

# sur

international journal  
on human rights

7

2007  
Number 7 • Year 4  
English Edition

● **Lucia Nader**

The role of NGOs in the UN Human Rights Council

● **Cecília MacDowell Santos**

Transnational legal activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights

## TRANSITIONAL JUSTICE

● **Tara Urs**

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The long road in the fight against poverty and its promising encounter with human rights

● **Interview with Juan Méndez**

By Glenda Mezarobba



HUMAN RIGHTS  
UNIVERSITY NETWORK **SUR**

A project of Conectas Human Rights

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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>>

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---

**CIRCULATION**

Catharina Nakashima

---

**PRINTING**

Pro! Editora Gráfica Ltda.

---

**SUBSCRIPTION AND CONTACT**

Sur – Human Rights University Network  
Rua Pamplona, 1197 - Casa 4 São Paulo/SP - Brasil -  
CEP: 01405-030 Tel.: (5511) 3884-7440 - Fax (5511) 3884-1122  
E-mail: <[surjournal@surjournal.org](mailto:surjournal@surjournal.org)>  
Internet: <<http://www.surjournal.org>>

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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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SUR - HUMAN RIGHTS UNIVERSITY NETWORK is a network of academics working together with the mission to strengthen the voice of universities in the South on human rights and social justice, and to create stronger cooperation between them, civil society organizations and the United Nations. Conectas Human Rights, a not-for-profit organization founded in Brazil, is home to Sur. (See website <[www.conectas.org](http://www.conectas.org)> and portal <[www.conectasur.org](http://www.conectasur.org)>. To access the online version of the journal, please go to: <[www.surjournal.org](http://www.surjournal.org)>.)

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## PRESENTATION



We have reached issue seven of *Sur – International Journal on Human Rights* with an excellent response from our readers and a new partnership with the International Center for Transitional Justice.

An evaluation of the journal was conducted to gain some feedback for us to improve the quality, to cater more to the interests of our readers and to make it even more accessible and critical. Of the 15% of readers who responded to an online survey, among them professors and human rights activists, 66% considered the journal to be excellent and 34% judged it to be good. The best qualities they identified were: (a) the high standard of the journal; (b) its potential to disseminate information on human rights; and (c) its broad application, both for university and non-university courses. The main challenges, meanwhile, are: (a) to address more specific thematic issues; (b) to publish new authors; and (c) to improve the dissemination of the journal. To meet these challenges, the following steps have already been taken: (a) we shall focus this and future issues on topics specifically related to the Global South, such as transitional justice, access to medicine and freedom of expression; and (b) we have staged launches in human rights centers at universities on different continents. Furthermore, we have plans in 2008 to establish a monitorial system, whereby new authors who have written promising articles will be supervised by more experienced researchers or professors. (For a more detailed account of the evaluation, please see the report at the end of this issue.)

In addition to the evaluation, we have also forged a partnership between Conectas Human Rights, which has published the journal since its first issue, and the International Center for Transitional Justice. This center was set up in 2000 with the mission to promote

justice, peace and reconciliation in societies emerging from repressive regimes or from armed conflicts, as well as to establish democracies where historical or systemic injustices remain unresolved.

The partnership was established so we could focus on a key topic for countries in the southern hemisphere: transitional justice. The balance between peace and justice and between reconciliation and retribution in post-conflict societies, or in cases of historical and persistent injustices, is dealt with by the authors from different geographical perspectives: Australia, Cambodia, Peru and Uganda. The authors, however, raise questions that often transcend these local contexts. By addressing the violated rights of aboriginal children in Australia who were forcibly taken from their families, for example, Ramona Vijayarasa questions whether Truth Commissions can help build more inclusive societies. By analyzing the Extraordinary Chambers in Cambodia, Tara Urs attempts to identify what truth commissions and extraordinary courts can realistically expect to accomplish. She also examines how culturally specific processes can help shape transitional justice and how best to respond to the interests of the victims. Looking at Peru's case, Elizabeth Salmón sheds some light on the links between conflict and poverty, and questions whether transitional justice should have a specific role beyond universalistic public policies. Finally, when addressing the situation in Uganda, Cecily Rose and Francis Ssekandi consider the role of amnesty in the consolidation of peace and question how to implement transitional justice in situations where peace agreements are still being reached.

To round off this subject, the journal is publishing an interview with Juan Méndez, director of the International Center for Transitional Justice.

This edition of the journal also carries an analysis of the recently established structure of the UN Human Rights Council (Lucia Nader) and a study on the influence of the inter-American system and "transnational legal activism" on the protection of human rights in Brazil (Cecília Santos).

We would like to thank the following professors and partners for their contribution to the selection of the articles for this issue: Glenda Mezarobba, Helena Olea, J. Paul Martin, Jeremy Sarkin, Juan Amaya Castro, Juan Carlos Arjona, Kawame Karikari, Maria Herminia Tavares de Almeida, Paula Ligia Martins, Richard Pierre Claude, Thami Ngwenya and Vinodh Jaichand.

Finally, we would like to announce that the next edition of the SUR Journal will be a special issue on access to medicine and human rights, to be published in collaboration with the Brazilian Interdisciplinary AIDS Association (ABIA). The journal will also carry articles on other topics.

The editors.

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LUCIA NADER

International Relations Coordinator at Conectas Human Rights ([www.conectas.org](http://www.conectas.org)) and Executive Secretary of the Brazilian Committee of Human Rights and Foreign Policy. She holds a Bachelor's degree in International Relations from the Catholic University of São Paulo – PUC/SP (Brazil) and a postgraduate degree in Political Science, with a major in International Organizations, from the Paris Institute of Political Studies - Sciences Po/Paris (France).

Address: Conectas Human Rights  
Rua Pamplona n. 1197, casa 4  
01405030 São Paulo – SP Brasil  
Email: [lucia.nader@conectas.org](mailto:lucia.nader@conectas.org)  
[www.conectas.org](http://www.conectas.org)

#### ABSTRACT

The UN Human Rights Council (HRC) in June 2007 completed its first year of activities having defined its principal institutional characteristics and its operating mechanisms. In this article, I propose to trace a brief history of this first year of the Council's activities and suggest some forms of action that can be taken by non-governmental organizations.

#### RESUMO

O Conselho de Direitos Humanos da ONU (CDH) completou, em junho de 2007, seu primeiro ano de trabalho com a definição de suas principais características institucionais e seus mecanismos de funcionamento. Neste artigo, pretende-se traçar um breve histórico desse primeiro ano de atividades do Conselho e sugerir algumas formas de ação por parte de organizações não governamentais.

#### RESUMEN

El Consejo de Derechos Humanos de la ONU (CDH) cumplió, en junio de 2007, su primer año de trabajo con la definición de sus principales características institucionales y sus mecanismos de funcionamiento. En este artículo se pretende trazar una breve memoria de este primer año de actividades del Consejo y sugerir algunas formas de acción de las organizaciones no gubernamentales.

Original in Portuguese. Translated by Barney Whiteoak.

#### KEYWORDS

Human Rights Council – UN – NGOs – Commission on Human Rights



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# THE ROLE OF NGOs IN THE UN HUMAN RIGHTS COUNCIL<sup>1</sup>

Lucia Nader

*“No society can develop without peace and security. No State can be secure if its people are condemned to poverty without hope. And no nation can be secure or prosperous for long if the basic rights of its citizens are not protected.”*

Kofi Annan<sup>2</sup>

## Introduction

In April 2006, the UN General Assembly approved the creation of the Human Rights Council (Council or HRC), making this body responsible for promoting universal respect for the protection of human rights and fundamental freedoms. The same document that breathes life into the HRC emphasizes that peace, development and human rights constitute the three pillars of the United Nations system. It also recognizes that the work of the new Human Rights Council should be guided by the principles of universality, impartiality, objectivity and non-selectivity – in a clear reference to the criticisms leveled against the Commission on Human Rights (Commission), the body that preceded it.

In the former Commission, Non-Governmental Organizations (NGOs) played an active and important role. There is no doubt that participation by NGOs in the new Council will continue to be essential, bringing to its attention local situations of human rights violations and monitoring the positions taken by its Member States. Neither is there any doubt that a stronger participation by NGOs from developing nations – the so-called Global South

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*Notes to this text start on page 24.*

– will grow increasingly more necessary given, among other factors, the geographic composition of the HRC.

I propose, therefore, in this article: (1) to trace a brief history of this first year of the Council's activities; (2) to put into context the importance NGO participation; and (3) to suggest some forms of action that can be taken by these organizations in the leading international body for the promotion and protection of human rights. In the third part of this article, the information has been compiled into tables, in an attempt to make it easier to read and to demonstrate that participation by NGOs in the Human Rights Council should be ongoing, both at the HRC headquarters in Geneva and with the governments at the capitals of their own countries.

### **Review of the Human Rights Council's first year of activities**

The UN Human Rights Council completed its first year of activities in June 2007, during its fifth session. Established by UN General Assembly Resolution 60/251,<sup>3</sup> the HRC replaced the sexagenarian Commission on Human Rights that was grappling at the time with a serious credibility crisis, accused by Non-Governmental Organizations and States of selectivity and excessive politicization in dealing with human rights violations around the world.

The HRC is today the principal international body for the promotion and protection of human rights; it is responsible for “promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in fair and equal manner”.<sup>4</sup>

The new body is comprised of 47 Member States elected by the General Assembly for a period of three years, respecting the following geographic distribution: 13 African States, 13 Asian States, 8 Latin American and Caribbean 13 Asian States, 6 Eastern European States and 7 Western European and other States.

Based in Geneva (Switzerland), the HRC must schedule no fewer than three ordinary sessions per year and it is also able to hold special sessions whenever necessary. In its first year, the HRC held five ordinary sessions and four special sessions to address the human rights situations in Palestine, Lebanon and Darfur. In addition, the Council also adopted: the International Convention for the Protection of all Persons from Enforced Disappearance<sup>5</sup> and the draft of the Declaration on the Rights of Indigenous Peoples.<sup>6</sup> Work also began on a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Nevertheless, the primary focus of the HRC in these first twelve months

was its own institution-building. According to Res. 60/251, the Human Rights Council had a year starting from its first session<sup>7</sup> to “assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights [...]”.<sup>8</sup>

The HRC approved, in its fifth session, Resolution 5/1,<sup>9</sup> the result of intense and tumultuous negotiations. The document sets out the principal characteristics of its agenda and program of work, methods of work and rules of procedure, universal periodic review mechanism,<sup>10</sup> special procedures, advisory committee and complaint procedure.

In light of the intense negotiations and the clashes that took place during the institution-building phase, it is clear that the Human Rights Council is not immune to the problems that undermined the credibility of its predecessor. Indeed, there are signs that excessive politicization and the prevalence of interests other than the promotion and protection of human rights in the positions taken by Member States may well have been inherited from the Commission on Human Rights.

### **Importance of the contribution of NGOs to the success of the new body**

It is widely recognized that the active participation of NGOs in the former Commission on Human Rights was instrumental in the creation of international instruments, the approval of resolutions, the realization of studies and the creation of special procedures, among other things.<sup>11</sup> Article 71 of the UN Charter authorizes the action of NGOs and makes the Economic and Social Council (ECOSOC) responsible for regulating this participation. In this context, ECOSOC Resolution 1996/31<sup>12</sup> defines the principles and rights concerning formal participation by NGOs, its principal regulatory instrument being the concession of consultative status for civil society organizations.<sup>13</sup>

In the new Human Rights Council, the participation of NGOs is expressly guaranteed in Res. 60/251: “[...] the participation of and consultation with observers, including [...] national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 [...] and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities”.<sup>14</sup>

So far, NGOs have played an important role in the institution-building process of the HRC. In its first year, 284 NGOs participated in Council sessions, slightly less than in the former Commission.<sup>15</sup>

The role of NGOs in the Council is considered important to bring

to its attention the reality in places where human rights violations are occurring and to contribute their own particular expertise. Furthermore, it is vitally important for NGOs to keep track on the positions taken by HRC Member States and observers, with a view to influencing them whenever necessary.

More participation by NGOs from the Global South is vital not only because most of the major fundamental rights violations occur in these countries, but also because the geographic composition of the HRC gives them numerical superiority. Together, African and Asian nations hold 26 seats on the Council, that is, more than 55% of the total. Adding the 8 countries from Latin America and the Caribbean, this figure rises to 72%. Many of these countries question the legitimacy of the action and the credibility of the information issued by NGOs that are not from their respective countries or regions.

However, NGOs from the Global South represent today just 33% of the 3050 NGOs that enjoy consultative status with ECOSOC<sup>16</sup> and can, therefore, participate fully in the Council sessions.

There are countless challenges facing NGOs' participation, foremost among them: (1) the difficult process of obtaining consultative status for those that do not already have it; (2) the high financial costs and the unavailability of staff to participate in the sessions in Geneva; (3) the lack of familiarity with the workings and procedure in the HRC; (4) the lack of access to information, including language barriers; and (5) the difficulty deriving any tangible benefits from this participation in the day-to-day work in their countries of origin.

Given these challenges, it is important to develop innovative forms of action. For example, the permanent engagement of NGOs from the Global South with their own governments at home is essential. All major foreign policy issues are decided on a national level, primarily in the Foreign Relations Ministries, including the positions to be taken by each country's diplomatic missions and delegations in the Human Rights Council. It is imperative, then, for NGOs to call on their respective governments for more transparency and formal mechanisms to participate in the preparation and implementation of the guidelines that will govern their actions in the HRC.

It is also crucial for NGOs to coordinate strategies and develop joint initiatives for combined action within the HRC, both in Geneva and at home, to strengthen individual actions, maximize resources and share experiences.

There is no doubt that responsibility for the success of the HRC lies squarely with the countries that comprise the new body. Resolution 60/251 determines that the status of the Council within the hierarchy of the UN will be reviewed in 2011 and that it may become one of its principal bodies, on a

par with the Security Council and the Economic and Social Council. Such a change in structure would, more than just being symbolic, demonstrate the interdependence between human rights, development and peace. This review will doubtless be a good indicator for evaluating the first five years' work of the Council, which by then must prove itself effective in combating human rights violations, wherever they may occur.

Non-Governmental Organizations will be responsible for monitoring and pressuring States to place the protection of human rights and human dignity above any other interests. It is not too early to assert that NGOs have a lot of work ahead of them and that their engagement with the HRC is now more necessary than ever. This article proposes to contribute to the success of the initiatives taken by these organizations.

### **Principal characteristics of the HRC, innovations in relation to the Commission on Human Rights, challenges for its success and forms of NGO action**

What follows is a description of the main characteristics of the Human Rights Council, the innovations in relation to the former Commission on Human Rights, some of the challenges the Council will face and suggestions for concrete forms of action by Non-Governmental Organizations in this new body.

It is worth pointing out that the suggestions on how NGOs can engage with the Human Rights Council are not limited to the strategies permitted only for NGOs that have consultative status with ECOSOC. These suggestions also place little importance on the distance between NGOs and the Council's headquarters in Geneva.

The information contained in the following tables draws on General Assembly Resolution A/RES/60/251 and Human Rights Council Resolution A/HRC/5/1, as well as articles and reports on the topic that have been published to date.<sup>17</sup> There are in all seven tables, in the following order:

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- 3) Methods of Work and Rules of Procedure - page 15
- 4) Universal Periodic Review Mechanism - page 17
- 5) Special Procedures - page 19
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*1) Election and membership*

The electoral process is considered one of the major differences of the Human Rights Council in relation to the former Commission on Human Rights, since members are elected by the UN General Assembly and criteria have been included for presenting candidatures. Furthermore, the possibility exists in the Council to suspend the mandates of members that commit systematic human rights violations. The new composition of the HRC is also quite innovative, giving African and Asian countries a proportionally superior numerical force than they held in the Commission.

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new</b>	<b>Forms of action by NGOs</b>
<b>Membership</b>	<p>The Council is comprised of 47 countries<sup>18</sup> and any UN member state can be a candidate</p> <p>Geographic composition: 13 countries from Africa, 13 from Asia, 6 from Eastern Europe, 8 from Latin America and the Caribbean and 7 from Western Europe and Others Countries<sup>19</sup></p>	<p>Number of Member States is lower than the 53 members of the former Commission</p> <p>African and Asian countries have 26 seats on the HRC, 55% of the total. This comfortable majority gives them the power to influence the agenda and the priorities to be addressed by the Council, as well as the numerical advantage to approve, or not, resolutions</p>	<p>As a result of the new composition, the relationship between African and Asian countries and other countries is likely to be different</p>	<p>Monitor and, if necessary, influence the positions taken by HRC countries and observers, particularly those from the African and Asian groups, remembering that each group selects a country as a representative, so working closely with that country becomes all the more essential. It is important to highlight that the action of African and Asian NGOs is extremely important because many of the countries from these groups question the role of NGOs that are not from their own countries or regions</p>
<b>Criteria for candidature</b>	<p>There are two criteria:</p> <ol style="list-style-type: none"> <li>1. The State must contribute to the promotion and protection of human rights;</li> <li>2. Each State must make a voluntarily and public commitment, presenting a document that justifies its candidature and spells out its intentions for the Council (Voluntary Pledge and Commitment)</li> </ol>	<p>Criteria for candidature are considered one of the principal innovations of the HRC, in particular the need to publicly present a justification for their candidature and to spell out their intentions for the Council</p>	<p>Difficulty gauging the contribution of each country to the promotion and protection of human rights</p> <p>Lack of definitiveness about the voluntary commitments, making it difficult to check whether or not they are being fulfilled</p>	<p>Pressure the country candidates for their voluntary commitments to contain definitive responsibilities to be fulfilled during their mandates so they can, as a result, be monitored by civil society<sup>20</sup></p>

**Election and membership**

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new</b>	<b>Forms of action by NGOs</b>
<b>Elections</b>	Member countries are elected by the UN General Assembly, in a secret ballot by an absolute majority (at least 97 of the 192 votes)	Elections held directly by the General Assembly have more credibility and legitimacy than those that were held by members of ECOSOC for the former Commission	Importance of having competitive elections, with more candidates than available positions, so only the best candidates are actually elected	Promote joint campaigns and initiatives to support or oppose given candidates, depending on their human rights records and potential commitment to the HRC, with the objective of influencing the votes of countries in the General Assembly
<b>Commitment</b>	The elected countries must make a commitment to: 1. Uphold and promote the highest standards in the promotion and protection of human rights 2. Cooperate with the work of the HRC 3. Be reviewed by the Universal Periodic Review Mechanism during their mandates	The mandatory review by the Universal Review Mechanism during the mandate becomes a "cost of membership" <sup>21</sup> to the Council	The credibility of the HRC is closely linked to the quality and the effective participation of its members <sup>22</sup>	Monitor the positions taken by all States on the HRC to determine their commitment to the success of the Council, with a view to influencing them whenever necessary
<b>Mandate</b>	Mandate of 3 years with the possibility of 1 consecutive reelection  The General Assembly can suspend the mandate of any country that commits systematic human rights violations - by a two-thirds majority of members present and voting	In the former Commission, there were no limits on consecutive reelections, nor the possibility of suspending mandates	The two-thirds majority required to suspend a mandate makes this prerogative of the General Assembly, in practice, difficult to apply <sup>23</sup>	Work together with the UN General Assembly to consider the suspension of a mandate whenever necessary

## 2) Agenda and program of work

The agenda defines the items to be addressed by the Human Rights Council in its ordinary sessions and that are, therefore, incorporated into the Council's program of work both for the whole year and for each individual session.

	Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1	Innovations in relation to the former Commission	Challenges for the success of the new body	Forms of action by NGOs
Principles	The agenda should be based on the principles of: universality, impartiality, objectivity and non-selectivity, constructive dialogue and co-operation, predictability, flexibility and transparency, accountability, balance, inclusiveness/ comprehensiveness, gender perspective and implementation and follow-up of decisions	The agenda of the Commission did not define the principles it should be based on	The annual calendar, as well as the agenda and program of work for each session, should be broadly publicized and predictable enough to enable those outside Geneva, including NGOs, to plan to weigh in on and/or participate in the sessions	Monitor the information released about the agenda and the program of work for the sessions on the HRC extranet <sup>24</sup>
Items	Comprised of 10 items: (1) Organizational and procedural matters; (2) Annual report of the UN High Commissioner for Human Rights and reports of the OHCHR and the Secretary General; (3) Promotion and protection of all human rights, civil, political, economic, social and cultural, including the right to development; (4) Human rights situations that require the Council's attention; (5) Human rights bodies and mechanisms; (6) Universal Periodic Review; (7) Human rights situation in Palestine and other occupied Arab territories; (8) Follow-up and implementation of the Vienna Declaration and Program of Action; (9) Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Program of Action; (10) Technical assistance and capacity building	The agenda is shorter, simpler and more concise than the Commission's, <sup>25</sup> although general enough for human rights issues and topics to be addressed  It does not separate Civil and Political Rights from Economic, Social and Cultural Rights	The agenda continues to contain a specific item on the "Human rights situation in Palestine and other occupied Arab territories" (item 7), which, in itself, demonstrates the selectivity and politicization inherited from the former Commission  Country resolutions ought to be adopted throughout the whole agenda and not just in the item "Human rights situations that require the Council's attention" (item 4). Otherwise, there is a risk of excessive politicization of the agenda, just like in the former Commission <sup>26</sup>	Work together with foreign relations ministries, delegations in Geneva, the bureau and the secretariat of the Council to include on the agenda or dedicate more time to priority issues and situations. Also, request information on the positions that countries plan to take on each item, with a view to influencing them if necessary

### 3) *Methods of work and rules of procedure*

These define the general functioning of the Council's ordinary and special sessions, other possible types of meetings and the quorum for approving resolutions, among other things.

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Ordinary and special sessions</b>	<p>At least 3 ordinary sessions should be held per year, including one main session,<sup>27</sup> for a minimum total of 10 weeks of work</p> <p>Special sessions may be held whenever necessary, at the request of a member of the Council and with the support of one third of the Member States</p> <p>Both ordinary and special sessions should be public, unless otherwise decided, and permit the participation of NGOs with consultative status</p>	<p>An increase in the number of ordinary annual sessions to 3, while in the Commission there was only one</p> <p>It is easier to convene special sessions, which will probably develop into an important mechanism for addressing situations in specific countries<sup>28</sup></p>	<p>The increase in the number of ordinary sessions presents a challenge for the participation of NGOs from outside Geneva, since it will involve additional costs and staff availability</p> <p>Guarantee effective dialogue between States and NGOs before and during the sessions</p>	<p>Forms of action by NGOs</p> <p>Keep track on the sessions via internet transmission,<sup>29</sup> through the information posted on the website of the UN High Commissioner for Human Rights and the HRC extranet, in addition to the information released by NGOs that participate in the sessions</p> <p>Monitor and attempt to influence the positions taken by countries during the sessions – through the proper authorities at home or through the delegations in Geneva</p> <p>Influence Member States to request, whenever necessary, special sessions to be scheduled, convincing them of the importance and urgency of dealing with a given human rights issue or situation</p> <p>Furthermore, NGOs with consultative status may:</p> <ol style="list-style-type: none"> <li>1. Submit written statements for official review during the sessions, besides circulating other documents during the sessions</li> <li>2. Attend the sessions<sup>30</sup> and make oral presentations<sup>31</sup></li> <li>3. Schedule side-events during the sessions to discuss specific issues and situations of human rights violations</li> <li>4. Organize informal meetings with delegations during the sessions</li> <li>5. Call press conferences to publicize the results of the session</li> </ol>

**Methods of work and rules of procedure**

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Other types of meeting</b>	<p>1. Meetings for reports and/or informal consultations on potential resolutions or decisions</p> <p>2. Open-ended informal meetings - convened by the president of the HRC to discuss the agenda of the sessions, provide information on proposed resolutions, etc</p> <p>3. Organizational meetings – held both at the start of each HRC working year to elect the president and vice presidents and also before each session to address various matters</p> <p>4. Debates, seminars, working groups and round tables – that can occur and are defined on a case-by-case basis</p>	<p>Provisions for meetings and informal consultations that may be attended by different actors, including NGOs</p>	<p>Difficulty for NGOs outside Geneva to participate and obtain information (it is worth noting here the efforts of the secretariat<sup>32</sup> of the Council to lend publicity to these meetings and release the information resulting from them)</p>	<p>NGOs with consultative status may participate in the various meetings and open-ended informal consultations that precede or occur during the sessions, as well as those that take place between one session and the next. Participation in the organizational meetings is essential to obtain relevant information on the program of work and issues and situations that will be addressed in each session</p>
<b>Adoption of documents</b>	<p>In addition to resolutions and decisions, the HRC can adopt recommendations, conclusions, summary of the discussions and statements of the president</p> <p>The quorum for approving resolutions or any other decision of the HRC is the simple majority of members present and voting</p>		<p>Consolidation of a Council that is driven by results and the effective implementation of the recommendations, not just by the number of resolutions it approves</p> <p>Curb the prevalence of voting in regional blocks and interest groups, which are normally politically motivated, rather than voting based on an analysis of the merits of the proposed action<sup>33</sup></p>	<p>Attempt to identify and, if necessary, influence the position (vote) of each country on a given resolution</p> <p>After the vote, draw attention to the votes considered “problematic”, calling on the countries to justify their positions</p> <p>Observe and monitor the effective implementation of the recommendations contained in the resolutions, in the special procedures reports or in any other decision of the HRC</p>

#### 4) Universal Periodic Review Mechanism

Mechanism created by General Assembly Resolution 60/251<sup>34</sup> that determines that all UN member states (universally) will periodically undergo a review process. The objective of the review is to determine the fulfillment by States of their international human rights obligations and commitments. It is considered the most innovative instrument of the Human Rights Council given the universality of coverage and the intention to combat the selectivity and double standards in responding human rights violations that existed in the Commission on Human Rights. The Council's Member States undergo a review during their mandates and the review cycle lasts 4 years, meaning that 48 countries will be reviewed each year.

Since it is an entirely new mechanism, the table below does not contain a column on the innovations in relation to the former Commission on Human Rights.

	Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1	Challenges for the success of the new body	Forms of action by NGOs
Objectives	<ol style="list-style-type: none"> <li>1. Improve the human rights situation on the ground</li> <li>2. Determine the fulfillment by States of their obligations and commitments<sup>35</sup></li> <li>3. Enhance the State's capacity and offer technical assistance</li> <li>4. Share best practices among States and other stakeholders</li> <li>5. Provide support for cooperation in the promotion and protection of human rights</li> <li>6. Encourage full cooperation and engagement with the HRC, other human rights bodies and the UN High Commissioner for Human Rights</li> </ol>	<p>Actually improve the human rights situation on the ground, not just be a process of accountability by the country under review</p> <p>Difficulty measuring fulfillment by States of their human rights obligations<sup>36</sup></p> <p>The Review Mechanism cannot in any way compromise the ability of the Council to use other mechanisms to respond to gross and systematic human rights violations<sup>37</sup></p>	<p>During the report preparation process, NGOs can question their States about how they intend to improve the human rights situation on a national level and about how the periodic review mechanism will contribute to this</p>
Information to be considered	<ol style="list-style-type: none"> <li>1. Report prepared by the State under review, through a broad consultation process with all relevant national stakeholders, including NGOs, and observing the general guidelines – 20 pages</li> <li>2. Information prepared by the UN High Commissioner for Human Rights: (1) A compilation of the information contained in the reports of treaty bodies, special procedures and others - 10 pages (2) A summary of the information presented by NGOs, National Human Rights Institutions and other relevant stakeholders – 10 pages</li> </ol>	<p>Quality and definitiveness of the information presented by the State</p> <p>Effective participation by NGOs on a national level and limitations for submitting information to the UN High Commissioner for Human Rights relating to language, specific format, number of pages and access to the High Commissioner</p> <p>Increased fragmentation of the UN human rights protection system, since the Treaty Committees have no formal role in the review mechanism<sup>38</sup></p>	<p>Accompany nationally the preparation of the official report to be presented by the State</p> <p>Submit relevant information to be considered by the UN High Commissioner for Human Rights for the document on information presented by civil society</p>

**Universal Periodic Review Mechanism**

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Process of the review</b>	<p>The review will be conducted in a Working Group comprised of 47 members of the Council in 3 specific annual sessions. Each State may decide on the composition of its delegation.</p> <p>Stages of the Review/Interactive Dialogue: (1) State presents its report; (2) Questions and commentary by HRC members; (3) Answers by the State under review; (4) Presentation of final document with recommendations; (5) Time for comments from the States and/or answers to new questions; (6) Comments by other stakeholders, including NGOs; (7) Adoption of the final document by the plenary of the Council</p>	<p>Since it is an “inter-governmental process” without the participation of independent experts, there is a risk of it being a superficial process with little information from the country under review and little exposure<sup>39</sup></p> <p>During the interactive dialogue, participation by NGOs is limited to the stage prior to the approval of the final document, meaning that they cannot pose questions or make a substantive contribution to the recommendations that are included in this document</p>	<p>Urge countries to include independent experts in their delegations for the review in the Working Group</p> <p>NGOs with consultative status may attend the review sessions</p> <p>Participation by NGOs from the same country and/or region as the State under review will be fundamental in this process</p>
<b>Final document</b>	<p>This report will be prepared with the assistance of rapporteurs appointed by 3 States selected by drawing lots, serving in their personal capacity. The State under review may veto one of the rapporteurs and request that one of the three is from its own regional group. A rapporteur may be excused from participation in a specific review process, being replaced by another candidate</p> <p>The final document will be approved in a Council plenary, with conclusions and/or recommendations and voluntary commitments, if any. The recommendations will be split into two categories: consensual (accepted by the State) and non consensual</p>	<p>The system of choosing the rapporteurs may open the door to the politicization of the review mechanism</p> <p>The provision for 2 levels of recommendations – those accepted and those not accepted by the State – weakens the authority of the HRC and may undermine their implementation</p>	<p>Devise strategies to influence the quality of the recommendations, among them releasing to the media the information presented by the States,<sup>40</sup> in the hope that the publicity will have an effect on the quality of the presentation and the final document</p>
<b>Implementation of the recommendations</b>	<ol style="list-style-type: none"> <li>1. The State is primarily responsible for implementing the recommendations/decisions</li> <li>2. The next review cycle should consider the previous recommendations/decisions</li> <li>3. The international community will help implement the recommendations/decisions, in consultation with the State concerned</li> <li>4. The HRC may address, when necessary, cases of persistent non-cooperation with the review</li> </ol>	<p>Importance of the quality of the recommendations and of keeping track of their effective implementation on a national level</p> <p>The absence of concrete follow-up mechanisms makes it even more crucial for the Council, in the subsequent review, to insist on progress implementing the previous recommendations<sup>41</sup></p>	<p>Observe and monitor, on a national level, the effective implementation of the recommendations, requesting information from the State and using innovative accountability methods, such as, for instance, the holding of public hearings by parliament</p> <p>Urge the HRC to conduct an ongoing follow-up of the recommendations made to the State and for these to serve as the basis for the subsequent review</p>

### 5) *Special procedures*

This is the mechanism whereby special representatives and rapporteurs, independent experts and working groups examine, monitor and prepare reports on the situation of human rights: (1) in specific countries (country mandates) or (2) on specific issues (thematic mandates).<sup>42</sup> During the institution-building process, special procedures were one of the most controversial topics, with questions raised about the need for their existence and an attempt to weaken this system by various member states.

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Criteria for Eligibility</b>	<p>1. Technical and objective criteria: non-accumulation of functions/mandates in the UN, a tenure of no more than 6 years for any mandate and a restriction on holding a position in government or any other organization in their country of origin that could cause a conflict of interest</p> <p>2. General criteria: expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity</p>	The definition of technical and objective criteria for the eligibility of special procedures mandate-holders	Despite progress identifying criteria, the atmosphere of hostility from countries that object to country mandates lead us to believe that it will be very difficult for new mandates to be created <sup>43</sup>	
<b>Appointment process</b>	<p>1. Public list prepared by the UN High Commissioner for Human Rights containing names of eligible experts nominated by governments, regional groups, international organizations, NGOs, other human rights bodies and individuals</p> <p>2. List sent to the Consultative Group, consisting of one person from each of the 5 regional groups, which selects eligible candidates for the vacancies and submits the new list to the president of the HRC</p> <p>3. From the recommendations of the Consultative Group, the president identifies a candidate for each vacancy</p> <p>4. Candidates are submitted to approval by the Council plenary</p>	The entire appointment process is new, particularly the preparation of the public list by the UN High Commissioner for Human Rights and the creation of the Consultative Group	The composition of the Consultative Group could lead to the politicization of the selection process by regional groups <sup>44</sup>	Recommend candidates for special procedure mandates to the UN High Commissioner for Human Rights and permanently accompany the public list prepared by this office

**Special procedures**

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Mandates and cooperation of the States</b>	<p>Duration of the mandates: 3 years for thematic mandates and one year for country mandates</p> <p>According to Resolution 60/251, all current mandates will be reviewed<sup>45</sup></p>	<p>Prior definition of country and thematic mandate durations</p> <p>Preparation and approval of the Code of Conduct – CoC,<sup>46</sup> proposed by the African Group, containing a set of rules on working methods and standards of conduct for special procedures mandate-holders, particularly during missions to the countries</p>	<p>Guarantee that the Code of Conduct does not affect the independence or effectiveness of the work of the mandate-holders</p> <p>Assure that the review of the mandates is not politicized and takes into account the real need for the existence of the special procedures</p> <p>Diminish the refusal to cooperate by States that, in many cases, do not respond to the communiqués they are sent by the mandate-holders or do not permit the entry of the mandate-holders into their territories</p>	<p>Submit requests to mandate-holders for them to visit given countries or to work on a specific issue</p> <p>Organize and/or participate in meetings between mandate-holders and civil society during missions to the countries</p> <p>Pressure States to extend open invitations to all mandate-holders, accepting <i>a priori</i> visits to the country, and to respond to their requests for information</p>
<b>Presentation of reports</b>	<p>The presentation of the reports prepared by the special procedures occurs during the Council sessions, in a stage known as interactive dialogue</p>	<p>This interactive dialogue already existed in the Commission. However, some positive innovations can be observed in the Council, such as the allocation of 1 full hour for the presentation of the reports by each rapporteur and the participation by NGOs after each presentation, which appears to have improved the level of participation by Member States in these stages<sup>47</sup></p>	<p>Assure the quality of the interactive dialogues, in terms of both the level of participation and their outcomes</p>	<p>Keep track on the release of reports by special rapporteurs, which occurs before the sessions in which they will be presented</p> <p>Observe and monitor the effective implementation of the recommendations contained in the reports prepared by special rapporteurs</p> <p>In addition, NGOs with consultative status can participate in the interactive dialogues</p>

### 6) Human Rights Council Advisory Committee

This committee is a subsidiary body of the Human Rights Council that replaces the former Sub-Commission on the Promotion and Protection Human Rights (Sub-Commission). Its job is to provide advice on thematic issues of interest to the Council.

	Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1	Innovations in relation to the former Commission	Challenges for the success of the new body	Forms of action by NGOs
Function	<p>To provide expertise to the HRC in the manner and form requested by it, focusing on studies and research-based advice</p> <p>It cannot adopt decisions or resolutions, but it can recommend that the HRC address a given issue in more depth</p>	<p>Very little innovation, continuing with the tendency to weaken the mandate of the Sub-Commission that began in 2000</p>	<p>A fairly unpurposeful function, limited to thematic issues</p> <p>The Committee cannot act on its own initiative, which severely undermines its power to initiate studies and identify trends and gaps in human rights, among other things<sup>48</sup></p>	<p>Make suggestions to HRC Member States on issues to be addressed by the Advisory Committee</p>
Criteria for candidature, election and composition	<p>Comprised of 18 independent experts serving in their personal capacity, and respecting the following geographic distribution: 5 African States, 5 Asian States, 2 Eastern European States, 3 Western European and other States and 3 Latin American and Caribbean States</p> <p>A 3-year mandate with the possibility of re-election only once</p> <p>Criteria for nomination and election: 1. Technical and objective criteria 2. Individuals cannot be elected who: (1) hold positions in government or in an organization that could cause a conflict of interests and (2) who accumulate other functions in the UN</p> <p>They are elected by the HRC from a list prepared by the secretariat.</p> <p>Any UN member state, in consultation with National Human Rights Institutions and NGOs, can propose candidates for this list</p>	<p>A lower number of experts than the 26 members of the Sub-Commission</p> <p>Limitation placed on the duration of the mandate</p> <p>Existence and publicity of technical and objective criteria for nominating candidates and electing the experts</p>	<p>Assure the independence and quality/expertise of the members</p>	<p>On a national level, propose to the State the names of candidates and independent experts and express support or opposition for candidates being considered by the State, based on the criteria for nomination and election</p>
Sessions	<p>It will hold 2 sessions for a maximum of 10 working days per year</p> <p>Additional sessions may be scheduled and working groups created with the approval of the Council</p> <p>It should interact continually with States, National Human Rights Institutions and NGOs, which may participate in the sessions</p>	<p>It will hold 2 sessions per year, compared to the former Sub-Commission's single annual session.</p> <p>However, the Sub-Commission met for 3 weeks – more than the 10 days per year authorized for the new Advisory Committee</p>	<p>“To maximize the time that is available and to focus discussions, the Advisory Committee will need to organize its time well and develop a clear agenda for its sessions well in advance to enable NGOs to plan their participation”<sup>49</sup></p> <p>An uncertain future for existing working groups and a lack of clarity about the eventual creation of new groups</p>	<p>NGOs with consultative status can participate in the sessions and working groups of the Advisory Committee<sup>50</sup></p>

### 7) Complaint procedure<sup>51</sup>

Procedure through which individuals and NGOs can file complains of systematic human rights violations<sup>52</sup> that occur in any part of the world and under any circumstances.

	Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1	Innovations in relation to the former Commission	Challenges for the success of the new body	Forms of action by NGOs
Criteria for Admissibility	The communication of complaints of systematic human rights violations should: (1) Not have manifestly political motivations; (2) Contain a factual description, including which rights are being violated; (3) Not use abusive language; (4) Be submitted by the victim or a group representing/defending the victim; (5) Not be exclusively based on reports disseminated by the media; (6) Not be a case that is already being dealt with by UN bodies or special procedures, or a regional human rights system and (7) Only be presented when all domestic remedies have either been exhausted or proven ineffective	The Commission did not accept complaints if, given their scope, they could be dealt with by any of the special procedures or by any complaints mechanism established by a treaty ratified by the State <sup>53</sup>		Present complaints of systematic human rights violations. <sup>54</sup> The country being accused does not need to have ratified human rights treaties
Process prior to engaging the HRC	Complaints must be examined by 2 Working Groups: 1 <sup>st</sup> - Working Group on Communications (WGC): it decides on the admissibility of the complaint. It consists of 5 independent experts, one from each regional group, appointed by the HRC Advisory Committee. If the communication is deemed admissible, it will be forwarded to the second working group 2 <sup>nd</sup> - Working Group on Situations (WGS): it can present the HRC with a report on the situation or decide to dismiss the case. It consists of 5 representatives appointed by HRC Member States, one from each of the 5 regional groups, who serve in their personal capacity The Working Groups should meet at least twice a year for at least 5 working days each time	More meetings held by the 2 Working Groups that need to present justifications for their decisions	Rebuild the credibility of the procedure, which was damaged in the final years of the Commission, when it faced major problems <sup>55</sup> : (1) Difficulty obtaining information from States; (2) Double standards in the treatment of countries; (3) Sluggishness of the process, from communication to treatment by the Council; (4) Resolution 1503, although revised, proved to be inadequate on numerous occasions	Monitor the process by the Advisory Council of appointing the 5 members of the Working Group on Communications

**Complaint procedure**

	<b>Principal characteristics of the HRC, according to resolutions A/Res/60/251 and A/HRC/5/1</b>	<b>Innovations in relation to the former Commission</b>	<b>Challenges for the success of the new body</b>	<b>Forms of action by NGOs</b>
<b>Confidentiality, secrecy and information</b>	<p>The entire process is confidential, unless the HRC decides otherwise following a recommendation by the WGS.</p> <p>The complainant may request that its identity remain in secret and shall be informed when: (1) the communication is registered by the complaint procedure; (2) the communication is deemed inadmissible by the WGC or forwarded to the WGS; (3) the communication is kept pending by one of the Working Groups and (4) the case is dismissed by the HRC, indicating the end of the process</p> <p>The State being accused should be kept informed in the aforementioned stages 2, 3 and 4</p>	<p>The complainant must be kept informed during the entire process and they may request that their identity be kept secret</p>	<p>Maintaining confidentiality will hamper, among other things, the action of NGOs</p>	<p>Make sure that the provision to keep the complainant informed throughout the process is upheld</p>
<b>Role of the HRC</b>	<p>The Council should consider the situations submitted by the WGS at least once a year and may take the following measures:</p> <ol style="list-style-type: none"> <li>1. Dismiss the case without taking any action</li> <li>2. Keep the case open and request the State concerned to provide further information</li> <li>3. Keep the case open and appoint an independent expert to monitor the situation and report back to the HRC</li> <li>4. Make the case public</li> <li>5. Recommend to the UN High Commissioner for Human Rights that it provide technical cooperation, capacity building assistance or advisory services to the State concerned</li> </ol>		<p>The procedure still does not offer any concrete response to remedy the situation of the victims<sup>56</sup></p>	<p>Keep check on the activities of the UN High Commissioner for Human Rights when the HRC requests that this office provide technical cooperation, capacity building assistance or advisory services to the State concerned</p>
<b>Timetrames</b>	<p>The State being accused should cooperate with the complaint procedure, supplying information whenever it is requested by the working groups within a maximum period of 3 months</p> <p>The timeframe between the communication of the complaint to the State concerned and the consideration of the case by the HRC should not exceed 24 months</p>	<p>Reinforcement of the need for cooperation by the State, with the establishment of a timeframe for sending information</p>	<p>Difficulty obtaining information from the States</p>	

## NOTES

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1. I am grateful to Thiago Amparo and Camila Asano for their help compiling the information contained in this article and for their tireless work with the UN Human Rights Council as staff members of Conectas Human Rights.
2. Former Secretary General of the UN, in a speech at the inaugural session of the Human Rights Council, "*The Secretary General Address to the Human Rights Council*", on 19 June 2006,
3. General Assembly, *Human Rights Council*, Resolution A/RES/60/251, 3 April 2006, available at <[http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251\\_En.pdf](http://www.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf)>, last access on 30 August 2007.
4. Ibid.
5. UN, International Convention for the Protection of all Persons From Enforced Disappearance, not yet in force, available at <<http://www.ohchr.org/english/law/disappearance-convention.htm>>, last access on 15 September 2007.
6. UN, Declaration on the Rights of Indigenous Peoples (draft), Res. 2006/2, 2006: available at <<http://www1.umn.edu/humanrts/hrcouncil2-2006.html>>, last access on 12 September 2007.
7. The first session of the Human Rights Council occurred from 19-30 June 2006 in Geneva.
8. General Assembly, *Human Rights Council*, Resolution A/RES/60/251, 3 April 2006, Paragraph 6.
9. Human Rights Council, Institution-building of the United Nations Human Rights Council, Res. A/HRC/5/1, 18 June 2007, available at < >, <<http://www.ohchr.org/english/bodies/hrcouncil/5session/reports.htm>> last access on 10 September 2007.
10. Created by Res. 60/251 of 3 April 2006, the General Assembly requires all UN Member States to submit to a periodic review to determine the fulfillment of their international human rights obligations and commitments.
11. International Service for Human Rights (ISHR) and Friedrich Ebert Stiftung, *A New Chapter for Human Rights* – a handbook on issues of transition from the Commission on Human Rights to the Human Rights Council, Geneva/Switzerland, June/2006, p.88, available at <[www.ishr.ch](http://www.ishr.ch)>, last access on 21 August 2007.
12. UN, ECOSOC, Resolution 1996/31 - Consultative Relationship between the United Nations and non-governmental organizations, 25 July 2006, available at <[http://www.un.org/esa/coordination/ngo/Resolution\\_1996\\_31/index.htm](http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm)>, last access on 30 September 2007.
13. See the criteria for obtaining consultative status with ECOSOC in: ECOSOC, *How to obtain Consultative Status with ECOSOC*, available at <<http://www.un.org/esa/coordination/ngo/howtoapply.htm>>, last access on 11 September 2007.
14. General Assembly, *Human Rights Council*, Resolution A/RES/60/251, 3 April 2006, Paragraph 11.
15. In R. Brett, *Neither Mountain nor Molehill – UN Human Rights Council: one year on*, Quaker

United Nations Office, Geneva/Switzerland, August 2007, p. 13, available at <[www.uno.org](http://www.uno.org)>, last access on 10 September 2007.

16. European NGOs represent 37% and North American NGOs 29% of the total. Data available in ECOSOC, *Number of NGO's in Consultative Status with the council by Region, 2007*, available at <<http://www.un.org/esa/coordination/ngo/pie2007.html>>, last access on 12 September 2007.

17. Special thanks to three bibliographic references that were crucial in developing this article: International Service for Human Rights (ISHR) and Friedrich Ebert Stiftung, *A New Chapter for Human Rights – a handbook on issues of transition from the Commission on Human Rights to the Human Rights Council*, *op. cit.*; Y. Terlingen, "The Human Rights Council, A New Era in UN Human Rights Work?", *Ethics & International Affairs*, v. 21, number 2, 12 June 2007 and M. Abraham, *Building the New Human Rights Council – outcome and analyses of the institution-building year*, Geneva/Switzerland, Friedrich Ebert Stiftung, August 2007, available at <[www.fes-globalization.org/geneva](http://www.fes-globalization.org/geneva)>, last access on 11 September 2007.

18. For a list of current members of the HRC, see *Membership of the Human Rights Council*, available at <<http://www.ohchr.org/english/bodies/hrcouncil/membership.htm>>, last access on 30 August 2007.

19. In the Commission on Human Rights, the geographic composition was: 15 African countries, 12 Asian, 5 from Eastern Europe, 11 from Latin America and the Caribbean and 10 from Western Europe and other countries. Both in the Commission and in the Council, the geographic division is reflected in 5 "regional groups" that work together more or less cohesively: African group, Asian group, Eastern Europe group, America and the Caribbean group (GRULAC) and Western Europe and Others group (WEOG).

20. On this topic, see the Commonwealth Human Rights Initiative report, *Easier Said than Done – a report on the commitments and performances of the Commonwealth members of the UN Human Rights Council*, 2007, available at <[www.humanrightsinitiative.org](http://www.humanrightsinitiative.org)>, last access on 15 September 2007.

21. R. Brett, *op. cit.*, p. 5.

22. *Ibid.*, p.15.

23. C. Villan Duran, "Lights and Shadows of the new United Nations Human Rights Council", *Sur – International Journal on Human Rights*, no. 5, year 3, São Paulo/Brazil, 2006, p.11, available at <[www.revistasur.org](http://www.revistasur.org)>, last access on 15 September 2007.

24. The Council's official documents are available on its official website <<http://www.ohchr.org/english/bodies/hrcouncil/>> or its extranet, <<http://portal.ohchr.org/>> (login: hrc extranet; password: 1session).

