

sur

International Journal
on Human Rights

1

2004
Year 1 • Number 1 • 1st Semester
English Edition

- **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 Work
Five Questions for the Human Rights Field



HUMAN RIGHTS
UNIVERSITY NETWORK

SUR

ISSN 1806-6445

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>>

EDITORIAL BOARD

Christof Heyns

University of Pretoria, South Africa

Emilio García Méndez

University of Buenos Aires, Argentina

Fifi Benaboud

North-South Centre of the Council of Europe, Portugal

Fiona Macaulay

Oxford University, United Kingdom

Flavia Piovesan

Pontifical Catholic University of Sao Paulo, Brazil

J. Paul Martin

Columbia University, United States

Kwame Karikari

University of Ghana, Ghana

Mustapha Kamel

Al-Sayyed Cairo University, Egypt

Richard Pierre Claude

University of Maryland, United States

Roberto Garretón

UN Office of the High Commissioner for Human Rights, Chile

EDITOR

Pedro Paulo Poppovic

MANAGING EDITOR

Andre Degenszajn

GRAPHIC DESIGN

Oz Design

TEXT EDITING

Elzira Arantes

TEXT PREPARATION AND REVISION

Francis Henrik Aubert, Noêmia de A. Ramos, José Roberto Miney

TRANSLATORS

Barney Whiteoak, Francis Henrik Aubert, Regina de Barros Carvalho and Jonathan Morris

ART EDITING

Alex Furini

CIRCULATION

Andrea de Lima
Camila Lissa Asano

PRINTING

Prol Editora Gráfica Ltda.

CONTRIBUTIONS

This journal accepts contributions from authors interested in publishing their papers. All submissions must conform to the editing standards, available on the Internet site of the journal. Unsolicited papers shall be submitted to the Editorial Board for final decision on publication. All opinions expressed in the papers are the sole responsibility of the authors and do not represent opinions of *Sur* or the Editorial Board.

SUBSCRIPTION AND CONTACT

Sur – Rede Universitária de Direitos Humanos

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

Internet: <<http://www.surjournal.org>>

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.

Internet: <<http://www.surjournal.org>>

PRESENTATION



The **Human Rights University Network – Sur** was set up in 2002 with the purpose of bringing together Southern Hemisphere academics active in the field of human rights, and of promoting their cooperation with UN agencies. The network currently has over 130 associates, from 36 countries, including scholars and members of international organizations and UN agencies.

The initiative arose from a series of meetings held between academics and UN officials involved in the field. The major motivation stemmed from the realization that, particularly in the Southern Hemisphere, scholars tended to conduct their work in an isolated fashion, with a very meager interchange among researchers of the countries involved.

Sur aims to operate as a network that will deepen and strengthen bonds between scholars concerned with the subject of human rights, magnifying their voices and participation in UN agencies, international organizations and universities. Within this framework, the network now offers a specific journal, *Sur – International Journal on Human Rights*, with the purpose of consolidating a channel that will publicize and promote groundbreaking research.

The journal, which intends to provide a different view of the issues involved in this debate, takes as references other publications in the field, with which it attempts to establish a permanent and ongoing dialogue. Nevertheless, its singularity is a consequence of its scope, plurality and perspective.

Scope. Language will often represent a major barrier for the establishment of long-lasting cooperative bonds among

researchers in the several countries. Although English has become largely universal, it is not as effective as the various mother tongues of organizations and scholars to conduct discussions about complex subjects. For this reason, *Sur – International Journal on Human Rights* is published in three languages (English, Portuguese and Spanish), and is made fully available on the Internet, at <<http://www.surjournal.org>>. In this manner, it attempts to facilitate access by the largest possible number of people.

Plurality. Another distinguishing feature of the journal concerns the institution responsible for its publication. Being a network, *Sur* can count on the collaboration of researchers from several countries, in a sustained effort to identify issues relevant to different realities, and with a consistent aim at exploring new frontiers in the human rights debate. Thus, instead of mirroring the concerns and perspectives of a closed institution, the journal opens up to a plurality of contexts and visions, which will make themselves present in each one of its issues.

Perspective. With the aim of ensuring internal consistency and adopting a political and not only an academic dimension, the journal intends to privilege discussions whose main focus is centered on the countries of the South. The point here is not to wage any ideological opposition to the scientific production of the North, but rather to insert in the global debate an agenda benchmarked by the demands and priorities identified by the South in the discussion on human rights.

This issue purports to present the journal to its readership and introduce some of the debates roused by the III International Colloquium on Human Rights, held in May 2003, in São Paulo, Brazil.

This publication would not have been made possible without the support and the material contributions of the United Nations Foundation and of the Ford Foundation. Special thanks are due also to our editor, Pedro Paulo Poppovic, for his *pro bono* work in bringing the journal to life.

CONTENTS

EMILIO GARCÍA MÉNDEZ	7	Origin, Concept and Future of Human Rights: Reflections for a New Agenda
FLAVIA PIOVESAN	21	Social, Economic and Cultural Rights and Civil and Political Rights
OSCAR VILHENA VIEIRA and A. SCOTT DUPREE	47	Reflections on Civil Society and Human Rights
JEREMY SARKIN	67	The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South
VINODH JAICHAND	127	Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law
PAUL CHEVIGNY	143	Repression in the United States after the September 11 Attack
SERGIO VIEIRA DE MELLO	161	Only Member States Can Make the UN Work
	165	Five Questions for the Human Rights Field

EMILIO GARCÍA MÉNDEZ

Professor of Criminology at the Faculty of Psychology, University of Buenos Aires, Argentina.

ABSTRACT

The purpose of this article is to reopen the debate on some conceptual issues of human rights, for the purpose of relaunching and revitalizing a politically mobilizing agenda for Latin America.

The author defends the priority of civil and political rights over economic and social rights by reformulating, for example, the right to education, which has traditionally been understood to be part of economic and social rights.

He also contends that it is both urgent and necessary to address through political action, and not within the domain of human rights, issues that raise controversies of a moral character in society. The case of abortion, which is still treated as a human rights issue in the United States, is sufficiently illustrative.

