission, namely that political interests take priority over human rights and preclude criticism of allies. Bloc voting by powers meant that results were predictable and often did not correspond to the severity of the human rights violations being discussed.

As the twentieth century drew to a close, the Commission was progressively undermined, failing to fulfil its mandate and by aiding the perpetrators of human rights abuses, by indirectly granting them immunity from international scrutiny. It became a ridiculed body rife with scandal, its members coming from the same countries it was supposed to condemn. In 2003, for example, Sudan was successfully able to gain a seat on the Commission, despite its record of human rights abuses. The then-incumbent Secretary General, Kofi Annan, asserted in 2004 that “standard-setting to reinforce human rights cannot be achieved by states that lack a demonstrated commitment to their promotion and protection”.<sup>11</sup>

The desire to uphold the Westphalian system in which states are sovereign actors guided by the norm of non-intervention, has prevented intervention in the jurisdiction of sovereign states, even when that intervention could promote the good of the individual over the good of the state through the enforcement of universal human rights standards. Lauren asserts that the “doctrine of sovereignty enabled national leaders to declare that what they did to their own people was their own business, making them immune from any international effort that might try to hold them responsible for violations of human rights”.<sup>12</sup> The theoretical and practical constraints that this brought about hampered the Commission throughout its life; “For the first two and a half decades of its existence, the Commission (...) narrowly interpreted its own mandate and focused principally on promotional activities and standard setting through the preparation of drafts of human rights instruments”.<sup>13</sup> However, as the international human rights ideology grew, so did demands upon the Commission to widen its mandate to condemn and scrutinize. This extension of its mandate brought with it added problems of increased criticism of its selectivity of scrutiny.

### *Successes of the Commission*

The Commission contributed to the development of a wealth of human rights laws, of various international treaties and in customary international law. The drafting of the Universal Declaration on Human Rights, (“UDHR”), adopted by the General Assembly on the 10<sup>th</sup> December 1948, will remain as one of the Commission’s greatest achievements and also as one of the most notable successes in the entire history of the UN. The UDHR has had profound consequences, as Lauren notes, coming quickly “to take on a life of its own and to assume growing moral, political, and even legal force through customary law”,<sup>14</sup> making it legal as well as declaratory.

The initial task of the Commission was to outline desirable universal standards of human rights, especially important given the post-war context. Upton asserts that “an examination of the covenants, conventions and declarations initiated by the Commission during its lifetime clearly indicates that this body has fulfilled its standard-setting mandate”.<sup>15</sup> Introducing civil and political as well as economic and social norms into civil society, the Commission showed an important recognition of the previously deprioritised economic and social rights in its creation of Special Rapporteurs (“SRs”) in areas such as health and education. In particular, the creation of the SRs on the right to education in 1998 has been highly successful and, as Smith notes, has been important in the recognition of “the use of education as a tool for fighting war and conflict”,<sup>16</sup> showing an important recognition by the Commission of the role that human rights play in development.

“The Commission advanced human rights protection globally through increasingly substantive thematic and country specific work, inventing a unique system of Special Procedures.”<sup>17</sup> The Commission’s first SR reported on human rights abuses in Chile under Pinochet, and by 2002 some 41 SRs worked globally examining human rights abuses. This system of SRs has been highly praised for investigative abilities and detailed reports. The rapporteurs have reported early signs of impending human rights abuses, identifying problems that could lead to catastrophes, for example, the early recognition of a humanitarian emergency in Rwanda.<sup>18</sup> However, as Pinheiro, a former SR notes, the Commission was “unlikely to assign SRs who [did] not have at least the acquiescence of their own governments”<sup>19</sup> restricting their capability to condemn. SRs need to prioritize the safety of individuals and it is vitally necessary that they be able to maintain their independence and impartiality. Their success was further limited by states neglecting to reply to requests or restricting access if granted. For example, SRs acting in areas including torture and health were refused access to Guantanamo Bay by the US government.<sup>20</sup> Furthermore, there was, and still is, a great discrepancy between the vast number of communications or urgent appeals sent in by SRs and Working Groups and the number of replies. For example, the Working Group on Enforced and Involuntary Disappearance has issued thousands of requests to governments around the world; yet received very few responses.<sup>21</sup>

The involvement of non-state actors led the Commission to be, apparently, an inclusive body aimed at hearing the opinions of all in order to reach a universal consensus. At its annual meeting there were “more than 3000 participants, between

national human rights institutions, UN agencies, and NGOs<sup>22</sup> who met to discuss human rights issues in a formal setting. By inviting NGOs, and observer states to attend, it was able to engage a wide spectrum of international society. However, while independent organisations were able to offer constructive suggestions, helping to depoliticise issues, there remained the problem that NGOs come from a wide variety of political backgrounds and defend specific causes.

It can be argued that the Commission's greatest achievement was that it ever came into existence. The first global body with state membership that was solely focused on human rights, it became an organisation for states and individuals to refer to for advice and for complaints. Its investigative powers brought to life some of the most horrific human rights abuses worldwide and provided impetus for change. It encouraged governments to act to improve their human rights records, evident in their willingness to avoid criticism by the Commission. However, its achievements in championing and safeguarding human rights came to be overshadowed by a credibility crisis.

### *Difficulties in the history of the Commission*

By 2006, the Commission had become the primary “forum in which governments publicly named and shamed others for abusing their citizens”.<sup>23</sup> While it was supposed to open up necessary discussions and make it hard for states to escape condemnation, its credibility was put into question when some members were themselves human rights violators. A study by Freedom House in 2005 revealed that “six of the eighteen most repressive governments, those of China, Cuba, Eritrea, Saudi Arabia, Sudan, and Zimbabwe, are members of the Commission on Human Rights (CHR), representing nearly 11 percent of the 53-member body”.<sup>24</sup> It became worryingly obvious that states were seeking membership in order to shield themselves from criticism or to criticise others for politically motivated reasons. The chair of the Commission rotated among the regional groups, and when it fell to the African Group in 2003, Libya, a state notorious for its abysmal treatment of its citizens, was appointed, a problem unfortunately unavoidable in a truly democratic organisation. The “realist contention that international organisations, like the UNCHR, have selectively enforced rules to support friends and punish adversaries”<sup>25</sup> was very much alive in the last few years of the Commission.

In May 2001 the Commission came under international scrutiny when the US failed to be re-elected for the first time since the body was established. There were suggestions that the US, under the new Bush administration, had not effectively campaigned since it was already disheartened by the inefficacy of the institution. Others claimed that the lack of US participation in new human rights instruments such as the International Criminal Court strongly influenced other western states into voting against its inclusion in the Commission. Sanger suggests that “China had quietly lobbied to get the United States removed, striking back for the annual (...) resolution that Washington sponsors condemning Beijing's treatment of dissidents and, this year, the Falun Gong movement”.<sup>26</sup>



The institutional standing of the Commission as a subsidiary of ECOSOC failed to give the Commission the focus it needed to increase its credibility. The importance of human rights within the UN had been mentioned in the preamble of the UN Charter declaring their protection, as one of the purposes of the UN, and yet they had not been given a position equivalent to the Security Council or ECOSOC. This sent a message that human rights, rather than being fundamental, could be subsumed to the political, economic or security interests of states. With cooperation and good faith this could have been overcome, but with human rights used as a pawn, institutional change and restructuring was essential to restore credibility in the UN human rights mechanisms.