25. Commission on Human Rights, Resolution 1998/84, 24 April 1998, available at <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/a2d51307fc6f017680256672004dd8c2?Opendocument>>, last access on 2 September 2007.

26. International Service for Human Rights (ISHR) and Friedrich Ebert Stiftung, *op. cit.* p.26.

27. *Main Session*, held annually in March, during which the High Level Segment will occur with the

participation of ministers of state and ambassadors of Member States.

28. Y. Terlingen, *op. cit.*

29. The sessions of the Human Rights Council are broadcast live on the internet at <<http://www.un.org/webcast/unhrc/index.asp>> (*webcasting*), last access 23 August 2007.

30. The only way NGOs without consultative status can participate in the sessions of the HRC is by joining delegations of NGOs with consultative status, when authorized by them and acting on their behalf.

31. After the interactive dialogue and debates, each accredited NGO is given 3 minutes to make their oral presentation.

32. The Office of The High Commissioner for Human Rights acts as the secretariat and it is responsible for translating, printing, circulating and preserving all official documents of the HRC.

33. *A New Chapter for Human Rights – a handbook on issues of transition from the Commission on Human Rights to the Human Rights Council*, *op. cit.*, p. 28

34. General Assembly, *Human Rights Council*, Resolution A/RES/60/251, 3 April 2006, Paragraph 5.

35. According to Resolution A/HRC/5/1, the basis of the review will be the: (1) UN Charter, (2) Universal Declaration of Human Rights, (3) Conventions and covenants to which the State is party, (4) Voluntary pledges and commitments made by States – including those undertaken when presenting their candidatures for election to the HRC, (5) Applicable international humanitarian law.

36. C. Villan Duran, *op. cit.*

37. International Service for Human Rights (ISHR) and Friedrich Ebert Stiftung, *op. cit.*, p.84

38. C. Villan Duran laments that no permanent institutional working relations were established between the Council and the Treaty Committees, in C. Villan Duran, *op. cit.*, p. 15.

39. According to P. Hicks (Human Rights Watch), "The possibilities of using these reviews to expose violations and push for change are vast, but the spirit of 'protect our own,' which has limited action by the council so far, could infect these reviews as well," in P. Hicks, "Don't Write it Off Yet", *International Herald Tribune*, 21 June 2007, available at <[www.hrw.org](http://www.hrw.org)>, last access on 22 August 2007.

40. M. Abraham, *op. cit.*, p.40.

41. See also Amnesty International, "Conclusion of the United Nations Human Rights Council's institution building: Has the spirit of General Assembly resolution 60/251 been honoured?", 20 June 2007, available at <[www.amnesty.org](http://www.amnesty.org)> Index: OIR 41/015/2007 (Public), last access on 15 August 2007.

42. See the list of current special procedure mandate-holders (thematic and country) at <<http://www.ohchr.org/english/bodies/chr/special/index.htm>>, last access 15 September 2007.

43. M. Abraham, *op. cit.*, p. 29.

44. *Ibid.*, p. 5.

45. However, the special procedure mandates for Cuba and Belarus were eliminated in the 5<sup>th</sup> Session of the HRC, as a result of political pressure from the two countries.

46. NGOs were categorical and persistent in their attempt to convince the African group there was no need to prepare a code of conduct for special procedures mandate-holders, fearing that this code could limit the autonomy and independence of the system. Human Rights Council, Resolution A/HRC/5/L.3/Rev.1 (Code of Conduct), 18 June 2007
47. R. Brett, *Neither Mountain nor Molehill – UN Human Rights Council: one year on*, *op. cit.*, pp 5 and 9.
48. M. Abraham, *op. cit.*, p.17.
49. *Ibid.*, p. 18.
50. In the Sub-Commission, it became common practice for NGOs without consultative status to participate in the Working Groups, which could lead to the same thing happening in the new Advisory Committee.
51. The complaint procedure of the former Commission on Human Rights was based on ECOSOC Resolutions 1503 (XLVIII), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/1970.1503.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument), and its revised version, Resolution 2000/3, of 19 June 2000, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.3.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.3.En?OpenDocument), last access on 12 September 2007. The new complaint procedure draws on various characteristics of both these resolutions.
52. Individual cases are not accepted.
53. M. Abraham, *op. cit.*, p. 21.
54. These should be submitted to the UN High Commissioner for Human Rights, even by NGOs without consultative status with ECOSOC.
55. International Service for Human Rights (ISHR) and Friedrich Ebert Stiftung, *op. cit.*, p.66
56. *Ibid.*, p.65



CECÍLIA MACDOWELL SANTOS

Associate Professor of Sociology at the University of San Francisco and  
Researcher of the Center for Social Studies, University of Coimbra  
Address: Department of Sociology, University of San Francisco, 2130 Fulton  
Street, San Francisco, CA 94117, USA.  
E-mail: santos@usfca.edu

#### ABSTRACT

This paper analyzes the increased use, by local and transnational human rights NGO, of international legal instruments for the recognition and protection of human rights, a phenomenon the author calls “transnational legal activism”.

#### RESUMO

Este artigo analisa o crescente uso, por ONG locais e transnacionais de direitos humanos, dos instrumentos jurídicos internacionais para o reconhecimento e a proteção dos direitos humanos, um fenômeno que a autora denomina de “ativismo jurídico transnacional”.

#### RESUMEN

Este trabajo analiza el uso creciente que las ONG locales y transnacionales de derechos humanos hacen de instrumentos legales internacionales para reconocer y proteger los derechos humanos, fenómeno que la autora denomina “activismo legal transnacional”.

Original in English.

#### KEYWORDS

Transnational legal mobilization – Human rights and globalization – Inter-American Commission on Human Rights – Brazil – Memory – Violence against women – Racial discrimination.



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# TRANSNATIONAL LEGAL ACTIVISM AND THE STATE: REFLECTIONS ON CASES AGAINST BRAZIL IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Cecília MacDowell Santos

## Introduction<sup>1</sup>

Since the early 1990s, as part of the process of globalization, we have witnessed the increasing transnationalization of legal institutions and of legal mobilization, two sides of a phenomenon legal scholars refer to as “global judicialization”<sup>2</sup> and “transnational litigation”.<sup>3</sup> Global judicialization has emerged through the creation of international *ad hoc* or permanent courts and arbitral tribunals, as well as the increased resort to international judicial and quasi-judicial institutions to deal with disputes over both commercial and human rights issues. Transnational litigation involves disputes between States, between individuals and States, and between individuals across national borders. These changes of law in the context of globalization have raised debates on whether global judicialization is desirable or effective for enforcing the rule of law and for promoting local and global democracy. However, both advocates and critics of global judicialization have failed to critically examine the global politics of the rule of law in legitimizing the hegemonic neoliberal project of globalization, which has weakened the capacity of nation-States to enforce human rights norms.<sup>4</sup> In addition, most studies of law and globalization have not paid sufficient attention to the role of human rights non-governmental organizations (NGOs), or to the central and often contradictory role of the State in the transnational legal battles over the recognition and protection of human rights.

The objective of this paper is to reflect on the relationship between transnational legal mobilization and the State through an analysis of the

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*Notes to this text start on page 54.*

increased use, by local and transnational human rights NGOs, of international legal instruments for the recognition and protection of human rights.<sup>5</sup> Drawing on cases against Brazil in the Inter-American Commission on Human Rights (hereafter, IACHR), the paper attempts to offer theoretical tools for reflecting on the strategies and limitations of what I call “transnational legal activism” vis-à-vis the responses given by the State. By transnational legal activism I mean a type of activism that focuses on legal action engaged with international courts or quasi-judicial institutions to strengthen the demands of social movements; to make domestic legal and political changes; to reframe or redefine rights; and/or to pressure States to enforce domestic and international human rights norms. The responses of the Brazilian State will be analyzed in light of the concept of a “heterogeneous State,” that is, a State that, due to contradictory national and international pressures, assumes different logics of development and rhythms, making it impossible to identify a coherent pattern of State action common to all State sectors or fields of action.<sup>6</sup>

Transnational legal activism can be viewed as an attempt not simply to remedy individual abuses, but also to re-politicize law and re-legalize human rights politics by invoking and bringing international courts and quasi-judicial systems of human rights to act upon the national and local juridical-political arenas. Yet the strategies of transnational legal activism are historically and politically situated. Therefore, they must be an object of empirical research. Since the State is a major actor in transnational legal battles over human rights issues, it is important to investigate both the practices of transnational legal advocates and how the State responds to them. This will help us to better understand not only how civil society actors engage in transnational legal mobilization, but also how the State relates to international human rights norms and how human rights discourses and practices develop in different sectors of the State and at different levels of State action.

Drawing on interviews and conversations with human rights activists in Brazil, as well as archival research, including legal documents and data collected from human rights NGOs and from the website of the Organization of American States, the paper will show that the practices of local and transnational human rights NGOs in the cases they brought against Brazil before the IACHR constitute an example of transnational legal activism. However, as the case-study will illustrate, their achievements, though important, have been very limited, both because of the precarious effectiveness of international human rights law and the internal contradictions and heterogeneity of the Brazilian State in the field of human rights. In addition to an overview of the cases against Brazil in the IACHR, I will present a closer examination of three cases concerning, respectively, the “memory battle” in the Araguaia Guerrilla case; the issue of domestic violence addressed in

the case of Maria da Penha; and the issue of racial discrimination addressed in the case of Simone Diniz. Each of these cases will show that the discourses and practices of the State regarding human rights issues are heterogeneous and contradictory at the national and local levels of administration. In what follows, I begin with a critical review of existing research on law, globalization and transnational legal mobilization. Secondly, I situate the case-study within the larger political context of democratization and the persistence of human rights violations in Brazil. This is followed by a discussion of transnational legal activism in the IACHR and the contradictory role of the Brazilian State regarding the politics of human rights.

### **Studies of law, globalization and transnational legal mobilization**

Legal scholars have analyzed the internationalization of the judiciary from a dispute resolution perspective, debating whether global judicialization is inevitable and desirable for an effective and equitable enforcement of the rule of law.<sup>7</sup> On one side of the debate are those who favor the establishment of a global law of jurisdiction and judgments, both in civil and commercial matters as well as in criminal matters.<sup>8</sup> Slaughter, for example, is enthusiastic about the emergence of what she envisions as a “global community of courts” and “global jurisprudence”, which she sees as a consequence of the emerging fora of “transnational litigation”.<sup>9</sup> According to Slaughter, international dispute resolution has been increasingly replaced with transnational litigation, a significant shift in the international legal system. Traditionally, international disputes involved States and were solved under the auspices of the international system. By contrast, transnational litigation encompasses domestic and international courts, involving cases between States, between individuals and States, and between individuals across borders. Slaughter points out that transnational litigation typically refers to commercial disputes, as in cases brought to the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA) and the Law of the Sea Tribunal.

On the other side of the debate are those who do not view global judicialization as an inevitable development of international law and seem to be less enthusiastic about this trend. Observing that, in Europe and in Latin America, “the ability of individuals to seek a remedy against their government has advanced very rapidly at the international level”, Ratner discusses the limits of “global judicialization” by focusing on the internationalization of criminal law and on the obstacles to the effectiveness of the International Criminal Court.<sup>10</sup> A former member of the U.S. State Department Legal Adviser’s Office, Ratner argues that global judicialization is neither inevitable

nor effective or desirable if it is going to divert resources from non-judicial methods of enforcing the law and solving disputes, such as diplomacy, negotiations and sanctions. His view that “soft law” is more effective in addressing international disputes is also shaped by his experience working for the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE).

While offering insights into the procedural aspects and obstacles to the globalization of the rule of law and judgments, legal scholars have approached the phenomenon of global judicialization and transnational litigation from a narrow, legalistic perspective. They have focused primarily on dispute resolution that deals with commercial disputes, adopting an individualistic and doctrinal perspective that overlooks the complex relations between different legal ideologies and power relations between diverse legal actors. When discussing human rights abuses, they have also approached the disputes from an individualistic perspective, as if the interests of the parties in question and the remedies sought by them concerned only legal matters and could be separated from politics and culture. Furthermore, legal scholars have often approached domestic and international courts and quasi-judicial institutions as either separate entities or as institutions merging into one developing “global community of courts”. Both perspectives overlook the role that NGOs and nation-States play as parties involved in domestic and international disputes as well as in the constitution of both domestic and international judicial and quasi-judicial systems.

Studies of transnational advocacy networks, transnational activism and counter-hegemonic globalization have contributed to our understanding of transnational human rights activism.<sup>11</sup> In their seminal work in this area, Keck and Sikkink define “networks” as “forms of organizations characterized by voluntary, reciprocal and horizontal patterns of communication and exchange. In spite of the differences between domestic and international realms, the network concept travels well because it stresses fluid and open relations among committed and knowledgeable actors working in specialized issue areas”.<sup>12</sup> The authors call these networks “advocacy networks because advocates plead the causes of others or defend a cause or proposition. [...] They are organized to promote causes, principled ideas and norms, and they often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their ‘interests’”.<sup>13</sup> The concept of “transnational advocacy networks” is more useful than “transnational litigation” to uncover the power relations inherent in the struggles over the definition and protection of human rights. However, it does not specifically address *legal* practices and transnational *legal* mobilization.

Since the 1990s, cross-border legal interactions and the globalization of

the rule of law have emerged as a new field of socio-legal research.<sup>14</sup> Two approaches can be identified in this field, ranging from an institutional and systemic to a more political and critical analysis of the relationship between law and globalization. This approach seeks to analyze the relations between legal and nonlegal institutions in order to uncover the characteristics of the developing global legal culture. It raises questions about “use or avoidance of legal processes, as well as the legal cultures, the types of disputes, forms of decision-making, as well as the attitudes and strategies of legal actors”.<sup>15</sup> The importance of this approach lies in its attention to legal actors and legal cultures, as well as unequal power relations between these actors. But it focuses primarily on commercial disputes and international elites, and tends to overlook the relationship between the globalization of law and politics. By not examining the practices of social movement actors and their engagement with legal institutions, this approach also overlooks the contradictory processes of globalization and the dual role of the State as both promoter and violator of human rights.

The political and critical approach to law and globalization builds on socio-legal studies on law as an instrument of “social conflict”<sup>16</sup> and a “social movement tactic”.<sup>17</sup> Focusing on transnational legal mobilization and its relationship with social movements that advocate an alternative to neoliberal globalization, this emerging literature continues to question whether and under what conditions law can be used as an instrument of social emancipation.<sup>18</sup> Although neoliberal globalization has diminished the power of the nation-States, this literature examines how transnational legal mobilization relates to both the State and international institutions. As Sousa Santos observes, “The nation-States will remain, in the foreseeable future, a major focus of human rights struggles, both as violators and as promoters-guarantors of human rights”.<sup>19</sup> However, the expansion of transnational corporations and the establishment of structural adjustment programs, all backed up by nation-States, have had disastrous effects on human rights. Even when States are not violators of human rights, they are too small and weak to counteract such violations. That is why “it is imperative to strengthen the extant forms of global advocacy and promotion and protection of human rights – as well to create new ones”.<sup>20</sup>

According to Sousa Santos, transnational legal mobilization will be emancipatory and will constitute a “subaltern cosmopolitan politics and legality” if it includes four expansions of the conception of the politics of legality. First, there must be a combination of “political mobilization with legal mobilization”.<sup>21</sup> Second, “the politics of legality needs to be conceptualized at three different scales – the local, the national, and the global”.<sup>22</sup> Third, there must be an expansion of professional legal knowledge, of the nation-State law and of the

legal canon that privileges individual rights. This does not mean that conceptions of individual rights are abandoned. Finally, the time frame of the legal struggles must be expanded to include the time frame of the social struggles by referring, for example, to capitalism, colonialism, authoritarian political regimes or other historical contexts.

The practices of human rights NGOs in cases against Brazil brought to the IACHR meet the conditions of what Sousa Santos describes as “subaltern cosmopolitan politics and legality”. However, I prefer to use the term “transnational legal activism” to emphasize the **transnational** dimension of the alliances and networks formed by NGOs, social movement actors and grassroots organizations engaged in human rights activism. The expression “legal activism” also highlights social actors such as **activists**, and emphasizes a **movement** including a variety of legal, social and political struggles. Furthermore, not all forms of transnational legal activism directly challenge neoliberal globalization, which does not mean that this type of activism does not seek to promote social, legal and political changes. Just like the interests of those involved in human rights struggles, the strategies and goals of transnational human rights legal activism are diverse, linked to various social movements, ranging from class-based struggles to struggles against sexism, racism, political repression, imperialism and so on. Since the State is an important actor in transnational legal disputes, we need to further examine how the State responds to transnational legal activism in concrete cases and at all levels of State action—local, national and international. Before examining the strategies of NGOs in cases against Brazil in the IACHR and the responses of the Brazilian State, I shall situate them within the larger political context of democratization and the persistence of human rights violations in Brazil.

### **The paradox of democratization and the persistence of human rights violations**

From the 1960s until the mid-1980s, many countries in Latin America experienced military coups and were controlled by governments that promoted the systematic practice of kidnapping, torture and murder of political dissidents. These regimes imposed authoritarian constitutions revoking fundamental political and civil rights. Since the mid-1980s, most countries in Latin America have been successful in ending military-authoritarian regimes, making important legal and political reforms towards democracy. Most countries in the region now have a democratic political regime, along with progressive legislation granting new rights to often excluded groups, such as prisoners, rural workers, street children, indigenous populations, blacks, women, homosexuals and

transvestites. However, systematic practices of human rights violations against these social groups have persisted in Latin America.<sup>23</sup>

In Brazil, the military-authoritarian regime lasted over twenty years, from 1964 to 1985. Based on the doctrine of National Security and Development,<sup>24</sup> the military regime suspended direct elections for president, governors and senators; rendered the legislature ineffective; banned existing political parties; suspended constitutional rights; censored the press, the arts, and academia; and persecuted, imprisoned, tortured and killed whoever opposed the regime. During this period of political terror, sectors of civil society organized resistance and opposition movements.<sup>25</sup> Various social movements flourished throughout the 1970s.<sup>26</sup> Pressures from these movements and their international allies, as well as divisions among military leaders, instigated a decrease in repression in the late 1970s, leading to the *Abertura Política* (Political Opening). In 1979, during the presidency of General Figueiredo, amnesty of political prisoners was granted through the enactment of the *Lei da Anistia* (Amnesty Law, law no. 6,683/79). Activists in exile returned to the country. Elections for mayors and State assemblies were restored.<sup>27</sup>

To facilitate a smooth transition to civilian rule, the military and subsequent civilian regime broadened the interpretation of the Amnesty Law to also grant amnesty to the military officials and police officers who committed human rights abuses against political dissidents. This has provoked numerous protests by family members of the disappeared and former political prisoners. Human rights NGOs and renowned jurists have also protested against the impunity granted by such an ample interpretation of the Amnesty Law and have demanded a revision of this law.<sup>28</sup> This is an important aspect in the battle over the memory of the dictatorship, which will be further examined in the next section in light of the case of the Araguaia Guerrilla that has been pending in the Brazilian federal courts since the early 1980s and in the IACHR since the mid-1990s.

The 1980s brought a period of political, legal and institutional reform in order to restore democracy in the country. Elections for governors, national congress members and the president were restored. During the transition from military to civilian rule, the strategy of social movements shifted from fighting the regime from the outside to participating in the democratization process from both inside and outside of the State. Thanks to pressures from the women's movement, the world's first women's police station, run exclusively by female police officers, was created in São Paulo in 1985.<sup>29</sup> However, only recently did Congress pass a specific law determining the establishment of integrated services to combat domestic violence against women in the country, a much-awaited legal change that owes much to the case of Maria da Penha, discussed in the next section.

Diverse social movements also lobbied to influence the redrafting of the new Brazilian Constitution in 1988. As a consequence, Article 5 established a series of fundamental rights, stating that “men and women are equal in rights and obligations”, “nobody will be subject to torture”, “property must fulfill its social function”, “the practice of racism is a crime”. The Constitution also declared that foreign relations are guided by the principle of the “prevalence of human rights” (Article 4, II).<sup>30</sup> In the early 1990s, new progressive infra-constitutional legislation was also enacted. For instance, Law no. 7,719/89 was created to punish crimes resulting from discrimination on the basis of race, color, ethnicity, religion or national origin.

The 1990s was a decade of ratification of several international and regional human rights norms.<sup>31</sup> Former President Fernando Henrique Cardoso (Social Democratic Party or PSDB), elected for two terms (1995-1998 and 1999-2002), favored the recognition of international human rights norms. In 1995, Brazil ratified the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, the so-called “Belém do Pará” Convention, adopted by the Organization of American States (OAS) in 1994. However, despite several communications sent by the IACHR the Cardoso administration ignored the case of Maria da Penha until the end of Cardoso’s second term. Furthermore, compared with other Latin American countries, Brazil took much longer to recognize the regional human rights norms established by the American Convention on Human Rights. While a number of OAS member States ratified the Convention in the 1980s, Brazil ratified it only in 1992. Brazil also ranks as one of the last OAS member States to accept the jurisdiction of the Inter-American Court of Human Rights. Only in 1998 did Brazil recognize the jurisdiction of this court.<sup>32</sup>

Following the constitutional principle of the prevalence of human rights and to promote a culture of human rights, Cardoso launched in 1996 the *Programa Nacional de Direitos Humanos* (National Program of Human Rights, Decree no. 1,904/96), formally recognizing the human rights of “women, Blacks, homosexuals, Indigenous populations, the elderly, individuals with disabilities, refugees, individuals infected with HIV, children and adolescents, police officers, prisoners, the poor and the rich”.<sup>33</sup> In 1998, Cardoso created the *Secretaria Nacional de Direitos Humanos* (National Secretariat of Human Rights) to implement this program. For the first time in Brazilian history, the government recognized that Brazil was not a “racial democracy”. The National Program of Human Rights signaled the establishment of affirmative action programs in higher education, though these are not mandatory and have been an object of heated debate in the country.

Regarding the battle over the memory of the dictatorship, in the beginning of his first term, Cardoso signed Law no. 9,140/95, known as *Lei dos*

*Desaparecidos* (Law of the Disappeared), creating the *Comissão Especial de Reconhecimento dos Mortos e Desaparecidos Políticos* (Special Commission to Recognize those Killed or Disappeared for Political Reasons). This law determined the recognition that the Brazilian State was responsible for the killing of 136 persons who had disappeared for political reasons. It created the Special Commission to examine claims presented by family victims, who ended up receiving some pecuniary compensation. However, family victims and their allies were critical of the procedures and the scope of this law. They claimed that the government, by refusing to revise the Amnesty Law and to declassify documents on the military massacre of the Araguaia Guerrilla members, was promoting a politics of forgetfulness and impunity.<sup>34</sup>

President Luiz Ignácio Lula da Silva (Workers' Party or PT), also elected for two terms (2003-2006 and 2007-present), has not differed from his predecessor with respect to the battle over the memory of the dictatorship. However, the Lula administration has created some institutional support for the promotion of human rights. For instance, right after taking office in 2003, President Lula granted ministerial status to the *Secretaria Nacional de Direitos Humanos* (National Secretariat of Human Rights), renamed as *Secretaria Especial de Direitos Humanos* (Special Secretariat of Human Rights). He also created the *Secretaria Especial de Políticas para as Mulheres* (Special Secretariat of Public Policy for Women) and the *Secretaria Especial de Políticas de Promoção da Igualdade Racial* (Special Secretariat of Public Policy for the Promotion of Racial Equality), empowering both with ministerial status.

Despite these secretariats, the new progressive laws and the recognition of international human rights norms, serious human rights violations have persisted in Brazil. Perpetrated by police, death squads and other interest groups, these violations include the systematic practice of torture; slave labor; discrimination on the basis of race, ethnicity, gender, sexual orientation, age and disability; impunity for the perpetrators of violence against women; summary executions; and violence against social movements struggling for agrarian reform and for indigenous rights, including the criminalization of these struggles.<sup>35</sup> The new laws and programs to combat social exclusion, racism and sexism have hardly been enforced. This is the case because of the continuing concentration of power in the hands of the elite, corruption and other institutional problems of the justice system in Brazil. The neoliberal policies adopted by all parties in power since the end of the military dictatorship have further reduced the capacity of the State to implement human rights programs.

Several domestic and international human rights non-governmental organizations (NGOs) have denounced this situation and have filed complaints in the Brazilian courts. But since the police and powerful interest groups are often involved in human rights violations, the local courts and the government

have blocked redress to these organizations. This has occasioned what Keck and Sikkink call the “boomerang pattern”.<sup>36</sup> This pattern occurs when a given State blocks redress to organizations within it, prompting the activation of a transnational network. Members of the network pressure their own States and, if relevant and necessary, a third-party organization, which in turn pressures the State that blocked redress to organizations.

Following the “boomerang pattern”, Brazilian NGOs have formed national and international human rights advocacy networks to pressure the government to enforce the progressive legislation, to create new laws and to devise public policy for the protection of human rights. Since the mid-1990s they have increasingly engaged in transnational legal activism, mobilizing to secure the support of intergovernmental organizations, such as the OAS and its Inter-American System of Human Rights.<sup>37</sup>

## Transnational legal activism in the IACHR and the Brazilian State

### *The IACHR and the expansion of transnational legal activism*

The American Convention on Human Rights, adopted in 1969 and in force since 1978, established that its observance should be carried out by two organs: the Inter-American Commission on Human Rights (IACHR), created by the OAS in 1959, and the Inter-American Court of Human Rights, created by the Convention and in force since 1978.<sup>38</sup> Since individuals and NGOs are allowed to file complaints only in the IACHR, transnational legal activism has directly engaged with this organ.<sup>39</sup> The IACHR is composed of seven members elected by the OAS General Assembly. They are not judges and they represent all of the OAS member States. The IACHR has the mandate to receive petitions against member States regardless of whether they have ratified the Convention. Given that the IACHR and the Court have a complementary function vis-à-vis domestic judicial systems, admission by the IACHR of a complaint is subject to the complainant having exhausted domestic remedies. Although the IACHR can handle individual complaints and proceed with an *in loco* investigation, it is not a judicial organ and cannot deliver judicial and binding decisions.<sup>40</sup>

Transnational legal activism in the IACHR has greatly expanded in the last decade. Although data on the complaints received and cases processed by the IACHR are not consistently presented in its annual reports, published since 1970, these reports indicate a significant increase in the number of complaints over the years.<sup>41</sup> In 1969 and 1970, for example, the IACHR received 217 complaints, half of the number received in 1997 alone (435).<sup>42</sup> This number

continued to increase over the past ten years, having tripled by 2006 (1325), with most complaints referring to Peru, Mexico and Argentina.<sup>43</sup>

The number of complaints against Brazil in the IACHR has also increased since the 1990s. However, compared with other countries in the region, Brazilian human rights NGOs have been slower in turning to transnational legal activism over the past ten years. In the years of 1969 and 1970, for example, the IACHR received 40 complaints against Brazil, and the country ranked second in number of complaints in the region.<sup>44</sup> In 1999 and 2000, the number of complaints against Brazil decreased (35).<sup>45</sup> In 1999, the country came tenth in the ranking of complaints, and 46 cases against Brazil were pending in the IACHR.<sup>46</sup> From 2001 to 2006, there was a gradual increase in the number of complaints against Brazil. In 2006, this number almost doubled (66) compared to the combined figure for 1999 and 2000, and the country reached the seventh position within the region.<sup>47</sup> Since 1999, the IACHR has received 272 complaints against Brazil, with 72 cases being processed currently.<sup>48</sup>

The increase in the number of complaints can be attributed to national and international political processes. Until the 1980s, military and other authoritarian governments had representatives at the IACHR, discrediting its stated goals of promoting democracy and respect for human rights. In addition to overlooking large-scale practices of torture, disappearances and extra-judicial execution, the Inter-American system of human rights also had to deal with a weak, inefficient and corrupt domestic judiciary.<sup>49</sup> The democratization process has helped to strengthen the OAS and its human rights system. The globalization of human rights law and the transnationalization of social movements have also contributed to the expansion of transnational legal activism. As a result of these processes, the IACHR has gained more credibility among human rights NGOs and has pressured member States of the OAS to recognize and enforce human rights norms.<sup>50</sup>

Before the Convention was ratified by Brazil in 1992, the IACHR called the attention of the Brazilian State only twice, in 1972 and 1985. During the dictatorship, the IACHR clearly ignored the vast majority of complaints against Brazil. From 1969 to 1973, for example, the IACHR received at least 77 complaints against Brazil. Of those, 20 were accepted as “concrete cases”.<sup>51</sup> All but one concerned practices of arbitrary detention, death threats, torture, disappearance and assassination perpetrated by agents of the State against political dissidents of the regime. When responding to the petitions sent by the IACHR, the Brazilian State denied the occurrence of the alleged violations. The IACHR considered that most of the cases were not admissible or should be archived.<sup>52</sup> The only case in which the Brazilian State was found responsible involved the arbitrary detention, torture and assassination of the union leader Olavo Hansen in the precinct of the *Departamento de Ordem Política e Social*

(Department of Social and Political Order, known as DOPS), in São Paulo, in May 1970. The IACHR decided that the Brazilian State should impose sanctions on the perpetrators of the violation and should compensate the family victims. The Brazilian government claimed that Hansen had committed suicide and refused to follow the recommendations.<sup>53</sup>

The second case concerned the violation of the human rights of the indigenous population of Yanomamis. It was initiated in 1980 and ended in 1985, within the context of democratization. The petitioners were representatives of anthropological associations and indigenous rights NGOs based in the United States. The IACHR recognized the “important measures taken by the Government of Brazil, particularly since 1983, to protect the security, health and integrity of the Yanomami Indians”.<sup>54</sup> At the same time, the IACHR recommended that the government continue to take these measures, proceed to demarcate the boundaries of the Yanomami Park and consult with the indigenous population to establish social programs in the park. This case shows that both the IACHR and the Brazilian government had begun to take human rights violations more seriously. Yet, since the 1980s, the State has not always responded to the communications sent by the IACHR and, though advocating the protection of human rights, has acted in contradictory ways.

### *Types of cases and petitioners*

According to Paulo Sérgio Pinheiro, over 70% of the cases pending in the IACHR concern the continued authoritarian practices by the States both past and present: they involve torture, arbitrary detention, disappearance and extra-judicial executions.<sup>55</sup> However, it is important to take into consideration the political context in which the cases have been reported. In cases against Brazil, for example, depending on the political context in question, one can find differences between the institutional and social positions of both perpetrators and victims. As noted above, under the dictatorship, almost all of the cases reported referred to political violence officially supported by the State and committed by agents of the State against political dissidents, regardless of their class, race or gender. Since the early 1980s most of the cases reported have concerned human rights violations not condoned by the State, though perpetrated by both agents of the State and death squads, paramilitary groups, landowners, business owners, or other members of the elite. Most of these cases concern class-and race-based violence against blacks, ethnic minorities, and the poor. Though a minority, there are also cases focusing specifically on violence against women, racial discrimination at the workplace, and the memory of political violence under the dictatorship.

It is estimated that human rights NGOs are responsible for 90% of the cases presented to the IACHR.<sup>56</sup> Since the 1980s, most of the cases against Brazil in the IACHR have been initiated by human rights NGOs. The majority of the petitions have been prepared and signed by international NGOs in partnership with local NGOs, victims or their families, social movement actors and/or grassroots non-governmental organizations. International human rights NGOs include, for example, the Center for Justice and International Law (CEJIL), Americas/Human Rights Watch and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM). Although the members of the Center for Global Justice (renamed as Global Justice) come from and work in Brazil and the United States, this can be defined as a *national* organization. It is based solely in Brazil and advocates for the human rights of individuals and groups within and throughout Brazil. Since the late 1980s, the majority of the complaints in the IACHR have been initiated by CEJIL, followed by Global Justice and Americas/Human Rights Watch.

The local NGOs come from a variety of social movements and struggles. Local NGOs that actively participate in the human rights movement and that have engaged in transnational human rights legal activism include, among others, the *Gabinete de Assistência Jurídica Popular* [Cabinet for Popular Juridical Assistance] (GAJOP), the *Movimento Nacional de Direitos Humanos* [National Movement of Human Rights] (MNDH), the *Grupo Tortura Nunca Mais* [Torture Never Again Group] (GTNM/RJ), and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* [Committee of the Families of Those Killed or Disappeared for Political Reasons] (CFMDP/SP). The *União de Mulheres de São Paulo* (Women's Collective of São Paulo) is an example of a local grassroots feminist organization that has used the IACHR to advance the feminist struggle against gender-based violence. The *Geledés-Instituto da Mulher Negra* (Institute of Black women) and the *Instituto do Negro Padre Batista* (Institute of Blacks Father Batista) are examples of local NGOs connected to the black rights movement and the women's movement. With the exception of GAJOP, which has created a program specializing in the mobilization of international human rights law, most of the local NGOs have signed only one to three petitions, usually in partnership with larger international, national or local human rights NGOs.

### Multiple strategies

NGOs use different strategies when approaching the OAS and the United Nations (UN). Transnational legal activism in the OAS is qualitative, whereas the approach of NGOs to the UN is quantitative. Since 1998, GAJOP, for

example, has sent ten complaints against Brazil to the IACHR. But the organization wrote 200 communications to the now extinct UN Commission on Human Rights.<sup>57</sup>

These NGOs appeal to the IACHR not only to find solutions for individual cases but also to create precedents that will have an impact on Brazilian politics, law and society. The strategy is to make the case an example for social change. As Jayme Benvenuto, director of the International Human Rights Program of GAJOP, explains, “We work with the idea of creating examples. The case must be exemplary to make the country adopt a different position. We are not simply interested in a solution to the individual case. We are also interested in changing the police, the laws and the State, to prevent the continuation of human rights violations”.<sup>58</sup>

But the NGOs are aware that legal mobilization in general, and the Inter-American System of Human Rights in particular, are limited resources for social change. As James Cavallaro, founder of the offices of Human Rights Watch and CEJIL in Brazil, founding member of Global Justice and currently a professor at the Law School of Harvard University, explains:

*Global Justice prepares a report on the situation of conflicts over land in Pará, Espírito Santo or any state where there is a crisis, on police brutality in São Paulo, or any theme. The report is prepared in Portuguese and translated into English. It is delivered to international organizations, newspapers, such as New York Times, etc. Thus, Global Justice also uses this informal space to press the Brazilian government to respond to our demands. The organization does this in conjunction with the use of the Inter-American system. The approach is holistic, because one petition alone is not going to transform the reality of Brazil. The starting point is strategic for any action in the Inter-American system. The system is useful only to some extent, because it is not going to solve the problem we're working on.*<sup>59</sup>

In addition to using the IACHR as a political resource for social change, NGOs also approach it to reframe international human rights norms. The framing of the complaint as a violation of civil and political rights is more likely to be accepted by international judicial and quasi-judicial organs. For instance, all but one of the complaints initiated by GAJOP in the IACHR has been framed as a violation of civil rights. The IACHR has considered these complaints admissible. The only case referring to social rights (housing) was not admitted by the IACHR. Jayme Benvenuto explains that this complaint was framed as a social right to test the justiciability of social, economic and cultural rights. Like other NGOs in Brazil, GAJOP is using international judicial and quasi-judicial organs not only to solve individual disputes over human rights but also to reframe them.

But while most human rights violations are framed in terms of civil rights violations, the demands go beyond reparations for the victims. The petitioners normally demand that the Brazilian State take preventative measures and create new legislation or public policy on a specific issue. Despite the context of democratization, the Brazilian State has responded to these demands in contradictory ways, as the following cases illustrate.

*The Araguaia Guerrilla Case:  
the right to memory versus the politics of forgetfulness*

Since the early 1990s, the only case about political rights violations under the period of the military dictatorship brought to the IACHR concerns the massacre of members of the Araguaia guerrilla movement, which took place in the state of Pará from 1972 to 1975. In this case, the petitioners have used domestic and international law to reconstruct their memories, requesting access to classified documents and recovery of the bodies of those who were assassinated in the Araguaia region.

This legal battle began in 1982, when family members of 22 of the disappeared persons brought proceedings in the Federal Court of the Federal District in Brasília. Because the court had not issued a decision on the merit of this case for thirteen years, CEJIL, the Americas/Human Rights Watch, the GTNM/RJ and the CFMDP/SP in 1995 sent a petition against the Brazilian State to the IACHR. At first, the Brazilian State denied its responsibility over this case and even denied the existence of the Araguaia guerrilla movement. It later recognized its responsibility but alleged that a new law enacted in 1995, the Law of the Disappeared, cited above, would provide pecuniary compensation to family members of those who had been killed or disappeared for political reasons. The petitioners argued that such compensation was not sufficient to reveal the circumstances of the death and disappearance of their family members. In March 2001, the IACHR declared the case admissible.

The strategy to use the IACHR had some impact on the case pending in the domestic federal court. In June 2003, federal judge Solange Salgado issued an unprecedented decision on the merit of the case, condemning the Brazilian State to take all necessary measures to find the bodies of the petitioners' family members who had disappeared during the massacre of the Araguaia Guerrilla movement; to provide the victims with a dignified burial, along with all the necessary information to issue their death certificate; and to provide the petitioners with all required information on the circumstances of the death and disappearance of the victims.

However, according to the attorneys working for the Special Secretariat

of Human Rights, the transnational legal mobilization over the Araguaia Guerrilla case has not impacted this organ, nor affected the government.<sup>60</sup> The Brazilian State filed an appeal to Justice Salgado's decision. The government has not declassified the documents on the Araguaia Guerrilla. Military officials insist that the documents have been destroyed. In November 2004, the Regional Federal Court (*Tribunal Regional Federal*) upheld Justice Salgado's decision and scheduled a hearing with the parties involved to implement that decision. The Brazilian State did not deny its responsibility but it did appeal again, claiming that Justice Salgado's decision should be executed under the jurisdiction of the original court where the lawsuit had been initiated. As of 26 June, 2007, the case was still pending in the Superior Court of Justice (*Superior Tribunal de Justiça or STJ*). On June 26, the *STJ*, while confirming Salgado's decision, has favored the state's appeal by ordering the original court to execute that decision.

In October of 2003, while the case was still pending in the Regional Federal Court, President Lula created an Inter-Ministerial Commission with the purpose of obtaining information on the remains of those who disappeared during the Araguaia Guerrilla massacre (see Decree no. 4,850/2003). It is worth noting that, contrary to the *Comissão Especial de Reconhecimento dos Mortos e Desaparecidos Políticos* (Special Commission to Recognize those Killed or Disappeared for Political Reasons), this Inter-Ministerial Commission only included representatives of the state. In March 2007, the commission issued its final report, stating, among other things, that Brazilian Army officials continue to claim that all documents relating to the Araguaia Guerrilla movement have been destroyed. The report also makes it clear that the commission worked under the condition, assured to military officials, that it would not use the information solicited from the Brazilian Army to revise the Amnesty Law. While the commission was indeed committed to finding the remains of those who were killed or disappeared for political reasons, it would not necessarily release the names of the perpetrators.<sup>61</sup> Clearly, the federal government, while recognizing its responsibility for the historical past, has accepted the conditions imposed by the military to find the "truth" about the past. Furthermore, the battle over when and how the existing "secret" documents will be declassified continues, and the Araguaia Guerrilla case is still pending in the IACHR.

The GTNM/RJ and the CFMDP/SP have been very active in politicizing this legal battle outside of the courts. Since the early 1980s they have been mobilized for the right to have access to classified documents kept by the Brazilian Army. Among other things, they have used the media to denounce the impunity of military officials and police officers involved in the killing and

disappearance of political dissidents during the dictatorship; run campaigns for the right to memory; denounced the limitations of the governmental politics of reparation as a means to promote the erasure of history. The CFMDP/SP has also created a website to document its actions in search of information on those who disappeared.<sup>62</sup>

It is important to note that legal mobilization and the use of the IACHR are not the major focus of their struggles over the right to memory and access to classified documents. Unlike human rights NGOs such as CEJIL, which specializes in human rights legal advocacy in the Inter-American System of Human Rights, the GTNM/RJ and the CFMDP/SP approach domestic and transnational legal mobilization as additional tools to strengthen their social and political struggles. As Criméia Schmidt de Almeida, founding member of the CFMDP/SP and survivor of the Araguaia Guerrilla movement, points out,

*The role of local justice and of the international institutions of justice would be important if they could enforce the law. I think that laws are important. But there are many tricks. We've won a case against the government and the government can procrastinate and never comply with the decision. My ideological perspective is Marxist and I don't see the judiciary as something separate from the State, and the State is at the service of the dominant class. The same can be said about the international organizations. On the other hand, the commissions on human rights, in principle, can defend human rights in favor of those who do not have access to State power. Hence, the laws are important. But they will only be enforced when we really achieve power.<sup>63</sup>*

Both the Cardoso and the Lula governments have been unwilling to declassify the documents on the military operations in the Araguaia region. Both have enacted decrees that have indefinitely extended the time period for declassifying official documents considered “top secret”, which, according to these laws, can endanger the “national security” if they become public.<sup>64</sup> Both administrations have also opposed a revision of the Amnesty Law either. In sum, the case of the Araguaia Guerrilla clearly illustrates the heterogeneity and contradictory role of the Brazilian State regarding the politics of human rights at the federal level of State action. While international human rights norms have been recognized and a Special Secretariat of Human Rights has been created to implement national human rights programs, the federal government, regardless of the political party in power, has faced strong resistance on the part of military officials to follow the decision of a federal court and to guarantee the right to memory. Clearly, the federal government has promoted a politics of forgetfulness and impunity.

*The Maria da Penha Case: engendering  
human rights despite a heterogeneous State*

In 1998, CEJIL, CLADEM and Maria da Penha Maia Fernandes filed a complaint before the IACHR alleging that the Brazilian State had “condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Mrs. Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983”. The petitioners maintained that the Brazilian State “condoned this situation since, for more than 15 years, it failed to take the effective measures required to prosecute and punish the perpetrator, despite repeated complaints”.<sup>65</sup>

Despite sending several communications to the Brazilian State over a period of three years, the IACHR did not receive any response from the government under the presidency of Cardoso. In 2001, the IACHR published a report of merit on this case, concluding that the Brazilian State had “violated the rights of Mrs. Maria da Penha Maia Fernandes to a fair trial and judicial protection”. The IACHR also concluded that this violation formed “a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action”. The IACHR recommended that “the State conduct a serious, impartial, and exhaustive investigation in order to establish the criminal liability of the perpetrator for the attempted murder of Mrs. Fernandes and to determine whether there are any other events or actions of State agents that have prevented the rapid and effective prosecution of the perpetrator”. The IACHR also recommended “prompt and effective compensation for the victim and the adoption of measures at the national level to eliminate tolerance by the State of domestic violence against women”.<sup>66</sup>

As noted by the organizations CEJIL, CLADEM and AGENDE-Action in Gender Citizenship and Development, “the extreme relevance of this case surpasses the interest of the victim Maria da Penha, extending its importance to all Brazilian women”.<sup>67</sup> According to them,

*This is because, besides of having declared the Brazilian State responsible for negligence, omission and tolerance regarding to the domestic violence against women, recommending the adoption of measures related to the individual case [paragraph 61, items 1, 2 and 3] – including establishing the payment of compensation to the victim – the Commission also recommended that the State the adoption of public policy measures to put an end to state tolerance and the discriminatory treatment of domestic violence against women in Brazil [paragraph 61, items 4 a, b, c, d and e].*

*This was the first case in which the Convention of Belém do Pará was applied by an international human rights body, in a decision in which a country was declared responsible in a matter of domestic violence.*

*The case of Maria da Penha, therefore, has become a symbolic case as it determines the systematic pattern of domestic violence against women and establishes State responsibility at international levels due to the ineffectiveness of judicial systems at a national level.<sup>68</sup>*

Despite the importance of the case, only in October 2002 did the government, through the *Secretaria de Estado dos Direitos da Mulher* (State Secretary of Women's Rights or SEDIM), created at the very end of Cardoso's second term, began to pay attention to the case of Maria da Penha.<sup>69</sup> The head of SEDIM, Solange Bentes, then pressured the *Superior Tribunal de Justiça* (Superior Tribunal of Justice) to conclude the appeal to trial against the aggressor. The case was concluded soon after, confirming the decision of the local Jury that had condemned Mr. Viveros to 10 years and 6 months in prison. The delivery of such decision, just a few months before the deadline for the prescription of the crime, was one among other IACHR recommendations on this case.

Similarly to Cardoso, President Lula ignored the case of Maria da Penha and the recommendations by the IACHR for over two years. In 2004, CEJIL, CLADEM and AGENDE sent a petition to the Committee on the CEDAW-Convention on the Elimination of All Forms of Discrimination against Women, informing on the lack of compliance by Brazil of its international obligations related to the prevention and eradication of violence against women. Thanks to pressures from the women's movement, the government began to partially comply with the IACHR's recommendations. Thanks to efforts by the women's movement and the *Secretaria Especial de Políticas para as Mulheres* (Special Secretariat of Public Policy for Women), the government proposed to National Congress a law on domestic violence against women—a proposal that had been demanded by the women's movement since the 1980s. The law was approved by Congress and signed by President Lula on 7 August 2006. As an act of symbolic reparation, the law was named "Law Maria da Penha" (Law no. 11,340/2006) and was signed in a public and solemn ceremony widely publicized by the Brazilian media.

Although the Brazilian State has partially complied with the recommendations concerning this case, it is important to note that the state of Ceará has refused to compensate the victim. It is also likely that the implementation of the Law Maria da Penha will face resistance from local administrations. Maria da Penha Fernandes feels honored by the name of the law, but she considers it "very important that those using corporatism negatively to procrastinate the case be held responsible".<sup>70</sup>

*The Simone Diniz Case: racial discrimination  
as a human rights violation versus the denial of racism*

In October 1997, CEJIL, the Subcommittee on Blacks of the Human Rights Commission of the Brazilian Bar Association in São Paulo (OAB/SP) and Simone André Diniz sent a petition to the IACHR, alleging that the Brazilian State did not guarantee the right to justice and due process of law with respect to the domestic remedies to investigate the racial discrimination suffered by Simone Diniz. The *Instituto do Negro Padre Batista* was added as co-petitioner later.<sup>71</sup> Several individuals and black rights organizations signed a statement in support of this initiative, connecting this legal mobilization to a larger social movement to end racism in Brazil.

In March 1997, Aparecida Gisele Mota da Silva placed a classified ad in the daily *Folha de São Paulo* expressing her interest in hiring a domestic employee. The ad explicitly indicated her preference for a white person. Student and domestic worker Simone Diniz answered the ad by calling the phone number indicated and introduced herself as a candidate for the job. The person answering Diniz's call asked about the color of her skin. When Diniz said that she is black, she was informed that she did not meet the requirements for the job.

Diniz immediately filed a complaint with the São Paulo Police Station for Investigation of Racial Crimes (*Delegacia de Crimes Raciais*). The police inquiry (10541/97-4) was initiated and sent to the office of the Public Ministry. But on 2 April 1997, the public attorney in charge of the case asked that the proceedings be archived, since he did not consider the acts committed by Aparecida da Silva to have constituted a crime of racism, as defined under Law no. 7716/89. The judge presiding over the case issued a decision on 7 April 1997, determining that the proceedings indeed be archived.