ORIGIN, MEANING AND FUTURE OF HUMAN RIGHTS: REFLECTIONS FOR A NEW AGENDA*

Emilio García Méndez

Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable.

Michael Ignatieff



Human rights: between history and politics

For those who take a critical view of the world of intellectual production on human rights, two specific aspects should stand out: the enormous quantitative dimension and the predominantly pacific character of their conceptual evolution.

While the first characteristic can be explained by the continuous rise in violations of individuals' rights by states, the second appears to refer to the very genesis of the concept of human rights. Born as a political response, real and contingent to a horrific event, unthinkable *a priori*, such as the Holocaust, their theoretic development was marked by an exceptional universal consensus based on the worldwide repudiation of the maniacal plan for the mass annihilation of an entire race. This enormous political consensus promoted a broad theoretic consensus which, objectively, resulted in the intellectual impoverishment of its development.

The ensuing debate on the fundamentals of human rights was initially strongly directed towards a philosophic and metaphysical plane that enabled us to claim their existence and their legitimacy, independently not only of recognition by governments, but also by

* I would like to express my special thanks to Roberto Saba, for his patience and interest in discussing the preliminary draft of this text with me. However, it would be fair to say that the many imperfections and, let's face it, excesses, are entirely of my own responsibility.

The references of the sources quoted in this text will be found on page 19.

1. A representative example of this philosophic-metaphysical, tributary perspective, among others, from the thinking of the Argentine philosopher Carlos Nino, can be found in Pedro Nikken (p. 21): "The recognition of human rights as attributes that are inherent to people, not as a concession from society, nor depending on recognition from any government ...". On the other hand, decisive arguments demonstrating the fragility of the concept of "human nature" in relation to the fundamentals of human rights are presented by Norberto Bobbio (pp. 118 and followings).

2. For a radically critical view of the association between humanist thinking and the idea of progress and, as a consequence, for a view that deals with the serious crisis in humanist thinking, see the recent work of J. Gray (2002, particularly pp. 3-4).

society itself.¹ Within this context, although the concept of human rights as inherent to the human condition has served, on the one hand, to neutralize the negative trends originating from circumstances related to an exaggerated concept of sovereignty; it has, on the other hand, been damaging, in so far as it has considered as heresy any approach that traces the origin and existence of human rights back to history and politics. The strong hegemony of humanism in its various forms supports this perspective of the metaphysical foundation of human rights. Paradoxically, it was the full association of humanist thinking with the idea of progress and the profound crisis which has afflicted this notion² that opened an anti-foundational breach in dominant thinking on human rights.

There is no doubt that the conception of human rights as inherent rights of human beings has contributed decisively to an idolatrous³ and unhistoric view of rights that, evidently, are historic and contingent. Contrary to the metaphysical view held by Carlos Nino, Eduardo Rabossi rejects the idea of any foundation that intends to transcend the normative trend that, on the subject of international protection of human rights, has been under development from World War II to the present day.⁴ These ideas were pursued more aggressively by the American philosopher Richard Rorty (pp. 120-121), in a lecture from which I consider it pertinent to cite a truly significant paragraph:

My basic point is that the world has changed and that the human rights phenomenon renders human rights foundationalism outmoded and irrelevant. Rabossi's claim that human rights foundationalism is outmoded seems to me both true and important; it will, therefore, be the principal topic of this lecture. I shall be enlarging on, and defending, Rabossi's claim that the question whether human beings really have their rights enumerated in the Helsinki Declaration is not worth raising. In particular, I shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.

The central idea I wish to defend here refers to the fact

that I am convinced that the development of a vigorous and reliable human rights agenda, which to be effective must recover the capacity for social mobilization, depends largely on recovering original political meaning of human rights, manifest in their historical origin. This perspective seems to me particularly relevant for the tangible reality of what, without ignoring the problematic aspects of this definition, can be understood to be the geopolitical South of our global village. In this South, not only from a factual point of view, but also from what may be described as a cultural standpoint, the absolutely intolerable character of civil and political rights violation is far from constituting a politically closed debate. Discussions surrounding the binomial guarantees/police efficiency in topics concerning the security of citizens are the best examples, although obviously they are not the only ones.

Clearly the paths to the legitimacy of human rights, a vital condition for their effective validity, lead to metaphysics or politics. History and experience are only there to remind us of the mere apparent validity of any metaphysical legitimacy. On the contrary, and paradoxically, there seems to be far more force in the fragility of political legitimacy. Let's take a look at some reasons for this.

If the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights", this is precisely because men are not equal by nature, since, if it were so, the declaration's content would be, at the very least, superfluous. In this sense, the following quotations seem to me sufficiently illustrative:

The public sphere, always inseparable from the concepts of liberty and distinction, is characterized by equality: men are by nature not equal, they require a political institution to become equal, in a word, laws. Only political action can generate equality [my underlining]. (Fina Birules, p. 22)

*The [Universal] Declaration [of Human Rights] retains an echo of all this because men, **indeed**, are not born free, nor equal ... the liberty and equality of men is not a foregone conclusion, but an ideal to be pursued; not a reality, but a value; not a truth, but a duty ... (Norberto Bobbio, p. 134)*

3. This characterization and this criticism of human rights idolatry are very well explained in the book by Michael Ignatieff (2001, particularly p. 83).

4. A brief but clear reconstruction of this debate between Nino and Rabossi can be found in G. Carrio. Although the topic of the foundation of human rights is present and widely discussed many times in the vast and brilliant works of Carlos Nino, allow me to make a specific reference for this point to his essay *Ética y derechos humanos: un ensayo de fundamentación*. Concerning the perspective of Rabossi, allow me also to make a direct reference to the text "La teoría de los derechos humanos naturalizada".

This perspective paves the way for a positive and non-transcendent foundation of human rights as a political instrument of equality. A perspective that, on the other hand, would enable us to overcome the impasses the aforementioned prolonged debate has imposed on the international human rights agenda. It seems to me that nobody has expressed it better than Michael Ignatieff (p. 83), when he says: “Human rights is the language through which individuals have created a defense of their autonomy against the oppression of religion, state, family, and group”.