## 2. From Commission to Council

### *Final straw events*

By 2006, it had become clear that change was vitally necessary if the discrediting of the entire UN human rights system was to be avoided. Kofi Annan stated that:

*if the United Nations is to meet the expectations of men and women everywhere - and indeed, if the Organisation is to take the cause of human rights as seriously as those of security and development - then member states should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council.*<sup>27</sup>

The Council has a greater position within the UN; it is now it reports directly to the General Assembly instead of ECOSOC, giving it improved international importance.

The 1993 Conference on Human Rights in Vienna signified that change was almost inevitable, as it recognised the new human rights priorities that existed in the world, crucially reaffirming the indivisibility between civil and political and economic and social rights. In his 2005 report 'In Larger Freedom' Kofi Annan proposed radical reform to the Commission declaring that, "a credibility deficit has developed, which casts a shadow on the reputation of the [UN] as a whole".<sup>28</sup> Moreover, the report asserted that the "promotion of [human rights] has been one of the purposes of the Organization from its beginnings but now clearly requires more effective operational structures",<sup>29</sup> suggesting that this could be done by disbanding the discredited Commission and replacing it with a much improved Council.

The preamble to GA Resolution 60/251 stated that the Council would recognise "the work undertaken by the Commission and the need to preserve and build on its achievements, as well as redressing its shortcomings".<sup>30</sup> The formation of the new Council involved almost a year of contentious debate over its new structure and mandate. Mary Robinson, former UN High Commissioner for Human Rights, has suggested that it was built upon compromise which led to human rights standards being sacrificed.<sup>31</sup> The Council "shall be guided by the principles of universality, impartiality, objectivity, and non selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human

rights”<sup>32</sup> and will aim to set universal standards of human rights to be adhered to globally. As a result, the new organisation has significant institutional changes to implement.

The inaugural session of the Council consisted of representatives from 153 states including all 47 member states, 154 International NGOs and 25 representatives from international organisations, including the UN. The Council was voted in with a near unanimous vote from the members of the General Assembly under Resolution 60/251<sup>33</sup> with only the US, Israel, the Marshall Island and Palau voting against it. While perhaps it is too soon to make a comprehensive analysis of the new Council, its failings and its successes are already starting to show.

### *New structure and mechanisms*

After much negotiation,<sup>34</sup> the Council has introduced significant changes and improvements on the workings of the Commission. These include a universal review system; stricter membership criteria, including measures to counter selectivity and fairer geographical representation; and procedural aspects such as a quicker response to human rights emergencies.

### **Universal Periodic Review**

In an attempt to overcome accusations of selectivity and double standards, the Council has installed an examination system called the Universal Period Review (the “UPR”). Resolution 60/251 stated that the UPR would be “based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states”.<sup>35</sup> This review system will first examine 28 Council members, 2 voluntary states and 18 randomly-selected states. The normative framework of the review is taken from “[t]he Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which a State is party, voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council”.<sup>36</sup>

The establishment of the UPR, while praised by many, has not escaped criticism. In the first place, the length of time that it took to get the review under way was criticised for being highly unacceptable. However, this was overcome with the review planned for April 2008. Secondly, the Council was faced with the challenge of deciding which state should be reviewed first. Critics claimed that the Council should have started by scrutinising all of its members before venturing further afield, in order to ensure that the body enforcing human rights would also be actively promoting these values by setting an example. The Council has taken steps to ensure that this problem will be overcome by declaring that every member of the Council will be examined during its three year membership.

The review system is very ambitious for a nascent body. With 191 recognised states in the UN, the task of examining the human rights records of all of them is

immense and will involve a great deal of staff, time and funding, all three of which are not plentiful within the Council or the UN as a whole. Initially “the Council [had] no budget to undertake”<sup>37</sup> the UPR, which threatened to delay its implementation. However, the OHCHR has now contributed a great deal of resources and personnel to work on this ambitious project, and Switzerland has also set up a fund to support smaller states who are preparing their UPR reports. The UPR will examine 48 countries per year, perhaps too many to allow the vigorous examination needed of every state, but will ensure that all states are regularly reviewed. Three hours will be allotted to each state review, regardless of whether the state has a good human rights record or of its size and population. Whilst this maintains equality between member states, it nevertheless fails to take into account the fact that states with poor human rights records need to be examined more closely.

While the resolution establishing the UPR system dictated that the review procedure would “complement and not duplicate the work of the treaty bodies”,<sup>38</sup> the Council has to ensure that the UN human rights system does not use this review system as an excuse for not utilising other UN Charter and Treaty mechanisms which already document human rights abuses. Treaty-based bodies such as the Human Rights Committee consider it as within their jurisdiction to investigate violations, so that the Council must endeavour to make sure to complements rather than undermines or overshadows these Committees’ important work. The UPR will not undermine country specific processes that were already in force within the Commission, as states are able to convene for special sessions and can examine specific human rights regardless of whether they are being reviewed.

“A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (troika) will be formed to facilitate each review.”<sup>39</sup> This will help the credibility of the body by ensuring that no bloc of regional states can seek to get involved in the review process to shield themselves from criticism. The UPR has the capacity to be one of the greatest successes and innovations of the Council as condemnation can have a detrimental impact on states’ political and economic foreign relations, an impact that states are eager to avoid. Pressure upon states to conform under popular pressure to human rights norms should make them reassess their public policies. A problem arises when states seek to influence the outcome of the review process to escape scrutiny; indeed Egypt has already attempted to do so.<sup>40</sup> During the 7<sup>th</sup> session, this became clear in the repeated statements of government representatives using the UPR to avoid discussion of their human rights records.

The UPR is a system of not only periodic review but also peer evaluation; states will be examining other states, which could result in undesirable politicisation weakening the credibility of the Council. A problem with the former Commission was that states took upon themselves the role of “judges and defendants at the same time (...) [indulging] in their little diplomatic games for big political stakes”.<sup>41</sup> The Council, with its mandate of human rights promotion, does not take precedence in the international relations of states; the furthering of national interest will inevitably be a state priority. The dependence upon state cooperation and a willingness to

condemn in a fair and impartial manner leads to the conclusion that the UPR will only function if states commit themselves to its success.

The UPR is now fully underway, and is exceeding the expectations of its critics. States being reviewed have brought huge delegations to Geneva, and have been helpful in preparing and introducing the documents, the inter-active dialogue was fairly open and recommendations were made. A positive result of the UPR that we can already observe is in the ratification of treaties: Honduras and Ecuador have ratified a number of treaties as a consequence of the UPR. However, it remains to be seen whether or not this will set a precedent.