Using the IACHR as an instrument both to achieve individual compensation and to promote broader social change, the petitioners requested "that a recommendation be made to the State to proceed to investigate the facts, to make compensation to the victim and to give publicity to the resolution of this case in order to prevent future incidents of discrimination based on color or race".<sup>72</sup> In October 2002, the IACHR declared the admissibility of the petition.

The Brazilian State did not deny the existence of racial discrimination in Brazil, but it denied its responsibility in the case of Simone Diniz, alleging that, as the domestic court had ruled, the actions committed by Aparecida da Silva did not constitute a crime of racism, and therefore did not constitute a human rights violation. At the same time, the Brazilian State offered to pursue a friendly settlement. But since the State did not make any proposal on how to

achieve an agreement, the petitioners asked the IACHR to decide on the merits of the case.

In an unprecedented decision on a case of racial discrimination framed as a violation of human rights, the IACHR sent a report on the merits of the case to the parties in October 2004, concluding that “the State is responsible for the violation of the rights to equality before the law and judicial protection, and the right to a fair trial [...]”.<sup>73</sup> The IACHR recommended that the Brazilian State:

1. *Fully compensate the victim, Simone André Diniz, in both moral and material terms for human rights violations as determined in the report on the merits, and in particular,*
2. *Publicly acknowledge international responsibility for violating the human rights of Simone André Diniz;*
3. *Grant financial assistance to the victim so that she can begin or complete higher education;*
4. *Establish a monetary value to be paid to the victim as compensation for moral damages;*
5. *Make the legislative and administrative changes needed so that the anti-racism law is effective[. . .];*
6. *Conduct a complete, impartial and effective investigation of the facts, in order to establish and sanction responsibility with respect to the events associated with the racial discrimination experienced by Simone André Diniz;*
7. *Adopt and implement measures to educate court and police officials to avoid actions that involve discrimination in investigations, proceedings or in civil or criminal conviction for complaints of racial discrimination and racism;*
8. *Support a meeting with organizations representing the Brazilian press, with the participation of the petitioners, in order to draw up an agreement on avoiding the publicizing of complaints of racism, all in accordance with the Declaration of Principles on Freedom of Expression;*
9. *Organize government seminars with representatives of the judicial branch, the Public Ministry and local Public Safety Secretariats in order to strengthen protection against racial discrimination or racism;*
10. *Ask state governments to create offices specializing in the investigation of crimes of racism and racial discrimination;*
11. *Ask Public Ministries at the state level to create Public Prosecutor’s Offices at the state level specializing in combating racism and racial discrimination;*
12. *Promote awareness campaigns against racial discrimination and racism.*<sup>74</sup>

This decision had an impact on the Brazilian government at both the federal and state levels. The local media widely publicized the case and the Brazilian

State became more attentive to the need to create more public policies to combat racial discrimination in the country. The state of São Paulo began to pay more attention to the 26 cases involving that state in the IACHR. In September 2005, then vice-governor and acting governor Cláudio Lembo (DEM) determined that the Public Attorney Office of the State of São Paulo (*Procuradoria Geral do Estado de São Paulo*) should accompany the cases involving that state in the IACHR (Decree no. 50,067, September 29, 2005). The governor appointed a public attorney, Mariângela Sarrubbo, to follow these cases and represent the state of São Paulo in the public hearings of the IACHR (Resolution PGE no. 21, 4 October 2005).

Nevertheless, the state of São Paulo refused to comply with the recommendations made by the IACHR regarding compensation to Diniz. In other words, recommendations 1, 2, 3, 4, and 6 have not been accepted by the state of São Paulo. According to public attorney Mariângela Sarrubbo:

*The state considered that it had not violated human rights because it had created affirmative policies, as recommended by the Commission. The Police Academy, for example, created a new course on racial discrimination for police officers. A new legislation was proposed by Governor Geraldo Alkmin to the São Paulo state Assembly to establish an evaluating system in public sector recruitment examinations favoring afro-descendants. The case of Simone Diniz made the state more attentive to the problem of racial discrimination. This case had an enormous repercussion because the media made it visible. But this is a particular case that does not prove the inexistence of affirmative policies. This is an isolated case of a woman who supposedly discriminated against another woman. But there was no crime of racism. After the Commission made its recommendations, it had 30 days to send the case to the Court. But it didn't. I believe the Commission trusted that the measures taken by the state were satisfactory.<sup>75</sup>*

The IACHR did not send the case to the Court because the petitioners asked not to do so, based on the fact that the violation had occurred before the acceptance of the jurisdiction of the Court by the Brazilian State. The development of this case shows that the Brazilian State responded in contradictory ways. At the federal level, the Special Secretariat of Public Policy for the Promotion of Racial Equality and the Special Secretariat of Human Rights tried, though unsuccessfully, to find ways to comply with the recommendations made by the IACHR. At the local level, the state of São Paulo denied even the existence of the violation.

Until 2004 the Brazilian State had accepted responsibility in sixteen cases. Two involved violations against rural workers. Another concerned illegal imprisonment, torture and death of an indigenous leader. Another

referred to the killing of 111 prisoners in the now-defunct prison, Carandiru. In eleven of the other cases, Brazil was found responsible for human rights violations concerning summary executions perpetrated by military police against children and adolescents. In all of these cases, the impunity of those responsible for the crimes was proven.<sup>76</sup> An important case that resulted in a friendly settlement agreement referred to slave labor. Signing the agreement in 2003, the Brazilian State recognized its responsibility even though the perpetration of the violation was not attributed to State agents. As the petitioners stated, such responsibility was due because “the State organs were not capable of preventing the occurrence of the grave practice of slave labor, nor of punishing the individual actors involved in the violations alleged”.<sup>77</sup>

In most cases, however, the Brazilian State has not fully complied with its obligation and the victims have had to carry out new struggles to guarantee that the recommendations of the IACHR be implemented by the Brazilian State.<sup>78</sup> Even in cases where the Brazilian State has agreed to comply with its obligation to compensate the victims, one of the major problems facing the federal government is the resistance by local governments and local courts to enforce international human rights norms, despite the fact that these norms have been ratified by the Brazilian State.

Thanks to the mobilization of human rights NGOs, President Lula created in 2002 a Commission for the Protection of Human Rights. This Commission was responsible for the implementation of the recommendations made by the IACHR and the decisions established by the Court. However, the governmental politics of human rights has been undermined by a political crisis hounding the government and the ongoing economic restructuring that has reduced the government’s capacity to implement human rights programs.

## Conclusion

Globalization has promoted the expansion of transnational advocacy networks. Activists have increasingly participated in these networks through transnational legal mobilization. In this paper, I have formulated the concept of “transnational legal activism” to reflect on the strategies of NGOs engaged in human rights disputes brought to the IACHR, using Brazil as a case-study. The concepts of “global judicialization” and “transnational litigation” are too narrow to capture the political aspects of the strategies of transnational legal activism. The framework of “transnational advocacy networks” is too broad to capture the specificity of transnational legal activism. Transnational legal activism can serve as an example of what Sousa Santos calls “subaltern cosmopolitan politics and legality”. By invoking international human rights systems to act upon the

national juridical-political arena, human rights NGOs have the potential to re-politicize law and re-legalize politics.

But the strategies of transnational legal activism face two types of limitations. First, legal mobilization alone is not sufficient to promote social change. Second, international human rights norms depend on nation-States for their recognition and enforcement. Depending on local, national and international political conditions, the State may be more or less open to recognize these norms. However, even within the same political context, the development of the politics of human rights may differ at each of these scales of State action. Enforcement of human rights norms by domestic judicial systems is also a major challenge facing transnational legal activism. The concept of a “heterogeneous State” helps to account for the distinctions between the politics of human rights at different levels and sectors of State action.

The case of Brazil reveals that political democracy has not been sufficient to end violations of human rights. NGOs have increasingly used the IACHR to pressure the Brazilian State to recognize and comply with the norms established by the American Convention on Human Rights and other international human rights documents. The Inter-American System of Human Rights has not been designed to replace domestic judicial systems, but it offers some room for human rights NGOs to shape the politics of law and public policies on human rights.

Yet, since the complaints are presented against the Executive branch of the State, the Judiciary remains almost intact and judges have little contact with international human rights norms. Transnational legal activism may help to change the course of a legal dispute pending in the domestic courts, as the cases of the Araguaia Guerrilla and Maria da Penha illustrate. But if the case is not pending, the local judicial system might remain untouched. In addition, the resistance on the part of sectors of the State, at both national and local levels of administration, to accept their responsibility concerning human rights violations makes it difficult for the State to fully comply with the decisions of the IACHR, as illustrated by the cases of the Araguaia Guerrilla and Simone Diniz.

In sum, despite the political context of democratization, the Brazilian State is heterogeneous and has responded to transnational legal activism in contradictory ways. At different levels of State action, the politics of human rights is ambiguous and contradictory, with different sectors of the State formally recognizing human rights norms in some cases, denying such recognition in other cases and rarely enforcing the recognized norms. The impact of transnational legal activism on different sectors of State action at all levels of administration is an important aspect of human rights struggles in Brazil and in other Latin American countries, deserving further investigation.

## Appendix

### Graph 1

<b>Total number of complaints against Brazil received by the Inter-American Commission on Human Rights, from 1969 to 1973.</b>			
<b>Year</b>	<b>Complaints</b>	<b>Cases or petitions transmitted to the Brazilian government</b>	<b>Cases being processed</b>
1969-1970	40	9	No data available
1971	26	4	No data available
1972	11	3	No data available
1973	No data available	4	No data available
<b>Total</b>	<b>77</b>	<b>20</b>	<b>No data available</b>

**Source:** Data compiled by the author, drawing from Inter-American Commission on Human Rights, Annual Reports, 1970, 1971, 1972, 1973.

### Graph 2

<b>Total number of complaints against Brazil received by the Inter-American Commission on Human Rights, from 1999 to 2006.</b>			
<b>Year</b>	<b>Complaints</b>	<b>Cases or petitions transmitted to the Brazilian government</b>	<b>Cases being processed</b>
1999	13	No data available	46
2000	22	13	58
2001	28	9	42
2002	30	3	55
2003	42	8	65
2004	29	7	90
2005	42	10	72
2006	66	8	72
<b>Total</b>	<b>272</b>	<b>58</b>	<b>72</b>

**Source:** Data compiled by the author, drawn from the Inter-American Commission on Human Rights, Annual Reports, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006.

## NOTES

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1. Paper written for submission to the *Sur-International Journal on Human Rights* on 7 March 2007.
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3. Anne-Marie Slaughter, "A Global Community of Courts", *Harvard International Law Journal*, v. 44, n. 1, 2003, pp. 191-219.
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5. Elsewhere, I have discussed the literature and some data presented here in light of the relationship between transnational legal activism and counter-hegemonic globalization. See Cecília MacDowell Santos, "Transnational Legal Activism and Counter-Hegemonic Globalization: Brazil and the Inter-American Human Rights System", *Oficina do CES 257*, September 2006. An earlier version of this article was presented at the Law and Society Association (LSA) annual meeting, Baltimore, 6-9 July, 2006. Research for this article was funded by the Jesuit Foundation and the Faculty Development Fund of the University of San Francisco. I also would like to acknowledge the support of the Portuguese Foundation for Science and Technology (FCT), through the Associate Laboratory Grant to the Center for Social Studies at the University of Coimbra, which made possible the development of the present research. Thanks to Brianna Dwyer-O'Connor and Adriana Carvalho for their invaluable research assistance. Thanks to Seth Racusen for his insightful feedback on the version presented in Baltimore. Thanks to an anonymous reviewer of *Sur* for the pertinent critiques and excellent suggestions on how to improve an earlier version of this article. I am especially grateful to the victims, human rights activists, attorneys, and public officials who gave me interviews.
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20. Boaventura de Sousa Santos, *op. cit.*, p. 283.
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27. See Maria Helena Moreira Alves, *op. cit.*
28. See Janaína Teles (Org.), *Mortos e Desaparecidos Políticos: Reparação ou Impunidade?*, São Paulo, Humanitas/FFLCH/USP, 2001.
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32. See Jayme Benvenuto Lima Jr., Fabiana Gorenstein, and Leonardo Ferreira Hidaka (Org.), *Manual de Direitos Humanos Internacionais: Acesso aos Sistemas Global e Regional de Proteção dos Direitos Humanos*, São Paulo, Edições Loyola, 2003.
33. Brasil, Secretaria de Direitos Humanos, *Programa Nacional de Direitos Humanos*, Brasília, SEFOR, 1995, p. 5.
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37. See Patricia Ferreira Galvão, “Brazil and the Inter-American System of Human Rights” in *Human Rights in Brazil 2002: A Report by the Social Network for Justice and Human Rights in Partnership with Global Exchange*, São Paulo, Social Network for Justice and Human Rights, 2002; Lílíana Tojo and Ana Luisa Lima, “O Brasil e o Sistema Interamericano de Proteção dos Direitos Humanos” in Evanize Sydow and Maria Luísa Mendonça (Org.), *Direitos Humanos no Brasil 2004: Relatório da Rede Social de Justiça e Direitos Humanos*, São Paulo, Rede Social de Justiça e Direitos Humanos, 2004, pp. 297-305.

38. For a comprehensive historical and doctrinal account on the OAS, established in 1948, and its human rights system, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Oxford, Clarendon Press, 1996. See also Olaya Sílvia Machado Hanashiro, *O Sistema Interamericano de Proteção aos Direitos Humanos*, São Paulo, Editora da Universidade de São Paulo/Fapesp, 2001; and Flávia Piovesan, *op. cit.*

39. Only State parties to the Convention and the IACHR can submit a case to the Inter-American Court of Human Rights.

40. The Court is the system’s judicial organ in charge of the interpretation and application of the Convention. The jurisdiction of the Court has to be recognized by the State parties involved in the case. The Court’s decisions are binding as if delivered by a domestic court. The decisions are final and not subject to appeal.

41. See Inter-American Commission on Human Rights, Annual Report, 2006. “Complaint” refers to a communication presented in writing by an individual or NGO, concerning an alleged violation by an OAS member State. “Case” refers to a complaint or petition that is opened for examination of admissibility and merit by the ICHR, being transmitted to the member State in question.

42. See Graph 1 in the Appendix; see also Inter-American Commission on Human Rights, Annual Report, 2006.

43. See Inter-American Commission on Human Rights, Annual Report, 2006.

44. See Graph 1 in the Appendix.

45. See Graph 2 in the Appendix.

46. See Inter-American Commission on Human Rights, Annual Report, 1999. See also Graph 2 in the Appendix.

47. See Inter-American Commission on Human Rights, Annual Report, 2006. See also Graph 2 in the Appendix.

48. See Graph 2 in the Appendix.

49. See Henry J. Steiner and Philip Alston, *op. cit.*, p. 641.

50. The credibility of the Inter-American System of Human Rights among human rights NGOs and a positive assessment of the effects of its decisions are illustrated in the following article by members of the Center for Justice and International Law (CEJIL): Beatriz Affonso and Rita Lamy Freund, "Efeitos Práticos das Decisões dos Órgãos do Sistema Interamericano de Direitos Humanos", available at <<http://www.social.org.br/relatorio2005/relatorio035.htm>>, last access on 24 April 2007.
51. See Graph 1 in the Appendix.
52. See Inter-American Commission on Human Rights, Annual Reports, 1970, 1971, 1972 and 1973.
53. See Inter-American Commission on Human Rights, Annual Report, 1973, Case no. 1,683, opened in 1970. The IACHR does not specify the names of the petitioners. At the time, the commissioner from Brazil, Carlos A. Dunshee de Abranches, dissented from the report on the merits of this case. The Brazilian government, through its Ambassador at the OAS, insisted that Hansen had committed suicide. He claimed that the State could not accept those recommendations and expressed surprise at the decision, arguing that the International Organization of Labor had examined the same case and had not condemned the Brazilian State.
54. See Inter-American Commission on Human Rights, Annual Report, 1985, Resolution no. 12/85, Case no. 7,615.
55. See Paulo Sérgio Pinheiro, "Prefácio" in Olaya Sílvia Machado Hanashiro, *O Sistema Interamericano de Proteção aos Direitos Humanos*, São Paulo, Editora da Universidade de São Paulo/Fapesp, 2001, pp. 13-17.
56. Cf. Olaya Sílvia Machado Hanashiro, *op. cit.*, p. 45.
57. The last session of the UN Commission on Human Rights occurred in March 2006. Since then its work has been continued by the newly-created UN Human Rights Council.
58. Interview with Jayme Benvenuto, Recife, 29 December 2003.
59. Interview with James Cavallaro, Coimbra, 14 August 2006.
60. Interview with Renata Pelisan, Brasília, 22 August 2006; and interview with Carolina de Campo Melo, Brasília, 22 August 2006.
61. See the report of the Inter-Ministerial Commission created by Decree n. 4850 of 2 October 2003 with a view to identifying those who disappeared during the "Araguaia Guerrilla" uprising, Brasília, 8 March 2007.
62. See <<http://www.desaparecidospoliticos.org.br>>, last access on 20 September 2007.
63. Interview with Criméia Alice Schmidt de Almeida, São Paulo, 29 July 2005.
64. See Decree no. 4,553/2002, signed by former President Cardoso. See also Decree no. 5,301/2004, signed by President Lula, later transformed into Law 11,111/2005.
65. Inter-American Commission on Human Rights, Report no. 54/01, Case no. 12,051.
66. *Ibid.*
67. Center for Justice and International Law (CEJIL), Latin American and Caribbean Committee

for the Defense of Women's Rights (CLADEM) and AGENDE – Action in Gender Citizenship and Development, *Document for CEDAW on the Compliance by Brazil of the Shrunken Obligations as State-party of the Convention Concerning Violence against Women. Violence against Women: The Case of Maria da Penha*, Brazil, 2003.

68. Center for Justice and International Law (CEJIL), Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) and AGENDE – Action in Gender Citizenship and Development, *op. cit.*

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70. Phone interview with Maria da Penha Maia Fernandes, 3 April 2007.

71. In 2003, a similar complaint of racial discrimination was lodged in the IACHR by *Geledés-Instituto da Mulher Negra*. In 2006, the IACHR published the report of admissibility on this case. See report no. 84/06, petition no. 1068-03.

72. See Inter-American Commission on Human Rights, Report no. 37/02.

73. The report no. 83/04 was published in the ICHR's annual report on October 26, 2006 (see Inter-American Commission on Human Rights, Report no. 66/06). Two commissioners, José Zalaquett and Evelio Fernández Arévalos, though concurring with the majority decision with respect to the substantive violation of the right to equality before the law, did not follow the majority with respect to the State's response to the complaint that the victim filed with the Police Office for Investigation of Racial Crimes on March 2, 1997. As they stated, “Our opinion in this respect is that, in the context of the specific factual and legal circumstances in this case, the actions of the Brazilian police, the Public Ministry and the Judicial Branch taken as a whole do not constitute a response that would amount to a violation of Articles 8, 25 and 1(1) of the American Convention” (Inter-American Commission on Human Rights, Report no. 66/06).

74. Inter-American Commission on Human Rights, Report no. 66/06.

75. Interview with public attorney Mariângela Sarrubbo, São Paulo, 8 September, 2006.

76. See Patrícia Ferreira Galvão, *op. cit.*, p. 215.

77. The case concerns the Brazilian citizen José Pereira, who was injured in 1989 by gunshot wounds inflicted by gunmen trying to impede the flight of workers held in conditions akin to slavery at a farm in the state of Pará. See Inter-American Commission on Human Rights, Report no. 95/03; see also Lílíana Tojo and Ana Luisa Lima, *op. cit.*

78. This can be illustrated by the status of compliance in cases decided by the IACHR in the last six years, as indicated by Inter-American Commission on Human Rights, Annual Report, 2006.



TARA URS

Tara Urs spent two years in Cambodia, working with a local NGO staff and as a Fellow for the Open Society Justice Initiative attempting to engage ordinary Cambodians in a dialogue about the Extraordinary Chambers. She graduated *cum laude* from New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow.  
Email: tara.urs@gmail.com

#### ABSTRACT

This article seeks to defend three propositions. First, the Extraordinary Chambers in the Courts of Cambodia (informally known as the Khmer Rouge Trials) is unlikely to achieve any of the primary goals put forward by its proponents. Second, the Court runs the risk of doing harm. Third, it becomes apparent that other culturally-specific processes have a greater chance at making a long-term impact and satisfying victims.

#### RESUMO

Este artigo procura defender três proposições. Primeiramente, é improvável que as Câmaras Extraordinárias nos tribunais do Camboja (conhecidas informalmente como Julgamentos do Khmer Vermelho) alcancem os principais objetivos apresentados por seus proponentes. Em segundo lugar, esse tribunal corre o risco de causar danos. Em terceiro lugar, outros processos culturalmente específicos têm uma chance maior de causar um impacto de longo prazo e satisfazer as vítimas.

#### RESUMEN

Este artículo intenta defender tres propuestas. En primer lugar, es muy improbable que las Cámaras Extraordinarias de los Tribunales de Camboya (informalmente conocidas como los Juicios de los Jémeros Rojos) consigan alcanzar alguno de los objetivos fundamentales fijados por sus partidarios. En segundo lugar, la Corte corre el riesgo de hacer daño también. En tercer lugar, otros procesos de mayor especificidad cultural tendrán mayores posibilidades de influir a largo plazo y de satisfacer a las víctimas.

Original in English.

#### KEYWORDS

Cambodia – Khmer Rouge – Rule of Law – Reconciliation - Justice



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# IMAGINING LOCALLY-MOTIVATED ACCOUNTABILITY FOR MASS ATROCITIES: VOICES FROM CAMBODIA

Tara Urs

## Introduction<sup>1</sup>

April 17, 1975 and January 7, 1979 mark the official beginning and end of the Cambodian regime that named itself “Democratic Kampuchea”, but is best known as the Khmer Rouge. Cambodians call it “the regime of three years, eight months and twenty days”, as if every single moment of that period has been permanently seared onto their memories. Under Democratic Kampuchea control, it is estimated that nearly 2 million people died as a result of killing, starvation, overwork, and disease.<sup>2</sup>

In 2005, a new criminal court known as the Extraordinary Chambers in the Courts of Cambodia (hereafter: “Extraordinary Chambers” or “the Court”) was established to try the senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed. The Court is created jointly by the UN and the Cambodian government, and utilizes a complicated decision-making structure to ensure both UN and Cambodian judge participation in convictions.

The work of the Office of Prosecution began in June 2006. In June 2007 the Prosecutors submitted the names of five defendants to the Investigating Judges, according to the civil law-based procedures followed by the trials. Only one name, Kaing Guek Eav, has been publicly disclosed as of the time of writing; he is also the only suspect in custody at this time.

This new hybrid tribunal marks an evolution in the ways that international justice is practiced – allowing for more local control than ever before. In fact, the role to be played by Cambodian judges and institutions was one of the major

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*Notes to this text start on page 90.*

points of contention during the 10-year long negotiations to set-up the court. But despite the long delays in reaching this point, the recent actions of the Prosecutors suggest that the Court is finally moving forward.

This article is the result of two years spent analyzing the Court on the ground in Cambodia, from May 2005 to April 2007. Research conducted by my team, to be discussed here, suggests that many of the claims being made about what the Court can accomplish are not founded in the reality of what is known about international justice generally and Cambodia in particular. Experts talk about using this Court to promote reconciliation and the rule of law and to provide justice to the victims. Yet, very little attention has been given to the plausibility of those claims or the mechanisms by which such aims will be achieved.

The need for plausible goals and justifications for this court is particularly pressing given research on the *ad hoc* tribunals by Eric Stover, Harvey Weinstein and others, which has documented the failure of such tribunals to have the anticipated transformative effect on the local population.<sup>3</sup>

This article seeks to defend three propositions. First, it is unlikely that the Extraordinary Chambers will be able to achieve any of the three primary goals put forward by its proponents: promoting the rule of law in Cambodia, providing justice for the victims, or fostering reconciliation. Second, whatever the Court will contribute, it runs the risk of doing harm as well; of particular concern are the possibilities that the Court will reify the flawed notion that only the leaders are responsible for the atrocities that occurred, and isolate Democratic Kampuchea's crimes from their historical context, limiting our understanding of the underlying cause. Third, once the unrealistic expectations for this process are cleared away, it becomes apparent that other culturally-specific models, rooted in the desires of the Cambodian people, have a greater chance at making a long-term impact and satisfying victims, without the risk of such significant harms.

Throughout this analysis I will rely on my own experiences and research in Cambodia as well as social science research undertaken by others. From June to December 2005 I worked with a Cambodian team on a research project that sought to identify ways to engage Cambodians with the work of the Extraordinary Chambers.<sup>4</sup> This research included in-depth interviews with 117 people in the rural areas of Cambodia.<sup>5</sup> In 2006, the results of that study were then put into practice at a local Cambodian NGO, The Khmer Institute of Democracy, which trained over one hundred local representatives to undertake carefully designed outreach activities on the Extraordinary Chambers in seven provinces throughout the country. The team also prepared and showed a documentary film for young Cambodians encouraging them to believe the stories they hear about the past and engage with the history of that period. The monitoring of those outreach activities, combined with the earlier research, provides one of the most comprehensive looks at Cambodians' views of the Court so far undertaken.

## Unrealistic aspirations for the Extraordinary Chambers

The Extraordinary Chambers is one of only a few hybrid criminal courts: courts where local legal officials and foreign jurists sit together. These courts have been hailed by scholars for their potential to avoid the pitfalls associated with the *ad hoc* tribunals.<sup>6</sup> It has been suggested that these new hybrid courts will be more connected to local society and therefore have a better chance at leaving a positive “legacy” behind.

In this section I will deal with the three most commonly offered candidates for the legacy of the Extraordinary Chambers: promoting the rule of law, providing justice for the victims of Democratic Kampuchea, and fostering reconciliation.<sup>7</sup>

This section proposes that the reality in Cambodia is far more complicated than the rhetoric surrounding the Court suggests. More attention to the exact mechanisms by which the Court is expected to impact on society shows that the link between the Court and its objectives is tenuous at best.

This section will present scholarship suggesting that power dynamics in Cambodian government, characterized by extreme levels of executive control, and cultural differences in dispute resolution, are likely to stand in the way of the Court’s ability to influence the rule of law. Furthermore, our research shows that prevailing notions of justice in Cambodia diverge in important ways from what the Court can be expected to accomplish. Finally, there is little evidence that Cambodians have difficulty coexisting with one another because of tensions stemming from the Democratic Kampuchea period; but even if there is a real need for reconciliation it is not clear how the Court will be able to impact on village-level dynamics.

### *Promoting the Rule of Law*

Japanese Ambassador to Cambodia, Takahashi Fumiaki, has been quoted as saying that, “the (Extraordinary Chambers) can play an important role as a catalyst for strengthening Cambodia’s general judicial system, providing a good model in legal proceedings based on due process, efficient judicial administration and support systems”.<sup>8</sup>

Likewise, James Goldston of the Open Society Justice Initiative has suggested that the Extraordinary Chambers can be used to “support broader legal reform efforts in Cambodia”.<sup>9</sup> If one thing is clear, Goldston says, “the (Extraordinary Chambers’) performance will have a major impact on both Cambodia and the future of international justice”.<sup>10</sup>

This section hopes to put the desired impact of the Extraordinary Chambers in the context of ongoing rule of law reform efforts in Cambodia.

The World Bank Phnom Penh has written that, “Cambodia’s justice system

has proven easy to criticize but hard to reform”.<sup>11</sup> Post-colonial law reform efforts in Cambodia are over a decade old, beginning in 1993 with the world’s first U.N. peacekeeping mission: the United Nations Transitional Authority for Cambodia (UNTAC).<sup>12</sup>

Today donors continue to spend tens of millions of dollars a year on rule of law promotion efforts in Cambodia and yet fail to disrupt the power structure that prevents fair trials.<sup>13</sup> The failures of past efforts form an important backdrop to any discussion as to what the Extraordinary Chambers can accomplish.

### **Impediments to Rule of Law reform**

There are many factors interacting to create the current situation in the Cambodian judiciary. A few oft-cited constraints to reform include: capacity, the strength of the executive in relation to the judiciary, and cultural differences regarding dispute resolution.

#### *Capacity*

It is uncontroversial that Cambodian judges lack the capacity to perform their duties effectively. Advocates for rule of law adherence regularly point to problems with resources and capacity in the Cambodian judicial system.<sup>14</sup>

According to the Cambodian government: “of the 120 or so judges who are actively employed in Cambodia, barely a handful of them have any proper legal qualifications”.<sup>15</sup>

In fact, in the original letter to the UN requesting help to set up a Khmer Rouge tribunal, the then-co-Prime Ministers Hun Sen and Norodom Ranariddh wrote that, “Cambodia does not have the resources or expertise to conduct this very important procedure”.<sup>16</sup> More recently, the President of the Cambodian Bar Association has expressed concerns about the capacity of Cambodian lawyers to provide adequate defense before the Extraordinary Chambers considering it a “necessity” that Cambodian defense lawyers be assisted by at least one foreign lawyer.<sup>17</sup>

Though few, if any, doubt that capacity is a major problem for Cambodian judges, the following sections will attempt to show that it is hardly the most serious impediment to rule of law reform.

#### *The Executive*

Judges in Cambodia act almost openly as subordinates of the Executive.<sup>18</sup> During UNTAC, UN officials noted that, “while the Courts were technically independent of the executive arms of government, they remained totally subject to executive

direction”.<sup>19</sup> During that period, the Minister of Justice explained to UNTAC officials that judges who did not follow his instructions and thus “disobeyed the law” must be punished.<sup>20</sup>

Although executive branch officials rarely speak so plainly these days, little has changed. In his 2005 report to the Human Rights Commission, UN Special Representative to the Secretary General on Human Rights in Cambodia, Peter Leuprecht said it was “increasingly obvious” that “impunity was not only the result of low capacity within law enforcement institutions and a weak judiciary; the judiciary continued to be subject to executive interference and open to corruption”.<sup>21</sup> He found that, “efforts to reform the judiciary over the past decade have been ineffectual in achieving significant improvements in the administration of justice”.<sup>22</sup>

Why has it been so hard to wrest the judiciary from the executive? One answer may be in the ways that power is understood and practiced in Cambodia.<sup>23</sup> Unlike Western legal bureaucracies that ideally function according to general rules, Cambodia’s patrimonial system is based in personal ties of loyalty between superiors and those loyal to them.<sup>24</sup> Although the legal rules on paper may appear similar to those in other nations, the reality is that government in Cambodia operates through “patron-client relations” – relationships of mutual assistance between those in power and their cadre of dependants, operating in pyramid fashion. Hinton notes that, “various high ranking officials may have strings of power and military units that are loyal to them (as well as strings of civil service personnel)”.<sup>25</sup>

Higher status patrons protect and provide resources to their clients who in turn repay that debt through support, respect, and obedience. Cambodians talk of this relationship using familial idioms, often noting that children (clients) must obey their parents (patrons).<sup>26</sup> Deference to your superiors is unquestioned, as patrons are seen as powerful individuals who should be feared.<sup>27</sup>

Cambodian judges have received their position through other more powerful officials and therefore almost certainly view themselves as the subordinates (or clients) of those executive branch officials.<sup>28</sup> These relationships often date back to the creation of the judiciary in the 1980s.<sup>29</sup> During that time the Cambodian government was isolated politically from the West, China and the UN, as such Cambodian students were generally only able to get legal training in Soviet schools. Candidates were chosen to study abroad as a reward for loyalty to the ruling party in Phnom Penh.<sup>30</sup> As a result, one can expect that some of the oldest, best-trained lawyers in Cambodia are also the closest and most faithful to the ruling party. When viewed in this way, the failure of the judiciary to act independently is not surprising.

What is surprising to many, however, is that a patron-client view of government is accepted by the people of Cambodia. In a nationwide survey, the Asia Foundation found that most Cambodians *favor* feudal or paternalistic local government over either democratic or authoritarian forms. Fifty-six percent of Cambodians said

that local government “is like a father and the people like a child”.<sup>31</sup> People expect for government to operate as a mutual assistance scheme, like children obey their parents and parents care for their children.

In short, the notion of separation of powers is absolutely foreign to Cambodian thinking about government, which is based on personal ties of power between government officials. As such, executive control of the judiciary will be an enormous obstacle to any attempts to reform Cambodia’s courts.

### *Cultural differences in dispute resolution*

In addition to the ways that power is structured, there are other cultural commitments that will complicate any rule of law promotion effort.

Professor Rosa Ehrenreich-Brooks writes, “[t]he rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes”.<sup>32</sup> That criticism can be fairly applied to Cambodia. Changes in black-letter law, and constitution making have not led to impartial law enforcement or created a Western-style rule of law culture. Part of the reason may be that many laws and procedures did not emerge from Cambodian society, but were imported as part of a larger development effort. This section will argue that cultural differences, in dispute resolution principles and procedures, cannot be ignored when analyzing projects such as the Extraordinary Chambers.

Take for instance, the principle of equality. Notions of equality of individuals and equality before the law are absolutely fundamental to Western notions of justice. Yet, in Cambodia that same principal has a very different meaning. Individuals are not seen as equal to one another, rather the relative importance of individuals is constantly measured.<sup>33</sup> According to Cambodian anthropologists: “Social relationships in Cambodia, like those across Southeast Asia, are hierarchical. No one is considered equal to anyone else”. In fact, Ledgerwood and Vijghen write that the, “idealized notion of moral equivalence was perhaps never present in Khmer society”.<sup>34</sup>

What’s more, the principle of equality has become equated by some Cambodians with the policies of Democratic Kampuchea, where people were stripped of their possessions and made to work “equally” in the fields.<sup>35</sup> In the minds of some Cambodians “equality” has become a dirty word.

Principles of fairness take on other meanings in Cambodia as well. Ledgerwood and Vijghen write about an older lady in a Cambodian village who did not receive development aid, although she was poor, because the village chief favored his kin and friends in the distribution, and she was not a member of his patronage group. They write, “contrary to Western concepts, this condition is not regarded as unfair or unjust by the villagers [...] one is expected to favor one’s kin and friends, otherwise

one would be seen as neglecting the interests of one's kin [...] in this sense it is only 'fair' to favor one's clientele".

Furthermore, a culturally-grounded analysis of Cambodian dispute resolution practices reveals important differences between the theories of dispute resolution that have evolved in the West and those that have evolved in Southeast Asia.<sup>36</sup> A Western judicial system for managing disputes was introduced to Cambodia by the French during the colonial period,<sup>37</sup> but never actually displaced indigenous methods of resolving problems known as *somroh-somruei*, a process of "third party assisted negotiation or mediation."<sup>38</sup>

*The aim of somroh-somruei mediation in a village is to achieve a settlement of the dispute that makes a positive strengthening of the relationship between the disputing parties. A particular conflict is not viewed as an isolated event or as the struggle of intrinsically incompatible interests. Rather, the Cambodian traditional attitude toward somroh-somruei views conflict as an occurrence that naturally punctuates all long-term relationships.*<sup>39</sup>

*Somroh-somruei* seems to reflect the unique cultural preferences of Cambodians when it comes to dispute resolution. For example, where Western traditions value an impartial adjudicator – Cambodians often seek out mediators who are familiar with the community and the disputants. UNDP found that "[i]ndividuals prefer institutions and authorities where there is a possibility for them to negotiate and participate in the resolution of the dispute. Hence there is a preference for local authorities".

There are religious elements built into dispute resolution as well; 95% of Cambodians are Theravada Buddhists.<sup>40</sup> Buddhism scholar Ian Harris notes that "the ideal of the learned patrician in the East [has historically been] that of a gentleman who makes peace, not an able advocate who wins cases for others in court".<sup>41</sup> "Evidence suggests that the Theravada Buddhists of Southeast Asia are less assertive in their demand for 'rights' by virtue of a religious worldview which links such demands with illusory attempts to aggrandize the self."<sup>42</sup> Marija de Wijn writes that, "villagers often noted a preference for restorative types of justice in which people 'become friends again'".<sup>43</sup> Essentially, traditional dispute resolution in Cambodia operates under fundamentally different principles than a Western legal system. Yet, the ordinary Cambodian courts and the Extraordinary Chambers are based on a fundamentally Western approach.<sup>44</sup>

Trying to achieve adherence to Western legal sensibilities would require nothing less than a paradigm shift; this is a lot to ask of the majority of Cambodians who have had little if any exposure to Western legal ideas.<sup>45</sup> As Ehrenreich-Brooks has suggested, the conditions for (indeed the desirability of) such a shift are not well understood.

Taken as a whole, these factors: low capacity among legal professionals, power

systems that flow through personal ties of loyalty, and cultural differences in legal principles, point to a complicated set of impediments surrounding rule of law promotion in Cambodia. The next section will discuss whether, even if increased adherence to Western legal principles is a proper aim, the Extraordinary Chambers would be able to make a meaningful contribution to such a goal.

### **What can the Extraordinary Chambers contribute to the Rule of Law landscape in Cambodia?**

This section will analyze the claim that the Extraordinary Chambers can promote the rule of law in light of the impediments discussed in the previous section and a growing body of literature which suggests that rule of law reforms, particularly technical initiatives like passing new laws and training local judges, are not likely to generate improvements.

One can posit two general theories of how the Extraordinary Chambers may impact on local law reform initiatives: (1) because the judiciary lacks education and training, the Court can train members of the judiciary and the legal community in ways that will help them to better carry on their functions after the Court ends, and (2) ordinary Cambodian people lack information about legal processes; the Court will model a well-functioning court for them so that they can better understand courts and demand similar treatment when they have future disputes that need to be resolved.

I will take the two theories in turn:

#### *Training*

One common theme in the literature promoting hybrid tribunals is that in post-conflict societies judges and legal professionals lack training, and so providing additional training and hands-on experience will improve adherence to the rule of law.<sup>46</sup>

Thomas Carothers, a premier scholar of rule of law development at the Carnegie Endowment, notes that, “[e]xperienced practitioners have consistently pointed [...] to the fact that judicial training, while understandably appealing to aid agencies, is usually rife with shortcomings and rarely does much good”.

That is certainly the case in Cambodia. Evan Gottesman, a legal advisor in Cambodia for the American Bar Association in early nineties, writes the following about his experiences: “What I discovered, not unexpectedly, was that the Courts, the police, the legislature, and the ministries responded to political and economic pressures put in place long before my arrival”.<sup>47</sup> He says, “Cambodia’s top leaders were clearly familiar with the concepts of human rights and the rule of law. Having thought through their political and legal

options and having already made what they felt were informed policy choices, they were unlikely to alter the way they governed the country merely in response to Western advisors”.<sup>48</sup>

Gottesman arrived in Cambodia in 1994, but despite 5-7 billion (U.S.) dollars spent on aid in Cambodia over the past decade,<sup>49</sup> with potentially hundreds of millions spent on rule of law reform,<sup>50</sup> the same is true today.<sup>51</sup>

On closer inspection, the theory that the Extraordinary Chambers will promote the rule of law by training may be based on the assumption that capacity is one of the major impediments to proper functioning of the legal process in Cambodia.<sup>52</sup> As discussed, problems with capacity are only one small part of the rule of law landscape. As long as power to control the courts is held by the executive, and cultural differences in dispute resolution prevail, rule of law promotion through training will not result in significant improvements in the justice sector in Cambodia.<sup>53</sup> In fact, training may simply reward party insiders.

*Increasing demand for Rule of Law by modeling a well-functioning court*

Proponents of using internationalized courts to enhance the rule of law often suggest that the Court will model a legal process for the local population and, in doing so, perhaps provide a goal for people to strive towards.<sup>54</sup> There are many assumptions built into this theory: (1) the Court will function properly, (2) internationalized tribunals are a good vehicle for teaching about a legal system, (3) once shown a Western legal system, people will prefer it and so demand it in the normal courts. Given the lack of available information about how the Extraordinary Chambers is functioning, I will deal only with the latter two elements.

*Teaching law through the Extraordinary Chambers*

There is reason to suspect that the Extraordinary Chambers is an especially problematic starting point through which to introduce legal systems. Not only are the words “Extraordinary Chambers” hard to understand in *Khmer* language (*ong chumnum chumria vikseaman knong tholakaa kampuchea*), but the structure and decision-making schemes at the Court are exceedingly complicated and different even from extant legal structures.<sup>55</sup> The names of the crimes in the Extraordinary Chambers Agreement<sup>56</sup> include words that many Cambodians have never heard before such as “crimes against humanity”.

These are substantial challenges in a society plagued by poverty and very low literacy. In Cambodia, 25 percent of men and 45 percent of women are completely illiterate, and 71 percent of women and 50 percent of men are functionally illiterate.<sup>57</sup>

As discussed above, many of the presumptions built into a legal system will be unfamiliar to Cambodians. For instance, many Cambodians will hear about the concept of defense rights for the first time in the context of the rights of those believed to be responsible for killing their relatives. That is not the sort of introduction likely to win over converts to a new way of thinking about criminal processes. Equality before the law, reasonable doubt, sufficiency of the evidence, elements of crimes – all of these legal concepts are absolutely foreign to ordinary Cambodians.

One of the projects we conducted as a local NGO was to teach exceedingly simplified legal concepts and procedure through a guided set of pictures presented by a local teacher. Although people in the villages thanked us politely for coming so far, they generally had little if any interest in learning what they felt were arcane rules about who judges are or how a case progresses through court. For many, it just didn't seem relevant to their daily lives as rice farmers, struggling to make a living.

For these reasons it makes sense to question whether the Extraordinary Chambers is the right forum to be modeling a Western legal system.

*Extraordinary Chambers  
as a catalyst for social change*

In meetings around Phnom Penh, it has been suggested that internationalized courts like the Extraordinary Chambers can spark social change – once people see how courts properly function they will understand how dysfunctional the national courts are and they will then demand change.

Yet, people in Cambodia already recognize that the national court system is deeply corrupt. Survey research conducted in 2003 by the Center for Advanced Study showed that “Cambodians retained little or no faith in the courts as institutions of justice. Similarly, respondents identified judges and prosecutors as the public officials whom they were *least* likely to trust”.<sup>58</sup> According to Collins, some common Cambodian sayings include “go to court, become poor” and “at court the rich wins, the poor loses”.<sup>59</sup>

People do not need the Extraordinary Chambers to illuminate by contrast the inadequacies of Cambodian courts. And yet, despite this widely acknowledged problem, the lack of functioning courts has not been the subject of grassroots campaigns for reform. Case study research by the World Bank suggests that cultural impediments to social activism in Cambodia are extremely strong. Cultural prescriptions encourage people to bow out or submit when faced with a conflict involving a richer or more powerful person.<sup>60</sup>

The World Bank research has found that those cultural barriers can be overcome in those situations where future livelihoods are at stake, but rarely in other situations.<sup>61</sup> Therefore, while Cambodia is just now starting to see

grassroots organizing around the issue of illegal takings of land (land is livelihood in a nation of subsistence farmers), there is little reason to anticipate grassroots activism for change in the legal sphere. This shouldn't be surprising given that Cambodians already resolve most disputes, including some criminal disputes, outside the legal sphere.<sup>62</sup>

In short, the international community has been trying to promote the rule of law in Cambodia since the early nineties, with little success. The impediments to the rule of law are deeply entrenched, and therefore not likely to be affected by the Extraordinary Chambers. As such, there is little reason to think that the Extraordinary Chambers will contribute anything meaningful towards the kind of social change necessary to create a "rule of law culture".

### *Justice for the victims*

One of the most oft-cited justifications for the Extraordinary Chambers is to provide justice for victims.<sup>63</sup> A majority of victims we spoke to in our research agreed.

*I used to suffer; my parents and four siblings were killed. Before I would feel sad and cry when I talked about the Khmer Rouge time, but now I feel relief. I can't say for others, what they feel, but I would feel relief if the court were to happen.* (Kampot, local government official, 7<sup>th</sup> grade, approx. 50 years old, female)

In fact, the scope of victimization in Cambodia is staggering. More than twenty percent of the population was killed during the Democratic Kampuchea period and everyone in the country at that time was affected in some way – millions suffered overwork and loss of personal property.<sup>64</sup> In all of my research and travels I never met a single adult over 30 who did not have painful stories of that period. It is a situation that cries out for justice.

Yet, this section will suggest that the Extraordinary Chambers is not designed in such a way that it can provide what many Cambodians view as justice.<sup>65</sup> Our research offers an interesting look at the ways justice for international legal experts differs from what Cambodians are hoping for.<sup>66</sup>

This concern, that Cambodians will be disappointed by the Extraordinary Chambers' ability to render "justice", is reinforced by the research in other contexts. In the former Yugoslavia, Eric Stover has found that people spoke of "justice as being highly intimate and idiosyncratic and at times, ephemeral". He found that for witnesses at the ICTY, "full justice" was larger than criminal trials and the *ex cathedra* pronouncements of foreign judges in the Hague".<sup>67</sup>

This section will describe some of the ways in which Cambodians who say they want the Court to bring them justice, are in fact, misinformed about what the Court will do.

*Wanting trials for dead perpetrators*

*Even though Pol Pot is dead we should bring him to trial because it is important to make a historical record, and to have a judgment against him.* (Svay Rieng, Atchaa (lay religious community leader), 3<sup>rd</sup> grade, 68 years old, male)

*I think Pol Pot is the most important person to say what exactly happened in that time. But I am so sad that he has died and cannot offer evidence in the case. In my opinion, however, I want the court to sentence him for whatever crimes that the court can and put that into the history books.* (Kampong Thom, local government authority, High School, Mid-50's, male)

*For me I want to have the court for Pol Pot because he did terrible bad things and also he followed the communist policy [...]. Also, I want this tribunal to prosecute the policy that Pol Pot followed in that time [...]. We need to put the name of Pol Pot in jail even though he has died.* (woman 2). (Kampong Thom Farmer, 3<sup>rd</sup> grade, 50 years old, female)

*My suggestion is that I want the court to put the names of the top leaders in the historical record after it gives the judgment in order to let the new generations know that those people are very dangerous and they should absolutely not follow those actions.* (Banteay Meanchay, Group interview, Primary School teacher, 6th grade, 39 years old, male)

*Government or NGOs should show a photo of Pol Pot in some places in order to tell the public that this is Pol Pot, the top leader of the Pol Pot regime and now he has died. Moreover, Pol Pot is the one who set up the policy to kill many people. So we would do this in order to find justice for the victims, even though he has died, and also to show the new generation that we have punished him for what he did. Moreover, for the new generation who one day will become the top leaders, they may do the same things as Pol Pot did because we haven't sentenced the top leaders.* (Kampot, First Deputy Commune Chief, 7th grade, 62 years old, male)

One of the most difficult issues that often came up in our conversations about the Extraordinary Chambers was the question of trying people who are already dead, including such notorious leaders as Pol Pot and Ta Mok. Many people hold the assumption that dead leaders will be tried. Despite our best attempts at explaining, it strained the imagination of rural Cambodians that it was not possible to try a dead person for her crimes.

This should not be surprising given that Theravada Buddhism includes the teaching of *karma*, which holds that punishments and consequences can carry

over between lives. In addition, Cambodians believe that spirits take a corporal form and can be encountered roaming the earth.<sup>68</sup> These religious beliefs, coupled with gaps in legal understanding and low literacy, make legal-talk about the right to confront witnesses and *in absentia* trials extraordinarily difficult for ordinary Cambodians to understand.