The problem of the relationship between civil and political rights and economic and social rights

The situation during the Cold War that followed World War II directly influenced the political and academic debate. Two key focuses of tension emerged at this time: (a) the debate concerning the pre-eminence of civil and political rights or economic and social rights – which pitted industrialized Western nations against countries in the socialist bloc; (b) the debate over the universality of human rights, which, in general, pitted developed nations against much of the Arab world and Asian countries.

Curiously enough, while the second debate continues, largely due to the permanent impulse that the different versions of cultural relativism and of moral imperialism provided it with, the first ended before it was exhausted.

The abrupt and poignant collapse of the socialist bloc in 1989 unmasked the superficial and grossly demagogic character of the “debate” on human rights that accompanied the entire period of the Cold War. What is interesting is that, with the victory of the “West”, in some ways the position of the socialist bloc also triumphed. The overstated, superficial and under-analyzed “indivisible” and “interdependent” character of human rights did in fact serve, as I shall try to demonstrate, as an element relativizing the priority of political rights. As Bobbio reminds us (pp. 150 and followings), one can never insist too strongly on the fact that human rights are not absolute, nor do they constitute a homogeneous category (contrary to what their supposed indivisible character would

indicate). The absolute value of a limited number rights, i.e. their privileged status, arises from the fact that their violation is condemned universally. Nevertheless, for example, the right not to be submitted to slavery implies the elimination of the right to own slaves and the right not to be tortured implies the elimination of the right to torture. Within this context, it can be asked, putting aside rhetoric and irony, what is the content or the significance of the concept of indivisibility.

This superficiality in dealing with the subject has revealed that the pre-eminence of civil and political rights upheld by the West during the Cold War, far from being the product of an ethical or moral imperative, constituted a very unsubtle means of weakening the already fragile legitimacy of the socialist bloc.

However, what is the current state of the problem of the relationship between political rights and economic and social rights? Paradoxically, in a world full of problems, the problem of this relationship appears to be that it poses no problem at all. Similarly to the magical character of indivisibility, the interdependent character of human rights, which places equal importance and homogeneity on both types of rights, has served to suppress any debate on the ultimate priority of one type or the other, generally labeled as being outmoded.⁵

For reasons and with arguments that I shall present later, I am an advocate of prioritizing political rights today in the countries of the South, as part of any strategy to reconstruct a reliable and mobilizing human rights agenda.

In this sense, I have taken this position given the contingent character of the content of political rights and of economic and social rights. There is nothing in the “nature of things” that makes a right inherently belong to one category or another. Moreover, this position in no way denies the importance of the content of economic and social rights. It does, in fact, defend the need for a public debate on the appropriateness of prioritizing one type of right and removing, or not, from politics (entrusting them exclusively to law) some aspects of civil life relating to what, in a broad sense, can be called economic and social development. At the same time, it also does something that could be considered contradictory to this tendency. I am referring to the need to consider as a

5. The supposed indivisible and interdependent character of human rights does not derive from anywhere other than the very declaration. Thus it was consecrated in the Vienna World Conference on Human Rights declaration, in June 1993. On this point, it appears to me important not to confuse the (for some time) un-discussed character of a concept, with the indisputable character of a concept. This last characteristic may only belong to a variable of fundamentalism. The most complete and profound document on the type of relationship between political rights and economic and social rights, which includes an identification of the most determinant causes of their violations, as well as specific recommendations for their observance, is the Final Report of the United Nations Rapporteur on Economic and Social Rights, Danilo Turk.

political right (and, consequently, not subject to tolerance or negotiation by use of the clause “subject to limitations determined by available resources”, which characterizes economic and social rights), certain rights that until now were typically considered to belong to the category of economic and social rights. I am referring here, specifically, to the right to education.

In the current stage of technological development, in which access to knowledge constitutes the decisive and fundamental factor allowing for an existence worthy of human dignity, which is the ultimate purpose of human rights, the right to education cannot be submitted to any form of negotiation, and must be considered to be as much an absolute priority as the abolition of slavery or of torture. Exactly the same can and should be said about basic health care. I will return to this point later.

The approach I am defending here can be mainly explained by a profound dissatisfaction with the existing state of affairs. In fact, it deals with raising new problems and new questions in a world where the war in Iraq has shattered the already weakened and questionable institutionality of human rights as established after World War II. Paraphrasing Ignatieff (p. 81) in a reference to the Holocaust, the war in Iraq revives both the conscience of the fragility of human rights and, simultaneously, their urgent necessity.

This insistence on the necessity for a critical revision of the human rights agenda is not a blind exercise of mere intellectual omnipotence, with the intent of erasing facts with words. It does, on the contrary, attempt to deny the continuance of business as usual in this mutated landscape of profound and dubious transformations.

To make myself clearer, I would like to make explicit my suspicion, from which stems my dissatisfaction and my alternative reasoning, that today’s refusal to accept the priority of political rights, through the assertion that all human rights are of equal priority, has prompted, principally in the countries of the South, an increase in the violation of political rights, while at the same time it has not prompted any significant progress in the field of economic and social rights.

Considering the politically and culturally hegemonic

character that the dimension of human rights has assumed and that later on I shall characterize as “programmatic”, to determine that all rights are equally important and, consequently, of equal priority, constitutes a subtle way of confirming the real priority of those rights whose non-observance does not actually generate strong political tensions with the state. The possibility of establishing a relationship of continuous, non-conflicting cooperation with the state, when the real priority is economic and social rights, explains much of the hegemonic character of this tendency.

Human rights: political, academic and programmatic dimensions

Specially over the past few years, what we might term “the human rights issue” can, for analytical purposes, be divided into three dimensions that I shall be mentioning in just a moment.

What we can characterize as a specifically **political** dimension of human rights has developed, fundamentally, in close connection with struggles on a national level, as a direct response to violations of the rights of individuals by the state. Non-professional active militancy, its essentially divisive character and the absence of significant theoretic thinking (particularly when measured in proportion to the size of the struggles) has profoundly marked the political dimension of human rights.