## Membership

The Commission was established as a small group of only 18 members; by the end of the 20<sup>th</sup> century it had grown to 53 members. The Council has maintained a size similar to that of the Commission with a membership of 47 states. Two conflicting ideas influenced discussions regarding the membership of the Council: smaller membership than before with strict entry requirements or a body with universal membership. Kofi Annan originally proposed a smaller council which would have taken on the role of being a guide with moral authority made up of a small number of members; with admirable human rights records,<sup>42</sup> which would allow more focused discussion and debate. However, the problems of establishing the membership criteria for such a body were so difficult that the proposal was considered unfeasible. A body with universal membership, as originally proposed in the High Level Panel,<sup>43</sup> would be much more suited to the UN, and would enable it to assume the role of a negotiating table. Arguably it is better to have human rights violators engaged in active debate and discussion than to ostracise them from the international community. In the end, General Assembly President Jan Eliasson proposed a compromise whereby the Council would remain fairly large, at 47 members, but each state running for election would have its human rights records assessed.

A pre-occupation of the Council has been to introduce membership criteria stricter than those used by the Commission. Resolution 60/251 states that:

*When electing members of the Human Rights Council, Member States shall take into account (1) the contribution of candidates to the promotion and protection of human rights and (2) their voluntary pledges and commitments made thereto. Additionally, members elected to the Council shall (1) uphold the highest standards in the promotion and protection of human rights; (2) fully cooperate with the Council and (3) be reviewed under the universal period review mechanism during their term.<sup>44</sup>*

The UPR will be able to support a state's membership bid by giving evidence of its contribution to the protection of human rights, and states will be obliged to undergo the UPR during their membership term.

The element of subjectivity in the above criteria has been criticised and there were demands for more prescriptive membership criteria such as a close examination

of human rights treaties ratified by an applicant state. Such measures would have severely restricted the number of member states and would have undermined the universality and geographical representation the Council was striving for. Discussions over membership criteria remain controversial; Schaefer has argued that “the presumption that a country is a violator of human rights is very subjective. If you want to create criteria (...) that exclude certain countries, why not those that don’t support trade liberalization or that don’t implement foreign aid targets? The knife cuts both ways”.<sup>45</sup> States are theoretically still able to obtain membership even if they are under some form of sanction by the Security Council for human rights abuses. However, a prerequisite for membership is that states abide by human rights law and international standards, which will restrict ease of gaining membership. Despite this, Pace notes that “the effective implementation of this mechanism will require an unprecedented level of efficiency and good faith by member States to judge by the poor reporting record to the treaty bodies – not to mention the preparedness of the Secretariat”.<sup>46</sup>

The new geographical distribution of the Council allows developing states greater opportunity to voice their opinions on human rights issues. While it does go towards universality, this is not necessarily the best way of safeguarding human rights. Fairness in terms of geographical representation has to be weighed against fairness in terms of a good human rights record. A state can only serve a maximum of two terms, preventing the domination by certain states on the body, an attempt to correct another fault of the Commission. Forty-seven Member States are “elected directly and individually by secret ballot by absolute majority of the members of the General Assembly”,<sup>47</sup> receiving an obligatory 96 votes. This is a lower number of votes than the two-thirds that the US and the then incumbent Secretary General requested the Council have as a voting requirement. Members will lose their membership if two thirds of the General Assembly vote against them cancelling their membership for reasons of severe violations of human rights, which is a positive change no doubt, but still it continues to be considerably harder to evict members from the Council than to elect it.

The first election for membership of the Council showed significant improvements in comparison to the Commission, with severe human rights violators not even standing for election. However, the body has been criticised for allowing Egypt to take up membership until 2010. It is alleged that the Egyptian government has tortured its political opponents, evoking memories of the Commission when Sudan was able to take a seat, a state subject to criticism for its policies involving its own citizens. On the one hand, the ballots allow states to vote honestly without fear of repercussions in other areas of their foreign affairs. However, on the other hand, the secret ballots have led to a lack of accountability which has not adequately prevented states such as Egypt, Algeria, Pakistan, China, and Cuba from gaining a seat on the Council.

## Procedure

A serious criticism of the Commission concerned its failure to establish efficient mechanisms to allow it to deal with urgent human rights crises. It was often unable

to respond until its annual meeting, permitting states to act with relative impunity in the meantime. This issue has been addressed in the Council by the “special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council”.<sup>48</sup> These increased ad-hoc meetings will also help to alleviate the large backlog that the Council developed throughout the transition process. The special sessions can be called with only a third of the Council’s members. This ease of calling session may make the mechanisms more susceptible to politicisation, as no safeguards exist against self interested groups of states usurping this mechanism for their own political ends.

Kofi Annan expressed grave concern at apparent attempts to undermine and discredit the Special Procedures, calling them “the crown jewel of the system”.<sup>49</sup> While the system of Special Procedures has been highly successful, it has not been without criticism. The Council chose controversially not to renew the mandates of Cuba, Belarus and DRC, with the mandate on the DRC being replaced by “an ambiguous call on a group of thematic Special Procedures to carry out a joint mission to the country and report to the Council in March 2009”.<sup>50</sup> The Special Procedures have been further weakened by the fact that there have been “concerted efforts by a small number of states, including Algeria, Egypt and Pakistan, to rewrite the rules governing the selection of mandate-holders in order to impose measures that would seriously undermine the independence and effectiveness of the Special Procedures”.<sup>51</sup>

The system of sending SR’s to investigate human rights abuses, while not without problems, has been one of the most successful elements of the UN human rights regime. However, the future of the “crown jewel” of the Council is uncertain. If states continue to undermine this process then the repercussions will impact on the entire credibility of the Council.

### **Is the deficit addressed in the Council?**

In order to be a credible international organisation, the Council should fulfil certain criteria. It must be impartial, consistent, universal and able to effectively and appropriately respond to human rights crises as they occur. This article will now assess the Council’s successes and failures against these criteria.

#### *Effectiveness*

The Council must not only be able to periodically review the status of a state’s approach to human rights, but also be able to respond to humanitarian emergencies as and when they arise. The issue of how to deal with the situation in Darfur has been one of the Council’s first urgent highly problematic issues that it had to address swiftly and effectively to demonstrate that it has been able to overcome the credibility deficit of the Commission and that it possesses the ability to swiftly respond to emergencies.

The UN has stated that over two million people have fled their homes in Darfur and that hundreds of thousands of lives have been lost during the ongoing

conflict. Colin Powell argued as early as 2004 that “genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility and genocide may still be occurring”.<sup>52</sup> There is a growing recognition that the international community may have a duty to respond, at least through condemnation if not military intervention. The genocide in Darfur has great international repercussions. It has caused the Sudan’s relationship with Chad to become even more strained as more and more refugees flee across the borders and, as it grows, the situation constitutes an ever larger threat to international peace and security.