People want to see a consequence for the spirit of Pol Pot, or for his name or picture. One woman we talked to suggested digging up the bodies of the dead perpetrators, putting chains around their bones, and re-burying them. Other people talked about hanging their pictures in a jail or building a statue of the leaders with their hands cuffed to display in a public place. For some, jailing a person's name, photo or bones would require that the spirit remain in a kind of purgatory creating an equivalent to punishment in this life.

Of course it would be impossible for the Court to undertake these sorts of activities; they are inconsistent with justice in a Western legal setting. Yet, not having any consequence for major perpetrators who have already died makes it hard for many Cambodians to feel that the trials will bring justice. Not having a consequence for the dead perpetrators seems like having no consequences at all.

*Wanting to know about the role of foreign nations and foreign individuals in the atrocities:*

*It has to be that some powerful countries were involved in that regime, such as China, Vietnam, America, etc. Will the Court for the Khmer Rouge prosecute those powerful countries? I am wondering if the Court has been delayed and delayed because of those other countries, and will be delayed until the old Khmer Rouge leaders die and then the case is forgotten. (Kampot, local government official, 7<sup>th</sup> grade (old system), 60 years old, male)*

*In the Khmer Rouge period they had CIA spies from America. From this point we know that there was something related to America and also related to other countries which used to support Khmer Rouge. So the Khmer Rouge could have been created because of that support. So in order to sentence Khmer Rouge, we have to sentence those who support Khmer rouge as well. (Banteay Meanchay, young man at film viewing)*

*Now I am 65 years old. I remember clearly what happened to me. I was arrested and they ordered me to be killed because I was so so hungry and I ate a potato which belonged to Angka (the "organization" the name for the Democratic Kampuchea party). I was tortured badly. It hurts me when I talk about this. I think this regime happened only because of foreign ideologies. (Phnom Penh, old man at film showing)*

*I have a question. Why did Khmer kill Khmer? Why did they not kill foreigners or Chinese? [...] Pol Pot, Ieng Sary are all Khmer, so why would they kill Khmer? Maybe someone was behind them, for example foreigners (French) or the Chinese. (Pailin, Young girl at film showing)*

Ordinary Cambodians often ask whether foreign nations will be prosecuted by the Court. It is not clear from the statute whether the co-Prosecutors will find they have a mandate to indict foreigners who are found to be “most responsible” for the crimes that happened during the specified period. However, given the limited time and budget, and the limitations on the temporal jurisdiction of the Court, prosecution of non-Cambodians seems unlikely.

Yet, we found that many Cambodians think that giving support to the perpetrators (political or financial support, for instance) is enough to make one responsible for what happened and therefore eligible for prosecution at the Extraordinary Chambers. Some educated Cambodians have said that this ought to include the professors in France who gave the “wrong ideas” to the Democratic Kampuchea leaders when they studied there as youth.

Present in these theories is a perhaps natural desire to shift blame away from one’s own group onto another group. The lack of information in Cambodia about the history of that period makes blame shifting seem more plausible. A highly politicized version of history was taught in the 1980s (with warring factions each teaching their own version of the story); since UNTAC only those limited number of students who reach the 9<sup>th</sup> or 12<sup>th</sup> grades get a brief instruction – just a two sentence insert in their text.<sup>69</sup>

For adults who remember that period, they know what happened to them in their own villages, but many have no sense of the greater conflict, the global alliances, or the political forces at work. Therefore, knowing vaguely that the Chinese had some role, without knowing what it was, leads to a dangerous situation where Cambodians can absolve their group of responsibility.

One theory of international courts is that they can provide an “authoritative” rendering of the truth, and can address some of these misconceptions of history or responsibility.<sup>70</sup> Yet, Fletcher and Weinstein have questioned this assertion, given people’s predisposition to deny blame. They found that in trials, “[i]ndividuals, particularly bystanders of a group that committed crimes may not be ready to accept the stigmatization that trials are intended to confer”.<sup>71</sup>

Overcoming the predisposition to deny blame is difficult in any circumstance. But, this may be especially true in Cambodia where those who deserve blame, in many people’s eyes, will not face trial. Without some sort of accounting for the role of other nations, if only to absolve those nations or individuals, it is hard to see how the Extraordinary Chambers will help Cambodians reach that point of taking responsibility. What’s more, it is possible that many Cambodians will feel that the

process is merely scape-goating them without discovering, “the ones standing behind the leaders”.

Not having any sort of accountability for foreigners is another way in which the Extraordinary Chambers may not live up to Cambodian’s notions of justice.

*Wanting to see consequences for greater number of defendants*

*If there is the Khmer Rouge court, I think that only the lower level leaders should face the trial because the top leaders didn’t know what the leaders in the commune or village level did at that time. The top leaders might not have ordered people to do such stupid things at that time but it was just an act of revenge resulting from the jealousy of the lower leaders. (Stung Treng, Fisherman, some primary school, 30 years old, male)*

*I think it is a good idea to bring the lower leaders to go to the court because the people whose relatives died because of the lower leaders will be happy to see this person in court. (Kampot, Head of Primary School, former KR stronghold, 34 years old, male)*

*Before I was afraid that I could not answer people if they asked me: why will the court not bring the lower leaders to trial? Because people have never seen Pol Pot kill anyone, they’ve just seen the lower leaders commit crimes. But now I understand. People are sad when they realize that the court will only be for the senior leaders but after I give them many reasons, they understand. (Svay Rieng, village-level NGO Staff Member conducting trainings on the Extraordinary Chambers, age: not given, female)*

There is a common perception that Cambodians will be dissatisfied with the Extraordinary Chambers because local, low-level perpetrators will not be brought to justice. We encountered a number of people who held this view.

In fact, this is a problem that international justice scholars have been struggling with for some time. The scope of genocide and crimes against humanity often make it impossible to bring to trial everyone who was involved in perpetrating the crimes. “Trigger-pullers” are often let off the hook in favor of prosecuting the architects of the crimes. Yet, this can place a court in danger of credibility problems because the individuals who have been seen committing terrible atrocities go unpunished.

Yet, to be fair, in Cambodia many people feel satisfied with the Court because the idea of following orders from a superior makes intrinsic sense in a society organized around top-down patron-client relations.

*For me I think that it is good to bring only top Khmer rouge leaders to the court because the others did what their leaders ordered. Of course, there is a possibility that the lower cadres doubled what their leaders said. But, those who created such an idiotic ideology are*

*the most responsible for the killing.* (Kampot, farmer, retired teacher: primary school, 7<sup>th</sup> grade, 60 years old, male)

*I think justice can still happen even though the court will send only the senior leaders to jail because the lower leaders at that time needed to follow the orders from the top and if they refused to follow, the senior leaders would kill them.* (Svay Rieng, Primary School Teacher, 55 years old, female)

Notions of hierarchy, so ingrained in Cambodian society, make the notion of superior responsibility easier for many to understand. But it also leads to a sense that following orders is an excuse for committing atrocities. This issue will be discussed in greater detail, in part IIIa.

#### *Wanting punishment to involve the death penalty and torture*

*I think death penalty is a correct punishment for them because my two children who I loved died in that time.* (woman 3)

*I also want to have death penalty because I feel really angry if I talk about or am reminded about that time again, I almost can't keep from crying. I think if I talk more about it, I will cry soon. You know many of my relatives died like animals, like dogs or cats, not like human beings because in [the minds of the leaders] they never thought that we were humans but animals.* (Stung Treng, (woman 1) farmer, Adult education only, 45 years old, female, (woman 3) farmer, 5<sup>th</sup> grade, 51 years old, female)

*We need the court do the same things to all these leaders as they used to do to us: for example hit them with the stick exactly as they did to us.* (Kampong Thom, farmer, first grade, 45 years old, male (comment supported by group)

*I want to have death penalty because I want the court to put all the wrongdoers through the same pain and hurt they did to my mother. If the KRT happens I will go to see the court because I want to see with my own eyes whether the court will give the same punishments to them as Pol Pot gave to the people.* (Kampong Thom, farmer, 3<sup>rd</sup> grade, 57 years old, male)

One thing we have often heard is that the absence of the death penalty and torture as a form punishment makes people feel like there will not be justice at the Court. To many Cambodians a jail sentence seems like “forgiveness”.

This is not surprising given the scope of the crimes of Democratic Kampuchea and the very recent development of international norms prohibiting the death

penalty. Again and again, for ordinary Cambodians, it was assumed that the Extraordinary Chambers would use the death penalty.

The same has been found in the minority Cham (Muslim community) in Cambodia who suffered greatly under the Khmer Rouge. A Phnom Penh newspaper reports that one *hakem*, or *imam* said, “In the Koran, if they kill us, we need to kill them back”. When asked if the leaders of the Khmer Rouge should be killed for their crimes he said, “Yes”.<sup>72</sup>

Similar problems have been noted in other contexts as well. About Rwanda, one scholar has written that, “the absence of the death penalty raised the specter of moral imperialism, especially in light of the fact that those found guilty at Nuremberg were given the death penalty”.<sup>73</sup>

There is Buddhist language about ending cycles of violence that could be useful, if the Court wanted to engage in an outreach campaign on this issue. However, the absence of the death penalty will be a major reason for Cambodians not to be interested in the Court – or that it will not feel like it has provided justice to them.

#### *The Court is the government's business*

Until now we have addressed some of the areas where the Court's mandate may conflict with the expectations of the majority of people who generally support the Court. Although our research was not based on a statistically random sample, about one in five people we talked to expressed resistance to engaging with the Court at all. Although this represents a minority of our sample, it is significant, and could indicate a larger problem with perceptions of the Court.

Consistent with the notions of hierarchy discussed above, many people we interviewed felt that the Court was above them, or none of their business.

*When the Khmer Rouge Trials are happening, even if someone request for me to go to see the court, I will not go to see that trial because we are so small. We know nothing about the government and we don't need to know about the court's work. It is the work of the authorities. (Stung Treng, fisherman, 30 years old, male)*

*I've heard about KRT for many years but nothing had been done up to now. To create a tribunal or not is the government's obligation. People always follow the government. I have no idea or commitment to this tribunal. (Kampot, farmer, 51 years old, male)*

*It doesn't matter to me. This is the government's problem. For me, I cannot say 'I need this court' because even if I say a thousand times that 'I need this court' sometimes it still will not happen because I have no power to create it. Only the government can do that. (Stung Treng, farmer, 55 years old, female)*

*I don't know about KRT. This is the government's obligation. I have no knowledge in this regard. I am a Buddhist monk. I don't want to put my nose in the government business.* (Kampot, Buddhist Monk, 68 years old, male)

Some felt they had to express support for the Court because it was their duty to support the government's plans.

*When I hear about this court I think: creating this tribunal is the government's duty. We are the simple people who must support the government's plans.* (Banteay Meanchay, farmer, 55 years old, male)

*I think this is good idea to create this court because we want to find justice for the victims who died in that regime and people will think that our government always thinks about the people who live under his control – the government is like the parent who needs to take care of the children – having this trial will also make people feel more confident in our government.* (Kampot, farmer, 47 years old, female)

These comments illuminate an important phenomenon in Cambodia: people's sense of their place in society, of "big people" (which includes the government) and "small people". These people felt that the Extraordinary Chambers belongs in the realm of those higher up in the power hierarchy. Cambodia scholar Fabienne Luco writes, that:

*Under cover of tradition, one accepts his/her place and condition without ever questioning the system. 'Tam pi propeyni.'[...] one must not challenge the established order. People are expected to remain in their place or face punishment.<sup>74</sup>*

Given how pervasive the underlying notions of "place" are in Cambodia, and how closely the Extraordinary Chambers is associated with the government, it is hard to imagine how the Court could unhinge itself from politics and bring itself down to the level of ordinary people. It would require strong messaging that the Court is independent of the government and for the people. Unless there is a dramatically different approach, such as this, a significant number of people will not even venture to consider the Court, let alone feel a sense of justice.

Ultimately, these conversations with Cambodians show that justice is a feeling, and one that is not automatically triggered by a fair trial. It is unsurprising, therefore, that the Extraordinary Chambers will have trouble living up to people's expectations of justice.

Although international experts in Cambodia regularly talk about the importance of "managing people's expectations", conducting outreach that will

prepare people for the reality of the trial, that overlooks the fundamental flaw in the design of the process: it was not created to meet people on their level or provide consequences consistent with their feelings of justice. The Extraordinary Chambers was always a trial in the Western mould the primary aim of which was to meet international due process standards.

### *Reconciliation*

Another common remark about the Extraordinary Chambers is that it will promote reconciliation in Cambodia.<sup>75</sup> However, advocating for reconciliation presupposes a problem of community unrest that has not been shown to exist. In addition, it assumes that courts are appropriate for addressing problems of non-reconciled communities despite evidence from other international courts that suggests that this is not the case.

Before analyzing the claim that the Extraordinary Chambers can contribute to reconciliation it is important to define the term.<sup>76</sup> Suzannah Linton writes that reconciliation, “involves the simple process of learning how to co-exist and work together with people one does not like or is not liked by, coming to terms with personal negativity about one’s experiences whether one be victim or perpetrator [...] so that all may lead as normal lives as possible”.<sup>77</sup>

This notion of co-existence, reflects the normal Cambodian understanding of the term. In fact, reconciliation is often translated as *somrob-somruel* (the mediation process used to resolve village level conflicts) – getting over a conflict so that the community can get along. But Linton’s definition also involves the sense of an individual “coming to terms” with the past, for which the best translation into *khmer* seems to be “reduce the heat of your anger” – but doesn’t appear to have a perfect translation.<sup>78</sup> Therefore, this section will separately address the two meanings: co-existence and reduced anger.

My limited research did not uncover problems with co-existence in Cambodian villages. And, there has been no systematic study of Khmer villages to determine how widespread the problem of victim/perpetrator animosity is within villages.

*When I see a person who used to be a Khmer Rouge I remember that he used to be cruel to me [...] Before I used to be reminded all of the time, but now I have forgiven: it is like a glass of seawater, when you add more and more fresh water there will be less salt, until it is just water. (Kampot, farmer, age: unknown, former Khmer Rouge cadre, female)*

*I think in this area we never have problems with the ex-Khmer Rouge soliders because we want to live in peace and also that regime happened in the past so we only need to think about the present. We sometimes have a party with the ex-Khmer Rouge solidier,*

*drinking beer or rice-wine together. We have a good relationship not only with the rich former Khmer Rouge soliders but also with the poor because we will not let someone die because they have no food. For me I give food to them—it is better than offering it to the monks because I think the monks have enough food from the villagers around the pagoda, so I will give the food to the poor and it also means I do a good deed. We are all Khmer people and we need to help each other. (Kampot, male, farmer, age 60+, living on the government side of an area where the Khmer Rouge fought the government until the late 90s.)*

*In this area, we had a former Khmer Rouge solider but now most of them moved to other area after they got married. I think the former Khmer Rouge soliders now have a good relationship with the village and we never have any conflicts. (Svay Rieng, Primary School Librarian, 55 years old, female)*

*Many former Khmer Rouge live in this area, but people don't think about that. People are mostly concerned with their work, and making a living. (Banteay Meanchay, local government official, 58 years old, male)*

Furthermore, reintegration efforts have been ongoing for some time. NGOs such as Buddhism for Development rely on culturally specific Buddhist language about tolerance to help bring fractured communities back together.<sup>79</sup> According to their Executive Director, BFD has had incredible success re-integrating hold-out Khmer Rouge communities with the rest of the country – to the point where they have seen marriages between communities formerly in conflict, and at least one joint effort to build a pagoda.<sup>80</sup> The Executive Director of BFD does not see a need for accountability in order to move the reconciliation project forward.<sup>81</sup>

Yet, despite these efforts, many people still harbor feelings of anger.

*We still have Khmer Rouges who live in this area and no conflicts happen. However, we are still angry with them because they killed our relatives. [We asked: Maybe when the court happens, it will cause people's bad feelings to wake up — do you think that will happen or no?] If the court happens it will not cause any problems because now we live under the control of the law and we let the law decide. Also, if we feel pain in our hearts we still cannot get our relatives back. (Kampong Thom, group of men and women, farmers, aged 45-57)*

While this comment suggests that people do still have heated feelings of anger, getting people to talk about that anger or “process it” in a therapeutic sense may be difficult.

Anthropologist Fabienne Luco finds that in Cambodia “[p]eople are advised to rely on themselves and keep their problems inside the home”. She

cites a proverb which holds that one's heart, like one's home, must be hidden from outsiders: "Third source of evil: when people go back and forth through the door and forget to shut it. Through negligence or by mistake they forget to close the door (so that) one can see everything (inside). This is the same as holding a torch to light the thieves while they steal all your belongings".<sup>82</sup> Cultural barriers such as these present a challenge to outsiders who want to help Cambodians "come to terms" with their past.

Yet, even assuming that problems of co-existence and lingering anger exist, and can and ought to be revisited at this time, it is still not clear what the Court can contribute.

As Cambodia anthropologist Alexander Hinton has written, "[i]n the end reconciliation will ultimately involve more than a trial [...] each Cambodian [must] decide what to do if a 'knot' of malice still ties him or her in anger against the Khmer Rouge".<sup>83</sup> Reconciliation is a deeply personal endeavor.

Extensive research has already been conducted in Rwanda and Yugoslavia, which suggests that international courts contribute little, if anything, to reconciliation. Stover and Weinstein put it in the starkest terms; they "suggest that there is no direct link between criminal trials [...] and reconciliation [...]".<sup>84</sup>

Therefore, although people talk about using the Court to promote reconciliation there is not nearly enough information to evaluate that claim. It is not clear in what sense the term is being used, which groups are in conflict, which people need to "come to terms with the past", how a court process would accomplish those goals, or if it is desirable to ask Cambodians to revisit these feelings at this time. All of these questions exist against a backdrop of extensive research on the ad hoc tribunals showing that those courts contributed little if anything to the process of reconciliation.

## **The potential for harm**

As discussed above, there is reason to be skeptical about what the Court can positively contribute to promoting the rule of law, victims' sense of justice, or reconciliation in Cambodian society. In this section, I will suggest that there are reasons to be concerned that the Court could do real harm. Some strategic choices have been made in order to make this court politically viable which can have harmful ripple effects down the line.

The two chief concerns are: (a) that the court will reinforce the flawed notion that only the leaders are responsible for the atrocities and (b) that the court will isolate Democratic Kampuchea's crimes from their historical context, damaging the greater project of international accountability by ignoring the role of powerful nations in atrocities committed in Cambodia.

## Reifying the notion of “place”

In the previous sections on power and the rule of law, this article discussed the fundamentally hierarchical nature of Cambodian society; the same concept came up again in the section on feelings of justice, noting people’s reluctance to engage with the Court because it was above them. Those are only two examples of how the pyramidal notion of power in Cambodia operates at the level of government and throughout everyday Cambodian life. And, as we noted earlier, hierarchy is accompanied by a sharply enforced notion of staying in one’s place. This section will discuss how this stay-in-your-place mentality has implications for Cambodian’s views of authority and responsibility for mass atrocity.

According to the World Bank in Cambodia, “The hierarchical social structures that characterize village life support a culture of acquiescence. Studies of village level decision-making note a tendency for people to avoid open conflict with those who are seen to be more powerful than they are, lest they be marked as troublemakers”.<sup>85</sup>

Consider those comments in light of what Miklos Biros has written about Yugoslavia: “In such a society, an authoritarian perspective is accompanied by profound passivity as the rank and file awaits instructions on acceptable thinking and behavior prescribed by the powerful elite”.<sup>86</sup> Biros finds that the authoritarian character of pre-conflict Yugoslav society created a “population that was ready to obey authority without reserve or criticism”; the result, now well documented, was horrific.

To what extent did Cambodia’s hierarchical social structure play a role in facilitating the crimes of Democratic Kampuchea? Cambodian anthropologist Alexander Hinton found that “when asked after the fact why they committed such abuses during DK [Democratic Kampuchea], many former Khmer Rouge cadres, like genocidal perpetrators all over the world, have claimed they were just following orders”.<sup>87</sup> Although Hinton finds that the motivating factors are more complicated than just one explanation, obedience to authority “highlights a key dynamic involved in genocide”.<sup>88</sup>

One woman explained to us the reason why lower Khmer Rouge leaders needed to follow their superiors:

*Those lower down needed to follow what the top said. For example, if I tell my son to go to the farm work he needs to go and cannot disobey my order. (Banteay Meanchay, farmer, age: not given, female)*

*In my opinion, the leaders are like big elephants and if the elephants attack one another other only the grass dies, not the elephants – this example is like real life, if the leaders fight each other only the simple people or the normal people will die. (Stung Treng, farmer, 53 years old, male)*

There is a common perception that Cambodians will be dissatisfied with the Extraordinary Chambers because local, low-level perpetrators will not be brought to justice. That is certainly true for many, but many others feel satisfied with the Court because the idea of following orders from a superior makes intrinsic sense in a society organized around top-down patron-client relations.

*If the KRT sentences only the top leaders and the most responsible for that regime, I support this idea because, the lower Khmer Rouge cadres are the parents, the children, and relatives of the villagers and especially they are all Khmer. They are innocent. Now they want to live in peace like others in the community. The ideology of that regime taught them to go the wrong way—they are also the victims of Khmer Rouge ideology.* (Kampot, farmer, 60 years old, male)

*The KRT should not prosecute the lower authorities at district, commune or village level. It is the same as in the present regime, the lower authorities are only the followers.* (Svay Rieng, Nun, 60 years old, female)

One respondent in a study conducted by Suzannah Linton wrote that, “[i]n the past Cambodia was insecure and at war because the leadership groups were separated, smeared one another saying this one was good, that one bad, propagandizing the people to support one group. In the end there was war, and the victims were the innocent people who understood nothing and followed their leaders and swayed one way or another in the wind”.<sup>89</sup>

These quotes indicate a potential danger for a tribunal that focuses only on the leadership: it can reinforce the authoritarian personality of the society, leading to a sense that following orders is an excuse for committing atrocities. Without careful attention to this issue, the take-home message of the Extraordinary Chambers may reaffirm the correctness of order-following suggesting that leaders are the only ones really responsible for crimes.

In fact, at a meeting with local NGOs, the most senior UN public affairs official at the Extraordinary Chambers, Peter Foster, explained that their outreach poster campaign was designed in part to “reassure” lower ranking Khmer Rouge cadres that they would not be targeted.<sup>90</sup> The Khmer Institute of Democracy, a local Cambodian NGO, also initially undertook a Western-donor funded outreach campaign designed to reassure low-level perpetrators.

This message is not only dangerous for Cambodian society, but it also flies in the face of the goals of international justice. International law clearly states that superior orders are not a defense to genocide or crimes against humanity.<sup>91</sup> While, in practice, it may not be possible to prosecute all offenders, international criminal courts should at least seek to promote the spirit of the law, which condemns even those who followed orders to commit mass atrocity.<sup>92</sup>

One danger presented by the Extraordinary Chambers is that by sanctioning only those who gave orders, the Court will reinforce the perceived correctness, the absence of blame for those who follow their superiors to whatever end. There are reasons to believe that it was exactly that sort of ideology that allowed the crimes to occur in the first place.

### **Creating a culture of impunity for foreign actors who committed serious crimes in Cambodia**

The temporal jurisdiction of the Extraordinary Chambers begins the day that Democratic Kampuchea seized Phnom Penh, and ends on the day before the Vietnamese forces took the city in 1979. By limiting the powers of the Court in such a way, the jurisdiction effectively eliminates the possibility of accountability for crimes committed during the larger war that both preceded and followed the Democratic Kampuchea period.

Assuming that there will be no further attempts (beyond the Extraordinary Chambers) to find accountability for those left out by the Court's jurisdiction, the limitations on this Court could potentially undermine the greater project of international justice. Leaving out certain perpetrators, particularly those from powerful nations who themselves committed serious crimes can create the impression that international norms apply only to those without the power to avoid them.

One could say that the larger war began October 4, 1965 when the American forces began a secret bombing campaign in Cambodia, as part of their conflict in Vietnam. Over about eight years, the United States dropped 2,756,941 tons' worth of bombs over Cambodia on 113,716 sites.<sup>93</sup> For perspective, the Allies dropped just over 2 million tons of bombs during *all* of World War II. The result was near total destruction of Cambodia.<sup>94</sup>

Ben Kiernan previously estimated that between 50,000 and 150,000 Cambodian civilians were killed as a result of the illegal American bombing; in light of a recent release of data from the U.S. government, he now suggests the number is surely higher.<sup>95</sup> The Finnish Kampuchea Inquiry Commission estimates that six hundred thousand Cambodians (or 10% of the population) died as result of the spillover of the Vietnam War in Cambodia.<sup>96</sup> They find that an additional two million civilians became refugees and 75% of the domestic animals (crucial in a largely agrarian society) were destroyed.

Kiernan also claims that the bombing played a direct role in facilitating the rise of the Khmer Rouge. He recounts a story told by journalist Bruce Palling, who asked a former Khmer Rouge officer if his forces had used the bombing as anti-American propaganda. The Khmer Rouge officer replied:

*Every time after there had been bombing, they would take the people to see the craters, to see how big and deep the craters were, to see how the earth had been gouged out and scorched*

*[...] The ordinary people sometimes literally shit in their pants when the big bombs and shells came. Their minds just froze up and they would wander around mute for three or four days. Terrified and half crazy, the people were ready to believe what they were told.<sup>97</sup>*

When the American war in Vietnam ended, the “civil” war continued in Cambodia between the American-backed Lon Nol forces and the anti-American Khmer Rouge forces, backed by Vietnam and China. The Americans eventually pulled out of Cambodia allowing the Khmer Rouge to take the capital a few days later.<sup>98</sup>

During the Democratic Kampuchea reign, China was by far the nation’s biggest supporter. The Chinese government gave enormous amounts of military and economic aid to the fledgling government. Historian Phillip Short details a long list of military equipment, economic aid and personnel resources committed by the Chinese – totaling perhaps more than 3.4 billion dollars in today’s money.<sup>99</sup>

Once the Vietnamese invaded Cambodia to expel Democratic Kampuchea at the end of 1978, the international politics had shifted. The Americans, who had once fought Democratic Kampuchea, now came to their defense. They supported Democratic Kampuchea against “Vietnamese aggression”, turning a blind eye to enormous amounts of evidence of mass killing and starvation.<sup>100</sup> The UN, the West and China maintained their support of DK leaders throughout the cold war, until UNTAC in the 1990s.<sup>101</sup>

Yet, even after UNTAC, skirmishes continued within Cambodia until the current Cambodian government sufficiently weakened the guerilla forces around 1998. In total, that makes for a 33-year war, of which the three and a half year Democratic Kampuchea reign was by far the worst period.

Discussing the politics underlying the Extraordinary Chambers, the New York Times editorial board once noted that: “All Security Council members, for example, might spare themselves embarrassment by restricting the scope of prosecution to those committed inside Cambodia during the four horrific years of the Khmer Rouge rule”.<sup>102</sup>

In fact, that is what happened. The jurisdiction of the Court has ensured that powerful nations will indeed be spared embarrassment, and reckoning for their respective roles in the overall war. The result is a significant danger that this limited court will take the place of full-fledged accountability.

To be sure, the proximate cause of the deaths of most of the people during the overall war was the Democratic Kampuchea regime, as they killed nearly two million people.<sup>103</sup> But shouldn’t the goal of international justice practitioners be a comprehensive investigation of the causes of atrocity and robust accountability for all the crimes and all the different players? Anything less threatens to undermine this relatively new project of international criminal justice, making it appear to be selective. There is a case that the United States alone committed grave breaches of the Geneva Conventions by systematically bombing known civilian targets.

For educated Cambodians, disappointment has already set in. Heng

Monychenda, the Executive Director of local Cambodian NGO Buddhism for Development, has said “I saw the Chinese at that time (during Democratic Kampuchea) – I watched films of Chinese people farming”. He feels “disappointed”, and wants to know “why is there no Chinese involvement [in the court process]; why is there no American involvement?”<sup>104</sup> For thoughtful leaders like Monychenda this is not about denying blame, rather it is about spreading it fairly.

But a broader project of accountability may also make it easier for ordinary Cambodians to accept Cambodia’s role in what happened. Without a comprehensive inquiry, the door is open to Cambodians to assign blame to outsiders, rejecting the outcomes of the Extraordinary Chambers.

In defense of the Court, one might say that accountability for some part of the crimes is better than for none. But by allowing the “international community” to participate in judging Democratic Kampuchea, without engaging in any process of reflection of their own, the Extraordinary Chambers runs the risk of de-legitimizing international criminal processes, and perhaps even promoting impunity.<sup>105</sup>

### **Normalizing expectations for international criminal processes**

Up to this point, this article has argued that the Extraordinary Chambers is ill-suited to live up to the three principle goals ascribed to it: to promote the rule of law, provide justice and encourage reconciliation. The article has also argued that there are some potential harms associated with the design of the process.

In fact, when viewed in light of the situation on the ground in Cambodia, the rationales for the Court begin to seem like post-hoc justifications for a Western-legal process.<sup>106</sup> The Extraordinary Chambers is so poorly suited to provide a sense of justice, promote the rule of law or foster reconciliation it is hard to imagine that the Extraordinary Chambers was in fact designed to meet those goals.

What are the actual reasons underlying support for this process? One can only speculate. For the Cambodian government it may be the desire to enhance the legitimacy they get from reminding the people of their role in ending the Democratic Kampuchea regime.<sup>107</sup> It is likely that each donor nation has its own national politics to consider. The United Nations may have institutional guilt left over from the recognition they afforded Democratic Kampuchea in the 1980s. It is impossible to know for sure.

But as the rhetoric of these international courts, such as the Extraordinary Chambers, soars higher and higher the Courts themselves can become distracted from what they can realistically accomplish.<sup>108</sup>

Ultimately, international criminal courts are just criminal courts on a bigger stage. These courts must operate within the strictly impersonal confines of criminal law.<sup>109</sup> Philosophers have long identified criminal law as that, which focuses on a

wrong that has been done and on the question of who – if anyone – should be condemned and punished for that wrong.<sup>110</sup> Whatever other goals we ascribe to these international processes are outside the scope of what they, like all criminal processes, are designed to do.<sup>111</sup>

In fact many of the agendas heaped onto international criminal courts are exactly the kind of thing the criminal law is criticized for not doing: healing victims, encouraging reconciliation, and developing a common understanding of the past.<sup>112</sup> Restorative justice advocates have long criticized the criminal law because it transfers problems to a professionalized context of criminal justice in which neither victim nor offender are really able to participate.<sup>113</sup> Malcolm Gladwell writes, “[t]he impersonality of codes is what makes the law fair. But it is also what can make the legal system so painful for victims, who find no room for their voices and their anger and their experiences. Codes punish, but they cannot heal”.<sup>114</sup>

The Extraordinary Chambers suffers from just this kind of misplaced expectations. Rather than trying to fit a square peg (victim’s sense of justice, reconciliation) into a round hole (Western-style criminal process) perhaps the expectations for the Court ought to line up with the kinds of things criminal courts normally do (find and punish offenders). In that case, the Court should be judged on whether it fairly identifies and prosecutes those individuals who fall within its mandate. And, if jailing a few old men for their few remaining years feels unsatisfactory, then that is a sign that other processes, ones tailored towards victims, should be studied. Creating a correct perception of what a court can realistically accomplish is a first step towards finding justice for the Cambodian victims.

## Moving forward in Cambodia

There is a growing body of literature suggesting that legal solutions to mass atrocity are less preferable in many cases than other processes that better resonate with the local population.<sup>115</sup> Fletcher and Weinstein suggest that the “emphasis on criminal trials overshadows attention to other options to achieve these same goals. In addition, the legal emphasis ignores the vast literature on collective violence”.<sup>116</sup>

Professor Mark Drumbl has said that, “given the important characteristics peculiar to each genocide and the differences among genocides, the modalities of securing accountability and encouraging healing should vary in each individual case. Consequently, there may be many policy responses to genocide, the efficacy of each depending on the situation at hand”.<sup>117</sup>

What would be non-legal responses to the Democratic Kampuchea period that could contribute to the rule of law, feelings of justice or reconciliation?

Promoting the rule of law in Cambodia begins with an analysis of the impediments to rule of law and reflection about whether efforts, such as training the judiciary, are indeed effective or instead entrench and reward party insiders. As

briefly discussed already, achieving a Western-style rule of law culture in Cambodia may be achieved best by promoting social change that disrupts entrenched power dynamics. But, power upheavals in Cambodia, especially those influenced by foreigners, have always been accompanied by terrible violence. Whether that dramatic social change is indeed best for Cambodia or whether foreign actors ought to take part in such activities deserves further debate.

Similarly, to begin a true justice process one might begin by identifying the most important elements of accountability in the minds of Cambodians. Further research may support an interest in punishing the dead, such as victims have suggested: putting chains on the grave of Pol Pot, constructing a prison for the names and photos of Democratic Kampuchea leaders, or a public Buddhist ceremonies to restrain the spirits of those dead leaders and to commemorate the victims.

Perhaps, a *somroh-somrueal* based process could give people a chance to tell their stories and maybe address the culpability of lower level perpetrators and bystanders who still live in Cambodian villages alongside victims. But it remains to be seen if such a process is of interest to ordinary people.

In addition, it is important to begin studying the kinds of historical education that will have the greatest impact on the new generation of youth, who now have difficulty believing their parents' stories about the past.<sup>118</sup> One recent study on Cambodian youth's view of the genocide specifically noted that it is necessary to teach the history "in a way that promotes taking responsibility and coming to terms with the genocide, instead of denial that Khmer killed Khmer and that it was foreign influence that caused it".<sup>119</sup>

Also, it would be useful to engage in further study of Cambodian's relationship with authority and how to prevent future generations from following their leaders down the path of mass atrocity. Such a nuanced, culturally-sensitive topic would need to be explored carefully, and follow-up programs designed by Cambodians.

Other less legal processes could also address the legacy of foreign involvement in Cambodia, including the American bombing campaign. The very fact that an international court for American or Chinese crimes is probably not politically viable suggests that non-legal efforts should be pursued. De-mining efforts and public education campaigns could draw awareness to the present-day harms of that crime and recognize its victims. Taking stories of the bombing to American soil could serve an important purpose as well.

In essence, those responding to future mass atrocities may consider addressing the needs of the society from the perspective of the people living in it. This is hardly an original notion. Ariel Dorfman writes that we ought to think "from the ground up" and have "confidence that those who have been the most hurt have the best idea of how to mend the destruction".<sup>120</sup> That may also mean a willingness to acknowledge that people do not want to deal with the past.<sup>121</sup>

This is the challenge now facing the personnel at the Extraordinary Chambers. Once the limitations of a legal process are recognized, will the international community, donor states, and international NGOs dedicate themselves to listening to Cambodians, and carrying forward the people's agenda with the same energy and passion they have dedicated themselves to a trial meeting international due process standards? And will the Cambodian government pursue the people's input with the same fervor it has used the nation's troubled past to gain political advantage?

As it stands, the rhetoric and priorities of Extraordinary Chambers seem far removed from the priorities of the people. Yet even though it has taken over a decade to get to this point, and the defendants are quite old, the majority of Cambodians are young – there is still time to refocus.

## Conclusion

The events of the past decade show that international criminal trials are fast becoming the preferred response to mass atrocity.<sup>122</sup> But as quoted throughout this paper, Stover, Fletcher, Weinstein and others are sending up some cautionary research on the ICTY and ICTR – they've found “no direct link between criminal trials and reconciliation” and that “for survivors of ethnic war and genocide the idea of ‘justice’ encompasses more than criminal trials”.<sup>123</sup> The research on Cambodia presented here suggests that the Extraordinary Chambers could meet a similar reaction. Yet, the trials seem to be moving ahead with little reflection on these findings.

The international community has made a significant investment in the Extraordinary Chambers. The investment of foreign funds, at least \$50 million dollars over three years, is a mere drop in the bucket in terms Cambodia development dollars.<sup>124</sup> But the political investment has been enormous: the negotiations to create the Court lasted over ten years. The thinking on the ground is that we have come so far we cannot let this process fall apart now.

The Extraordinary Chambers may very well have reached a point of no return. But there are lessons in this story. One, the job of dealing with the Democratic Kampuchea legacy will not end with the last trials at Extraordinary Chambers. The next steps, if motivated by the Cambodian people, may take place outside the legal sphere, but they require no less seriousness, commitment or funds than a legal process.

Second, when future international experts debate the appropriate consequence for new atrocities, they would do well to learn from past experiences and engage with a detailed cultural analysis of the role criminal trials can realistically play and approach, with open minds, the suggestions of the people. A starting point for future responses could be: what do the members of the society want? As far as I know, that question was never asked in Cambodia.<sup>125</sup>

## NOTES

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1. The author would like to express special thanks to Vichhra Muoyly, Vireak Kong, and Va Nou for their contributions to the underlying research and help in formulating this analysis. Also, to Henry Hwang and Heather Ryan for their support.

2. A. Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide*, Berkeley, University of California Press, 2005, p. 1 (hereafter: Hinton).

3. E. Stover and H. Weinstein, "Introduction" in E. Stover & H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004 (hereafter: *My neighbor, my enemy*). See also L. Fletcher and H. Weinstein, "Violence and social repair: rethinking the contribution of justice to reconciliation", *Human Rights Quarterly*, v. 24.3, 2002, pp. 573-639 and p. 578 (noting that "the predominant mechanism to respond to mass violence focuses on individual perpetrators of war crimes and other serious violations of international law. Frequently, advocates for this model suggest that international trials may be the single most appropriate response to communal violence".) (hereafter: Fletcher and Weinstein). N. Kritz, "Progress and humility: the ongoing search for post-conflict justice" in M. Cherif Bassiouni (ed.), *Post conflict justice*, Ardsley, New York, Transnational Publishers, 2002, p.75; R. Zacklin, "The failings of ad hoc international tribunals", *Journal of International Criminal Justice*, v. 2, 2004, pp. 541-545.

4. This research was undertaken for the Open Society Justice Initiative; their support is gratefully acknowledged. The conclusions drawn here do not in any way reflect the views of the Justice Initiative or the Open Society Institute.

5. The interviews varied in length from half an hour to well over two hours. Although the team initially sought to conduct individual interviews, the nature of life in Cambodia meant that group interviews were often unavoidable. The sample was not statistically random. In each location the team sought to speak with different community stakeholders; consequently, the interview pool over-represents the views of local government authorities. Interviewees were selected arbitrarily among people who were home during the day at the time that the interviews were conducted. No interviews were conducted in cities (because the purpose of the research was to identify issues related to outreach in the rural areas) – 80% of the Cambodian population lives in rural areas.

6. See Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, v. 97, 2003, pp. 295-310 (hereafter Dickinson).

7. See e.g. J. Goldston, "Foreword: an extraordinary experiment in transitional justice" in *Justice Initiatives*, Spring 2006, pp.1-6, available at: <[www.justiceinitiative.org](http://www.justiceinitiative.org)>, accessed on 25 August 2007 (hereafter: Goldston). Noting that if things at the Extraordinary Chambers goes well it will, "contribute to a sense of justice for the Khmer Rouge crimes, support broader legal reform efforts in Cambodia, and help confirm mixed national/international courts as a model for the future". International Bar Association, "Cambodia: IBA in consultation with Bar Association of the Kingdom of Cambodia", 13 December 2005, available at <<http://www.ibanet.org>>, accessed on 25 August 2007: noting that the Extraordinary Chambers will play a "fundamental role in establishing a legal tradition for Cambodia based on justice, accountability, and the rule of law". See also L. McGrew,

"The Legacy of the Khmer Rouge Trials Needs to be Planned", Letter to editor, *Phnom Penh Post*, v.15, issue 17, September, 2006, p.7; S. Huntington, "The Khmer Rouge Tribunal as an Opportunity for More Than Answers", *Searching for the Truth Magazine*, n.. 80, Debate, August 2006, E. Kinetz, "Tribunal's justice and judicial legacy at odds", *The Cambodia Daily*, 16 November 2006.

8. See generally, Cat Barton, "KR trial holds promise for court reform", 10-23 March 2006.

9. Goldston, pp. 1-2.

10. Ibid.

11.Center for Advanced Study and World Bank Phnom Penh, *Justice for the Poor? An Exploratory Study of Collective Grievances over Land and Local Governance in Cambodia*, Cambodia, 2006, p.2. See also *U.S. State Department Country Report on Human Rights Practices*, Cambodia, 2006, available at <<http://www.state.gov>>, accessed on 25 August 2007; Human Rights Watch, "Cambodia: Events in 2006" in *World Report 2007*, available at <<http://hrw.org>>, accessed on 25 August 2007 and Hinton, p. 101.

12. See generally United Nations Special Representative for the Secretary-General for Human Rights in Cambodia, "Continuing patterns of impunity in Cambodia", 2005, available at <<http://cambodia.ohchr.org/index.aspx>>, accessed on 25 August 2007 (hereafter: Continuing Patterns of Impunity).

13. A number of nations, individual donors, and UN Agencies contribute funds to rule of law promoting activities in Cambodia. An exhaustive list is not possible as not every donor makes their contributions public. See e.g. Ausaid, "Aid activities in Cambodia", 2006, available at <<http://www.usaid.gov.au>>, accessed on 25 August 2007 (detailing about 30 million dollars in grants over a period of six years); East West Management Institute, "Grantmaking", 2007, available at <<http://www.ewmi-praj.org/>>, accessed on 25 August 2007 (noting that from the program's inception in October 2003 until December 2006 PRAJ has given 92 grants with a total value of almost US\$8.4 Million in USAID funding; The World Bank's Legal and Judicial Reform Project, which has been dropped, managed about 10 million dollars over a period beginning in 2002, The World Bank, Legal and Judicial Reform Project, 2007, available at <[www.worldbank.org](http://www.worldbank.org)>, accessed on 25 August 2007). Japan's significant donation are not calculated: JICA, "Activities", available at <<http://www.jica.go.jp/cambodia>> accessed on 25 August 2007. Other nations give smaller amounts as well, see: AiDA, Accessible Information on Development Activities, "Details", available at <[www.developmentgateway.org](http://www.developmentgateway.org)>, accessed on 25 August 2007.

14. See e.g. Continuing Patterns of Impunity, p. 22.

15. Kingdom of Cambodia, Ministry of Commerce, *Legal and Judicial Reform Strategy for Cambodia*, available at <<http://www.moc.gov.kh>>, accessed on 25 August 2007.

16. T. Fawthrop & H. Jarvis, *Getting away with genocide?*, Ann Arbor and London, Pluto Press, 2004, p. 117.

17. E. Kinetz, "Sok An calls for UN 'dialogue' on KR defense", *The Cambodia Daily*, 18 December 2006.

18. One of the mandates of UNTAC was to wrest administrative control of the country from the ruling party of Hun Sen – despite formally controlling the reigns of power there is no evidence that

UNTAC disrupted administrative control. Michael Doyle, *UN peacekeeping in Cambodia: UNTAC's civil mandate*, London, Lynne Rienner Publishers, 1995.

19. *Continuing patterns of impunity*, p. 9.

20. Ibid.

21. Ibid., p. 33.

22. Ibid.

23. See Hinton, *op. cit.*, pp. 100-116 (detailing a case study on justice practices in Cambodia).

24. Hinton, p. 110.

25. J. Ledgerwood, *Understanding Cambodia: social hierarchy, patron-client relationships and power*, Department of Anthropology and Center for Southeast Asian Studies, Northern Illinois University, available at <<http://www.seasite.niu.edu>>, accessed on 25 August 2007 (describing patron-client relations).

26. Hinton, p.113

27. Fabienne Luco, *Between a tiger and a crocodile: management of local conflicts in Cambodia an anthropological approach to traditional and new practices*, Phnom Penh, UNESCO, 2002 (translated from the original French) (hereafter: Luco). Also Ledgerwood, *op. cit.*

28. See e.g. Hinton, pp. 105-116.

29. E. Gottesman, *Cambodia after the Khmer Rouge*, New Haven, Yale University Press, 2002, pp. 242-247. The government in Cambodia, including the judiciary, was constructed, literally from scratch, under the influence of the Vietnamese authorities starting in 1979. The Vietnamese courts have themselves been described as providing "telephone justice": whereby party elites contact the judges to direct the outcome of a case. K. Decker, C. Sage & M. Stefanova, "Law or justice: building equitable legal institutions", *World Bank Publications*, available at <<http://web.worldbank.org>>, accessed on 25 August 2007.

30. For example, Cold-War era judicial training is common among Cambodian judicial officials at the Extraordinary Chambers judges: of the 17 Cambodian judges and prosecutors appointed to the tribunal, four received their legal education in Cambodia; four were schooled in Kazakhstan and three in the USSR, of whom one pursued further study in Japan. Three more studied in Vietnam, and two in East Germany. Prak Chan Thul and W. Kvasger, "Some question KR judges' Soviet-era schooling", *The Cambodia Daily*, 16 May 2006, p. 1.

31. Center for Advanced Study and The Asia Foundation, *Democracy in Cambodia: a survey of the Cambodian electorate*, Cambodia, 2001, p. 26 (hereafter: CAS).

32. R. Ehrenreich Brooks, "The new imperialism: violence norms and the 'Rule of Law'", *Michigan Law Review*, v. 101, 2003, pp. 2275 and 2285.

33. Ledgerwood, *supra* note.

34. J. Ledgerwood & J. Vijghen, "Decision-making in rural khmer villages" in J. Ledgerwood (ed), *Cambodia emerges from the Past: eight essays*, DeKalb Illinois, Southeast Asia Publications, 2002, pp. 109 and 116 (hereafter: Ledgerwood and Vijghen).