Meanwhile, the dimension that may be called **academic** has in general been confined to the world of universities and other centers of knowledge. The relationship between domestic law and international law and, more specifically, the applicability of international treaties on a national level have occupied the center stage in this debate. In other words, the academic development of human rights has become, to a fairly large extent, a synonym for “International Law of Human Rights”.

But the dimension that presents the greater number of complex fringes and which is, furthermore, perhaps the richest in political and conceptual implications, is the dimension I shall here call **programmatic**. This dimension makes a reference to the incorporation, by international organizations from various geographical areas and from very

diversified fields, of the forms and semantics of political and academic human rights developments. However, it would be a crude misconception to imagine that this process was accomplished by the passive incorporation and mere assimilation of the two aforementioned dimensions. The programmatic dimension of human rights, in the form that it is effectively taking place, presumes a profound reformulation of the theory and the practice, both academic and political, of human rights, whose consequences (some of them) I propose to identify and begin to analyze in the remainder of this article.

The programmatic dimension of human rights is characterized by a perspective that is politically non-conflicting with the state and ambiguous concerning the harsher aspects of the academic debate. An unhistorical, ritualistic, pragmatic, indisputable (mainstream) and totalizing perspective have gradually removed the content of the original political and academic proposal of human rights. Similarly, given that when everything is a priority, in reality nothing is a priority, when everything is human rights (starting with situations that imply no responsibility whatsoever on the part of the state), nothing is human rights.

This bureaucratic colonization of the human rights discourse has had a profound and uneven impact on conceptual practices and developments, particularly in the countries of the South. In these countries, the fragility and at times the sheer inexistence of autonomous centers of knowledge increased the ultimate theoretical and cultural dependence on international organizations, principally on those that have contributed most to the conceptual reformulation of the human rights issue. As a result, nothing that could be perceived to be a critical perspective has emerged over the past few years.

Almost invariably, the “consensuses” in this dimension have been obtained by aggregation. The practical consequence is that any **full and comprehensive** human rights agenda often ends up, in actual fact, just being a euphemism for an agenda that is as politically innocuous as it is static and insignificant.

Paradoxically, while the conflictual character of the politics concerning critical human rights issues grows, i.e. while blatant violations of the most basic human rights

multiply, the list of human rights referring to economic and social development lengthens incessantly. It appears that a sizable part of the current conceptual advances has been able only to reflect the sterility and the superficiality of a unipolar world.

This is the context within which I propose to make a critical analysis both of the practical consequences of some of the (unproven) suppositions on which the current human rights discourse and actions (universality, interdependence and indivisibility) are based, and also on the relationship between politics and the field of human rights.

In the ritualistic concept that today dominates human rights discourse and is clearly expressed in its programmatic dimension, the suppositions that I alluded to earlier appear to constitute home truths that do not require – but, more to the point, do not tolerate – debate or, much less, criticism.

Such a debate, or to be more precise, the absence of such debate, is structured basically around the type of relationship, both the existing and the desirable one, between political rights and economic and social rights.

The programmatic concept that is structured methodologically around the consensus achieved by aggregation constitutes, in actual fact, a cumulative concept of human rights. In this way, economic and social rights are a type of later geological stratum that fits harmoniously and naturally over political rights. It is interesting to observe a certain kinship between this linear and cumulative concept and the development, not divested of a certain economicism, of T.W. Marshall's theory on the historical process of the expansion of rights.⁶

Human rights: between law and politics

After everything that has been said previously, it appears to me important to start questioning the “politically correct” idea that the continuous expansion of the content of human rights, i.e. of those areas of civil life that are removed from political contingency and negotiations, directly strengthen the agenda and the struggle for human rights. To do so, it is important, among other things, to understand the complex nature of the relationship between human rights and civil peace.⁷

6. I am referring specifically to the well known 1950 essay, *Ciudadanía y clase social*. See T.H. Marshall & Tom Botommore.

7. The insistence on the connection between political stability and effective validity of human rights is very firmly present in the work of Ignatieff.

It is true that a greater attention to human rights contributes to civil peace. However, it is no less true that civil peace and democratic stability are the only environment in which human rights may develop in a genuine and sustainable manner.

It is often argued that, in the field of rights, the incorporation of aspects that were previously considered exclusive to social policy possesses the exceptional advantage of its “justiciability”. Although this statement is, strictly speaking, correct, it is no less correct to say that the individual action of justice to provide the benefits of social policy may become not only a source of amplified reproduction of social inequalities, through unequal access to justice,⁸ but also an undesirable concession of legitimacy to governments that use this means to serve only very few.

8. This specific warning may be found in the excellent work of Vitor Abramovich & Christian Courtis (p. 42), who defend, contrary to what I argue for here, an expanded concept of human rights.

However, the more important and alarming problem of this extended concept of human rights is not found, in my opinion, in the aforementioned example. The most serious problem arises, more specifically, from transforming into a human rights issue political matters that are also highly conflictuous from a moral point of view.

In the words of the British philosopher John Gray (1997, p. 22):

To make a political issue that is deeply morally contested a matter of basic rights is to make it non-negotiable, since rights – at least as they are understood in the dominant contemporary schools of Anglo-American jurisprudence – are unconditional entitlements, not susceptible to moderation. Because they are preemptory in this way, rights to not allow divisive issues to be settled by a legislative compromise: [in the field of law] they permit only unconditional victory or surrender. The abortion issue in North America, where it is treated as an issue of constitutional rights rather than of [political] legislation, is the clearest example of a divisive issue rendered yet more dangerous to civil peace by being elevated to an issue of constitutional law and the theory of rights.

In fact, the comparatively different treatment afforded to the abortion issue in Europe and the United States illustrates well what has become the central way of thinking that I am attempting to express here.

Arising almost simultaneously in Europe and the United States, in the early 1970s, the abortion issue literally shattered the European social fabric, the case in Italy probably being the clearest example of this. During years of intense and heated debate, the Catholic Church on the one hand and the feminist movement on the other, directed and mobilized a society that was deeply divided by this moral issue. The first glimmer of consensus did not emerge from within the debate itself, but instead from a procedure to settle the conflict. Given that society had become exhausted from years of debate, an agreement was finally reached to understand the political dimension of a problem with deep moral roots. Plebiscites and laws resolved the issue politically, in a peaceful and lasting manner.