It took a substantial amount of time for the Council to act upon this dreadful issue, for which it received widespread criticism, and when it did, it initially chose to only “express concern”<sup>53</sup> rather than issue a condemnation, as it has done with great ease in the case of Israel. There have been constant calls for the Council to do more. Minority Rights Group has suggested that there has been “little effort by UN or external actors to drive forward a negotiated solution”.<sup>54</sup> The Council attempted to send a mission to Darfur but Sudan did not grant visas to the investigative team attempting to enter the country, a move which the Council’s subsequent resolution did not condemn. While it admirably attempted to carry out this mandate without being granted entry, through speaking to refugees and aid workers from Darfur, its actions were slow. “While the group of experts was ready to deliver their damning report on Sudan in September, Doru Costea agreed to delay it for two months without getting anything in return.”<sup>55</sup>

The decision not to renew the mandate<sup>56</sup> of the Group of Experts team was met with criticism by human rights NGOs such as Amnesty International.<sup>57</sup> The aim of this group had been to oversee the implementation of UN recommendations concerning Darfur and its lack of presence in the region will damage the reputation of the Council. The SR on Sudan will now take over this mandate while simultaneously being mandated with the investigation of abuses elsewhere in Sudan.

The report issued by the Council on the 7th March 2007<sup>58</sup> was damning not only upon Sudan but also upon the international community for its inability to act. Given the previous inaction coupled with Sudan’s seat on the Commission, tackling the situation in Darfur will be one of the most difficult tests of the Council and is its chance to prove that it has greater credibility than the Commission. The team investigating Darfur has called the response of the international community “pathetic”, calling upon “the solemn obligation of the international community to exercise its responsibility to protect [adopted at the 2005 world summit] has become evident and urgent”. If a state were to find it in its interests to act however, the Council’s resolution will hopefully prove to be a moral guide in gaining Security Council authority. The Council’s actions concerning Darfur are one of its greatest achievements. While slow to begin to act, once authorised, the Council has made good use of its limited resources in researching the situation and condemning the abuses. This has proven that the Council possesses the ability to act in the face of unprecedented crises; however, this does not mean that it always will.

### *Impartiality and Universality*

The Council's ability to act effectively and quickly is clearly still overly dependent on the political will of its members. The Council's credibility is also being undermined by those states which have chosen not to join the body, as they are succeeding in undermining the Council's legitimacy. One of the greatest criticisms of the Commission was that throughout its years it became a highly politicised body, dependent upon the political will of its members to act. The Council has been faced with the difficult challenge of attempting to gain the cooperation and membership of the world's greatest powers whilst remaining impartial and free from political influence.

The United States was one of the four states, alongside Israel, the Marshall Islands, and Palau, that voted against the creation of the Council and it has not yet chosen to seek a seat on the Council, despite almost continually holding a seat on the Commission. It publicly shunned the body in favour of a unilateral approach to human rights, arguing that it could further human rights better from the outside while pledging financial support to the institution to enable it to efficiently carry out its mandate. They argued that there is a lack of sufficient safeguards to prevent it from suffering from the same deficiencies as the Commission. Critics of the American decision suggest that this stems from fear of criticism under the review system, as a result of the high profile negative publicity surrounding the treatment of suspected terrorists at Guantanamo Bay and the Abu Ghraib prison<sup>59</sup> made in part by the SR's earlier scathing report. It was also reluctant to get involved without being able to guarantee its ability to exert a dominating influence, thus avoiding having its power and decisions undermined, not having the veto power it commands on the Security Council. The US preoccupied with the maintenance of its leading world power status and is reluctant to submit to universal principles that might put it in jeopardy.

US attitudes towards the Council have been a mixed blessing for the success of the body. Objections have been most loudly vocalised by John Bolton, the US Ambassador to the UN. He articulated the American reluctance to compromise with his declaration that "we want a butterfly. We're not going to put lipstick on a caterpillar and declare it a success".<sup>60</sup> While the US opposition to the Council has been a setback for its credibility and reputation, during the early stages, the Council may have actually gained from the US position. The US argued persistently for stricter membership criteria which influenced the current structure of the body. Furthermore, once the US had made clear its opposition to the Council, and its intention not to join, the formation of the Council was able to proceed with fewer compromises.

Lack of US engagement in the Council has had repercussions on the Council's credibility and its ability to act with global legitimacy. As the largest financial donor to the UN, the US is arguably its most powerful member. Primarily as a result of the Council's condemnation of Israel, the US has argued that the Council has developed a credibility deficit akin to the Commission and has threatened to withdraw funding.<sup>61</sup>



There have already been discussions as to whether the Council can afford to fully undertake its periodic review system, as decreased funding would serve to harm its most prized innovation.

American acquiescence and cooperation is vital to the success of the Council as the Council needs the US for funding, support, and its power in influencing other states to comply with human rights norms. If the US does not abide by extremely high human rights standards, other states will feel no compulsion to do so either, using US actions as a justification. The US has gradually been increasing its involvement in the Council, having chosen to be an observer at meetings. A future of cooperation between the US and the Council looks optimistic as the US appears to begin to accept its work. Such a move would help to restore faith in the US' commitment to international human rights and as it would improve the international standing and reputation of the Council.

The Council has been criticised for failing to promote universal human rights and, as such, letting down the people of the world living under repressive regimes. "A partisan approach by the Human Rights Council won't help the victims of [Arab-Israeli] conflict. It will only undermine the new Council's credibility."<sup>62</sup> The Council has begun to recognise this failing, evident in the admission by Doru Costea, the current President of the Council, that with regards to the Israel-Palestine conflict the "the Council has failed".<sup>63</sup> George Bush has stated that the "body has been silent on repression by regimes from Havana to Caracas to Pyongyang and Tehran, while focusing its criticism excessively on Israel."<sup>64</sup> The Council made the calling of special sessions easier to enable a quicker response to violations as they happen. So far, this has arguably been abused, however, it is well within the capabilities of member states to reform and hold sessions covering other issues, both thematic and country specific.

Encouraged by Kofi Annan to take "urgent action" on the matter, there was a special session held on the situation in Darfur in December 2006, marking a positive change of the Council after its previous weak approach. Indeed, "the Council fulfilled its mandate by 'rising to its responsibilities', 'putting people before politics' and thus cementing its credibility".<sup>65</sup> The session marked a move away from the highly politicised special sessions previously focused on Israel.<sup>66</sup> However, though lauded as a great success, the session did not have a strong enough repercussion to help with the situation in Darfur.

### *Consistency*

In order to prevent accusations of selectivity and politicisation the Council must respond to human rights issues consistently and not be dependent on the ideological, political or economic alliances of its members. It should develop a human rights standard that is universally applicable to all states.