35. Article 13 of the Democratic Kampuchea constitution stated, "There must be complete equality among all Kampuchean people [...]" "The Constitution of Democratic Kampuchea" in *The Cambodian Constitutions (1953-1993)*, Raoul M. Jennar (ed), available at: <<http://www.dccam.org>>, accessed on 25 August 2007. One foreign employee of a local NGO was surprised when the Executive Director asked him to remove the word "equality" from the front cover he had designed for the group's annual report. The Director explained that the word reminded him of the Khmer Rouge period. (Notes on Conversation with Henry Hwang, on file with author).
36. R. Y. Fajardo, Kong Rady & Phan Sin, *Pathways to justice: access to justice with a focus on the poor, women and indigenous peoples*, Cambodia, United Nations Development Program and the Cambodian Ministry of Justice, 2005, p. 11 (finding that "[m]ost rural people [...] do not participate in the cultural background of the formal legal system".) (Hereafter: *Pathways to Justice*). Furthermore, among those in the countryside, there is the additional barrier of extreme poverty with 75 percent working in the agricultural sector, even though the agriculture sector represents only 35 percent of the gross domestic product. This translates into a GNI per capita of only \$0.82 per day. Even public servants, such as teachers, nurses, and policemen receive less than a dollar per day. *Ibid.*, pp. 65-66.
37. I. Harris, "'Onslaught on beings': a theravada Buddhist Perspective on accountability for crimes committed in the Democratic Kampuchea period" in J. Ramji and B. Van Schaack, *Bringing the Khmer Rouge to justice: prosecuting mass violence before the Cambodian Courts*, Lewiston, The Edwin Mellen Press, 2005, pp. 76-80 (hereafter: Harris).
38. W. A. Collins, "Dynamics of dispute resolution and administration of justice for Cambodian villagers", a Preliminary Assessment Funded by USAID pursuant to Project Number 422-0111, Phnom Penh, 1997 (on file with author) (hereafter: Collins).
39. *Ibid.*, p. 40. The *somroh-somrueal* process has ancient roots; Harris has found that the Ankorian Cambodia possessed a sophisticated legal system. Harris, *op. cit.*, p. 74. He also notes that that the French colonial policies and laws eroded the monks role as a traditional solver of disputes. *Ibid.*, p. 79.
40. *Pathways to justice*, pp. 67-68.
41. Harris, p. 79.
42. Harris, p. 80.
43. Marija de Wijn, *Global justice and legitimacy in Cambodia: the Khmer Rouge trials and local concepts of justice* (Thesis in International Development Studies), University of Amsterdam, 2005, p. 76.
44. The purpose of this section is to set up the different cultural underpinnings to dispute resolution. But, *somroh-somrueal* is by no means a perfect system. Often, giving in to the more powerful party is seen to be an appropriate outcome of mediation. In addition, vigilante justice is also a problem. The U.S. State Department reports that, "Vigilante justice persisted, as well as killings of alleged witches and sorcerers. During the year vigilante mob violence resulted in at least 22 deaths of suspected thieves and the severe injury of many others [...]" *U.S. State Department Country Report on Human Rights Practices, Cambodia*, 2006, available at <<http://www.state.gov>>, accessed on 25 August 2007.
45. *Pathways to justice*, p. 11 (UNDP notes that, "[m]ost rural people are unfamiliar with the

formal proceedings and the law".); de Wijn, *op cit*, p. 76 (writing that, "[t]he official legal process is quite foreign to village reality, as its procedures are unclear to many villagers [...]). Our own research showed that there was little understanding of the role of judges or prosecutors, the basic steps of a court process, or higher order concepts underlying court procedure (such as why courts require evidence). As a statistical matter it is clear that courts resolve far fewer disputes every year than other local authorities. *Pathways to justice*, p. 179.

46. See e.g. Dickenson *supra* note.

47. Gottesman, p. 11.

48. *Ibid.*, p. 13.

49. Voice of the Asian-Pacific Human Rights Network, "Rule of law an elusive concept in Cambodia", 17 March 2006, available at <<http://www.hrdc.net/sahrdc/>>, accessed on 25 August 2007.

50. *Supra* note 13.

51. In 2005, the UN Special Representative of the High Commissioner for Human Rights Cambodia wrote that, "Although the failure to bring to justice those responsible is often attributed to scarce resources and poor capacity within law enforcement institutions and to the absence of a well functioning judiciary, the failure of these institutions to uphold the law can also be attributed to an accepted practice of impunity and collusion by police, military and security agencies". *Continuing patterns of impunity*, p.33.

52. *Justice for the poor?*, p. 5 (noting that "newly created or reformed institutions of justice in the liberal mold are prone to failure unless supported by the transformation of power relations that preceded (and to a great extent precipitated) their development in the West").

53. Similar problems have been noted in Rwanda where researchers have found that a highly politicized local judiciary stands in the way of international tribunals' ability to promote the rule of law, regardless of the additional funds invested. Alison Des Forges, Tim Longman, "Legal responses to genocide in Rwanda" in E. Stover, H. Weinstein (eds.), *op. cit.*, United Kingdom, Cambridge University Press, 2004, p.62 (hereafter: Des Forges and Longman).

54. Cambodian Human Rights Action Committee *et al.*, *Joint statement: urgent action needed on rules for Khmer Rouge Tribunal*, 2007, available at <<http://www.justiceinitiative.org>>, accessed on 25 August 2007 (noting that: "It is also hoped that the Extraordinary Chambers will contribute to the development of international standards and act as a catalyst for the strengthening of the rule of law and as a model for judicial reform, which are both greatly needed in Cambodia").

55. Voting on guilt or innocence will be achieved by supermajority – a majority of judges plus one (four of five judges in the trial chamber, or five of seven judges in the Supreme Chamber. *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of Crimes Committed During The Period Of Democratic Kampuchea*, June 6, 2003, available at <<http://www.eccc.gov.kh>>, accessed on 25 August 2007 (hereafter: Agreement).

56. Agreement, *supra* note.

57. The World Bank *et al*, *A fair share for women: Cambodia gender assessment*, 2004, available at <<http://go.worldbank.org>>, accessed on 25 August 2007, p. 8.

58. *Justice for the poor?*, *op. cit.*, p. 5. See also, *CAS*, p. 48 (noting that: “[i]f one leaves the village arena, mediation becomes more difficult and more costly without a greater chance for success”).

59. Collins, *op. cit.*, p. 15.

60. *Justice for the poor?*, p. 5.

61. *Ibid.*

62. Pathways to Justice, *supra* note 45. See also, Des Forges and Longman, *op. cit.*, p. 56 (finding that many respondents in their survey saw the adversarial legal approach applied in the ICTR “as foreign to traditional Rwandan methods of conflict resolution, in which communities would come together and determine the nature of events and the punishments and reparations needed to reestablish social equilibrium”).

63. Xinhua, “Cambodia’s ruling party airs support for trial of former DK leaders”, *People’s Daily Online*, January 7, 2007, available at <<http://english.people.com.cn>>, accessed on 25 August 2007; Ek Madra, “Spat over bill threatens Khmer Rouge trial”, Reuters, 4 April 2007, available at <<http://www.swissinfo.org>>, accessed on 25 August 2007; Sophie Huntington, “The Khmer Rouge Tribunal as an opportunity for more than answers”, *Searching for the truth magazine, Debate*, n. 80, August 2006.

64. Hinton, *op. cit.*, p. 1 and P. Short, *Pol Pot: The History of a Nightmare*, London, John Murray Press, 2004, pp. 321-322.

65. However, more statistically relevant research on these issues is needed to make broad conclusions. There have been numerous attempts to gauge Cambodian’s views about a court for the Khmer Rouge. Yet, even so, there are no studies available that have been conducted in a scientifically meaningful way. Consequently, there is not enough information to draw exact conclusions about the views of the Cambodian population on this topic. The other studies of which I am aware are: B. Münyas, *Youth for peace, a study on genocide in the mind of Cambodian youth*, Cambodia, Peace Research and Publications, 2005 (hereafter: Münyas); Khmer Institute of Democracy, *Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal*, Cambodia, 2004, available at: <<http://www.bigpond.com.kh/users/kid>>, accessed on 25 August 2007; S. Linton, *Reconciliation in Cambodia*, Phnom Penh, Documentation Center of Cambodia, 2004; L. McGrew, *Truth, justice, reconciliation, and peace in Cambodia—20 years after the Khmer Rouge*, December 1999-February 2000, unpublished report, on file with author; de Wijn, *op. cit.*; W. Burke-White, “Preferences matter: conversations with the cambodian people on the prosecution of the Khmer Rouge leadership” in J. Ramji and B. Van Schaack, *Bringing the Khmer Rouge to justice: prosecuting mass violence before the Cambodian courts*, Lewiston, The Edwin Mellen Press, 2005; J. Ramji, “Reclaiming Cambodian history: the case for a truth commission”, *Fletcher Forum of World Affairs*, v. 24, 2000, pp. 137-158..

66. After our research interviews were completed, the two Cambodian researchers on the team, Vireak and Vichhra, rated their subjective impression of interviewees’ level of interest in the Extraordinary Chambers – their rankings came out roughly the same. In our qualitative research we found that about 20% of our interviewees were not interested or were opposed to the Court, about 45% were interested in the Court but not strongly, and about 35% were strongly supportive of and interested in the Court. Detailed analysis on file with author.

67. E. Stover, "Witnesses and the promise of justice at The Hague" in E. Stover and H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 114.
68. Hinton, *op. cit.*, p. 98.
69. Münyas, *op. cit.*, p. 15 (also noting that a longer history, introduced in 2002 was pulled by the government upon criticism of the opposition – in addition, few teachers dare talk about the KR today because of difficulties distinguishing between history and politics).
70. D. Orentlicher, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal*, v. 100, 1991, p. 2537.
71. Fletcher and Weinstein, *op. cit.*, p. 591.
72. E. Kinetz and Prak Chan Thul, "For Cham Muslims, justice may not be a tribunal", *The Cambodia Daily*, October 31, 2006.
73. Ida Bostian, "Cultural relativism in international war crimes prosecutions: the International Criminal Tribunal for Rwanda", *ILSA Journal of International and Comparative Law*, v. 12, n. 1, Fall 2005.
74. Luco, *op. cit.*
75. See e.g., John D. Ciorciari, "The Khmer Rouge Tribunal", Phnom Penh, Documentation Center of Cambodia, 2006, available at <<http://www.dccam.org>>, accessed on 25 August 2007.
76. Indeed there are many different groups in Cambodia that may hold differing views of the past: urban and rural Cambodians, young and old, Cambodians living abroad and those living in Cambodia, Khmer Rouge living in the North/Northwest and the rest of the country, and low-level perpetrators and villagers living in the same community. In some sense all of these views need to be "reconciled". That is not the sense in which reconciliation is being discussed here.
77. Linton, *op. cit.*, p.106. Weinstein and Stover talk about reconciliation as "people re-forming prior connections, both instrumental and affective, across ethnic, racial or religious lines". Stover and Weinstein, *op. cit.*, pp. 3 and 13.
78. "Coming to terms" with the past is a phrase sounds in an almost psychoanalytical framework; such Western terminology is particularly difficult to apply in Cambodia.
79. See Buddhism for Development, available at <<http://www.bfdkhmer.org/>>, accessed on August 31, 2007.
80. Author's interview with Look Heng Monychenda; notes on file with author.
81. *Ibid.*
82. Luco, *op. cit.*, pp. 16 and 21-22.
83. Hinton, *op. cit.*, p. 95.
84. Stover and Weinstein, *op. cit.*, p. 323.
85. *Justice for the poor?*, *op. cit.*, p. 16.
86. Miklos Biroš *et. al.*, "Attitudes toward justice and social reconstruction in Bosnia Herzegovina

and Croatia" in E. Stover and H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 185.

87. Hinton, *op. cit.*, p. 277.

88. *Ibid.*, p. 279.

89. Linton, *op. cit.*, p. 169.

90. Meeting notes for CJI Outreach Meeting at Sunway Hotel, 15 December 2006; on file with the author.

91. Jason S. Abrams and Steven R. Ratner, *Accountability for human rights atrocities in International Law: beyond the Nuremberg Legacy*, New York, Oxford, Oxford University Press, 2001, p. 136.

92. Fletcher and Weinstein, *op. cit.*, pp. 597, 600 (noting that, "when guilt is attributed to specific persons, then individuals and groups are offered the opportunity to rationalize or deny their own responsibility for crimes committed in their name").

93. Ben Kiernan and Taylor Owen, "Bombs over Cambodia: new information reveals that Cambodia was bombed far more heavily than previously believed", *The Walrus*, October 2006, available at <<http://www.walrusmagazine.com>>, accessed on 25 August 2007 (hereafter: Owen and Kiernan); Kimmo Kiljunen (ed), *Kampuchea: decade of genocide*, Report of a Finnish Inquiry Commission, London, Zed Books, 1984 (hereafter Kiljunen) and Becker, *op. cit.*, p. 156.

94. Owen and Kiernan, *op. cit.*, p. 2.

95. *Ibid.*

96. Kiljunen, *supra* note 93.

97. Kiernan and Owen, p. 2.

98. Former Senator and Presidential nominee George McGovern once said that he thought the rise of the Khmer Rouge was one of the greatest single costs of U.S. involvement in Indochina. S. Power, *A problem from hell: America in the age of genocide*, New York, Basic Books, 2002, p. 133 (hereafter: Power).

99. Short, pp. 301-2.

100. Power has noted that the then U.S. National Security Advisor Zbigniew Brzezinski "saw the [Cambodian] problem through the Sino-Soviet prism. Since U.S. interests lay with China, they lay, indirectly, with the Khmer Rouge". See Power, p. 147.

101. Although occupied by Democratic Kampuchea directly, in 1979, the UN seat was later occupied by a coalition force but the Khmer Rouge maintained military superiority within the alliance and continued to keep their diplomats in all the foreign posts for the new group. See Becker, p. 457. China alone gave over billion dollars of aid to the Pol Pot regime in the 1980s, while they continued to wage a war against the Vietnamese backed Khmer government. See also Fawthrop and Jarvis, p. 178.

102. New York Times Editorial, "A trial for Pol Pot", *New York Times*, 24 June 1997, Sec. A. See also Fawthrop and Jarvis, p. 5.

103. Owen and Kiernan, p. 2.

104. Interview with Look Heng Monychenda; notes on file with the author.
105. See generally, Owen and Kiernan, *op. cit.*: making a similar point.
106. In fact, the history of the creation of the Court bears this out; the Extraordinary Chambers was conceived of as a legal process from the beginning and pushed along by UN officials and international NGOs. See generally T. Hammarberg, *Efforts to establish a tribunal against the Khmer Rouge leaders: discussions between the Cambodian Government and the UN*, available at <<http://www.ui.se/uikr.pdf>>, accessed on 25 August 2007; United Nations Report, *Report of the Group of Experts for Cambodia*, Established Pursuant to General Assembly Resolution 52/135, at U.N. GAOR, 53d Session, Agenda Item 110(b), at ¶ 5, U.N. Doc. A/53/850, 1999.
107. E. Davis, *Keeping the bones*, 2007, available at <<http://leahbowe.com/deathpower/>>, accessed on 25 August 2007.
108. V. Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program", *Journal of International Criminal Justice*, v. 3, 2005, pp. 950-961 and 955-57.
109. Stanford Encyclopedia of Philosophy, "Punishment", available at <<http://plato.stanford.edu>>, accessed on 25 August 2007.
110. American Model Penal Code, s. 1.01 (1).
111. The International Co-Prosecutor at the Extraordinary Chambers has started making this claim. Robert Petit has been quoted as saying: "Our role is very black and white – to find someone innocent or guilty beyond a reasonable doubt". O. Ward, "Long road back to the killing fields", *Thestar.com*, 11 February 2007, available at <<http://www.thestar.com>>, accessed on 25 August 2007.
112. See generally, H. Strang and L. W. Sherman, "Reintegrative shaming experiments (rise): the victim's perspective", *Canberra RISE Working Papers*, n. 2, Australian National University, 1997, available at <<http://www.aic.gov.au/rjustice>>, accessed on 25 August 2007 (hereafter: Strang and Sherman).
113. M. Gladwell, "Here's why: a sociologist offers an anatomy of explanations", *The New Yorker*, April 10, 2006, available at <<http://www.gladwell.com/>>, accessed on 25 August 2007 (writing that, "All over the modern world, victims are the forgotten players in the drama of criminal justice, exploited for their evidence but otherwise abandoned").
114. *Ibid.*
115. Fletcher and Weinstein, p. 594 (finding that all Bosnian Serb and Bosnian Croat participants in their study "expressed concern that the ICTY was a 'political' organization; in this context, 'political' meant biased and thus incapable of providing fair trials").
116. *Idem*, p. 583 (questioning the assumption that contribution international courts can contribute to social healing, reconciliation, the feelings of victims, and the rule of law). See generally, Christina M. Carroll, "An assessment of the role and effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994", *Boston University International Law Journal*, v. 18, n. 2, 2000, pp. 163-200.
117. M. Drumbl, "Punishment postgenocide: from guilt to shame to 'Civis' in Rwanda", *New York University Law Review*, v. 75, n. 5, 2000, pp. 1258 and 1225.

118. BBC News Online, "Khmer Rouge film reveals horrors", 16 December 2006, p. 1, available at <<http://news.bbc.co.uk>>, accessed on 25 August 2007.
119. Munyas, *op. cit.*
120. Stover and Weinstein, pp. 11, 15 and 18.
121. See E. Davis, Article on Bokor, 2007, available at <<http://leahbowe.com/deathpower/>>, accessed on 25 August 2007.
122. L. Fletcher and H. Weinstein, "A world unto itself? The application of international justice in the former Yugoslavia" in E. Stover & H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 29.
123. Stover and Weinstein, p. 323.
124. In March 2007 major donors reportedly pledged \$ 601 million for one year of aid to Cambodia. In April, China announced a separate \$ 600 million pledge in grants and loans. Human Rights Watch, *op. cit.* See also Voice of the Asian-Pacific Human Rights Network, *op. cit.* (noting that "the international community has spent somewhere between US\$5-7 billion in Cambodia in the past decade").
125. The idea to establish a court process began with a suggestion by Thomas Hammarburg, then working for the UNHCHR in Cambodia. T. Hammarberg, "Efforts to establish a tribunal against the Khmer Rouge leaders: discussions between the Cambodian Government and the UN", Paper presented at seminar organised by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos and Cambodia on the Proposed Trial against Khmer Rouge Leaders Responsible for Crimes against Humanity, Stockholm, 29 May 2001, available at <<http://www.ui.se/uikr.pdf>>, accessed on 25 August 2007, p. 8. After a request letter was drafted by the then co-Prime Ministers (with Hammarburg), the possibilities were studied by the United Nations Group of Experts who spent less than 10 days in Cambodia. Group of Experts Report, *op. cit.*, paragraph 7. After their suggestions were rejected, the negotiations between the Cambodian government and the UN began in earnest. From then on, as far as I know there was never a study done to determine what characteristics of a justice process would be most meaningful to Cambodians.

## CECILY ROSE

Cecily Rose received her J.D. from Columbia and her B.A. from Yale. In 2006-2007 she was a Law Clerk to Judge Bernardo Sepúlveda-Amor and Judge Shi Jiuyong at the International Court of Justice. She is currently working in the Appeals Chamber of the Special Court for Sierra Leone.

## FRANCIS M. SSEKANDI



Francis Ssekandi is Professor at Columbia University School of Law. He has a LL.M from Columbia University (1966); he was a Visiting Professor of International Law at Wayne State University (1980-81) and Visiting Lecturer of Law at Makerere University 1968-69; and he worked as a judge at the High Court/Justice of Appeal Uganda Court of Appeal (current Supreme Court, 1974-79). From 1981-97 he was a senior legal advisor in the Office of Legal Affairs of the United Nations and later General Counsel of the African Development Bank (1997-2000). He is also currently Judge on the World Bank Administrative Tribunal and sits on the Boards a number of volunteer organizations.

Address: Professor Francis M. Ssekandi, Columbia University,  
Jerome L. Greene Hall, 435 West 116th Street, New York, NY 10027 USA  
Email: fsseka@law.columbia.edu

## ABSTRACT

This article examines the role that amnesty and traditional practices play in fostering justice and reconciliation in northern Uganda.

## RESUMO

Este artigo analisa o papel que a anistia e as práticas tradicionais assumem na promoção da justiça e da reconciliação no norte de Uganda.

## RESUMEN

Este artículo analiza el papel que desempeñan la amnistía y las prácticas tradicionales en la promoción de la justicia y la reconciliación en el norte de Uganda.

Original in English.

## KEY WORDS

Northern Uganda – Transitional justice – Truth commission – Reparations – Reintegration



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# THE PURSUIT OF TRANSITIONAL JUSTICE AND AFRICAN TRADITIONAL VALUES: A CLASH OF CIVILIZATIONS – THE CASE OF UGANDA<sup>1</sup>

Cecily Rose and Francis M. Ssekandi

## Introduction

After almost twenty years of violence in northern Uganda, movement toward reconciliation has begun even though the government of Uganda has not yet reached a peace deal with the Lord's Resistance Army. Although making peace with the Lord's Resistance Army (LRA) has been elusive, literature on the subject has already begun to discuss how Uganda might foster long-term reconciliation, in the face of a pending indictment by the International Criminal Court of five of the LRA commanders. As thousands of former members of the LRA have returned to their communities after taking advantage of the amnesty granted by the government of Uganda under the Amnesty Act of 2000, issues of reintegration and reconciliation have received more attention from government officials, non governmental organizations (NGOs) and academics. Furthermore, when the International Criminal Court (ICC) commenced its investigation of the senior leaders of the LRA in 2004, the international community began to examine how the ICC's role might conflict with peace negotiations and with the use of traditional conflict resolution through reconciliation mechanisms in northern Uganda. While negotiators still struggle to make peace and victims of the LRA are struggling to forgive and to reintegrate former LRA rebels who have returned from the bush, it is critical to consider to what extent a pursuit of justice through prosecution would advance or hinder true reconciliation. This paper therefore examines how the Amnesty Act and the traditional mechanisms structure aimed at aiding the process of reintegration and

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*Notes to this text start on page 121.*

reconciliation in northern Uganda, is consistent with the goals pursued by the international community when instituting the ICC of attaining justice and deterring impunity.

Theoretically, reconciliation in a post-conflict context in northern Uganda would involve admittance of guilt by perpetrators and forgiveness by victims through some sort of dialogue. Communities would reintegrate former members of the LRA and victims would receive support to enable them to return to their homes and resume their lives. Communities would receive economic and social assistance so that the region as a whole could overcome a conflict that has left it impoverished and marginalized. Though methods of reconciliation necessarily differ according to the particular context, some tools foster it more successfully than others. This paper examines how effectively Uganda's Amnesty Act and traditional conflict resolution through reconciliation mechanisms could foster reconciliation both during and post-conflict.

This paper argues that justice and reconciliation in northern Uganda would require more than amnesty and the use of traditional mechanisms, which respectively work more towards ending the conflict and fostering reintegration of former combatants than towards justice. To address the interests of victims of the conflict, compensation for victims and communities as well as a truth telling process would be necessary. In addition, prosecution of the most notorious leaders of the LRA by the ICC would have been helpful as a tool for promoting the attainment of justice if it had occurred before the current peace talks. Part I of this paper provides background information on the conflict in northern Uganda. Part II outlines Uganda's Amnesty Act and describes the traditional conflict resolution through conciliation mechanisms of the Acholi people. Part III discusses the various mechanisms used in countries like South Africa, Sierra Leone and Rwanda to promote justice and reconciliation and argues that a truth-telling process and compensation system could help to promote reconciliation in northern Uganda, while ICC prosecutions of LRA leaders may now be of increasingly limited utility to Uganda.

## **Background on the conflict in Northern Uganda**

The war in northern Uganda has persisted for nineteen years, since President Yoweri Museveni and the National Resistance Movement (NRM) took power in 1986. The Lord's Resistance Army emerged from Alice Auma Lakwena's Holy Spirit Movement (HSM) that aimed to overthrow the newly established NRM government and enjoyed popular support from 1986 to 1987. When Lakwena fled to Kenya in 1987, after her forces suffered heavy casualties in a battle with the NRM, her supposed cousin, Joseph Kony assumed leadership of the remnants of the HSM.<sup>2</sup>

Under Kony's command, the LRA purportedly aimed to overthrow Uganda's government based in the southern capital of Kampala and to rule Uganda according to the Ten Commandments. However, the LRA does not in fact have a "coherent ideology, rational political agenda, or popular support".<sup>3</sup> The LRA never crosses the Nile River which divides the northern and southern regions and instead attacks the civilian population in Northern Uganda, whom Kony claims to be punishing for their sins, particularly that of not supporting him.<sup>4</sup> Because the LRA lacks a popular base of support, it populates its forces almost exclusively through abduction and forced conscription of children, usually ages 11-15.<sup>5</sup>

The Government of Sudan had heavily supported the LRA until 2002 when Uganda and Sudan signed a treaty by which both countries agreed to stop supporting each other's insurgents.<sup>6</sup> With the permission of the Sudanese government, the Ugandan People's Defence Force (UPDF) launched a military offensive in March 2002 against the LRA, known as "Operation Iron Fist". Though the UPDF was supposedly aiming to eradicate the LRA by attacking its camps in southern Sudan, the LRA instead fled back into northern Uganda where fighting and abductions intensified.<sup>7</sup> The LRA also expanded the theatre of war into the eastern region of Uganda which had previously been less affected by the conflict.<sup>8</sup> As of the start of Operation Iron Fist, the number of internally displaced persons (IDPs) has grown from 450,000 to over 1.6 million.<sup>9</sup> Furthermore, since the mid-1990s, approximately three-fourths of the populations in the Gulu, Pader, and Kitgum districts of northern Uganda have been displaced.<sup>10</sup>

The LRA's atrocities include killings, beatings, mutilations, abductions, forced recruitment of children and adults, and sexual violence against girls who serve as "wives" or sex slaves for LRA commanders.<sup>11</sup> The LRA's members range between 1,000 to 3,000, with a core of 150 to 200 commanders and the rest consisting of abducted children (the LRA has abducted approximately 20,000 children during the nineteen year conflict).<sup>12</sup> During the course of the conflict the LRA has looted and burned houses, storage granaries, shops, and villages in northern Uganda.<sup>13</sup> In addition, the Ugandan People's Defence Force has also committed human rights violations against the civilians in northern Uganda, including extrajudicial execution, arbitrary detention, torture, rape and sexual assault, recruitment of children, and forcible relocation.<sup>14</sup> Altogether, this prolonged conflict has had a severe socio-economic and psychological impact on the entire Acholi population.<sup>15</sup>

In December 2003 President Museveni referred the problem of the LRA to the International Criminal Court. The government of Uganda reportedly conceived of the referral as a strategy for generally engaging the international community and specifically increasing international pressure on Sudan to stop

it from supporting the LRA.<sup>16</sup> In October 2005, the ICC issued indictments and arrest warrants for Kony and four other leaders, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. Their alleged crimes include rape, murder, enslavement, sexual enslavement, and forced enlistment of children.<sup>17</sup> As of this writing, none of the indictees is in the custody of the Ugandan government or the ICC and Lukwiya was reportedly killed recently.<sup>18</sup>

In the spring of 2006, a significant shift in the conflict occurred as the LRA began portraying itself as a politically motivated movement with legitimate grievances about the marginalization of northern and eastern Uganda. In this vein, Kony appeared in May for the first time on a video in which he discussed peace and denied the LRA's involvement in the commission of war crimes.<sup>19</sup> Most importantly, in May and June, a series of meetings took place between Kony and Riek Machar, the vice president of southern Sudan and the second in command of the Sudan People's Liberation Movement. The SPLM reportedly took on the role of peace mediator because its leaders recognized that the LRA threatened the potential for stability and development in southern Sudan.<sup>20</sup>

In mid July the government of Uganda began actively negotiating for peace with the LRA.<sup>21</sup> Despite the ICC indictments, Museveni has offered amnesty to Kony should he surrender. Finally, on August 26, 2006, a cease-fire came into effect and peace talks in southern Sudan have been ongoing since that time. The LRA and the government of Uganda are currently negotiating issues of disarmament, reconciliation, and political change in northern Uganda. Museveni has promised that once the LRA and the government sign a peace deal, the government of Uganda will work to have the ICC drop its charges. The government has also announced that it will establish a \$340 million fund to help northern Uganda.<sup>22</sup>

## Mechanisms in Uganda

### *Amnesty*

Even before the conflict in northern Uganda had no clear end in sight, literature on the subject had already begun to address issues of reintegration and reconciliation. This discussion merits attention because even though the LRA and the government of Uganda have not yet successfully negotiated a peace deal, thousands of former members of the LRA have sought amnesty and returned to their communities.<sup>23</sup> Even when the conflict was ongoing, communities in northern Uganda had begun reintegrating former LRA rebels and had begun to work towards reconciliation through traditional conflict resolution mechanisms. Parts (1) and (2) of this paper therefore explore the

features of Uganda's Amnesty Act and the Acholis' traditional ceremonies and examine how these two mechanisms alone may fall short of achieving reintegration and reconciliation both during and post-conflict.

### The contours of the Amnesty Act

Religious and cultural leaders in northern Uganda have led the movement towards ending the conflict through amnesty.<sup>24</sup> Accordingly, the objective of the Amnesty Act of 2000 is to break the cycle of violence in northern Uganda by encouraging the combatants of various rebel groups to leave their insurgencies without fear of prosecution.<sup>25</sup> The Act thereby declares amnesty with respect to any Ugandan who has engaged in war or armed rebellion against the government of Uganda since January 20, 1986. Those granted amnesty under the act receive "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State".<sup>26</sup> The following outlines the Act's provisions for granting amnesty as well as the institutions which it establishes for that purpose.

To qualify for amnesty, the applicant must have actually participated in combat, collaborated with the perpetrators of the war or armed rebellion, committed a crime in the furtherance of the war or armed rebellion, or assisted or aided the conduct or prosecution of the war or armed rebellion.<sup>27</sup> The government will not prosecute or punish such persons if he or she reports to the nearest local or central government authority, renounces and abandons involvement in the war or armed rebellion, and surrenders any weapons in his or her possession.<sup>28</sup> In renouncing involvement, the rebels' declarations need not be onerous or specify the crimes for which he or she seeks amnesty.<sup>29</sup> After a rebel has completed the above steps, he or she becomes a "reporter", whose file the Amnesty Commission reviews before a Certificate of Amnesty is issued and the process is complete.<sup>30</sup>

In addition, the Amnesty Act establishes the Amnesty Commission which consists of a Chairperson, who is a judge of the High Court (or a person qualified to be a judge of the High Court), and six other persons of high moral integrity.<sup>31</sup> The Commission's objectives are "to persuade reporters to take advantage of the amnesty and to encourage communities to reconcile with those who have committed the offenses".<sup>32</sup> The Commission's functions specifically require it to monitor programs of demobilization, reintegration, and resettlement of reporters and to coordinate a program to sensitize the general public regarding the Amnesty Act.<sup>33</sup> According to the *International Center for Transitional Justice*, the Commission appears to be efficient and well functioning despite challenging circumstances such as inadequate funding.<sup>34</sup> It also seems to maintain good relationships with northern Uganda's civil society.<sup>35</sup> Finally, the Act further

institutes a seven member Demobilization and Resettlement Team (DRT) which functions at a regional level to implement the amnesty by establishing programs for decommissioning arms, demobilization, resettlement, and reintegration of reporters.<sup>36</sup>

In 2005 the Commission began to run a disarmament, demobilization, and reintegration (DDR) program to support former combatants as they start new lives.<sup>37</sup> The program provides the reporters with resettlement packages which include 263,000 Uganda shillings (US \$150) and a home kit with items such as a mattress, a blanket, saucepans, plates, cups, a hoe, maize flour, and seeds.<sup>38</sup> Funding of the resettlement packages has only been selective, leaving approximately 10,000 former rebels still without packages (out of a total of 15,000 reporters). However, the Multi-Country Demobilization and Reintegration Program (MDRP) of the World Bank released US \$450,000 at the beginning of 2005 and the Commission anticipates that the MDRP will release more funds, as is needed, out of the \$4.1 million budgeted for the purpose.<sup>39</sup> Lastly, while the DRT supposedly monitors reporters for up to two years, there are in fact few long term programs and reintegration is generally uncoordinated and poorly funded.

### **Shortcomings of the Amnesty Act**

The Amnesty Act could fail to function as a mechanism for reconciliation because the resettlement packages have been so contentious, and because Commission has not expanded its functions to include a truth-telling process. First, while the DRT's reintegration measures are generally a main weakness of the current amnesty process, the resettlement packages have been particularly contentious in northern Uganda and may foster resentment and hinder reconciliation unless the government handles them with greater sensitivity.<sup>40</sup> Many former rebels view the government's untimely distribution of resettlement packages as a failure to honor their commitments to the reporters.<sup>41</sup> According to the *Refugee Law Project*, the issue of resettlement packages has "become the primary focus [...] of the Amnesty Law for the majority of ex-combatants interviewed, and is the major issue when considering the current potential for reintegration into the region".<sup>42</sup> In addition, resentment exists among some displaced, impoverished non combatants who perceive the packages as perversely rewarding the former rebels for having committed atrocities.<sup>43</sup> Communities sometimes fail to understand why the government offers assistance to the former rebels but not to the other community members whom they victimized.<sup>44</sup>

Furthermore, the issue of resettlement packages has created divisions not only between former rebels and their communities, but also between the former

rebels themselves.<sup>45</sup> The treatment of former high level rebels and average returnees is widely disparate. Usually former LRA rebels return to their homes or internally displaced persons camps with a delayed or nonexistent resettlement package and little further monitoring or follow-up by the government. Former high level rebels, however, receive 24-hour armed protection by the UPDF and live in UPDF barracks or in a renovated hotel in Guru.<sup>46</sup>

Second, the Amnesty Act could fail to reach its potential as a tool for reconciliation because the Commission has not fulfilled its broader functions which could include a truth-telling process. Under Article 9 of the Amnesty Act, the Commission “shall” also consider and promote appropriate reconciliation mechanisms in northern Uganda, promote dialogue and reconciliation within the spirit of the Amnesty Act, and “perform any other function that is associated or connected with the execution of the functions stipulated in the Act”.<sup>47</sup> The Commission has in fact supported the integration of traditional cleansing ceremonies, thereby working to fulfill its mandate to promote appropriate reconciliation mechanisms. Yet, these provisions also suggest that the Commission could adopt a truth-seeking function or establish links with traditional conflict resolution mechanisms. A truth-telling process, perhaps in the shape of a truth and reconciliation commission, would foster a national dialogue and at least theoretically promote reconciliation in northern Uganda and between Northern Uganda and the rest of the country [...]. Instituting such a process would in fact be in keeping with the language of the provision as well as the act’s goal of fostering reintegration. The merits of such a truth-telling process are explored in more detail below.

### *Traditional reconciliation mechanisms*

Traditional Acholi leaders have also strongly advocated the use of traditional conflict resolution through reconciliation ceremonies as mechanisms for reintegration in the post-conflict context. Although traditional chiefs have not had any legal status for most of the last century, their legitimacy was never destroyed and many continued to operate informally. As of 1911, colonially appointed chiefs, known as Rwodi Kalam, replaced the traditional chiefs, known as Rwodi, and the 1965 Constitution abolished the system of traditional chiefs (Kings) altogether. The 1995 Constitution, however, led to the revival of traditional institutions and allowed traditional leaders to exist in any part of Uganda. Furthermore, a civil society initiative in 2000 reinstated many traditional leaders, including the Acholi Traditional Leaders Council and the head chief, known as the Lawi Rwodi, whom the other Rwodi elect. In general, the chiefs’ political independence gives them enhanced credibility in mediation and reconciliation.<sup>48</sup>

According to Acholi customs, when an offender declares that he or she has committed a wrong, the traditional conflict management system is triggered. The dispute resolution process identifies certain behaviors as “kir”, or taboo. “These behaviors may range from the criminal to the antisocial—violent acts, disputes over resources, and sexual misconduct – including behavior that would prevent the settlement of the dispute.” Clans must then cleanse the “kir” through rituals which help to reaffirm communal values. Many argue that these traditional mechanisms in particular represent important channels for reintegration and reconciliation which can and should be widely adopted. The following section details “the stepping on the egg ceremony”, *mato oput*, and “the bending of the spears” ceremony.<sup>49</sup>

### Three ceremonies

First, cleansing ceremonies take place upon the return of an individual who has spent a significant amount of time away from the community. The ritual cleanses foreign elements to prevent them from entering the community and bringing it misfortune. The returnee steps on a raw egg which symbolizes innocence, or something pure or untouched. Its crushed shell represents how foreign elements crush the community’s life. In addition, a twig from the opobo tree and the *layibi* also accompany the ceremony. The twig symbolizes cleansing because soap is traditionally made from the opobo tree and the *layibi* is the stick for opening the granary and thereby marks the individual’s return to eat where he or she has eaten before.<sup>50</sup> These individual cleansing ceremonies routinely take place whenever former LRA members return to their communities. Most agencies which receive and reintegrate former combatants ensure that the somewhat bureaucratic process also incorporates traditional ceremonies, usually performed at the agencies.<sup>51</sup>

Second, the *mato oput* (meaning drinking of the bitter root) restores relationships within or between friendly clans after a wrongful killing or murder between them. Relatives of the offender or victim report the killing or murder and then the clans discuss the circumstances. The offender asks for forgiveness and then the parties decide upon compensation by the entire clan of the offender, usually in the form of cattle or money. Compensation must be affordable so as not to prevent restoration of relations. During this process, the parties consider their social relationship suspended, and they do not take any meals or drinks together. After the offender’s clan has made compensation, the local chief presides over a ceremony at which the offender and representatives of the victim kneel together and drink the crushed roots of the oput tree. The root’s bitterness symbolizes the nature of the crime and the loss of life. A meal follows this ceremony and the “elders remind everyone present not to promote antagonism”.<sup>52</sup>

Third, “the bending of the spears” (*gomo tong*) ceremony marks the end of violent conflict between clans or tribes. The parties make vows that the killings will not be renewed. Each clan then bends a spear and gives it to the other, thereby signaling that renewed violence will “turn back on them”.<sup>53</sup> The performance of the bending of the spears ceremonies is reportedly very rare.<sup>54</sup>

### **Application of traditional mechanisms may be problematic**

Although traditional chiefs have advocated the use of traditional mechanisms, and the Amnesty Commission has supported their use, such mechanisms may fall short of significantly promoting justice. The application and relevance of such ceremonies to the atrocities committed by the LRA is questionable for a variety of reasons. First, while the *mato oput* ceremony is fairly well known in Uganda, the Acholi no longer widely practice it.<sup>55</sup> Because the ceremony has been in disuse, younger generations question its relevance and value. Also, those who are unfamiliar with the rituals do not gain exposure to them because they are typically held at reception centers in district centers where only small audiences bear witness.<sup>56</sup> Furthermore, non Acholis in northern Uganda and southern Sudan and in fact all Ugandans have also been greatly affected by the LRA conflict since 2002 but have relatively little knowledge of traditional justice ceremonies and might not consider them sufficient.<sup>57</sup> The conflict in Northern Uganda has claimed the lives of many soldiers from all over Uganda who were deployed to fight the Kony insurgency. In addition to the lost lives millions of dollars of Ugandan tax payers money has been used to attempt to quell the rebellion.

Second, such ceremonies may not have a significant impact because communities may not be genuinely willing to accept former LRA rebels. Academics, NGOs, human rights activists, and reporters have begun to challenge the widely accepted notion that the Acholi people have a special capacity to forgive.<sup>58</sup> A recent survey by the *International Center for Transitional Justice* shows that community leaders and victims are divided on the topics of justice, accountability, and reconciliation.<sup>59</sup> Victims interviewed by *Human Rights Watch* apparently “did not agree with the prospect of having the LRA leaders forgiven, however, but instead wanted justice, even retribution”.<sup>60</sup> According to the *New York Times Magazine*, many former child soldiers have reportedly “returned from the bush to find themselves homeless. They cannot go back to villages where people recall the night they returned with the rebels and massacred their relatives and neighbors – and sometimes, even, their own parents”.<sup>61</sup> Also, while Acholis “know that all but a few of the oldest commanders were themselves once abducted children, their pity for the rebels

as victims is overlaid with hatred and fear of them as victimizers”.<sup>62</sup> *Human Rights Watch* asserts that even if the community has accepted perpetrators back into the community, individual victims might not want to forgive the perpetrators of serious crimes.<sup>63</sup>

Third, *mato oput*, in its traditional form, does not necessarily apply to the mass atrocities committed by the LRA. *Mato oput* traditionally applied only to minor cases of manslaughter not to wanton killing, rape or mutilation or a killing between enemies during a war. According to anthropologist Tim Allen, even those promoting the use of *mato oput* acknowledge that it was a mechanism used for individual cases, not for collective dispute settlement.<sup>64</sup> *Mato oput* ceremonies therefore may not be sufficient given the scale of the LRA atrocities. Also, the application of *mato oput* may be problematic because it applies only when the identity of the perpetrator and victim are known. Clans, however, may not be willing to accept responsibility for the acts of former LRA rebels. Finally, in a post-conflict context, traditional leaders may be so preoccupied with settling the disputes likely to arise when people return to their villages, that they will not be able to oversee the reconciliation ceremonies.

Altogether, these three problems suggest that traditional chiefs might have to educate the Acholi population about these ceremonies and adapt them to the circumstances presented by the current conflict. These challenges are not necessarily insurmountable, but they do indicate that other non-traditional mechanisms may have to play a prominent role in guiding the reconciliation process among the Acholi. In particular, the Government will have to re-examine its extension of the Amnesty Act to the most notorious leaders of the LRA. These leaders must be prosecuted under the Laws of Uganda for there to be justice. In fact, the prosecution of these LRA may be the only way of retiring the ICC indictments, which if executed would be a big embarrassment to the Government which will have granted them amnesty.

### **Mechanisms used by other post-conflict African countries to work towards reconciliation**

This section looks to the experiences of other post-conflict African societies and thereby explores other justice and reconciliation mechanisms that the government of Uganda could examine in seeking to end the conflict in Northern Uganda and promote peace in the region. This paper proceeds under the assumption that other mechanisms are necessary in Uganda because the amnesty and the traditional conflict resolution through reconciliation mechanisms are insufficient by themselves. With only the amnesty and the traditional mechanisms in place, unrealistic demands of forgiveness may be placed on

victims who may never receive compensation or an acknowledgment of guilt from perpetrators. While the Amnesty Act currently does not offer reparations for victims or foster a dialogue or truth-telling process, the traditional mechanisms have not, as of yet, begun to foster those processes in a robust way.

This section examines Uganda's situation in light of the experiences of other post-conflict African countries and explains why mass criminal trials would not be appropriate for northern Uganda, but how compensation, truth-telling, and the International Criminal Court could play important roles in promoting reconciliation. This section discusses the South Africa's Truth and Reconciliation Commission, reparations in South Africa and Rwanda, and finally, Sierra Leone's Special Court.

### *Truth-telling processes*

Truth and reconciliation commissions can play an important role in post conflict societies for the following reasons. First, truth and reconciliation commissions create comprehensive records of human rights abuses by recording the crimes and the victims' identities and fates. Such a record facilitates public awareness and acknowledgement of past human rights violations and the development of a culture of human rights and more generally, the rule of law. Second, truth and reconciliation commissions provide victims with a "credible and legitimate forum through which to reclaim their human worth and dignity", and they provide perpetrators with a "channel through which to expiate their guilt".<sup>65</sup> Finally, a post conflict society that fails to establish a truth-telling process may perpetuate anger and revenge, disregard the needs of victims, and preclude eventual forgiveness. In South Africa, after much debate, the government chose to establish a truth and reconciliation commission in order to record the past and work towards uniting a very divided population. The following discusses South Africa's experience with truth-telling and explores its application to northern Uganda.

### **South Africa's Truth and Reconciliation Commission**

South Africa established its Truth and Reconciliation on July 19, 1995 when President Nelson Mandela signed into law the Promotion of National Unity and Reconciliation Act. The Commission's mandate was to hold hearings over the course of two years about human rights abuses spanning from March 1, 1960 through May 10, 1994. The Act established the Truth and Reconciliation Commission (TRC) for the purpose of fully investigating and documenting the gross human rights violations of South Africa's past. The TRC existed in order to restore victims' human rights and civil dignity by allowing them to

recount the violations they suffered, to recommend reparations, and to determine whether to grant amnesty to those who perpetrated abuses for political objectives and who provided the Commission with a full account of their actions. Archbishop Desmond Tutu chaired the TRC, which consisted of three separate committees: the Committee on Human Rights Violations (HRV), the Committee on Amnesty, and the Committee on Reparation and Rehabilitation.<sup>66</sup>

The hearings of the HRV Committee are of particular importance for our purposes. The Act specifically tasked the HRV Committee with hearing victims' stories and determining whether gross human rights violations had occurred. The enabling legislation defined gross violations as the "violation of human rights through the killing, abduction, torture, or severe ill treatment of any person [...] which emanated from conflicts of the past [...] and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive".<sup>67</sup> The HRV Committee ultimately processed approximately 22,000 victim statements and thousands told their stories.

The storytelling process was tremendously valuable but not without serious pitfalls. By recounting the abuses they had suffered, victims found some relief from the self-blame and guilt which they experienced because their political activity had caused suffering for themselves and their families. The HRV Committee acknowledged the sacrifices made by these individuals, and thereby created new, redeeming narratives. Collectively, the HRV Committee hearings created a new social memory for South Africa by legitimizing previously suppressed interpretations of the past. By creating a shared memory, these narratives ensured that South Africans could never deny the wrongs of apartheid. Many victims who testified, however, later experienced further trauma and despondency but did not receive much needed psychological support. Not only was the unavailability of psychological support problematic, but even where it was available, victims did not prioritize mental health care because the social problems and poverty of their daily lives was so overwhelming. These problems, as well as the many successes of South Africa's truth-telling experience may be of great relevance to other countries pursuing truth and reconciliation commissions.<sup>68</sup>

### Truth-telling in Uganda

In northern Uganda, amnesty will not become a genuine tool for reconciliation unless it also includes a mechanism for dialogue and truth-telling. The admittance of guilt by former combatants would help to foster the conditions necessary for reconciliation to take place.<sup>69</sup> As Jeremy Sarkin asserts, "[f]acilitating an open and honest dialogue can effect a catharsis, and prevent collective amnesia which

is not only unhealthy for the body politic, but is also essentially an illusion—an unresolved past inevitably returns to haunt a society in transition”.<sup>70</sup> Without dialogue and truth-telling, the amnesty process could place unrealistic demands on victims and unnecessarily sacrifice the truth for peace.<sup>71</sup>

Surveys by the *International Center for Transitional Justice* reveal that the population of northern Uganda would be overwhelmingly in favor of a truth-telling process. While only 28 percent had knowledge of the truth commissions in other countries such as Sierra Leone and South Africa, 92 percent said that Uganda needed a truth-telling process.<sup>72</sup> Furthermore, 84% said that the population of northern Uganda should remember the legacy of past abuses.<sup>73</sup> Although the population already desires a truth-telling process, a formalized process would be necessary because people fear openly discussing the war and experience shame in association with atrocities that have taken place.<sup>74</sup> A formal process could also ensure that the atrocities are sufficiently memorialized. South Africa’s Truth and Reconciliation Commission could potentially serve as a model for Uganda’s construction of a formal truth-telling process.

The Amnesty Commission could also encourage more dialogue at an informal level. The Acholis’ traditional justice mechanisms, in their current form, do not sufficiently address the population’s desire for truth-telling and reconciliation. As mentioned above, the ceremonies are not uniformly practiced and do not appear to allow for any particular process of dialogue.<sup>75</sup> The extent to which communities as a whole are involved in the traditional ceremonies is reportedly unclear. Though ceremonies appear to have taken place within the camps in a few instances, the “the stepping on the egg” cleansing ceremony is usually organized by the cultural leaders and performed at the reception centers for the reporters. The Amnesty Commission could strengthen such traditional reconciliation mechanisms to ensure that greater dialogue and participation takes place. Instead of holding the cleansing ceremonies at the reception centers, the Commission could facilitate meetings between the communities and the former combatants at which reporters formally return to their communities. This could provide an opportunity for combatants to express remorse and for the victims to hear the truth.

### *Compensation in South Africa and Rwanda*

This section examines the compensation systems of South Africa and Rwanda and explores their application to Uganda’s post conflict situation. South Africa provides an example of how compensation may be tied to a larger truth and reconciliation commission while Rwanda alternatively exemplifies how traditional justice and reconciliation mechanisms may be codified and expanded to include compensation.