Concomitantly, the path taken in the United States was very different. Shortly after the debate began, which promised to become even more embittered than in Europe, the Supreme Court of the United States cut short the political debate by, in the well-known *Roe vs. Wade* case, declaring abortion to be a constitutional right.⁹ Exactly 30 years later, American society is even more divided and the civil peace is more threatened, precisely because the country attempted to solve within the field of human rights, and not within the field of politics, a problem that morally split (and that still splits), profoundly, this society.

Final words

Lastly, with no intent to draw any final conclusions, but primarily with a view to stimulating the debate, I would like to address the issue of the relationship between politics and human rights. The problem is complex in appearance, but is far more so in its very essence.

Under the perspective of a democracy taken seriously, a broad consensus exists over imposing and accepting the need to bar from politics some areas of civil and institutional life, as a necessary condition for the functioning of the Rule of Law. However, this should not be confused with judging human rights to be beyond or above politics. In general, the consensus to bar certain topics from politics is the result of nothing other than political agreements, whose solidity and durability are directly related to the degree of moral

9. An excellent description and analysis of this case was published in a special report in the British magazine *The Economist*: "The War that Never Ends" (Special Report Abortion in America), 18-24 January 2003, pp. 24-26.

consensus supporting them. As Ignatieff says (p. 22): “Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable”.

If we agree with this quote, we should, then, be prepared to accept the possibility that the lack of explicit human rights priorities contributes to exhaust the content and relativize the existence of a resistant nucleus of human rights.

The insistence in continuously expanding the areas of economic and civil life that should be considered human rights considerably weakens any reliable and, above all, any mobilizing political human rights agenda. It does not appear to me that the actual list of human rights is expanding, like a type of flight to the future making up for lost credibility.

For the partisans of the interdependence and indivisibility of human rights, primarily those with the responsibility of developing the programmatic dimension of human rights, it is appropriate to recall that a cultural hegemony cannot be conserved indefinitely by always evading the debate and demonizing the critical postures of this article, which they may consider disruptive or outmoded.

BIBLIOGRAPHY

- ABRAMOVICH, Victor & COURTIS, Christian. *Los derechos sociales como derechos exigibles*. Madrid: Trotta, 2002.
- BIRULES, Fina. *Introducción a Hanna Arendt “¿Qué es la política?”*. Barcelona: Paidós, 1997.
- BOBBIO, Norberto. “Presente y futuro de los derechos del hombre”. In: _____, *El problema de la guerra y las vías de la paz*. Barcelona: Gedisa, 1982.
- CARRIO, Genaro. “Los derechos humanos y su protección”. Buenos Aires: Abeledo-Perrot, 1990.
- GRAY, John. *Enlightenment’s Wake. Politics and Culture at the Close of the Modern Age*. London/New York: Routledge, 1997.
- _____. *Straw Dogs. Thoughts on Humans and Other Animals*. London: Granta Books, 2002.
- IGNATIEFF, Michael. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press, 2001.
- MARSHALL, T. H. & BOTTOMORE, Tom. *Ciudadanía y clase social*. Madrid: Alianza, 1998. [Original edition: 1950]
- NIKKEN, Pedro. *El concepto de derechos humanos*. San José de Costa Rica: Interamerican Institute for Human Rights, 1994. (Human Rights Studies series)
- NINO, Carlos. *Ética y derechos humanos: un ensayo de fundamentación*. Buenos Aires: Astrea, 1989.
- RABOSI, Eduardo. “La teoría de los derechos humanos naturalizada”. *Revista del Centro de Estudios Constitucionales*, n. 5, January-March 1990, pp.159-175.
- RORTY, Richard. “Derechos humanos, racionalidad y sentimentalidad”. In: S. Shute & S. Hurley (eds.). *De los derechos humanos*. Madrid: Trotta, 1998.

FLAVIA PIOVESAN

Lecturer of Constitutional Law and Human Rights at the Catholic University of São Paulo (PUC-SP), and at the Catholic University of Paraná.

ABSTRACT

This essay deals with social, economic and cultural rights and political and civil rights within the context of international law on human rights. To this end, it reviews the contemporary conception of this issue in the light of the international system of protection, evaluating its profile, its objectives, its logic and its principles, and questioning the feasibility of an integrated vision of human rights. This is followed by an evaluation of the main challenges and prospects for the implementation of these rights, claiming that facing this challenge is essential to ensure that human rights will take on their central role in the contemporary order.

SOCIAL, ECONOMIC AND CULTURAL RIGHTS AND CIVIL AND POLITICAL RIGHTS*

Flavia Piovesan



How to understand the contemporary formulation of human rights

Human rights come into being as and when they are able and required to do so. As Norberto Bobbio emphasizes, human rights do not arise either all at once or for good. To Hannah Arendt, human rights are not given facts, but a construct, a human invention that is subject to an ongoing process of construction and reconstruction.¹ Considering the historicity of these rights, it may be said that the definition of human rights will point to a plurality of meanings. Considering this plurality, the so-called contemporary conception of human rights is a distinctive one, introduced through the Universal Declaration of 1948, and restated in the Vienna Declaration of Human Rights of 1993.

This conception is the result of a movement towards the internationalization of human rights, an extremely recent phenomenon that emerged after World War II as a response to the atrocities and horrors committed during the Nazi regime. Presenting the State as the major violator of human rights, the Hitler Era was characterized by a logic of destruction and expendability of human beings that resulted in the confinement of 18 million individuals in concentration camps, and the death of 11 million, including 6 million Jews,

* This text is based on the lecture "Social, Economic and Cultural Rights and Civil and Political Rights" presented at the 3rd International Conference on Human Rights, whose central theme was "The State of Law and the Construction of Peace", held in São Paulo on May 27, 2003.

See the notes to this text as from page 39.

The references of the sources quoted in this text will be found on page 43.

as well as Communists, homosexuals and Gypsies, etc. The legacy of Nazism made entitlement to rights, that is, the condition of qualifying for rights, contingent on membership of a given race: the pure Aryan race. In the words of Ignacy Sachs (1998, p. 149), the 20th Century was marked by two world wars and the absolute horror of genocide formulated as a political and industrial project.