The most controversial path the Council has taken is towards the Occupied Palestinian Territories. It has maintained a disproportionate condemnation of Israeli military actions, neglecting the condemnation of other participating states. The Council has not yet, at least numerically, demonstrated impartiality, proving to critics

that it is a politicised body incapable of acting fairly. In its first meeting, the Council made Israel a permanent agenda item, while simultaneously ignoring great human rights violations in other countries. This lack of impartiality has not gone unnoticed and has led to severe criticism of the body by the press, academics and the UN.<sup>67</sup> Ban Ki-Moon, incumbent Secretary General, expressed his disappointment “at the Council’s decision to single out only one specific regional item, given the range and scope of allegations of human rights violations throughout the world”.<sup>68</sup>

The actions of the Council during its second session regarding the 2006 conflict in Lebanon were one-sided, condemning Israel while ignoring violations of international law by the opposing side, Hezbollah. Out of the six special sessions called since its inception, the Council has devoted four to Israel. Louise Arbour, former High Commissioner for Human Rights, argued that “the independence, impartiality and objectivity of such an inquiry must be guaranteed not only by the credibility of the panel members, but also by the scope and the methodology of their mandate”<sup>69</sup> and the Council is failing to fulfil this mandate.

The resolution condemning Israeli action on the Gaza strip was voted against by many European States, including France and Germany, who argued that the Council should treat these sensitive and controversial issues in a more balanced manner.<sup>70</sup> Furthermore, the resolutions regarding the occupied territories lack explicit references to the rockets fired by militant Palestinian groups against Israel while constantly condemning the latter. If the Council cannot escape states forming blocs according to ideological or religious beliefs and voting accordingly, rather than voting impartially in the face of human rights abuses, then it will be unable to maintain any shred of credibility.

The controversial amendment to the mandate of the SR on the freedom of expression, which was supported by the Organisation of the Islamic Conference and by states such as China and Russia and passed in March 2008, was declared by the International Humanist and Ethical Union to be “the end of Universal Human Rights”.<sup>71</sup> The amendment maintains that the SR will have to report on instances of “abuse of the right of freedom of expression which constitutes an act of religious or racial discrimination”.<sup>72</sup> The resolution was opposed by many states as they saw it as an infringement of free speech and they “were of the view that it gave the SR ‘policing functions’ contrary to the established practice of Special Procedures and ran the risk of setting a precedent”.<sup>73</sup> Freedom of expressions is one of the most fundamental human rights and must be protected in order to ensure a free society. Furthermore, in order to prove itself to be consistent and credible, the Council must not only impartially comment on the human rights of all states, but also covers all aspects of human rights, ensuring their indivisibility.

## Recommendations and conclusions

There were three key factors which impeded the credibility of the Commission: a lack of effective mechanisms, politicisation and the inability to respond to human rights issues in a speedy manner. By 2006 it was not respected as a credible body,

creating a need for reform which was made possible by the end of the Cold War and the rise in strength and influence of the international human rights ideology. There was a demand for an organisation that would be respected by the international community. Human Rights Watch declared that, “the credibility deficit of the Commission on Human Rights, especially in its later years, created a demand for a body that is principled, credible, objective, firm in its dealings with governments, and timely in its response”.<sup>74</sup> The aim of this article was to assess whether the UN has succeeded in creating such a body that succeeds in overcoming the Commission's key failings.

The establishment of the Council received a mixed reception and has experienced vastly differing levels of engagement by states. The US, as the UN's most influential member and largest financial supporter, was initially one of its most vocal critics, which threatened to cause great problems for the body. It is clear that the UN has finally begun to embrace its third pillar, the protection of human rights, showing a “pursuit of the emerging norm of a collective international responsibility to protect”.<sup>75</sup> However, the persistent accusations of politicisation threaten its future. The new Council introduced significant changes in the Commission, including new membership, improved meeting processes and an improved standing within the UN, which has succeeded in giving it a new life with which to investigate human rights abuses. “Its inaugural two-week session, in June 2006, attracted several thousand participants, including representatives of the 47 Member States, 108 other states, 25 UN and other international organisations and 154 international NGOs”.<sup>76</sup>

The Commission lacked effective mechanisms to prevent human rights violators of gaining a seat on the body. To overcome this it will be necessary for its members to undergo a periodic review, a move which will increase the transparency of the body. The UPR is the most impressive institutional change within the Council; it will reduce politicisation and help counter selectivity. No state will be able to avoid scrutiny, regardless of its power or UN contributions. Cuba criticised the Commission for being “an inquisition tribunal for the rich”,<sup>77</sup> China argued that in the Commission “human rights progress in certain parts of the world could be bloated beyond proportion in order to fulfil hidden political agendas. For the same reason, serious human rights violations could also be ignored on purpose”.<sup>78</sup> With the new ability to suspend membership, the Council should succeed in being a reputable body to further human rights.

Country specific sessions run a great risk of excluding countries which deserve to be shamed and are at most risk from the politicisation that the Commission was infamous for, therefore they are one of the greatest challenges for the Council. The Council has put in place measures which will make it easier for special sessions to be held and it should make use of this opportunity to discuss thematic issues which would reduce politicisation opportunities. From its very first session in June 2006 the Council made Israel a permanent agenda item, subsequently dedicating the majority of its special sessions to the issue. The Council's obsession with Israel threatens to undermine its own credibility, hindering its prospects for

success and, furthermore, undermining all of the other good work which it is endeavouring to undertake. The ease with which special sessions can be held has made it possible that states with an ulterior political agenda have called them to further their own interests. The special sessions should be used to investigate not just country specific problems but also thematic human rights violations which would reduce opportunities for politicisation.

The Council replaced the Commission's annual meeting with three per year and incorporated allowance to convene for emergency sessions, yet it still does not respond to specific human rights violations quickly and effectively enough. As shown in Darfur, when a real and serious human rights emergency occurs, the Council is slow and ineffective when there is not the political will to encourage action. The situation in Darfur is deteriorating and a failure to act has serious implications on the lives of individuals.

Using the United States as a key example, this article has looked at the importance of gaining the involvement and cooperation of the largest world powers. The Council shows sufficient organisational improvements from the Commission and its mandate allows it to function credibly. The problem lies in its reliance on states to make full use of these opportunities. States are unwilling to damage the political and economic ties that they have with other states to enforce human rights standards that do not directly affect their own interests. Furthermore, it is the member states which prevent the Council from acting swiftly and effectively to sudden human rights violations, rather than institutional deficiencies.

While the Council may still be suffering from teething problems, there are provisions in place to allow for further reform, an advantage not available within the Commission. However, the Council cannot form a credible and effective human rights body if its members do not follow the standards it aims to preach. For this reason, the NGO involvement with the Council is a positive move, as it offers the opportunity to hear independent opinions on human rights abuses. It will even consider recommendations and reports from NGOs in the UPR. However, "until the United Nations holds its members accountable for their failure to observe well-established human rights norms, the United Nations is not the best forum for the pro-proposed Human Rights Council".<sup>79</sup> The UN is an inadequate body to condemn human rights abuses, as, even if they are well documented, states will not openly admit to committing human rights violations. Furthermore, there still are insufficient safeguards to stop human rights violators from gaining membership. The Council is becoming a body tarnished with acquiescence and compromise rather than a body that is working to safeguard the human rights of the individual. A more effective body could be formed independently of the UN, made up of truly democratic liberal states, as the Council has trouble simultaneously taking on the role of violator and punisher while maintaining credibility.