## South Africa's Committee on Reparation and Rehabilitation

South Africa's Truth and Reconciliation Commission included a Committee on Reparations and Rehabilitation that made recommendations for symbolic reparations as well as for substantial payments to victims of gross human rights violations. When the Committee began its work in 1996, many South Africans expected that compensation would be only symbolic because of the vast number of claims and the difficulties involved in adequately compensating victims. The Committee, however, shifted its emphasis from symbolic to substantial compensation after conducting workshops throughout South Africa over two years. While the Committee did propose symbolic reparations, including memorials, reburials, renaming of streets, and days of remembrance, the Committee also proposed individual reparation grants of 17,000 rand a minimum per year for each victim for six years. The recommended grant was 23,000 rand per year for victims with many dependents or living in rural areas and the average grant was 21,700 rand, based on the median income of black South African households. In addition, the Committee determined that certain victims required urgent interim relief, including those who had lost a wage-earner, who required psychological support after testifying, who required urgent medical attention, or who were terminally ill and not expected to live beyond the life of the Commission.<sup>76</sup>

Despite these substantial recommendations by the Committee, the reparations process in South Africa has generated significant dissatisfaction among victims. First, the government was very slow to respond to the TRC's recommendations about payments to the 22,000 victims. In 2003, five years after the recommendations, President Thabo Mbeki's administration announced that only 30,000 rand could be paid in total to each victim who wanted reparations.<sup>77</sup> Second, the Promotion of National Unity and Reconciliation Act included no requirements for reparations from perpetrators or beneficiaries of apartheid. The Act did not call for reparations directly from perpetrators to victims even though under traditional systems, *ubuntu* requires *ulihlawule* (paying the debt) by the one who violates community law. The Act thus broke this link between the violation and the obligation. In addition, discussions about a wealth tax on the beneficiaries of apartheid fell by the wayside when Mbeki came into office in the spring of 1999.<sup>78</sup>

### *Rwanda's compensation system*

Rwanda, by contrast, developed a compensation system linked not to a truth and reconciliation commission, but to its court systems. Rwanda's Organic Law of 2000 establishes *gacaca* courts and organizes prosecutions for genocide

and crimes against humanity committed between October 1, 1990 and December 31, 1994. Following the 1994 Rwandan Genocide, the *gacaca* courts grew out of the government's struggle to detain and prosecute over 100,000 people charged with genocide, war crimes, and crimes against humanity. Rwanda's Organic Law codified a somewhat modified version of Rwanda's traditional law enforcement procedures whereby village elders would assemble all parties to a dispute in order to mediate a solution.

Within the Organic Law, Chapter 7 concerns damages and article 90 therein establishes a Compensation Fund for Victims of Genocide and Crimes Against Humanity. Under Article 90, both ordinary jurisdictions and *gacaca* jurisdictions were obliged to forward copies of rulings and judgments to the fund which shall indicate: (1) "the identity of persons who have suffered material losses and the inventory of damages to their property"; (2) "the list of victims and the inventory of suffered body damages"; and (3) "related damages fixed in conformity with the scale provided for by law". Based on the damages fixed by jurisdictions, the Fund then fixes the modalities for granting compensation.<sup>79</sup>

### Compensation in Uganda

In post-conflict northern Uganda, a compensation system similar to that of Rwanda or South Africa could work towards adequately addressing victims' interests. Compensation could serve victims' interests by indirectly acknowledging their injuries and by supporting their efforts to overcome those injuries or to live in peace despite them. In an interview conducted by the *International Crisis Group*, President Museveni apparently acknowledged that benefits for former LRA members must be balanced by benefits for the LRA's victims, both as a matter of equity and to generate support for the DDR.<sup>80</sup>

According to the *International Center for Transitional Justice (ICTJ)*, a compensation system would be responding to relatively widespread opinion that victims of the conflict should receive some form of reparations. Of those surveyed by the *ICTJ*, 52 percent wanted victims to receive financial compensation and 58 percent thought that such compensation should be for the community as opposed to individual victims.<sup>81</sup> While a majority (63 percent) of respondents believed that the return of IDPs to their villages should be prioritized once peace is achieved, respondents also gave priority to rebuilding village infrastructure (29 percent), providing compensations to victims (22 percent), and providing education to children (21 percent).<sup>82</sup> The following therefore describes how the government of Uganda has not responded to the interests of victims in compensation and how the Amnesty Act could be expanded to include compensation for victims as well as communities.

Neither the Amnesty Act nor Acholi traditional mechanisms currently

provide victims with significant compensation. The Amnesty Act, in fact, provides no compensation for victims but instead provides the perpetrators with resettlement packages. Though *mato oput* is supposed to include compensation in the form of cattle or money, such payments may no longer be possible because the vast majority of the Acholi population now lives in an impoverished state in the IDP camps. In addition, former LRA rebels escape from the bush with no ability to offer any compensation themselves. This paper therefore argues that the government of Uganda could pay compensation to the victims of the LRA's atrocities by funding the compensation mechanism embodied in *mato oput*. Alternatively, if the government of Uganda were to establish a truth and reconciliation commission, then South Africa's experiences with reparations could provide a useful guidepost for Uganda. A compensation system for the victims of LRA atrocities could certainly be incorporated within a broader truth and reconciliation commission, as was done in South Africa. The following, however, focuses on how Uganda could model its compensation system on the one set forth in the Organic Law of 2000 for Rwanda's *gacaca* courts.

While Uganda will probably not implement the equivalent of Rwanda's *gacaca* courts, the compensation system set forth in the Organic Law of 2000 could still be of some relevance to the victims of the LRA in northern Uganda. Rwanda's Organic Law demonstrates how government-funded compensation can take place through traditional justice mechanisms, as opposed to a truth and reconciliation commission. Like Rwanda, the government of Uganda could strengthen its traditional mechanism, *mato oput*, by pledging to provide the funds for the compensation upon which the parties have agreed. The Amnesty Commission could establish a compensation fund under its power to "perform any other function that is associated or connected with the execution of the functions stipulated" in the Act.<sup>83</sup> Because the Commission's functions include promotion of reconciliation, a compensation fund would seemingly be a permissible expansion of the Commission's current operations. Parties performing *mato oput* could agree upon an appropriate level of compensation and then submit a claim to the compensation fund.<sup>84</sup> The Commission could issue guidelines for parties to use when determining appropriate levels of compensation.

Rwanda could also serve as a useful example of how broad poverty reduction, in addition to compensation for individual victims or clans, may contribute to reconciliation. Poverty reduction is in fact one of the priorities of the RPF (Rwandan Patriotic Front) led government, as President Kagame has reiterated in public statements. For Rwandans whose livelihood was destroyed during the genocide, economic assistance may lay the groundwork necessary for the process of forgiveness and reconciliation.<sup>85</sup> Similarly, in northern Uganda,

compensation for communities as a whole could also play an important role in helping the region to achieve reconciliation. The government could focus on providing the infrastructure necessary for the Acholi to achieve reintegration because northern Ugandans cannot truly reintegrate the former rebels until they have left the IDP camps and returned to their homes. Communal compensation could therefore concentrate on rebuilding infrastructure, resettlement packages for farming, and resources for education.

Measures aimed at broader poverty reduction beyond support for reintegration could also be an important tool for achieving national as well as regional reconciliation. The *International Crisis Group* writes of how the North-South divide in Uganda must be bridged so that the Acholi feel that they are a part of Ugandan society. Unifying the country would require “specific political, economic and social initiatives aimed at building the North’s connections with the central government while enhancing autonomy and localized decision-making”. Such initiatives could include post-conflict reconstruction assistance through support for agricultural production, affirmative action through scholarships and employment opportunities, social reform, settlement and reintegration of IDPs, and psychological and social support for former LRA rebels and victimized communities.<sup>86</sup>

### *Criminal prosecutions in Sierra Leone and at the ICC*

The experience of the Special Court for Sierra Leone is highly relevant to the situation in northern Uganda because the Special Court narrowly focused on prosecuting only those bearing the greatest responsibility for the civil war in Sierra Leone. In June 2000 Sierra Leone’s President Ahmad Tejan Kabbah requested the assistance of the international community in establishing a court to try high level Revolutionary United Front (RUF) officers. Having taken RUF leader Foday Sankoh into custody in May 2000, the government was apprehensive that a national trial of Sankoh and other RUF leaders would aggravate the conflict and produce further instability. By January 2002, the government of Sierra Leone and the United Nations had concluded the Agreement on the Special Court, thereby establishing a hybrid national and international tribunal based in Freetown, Sierra Leone.<sup>87</sup>

The Special Court’s Statute limits the Court’s prosecutorial scope to only “those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law” committed during the conflict.<sup>88</sup> The Court’s limited prosecutorial discretion enabled the court to keep the Court’s time frame relatively short and its costs relatively low, as compared with the ad hoc tribunals for Rwanda and the former Yugoslavia.

The Court only indicted thirteen persons, and eleven arrests resulted, including that of Charles Taylor in March 2006. While questions linger about whether such limited prosecutions will produce incomplete or unsatisfactory justice in Sierra Leone, the recent arrest of Charles Taylor will likely have a highly significant impact on the Court's ultimate credibility as well as Sierra Leonean perceptions of the Court.<sup>89</sup>

The Special Court for Sierra Leone is especially relevant to the situation in northern Uganda because limited prosecutions of the LRA by the International Criminal Court or a mixed-tribunal like that of Sierra Leone, are currently the only practicable and available, though questionably desirable, option for Uganda. In post-conflict northern Uganda, the widespread use of retributive justice would not be an effective tool for achieving reconciliation. This paper certainly acknowledges, however, that mass justice can play an important role in other post-conflict societies, such as Rwanda. Many argue that justice can theoretically deter similar acts in the future by ensuring respect for human rights and the rule of law. In fact, "[t]he basic argument in support of prosecution is that trials are necessary in order to bring violators of human rights to justice and to deter future repression".<sup>90</sup> Yet prolonged trials of all or most of the LRA perpetrators on the scale of those adopted in Rwanda (through the ordinary courts, the Gacaca and ICTR) would be inappropriate in northern Uganda for the following reasons.

First, on a pragmatic level, northern Uganda could not accommodate mass prosecutions of former LRA rebels. Northern Uganda currently lacks the infrastructure necessary to conduct trials for UPDF soldiers, let alone the thousands of former LRA rebels. The courts are grossly understaffed and little or no judicial presence exists in the Kitgum and Pader districts. As of March 2005, a large backlog of cases two to three years old existed in Gulu because no High Court judge had sat in Gulu for more than five months.<sup>91</sup> Thus the judiciary's capacity to guarantee fair trials is very limited and the resources necessary to rebuild the judiciary and to support mass justice in the Acholi region could perhaps be better spent on other initiatives geared more directly towards reconciliation.

Second, even a less expensive, mass justice system such as the *gacaca* courts in Rwanda would be inappropriate for northern Uganda because of the circumstances of this conflict and the cultural norms of the victims. Trials would not be suitable for most of the perpetrators of the atrocities in northern Uganda because the vast majority of the reporters were abducted as children into the LRA and carried out atrocities while essentially under duress.<sup>92</sup> Deterrence has a very limited role to play because most of the perpetrators would not have voluntarily joined the LRA or committed atrocities. Thus criminal justice is inappropriate given the identity of the perpetrators and

the circumstances surrounding their crimes. Additionally, the victims and perpetrators most probably belonged to the same families and neighborhoods and finding credible evidence against them would prove elusive, as most of the Acholi had mixed feelings about the LRA war, which they believed was imposed on them by the Museveni Government, which Kony was attempting to overthrow.

Furthermore, widespread use of retributive justice would conflict with Acholi traditions and with the current perspective of the population in northern Uganda. The Acholis' traditional mechanisms are geared towards reconciliation and reintegration rather than punishment. Interviews conducted by various NGOs note that interviewees generally wish to forgive the perpetrators for the sake of peace after so many years of conflict. Also, according to a survey conducted by the *International Center for Transitional Justice*, 58 percent of respondents did not want low ranking members of the LRA to be held accountable for their crimes.<sup>93</sup> However, 66 percent of respondents wanted to see the LRA leaders who are responsible for the violations held accountable through punishment such as trial and imprisonment. The following therefore discusses how the International Criminal Court or a similar Judicial alternative could play an important role in achieving justice by bringing the LRA leaders to trial.

Prior to Museveni's shift in attitude towards the International Criminal Court, the ICC had the potential to play an important role in national as well as regional justice.<sup>94</sup> In light of the historic distrust between Uganda's north and south, credible international trials could function as a depoliticized venue for justice, if and when the LRA's top leadership is arrested. As in Sierra Leone, prosecution by an international body could help to prevent the political instability that could result from national prosecutions. Some Acholis, however, have reportedly perceived the ICC referral as an anti-Acholi policy aimed at foiling peace negotiations and prolonging the war to keep northern Uganda weak.<sup>95</sup> The ICC has consequently made significant efforts to explain its mission to communities in northern Uganda that have been concerned about the implications of the ICC process and their right to continue to use traditional reconciliation procedures.<sup>96</sup> Because of increased contact between Acholi leaders and ICC officials, a spirit of cooperation in northern Uganda reportedly replaced suspicions about the Court's intentions.<sup>97</sup> Within this context of cooperation, Uganda's decision to relinquish jurisdiction to the ICC could allow the ICC to function as an instrument achieving justice and full closure of the conflict.

The ICC's prosecutions or similar judicial mechanism could also help to promote regional peace by ensuring that the Amnesty Act does not amount to total impunity. Through its referral to the ICC, Uganda essentially withdrew

its offer of amnesty to the top leadership of the LRA.<sup>98</sup> While prosecution of the lower ranking former LRA rebels would not be appropriate or possible, as discussed above, trials for the leaders might signify some degree of accountability and justice, however limited. Despite the very small number of prosecutions, the trials could nonetheless be significant if those most responsible for the atrocities were held accountable and brought to justice.

However, a very important caveat to the above analysis stems from Museveni's relatively recent change of position regarding the ICC indictments. If the ICC indictments will ultimately prevent the government of Uganda from successfully negotiating a peace deal with Kony and the other LRA leaders, then the ICC trials will in fact be exacerbating, rather than diminishing, northern Uganda's instability. It may thus be more appropriate to institute a mixed-tribunal on the lines of that adopted in Sierra Leone to ensure that Ugandans have a stake in achieving justice but also avoid viewing the trials as retribution by the Southern dominated Government against Northern Uganda.

## Conclusion

This paper aims to contribute to the discussion of Uganda's approach to conflict resolution and reconciliation by examining the tension between the chosen mode of achieving it through traditional reconciliation mechanisms and amnesty and the international outcry for justice. With only the Amnesty Act and the traditional Acholi ceremonies in place, any reconciliation would be hindered by Uganda's failure to adequately address the interests of LRA victims. While the path to reconciliation in Uganda would be difficult and uncertain, at least the experiences of other African countries like Rwanda, South Africa, and Sierra Leone could offer useful examples upon which Uganda could draw. Rwanda's *gacaca* courts offer guidance as to how Uganda could have combined the use of its traditional conflict resolution mechanism through reconciliation and a search for justice with community participation. Uganda could conceivably promote compensation as well as dialogue through the Acholi traditional mechanisms while at the same time maintaining the integrity of those traditional customs. Alternatively, should Uganda formally establish a truth-telling process, it could look to the Truth and Reconciliation Commission of South African as an example of how another African country promoted dialogue and forgiveness. Although the circumstances of Rwanda's genocide and South Africa's apartheid regime differ greatly from northern Uganda's conflict with the LRA, the innovative legal approaches of Rwanda, South Africa, and Sierra Leone can serve as useful examples and as inspiration for Uganda.

## NOTES

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1. Paper presented by Cecily rose for African Law and Development class and revised with assistance of Professor Francis M. Ssekandi for presentation at IIJD seminar.
2. UN High Commissioner for Human Rights, *Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, UN Doc. E/CN.4/2002/86, 2001, paragraph 12.
3. A. Payam, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", *American Journal of International Law (AJIL)*, vol. 99, n. 2, Washington DC, American Society of International Law (ASIL), April/2005, pp. 403 and 407.
4. M. Thernstrom, "Charlotte, Grace, Janet and Caroline Come Home", *New York Times Magazine*, 8 May 2005, p. 37.
5. A. Payam, *supra* note 3, p. 407.
6. Human Rights First, *Background on the Conflict in Northern Uganda*. The Ugandan government had allegedly supported the Sudan Peoples' Liberation Movement/Army (SPLM/A). Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, vol. 17, n. 12(A), 9 September 2005. The unlikely alliance between the Islamist government of Sudan and the nominally Christian LRA grew out of the Sudanese government's fear that the NRM would threaten its control over the non-Islamic, non-Arab southern part of Sudan. Sudan perceived a link between the NRM and the SPLM/A and consequently supported the remnants of the forces of Idi Amin, General Tito Okello, and Milton Obote. Payam, *supra* note 3, p. 406.
7. Human Rights First, *supra* note 6.
8. Human Rights Watch, *supra* note 6, p. 9. The conflict expanded into "the Lira and Teso sub-region of eastern Uganda, dominated by the Langi and Iteso peoples, respectively".
9. Human Rights First, *supra* note 6; International Center for Transitional Justice, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, July 2005.
10. Human Rights First, *supra* note 6.
11. Human Rights Watch, *supra* note 6, p. 15.
12. International Criminal Court, *Background Information on the Situation in Uganda*, 29 January 2004, available at <[http://www.icc-cpi.int/cases/current\\_situations/Uganda.html](http://www.icc-cpi.int/cases/current_situations/Uganda.html)>, accessed on 27 August 2007. International Center for Transitional Justice, *supra* note 9, p. 14.
13. Ibid.
14. Human Rights First, *supra* note 6.
15. UN High Commissioner for Human Rights, *supra* note 2, paragraph 14.
16. Payam, *supra* note 3, p. 410: "Despite various diplomatic initiatives aimed at improving relations between Uganda and Sudan, the LRA continued to receive support from Sudan and to operate out of bases in the southern part of that country [...]."
17. Statement by Chief Prosecutor Luis Moreno-Ocampo, 14 October 2005, available at <[http://www.icc-cpi.int/library/organs/otp/Uganda-\\_LMO\\_Speech\\_14102005.pdf](http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf)>, accessed on 27 August 2007.

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19. T. McConnell, *Side Talks Could be Key to Northern Uganda Peace Process; Families of LRA Rebels and Traditional Leaders Will Meet This Week Before High-Level Talks Restart Next Week*, The Christian Science Monitor, Boston, 26 July 2006.
20. Idem, *Fresh Hope for Peace in Northern Uganda? Talks Between LRA Rebels and Uganda's Government Could Begin as Early as This Week*, The Christian Science Monitor, Boston, 26 June 2006.
21. H. Cobban, *op. cit.*
22. T. McConnell, *Uganda Sees Local Justice as Key to Peace; Talks Raise Hopes That a Central African Conflict Involving the Lord's Resistance Army is Winding Down*, The Christian Science Monitor, Boston, 8 September 2006.
23. At the end of January 2005, there were 14,695 reporters, according to the Ministry of Internal Affairs. Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long Term Reconciliation*, 7 February 2005.
24. *Ibid.*, p. 6.
25. Amnesty Act 2000, Preamble and International Center for Transitional Justice, *supra* note 9, p. 46.
26. Amnesty Act 2000, art. 2.
27. *Ibid.*, art. 3(1).
28. *Ibid.*, art. 4(1).
29. International Center for Transitional Justice, *supra* note 9, p. 47.
30. International Center for Transitional Justice, *supra* note 9, p. 47 and Amnesty Act 2000, art. 2.
31. Amnesty Act 2000, arts. 7-8.
32. Refugee Law Project, *supra* note 23, p. 7, quoting Amnesty Commission Handbook, Section 3.11.
33. Amnesty Act 2000, art. 9(a), (b).
34. International Center for Transitional Justice, *supra* note 9, p. 47.
35. *Ibid.*
36. Amnesty Act 2000, arts. 11-13.
37. International Crisis Group, Policy Briefing, *Building a Comprehensive Peace Strategy for Northern Uganda*, Africa Briefing, n. 27, 23 June 2005.
38. Human Rights Watch, *supra* note 6, p. 38; Refugee Law Project, *supra* note 23, p. 8.
39. Human Rights Watch, *supra* note 6, p. 38 and International Crisis Group, *supra* note 38, p. 8.
40. International Center for Transitional Justice, *supra* note 8, p. 48.
41. Refugee Law Project, *supra* note 23, p. 16.
42. *Ibid.*

43. Human Rights Watch, *supra* note 6, pp. 38-39.
44. Refugee Law Project, *supra* note 23, pp. 14-15 and p.18.
45. *Ibid.*, p.18.
46. Human Rights Watch, *supra* note 6, p. 39.
47. Amnesty Act 2000, art. 9(c)-(e).
48. International Center for Transitional Justice, *supra* note 9; Barney Afako. Reconciliation and Justice: 'Mato Oput' and the Amnesty Act. In: *Accord - Initiatives to End the Violence in Northern Uganda* Counciliation Resources, 2002, available at: <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>>, access on 29 August 2007.
49. The descriptions of the ceremonies rely on International Center for Transitional Justice, *supra* note 9, unless otherwise noted.
50. For another description of this cleansing ceremony see M. Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, The New York Times, 18 April 2005, A1. Sometimes parents of a returning child follow this cleansing ceremony with a "washing away the tears" ceremony. The parents slaughter a goat and pour water on the roof of the home where the child will live to symbolize washing away the tears shed over the child. Because not many people can afford to slaughter a goat, this ceremony is less common. International Center for Transitional Justice, *supra* note 9.
51. *Accord*, *supra* note 48.
52. In early November 2001, a group *mato oput* ceremony held in Pajule involved about 20 recently returned LRA rebels and many others who had already settled in the community. NGOs, churches and Acholi in the diaspora supported the ceremony. "Government officials, the amnesty commissioners, senior army commanders in the region and several representatives of NGOs attended the function, demonstrating the support of the wider Ugandan community. Another ceremony has taken place in Pabbo, in Gulu district, and others are planned for different parts of Acholi." *Accord*, *supra* note 48.
53. T. Allen, *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention (Draft)*, Crisis States Research Center, London School of Economics, London, February 2005, p.67, available at <<http://www.crisisstates.com/download/others/AllenICCRReport.pdf>>, accessed on 27 August 2007.
54. *Ibid.*, p. 86.
55. T. Allen, however, writes that "most local knowledge of both *mato oput* and 'the bending of the spears' (*gomo tong*) is second hand. Relatively few elders seem to have actually performed the former [...] 'The bending of the spears' has probably only happened once or twice in living memory. Is it appropriate or feasible to rehabilitate or reinvent it?". T. Allen, *op. cit.*
56. International Crisis Group, *supra* note 38, p. 10.
57. International Center for Transitional Justice, *supra* note 9, p. 40; Human Rights Watch, *supra* note 6, p. 56. "The Langi of Lira district and Teso in Soroti district to the south and southeast of Gulu respectively have been greatly affected by the LRA conflict since 2002, as have southern Sudanese, most of whom are non-Acholi." See also, T. Allen, *supra* note 53, p. 86.
58. T. Allen, *supra* note 53, pp. 65-66. Allen found that interviewees would often contradict their initial

statements concerning the need for forgiveness by later expressing “much greater enthusiasm for prosecution and punishment than other researchers have suggested”. His “conclusion was that arguments about Acholi forgiveness need to be closely interrogated, and certainly not taken at face value. In the course of our fieldwork we become concerned that there was too ready an acceptance of the idea that the Acholi people have a special or even unique capacity to forgive those who abuse them”.

59. International Center for Transitional Justice, *supra* note 9.
60. Human Rights Watch, *supra* note 6, p. 40.
61. Thernstrom, *supra* note 4, p. 38.
62. *Ibid.*, p. 36.
63. Human Rights Watch, *supra* note 6, pp. 55-56.
64. T. Allen, *supra* note 53, p. 86.
65. J. Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Antwerpen, Intersentia, 2004, pp. 51-52.
66. *Ibid.*, pp. 58-59 and Lyn S. Graybill, *Truth & Reconciliation in South Africa: Miracle or Model?*, Boulder, Colorado, Lynne Rienner Publishers, 2002, pp.5-6.
67. Republic of South Africa, Promotion of National Unity and Reconciliation Act, no. 34, 26 July 1995.
68. Graybill, *supra* note 66, pp. 81-92.
69. Refugee Law Project, *supra* note 23, p. 25.
70. Sarkin, *supra* note 65.
71. Refugee Law Project, *supra* note 23, p. 27.
72. International Center for Transitional Justice, *supra* note 9, p. 35. “Forty-three percent said that they would speak to anyone about their ordeals. Twenty-six percent specifically named the government, while 9 percent said religious leaders and 6 percent chose traditional leaders”.
73. *Ibid.*: “The three top rationales for remembrance were to honor the victims (44 percent), prevent the violence from happening again (36 percent), and establish a historical record (22 percent)”.
74. Refugee Law Project, *supra* note 23, p. 14.
75. *Ibid.*, p. 26.
76. Graybill, *supra* note 66, pp. 149-150.
77. Sarkin, *supra* note 65, p.101 and pp.104-105.
78. Graybill, *supra* note 66, pp. 151-152.
79. By contrast, Rwanda’s Organic Law of 2004 contains much narrower provisions for compensation. Chapter VII of the Law of 2004 concerns “Compensation for Damaged Property and Other Forms”, rather than simply damages, as in the Law of 2000. Article 95 states that reparations require (1) “restitution of the property looted whenever possible” and (2) “repayment of the ransacked property or carrying out the work worth the property to be repaired”. Under Article 96, “[o]ther forms of compensation the victims receive shall be determined by a particular law”. The 2004 law therefore significantly reduces the scope of damages which victims may receive because the law covers only

property damages, not bodily harm. This paper focuses on the 2000 law because its broader compensation mechanism would address victims' interests more adequately than does the 2004 law.

80. International Crisis Group, *supra* note 38, p. 8.
81. International Center for Transitional Justice, *supra* note 9, p. 36. "Fifty-two percent said victims should be provided with financial compensation. Forty percent mentioned foods, 26 percent wanted education, 26 percent chose counseling, and 17 percent mentioned cattle and goats. Eight percent of the respondents said justice, 9 percent chose apologies, and 6 percent mentioned reconciliation. When asked whether these measures should be done for the individual victim or the community as a whole, the majority (58 percent) of the respondents said that they could be taken in respect of the community as opposed to individual victims." Respondents could state more than one response.
82. International Center for Transitional Justice, *supra* note 9, p. 25.
83. Amnesty Act of 2000, art. 9(e).
84. Alternatively, the Commission could simply provide benefits to certain LRA victims who apply to receive compensation packages. Such benefits could be similar to the resettlement packages given to the reporters.
85. Eugenia Zorbas, "Reconciliation in Post-Genocide Rwanda", *African Journal of Legal Studies*, v. 1, n. 1, Ottawa, 2004, p. 29 and pp.37-38.
86. International Crisis Group, *Understanding and Solving the Conflict*, 14 April 2004, p.23.
87. International Center for Transitional Justice, *Hybrid Courts Case Study: The Special Court for Sierra Leone Under Scrutiny*, 5 March 2006, pp. 10 and 14.
88. Government of Sierra Leone and the United Nations Organization, *Special Court Statute*, Art. 1(1), 1996.
89. International Center for Transitional Justice, *supra* note 87.
90. J. Sarkin, "The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide", *Journal of African Law*, v. 45, issue 2, New York, Cambridge University Press, October 2001, p. 147.
91. Human Rights Watch, *supra* note 6, p. 50.
92. Refugee Law Project, *supra* note 23, p. 12.
93. International Center for Transitional Justice, *supra* note 9, p. 26. The percentages of respondents who opposed accountability for lower ranking members of the LRA varied considerably by district. In Gulu, this number was as high as 72 percent, and in Lira, 62 percent. Conversely, in Soroti and Kitgum, many were also in favor of holding lower-ranking LRA members accountable (61 percent and 41 percent, respectively).
94. The compatibility of the ICC's prosecution with efforts to end the conflict is highly controversial and beyond the scope of this paper.
95. Payam, *supra* note 3, pp. 416 and 418.
96. International Crisis Group, *supra* note 38, p. 9.
97. International Crisis Group, Policy Briefing, Shock Therapy for Northern Uganda's Peace Process, 11 April 2005, p. 5.
98. *Ibid.*, p. 410.



#### RAMONA VIJEYARASA

Ramona Vijayarasa (LL.M '07 NYU, LL.B '05 UNSW, B.A. '05 UNSW) was a NYU Human Rights and International Law Fellow at The Center for Transitional Justice. An Australian lawyer, Ramona has extensive experience in the field of international human rights, including at the Coalition Against Trafficking in Women in Manila, The Philippines, and the Center for Reproductive Rights in New York.

Address: The Center for Reproductive Rights, 120 Wall St., New York, NY 10005, US

Email: [rvijayarasa@reprorights.org](mailto:rvijayarasa@reprorights.org)

#### ABSTRACT

The Tasmanian State Government and the Australian Federal Senate have taken recent steps towards setting up a Reparations Tribunal for Aboriginal and Torres Strait Islander (ATSI) people who were separated from their families and communities under State-based forced removal policies of the 20th Century. This paper proposes a Truth and Reconciliation Commission drawing on international lessons.

#### RESUMO

O governo do Estado da Tasmânia e o Senado Federal da Austrália tomaram medidas recentes no sentido de criar um Tribunal de Reparações para os povos Aborígenes e Insulares do Estreito de Torres (ATSI). Os ATSI foram separados de suas famílias e comunidades por políticas estatais de remoção forçada do século 20. Este trabalho propõe uma Comissão de Verdade e Reconciliação que incorpore lições internacionais.

#### RESUMEN

El Gobierno del Estado de Tasmania y el Senado Federal Australiano están avanzando en la creación de un Tribunal de Reparaciones para los Aborígenes e Isleños del Estrecho de Torres (AIET). Los AIET fueron separados de sus familias y comunidades bajo políticas estatales de separación forzada durante el siglo 20. Este artículo propone la creación de una Comisión de Verdad y Reconciliación que incorpore lecciones internacionales.

Original in English.

#### KEYWORDS

Reparations – Indigenous – Truth-telling – Reconciliation



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# FACING AUSTRALIA'S HISTORY: TRUTH AND RECONCILIATION FOR THE STOLEN GENERATIONS

Ramona Vijeyarasa

## Introduction

From 1910 to the early 1980s, somewhere between one in three and one in ten Aboriginal and Torres Strait Islander (ATSI)<sup>1</sup> children in Australia were removed from their families.<sup>2</sup> Legislation was passed in the early years of the twentieth-century which gave Aboriginal protectors guardianship rights over ATSI people up to the age of sixteen or twenty-one, in all states of Australia and the Northern Territory, with the exception of Tasmania, where Aboriginal children were removed under general welfare legislation.<sup>3</sup> Subsequently, police officers or other agents of the State began to locate and transfer babies and children of pure-blood or mixed descent, from their mothers, families or communities into government or missionary institutions.

The Australian Federal (then Labor) Government instituted a National Inquiry in 1995 into the Stolen Generations through the Human Rights and Equal Opportunity Commission (HREOC), as pressure swelled from various avenues through the late 1980s and early 1990s. The Federal Government issued its Terms of Reference for the National Inquiry to HREOC on 11 May 1995. The Inquiry was initially aimed at determining how many children were taken away and how this occurred, hearing from ATSI people about how they had been affected and what must be done to compensate and finally, considering whether the policies of removal fell within the definition of genocide in Article II(e) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>4</sup> This was later replaced by four goals: tracing the past

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*Notes to this text start on page 144 .*

laws, practices and policies which resulted in the Stolen Generations; examining the adequacy of and the need for any changes in laws, practices and policies relating to services and procedures *currently* available to those ATSI persons affected by the Stolen Generations; examining the principles relevant to determining the justification for compensation for persons or communities affected by separation; and examining current laws, practices and policies with respect to the placement and care of ATSI children, taking into account the principle of self-determination.<sup>5</sup>

The achievement of reconciliation required the detailed and extensive implementation of the recommendations outlined in the resulting 1997 report *Bringing them home*,<sup>6</sup> of which sixty thousand copies were sold in the first year of its release.<sup>7</sup> Yet, the response of the Australian Federal Government (now Liberal Coalition, which has been re-elected twice since the 1996 National Inquiry, most recently in 2004) announced on 16 December 1997 fell far short of the reparations goals outlined in the van Boven principles.<sup>8</sup> Van Boven found that under international law, the violation of any human right gives rise to a right to reparations for the victim and that particular attention must be paid to gross violations of human rights, which includes genocide, systematic discrimination and the forcible transfer of populations.<sup>9</sup>

The National Inquiry has been described as an example of a “historical truth commission” involving an historical inquiry into past government practices.<sup>10</sup> Yet, the ongoing continual removal of ATSI children to date,<sup>11</sup> and the failure of the Australian Government to recognize the correlation between the sexual abuse experienced by members of the Stolen Generations and present-day sexual abuse that is rife in many indigenous communities, highlights the need for a Truth and Reconciliation Commission that acknowledges both past and present patterns of abuse.<sup>12</sup> The Australian Government, which has thus far refused to publicly apologize to the members of the Stolen Generations, has rejected the proposal for a Reparations Tribunal. Instead, it has left incremental efforts by the Tasmanian State Government in 2006 and the Australian Democrats in the Federal Senate in March 2007 to establish either a state-based or a national compensation program, a cursory paper-based solution with monetary compensation awarded for claims assessed by a Stolen Generations Assessor.

Despite the National Inquiry giving the ATSI people a voice, and *Bringing them home* creating the path for reconciliation, the opportunity was wasted. Ten years on, the Australian nation has still not moved forward and beyond its history of genocide and exploitation. This paper proposes, as the best model to address the historical wrongs perpetrated against members of the Stolen Generations, a Truth and Reconciliation Commission, with an attached Reparations Program. The Truth and Reconciliation Commission will build upon the work of past and

existing inquiries, including *Bringing them home*, whilst incorporating into its mandate a requirement to report on the implementation of recommendations at regular intervals after the completion of hearings. At the same time, the proposed Truth and Reconciliation Commission will incorporate culturally appropriate mechanisms to allow truth-telling and healing for ATSI victims, including special recognition of the difficulties for mothers and stolen children who were the victims of sexual abuse to tell of their suffering in the environments previously offered by the National Inquiry.

Today, a Truth and Reconciliation Commission will help facilitate this healing through truth-telling as well as enhanced public awareness of the experiences and consequences of “forced” removal. Therapeutic for both the Australian nation as well as individual victims, conducting hearings in each State or Territory, in a localised setting, with indigenous and non-indigenous Commissioners, will also require the involvement, and acceptance of responsibility by each state government. This process will also best facilitate recognition of the heterogeneity of each ATSI person’s experiences, the different ATSI clans living in the different states of Australia and the numerous languages spoken by former or present inhabitants of a particular state.

The success of such a decentralised model sitting under the umbrella of the Federal Government is premised on an apology being made by the Australian Federal Government towards all of those persons affected by the forcible removal policies of the 20<sup>th</sup> Century. The involvement of State Governments is additionally essential given their fundamental relationship to service delivery, carrying the prime responsibility for education, health services as well as law and order today.

The likelihood of success of this model can be assessed in accordance with the progress of the truth-seeking process presently being undertaken by the Canadian Government. In Canada, a package has been designed for the survivors of the Indian Residential Schools (IRS) to address the injustices of the policy of assimilation, forcible removal and cultural dilution, enforced by the Canadian Government, Anglican, United Presbyterian and Catholic Churches, for more than 100 years, most extensively from the 1920s to 1960s, during which time widespread sexual abuse occurred.<sup>13</sup> Whilst this proposed model to address the harms suffered by ATSI persons differs from the Canadian Truth and Reconciliation Commission, the similarities of the experiences of indigenous Australians and Canadians provide Australia with a valuable learning opportunity. *Bringing them home* raised the issue of responsibility, which has since largely been neglected. A Truth and Reconciliation Commission as proposed in this paper will once again provide an opportunity for developing a collective memory and shared national history, and create the renewed vigour for the full achievement of reparations and the principles of reconciliation.

## The national inquiry and its limited outcomes

### *The extent of forced removal*

It is questionable how many non-Aboriginal Australians either did not know or were dimly aware that for a period of nearly seventy years, Australian State Governments were involved in a process of ATSI child removal. Children were removed for a number of reasons, the dominant being the view that the full-blood tribal Aborigine represented a dying race and that ATSI people were a lesser culture, believed not to be able to survive contact with higher civilisations.<sup>14</sup> There was also an emergence of mixed descent children. These children were born to ATSI mothers after sexual encounters-sometimes fleeting, sometimes exploitative, occasionally more permanent or even matrimonial-with European and sometimes Chinese or Pacific Islander males. 'Half-caste institutions', government or missionary, were established in the early decades of the twentieth-century for the reception of these children.

With increasing pressure placed on the Australian Government to address this untold story, a National Inquiry was the preferred option because it was evident that, three years into the Royal Commission into Aboriginal Deaths in Custody, a Royal Commission was not a suitable form of inquiry. It was far too formal and did not permit significant participation by ATSI people. The National Inquiry held hearings in every capital city and several regional centres between December 1995 and October 1996 and received 777 submissions, including 535 from Indigenous persons and organizations, 49 from church organizations and seven from governments.<sup>15</sup>

Australia-wide, it is difficult to estimate the number of ATSI children who were removed. Peter Read, co-founder of Link-Up (NSW), estimates that around 50,000 were removed. In NSW, for example, he estimates that the total number removed between 1921 and 1985 is close to 10,000.<sup>16</sup> Surprisingly, he believes that there are approximately 100,000 people:

[...]who do not identify as Aborigines but who are entitled to do so because their parent or grandparent had been removed.<sup>17</sup>

The Australian Bureau of Statistics conducted a survey in 1993, involving interviews with 15,700 ATSI people. It found that 5.7% of those interviewed reported having been taken away from their natural family by a mission, the government or "welfare". Applying these results with the 1991 Population Census data, out of a total ATSI population of 303,000 in 1991, these statistics indicate that approximately 17,000 had been removed from their families up until 1994.<sup>18</sup> Whilst this is likely to be an under-estimation of the total number of removed persons, particularly when set against Read's estimate, it is a figure that might more realistically be accepted by the Australian Government when

establishing a Truth and Reconciliation Commission and moreover, funding a Reparations Program. It is hoped that a truth and reconciliation process will allow the stories of a broader depth of ATSI people to be told, reaching different language groups and ATSI people who have lost touch with or are otherwise unaware of their aboriginality. This will facilitate a more realistic account of the numbers of removed children.

### *Implementing the recommendations of Bringing them home*

The legally significant consequences of forcible removal were that ATSI were denied the common law rights which other Australians enjoyed, suffered violations of their human rights and were often subjected to other forms of victimisation and discrimination.<sup>19</sup> *Bringing them home* made 54 recommendations to address these violations. The recommendations covered all the components of reparations: acknowledgement of truth and an apology; guarantees of non-repetition of violations; rehabilitation; compensation and restitution.

A cursory review of the Australian Government's response is impressive, yet clearly reveals a failure to understand the importance of truth-telling and the centrality of an apology to the healing of ATSI people. The Australian Government outlined a plan to provide \$63 million over four years, primarily aimed at addressing "family separation and its consequences".

Most significantly, the awarding of monetary compensation for those removed and/or those affected by the removals received opposition within the Australia Government itself. In its submission to the National Inquiry, the Australia Government raised as a concern the difficulty in estimating the monetary value of losses, on the grounds that "[t]here is no comparable area of awards of compensation and no basis for arguing a quantum of damages from first principles",<sup>20</sup> a position that will not be tenable as the Canadian Truth and Reconciliation Commission begins its work.

*Bringing them home* recommended that all Australian Parliaments, State and Territory police forces, churches and other relevant non-government agencies, "acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal" and "apologise for the wrong committed".<sup>21</sup> A Government apology is necessary for a sense of acknowledgment and to create a collective memory and social solidarity.<sup>22</sup> Yet, the Australia Government has lagged behind state and territory governments in providing a formal apology to ATSI people. Instead, The Sorry Day Committee launched the first National "Sorry Day" independently of the Government on May 26, 1998. The National Sorry Day was designed as a "day when all Australians could [can] express their sorrow for the whole tragic episode, and celebrate the beginning of a new understanding"<sup>23</sup> with "Sorry Books" receiving hundreds of thousands of signatures and Bridge

Walks occurring in every major city in Australia in a gesture towards healing.<sup>24</sup> It was not until 26 August 1999 that the current Prime Minister, John Howard, proposed a Motion of Reconciliation to Parliament, offering a statement of regret but not sorry to Aboriginal people in an attempt to reaffirm the Australian Government's so-called commitment to reconciliation between Aboriginal and non-Aboriginal Australians.<sup>25</sup>

*Bringing them home* specified that reparations include rehabilitation measures, such as “legal, medical, psychological and other care services”.<sup>26</sup> These measures require culturally appropriate delivery of services. Yet, ATSI children continue to be severely over-represented within State and Territory welfare systems which continue to discriminate against ATSI children and their families through the application of Anglo-Australian perspectives. These values reject as non-beneficial ATSI values, culture and child-rearing practices. *Bringing them home* noted that welfare agencies continue to fail to consult with ATSI families and communities and their organizations.<sup>27</sup> Though the report recommended the establishment of minimum standards for the treatment of ATSI children, including the Indigenous Child Placement Principles which requires that ATSI children in out-of-home care be placed with ATSI carers,<sup>28</sup> the Australia Government ignored the *Bringing them home* recommendation for national standards for ATSI child removal. It resolved to leave the matter to the state governments.<sup>29</sup>

## Establishing a truth and reconciliation commission and reparations program

### *The shortfalls of Bringing them home*

An ongoing flaw in the methods of compensation implemented to date relates to the approach of the National Inquiry. All fact-finding and truth-telling missions have been premised on a homogenous ATSI community. Services based upon the recognition of a divergence of ATSI cultures are often seen as “unnecessary duplication”. It is this misconception that underlies the struggle of the Stolen Generations for access to many services such as archives and counselling. Furthermore, the National Inquiry did not recognize that the needs of the Stolen Generations differ from those of other ATSI non-removed people.<sup>30</sup>

A further limitation of the *Bringing them home* was highlighted in the submission of Link-up (NSW).<sup>31</sup> No mechanisms were incorporated into the National Inquiry to account for the extreme levels of trauma and the guilt felt by parents unable to tell their stories. Link-up (NSW) reported:

*In preparing this submission we found that Aboriginal women were unwilling and unable to speak about the immense pain, grief and anguish that losing their children*

*had caused them. That pain was so strong that we were unable to find a mother who had healed enough to be able to speak, and to share her experience with us and with the Commission [...].*<sup>32</sup>

In addition to these “silenced” mothers, *Bringing them home* reports that children, especially girls, were vulnerable to sexual abuse. Based on testimony of witnesses before HREOC, almost one in ten boys and just over one in ten girls alleged they were sexually abused in a children’s institution, one in ten boys and three in ten girls alleged they were sexually abused in a foster placement or placements and one in ten girls alleged they were sexually abused in a work placement organization by the Protection Board or institution.<sup>33</sup> On this basis alone, it is an obvious concern that victims of sexual abuse can easily become “silenced” victims in a National Inquiry process if special mechanisms are not implemented to create an environment in which these victims are able to tell their story.

A Truth and Reconciliation Commission provides an opportunity to accommodate these “silenced” interest groups.<sup>34</sup> Vasuki Nesiah discusses the treatment of gender crimes by truth and reconciliation commissions in a paper titled, “Gender and Truth Commission Mandates”.<sup>35</sup> Nesiah highlights that truth commissions have been valuable in identifying sexual violence against women, as well as men. When testifying before the Peruvian Truth and Reconciliation Commission, there are a number of reasons why many female victims downplayed their suffering, including shame and fear of social condemnation. Rather, women vocalized suffering as the wives, mothers, daughters and sisters of predominantly male victims.<sup>36</sup> To encourage women to participate, the Peruvian Truth and Reconciliation Commission developed a series of training documents that included communication strategies on how to conduct investigations in the country’s rural areas and providing guidelines for interviewers, an aspect that would be a valuable contribution to culturally sensitive investigations amongst indigenous populations and in particular, with women unable to tell the stories of their stolen children. The Truth and Reconciliation Commission of South Africa organized several special hearings focused on women, with a female-only panel of commissioners, and in one case, “allowing a deponent to give testimony from behind a screen, in confidence and out of view of the glaring television cameras”.<sup>37</sup>

A further example is the terms of reference of the Haitian Truth Commission which directed it to pay particular attention to “crimes of a sexual nature against female victims that were committed with political ends”.<sup>38</sup> This resulted in focused attention to the subject throughout its work and a subchapter of its report dedicated to sexual crimes. Hayner notes this approach, “of focusing attention to the matter in the mandate, should be seriously considered elsewhere”.<sup>39</sup> It is an ideal way to address both silenced and traumatised mothers and removed children

who are the victims of sexual abuse in the hearings of the Truth and Reconciliation Commission and its resulting report and recommendations.

A further issue is the unimplemented recommendations, which stemmed from a lack of ongoing reporting requirements in HREOC's initial National Inquiry mandate. On 24 November 1999, the Federal Senate requested the Senate Committee to conduct an inquiry into the Australian Government's implementation of the recommendations from the National Inquiry.<sup>40</sup> Tabled in November 2000, the Senate Committee Majority Report: *Healing: A Legacy of Generations*, made ten recommendations, largely in relation to the issue of reporting and monitoring the responses to *Bringing them home*<sup>41</sup> and the establishment of a Reparations Tribunal.<sup>42</sup> In June 2001, when the Australian Federal Government tabled its response to the Senate Committee's recommendations, it once again rejected the notion of a Reparations Tribunal and chose instead to allocate additional funding beyond 30 June 2002 for key family reunion and health services at a cost of \$52.9 million over four years to 30 June 2006.<sup>43</sup> Relying on the Dissenting Report of the Government Senators on the Senate Committee, the Australian Federal Government response indicates a lack of understanding of the functioning and benefits of a truth and reconciliation commission:

*The government considers that establishing a tribunal with the comprehensive jurisdiction and extensive powers suggested would neither guarantee a less stressful consideration of matters nor less expense for either party than court proceedings. The same complex and costly legal and factual issues would need to be addressed in order to assess individual claims and such decisions would still be open to further judicial review. The experience of other administrative tribunals, including in the field of immigration and refugees, illustrates that it is not possible to insulate such deliberations from legal challenges and procedures [...].<sup>44</sup>*

### ***Problems with proposed Reparations Tribunals and compensation packages***

Numerous parties have recommended different forms of reparations programs, yet all of these recommendations can be critiqued on some level. Recommendations for a Reparations Tribunal have been made, though with significant limitations, by the Public Interest Advocacy Centre of NSW, an independent and non-profit legal and policy centre located in Sydney, Australia (PIAC) which was later endorsed by the Senate Legal and Constitutional References Committee (Senate Committee). Efforts have also been made by the Tasmanian State Government in the form of the Stolen Generations of Aboriginal Children Act 2006 (Tasmanian Act) to provide compensation for

Tasmanian members of the Stolen Generations. The Tasmanian Act was a catalyst for the Stolen Generations Compensation Bill (Compensation Bill), tabled before the Federal Senate, to provide for a national Stolen Generations compensation program.