It was in this context that the attempt to reconstruct human rights was formulated as an ethical paradigm and benchmark to guide the contemporary international order. If World War II stood for a breach with human rights, the post-war period had to stand for their reconstruction. The approval of the Universal Declaration of Human Rights on December 10, 1948 was the major landmark in the reconstruction of human rights. This declaration introduces the contemporary conception of human rights, characterized by their universality and indivisibility: universality insofar as it calls for the universal extension of human rights in the belief that being human is the sole criterion for entitlement to rights, and considering human beings as essentially moral beings that have an existential uniqueness and dignity; indivisibility, since the guarantee of political and civil rights is a precondition for the observance of social, economic and cultural rights, and vice-versa. When one of these conditions is violated, so are all the others. Human rights thus comprise an indivisible, interdependent and inter-related unity that is capable of associating the list of civil and political rights to the list of social, economic and cultural rights. In this manner, it enshrines an integrated concept of human rights.

Examining the indivisibility and interdependence of human rights, Hector Gros Espiell (1986, pp. 16-17) notes that:

Only the full recognition of all of these rights can guarantee the real existence of any one of them, since without the effective enjoyment of economic, social and cultural rights, civil and political rights are reduced to merely formal categories. Conversely, without the reality of civil and political rights, without effective liberty understood in its broadest sense, economic, social and cultural rights in turn lack any real significance. This idea of the necessary integrality, interdependence and indivisibility regarding the concept and the reality of the content of human rights that is, in a certain sense, implicit in the Charter of the United Nations,

was compiled, expanded and systematized in the 1948 Universal Declaration of Human Rights, definitively reaffirmed in the Universal Covenants on Human Rights approved by the General Assembly in 1966, and in force since 1976, as well as in the Proclamation of Teheran of 1968, and the Resolution of the General Assembly, adopted on December 16, 1977, on the criteria and means for improving the effective enjoyment of fundamental rights and liberties (Resolution n. 32/130).

As the major landmark in the movement towards the internationalization of human rights, the Universal Declaration of 1948 promoted the conversion of these rights into an issue of legitimate interest to the international community. As Kathryn Sikkink (p. 413) observes: “International human rights law assumes that it is legitimate and necessary for governmental and non-governmental actors to be concerned with the way in which the inhabitants of other states are treated. The safety net of international human rights aims to redefine what is exclusively within the domestic jurisdiction of individual states.”²

In this way, the idea that the protection of human rights should not be the exclusive responsibility of the state is strengthened, i.e. it should not be restricted to the national authority or to a domestic jurisdiction, since it evolves an issue of legitimate international interest. In turn, this innovative concept points to two important consequences: (1) The revision of the traditional concept of the absolute sovereignty of the state, which has become a more relative notion, to the degree that international intervention in national affairs is permitted in the cause of protecting human rights; i.e. there has been a shift from a “hobbesian” conception of sovereignty centered on the state to a “kantian” notion of sovereignty centered on universal citizenship.³ (2) The crystallization of the idea that individuals should enjoy the protection of their rights at international level, as a subject of the law.

These measures thus predict the end of an era in which the state’s form of treating its citizens was conceived as a problem of domestic jurisdiction, derived from its own sovereignty.

The process of universalizing human rights permitted, in turn, the formation of a normative international system for protecting these rights. According to André Gonçalves Pereira

& Fausto de Quadros (p. 661) “in terms of political science, it was merely a question of transposing and adapting to international law the evolution that had already taken place in domestic law at the start of the century, from the police state to the welfare state. It was nevertheless sufficient for international law to abandon its classical phase, in the form of the law of peace and war, to move on to the new or modern era in its evolution, in the form of an international law of cooperation and solidarity”.⁴

Starting with the Universal Declaration of 1948 and the contemporary conception of human rights that it introduced, International Human Rights Law began to develop through the adoption of many international treaties that aimed to protect fundamental rights. The 1948 Declaration provides axiological support and a unity of values for this area of the law, with an emphasis on the universality, indivisibility and interdependence of human rights. As Norberto Bobbio (p. 30) states, human rights arise as universal natural rights, develop as private positive rights (when every constitution incorporates declarations of rights) and are finally realized in full as universal positive rights.

The process of universalization of human rights has allowed the formation of an international system for protecting these rights. This system has been set up by international protection treaties that above all, reflect a contemporary ethical conscience that is shared among states, to the degree that these invoke the international consensus on minimum protective parameters with regard to human rights (the “irreducible ethical minimum”). In this sense, it should be emphasized that as of August 2002 (See Human Development Report, UNDP), the International Covenant on Civil and Political Rights had 148 signatory countries, while the International Covenant on Economic, Social, and Cultural Rights had 145 signatory countries, the Convention against Torture had 130, the Convention on the Elimination of Racial Discrimination had 162, the Convention on the Elimination of Discrimination against Women had 170, and the Convention on the Rights of the Child had the widest membership, with 191 signatory countries.

Side by side with this global normative system, regional systems of protection have emerged that aim to internationalize human rights at regional level, particularly

in Europe, the Americas and Africa. There is also an incipient Arab system and a proposal for the creation of a regional system in Asia. These developments will consolidate the coexistence of the UN's global system with instruments of a regional system that are in turn integrated by the American, European and African systems of protection for human rights.

The global and regional systems are therefore not divergent, but complementary. Inspired by the values and principles of the Universal Declaration, they comprise a range of instruments for protecting human rights at international level. From this point of view, the various systems for the protection of human rights interact on behalf of protected individuals. The proposal for the coexistence of distinct legal instruments that guarantee the same rights is thus consistent with the expansion and strengthening of the protection of these rights. The crucial issue is the degree of efficiency of the protection afforded, for which reason, in real life cases, the rule to be applied is that which ensures the victim the best protection. In adopting the value of the primacy of the individual, these systems complement each other, interacting with the national protection system in order to provide the greatest possible effectiveness in protecting and promoting fundamental rights. This is also the logic and the underlying set of principles of International Law of Human Rights itself, which is entirely founded on the supreme principle of human dignity.