The Council is still a young project of the UN and has the capability to "help bridge the gap between the lofty rhetoric of human rights in the halls of the United Nations and the sobering realities on the ground".<sup>80</sup> It is only just beginning to realise its potential to make great advancements and achievements

in the field of human rights. The Council will be reviewed in 2011; an important test which could elevate the status of the Council and prove to the international community that it is capable of upholding international human rights standards. If it fails, then the workings of the Council must be radically reassessed, and possibly reformed again to solve the problems highlighted. However, the real test is in the daily battle of victims of human rights for justice and redress. The Council must act on behalf of victims. "The moral authority of the U.N. depends on its ability to respond effectively and quickly to the plight of human rights victims around the world" declared Roth, adding that the Council "can be made to work if the governments of the world show the necessary commitment. The ball is in their court".<sup>81</sup>

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## RESUMO

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Em 2006 a Organização das Nações Unidas passou pela maior reforma desde sua fundação em 1945, demonstrando um compromisso renovado com a proteção dos direitos humanos. A substituição da Comissão de Direitos Humanos pelo Conselho de Direitos Humanos reflete o fortalecimento do regime internacional de proteção dos direitos humanos. Entretanto, essa mudança não transcorreu sem críticas. Particularmente, alega-se que o Conselho é influenciado por diferentes inclinações políticas, em detrimento de sua efetividade: mantendo, por exemplo, foco desproporcional nos Territórios Ocupados da Palestina, e falhando em reagir com prontidão aos abusos cometidos em Darfur. Além disso, o Conselho é claramente desacreditado por seu fracasso: de um lado, tem falhado na implementação de mecanismos eficazes de direitos humanos que impeçam ações de seus próprios membros, violadores de direitos humanos; de outro, não tem conseguido angariar apoio dos Estados Unidos. Esse artigo analisa tais críticas.

### PALAVRAS-CHAVE

Nações Unidas - Conselho de Direitos Humanos - Comissão de Direitos Humanos - Politização

## RESUMEN

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En 2006 la Organización de Naciones Unidas sufrió su mayor reforma desde su creación en 1945, mostrando un renovado compromiso de protección de los derechos humanos. La sustitución de la Comisión de Derechos Humanos por el Consejo de Derechos Humanos pone de manifiesto la gran fortaleza del derecho internacional de los derechos humanos. Sin embargo, este cambio no ha estado exento de críticas. En particular se ha sostenido que el Consejo adolece de diversos prejuicios políticos en detrimento de su eficacia: por ejemplo, concentrándose desproporcionadamente en los territorios palestinos ocupados mientras que no responde rápidamente a los abusos en Darfur. Además, el Consejo está, sin duda, debilitado tanto por su fracaso para aplicar mecanismos eficaces para evitar que sus propios miembros sean violadores de los derechos humanos como por su incapacidad para conseguir el apoyo de los Estados Unidos. Este artículo analiza las referidas críticas.

### PALABRAS CLAVES

Naciones Unidas - Consejo de Derechos Humanos - Comisión de Derechos Humanos - politización



ANTHONY ROMERO

Anthony Romero has been the Executive Director of the American Civil Liberties Union since 2001, and he “has presided over the most successful membership growth in the ACLU’s history and more than doubled national staff and tripled the budget of the organization since he began his tenure.”\* Founded in 1920, the ACLU has focused on the

protection of freedom of speech, association and assembly, freedom of the press, freedom of religion, equality before the law, right to due process and right to privacy. It has today more than five hundred thousand members and litigates six thousand judicial cases a year.\* In this interview, Romero discusses the relationship between the ACLU and the human rights movement.



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## INTERVIEW WITH ANTHONY ROMERO, EXECUTIVE DIRECTOR OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU)

By Conectas Human Rights

**Conectas:** *How do you see the international human rights movement today?*

**Anthony Romero:** The international human rights movement has made enormous progress in the last forty years. The modern international human rights movement really came out of the atrocities of the Second World War, and when you look worldwide and you see the growth of human rights NGOs, as well as the effect we've made in having international law that's binding on countries; when you see that we've had governments and government leaders held accountable, you might agree that this is one of the great success stories of the twentieth century: human rights NGOs have really made a difference in peoples' lives.

However, over the last several years, especially in the United States, we've seen a remarkable loss of human rights. The eight years of President Bush will go down in history as one of the darkest moments in America's commitment to human rights. It was almost inconceivable to anyone here in the United States that the highest levels of our government would sanction torture; that our government would arrest American citizens and hold them without access to lawyers and without charging them with a crime; that our leaders would sanction policies that abrogate every commitment this country has ever stood for, every commitment this country has ever made on human rights issues. Unfortunately, while the

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\*ACLU. ROMERO, A. D. Available at: <<http://www.aclu.org/about/staff/13279res20030205.html>>. Last access on: 24 Oct. 2008.

\*ACLU. About us. Available at: <<http://www.aclu.org/about/index.html>>. Last access on: 24 Oct. 2008.

human rights movement has had enormous success in its history, the United States has lost enormous ground over the last eight years.

The existence of a global human rights movement is actually, for this very reason, vitally important. Even if one government of one country sets back human rights, there is a movement of leaders and human rights NGOs that can keep the pressure on and keep pushing for advances in human rights.

**Conectas:** *Does the ACLU have any connections to human rights NGOs outside the US?*

**Anthony Romero:** Sure. The ACLU is a human rights organization. We're often described as a civil liberties organization, but we defend the rights of all people in America, whether you're a woman or a man, whether you're a citizen or an immigrant, whether you're black or white, or Hispanic, whether you're gay or straight, whether you're a member of the Nazi party, or a member of the African-American civil rights movement. I've always viewed our mission as being a human rights NGO that fights for the human rights of all people in America. That being said, our mandate is to hold the US government accountable for the human rights abuses in the US. And we do that by suing the government; we do that by lobbying Congress; we do that by educating the public. We also do it by using international mechanisms. We've increasingly looked to both the United Nations and the Inter-American Commission on Human Rights to hold the US government accountable for human rights abuses, when we're not able to do so in domestic fora. We've recently brought cases to the Inter-American Commission. We've prepared shadow reports for the UN Committee on the Elimination of All Forms of Racial Discrimination. We've sent delegations of domestic advocates to Geneva and to some of the UN Meetings to talk about the human rights abuses at home.

There is a lot that we share in common with other human rights NGOs who work in their own home countries. We have an emerging network of human rights or domestic human rights organizations that, like us, hold their governments accountable. We had a meeting about three months ago, for instance, with 15 domestic human rights groups, including "Liberty" in the UK, "The Legal Resources Center" in South Africa, the "Irish Civil Liberties Union", the "Hungarian Civil Liberties Union", the "Association for Civil Rights" in Argentina, and the "Association for Civil Rights" in Israel. We all got together earlier this year with the sole purpose of sharing perspectives and strategies. It was a remarkable meeting because we realized, as domestic human rights NGOs, that our job is to protect the rights of all people, without respect of countries, and there was a lot that we could learn and share with each other.