These programs provide for monetary compensation. However, without multiple efforts towards reconciliation, these programs fail to fulfil the requirements of the van Boven principles. This should include guarantees of non-repetition including cessation and prevention of continuing violations. This is particularly important in light of the continually over-representation of ATSI children among children temporarily or permanently separated from their families or communities.<sup>45</sup> A further very applicable principle is public disclosure of the truth in terms of historical records of individual and group experiences and an official public apology by the Australian Federal Government. These are all essential factors in the “healing” of the Stolen Generations and act as a starting point for addressing some of the ongoing generational consequences of forced removal policies.<sup>46</sup>

In PIAC’s view, reparations should be provided to people affected by forcible removal under the heads of damage proposed in *Bringing them home*: racial discrimination; arbitrary deprivation of liberty; pain and suffering; abuse, including physical, sexual and emotional abuse; disruption of family life; loss of cultural rights and fulfilment; loss of native title rights; labour exploitation; economic loss; and loss of opportunities.<sup>47</sup> PIAC also recommended monetary compensation to all those persons affected by forcible removal, including to those family members, community members and descendants of a person who were forcibly removed, if they can demonstrate a particular harm.<sup>48</sup>

Yet, PIAC’s model remains heavily adversarial and is not sufficiently different from often unsuccessful attempts at litigation. The recent award of \$A500,000 by Justice Gray of the Supreme Court of South Australia on 1 August 2007 to Mr Bruce Trevor for unlawful removal almost 50 years ago from the Adelaide Children’s Hospital, whilst a watershed decision, does not indicate a lowering of standards of proof for future claims adjudicated through the traditional legal system.<sup>49</sup> A member of his legal team noted the “unusual” volume of evidence in this case, including letters exchanged between the victim’s mother and the Aboriginal Control Board.<sup>50</sup> Therefore, despite the recent precedent of the Trevor decision, there remain other obstacles, including difficulties in locating evidence, particularly when governments were lax in recording matters involving ATSI people, the emotional and psychological trauma experienced by claimants in the hostile environment of an adversarial court system, the length of time involved before the outcome of litigation is finalised and the problem of establishing specific liability for harms that have been caused and overcoming the judicial view that ‘standards of the time’ justified removal in the “best interests

of the child". Moreover, the significant size of the award recognises the seriousness of the harm and suffering caused by forced removal policies and the need for renewed widespread efforts to ensure compensation for all affected.

PIAC's proposed model provides for the Australian Federal Government to answer to (effectively defend) claims against it if it can demonstrate that the removal was in the best interests of the child.<sup>51</sup> PIAC's proposed Reparations Tribunal provides that claimants must show sufficient evidence that they were affected by forcible removal and of the particular harm suffered.<sup>52</sup> This onus of proof fails to recognize that the purpose of taking cooperative steps towards reconciliation recognizes that the policy of forcible removal had, at the very least, partly racist origins and ongoing harmful effects for those involved and their descendants. This onus of proof burdens victims with the challenge of evidence.

Further, a Reparations Tribunal based on proof of evidence of harm suffered, which requires locatable evidence, is not an ideal forum for healing but rather interrogatory. The monetary compensation awarded is linked to common law damages principles which leads to potential incoherence in the compensation awarded, given that the model recommends a minimum lump sum payment, as well as monetary compensation where it can be shown that a person additionally suffered "a particular type of harm or loss" resulting from forcible removal.<sup>53</sup> It also allows appeals from the Reparations Tribunal to the Federal Court on questions of law, resulting in a Reparations Tribunal closely linked, if not situated within, an adversarial litigious system. Rather than providing a system which recognizes the widespread and general harms suffered by the Stolen Generations that a Truth and Reconciliation Commission would facilitate, PIAC's Reparations Tribunal would involve legal representation, legal procedures and rules (albeit relaxed) and hearings or applications on papers that do not facilitate the truth-telling, extensive historical record-keeping and public participation that a Truth and Reconciliation model would encompass. It ignores the opportunity for a hearing in a sympathetic setting, which would provide victims validation through an official acknowledge.<sup>54</sup>

Recent state and federal legislative efforts towards reparations have also failed to completely address the situation. The most robust efforts towards reconciliation by any state government were made by the Tasmania Government in 2006, following an election commitment to compensate ATSI Tasmanians who were removed from their families, a commitment which led to the passing of the Stolen Generations of Aboriginal Children Act 2006 (TAS) on 28 November 2006 (Tasmanian Act). The Tasmanian Act sets up a \$5 million compensation fund and provides for a one-off cash payment to children who were taken from their families between 1910 and 1975 and remained removed from his or her parents for a period of five months or more.<sup>55</sup> Approximately 124 Aboriginal people are expected to qualify for the Tasmanian compensation payment.<sup>56</sup> The package

includes compensation payments of up to \$5,000 for descendants of *deceased* members of the Stolen Generations<sup>57</sup> (capped at \$20,000 per family).<sup>58</sup> The remainder of the funding will be divided between living members of the Stolen Generations.<sup>59</sup> Applications for payment, which were reviewed by the Stolen Generations Assessor,<sup>60</sup> were accepted for a period of six months from 15 January 2007 to 15 July 2007, with decisions on all applications to be determined by January 15, 2008.<sup>61</sup> The Tasmanian Act specifically provides that an ex gratia payment made pursuant to the Tasmanian Act does not render the State of Tasmania liable for the admission of children as wards of the State or removal from their families.<sup>62</sup>

It is unfortunate that there was no scope for public hearings at a localised level.<sup>63</sup> What has been described as the “historicizing of the victim/survivor” is limited in this process.<sup>64</sup> Testimony, narration and storytelling can be key to situating victims in a specific historical context and reconstructing their identities and roles in that context,<sup>65</sup> particularly in light of the importance of story telling to many ATSI cultures. Instead, the Tasmanian Act provides that a Stolen Generations Assessor will prepare a report for the Minister for Community Development within 30 days of the last assessment made,<sup>66</sup> tabled before each House of Parliament.<sup>67</sup>

The willingness of the Tasmanian State Government to pass the Tasmanian Act must be considered in light of the fact that Tasmania has the smallest ATSI population, outside of the Australian Capital Territory. In 2001, the majority of ATSI people live in New South Wales (29% of the ATSI population) and Queensland (27%), Western Australia (14%) and the Northern Territory (12%).<sup>68</sup> ATSI people comprise about 30% of the Northern Territory population but less than 4% in all other State/Territory populations, including in Tasmania.<sup>69</sup>

Despite its limitations, the Tasmanian Act has been a major catalyst for Federal Government legislation: The Stolen Generation Compensation Bill 2007, tabled by Andrew Bartlett, Queensland Democrat Senator and spokesperson on Indigenous Affairs, at the end of March 2007. Modelled predominantly on the Tasmanian Act, the Exposure Draft of the Democrats Stolen Generation Compensation Bill (Compensation Bill) seeks to implement a federal reparations process for victims of the Stolen Generations and has called for feedback and comment from the wider community about how best to address the unimplemented recommendations from *Bringing them home*.<sup>70</sup> In the event that the Tasmanian Act acts as an impetus for other States to pass similar legislation, the Compensation Bill is intended to give coverage to those applicants in a State or Territory where there is no legislation. If legislation were later enacted, the applicant would be required to choose whether to claim under State or Federal law, and not both.

What is most problematic about the Tasmanian Act and Compensations Bill is that neither provides a forum for public hearings and discussion regarding the experiences of members of the Stolen Generation. Rather, both involve a speedy process, completed within one year, reducing the time-period for awareness raising and education.

*A national approach to truth and reconciliation  
with localised hearings*

A national approach to setting up a Truth and Reconciliation Commission, to operate at a decentralized community-based level, is preferable to a system of state-by-state compensation, with the gaps filled by a federal statute. The national umbrella will help ensure a coherent approach to decisions made regarding in what circumstances and for which affected individuals compensation will be given under the Reparations Program. At the same time, hearings at a community level facilitate proper recognition of the experiences of heterogeneous indigenous groups.

Truth and Reconciliation Commissions should be established in each state or territory in Australia and should simultaneously accept the applications and hear the stories of ATSI people who qualify as members of the Stolen Generations. Each local Commission would include members of indigenous and non-indigenous communities and include the participation of tribal elders to give the process credibility amongst ATSI people. Localised Truth and Reconciliation Commissions also increase the potential for creating public awareness amongst non-indigenous people in each state or territory.

Most significantly, localised Truth and Reconciliation Commissions will help to address the problem that the ATSI community has thus far been treated as homogenous. The approach of the Tasmanian Act and Compensation Bill homogenises the ATSI population in two ways, only one of which is distinctly problematic. First, it homogenises the harm suffered, considered by some as problematic in terms of restoring a victim's dignity,<sup>71</sup> yet in the author's view, to ensure a coherent system of reparations, is unavoidable.

Second, however, the approach of the Tasmanian Act and Compensation Bill homogenises the ATSI population as a mass whose heterogeneity is irrelevant.<sup>72</sup> This is particularly problematic given the composition of the ATSI population:

*The population of Australia's Aboriginal and Torres Strait Islander communities is extremely diverse in its culture with many different languages spoken. Think of the Kimberly region of Western Australia[...] if you travel through the Kimberly with its large Aboriginal population and the diversity of people within this region, it's just like travelling through Europe with its changing cultures and languages.<sup>73</sup>*

### *A forum to voice grievances*

A Truth and Reconciliation Commission allows a much-needed move away from an adversarial approach. Litigation in the adversarial court system “is not a culturally appropriate or effective remedy for the situation confronting the stolen generations, their families and communities”.<sup>74</sup> The Tasmanian Act and Compensation Bill both reflect an adversarial, tort-based approach. They require a system of justice to award damages to each individual, on the basis of the evidence supplied by the victim as to the magnitude of the harm suffered, assessed under standard procedural and substantive rules.<sup>75</sup>

Rather, a Truth and Reconciliation Commission has the advantage of providing indigenous persons affected by forcible removal with a forum in which their grievances can be heard and allows those individuals to receive public acknowledgement of the harm suffered. It also allows those affected by forcible removal a role in shaping the Reparations Programs. Participation is essential for reparations to be appropriate and effective. The Sixth Social Justice Report produced by HREOC states:

*The Indigenous perception of the inadequacy of government responses to recommendations on these matters is met, not merely with disappointment and a sense of exclusion from government processes, it confirms an expectation that this would be so. There is a strain of Indigenous response which reveals the cumulative effect of paternalistic policies and the lack of participation in government processes: of constantly being the subject of other people’s decisions about what is best for you, what you deserve, what you are entitled to.*<sup>76</sup>

The Canadian IRS Settlement Agreement most aptly addresses the issue of localised indigenous involvement by establishing an Indian Residential School Survivor Committee, composed of 10 representatives drawn from various Aboriginal organizations and survivor groups, designed to advise Truth and Reconciliation Commissioners on community issues, including criteria for community and national processes.<sup>77</sup> However, whilst Canada’s IRS Settlement Agreement provides for Regional Liaisons,<sup>78</sup> neither the Regional Liaisons nor National Commissioners will conduct formal hearings.<sup>79</sup> In outlining this ATSI Truth and Reconciliation Commission Model, the author believes that public hearings provide the best solution for healing and acknowledgement for individuals, families and their communities. Public hearings, however, would not be compulsory. Either closed hearings would be conducted or victims would be able to submit electronic or paper statements, particularly in cases of physical and sexual abuse.

The absence of individual storytelling under the Tasmanian Act and Compensation Bill is key. Holocaust survivor Dory Laub has written about the

process of telling and listening as an essential first step towards healing.<sup>80</sup> Laub describes story-telling as a two-step process: the telling itself, which breaks previous frameworks of knowing and secondly, what happens beyond words, which allows emotional healing, the key to rediscovery of a lost identity.<sup>81</sup> Since the tabling of *Bringing them home*, hundreds of indigenous life narratives have been published as well as films. For example, Philip Noyce's awarded-winning film, *Rabbit-Proof Fence*, based on the auto/biographical narrative of Doris Pilkington Garimara, tells the story of three removed children who experience a 1,600 kilometre journey in an attempt to return to their community rather than remain at the Moore River Mission in Western Australia.<sup>82</sup>

The greatest role a Truth and Reconciliation Commission can play is allowing different ATSI peoples' stories to be heard and acknowledged, giving recognition to the different stories that need to be told. For example, when Lowitja O'Donoghue in an interview related that she was not "stolen" but "removed" as her mother had agreed to her separation believing it in the best interest of her daughter, the media exploited the remarks and cast doubt on the harm suffered and reparations needed for members of the Stolen Generations.<sup>83</sup> Similarly, Nancy Barnes in *Munyi's Daughter* wanted to tell a different story, one that highlighted triumph over adversity and the successful journey of a member of the Stolen Generations into relationships and employment, and yet found no audience, in her own community or others.<sup>84</sup> A Truth and Reconciliation Commission would provide an audience for a heterogeneous recount of history.

### *Determining the scope of those entitled to a hearing before the Truth and Reconciliation Commission and compensation*

A significant issue to determine is how to address the harms suffered by the descendants of victims. Both the Tasmanian Act and Compensation Bill recognize compensation for the living biological child of a deceased person who would otherwise qualify for compensation but not descendants of a person who was directly removed, if the removed "child" is still living.<sup>85</sup> A recent study by the MCATSIA in June 2006 compares the relative socio-economic and health positions of those ATSI people who were removed (directly) and those not removed. The study combines the framework used by the National Aboriginal and Torres Strait Islander Social Survey 2002 (NATSISS), which surveyed 9,400 ATSI people and the National Aboriginal and Torres Strait Islander Health Survey 2004-2005 (NATSIHS), which surveyed 10,400 ATSI people. The surveyors recognized the limits in their methodology, and the resulting degree of uncertainty.<sup>86</sup> The NATSISS and NATSIHS data was used to draw conclusions regarding such indicators as the rates of disability, post-secondary education participation and attainment, labour force participation, victim rates for crime

and imprisonment and juvenile detention rates.<sup>87</sup> The results showed that the removed population had worse outcomes than for the non-removed population.<sup>88</sup> Disadvantage for removed populations was not concentrated in any particular area, but rather covered a broad spectrum of indicators.<sup>89</sup> For example, removed populations had lower rates of completion of year 10-12 school (28.5 per cent compared to 38.5 per cent), lower rates of living in owner occupied housing (16.9 per cent compared to 28.3 per cent); higher rates of being arrested more than once in a five year period (14.6 per cent compared to 8.8 per cent) and lower rates of full-time employment (17.8 per cent compared to 24.8 per cent).<sup>90</sup>

The evident disadvantage is illustrative of the ongoing effects of forced removal policies, both on those persons directly removed as well as their descendants. Indigenous Australians are 45 times more likely to be a victim of domestic violence than other Australians, 8.1 times more likely to be homicide victims and 16.6 per cent more likely to commit homicide than the non-indigenous population.<sup>91</sup> According to Reconciliation Australia, ATSI people experience higher rates of self-injury, suicide and incarceration-15 times the rate of other Australians.<sup>92</sup> Alarming, the Australian National Audit Office reports that the mortality rate of ATSI people is twice as high as the Maori, 2.3 times the rate of indigenous people in the United States, and 3.1 times the total Australian rate.<sup>93</sup>

Whilst monetary compensation will be difficult, if not impossible to award to descendants, particularly in terms of maintaining coherence within the compensation program, it is also questionable the extent to which such compensation will adequately address the present inequity experienced by ATSI descendants. However, this is further impetus for a Truth and Reconciliation Commission which can play a role in restoring the dignity of all members of the ATSI community. All descendants of the Stolen Generations would have an opportunity to tell of their experience with the ongoing effects of forced removal before a Truth and Reconciliation Commission, which is likely to impact both future government policy and public perception.

### *The awarding of reparations*

It is essential to overcome the Australian Government's reluctance to award compensation. It is firstly importance to accept that under a Reparations Program, victims are likely to receive far less compensation than through successful litigation. For claims pursued through the Victims Compensation Tribunal, claimants may receive \$50,000 for the harm occasioned by one act of violence.<sup>94</sup> In civil courts, PIAC suggests that successful claimants "would receive substantially more" considering the harm identified in *Bringing them home*.<sup>95</sup> PIAC also identifies the recommendation of the Reparations and Rehabilitation Committee in South Africa, which provided that victims receive a sum equivalent to the median annual

household income per annum for six years, as a guide.<sup>96</sup> However, PIAC fails to note that, in practice, very few South African victims identified by the Committee have in fact received the recommended compensation. Reparations in South Africa have been highly controversial, with a failure by civil society to pursue and monitor the implementation of the South African Truth and Reconciliation Commission's reparations recommendations.<sup>97</sup>

The Canadian IRS Settlement Agreement has set aside \$60 million for a range of truth and reconciliation measures.<sup>98</sup> Similarly, the amounts of monetary compensation allocated in the Tasmanian Act and Compensation Bill are realistic, within the bounds of state and national budgets. Whilst the compensation falls far short of what may be received through judicial means *if* the victim was to succeed, Pablo de Greiff uses the example of Peru which valuably illustrates the difficulties of parallel systems of "judicial" and "political" reparations.<sup>99</sup> The Peruvian Truth and Reconciliation Commission discussed its reparations recommendations, whilst simultaneously the Inter-American Commission and the Court decided cases of torture and disappearances, awarding between \$100,000 to \$200,000 per victim. This raised expectations of an impossible outcome for persons before the Truth and Reconciliation Commission. If each family of the more than 69,000 victims of death were awarded \$150,000, the total cost would be more than the entire national yearly budget of Peru.<sup>100</sup>

De Greiff also notes that the mere disparity in the award made by courts compared to those distributed under mass reparations programs does not illustrate a lack of fairness in reparations programs. Rather, reparations programs provide other benefits by obviating the problems with litigation, such as long delays, high costs, having to gather evidence that will be closely scrutinised, emotional pain suffered through cross-examination and the real risk of an adverse decision.<sup>101</sup>

## Conclusion

There has been a multitude of litigious attempts to seek redress for the Stolen Generations. Such litigation may force the Australian Government and possibly other private parties involved in the forcible removal, such as church-run schools, to recognize breaches of the law and provide compensation for the harm suffered as a result:

*Ultimately, governments will be forced to address the issue of liability for forcible removal. Better that it be in an equitable, efficient and constructive manner, than one that is inequitable, inefficient and adversarial.*<sup>102</sup>

In response to the law-suits filed against the Canadian government by between 5000 and 8000 former residential school students, which the government initially

fought, the Canadian government began entering into settlement negotiations. In 1997-98, the Canadian government settled 220 claims out-of-court, paying more than \$20 million to former victims of the schools run solely by the federal government in cases where employees were convicted of sexual abuse.<sup>103</sup> In 1998-99, about \$8 million was paid to 70 alleged victims of abuse, with settlements ranging from \$20,000 to \$200,000.<sup>104</sup> According to data provided by the Canadian Government, as of May 21, 2007, the total value of litigation in relation to the Indian Residential Schools amounted to \$120.7 million, whilst the total value of damages awarded from ADR decisions amounted to \$128.2 million.<sup>105</sup> It is therefore unquestionably that it is financially beneficial for the Australian Government to pursue the model of a Truth and Reconciliation Commission with a Reparations Program attached, rather than continuing on an ad hoc road of litigation and victims compensation applications.

The model proposed in the Tasmanian Act and Compensation Bill is flawed in a number of key ways. First, the paper-based process, which is completed over a short time-frame, fails to involve the wider community. Whilst a report by the Stolen Generations Assessor will be tabled before parliament, it is unfortunate that the process does not give victims a voice to publicly re-telling their history, in a way that would recognize the heterogeneity of the ATSI population. This would also provide an opportunity for renewed vigour towards ATSI languages, particularly in light of the fact that a submission was made to the UN Commission on Human Rights describing the officially unacknowledged status of ATSI languages.<sup>106</sup>

There are a number of benefits of a Truth and Reconciliation Commission, with simultaneous hearings taking place in each State or Territory, with members of the indigenous and non-indigenous community sitting as commissioners. This will be a positive move away from thus-far unsuccessful adversarial models. In addition, a Reparations Program should be attached to the Truth and Reconciliation Commissions and compensation coherently awarded in the amounts recommended by the Tasmanian Act and Compensation Bill.

The Australian community has, to a large extent, attempted to block out a very dark chapter of its history, or at least deal with it in a cursory manner. Given the ongoing consequences suffered by the descendants of the Stolen Generations, the Australian people, and in particular the Australian Government, cannot deny the facts of its past, however differently these have been interpreted. Unity and reconciliation between indigenous and non-indigenous Australians depends upon truth-telling, remembering the past and accurately re-writing Australia's history. The truth is necessary for the social catharsis of ATSI people and is an essential part of the national recognition of the ongoing consequences that the removal of ATSI children from their families and communities continues to have on the poorer health, employment, education and social status of present-day Aborigines and Torres Strait Islanders.

## NOTES

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1. Australia officially has two groups of indigenous people who are referred to as Aboriginal and Torres Strait Islander people. For the purpose of this paper, the acronym ATSI has been applied. See Australian Federal Government, Department of Aboriginal and Torres Strait Islander Affairs, *Indigenous Fact Sheet*, available at <[http://www.atsia.gov.au/Facts/docs/FS\\_series23.pdf](http://www.atsia.gov.au/Facts/docs/FS_series23.pdf)> accessed on 14 June 2007.
2. Human Rights and Equal Opportunity Commission, *Bringing them home: report of the national inquiry into the separation of Aboriginal and Torres Strait Islander child*, Canberra, AGPS, 1997, p. 31[Hereinafter *Bringing them home*], available at <[http://www.humanrights.gov.au/social\\_justice/stolen\\_children/how\\_to.html](http://www.humanrights.gov.au/social_justice/stolen_children/how_to.html)> accessed on 20 January 2007.
3. A summary of all "removal" and general welfare legislation can be found in *Bringing them home*, note 2, pp. 600-648.
4. Nigel D'Souza, "Authors of our own history: the challenge for all Australians presented by the final report of the human rights commission national inquiry into the separation of aboriginal and torres strait islander children from their families forum-the stolen generation: from removal to reconciliation-authors of our own history", *University of New South Wales Law Journal*, v. 21, 1998, pp. 204-205 citing media release issued by SNAICC on 4 August 1991, National Aboriginal and Islander Children's Day.
5. *Bringing them home*, note 2, pp. 2-3.
6. *Ibid.*, which cites throughout to the range of evidence heard by the National Inquiry.
7. Anne Orford, "Commissioning the truth", *Columbia Journal of Gender and Law*, v. 15, 2006, p. 867.
8. In 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation, rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account relevant existing international human rights norm and relevant decisions and views of international human rights organs. See Theo van Boven, Final Report of the Special Rapporteur of the United Nations, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (1993).
9. Van Boven, Final Report of the Special Rapporteur of the United Nations, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (1993), p. 4.
10. Priscilla Hayner, *Unspeakable truths: facing the challenges of truth commissioners* Routledge, New York and London, 2002, pp. 17-18, 313.
11. See *Bringing them home*, note 2, p.15, regarding contemporary removals of ATSI children until the release of the report in 1997, such as non-custodial sentences applied to indigenous people.
12. See discussion of inter-generational transfer of the effects of forcible removal discussed in *Bringing them home*, note 2, pp.174-175, 188-189 and 481-483. See also research on the

association of past unresolved trauma experienced over many generations of ATSI people with present-day child sexual abuse in indigenous communities in Janet Stanley, "Child Sexual Abuse in Indigenous Communities", paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, convened by the Australian Institute of Criminology and held in Adelaide, 1-2 May 2003, available at <<http://www.aic.gov.au/conferences/2003-abuse/stanley.pdf>>, accessed on 26 August 2007.

13. See International Center for Transitional Justice (ICTJ), "Canada-Background", March 2007, available at <<http://www.ictj.org/en/where/region2/513.html>>, accessed on 14 June 2007. See also Canadian Indian Residential Schools Settlement Agreement, Schedule N: Mandate for the Truth and Reconciliation Commission, 8 May 2006, [Hereinafter IRS Settlement Agreement], 5, §4(c), available at <<http://www.irsr-rqpi.gc.ca/english/index.html>>, accessed on 14 June 2007.

14. IRS Settlement Agreement, note 13. See also *Bringing them home*, note 2, p. 231.

15. Coral Dow, Parliament of Australia-Parliamentary Library, *E-Brief: the stolen generation*, Issued April 2000 (Updated July 2006), available at <<http://www.aph.gov.au/library/intguide/SP/Stolen.htm>> accessed on 6 May 2007. See also *Bringing them home*, note 2, pp. 16-17 regarding Australia-wide hearings, support granted for witnesses giving confidential information and the obligation on HREOC to archive all evidence and submissions to the inquiry.

16. Peter Read, *A rape of the soul so profound*, Allen and Unwin, 1999, pp. 25-26.

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20. *Bringing them home*, note 2, p. 306.

21. *Bringing them home*, note 2, pp. 245-249.

22. See Pablo de Greiff, "Justice and reparations" in Pablo de Greiff (ed.), *The handbook of reparations*, Oxford, Oxford University Press, 2006, p. 468.

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24. Kay Schaffer & Sidonie Smith, *Human rights and narrated lives: the ethics of recognition*, Victoria, Palgrave Macmillan, 2004, p. 107.

25. Buti, note 19, par. 33.

26. *Bringing them home*, note 2, p. 344, citing van Boven Principle 14.

27. *Ibid.*, p. 389.

28. *Bringing them home*, note 2, p. 30.

29. Buti, note 19, par. 43.
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32. *Bringing them home*, above note 2, p. 185.
33. *Bringing them home*, above note 2, pp. 141-142.
34. See Anne Orford, "Commissioning the truth", note 7, p. 883.
35. Vasuki Nesiah, "Gender and truth commission mandates", International Center for Transitional Justice, available at <[www.ictj.org](http://www.ictj.org)>, accessed on 10 July 2007.
36. *Ibid.*, p. 2.
37. Priscilla Hayner, "Unspeakable truths", note 10, p. 78.
38. *Ibid.*
39. *Ibid.*
40. Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: a legacy of generations*, (2000) [1.3], 30 November 2003, Available at <[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/1999-02/stolen/report/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/index.htm)> accessed on 23 July 2007, [Hereinafter Senate Committee Report].
41. *Ibid.*, Recommendations 1, 2 and 6.
42. *Ibid.*, Recommendations 7-9.
43. Coral Dow, Parliament of Australia, note 15.
44. Commonwealth, *Legal and Constitutional References Committee. Report: government response*, Parliament of Australia, Senate Hansard, 28 June 2001, available at <[http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?TABLE=hansards&ID=1902233](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?TABLE=hansards&ID=1902233)> accessed on 25 March 2007.
45. See *Bringing them home*, note 2, p. 15 regarding evidence of contemporary removals of ATSI children up until the release of the report in 1997.
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73. Dot West, Chairperson, National Indigenous Media Association of Australia, Boyer Lectures (1993) cited at Indigenous Australia, Australian Museum 2004, available at <<http://www.dreamtime.net.au/index.cfm>>, accessed on 23 July 2007.
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81. Ibid.
82. See Schaffer, above note 24, p. 97 for a discussion of the power of the film to move audiences and educate about the experience of forced removal as well as the suspicion raised from the potential to universalize and commodify the experience of the Stolen Generations.
83. Schaffer, above note 24, p. 111.
84. Ibid.
85. See section 5(3) of the Tasmanian Act and Compensation Bill.
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89. Ibid.
90. Ibid., p. 9.

91. "Decolonization and Healing: Indigenous Experiences in the United States, New Zealand, Australia and Greenland", prepared for The Aboriginal Healing Foundation by Linda Archibald, 2006, available at <<http://www.ahf.ca/publications/research-series>>, accessed on 23 May 2007.
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93. Australian National Audit office "The Aboriginal and Torres Strait Islander Health Program Follow-up Audit", The Auditor-General Report No. 15 Performance Audit on Department of Health and Ageing, Aboriginal and Torres Strait Islander Commission (ATIC), 2002/2003, tabled 29 October 2002, available at <[http://www.anao.gov.au/uploads/documents/2002-03\\_Audit\\_Report\\_15.pdf](http://www.anao.gov.au/uploads/documents/2002-03_Audit_Report_15.pdf)>, accessed on 23 May 2007, par. 1.5.
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99. De Greiff, note 22, p. 456.
100. *Ibid.*, pp. 456-457.
101. *Ibid.*, p. 439.
102. PIAC Submission, note 18, p. 10.
103. *Ibid.*, p. 16.
104. *Ibid.*
105. These statistics included all individuals who had filed a claim in litigation and all individuals who had participated in the Canadian Government pilot project. See "Indian Residential School Statistics", Indian Residential Schools Resolution Canada, available at <[http://www.irsr-rqpi.gc.ca/english/dispute\\_resolution\\_adr\\_decisions.html](http://www.irsr-rqpi.gc.ca/english/dispute_resolution_adr_decisions.html)>, accessed on 23 May 2007.
106. Lester Irabinna Rigney, "Building stronger communities: Indigenous Australian rights in education and language", Sub-Commission on the Promotion & Protection of Human Rights Working Group on Indigenous Populations, Session 19, 25 July 2001, available at <<http://www.fatsil.org/papers/research/rigney-1.htm#contact>>, accessed on 23 March 2007.



ELIZABETH SALMÓN G.

Professor of International Law and Coordinator of the Masters Program in Human Rights at the Catholic University of Peru.  
Address: Pontificia Universidad Católica del Perú  
Departamento de Derecho  
Av. Universitaria s/n cdra. 18 - San Miguel Lima - Perú  
Email: esalmon@pucp.edu.pe

#### ABSTRACT

This article proposes to find a possible legal basis for the fight against poverty, even in post-conflict contexts, taking into consideration the principle of human rights and the contemporary international order.

#### RESUMO

Este artigo tem como finalidade procurar por uma possível fundamentação jurídica da luta contra a pobreza, inclusive em contextos pós-conflito, levando em consideração o princípio dos direitos humanos e da ordem internacional contemporânea.

#### RESUMEN

La finalidad de este artículo consiste en acercarnos hacia una posible fundamentación jurídica de la lucha contra la pobreza, incluso en contextos post conflicto, que tenga en cuenta un principio del orden internacional contemporáneo y de los derechos humanos.

Original in Spanish. Translated by Barney Wheiteoak.

#### KEYWORDS

Concept of poverty – Development – Armed conflict – Human rights – Fight against poverty



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# THE LONG ROAD IN THE FIGHT AGAINST POVERTY AND ITS PROMISING ENCOUNTER WITH HUMAN RIGHTS<sup>1</sup>

Elizabeth Salmón G.

In times when all discussion often seems to revolve around the so-called “war on terror”, the debate on another war, also transcendental, against poverty, has been neglected, despite the enormous importance of the mission to put an end to a scourge that affects all the spheres of human existence.

This lack of attention has also become evident in the legal sphere. In fact, the basis for the fight against poverty has remained consistently isolated from the legal debate, despite the close relationship between the situation of poverty and the effective enjoyment of human rights. In view of this, the purpose of this article is to find a possible legal basis for the fight against poverty, even in post-conflict contexts, that takes into account a constitutional principle of the contemporary international order, which is respect for all human rights.

## **Stages of the fight against poverty**

Needless to say, the very understanding of the phenomenon of poverty is controversial and complex, since it encompasses a range of problems and dimensions. Moreover, it is not a static concept; instead, as Nowak points out, the concepts of poverty and development, including their relation to human rights, have changed over time.<sup>2</sup>

In fact, this concept was initially addressed from a purely economic point of view. Poverty, in the 70s, was understood to be a significant lack of resources. Furthermore, it was believed that the free market would generate the economic development capable of eliminating poverty. However, the application of these economic policies only caused levels of poverty to rise and produced new human

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*Notes to this text start on page 162.*

rights violations in the name of the market and the policies of northern countries, which were inclined to support southern dictatorial governments whenever they collaborated with their objectives.

A second stage began in the late 70s, when the focus shifted to the “right to development” and the “law of development”. Accordingly, the Charter of the Organization for African Unity, currently the African Union, drafted in 1981, included in article 22 the idea of a new more just and humane international economic order. The idea of development, then, emerged as an inalienable right by virtue of which all human beings and peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, and all human rights can be fully realized.

Finally, during the 90s, the fight against poverty was focused on the conditionality of international cooperation in the promotion of human rights. This conditionality could take two forms: negative conditionality, which implied not cooperating with governments that severely and systematically violate human rights; and positive conditionality, which implied a commitment to collaborate on programs to promote and disseminate human rights and to work towards the democratization of States that respected these rights.

### **Poverty as a multidimensional phenomenon: definitions and contributions to the human rights-based approach**

This change of paradigm and focus in understanding poverty is also reflected in a statement by the World Bank, which stated in 2000 that “of the world’s 6 billion people, 2.8 billion live on less than 2 dollars a day and 1.2 billion live on less than 1 dollar a day. Out of every 100 infants, 6 do not survive a full year and 8 do not live to see their fifth birthday. Out of every 100 infants who reach school age, 9 boys and 14 girls do not attend school”.<sup>3</sup> These figures illustrate that the concept of poverty is more complex than the traditional perception related to low income and consumption; it also encompasses other considerations such as health and education.

Similarly, poverty defined by the United Nations Development Programme (UNDP) as “a situation that prevents an individual or a family from satisfying one or more basic necessities and participating fully in the life of society”<sup>4</sup> is characterized as a fundamentally economic phenomenon, although it does recognize that social, political and cultural dimensions exist within the concept.<sup>5</sup>

Presently, we no longer refer only to poverty, but also to “extreme poverty”, a category that involves a more complex and serious situation that calls for more urgent attention. Arjun Sengupta, the United Nations independent expert on Human Rights and Extreme Poverty, points out that the difference between poverty and extreme poverty is essentially a question of the degree or extent of the phenomenon,<sup>6</sup> implying an access to goods and services that, according to the

UNDP, means people cannot meet basic needs for survival.<sup>7</sup> In this sense, Sengupta holds that extreme poverty should be defined as “a composite of income poverty, human development poverty and social exclusion, to encompass the notions of lack of basic security and capability deprivation”. This results in the social exclusion of people, which restricts their status as citizens and, consequently, their status as subjects of law, meaning they are denied their fundamental rights and freedoms.<sup>8</sup>

Similarly, the United Nations ad hoc Group of Experts, created to draft the guiding principles for the implementation of existing human rights norms and standards in the context of the fight against extreme poverty, which for the purposes of this article we shall call the Group of Experts, noted that international organizations and specialized agencies had reached a consensus on the concept of “extreme poverty”, which it understood to be “a denial of fundamental human rights [that] prevents the effective realization of human rights”.<sup>9</sup> Therefore, the existence of widespread and extreme poverty inhibits the full and effective enjoyment of human rights.<sup>10</sup>

Extreme poverty, therefore, is not just an economic problem, but also a more complex problem in different spheres, namely social and cultural. It has also become a political problem<sup>11</sup> that directly affects human development and, consequently, the fulfillment of human rights.

This is why, according to the Group of Experts, the problem of poverty needs to be tackled starting with extreme poverty. Any strategy aimed at solving the problem needs to focus on extreme poverty to provide a real basis for action to restore the rights of the most excluded and often the most overlooked individuals and populations.<sup>12</sup>

The combination of these assertions gives us a definition of poverty framed in human rights. The UNDP Poverty Report 2000 introduced the concept of *human development*, in which it established that this involves more than just income and economic growth; it encompasses the potentialities and capacities of the population. This development is the result of a process that incorporates social, economic, demographic, political, environmental and cultural factors, in which all the different social actors participate actively and with commitment.<sup>13</sup> From this point of view, poverty emerges as the absence of denial of human development, since this development gives priority to the poor, broadening their options and opportunities.

It can be concluded, then, that the problem of poverty can be presented from two different perspectives: the first called “income poverty”, which basically refers to the absence of an income that can satisfy minimum necessities; and the second, “human poverty”, related to the lack of basic human capabilities, such as malnutrition and disease, among others. This position has been endorsed by Amartya Sen, who considers that poverty, rather than being merely a low-income problem, should be viewed as the deprivation of basic capabilities, although he does recognize that the lack of income is one of the principal causes of poverty.<sup>14</sup>

From this perspective, economic resources are a necessary condition to satisfy these minimum conditions and, consequently, develop such capabilities. However, it needs to be taken into account that not all lack of capabilities constitutes poverty: first, because we should only consider basic capabilities; and second, because if the lack of these conditions is caused by non-economic motives (such as, for example, an ongoing health problem), we cannot conclude that we are facing a condition of poverty, but rather a low level of general well-being. By and large, when talking about poverty, we should be referring to the lack of capabilities deemed basic by society, while the lack of command over economic resources must play an important role in the causal chain leading to this low level of well-being.<sup>15</sup>

To successfully combat poverty, it is necessary to postulate the effective implementation and guarantee of human rights. The first link between human rights and poverty is the discrimination to which people living in poverty are subjected. This discrimination adds to the social marginality and fuels the vicious circle in which poor individuals will never stop being poor, because they do not have the opportunities to escape this situation.<sup>16</sup>

This first approach enables us to understand the relation between poverty and other phenomena. Poverty discrimination is clearly an abuse of human rights, but this discrimination is a rights violation that stems from other causes that propelled the individual into a situation of poverty. Discrimination, while not wishing to justify it, is in fact the “consequence” – an unreasonable one – of a situation an individual has arrived at through the denial of other rights. That is to say, discrimination can cause poverty, just as poverty can cause discrimination.<sup>17</sup>

The rights that are denied because of the condition of poverty or, in other words, whose denial can cause a situation of poverty, can be either civil and political or economic, social and cultural. In this vein, the Copenhagen World Summit for Social Development, in 1995, debated the lack of sufficient income and productive resources to ensure sustainable livelihoods, hunger and malnutrition, ill health, limited or lack of access to education and other basic services, increased morbidity and mortality from illness, homelessness and inadequate housing, unsafe environments and social discrimination and exclusion.<sup>18</sup>

If we consider food, clothing, employment, housing and education to be the rights that are related to exclusion by poverty, then denying them is a violation of the most basic right of all: the right to life.

So the violation of the right to life – by which we mean a dignified life – contributes to a situation of poverty and vice-versa, which is reflected in the high mortality rates caused by poverty.<sup>19</sup> However, the right to life<sup>20</sup> is also breached when, without causing or tolerating a person’s death, there is an abuse against “quality of life”, a notion that has been developed by international jurisprudence in recent years. In view of this, the violation of the right to life can occur in two different ways: (i) as a consequence of the lack of fulfilment of other rights we have referred

to; and (ii) as a direct violation, together with the other rights, of the so-called “quality of life” to which all people have a right.

The first type of violation occurs when poverty causes the death of many people.<sup>21</sup> However, we should not overlook the other aspect of this right, which refers to a “dignified life” or an adequate “quality of life”. These terms refer to the fact that it is not enough for the State to guarantee that people will not be arbitrarily deprived of their lives; it must also guarantee a life in which people have the possibility to develop and enjoy the minimum conveniences, such as health, education and dignified employment, among other things. On this subject, the Inter-American Court of Human Rights ruled on the Villagrán Morales case as follows:

*[...] in essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.*<sup>22</sup>

Similarly, the Group of Experts made the following observations:

*With regard to the threat that extreme poverty poses to the right to life, the ad hoc Group of Experts notes that regional systems of law, like international law, are developing a conception of the right to life that goes beyond the idea of biological survival and links the right to life with a dignified existence, which is the same approach as that adopted by the Commission on Human Rights in its successive resolutions.*<sup>23</sup>

So, when a large part of the population is deprived access to services deemed basic for human development, what they are really being denied is an adequate quality of life, since without adequate housing, clothing, drinking water and shelter, a person cannot develop normally in society.

As Judges Cançado Trindade and Abreu Burelli point out in their joint concurring opinion on the judgment of the Villagrán Morales case, quality of life conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, and also economic, social and cultural rights, which illustrates the interrelation and indivisibility of all human rights.<sup>24</sup> Therefore, although poverty is not directly related to the violation of all human rights, given their indivisible nature, a global strategy to combat poverty will be necessary.<sup>25</sup>

In the field of economic, social and cultural rights, States are mistaken when they consider these rights to be “programmatic principles” that cannot be immediately realized since this would demand the use of scarce financial resources. The Committee on Economic, Social and Cultural Rights (CESCR) has made it

clear that while the full realization of these rights may be accomplished progressively, the steps taken to achieve this goal must be adopted within reasonably short period of time after the International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force.<sup>26</sup> For this reason, using the principle of progressive realization as an argument to avoid implementing these rights is highly contentious. In the fight against poverty, all the rights involved, such as the right to health and housing, play a very important role, which is why States cannot be permitted to use these arguments to escape their international obligations.

In Peru, this reasoning was adopted by the Constitutional Court in judgment 2945-2003-AA/TC, which awarded protection to a person with HIV/AIDS, recognizing that person's right to permanently receive the medicine necessary for treatment. There was, therefore, a contradiction in the State's argument that the right to health was also considered a "programmatic principle", and as such it was not obligated to provide medical treatment, nor to supply free drugs. In the same judgment, the Constitutional Court stressed the need to consider, when dealing with social rights, the principles of solidarity and respect for human dignity, which are the cornerstones of the Welfare State.<sup>27</sup>

Neither is the idea entirely correct that, on the one hand, the implementation of economic, social and cultural rights will always require a sizable investment from the State and, on the other, the implementation of civil and political rights will only require the State to abstain from performing certain acts that are banned by human rights treaties. In response to this, we can observe, as the CESCR points out, that many economic, social and cultural rights can be implemented immediately. This is the case, for instance, with the right to equal remuneration for work of equal value, the right to form and join trade unions, and the right for parents to choose schools for their children, among others.<sup>28</sup>

All these rights find their point of convergence in a higher value, which is the dignity of the human person. This value is expressed in article 1 of the Universal Declaration of Human Rights and has been recognized numerous times in different international documents, such as Commission on Human Rights resolutions nos. 2002/30<sup>29</sup> and 2005/16.<sup>30</sup> These resolutions establish that extreme poverty and social exclusion constitute a violation of human dignity. The United Nations General Assembly made a similar declaration in its resolution no. 59/186.<sup>31</sup>

The idea is for human rights to work like a kind of guarantee to avoid reaching a degree of poverty that violates human dignity and creates situations of exclusion. As such, policies to combat poverty will be more effective when they are based upon human rights.<sup>32</sup> It is the role of States, therefore, to promote and guarantee the effective fulfillment of human rights and to properly implement the most basic rights that assure people a dignified existence. To achieve this objective, it is necessary to first begin by recognizing the rights of the poor and the obligations of governments and the international community.<sup>33</sup>

However, not all human rights can be included in the minimum required for the eradication of poverty, only those deemed essential for all people to be able to develop basic capabilities.<sup>34</sup> These rights include, as the CESCR has pointed out, the right to employment, an adequate standard of living, housing, food, health and education.<sup>35</sup> We are only dealing, then, with the human rights that constitute a minimum standard for meeting basic living requirements.

### The fight against poverty in a post-conflict context

The struggle by States and the international community to afford all people the human rights that constitute a minimum standard for meeting basic living requirements becomes even more complex when this coexists with the fallout from an armed conflict.

According to a report prepared by Jane Alexander for the United Kingdom Department for International Development (DFID), the effects of conflict on levels of poverty include the hampering of economic growth and productivity at the macroeconomic level, and the destruction of state institutions and public infrastructure. From a microeconomic perspective, individuals and communities experience increased insecurity, loss of assets and employment, and diminished access to essential public services.<sup>36</sup>

The report also points out that the human rights violations committed during conflict are inextricably linked to exacerbating poverty.<sup>37</sup> That is, people in a situation of poverty – particularly extreme poverty – are more vulnerable to human rights abuse during an armed conflict. In this sense, the United Nations Limburg Principles of 1987 on the Implementation of the International Covenant on Economic, Social and Cultural Rights establish in paragraph 65 that “[t]he systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security [...]”.

In Peru’s case, this assertion was reinforced by the findings of the Peruvian Truth and Reconciliation Commission (TRC)<sup>38</sup> in its final report:

*There was a clear relationship between social exclusion and the intensity of the violence. It is no coincidence that four of the [places] most affected by the internal armed conflict were classified by different studies [...] on the list of the five [...] poorest in the country. [...] This does not mean that poverty is the primary cause of the conflict; however, it is possible to assert that when a process of armed violence is unleashed, the least privileged social sectors are the most vulnerable and the most affected.*<sup>39</sup>

Furthermore, it is also possible to claim that the human rights violations perpetrated in the context of the Peruvian armed conflict were generators of poverty, which can

be seen, for example, in the various cases of forced displacement and destruction and ransacking of the communities investigated by the TRC.<sup>40</sup>

It would be fair to say, first of all, that there was a close link between poverty and the causes of the armed conflict in Peru (although the TRC did not name poverty as the primary cause of the armed conflict, it did recognize that poverty was “one of the factors that contributed to igniting it and that it was the backdrop against which the tragedy unfolded”);<sup>41</sup> second, that there was a link between poverty and the development of the conflict, since the intensity of the violence varied depending on the poverty of the population involved; and, finally, that there was a link between poverty and the stage that followed the end of the armed conflict.

In fact, the violence perpetrated over 20 years aggravated the difficult economic, social and cultural conditions that already existed in the country, particularly in rural areas. According to the TRC:

*[the] internal armed conflict paralyzed the process of development in the rural world and left grave consequences for the productive structure, on social organization, on educational institutions and on the ambitions of the affected populations. Adding these repercussions to those [...] [produced] by the loss of human capital and by the ransacking and destruction of the community assets, it is possible to conclude that the process of violence left a desolate economic panorama with a huge number of affected people, to whom society and the State owe a debt of reparation.*<sup>42</sup>

Reparations for the victims of human rights violations are complementary to traditional justice, particularly as a means of restoring human dignity and repairing the damage caused by these violations.<sup>43</sup> According to the International Court of Justice, “it is a principle of international law (that is to say, a general concept of law) that every violation of an international commitment implies an obligation to make proper reparations”:<sup>44</sup> the human rights violations perpetrated by the Peruvian State – either by act or omission<sup>45</sup> – during the armed conflict constitute violations of commitments assumed through the ICCPR, the ICESCR and the American Convention on Human Rights, among other international instruments.