The contemporary conception of human rights is characterized by the universalization and internationalization of these rights, which are conceived of as indivisible.⁵ It should be noted that the Vienna Declaration of Human Rights, of 1993, reiterates the formulation of the 1948 Declaration, when it affirms in its 5th paragraph that: "All human rights are universal, interdependent and inter-related. The international community should treat human rights globally in a just and equitable way, on an equal basis and with the same emphasis".

In this way, the Vienna Declaration of 1993, signed by 171 states, endorses the universality and indivisibility of human rights, reinvigorating the legitimacy of the so-called contemporary conception of human rights introduced by the 1948 Declaration. It should be noted that as the "post-war" Consensus, the 1948 Declaration was adopted by 48 states, with 8 abstentions. The Vienna Declaration of 1993 extends,

renews and expands the consensus on the universality and indivisibility of human rights, at the same time as it affirms the interdependence between the values of human rights, democracy and development.

There can be no human rights without democracy, nor democracy without human rights. In other words, the regime that is most compatible with the protection of human rights is the democratic regime. At the present time, 140 states, of the almost 200 states that are part of the international order, hold regular elections. At the same time, only 82 states (representing 57% of the world's population) are considered to be fully democratic. In 1985, this proportion stood at 38%, comprising 44 States.⁶ The full exercise of political rights may imply the “empowerment” of more vulnerable populations as well as an increase in their capacity for lobbying, political coordination and mobilization. Amartya Sen (2003) considers that political rights (including freedom of expression and debate) are not only fundamental for demanding political responses to economic needs, but are central to the very formulation of these economic needs.

In addition, given the indivisibility of human rights, we must abandon for good the erroneous notion that one class of rights (civil and political rights) require full recognition and respect, while another class (social, economic and cultural rights) does not require observance of any kind. From an international normative perspective, the notion that social, economic and cultural rights are not legal rights has been superseded for good. The idea that social rights are non-actionable is purely ideological and not scientific; they stand out as authentic and genuine fundamental rights that are actionable, demandable and that require serious and responsible observance. For this reason, they should be demanded as rights, and not as gestures of charity, generosity or compassion.

As Asbjorn Eide & Allan Rosas (pp. 17-18) note: “Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Social, economic and cultural rights include protection for vulnerable groups as a central concern. ... Fundamental needs must not be made contingent on charity from state programs and policies, but must be defined as rights”.

An understanding of economic, social and cultural rights also demands recourse to the right to development. In order to reveal the reach of the right to development, it is important to highlight, as Celso Lafer (1999) does, that in the field of values, the consequence for human rights of an international system of defined polarities – East/West, North/South – has been an ideological battle between civil and political rights (the liberal heritage sponsored by the USA) and economic, social and cultural rights (the social heritage sponsored by the former Soviet Union). It was in this context that “an effort by the Third World to elaborate its own cultural identity, proposing collective rights of cultural identity, such as the right to development”, emerged.

In this sense, the UN adopted the Declaration of the Right to Development in 1986, with 146 states voting in favor, 1 against (USA) and 8 abstaining. For Allan Rosas (1995, pp. 254-255): “With regard to the content of the right to development, three aspects deserve mention: firstly, the 1986 Declaration endorses the importance of participation. ... Secondly, the Declaration should be conceived in the context of the basic needs of social justice. ... Thirdly, the Declaration emphasizes both the need to adopt national programs and policies and international cooperation ...”. The 2nd article of the Declaration of the Right to Development of 1986 enshrines the principle that: “Human beings are the central subject of development and should be active participants in and the beneficiaries of this right”. The 4th article of the Declaration adds that states have a duty to adopt measures, whether individually or collectively, that aim to formulate international development policies, with a view to facilitating the full realization of rights, adding that effective international cooperation is essential for providing developing countries with the means to encourage the right to development.

The right to development demands a form of globalization that is both ethical and sympathetic. In the understanding of Mohammed Bedjaoui (p. 182): “In reality, the international dimension of the right to development is nothing more than an equitable distribution with regard to global social and economic well being. This reflects a crucial question of our age, in so far as four fifths of the world’s population no longer accept the fact that a fifth of the world’s population continues to build its wealth on the basis of the remainder’s poverty”.

Global asymmetries reveal that the income of the richest 1% exceeds the income of the poorest 57% (UNDP, p. 19).

As Joseph E. Stiglitz (p. 6) points out: “The actual number of people living in poverty has actually increased by almost 100 million. This has occurred at the same time that total world income increased by an average of 2.5% percent annually”.⁷ For the World Health Organization: “poverty is the world’s greatest killer. Poverty wields its destructive influence at every stage of human life, from the moment of conception to the grave. It conspires with the most deadly and painful diseases to bring a wretched existence to all those who suffer from it” (Farmer, p. 50).⁸

To adopt Amartya Sen’s conception, development must in turn be imagined as a process of expanding real liberties that individuals can make use of.⁹ One may also add that the Vienna Declaration of 1993 emphasizes that the right to development is a universal and inalienable right that forms an integral part of fundamental human rights. We would reiterate that the Vienna Declaration recognizes the interdependence between democracy, development and human rights.

We thus move to the final reflection.

What are the challenges and prospects for the implementation of human rights within the contemporary order?

This question entails six challenges:

1. Consolidating and strengthening the process of affirming the integral and indivisible vision of human rights, through the conjugation of civil and political rights with economic, social and cultural rights

Human rights as an “acquired set of values” are undergoing constant elaboration and redefinition.

If, traditionally, the human rights agenda focused on the protection of civil and political rights, under the heavy impact of the “voice of the North”, we are currently witnessing the expansion of this traditional agenda, which is incorporating new rights, with an emphasis on economic, social and cultural rights, the right to development, the right to social inclusion,

and on poverty as a violation of rights. This process has allowed an echo for “the South’s own voice” that is capable of revealing the concerns, demands and priorities of this region.

These are necessary advances in the continuous expansion of the conceptual reach of human rights that contemplate the basic needs of social justice. In such a context, it is fundamental to consolidate and strengthen the process of affirming human rights from this integral, indivisible and interdependent perspective.