At the same time, some of the human rights challenges that we now confront are global challenges; they are no longer domestic problems. The question of xenophobia and *islamophobia* are problems that we all confront in our different societies. It is as much about how South Africans have been scapegoating individuals from Zimbabwe as it is about Americans scapegoating Muslims, Arabs and Mexican immigrants. We understand that the so called “war on terror” has had global implications for human rights. When you think about issues like rendition; when the American government renders an individual to another country with the purpose of having him tortured, that is no longer a domestic issue. And it requires us to understand and work with our sister organizations, in other countries, to have a global approach on what are global problems.

Another example of a global challenge is the advancement and protection of rights for lesbian, gay, bisexual and transgender people. The question of same-sex marriage is playing out very significantly on a global scale. Spain, for instance, has granted gay and lesbian couples the right to marry. The gay/lesbian rights movement, which has always been seen as a domestic issue in different countries, is increasingly becoming a global human rights movement for equality and dignity. The ACLU’s job is to play a part in that, and to share expertise and strategies, to learn from other countries in context, to draw upon international law that we can use in our domestic advocacy.

To be clear, the ACLU will always be focused on holding the US government accountable. Our job is not to criticize China, or Cuba, or Venezuela for their human rights violations. That is the work of other human rights NGOs, and luckily we’ve had very strong NGOs working at the global level and in those countries, which can do that work. However, as one of the largest human rights NGOs in the country, if not the world, we could still play a leadership role in the global movement for human rights.

**Conectas:** *And what is the role that it has been playing so far?*

**Anthony Romero:** About four years ago, we created a Human Rights Program at the ACLU. The idea was to hire individuals within the organization with expertise in international mechanisms and international human rights law. These individuals serve as a nucleus of expertise; they work with all the different litigation projects and offices of the ACLU to incorporate a global human rights approach into our domestic advocacy. They radiate out the expertise in other projects.

For instance, the Women’s Rights Project filed a lawsuit on behalf of Jessica Gonzales – a woman who had an abusive husband. She was able to get a court order requiring the husband to stay away from her and her children. However, one day, her husband showed up and took the



kids. She kept calling the police to enforce that protective order, but the police refused to enforce it. At the end of that same day, the husband killed himself and both of her two kids. We brought that case all the way up to the Supreme Court to say that the police failed on its permanent responsibility to protect Gonzales' and her children's human rights. The US Supreme Court did not agree with us. So we filed a case within the Inter-American Commission. We brought charges against the American government and the local police authorities for not enforcing the protection of Gonzales' human rights.

That is just one example of our using international mechanisms or international fora on issues that we are not able to make progress on domestically. There are other examples. Take racial discrimination. We have consistently worked to hold our government accountable for the persistence of racial discrimination in America, but we have never tried to put that within a larger context or framework of the United States' international obligations.

You will find, however, a remarkable number of decisions, even in local jurisdictions, that begin to apply international human rights law to local ordinances. For instance, the city of San Francisco has adopted CEDAW as a legal framework; it applies in the city of San Francisco just like a local city law would apply. One of the things that makes me very hopeful, even though the last eight years have been very dark times for human rights in America, has been the fact that this is a movement of enormous vigor and vitality. It is not good anymore to just turn a blind-eye and say "what happens in that country is that country's problem". The emergence of institutions like the International Criminal Court, the emergence of the cross-country campaigning that has come out on issues like Guantanamo and torture, that gives me hope that in fact the global human rights movement will continue to progress, notwithstanding whatever challenges we confront in our respective countries.

**Conectas:** *Do you think that after Abu Ghraib, Bagram Air Base and Guantanamo, there has been a shift in the way Americans perceive human rights or do Americans continue to regard human rights as something restricted to the developing world?*

**Anthony Romero:** No, there has been a change in America on this issue. In fact that is not just my opinion or my impression. We have conducted surveys, where we have asked people how they view these issues and, increasingly, what we thought would be a question that the domestic American constituency or the membership of the ACLU would see as a foreign issue, they see as the most *bread and butter* human rights issue. They understand that the abuses that happened in Abu Ghraib have as

much to do with what happened in Iraq as it does with what is happening in Washington. There is a greater recognition that the one thing that binds all these issues together, so that they are not constituency-specific, is a broader human rights framework; and I think that framework has taken root in a very significant and deep way.

The damage has been done by President Bush and Mr. Rumsfeld, Mr. Cheney and Mr. Ashcroft, Mr. Gonzales and Mr. Addington. But the fact is that the global human rights movement is strong enough to withstand and survive, and hold them accountable. One of the things we're looking at right now is that we have hopefully a change in administration in Washington in the next 30 days. And, whether it is Senator McCain or Senator Obama who gets elected,\* we will do our best to hold accountable, in American courts, those leaders who were responsible for human rights abuses over the last 8 years. We already sued Secretary of Defense Rumsfeld on behalf of individuals who were tortured in Abu Ghraib. We have a lawsuit against Mr. Tennant, who was the head of the CIA. We have lawsuits against Jeppesen Dataplan, which is a subsidiary of the Boeing Corporation, for running the rendition flights that rendered people to countries where they would be tortured. Those are very hard cases to win. We're giving it our best shot, but the odds are probably not with us. Now if we begin to think of strategies of holding them accountable, not just in America, but globally, then we will have many more opportunities. While American judges and American law enforcement officials may be unwilling to hold Mr. Rumsfeld accountable, we should make Mr. Rumsfeld quake in his boots whenever he travels to another country. What if Mr. Garzón were to indict Rumsfeld in the way he did Pinochet? What if we were able to make sure that, if Mr. Addington travels to London to address some group of jurists, the British authorities would exert power or pressure over him? We want to make sure that we can put the fear of God into them, so that when they travel anywhere overseas, they worry about the human rights movement holding them accountable. Human rights are universal values, and if the American government doesn't have the political will or the ability, or the willingness to hold American officials accountable for human rights violations, then we'll look to the global community to help us do that.

**Conectas:** *Changing subjects. Is there an agenda of social rights in the ACLU?*

**Anthony Romero:** The distinction between social rights and civil and political rights is a bit of an artificial debate within the ACLU, and

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\*Senator Obama was elected president in November 2008.

within American human rights circles. When you go back and you look at the beginnings of the human rights movement, these rights were one and the same. The Universal Declaration of Human Rights talks about all of them. Unfortunately, the civil and political rights agenda was the one that was taken and promoted by the Western Bloc countries, and the economic and social rights were taken up by the Eastern Bloc countries. That unified vision of human rights unfortunately fell victim to the Cold War politics of the twentieth century. I think some of that has changed. While we have certain limitations in American courts regarding economic and social rights (under our Constitution, we don't have the right to housing; we don't have the right to health; we don't have the right to food), there are other ways of addressing those issues, through established rights which are recognized by the federal government.