Therefore, the TRC presented together with its final report, the Comprehensive Plan for Reparations, or PIR,<sup>46</sup> that sought to make reparations for violations of civil and political rights. However, in practice, both nationally<sup>47</sup> and internationally,<sup>48</sup> reparations for these rights cannot be made without taking into account the aspects related to economic, social and cultural rights.<sup>49</sup>

As a result, although the TRC did not intend to present the PIR as a response to violations of both types of rights, its implementation has demonstrated that their separation is extremely difficult.<sup>50</sup>

*While 'development' generally refers to programs and projects that build the social and economic infrastructure of local communities, [...] reparations seek to repair actual damage suffered by a human rights violation. In some cases the form of reparations may resemble development-like measures in content, but reparations also contemplate other measures such as monetary compensation, restitution of rights, and symbolic reparations, among others, that do not necessarily resemble development and more clearly emanate the sentiment of 'repairing' harm.<sup>51</sup>*

The Inter-American Court, meanwhile, set a precedent for the concept of reparation in the scope of the Inter-American System of Human Rights Protection:

*Reparation for the damage caused by the breach of an international obligation requires, whenever possible, full restitution [restitutio in integrum], which consists of restoring the prior situation. If this is not possible [...], the international court may order the adoption of measures to guarantee the violated rights, as well as to make reparations for the consequences that the breach produced, including payment of compensation for the damages caused.<sup>52</sup>*

Guillerot warns that the PIR should not turn into a means of resolving the country's structural, social and economic problems. On the contrary, the State has two different types of obligations to the population. On the one hand, it has social obligations, which are independent of the existence of a conflict or of victim status, and which are fulfilled through government social investment programs in health, education or housing. On the other hand, it has the obligation to make reparations to the victims of the internal armed conflict, which should be fulfilled by implementing a plan for reparations, adequately combining symbolic and material measures that are both individual and collective in nature.<sup>53</sup>

As an illustration, the Peruvian State passed law no. 28,592, which created the Comprehensive Plan for Reparations on 28 July 2005, based on the recommendations of the TRC, and on 6 July 2006 it published the executive decree 015-2006-JUS, the regulation for the aforementioned law. Although the regulation included something not set forth in the law by establishing a program of individual economic reparations,<sup>54</sup> these have not yet been awarded. On the contrary, most of the reparations made so far by the government have been based on law no. 28,592 and represent collective or symbolic reparations, such as memorial parks and general programs in health and education.<sup>55</sup>

These measures bear more resemblance to development policies promoting economic, social and cultural rights – to which the population has a right, independent of the existence of an armed conflict – than to reparations *per se*, which is a distortion both of economic, social and cultural rights, and of the reparation mechanisms. The State, instead of fulfilling its obligation to make reparations to the victims of the armed conflict, annuls this obligation by assuming

it is fulfilled through the recognition and protection of economic, social and cultural rights, to which all people have a right, regardless of whether or not they are victims of a conflict.

There is, therefore, a third type of violation against people who were already in a situation of poverty before the outbreak of the conflict. The first, as we have already seen, occurs when a human rights violation triggers the situation of poverty; the second, when, as a direct result of this situation and the social exclusion encountered, the poor were more intensely affected by the armed violence, both in terms of their civil and political rights, and their economic, social and cultural rights; and third, when the State fails to recognize that, as well as having economic, social and cultural rights, they also have the right, as victims of the conflict, to reparation.

### **Change of paradigm and the emergence of international obligations in a globalized context**

The strategy that has been most traditionally used as a tool in the fight against poverty, both in peacetime and in post-conflict contexts, has not proved to be effective. We need, therefore, to develop a much broader vision more closely tied to human rights so as to acquire a first-rate legal dimension.

Confronting the topic in terms of legal obligations permits two approaches. First, that we address not only necessities, but also rights, which implies a genuine inclusion of human rights in public policies, that is, that the voice of the poor is heard (*empowerment of the poor*). Second, that we can also address the existence of duties.

In this vein, as the Group of Experts points out,<sup>56</sup> we can assert that effective poverty reduction is not possible without empowering the poor to participate in the policies for this purpose, which implies recognizing the poor as subjects of law. Poverty reduction, therefore, beyond just a moral obligation, can be regarded as a legal obligation.

Nevertheless, this legal obligation must be set apart from the obligation of the State to redress the victims of an armed conflict. As we have seen, there is a clear relation between a person's degree of poverty and the intensity of the violence in which they find themselves immersed during an armed conflict. As a result, the majority of conflict victims – and the Peruvian experience demonstrates this – are most frequently the population's poorest.

Although collective reparations often bear a resemblance to the development programs aimed at fulfilling economic, social and cultural rights, it is a serious violation of the rights of victims living in a situation of poverty to consider these obligations one and the same. This is akin to annulling the right to reparation, which only serves to perpetuate the vicious circle generated by poverty.

Moreover, it needs to be pointed out that the obligations that derive from rights need to be examined in light of the obligation to respect, protect and fulfill these rights. The duty to respect implies the duty to not directly or indirectly undermine the enjoyment of human rights. The duty to protect requires the adoption of provisions to prevent rights abuses by third parties. The duty to fulfill, meanwhile, consists of the obligation to adopt legislative, administrative and other such measures to give effect to these rights.<sup>57</sup>

On the other hand, we should not overlook that International Human Rights Law recognizes the interdependence of human rights, meaning that the enjoyment of certain rights will depend on the observance of others, such as the rights that prevent people from falling into a situation of poverty. Therefore, even though poverty at first appears to be related to economic, social and cultural rights, the enjoyment of civil and political rights depends on the observance of the former.

One way of embarking on the road to eradicating poverty is to observe how States perform their duty to take all the reasonable means at their disposal to ensure the realization of human rights. If a State takes upon itself to make all provisions for these rights to be effectively realized, it will not be held responsible should some of these rights fail to be fully upheld, neither can it be said that the State has not fulfilled its obligations. Nevertheless, a State can be held responsible when it does not take all the measures at its disposal to ensure the progressive realization of these rights expeditiously, that is to say, as quickly as possible.

However, this approach does not sidestep the fact that the fight against poverty is not exclusively of interest of the State where the situation of poverty occurs. Obviously, the State has the obligation to prevent it, avert it and, above all, combat it. However, it was the international community as a whole that set the scene for and created these international norms.

Finally, it should be added that since the current state of International Law makes it extremely difficult to find a legal basis that actually compels States to launch a fight against poverty, a more human rights-based approach will undoubtedly result in empowerment through the use of the existing institutional mechanisms for observing human rights. Among these measures, we might mention, for example, the quest to expand poverty reduction strategies and the quest to tackle the structures of discrimination that cause and perpetuate poverty. Civil and political rights, which play a crucial role in helping reduce poverty, urgently need to be expanded. In this context, economic, social and cultural rights are both compulsory and urgent in the eyes of International Human Rights Law, not just “programmatic principles”. They lend legitimacy to the calls for the empowerment of the poor in decision-making processes, and they create and strengthen the mechanisms that one way or another monitor the actions of public policies and other such initiatives.

## NOTES

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1. The original version of the this article in Spanish, "El largo camino de la lucha contra la pobreza y su esperanzador encuentro con los derechos humanos", was published in the collective work *Justicia global, derechos humanos y responsabilidad*, Antioquia, Siglo del Hombre Editores, Centro de Estudios Filosóficos de la Pontificia Universidad Católica del Perú e Instituto de Filosofía e Instituto de Estudios Políticos de la Universidad de Antioquia, 2007. The author would like to thank Mariana Chacón for her support in the revision of this edition.
2. M. Nowak, *A human rights approach to poverty*, Human Rights in Development, Year Book 2002, Oslo, Nordic Human Rights Publications, 2004, p 17.
3. The World Bank (J D. Wolfensohn), *World Development Report 2000/2001, Attacking Poverty*, World Bank Oxford, Oxford University Press, p. 7.
4. United Nations Development Programme (UNDP), *Proyecto Regional para la Superación de la Pobreza. Desarrollo sin Pobreza, II Conferencia Regional sobre la Pobreza en América Latina y el Caribe*. Quito, 20-23 November, 1990.
5. Ibid.
6. Office of the United Nations High Commissioner for Human Rights (OHCHR), Commission on Human Rights, Economic, Social and Cultural Rights, *Report of the independent expert on the question of human rights and extreme poverty Arjun Sengupta*, Doc E/CN. 4/2005/49, 11 February 2005, p. 5.
7. United Nations Development Programme (UNDP), *Poverty report 2000: overcoming human poverty*, New York, UNDP, 2000, p. 20. Nowak, *op. cit.*, p. 23.
8. Commission on Human Rights, Economic, Social and Cultural Rights, *op. cit.*, par.12.
9. OHCHR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights, *Implementation of existing human rights norms and standards in the context of the fight against extreme poverty*, Progress Report submitted by José Bengoa, coordinator of the ad hoc Group of Experts, Doc E/CN.4/Sub.2/2005/20, 6 July 2005, par. 27.
10. Vienna Declaration and Programme of Action, *Vienna Conference on Human Rights*, 1993, par. 14.
11. Ibid., par. 12.
12. Sub-commission on the Promotion and Protection of Human Rights, *op. cit.*, par. 9.
13. UNDP, *Desarrollo sin Pobreza, op. cit.*
14. A. Sen, *Development as freedom*, New York, Anchor Books, 1999. M. Nowak, *op. cit.*, p. 25.
15. Office of the United Nations High Commissioner for Human Rights, *Human Rights and poverty reduction: a conceptual framework*, Nova York and Geneva, 2004, p. 7.
16. Sub-Commission on the Promotion and Protection of Human Rights, *op.cit.*, par. 12.
17. *Poverty and the International Covenant on Economic, Social and Cultural Rights*, Statement adopted by the Committee on Economic, Social and Cultural Rights (OHCHR) on 4 May 2001, Doc E/C.12/2001/10, par. 11.

18. Programme of Action of the World Summit for Social Development, Copenhagen, 1995, Doc A/CONF.166/9, par. 19.
19. According to the World Bank, for every 100 infants, 6 do not survive a full year and 8 do not live to see their 5<sup>th</sup> birthday. Of those who do reach school age, 9 of every 100 boys and 14 of every 100 girls do not attend school. The World Bank, *op.cit.*, p. 5.
20. The right to life is guaranteed in various international treaties. For example, in the universal system, it appears in article 3 of the Universal Declaration of Human Rights, and in item 1, article 6 of the International Covenant on Civil and Political Rights (ICCPR). In the inter-American system, it is mentioned in article 4 of the American Convention on Human Rights.
21. According to Thomas Pogge, 955 million citizens in high-income countries consume 81% of the global product, while paradoxically the 2,735 million people considered *poor* have just 1.3%. That is to say, as the Amnesty International 2002 report claims, “many of the world’s poor have been bypassed by the benefits of globalization”. This has had numerous consequences, among them the death of 18 million people each year due to poverty. In 2002, for example, the infant mortality rate was 82%, equivalent to 10,889 deaths per year. The World Bank considers “poor” to be people living on less than 2 dollars per day. See T. Pogge, “Symposium World Poverty and Human Rights”, *Ethics and International Affairs*, v. 19, n. 1, 2005, p. 1.
22. Inter-American Court of Human Rights (IACHR). The “Street Children” Case (Villagrán Morales et al), Judgment of 19 November 1999, Series C No. 63, par. 144. This position reflects a real jurisprudential trend of the Inter-American Court on the subject. See also: Zambrano Vélez et al. vs. Ecuador. Judgment of 4 July 2007. Series C No. 166, par. 78. Miguel Castro Castro Prison vs. Peru. Judgment of 25 November 2006. Series C No. 160, par. 237. Vargas Areco vs. Paraguay. Judgment of 26 September 2006. Series C No. 155, par. 14. Ximenes Lopes vs. Brazil. Judgment of 4 July 2006. Series C No. 149, par. 125. Sawhoyamaxa Indigenous Community vs. Paraguay. Judgment of 29 March 2006. Series C No. 146, par. 153. Yakye Axa Indigenous Community vs. Paraguay. Judgment of 6 February 2006. Series C No. 142, par. 162 and Mapiripán Massacre vs. Colombia. Judgment of 15 September 2005. Series C No. 134, par. 232.
23. Sub-Commission on the Promotion and Protection of Human Rights, *op.cit.*, par. 20.
24. IACHR, “Street Children” Case (Villagrán Morales et al.). Judgment of A. C. Trindade and A. A. Burrelli, *op.cit.*, par. 4.
25. United Nations High Commissioner for Human Rights, *op.cit.*, p. 11.
26. ICESCR (International Covenant on Economic, Social and Cultural Rights), General Observation No. 3, *The nature of the obligations of the States party*, adopted on 14 December 1990, par. 2.
27. Constitutional Court, Judgment 2945-2003-AA/TC of 20 April 2004, par. 15.
28. *Ibid.*, par. 5. Similarly, Peru’s Constitutional Court ruled in Judgment 2002-2006-PC/TC of 12 May 2006, paragraphs 5-11, in which it ordered the Ministry of Health to implement an emergency system for people with lead poisoning in the mining town of La Oroya.
29. Adopted on 22 April 2002.
30. Adopted on 14 April 2005.
31. Adopted on 10 March 2005.

32. CESCR, Substantive issues arising in the implementation of International Covenant on Economic, Social and Cultural Rights. *Poverty and the International Covenant on Economic, Social and Cultural Rights*. Doc E/C.12/2001/10, par. 1, 3 and 13.
33. OHCHR, Draft Guidelines, *A human rights approach to poverty reduction strategies*, Geneva, United Nations, 2002, par. 1-5.
34. According to the draft guidelines issued in 2002 by the group of experts appointed by the Office of the United Nations High Commissioner for Human Rights, these minimum rights are: the right to adequate food, the right to health, the right to education, the right to decent work, the right to adequate housing, the right to personal security, the right to appear in public without shame, the right of equal access to justice and political rights and freedoms. See OHCHR, Draft Guidelines, *op.cit.*
35. United Nations High Commissioner for Human Rights, *op.cit.*, p. 23.
36. J. Alexander, *A Scoping Study of Transitional Justice and Poverty Reduction*, Final Report, UK Department for International Development, January 2003, par. 2.1.
37. *Ibid*, par. 2.2.
38. The *Peruvian Truth and Reconciliation Commission* was established by the interim government of former president Valentín Paniagua in 2001 to shed some light on the country's violent past by investigating the causes, consequences and responsibilities of the armed conflict that plagued Peru between 1980 and 2000. "By its calculations, more than 69,000 people were killed or disappeared as a direct consequence of human rights violations and crimes. The mother tongue of 75% of them was quechua". J. Ciurlizza. "El Informe Final de la CVR y la judicialización de violaciones de derechos humanos", *Construyendo Justicia. Verdad, reconciliación y procesamiento de violaciones de derechos humanos*, Francisco Macedo (ed.), Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú – IDEHPUCP, Fondo Editorial PUCP, OXFAM-DIFD, 2005, p. 129 – 130.
39. H. Willakuy, abbreviated version of the Final Report of the Truth and Reconciliation Commission, 2004, p. 22.
40. There were multiple cases of forced displacement and ransacking of communities, which caused the loss of assets of the displaced. Topical Public Hearing before the TRC. "*Violencia Política y Comunidades Desplazadas*", 12 December 2002. Communities of Ostocollo, Tancayllo, Izcahuaca and Huayrapampa. Residents of Valle del Monzón and Alto Huallaga were displaced following the destruction their communities. Information available at: <[http://www.cverdad.org.pe/ingles/apublicas/audiencias/atematicas/at05\\_sumillas.php](http://www.cverdad.org.pe/ingles/apublicas/audiencias/atematicas/at05_sumillas.php)>. Last access on 4 September 2007.
41. H. Willakuy, *op. cit.*, p. 337.
42. *Ibid*, p. 409.
43. L. Laplante and K. Theidon, "Reparations, international law, and global justice: a new frontier" in Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford, Oxford University Press, 2006, pp. 484-85.
44. Cited by C. Nash, *Las reparaciones en la jurisprudencia de la Corte IDH*, Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, Lom Ediciones, Santiago, 2004, p. 10. This principle is also established in article 63.1 of the American Convention on Human Rights.
45. "(R)eparations exist not only when the violation was caused by agents of the State [respect for human

rights], but they also extend to human rights violations perpetrated by external actors [impose respect for human rights]. In the latter case, the State, by not preventing and reacting adequately to the actions of external actors that severely undermined the full enjoyment of human rights, by not assuring respect for human rights and not fulfilling its duty to protect its citizens, is also responsible and is legally bound to provide reparations to the victims." J. Guillerot, "*Hacia la reparación integral de las víctimas del conflicto*", Informe sobre la situación de los DESC 2002 – 2003 en el Perú: "*Dos años de democracia [...] ¿y los DESC?*", APRODEH, CEDAL, Lima, Peru, December 2003. Available at <[http://www.aprodeh.org.pe/repares/opinión/Hacia\\_PIR\\_InformDESCdic2003.pdf](http://www.aprodeh.org.pe/repares/opinión/Hacia_PIR_InformDESCdic2003.pdf)>, last access on 4 September 2007.

46. Truth and Reconciliation Commission, *Final Report*, v. IX, part 4, 2003, par. 2.2.

47. See, on a national level, the reparation programs created by the *Comisión Especial de Atención a los Indultados Inocentes* (CEAI) and the *Comisión de Trabajo Interinstitucional para el Seguimiento de las Recomendación de la Comisión Interamericana de Derechos Humanos*. J. Guillerot, *op. cit.*

48. See C. Nash, *op. cit.*, pp. 43 – 44.

49. J. Guillerot, *op. cit.*

50. As L. Arbour points out in "*Economic and social justice for societies in transition*", *Second Annual Transitional Justice Lecture hosted by the New York University School of Law Center for Human Rights and Global Justice and by the International Center for Transitional Justice, October 2006*: "violations of civil and political rights are intrinsically linked to violations of economic, social and cultural rights, whether there are causes or consequences of the latter. We need only to think of Northern Ireland and South Africa to realize that systematic discriminations and inequities in access to health care, work or housing have led to, or exacerbated, social tension that led to conflict."

51. L. Laplante, *On the indivisibility of rights: truth commissions, reparations, and the right to development*, *Yale Human Rights & Development L.J.*, p. 161: to be published at <<http://islandia.law.yale.edu/yhrdlj/>>.

52. IACHR, *Trujillo Oroza Case, reparations*, par. 61; *Bámaca Velásquez Case, reparations*, par. 39; *Cantoral Benavides Case, reparations*, par. 41; *Durand y Ugarte Case, reparations*, par. 25 and *Barrios Altos Case, reparations*, par. 25. Cited by C. Nash, *op. cit.*, p. 25.

53. J. Guillerot, *op. cit.*

54. Coordinadora Nacional de Derechos Humanos, Informe Anual 2006, *Bajo el signo de un gobierno con pasado*, p. 51.

55. L. Laplante, *op. cit.*, p. 16.

56. OHCHR, Draft Guidelines, *op. cit.*, par. 3- 24.

57. IACHR, "*Velásquez Rodríguez*" Case, Judgment of 29 July 1988, Series C No. 4, par. 165 to 177.



#### JUAN MÉNDEZ

Juan Méndez is a lawyer who for decades has dedicated his career to the defense of human rights. As a result of his work representing political prisoners during the Argentine military regime, he was himself arrested and subjected to torture. A former member of *Human Rights Watch* and the *Inter-American Institute of Human Rights*, Méndez also headed the *Center for Civil and Human Rights* at the

University of Notre Dame in Indiana, United States, and for three years was a member of the Inter-American Commission on Human Rights of the Organization of American States (OAS). In July 2004, he was appointed United Nations Special Advisor on the Prevention of Genocide, a position he held until recently. President of the *International Center for Transitional Justice*, he also serves on the boards of directors of the *Center for Justice and International Law*, *Global Rights* and the *Open Society Justice Initiative*, and is an advisor to the *Social Science Research Council's Conflict Prevention and Peace Forum* and the *American Bar Association Center for Human Rights*. He has lectured at Georgetown Law School, at the Johns Hopkins School of Advanced International Studies and at Oxford, and has received several human rights awards, among them the Monsignor Oscar A. Romero Award, presented in April 2000 by the University of Dayton for his leadership in service to human rights, and the Jeanne and Joseph Sullivan Award of the Heartland Alliance, in May 2003.

## INTERVIEW WITH JUAN MÉNDEZ, PRESIDENT OF THE *INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE* (ICTJ)

By Glenda Mezarobba\*

*Since the end of the Second World War, more specifically in the past 30 to 40 years, various mechanisms have been developed and refined to deal with the legacy of violence perpetrated by authoritarian or totalitarian regimes, through what is conventionally called transitional justice. However, there are no studies to show definitively that these mechanisms contribute effectively to the quality of the democracy under construction, or that they constitute an effective means of achieving, for example, reconciliation. How, then, should each country act? What should be their priority?*

International Law has come a long way and now at least we have a series of parameters. I wouldn't say they are strict formulas, rather objectives that States are obligated to meet, following the many decisions, for example, of the Inter-American Commission on Human Rights and other human rights organizations. The obligations under human rights treaties are now seen as creating or endorsing certain affirmative obligations concerning, for example, crimes against humanity. We now have a regulatory framework, which until recently was not so explicit. There are also national and social practices that we can learn from, but not necessarily copy. At the ICTJ, we believe that the purpose of the regulatory framework and the comparative studies is to understand, through a comprehensive and balanced focus, different mechanisms of transitional justice. Which doesn't mean that it is possible to choose between them. It is not legitimate for the State

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\* Glenda Mezarobba is a journalist. She is a PhD student in Political Sciences, University of São Paulo (USP) and is the author of *Um acerto de contas com o futuro - a anistia e suas consequências: um estudo do caso brasileiro*, Editora Humanitas/Fapesp, 2006.

to say: we're not going to prosecute anybody, but we will offer reparations. Or to say: we will make a truth commission report, but we're not going to pay reparations to anyone. Each of these obligations of the State are independent from one another and each one must be fulfilled in good faith. We also recognize that each country, each society, needs to find its own way of implementing these mechanisms. It's not a matter of simply translating a law that was passed in South Africa and trying to apply it in Indonesia. There are principles that are universal and the State has an obligation to observe them, but the form, the method, can differ. We do not believe, for instance, that there is a strict sequence beginning with the need to prosecute and punish, followed by setting up a truth commission... Each country has to decide what to do and when, and in such a way that all the avenues are left open. So they don't say, for example, in advance: we will establish a truth commission that will last 10 years so that afterwards we cannot prosecute anyone criminally due to the statute of limitations. I believe that the principle of good faith needs to be applied here, and good faith is a legal concept: the sincere intent to do the maximum possible given the limitations you have. This is why different models exist. Neither can you say: we will pay reparations but we don't know who the victims are. The truth seeking processes sometimes have very practical consequences. From them, for example, emerges a way of conducting a census of the victims. In the case of Peru, for example, even the most exaggerated group underestimated the number of victims, which the truth commission found to be twice as high. What I mean to say with this is that, if they had begun by paying reparations, half the victims, who were unidentified, would have gone without. So here is an argument for having a sequence of different mechanisms, although it is important to have an approach that is at the same time holistic, comprehensive and balanced. Because if we only conducted criminal proceedings, justice would be incomplete and would be frustrating for the victims. I also believe that the other mechanisms of transitional justice help overcome what we call a breach of impunity. Sometimes, even with the best of intentions, we punish some crimes, but not all. So it is necessary to complement the judicial with the non-judicial, or even the administrative, as is the case with the reparations. This is the reason why we insist on this holistic and comprehensive approach.

*What objectives should we bear in mind when adopting transitional justice mechanisms: should we seek reconciliation, for example, at any cost?*

I think the ultimate objective ought to be the reconciliation of the opposing forces in each country. Not the reconciliation of torturers with their victims, for example, or between the perpetrators of human rights violations and their victims. There is always an underlying conflict, either the struggle against subversion or against terrorism, in which the violations are committed. If the conflict is such that there has been an historic confrontation between ideological or political factions, then reconciliation is a necessary objective. What has happened in Latin America specifically is that the term reconciliation has been misused, to justify the absence of justice, truth and reparation for victims and punishment for those

responsible. So, if reconciliation is used as a synonym for impunity, it is only logical that the victims and civil society at large take issue with the term reconciliation. Because it gives the word “reconciliation” to the enemy. Because what they want is not reconciliation, but impunity. It is necessary to condemn this and not to allow this interpretation of the word. I think that reconciliation is a fundamental objective of any transitional justice policy, since what we do not want is to reproduce the conflict. In this sense, everything we do – justice, truth, reparation – needs to be inspired by reconciliation, only real reconciliation, not the false reconciliation that has been used in Latin America as a smokescreen for impunity. The only way of achieving a serious and real reconciliation is through the mechanisms of justice, truth and reparation. Because reconciliation is not something that can be imposed by decree, nor can it be decided that nothing more will be done because we are reconciled. First, because the State does not have the right to forgive on behalf of the victims; each victim has the right to decide whether or not to forgive. And, second, the very least that could be done, in the sphere of reconciliation, would be to require from the perpetrators of human rights violations some form of conduct that contributes to the truth, some expression of regret or even an apology. In this sense, I disagree with some organizations in my country, Argentina, that, with very good reason, reject the word reconciliation and, thus, reject the very concept of reconciliation.

*It has also become increasingly clear that time is a variable to be considered in the equation of transitional justice. Even when solutions are long in coming, do you think time can be an ally?*

Yes. I believe that time is an ally, but you cannot place too much reliance on the idea that time will solve everything. In some countries where time has become an ally, such as Argentina and Chile, this does not mean that it wouldn't have been better to have done things earlier. What the cases of Argentina and Chile do illustrate very well is that our first instinct, when we began all this in the 80s, was mistaken. We were under the impression that if we didn't get everything done in the first six months, the opportunity would pass us by. We felt very sure about this. The reasoning was that if more than six months or a year elapsed, the pressures of other economic and social problems would cause us to forget. We also used to think that the democratic opportunity could be short-lived, and that the 'democratic springtime' could come to an abrupt end. It's now obvious that we underestimated two things: the societies, that truly wanted to be democratic; and the value of the idea of transitional justice and the idea that the victims needed to be respected and recognized. I think that the moral weight of the idea that human rights violations require a policy from the State in respect to the victims is something we discovered in practice, it's not something we knew in advance. It's not as if the idea is automatically disseminated to society as a whole, but it is because in Argentina and in Chile, and in other countries too, there was a very intelligent and very capable human rights movement that understood how, through moral gestures and practical political action, to transmit this agenda to society.

*Do you think that countries not directly involved with the problem of transitional justice ought to contribute to these processes? What kind of contribution can they make?*

Yes, I do. They can contribute primarily with funding. Particularly if the funds are earmarked for the civil society of each State. I think, for instance, that if a State in good faith creates a truth commission, like in Peru, and this commission will require funds, then it is important for the international community to help. In Peru, the commission was not entirely financed by international cooperation, as the government also made considerable investment, but without international cooperation the commission's work would have been far less effective. In the case of Liberia, the truth commission was financed completely by international cooperation, since the State of Liberia was in no financial condition. And this in itself is a problem. In cases like Liberia's, it is important that the State not think that since the international community is covering all the commission's expenses, the State does not need to do its part and accept its recommendations. Additionally, democratic and developed countries can help in a number of other ways. For example, providing their intelligence files. Considering Central America, the files kept by the United States Department of State are far more complete than any you might find, for example, in Honduras, Nicaragua or El Salvador. And I think that these countries have an obligation to contribute with this. Cuba, for example, could contribute with important information on other countries from the Americas. If these countries are really interested in democracy, justice and the rule of law, they ought to contribute at the very least with this information. An example: when the so-called "Terror Files" were opened in Paraguay, details were discovered about the disappeared from Argentina. Finally, I think that developed countries should contribute with a clear policy that promotes the rule of law and the search for truth and justice. Some European donors have begun to realize that post-conflict reconstruction and the creation of a genuine rule of law cannot be done if it is based on forgetfulness, on the absence of memory and on impunity. So they have begun to insist that, if they are going to provide the funding to rebuild the judicial infrastructure, for example, in return the beneficiary country cannot refuse to prosecute cases of human rights violations simply because the crimes were committed in the past. Likewise, if we are going to help rebuild the police force, there needs to be some type of procedure in place to guarantee that officers who abused their power in the past do not remain within the police ranks.

*Why are States in general so insensitive to the demands for truth, keeping their files secret?*

We always hear talk of protecting sources and methods. This is the kind of karma used by intelligence services. But you have to understand that intelligence services can only operate in secrecy, so it'll never be in their interests to reveal their secrets. First of all, there is the problem of conception: why was this information gathered in the first place? Second is the culture of secrecy. In recent decades, and increasingly

more so, the modern State has become ever more based on intelligence and secrecy, so there is an inertia about not releasing information. And, third, I think that States that possess this intelligence do not want to share it because they don't know whether they'll need their old sources in the future. These are explanations, but they are not justifications. They're just excuses. And I believe that this does nothing to promote the creation of democratic conditions. On the contrary, it promotes authoritarianism and a lack of democracy.

*Argentina, which has shaken off its reputation as a pariah State and become a paradigm in the field of human rights, has been reopening trials against individuals accused of human rights violations during the military regime. How much do you think this decision can influence other countries in the region?*

I'm not altogether sure. I think that Argentina has to keep on working, and working with more intelligence. There are currently a number of trials underway, there's a whole stack of cases, but everything is very chaotic. One judge opens one, another judge starts another. For example, you open one trial in a given jurisdiction against a torturer, for his activities in a given place, then you open another case against the same defendant for his activities in another detention center. The witnesses have to testify repeatedly in similar cases, which is exhausting and also raises security issues. We need to start thinking about a more rational policy, without violating the basic principles of an independent judiciary. The public prosecutors ought to coordinate the trials. That was how it was during the Alfonsín years. These cases accumulated into what were known as "megacauses". Right now everything is very chaotic, very disseminated, very dispersed. In addition to the Judicial Branch, the Public Prosecutor's Office also has a big responsibility. I think the Public Prosecutor's Office could – and I am not aware of any legal obstacle in Argentina, although this not how things are usually done – organize the trials nationally, rationalizing them and bringing them under the same set of rules, deciding what to emphasize at this time. If this is not done, what will emerge is the permanence of something extremely chaotic, extremely fragmented, running the risk that people will grow weary in the medium-term because they are not seeing any results. We have to exercise some patience.

*From your experience as a human rights activist, an academic, a former member of the Inter-American Commission on Human Rights and a former UN special advisor, how do you imagine it will be possible to develop a more effective cooperation between these three sectors (civil society, academia and public institutions), particularly in countries of the Global South?*

The fact that I've done all that doesn't mean I know the answer. I think a lot of effort is necessary to combine rigorous studies and academic reflection with the effective concrete action of civil society organizations. There are some very worthwhile experiences from which we can learn about these combinations. However, civil society organizations, on the one hand, need to professionalize

and be more rigorous, but without losing their passion or commitment. You need to recognize that it's not enough simply being convinced about the justness of the cause, you need to make things happen, and for that you need to know how to be convincing, and to be convincing you need a large dose of professionalism and rigor. And you learn this in the academic world. What you shouldn't learn in the academic world is the tendency to work in an ivory tower, to think the only thing that matters is reflection. I also think that academic rigor is different from the professional rigor of an NGO, for example. They feed off each other, but they are two different things. There are some good experiences that combine the two things, namely scientific or educational organizations that are geared towards strengthening civil society, such as the Inter-American Institute of Human Rights. This doesn't mean that everything it does is done well, but it is the only one I know of that for 30 years has been dedicated to human rights education, in order to strengthen them, and at the service of civil society. Perhaps deliberately it has renounced academic prestige and awarding titles to be able to do the job, over three decades, of training activists. And there is a whole tendency to recognize independent civil society organizations as actors in this process. Truly democratic countries are leading this tendency, enabling some doors to be opened at regional and international organizations, such as the United Nations and the OAS, that only a few years ago were closed to civil society. This creates more opportunities for civil society and also a responsibility to be independent, to not be manipulated by political forces or ideological inclinations. All this teaches us lessons about the true nature of democracy, about how it works on a day-to-day basis. And this in our countries, in Latin America, is very difficult. Because since political society is very weak, when there is a 'democratic springtime', civil society's best minds are absorbed by the State. In some countries, this has occurred more than in others. In Chile, for example, the majority of the people who worked with human rights, once the Pinochet dictatorship came to an end, moved to the State. It has been very difficult for Chile to refill the ranks of these organizations. They obviously have every right in the world to participate, and it is a very dignified participation, since they are democratic governments. But it left a gap. In Central America, not only did human rights groups become part of the State, but they did so in different political parties, opposing one another, and ended up taking the political struggle to the heart of the human rights movement. This has been a serious setback for the movement and for the possibility civil society has to do more to drive a demand for justice.

## ANNEX 1

### HUMAN RIGHTS CENTERS<sup>1</sup>

From this issue on, Sur Journal will publish key information on university-based human rights centers. Our goal is to disseminate their work and to create opportunities for cooperation between them and our readers.

#### CENTRE FOR HUMAN RIGHTS FACULTY OF LAW, UNIVERSITY OF PRETORIA

Site: [www.chr.up.ac.za](http://www.chr.up.ac.za)  
Contact: [chr@up.ac.za](mailto:chr@up.ac.za)  
Tel: +27-12-420 3810, Fax: +27-12-362 5125

**Teaching:** 2 Masters of Laws on human rights: the LLM in Human Rights and Democratization in Africa; and the LLM in Human Rights and Constitutional Practice; short courses on good governance.

**Research:** Human rights law in Africa

**Journals:** African Human Rights Law Journal, *Africa Human Rights Law Reports*

**Others:** African Human Rights Moot Court Competition

The Centre for Human Rights at the Faculty of Law, University of Pretoria, focuses primarily on human rights law in Africa. Highlights in its history since it was established in 1986 include the involvement of members of the Centre in writing the South African Constitution and Bill of Rights, and its contribution to legal education in human rights on the African continent through its academic programmes and research outputs. The Centre was awarded the 2006 UNESCO Prize for Human Rights Education.

The Centre offers two **Masters of Laws (LLM) Programmes on Human Rights**: the LLM on Human Rights and Democratisation in Africa. This is a unique programme to which 30 outstanding law graduates from all African countries are admitted to study each year. The second programme is the LLM on Human Rights and Constitutional Practice. This LLM aims at providing students with a solid grounding in general human rights law (both international and South African human rights law), with an in-depth focus on the practice of human rights law in South Africa. The Centre for Human Rights also presents a series of **short courses** throughout the year as part of its **Good Governance Programme**.

Aside from its educational purpose, the Centre publishes the **African Human Rights Law Journal** (AHLJ), which is accredited by the International Bibliography of the Social Sciences and contributions are peer-reviewed. The contributions deal with human rights related topics that are relevant to Africa, Africans and scholars of Africa. The AHLJ is published bi-annually - in March and October. The Centre also publishes the annual African Human Rights Law Reports (AHLR), which contain legal decisions of relevance to human

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1. This document was written by Fred Hasselquiste and Victoria Schulsinger; and it was in part revised and in part translated to English by Barney Whiteoak.

rights law in Africa. These include selected domestic decisions from the whole continent, as well as the decisions of the African Commission on Human and Peoples' Rights and the United Nations treaty bodies, dealing with African countries. The AHRLR are fully indexed, to facilitate access and make research easy. The AHRLR are published in English and French. The Centre for Human Rights organizes the **African Human Rights Moot Court Competition**. This competition is unique in giving the youngest and brightest future African lawyers the opportunity to critically examine the human rights situation on the continent, with a view to improving it through the use of the persuasive tactics of logical legal arguments based on the African Charter on Human and Peoples' Rights. Since its establishment in 1992, the African Human Rights Moot Court Competition has brought together 773 teams from 118 universities representing 45 African countries.

## HUMAN RIGHTS CENTER FACULTY OF LAW, UNIVERSITY OF CHILE

Site: <http://www.derecho.uchile.cl/cdh/>

Contact: [cdh@derecho.uchile.cl](mailto:cdh@derecho.uchile.cl)

Center for Human Rights, Faculty of Law – University of Chile, Avda. Santa Maria N° 076, oficina 506, Providencia, Santiago - Chile

**Teaching:** Postgraduate courses in Human Rights: "Human Rights and Processes of Democratization", "Human Rights and Women: Theory and Practice" and "Transparency, Accountability and the Fight against Corruption".

**Research:** Human Rights and strengthening the Rule of Law; International and regional human rights protection systems; Transition to democracy and overcoming a legacy of human rights violations or war crimes; Women's rights, with special reference to discrimination, violence and sexual and reproductive rights; Public integrity, transparency and the fight against corruption; Quality of the administration of justice.

**Periodicals:** Human Rights Annual

The Human Rights Center, an institute attached to the Faculty of Law of the University of Chile, is committed to academic excellence in training Latin American professionals who work with human rights, to the strengthening of democracy and also to the strategic planning of these issues.

The Center currently plays a regional leadership role in broadening respect for human rights and in consolidating democracy in Latin America, through:

- education and training of excellent quality;
- research and publications;
- development and support of networks of professionals who work with human rights; and
- coordination of strategic activities on a regional level.

The Center's work team is highly specialized and directed by Cecilia Medina and José Zalaquett. The main activity of the Center is the coordination of graduate courses on human rights. Moreover, with the intent of contributing to the implementation, education and dissemination of human rights, the Center has organized a series of research projects, which have been recently published. These publications are available at [www.publicacionescdh.uchile.cl](http://www.publicacionescdh.uchile.cl). Also, since 2005, the Center has published the Annual Report on Human Rights in Chile, available at [www.anuariocdh.uchile.cl](http://www.anuariocdh.uchile.cl).

**NATIONAL ACADEMY OF LEGAL  
EDUCATION AND RESEARCH/NALSAR  
UNIVERSITY OF LAW, HYDERABAD**

Site: <http://www.nalsarlawuniv.ac.in/>

Contact: registrar@nalsarlawuniv.org

City Office 3-4-761, Barkatpura, Hyderabad – 500 406 A.P - India.

Phone: +91 40 27567955/58 Fax: +91 40 27567310

**Teaching:** Five year B.A, LL.B.(Hons.) Degree Programme, Two year LL.B. Degree, Ph. D. Programme, One year Postgraduate Diplomas in Patents Law, Media Law, Cyber Laws and International Humanitarian Law

**Research:** "Convention on the Rights of the Child – Andhra Pradesh State Report" and "The Andhra Pradesh Child Labour Abolition and Compulsory Education Bill, 2003" among others.

**Main publications:** Periodicals: "NALSAR Law Review"

"IP Law News"

"NALSAR Newsletter

"Green News" – Newsletter

*Books: Cyber Space and the Law – Issues and Challenges, Ghanshyam Singh, Ranbir Singh.*

*Human Rights Education, Law and Society, Ghanshyam Singh, Ranbir Singh.*

NALSAR University of Law in Hyderabad is an institution focusing on the field of legal education and research. The University was established in 1998 and has since then played an important role for setting new standards in legal education, not least in the field of Human Rights. With the outspoken mission of educating capable, competent and humane lawyers, the University is providing India with a new generation of socially engaged lawyers.

Students in the five year B.A, LL.B.(Hons.) Degree Programme finish their law degree with courses in Human Rights, International Humanitarian Law and Refugee Laws.

NALSAR University of Law is the source of numerous projects and publications engaged in the social movement and struggle for Human Rights in India. Examples of this are the **Legal Assistance Programme for Land (LAPL)** which educates law students in collaboration with the Society for the Elimination of Rural Poverty (SERP). **Strengthening Criminal Justice and Human Rights** is a program that included twenty nine intensive workshops where students interacted with Judicial Officers, Disability Rights Activists, Human Rights Activists, Adivasi groups and Senior Journalists, debating issues related to the Criminal Justice System and Human Rights. The **Citizens' Guide on Access to Justice**, a handbook created with the purpose of raising legal awareness among the public, by translating booklets on Human Rights to local Indian languages such as Telugu, Tamil, Kannada and Malayalam, constitutes another way that the University increases citizen access to legal facilities. The "Convention on the Rights of the Child – Andhra Pradesh State Report" and the "The Andhra Pradesh Child Labour Abolition and Compulsory Education Bill, 2003" are examples of legal documents produced by the University.

## ANNEX 2

# RESULTS OF THE EVALUATION ON READER PROFILE AND THE QUALITY OF SUR JOURNAL

The journal was founded with the purpose of developing a channel for communication and for promoting innovative research on human rights, while adopting a focus that addresses the peculiarities of countries from the southern hemisphere. The first issue was launched in the second half of 2004 and it has been published twice yearly ever since. SUR Journal is printed in three languages with a press run of 2,700 copies and it is also available online. In addition, it has a mailing list of 2,119 readers. Subscription is aimed at professors, human rights activists and the libraries of universities with postgraduate courses in human rights.

As publication of issue No. 7 approached, we conducted a survey to discover who our readers are, what they think about the journal, what they use it for and how they think it could be improved. This was done with a questionnaire to evaluate reader profile and the quality of the journal.

### Survey format

The survey on the quality of SUR Journal took six months (from April 15 to October 15). The questionnaire was posted on the journal's website and readers were invited by mail to fill it out.

### Reader profile

The questionnaire was answered by 391 readers from 60 countries, representing approximately 18% of subscribers to the printed version (our goal was 300 responses). Brazilians represented 40% of respondents to the questionnaire. In numbers of responses, they were followed by Argentina (9.7%), United States (5.1%) and Mexico (4.6%). The African country with the highest number of responses was Nigeria (2.3%), while the most responses in Asia came from India (2.3%). The language distribution of our readers is relatively even: 38% read the journal in Portuguese, 32% in Spanish and 30% in English.

Most readers work at NGOs (31.2%) or are university professors (36.8%). The majority of them read between 3 and 5 articles.

### Opinion about the quality of the journal

The survey appears to confirm that the journal primarily serves an educational purpose, since 58.3% of respondents said the articles frequently improve their understanding of a given topic. However, the journal has not achieved its goal to spark debate, given that 49.1% replied that only occasionally do the articles manage to challenge their position on specific matter.

The question about the purposes the journal is used for was presented in multiple-choice format. Most readers answered that they use the journal for research (77.2%), university training activities (45.2%), personal reading (43.7%) or as recommended reading for university courses (41.6%).

The most important question was the one asking the reader to make an overall evaluation of the journal, and it was in these responses that journal was given the best assessment: 62% of readers said the quality of the journal was excellent and 38% said it was good (none judged it to poor or very poor).

## Reader suggestions

The final two questions enabled us to have some form of dialogue with our readers. Many of them responded, even though this section was optional.

The readers suggested an enormous list of topics that the journal could address, some of which are the subject of discussion in this and the next issue.

The question on critiques and suggestions yielded some welcome surprises and plenty of important information for us to continue our work with the journal: 36.3% of readers left comments, 28.1% of them to express their gratitude for the journal and to praise its content.

Many of the comments emphasized the need to give more space to new authors (young researchers) and others highlighted the need to publicize the journal more widely.

## The next steps

We believe that the number of responses to our evaluation questionnaire represents a significant sample of our readers. As the responses have indicated, our major challenge now is to promote an effective human rights debate capable of shattering existing false consensus and, in doing so, help develop a doctrine on the topic in a more coherent and critical manner. We realize that we need to pursue this objective without sacrificing the achievements made so far, particularly the regularity of the publication and the diversity of the authors.

At the same time as we launched the online evaluation questionnaire, we also consulted some professors and activists on how to maintain the quality of the articles and the diversity of the authors (so far, 75% of the published articles have been penned by authors from the southern hemisphere). As a result, we reached the conclusion that it would be necessary to create a new system for editing articles, whereby professors with more research experience would collaborate with the new authors. Therefore, starting with our next issue, a group of professors will work with the authors to improve their contributions so we can publish articles by new authors without losing any of the editorial quality we enjoy.

We would like to thank everyone who responded to the questionnaire and invite you all to continue sending us your comments and suggestions. We always welcome your ideas on how to improve the quality of the journal and how best to publicize it among the right audience.

## SURVEY - READER PROFILE AND SUR JOURNAL EVALUATION

### A – Reader Profile

1. Indicate which category is applicable to you? (multiple answers possible)

- I work for a NGO  
 I am a professor  
 I am a student  
 I work for a foundation  
 I work for a government  
 I am responsible for acquisitions in a library \*  
 I work for an international organization (UN, OAS, AU, etc.)  
 Other

\* if you are responsible for acquisitions in a library, please contact us at [surjournal@surjournal.org](mailto:surjournal@surjournal.org)

2. How many articles have you read?

- 0    1 - 2    3 - 5    6 - 10    More than 10

3. Country

4. Language in which you read the Sur Journal:

- Spanish    English    Portuguese

5. You usually read the Journal: (multiple answers possible)

- Printed    On-line

*Questions 5 and 6 are for subscribers of the printed version only:*

6. The Sur Journal is used for: (multiple answers possible)

- Personal use    Institutional use

7. Editions of the Sur Journal that you have received: (multiple answers possible)

- No. 1    No. 2    No. 3    No. 4    No. 5

### B – Sur Journal Evaluation

8. In your opinion, the issues addressed in the Sur Journal are:

- Irrelevant    Fairly relevant  
 Relevant    Very relevant

9. How often have the articles challenged your perception about a given topic?

- Never    Sometimes  
 Many times    Very often

10. How often have the articles enlarged your perception about a given topic?

- Never    Sometimes  
 Many times    Very often

11. Do you think that Sur Journal has succeeded in addressing specific issues of the Southern Hemisphere?

- Never    Sometimes  
 Many times    Very often

12. You use the Sur Journal for: (multiple answers possible)

- Personal reading  
 Bibliography for academic courses  
 Litigation  
 Mobilization  
 Research  
 Training  
 Other

13. What is your evaluation concerning the layout of the Sur Journal?

- Very bad    Bad  
 Good    Very good

14. What is your opinion in relation to the general quality of the Sur Journal?

- Very bad    Bad  
 Good    Very good

15. Please, suggest topics for following issues:

16. Other suggestions and critiques:

*Thank you very much for your cooperation!*

## PREVIOUS NUMBERS

Previous numbers are available at <[www.surjournal.org](http://www.surjournal.org)>.

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### SUR 1

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EMILIO GARCÍA MÉNDEZ

Origin, Concept and Future of Human Rights:  
Reflections for a New Agenda

FLAVIA PIOVESAN

Social, Economic and Cultural Rights and Civil  
and Political Rights

OSCAR VILHENA VIEIRA and A. SCOTT DUPREE

Reflections on Civil Society and Human Rights

JEREMY SARKIN

The Coming of Age of Claims for Reparations for  
Human Rights Abuses Committed in the South

VINODH JAICHAND

Public Interest Litigation Strategies for Advancing  
Human Rights in Domestic Systems of Law

PAUL CHEVIGNY

Repression in the United States after the  
September 11 Attack

SERGIO VIEIRA DE MELLO

Only Member States Can Make the UN WorkFive  
Questions for the Human Rights Field

### SUR 2

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SALIL SHETTY

Millennium Declaration and Development Goals:  
Opportunities for Human Rights

FATEH AZZAM

Reflections on Human Rights Approaches to  
Implementing the Millennium Development Goals

RICHARD PIERRE CLAUDE

The Right to Education and Human Rights  
Education

JOSÉ REINALDO DE LIMA LOPES

The Right to Recognition for Gays and Lesbians

E.S. NWAUCHE AND J.C. NWOBIKE

Implementing the Right to Development

STEVEN FREELAND

Human Rights, the Environment and Conflict:  
Addressing Crimes against the Environment

FIONA MACAULAY

Civil Society-State Partnerships for the  
Promotion of Citizen Security in Brazil

EDWIN REKOSH

Who Defines the Public Interest?

VÍCTOR E. ABRAMOVICH

Courses of Action in Economic, Social and  
Cultural Rights: Instruments and Allies

### SUR 3

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CAROLINE DOMMEN

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