When we focus, for instance, on women's rights, on gender discrimination, we apply an economic and social rights frame to figure out what clients we represent and what cases we'll bring. The ACLU Women's Rights Project focuses very much on the rights of low-income, minority women. As to the types of cases we bring, there is, for instance, a case of two domestic workers who were shipped to America to work for the ambassador of Kuwait to the United Nations. They were essentially slaves. They were not allowed out of the house; they were paid poor wages; they were physically abused, and sometimes sexually abused by their employers. We applied an economic and social rights frame to figure out what cases we pushed and how we pushed them. Now, the arguments we might use are not economic and social rights arguments *per se*, because economic and social rights are not justiciable in American courts.

I'd say the same rationale applies to our work after Hurricane Katrina, where a lot of our focus has been on the poor African-American community that has not been helped by the US government programs to rebuilt New Orleans. We have specifically targeted individuals that are the most disenfranchised and often the poorest of the poor. Once again, we applied an economic and social rights frame to select clients and cases. More specifically, one of the cases we brought after Katrina was on behalf of prisoners who were at the Orleans Parish Prison in New Orleans. The sheriff made a decision to not evacuate them, even when he knew that Katrina was on its way to wreak havoc in New Orleans. Many Americans might say: "well, why would these prisoners be entitled to rights? Katrina was a tragedy for everyone involved". But we were able to show that it was not just a mistake. It was a conscious decision to put prisoners at risk of enormous physical harms. Some of our clients were locked in that prison for three days, and they had no food; they couldn't get in or out, because the guards quit in the middle

of the storm. Prisoners were submitted to terrible conditions. When they were finally evacuated from the prison, they were put into other overcrowded prisons without sufficient food or access to healthcare, which just led to further violence.

**Conectas:** *As you mention ACLU's work on behalf of prisoners, we would like to address an issue that has been of concern in a number of countries in the Global South. The US is one of the countries with the largest percentage of the population in prison. Has ACLU taken a position regarding over-incarceration?*

**Anthony Romero:** Very much. First, we have a national prison project, which litigates the conditions of confinement in prisons. We deal with all sorts of issues, such as the lack of access to healthcare, overcrowding, violence and rape in prisons, the lack of access to good counsel, the lack of access to information, the lack of access to being able to practice your religious beliefs, the treatment of mentally ill prisoners. So, one way that we deal with the over-incarceration issue is by trying to improve conditions in prisons.

Second, we look at the root causes, because we don't want to treat only the symptoms without treating the disease. One of the root causes of over-incarceration in America - in a country that has a larger percentage of it is population in prisons than any other country in the world, including Russia and China, has been the drug war. You find that almost two thirds of all the prisoners who serve in US prisons right now are there for non-violent drug offenses. My organization takes the point of view that the use of drugs by individuals ought not to be criminalized. We take the point of view that all drugs should be legal: every drug, from marijuana to heroin. Drugs can be regulated by the government, just like it regulates alcohol or tobacco, but we should not criminalize what is a public health problem. The best way to deal with drug abuse and drug addiction is not to put people behind bars, but to help them treat it, as the public health issue that it is. We have a big litigation project that deals with the drug war and challenges the government's very vigorous campaign against the use of drugs, because we understand that crimes that often lead people to prison are often non-violent drug offenses; and we hope to lower the incarceration of individuals, by ultimately making this country deal with the drug issue from a public health perspective rather than a criminal justice perspective.

Third, we also focus on the selective enforcement of the nation's laws, because, let's face it, many of the people in prison represent the poor minorities; and that's not by chance, and that's not by coincidence, that's because the police specifically targets racial and ethnic minorities and poor people. In some of our local offices, we specifically work at

selective enforcement. We look at police practices that target minorities and poor people. One of our great campaigns has been to force police departments in America to document the individuals that they stop on the streets and on the highways. There is a phenomenon that we call in America: “driving while black or brown”. If you are a white person driving down the street, you are less likely be pulled over by police officers than if you are a black person or a Latino. We force the police departments to collect data; we sue the police departments to begin to collect data on the racial breakdown of the individuals they stop. We show that there is an over-concentration on stopping minority drivers, and then we force the police department to train their officers and to ensure that they are not just stopping people on the streets or on the highways because of their race or because they are poor. Combating selective enforcement of the law is also a way for us to make sure that we are not just dealing with the symptoms, but with the mechanism that creates the over-incarceration in the countries.

Finally, the one last way that we focus on the over-incarceration has been to connect it back to what is happening in many urban and minority schools. We talk about the school-to-prison pipeline. In recent years, there has been an effort to bring the police departments in to deal with discipline and violence issues in schools. That has become a revolving door. For when you have broken schools where kids are not getting good education with teachers who are not well prepared, you wind up with a revolving door from the broken school house to the jail house. By making that link very explicit, both through research and through litigation, we hope to deal with the over-incarceration issue as well.

**Conectas:** *A last question. Do you think it is important that a Supreme Court be open to the participation of civil society organizations through, let's say, amicus curiae? Why?*

**Anthony Romero:** The Supreme Court in our country and in almost all the countries that I know is one of the most significant branches of government. We elect the President; we elect the Congress. The Supreme Court Justices in America and in many countries are appointed by the heads of government. One of the ways that you can make sure that the Supreme Court remains accessible to the public is by ensuring that civil society organizations are able to bring cases before the Court, able to file *amicus* pleas. The Court should be a more visible institution; it shouldn't just be a marble box that is sealed from public review and public scrutiny.

The ACLU participates in more than twenty cases a year that come before the Supreme Court. We are either direct Counsel on those cases or we write *amicus* pleas. It is essential that they hear our perspectives,

even though it may not be our case, and even though we might lose in the Supreme Court. The Supreme Court should not be isolated from general society. Much of the work that we do in educating the public and in lobbying Congress helps change the points of view and the conditions, and the ultimate outcomes of Supreme Court decisions. The one example I would use would be *Bowers v. Hardwick*, a 1986 case where the Supreme Court said that two consensual adults did not have the right to have sex in the privacy of their home if they were gay. That was a case we brought to view of the Supreme Court in 1986, and it was a case that we lost. Now, in 2004, the Court reversed itself. In the *Lawrence v. Texas* case, they held that two consenting men or two consenting women had the right to privacy in their bedroom. That flip-flop, if you will, from 1986 to 2004, said less to me about what happened in the Court and more about what had happened in American public opinion. It was no longer tenable for the Court to uphold discrimination in that way. The jurisprudence didn't evolve very much from 1986 to 2004; what evolved was public opinion, and the court had to catch up with what public opinion had become, rather than helping set the public opinion. The more that we can make the Supreme Court, and the Supreme Courts of all countries, more accessible, more responsive, having to explain their positions, the more we will find those Courts willing to make the hard decisions and to defend human rights.

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