2. Incorporating gender, race and ethnicity approaches in the conception of human rights, as well as creating specific policies to protect socially vulnerable groups

The effective protection of human rights demands not only universalistic policies, but also specific, those that target socially vulnerable groups, as the major victims of exclusion. In other words, the implementation of human rights demands the universality and indivisibility of these rights as well as the respect for diversity.

To the process of expanding human rights, we may add the process of specifying the subjects of these rights.

The first phase of protection of human rights was characterized by a general protection, which expressed a fear of difference (which under Nazism had been directed towards extermination), based on formal equality.

It has nevertheless proven insufficient to treat individuals in a generic, general and abstract form, rendering it necessary to specify the subjects of law, which must be seen in all of their peculiarity and singularity. From this point of view, certain subjects of law, or certain violations of law, require a specific and differentiated response. From this perspective, among other vulnerable categories, women, children, populations of African descent, migrants and physically disadvantaged individuals must be seen in terms of the specificities and peculiarities of their social condition. Together with the right to equality, the right to difference also arises as a fundamental right. Respect for difference and diversity, guaranteeing these special treatment, are equally important.

According to Paul Farmer (p. 212), “The concept of human rights may at times be brandished as an all-purpose and universal tonic, but it was developed to protect the vulnerable.

The true value of the human rights movement's central documents is revealed only when they serve to protect the rights of those who are most likely to have their rights violated. The proper beneficiaries of the Universal Declaration of Human Rights ... are the poor and otherwise disempowered".

For Nancy Fraser (pp. 55-56), justice simultaneously demands redistribution and the recognition of identities. "Recognition cannot be reduced to distribution, since social status is not simply a function of class. Let us take the example of an African-American banker on Wall Street who cannot find a taxi. In this case, the injustice of a lack of recognition has little to do with poor distribution. ... Conversely, distribution cannot be reduced to recognition, since access to resources does not merely derive from status. We may consider the example of a specialized industrial worker who becomes unemployed due to the closure of the factory in which he or she works as the result of a speculative corporate merger. In this case, the injustice of poor distribution has little to do with the lack of recognition". Justice has thus a two-dimensional character: redistribution plus recognition. In the same sense, Boaventura de Souza Santos (2003, pp. 56 and 429-461) states that only a demand for recognition and redistribution permits the realization of equality.

Boaventura (p. 458) adds that: "we have the right to be equal when our difference makes us inferior; and we have the right to be different when our equality jeopardizes our identity. This entails the need for an equality that acknowledges differences and a difference that does not produce, promote or reproduce inequalities".

If we consider the processes of "feminization" and "ethnicization" of poverty, we perceive that, in Brazil, the main victims of the violation of economic, social and cultural rights are women and populations of African descent (on this subject, see Flavia Piovesan & Silvia Pimentel). This entails the need to adopt, in tandem with universalist policies, specific policies that are capable of providing visibility to individuals that are more vulnerable and that allow these to exercise their right to social inclusion in full.

We should also add the democratic component in order to guide the formulation of such public policies; i.e. there is a need to ensure the right to effective participation of social groups in the formulation of policies that affect them directly.

Civil society is clamoring for greater transparency and democratic accountability in the management of public sector budgets and the construction and implementation of public policies.

3. Optimizing the justiciability and enforceability of economic, social and cultural rights

As the Vienna Declaration of 1993 recommended, it is fundamental to adopt measures to ensure greater justiciability and enforceability for economic, social and cultural rights, such as the elaboration of a Facultative Protocol to the International Covenant on Economic, Social, and Cultural Rights (which introduces the system of individual petitions), as well as of technical/scientific indicators capable of measuring the advances in the implementation of these rights.

Within the global system, the International Covenant on Economic, Social, and Cultural Rights merely considers the mechanism for states to submit reports, as a way of monitoring the rights that it expresses. Already within the interamerican system, there are plans for a system of petitions to the Interamerican Commission on Human Rights to denounce violations of the right to education and union rights, expressed in the San Salvador Protocol. In addition to introducing a system for lobbying at global level, through the adoption of the Facultative Protocol, it is also essential to optimize the use of this regional mechanism, in whatever form the right of petition takes, in order to protect rights to education and union rights. In addition, there is a need to extend the ability to bring actions in defense of other economic, social and cultural rights, such as the violation of civil rights as an “entry door” for demands deriving from economic, social and cultural rights. By way of illustration, the following cases deserve highlighting: (a) the provision of drugs to carriers of the HIV virus (on the basis of the violation of the 4th article of the American Convention – right to life); and (b) summary dismissal of workers (on the basis of the violation of due legal process – Baena Ricardo vs. Panama).

The potential of international litigation in securing internal advances in the regime of protecting human rights is obvious. This is the most important contribution that the use of the international system of protection can offer: promoting

progress and internal advances in the protection of human rights within a given state.

The incorporation of the system of individual petitions is also the result of a process of recognition of new actors among the international players, with the consequent democratization of international instruments. If, over the course of a long period, states have been the central protagonists of the international order, today we are experiencing the emergence of new international actors, such as international organizations, regional economic blocs, individuals and international civil society. The strengthening of international civil society through a network that promotes communication between local, regional and global entities,¹⁰ as well as the consolidation of the individual as the subject of international law, demand the democratization of international instruments, as well as access to international mechanisms and international justice itself.

The emergence of new international actors requires the democratization of the international system for the protection of human rights. An example of this is Protocol n. 11 of the European regional system, which has allowed direct access by individuals to the European Court of Human Rights. To this may be added the recent approval of the 1999 Facultative Protocol to the Convention on the Elimination of Discrimination against Women, which incorporates the system of individual petition. Also worthy of mention is the Facultative Protocol to the International Covenant on Economic, Social, and Cultural Rights, which introduces the right of individual petition in the same way.

Having said this, it should be pointed out that one finds a marked resistance by many states to accept the democratization of the international system of protection of human rights, especially with regard to the system of individual petitions.¹¹ This system crystallizes the capacity of the individual to bring actions at international level, “constituting” according to Antônio Augusto Cançado Trindade (p. 8), “a protection mechanism of notable significance, as well as a conquest of historic proportions”.

It is also fundamental to ensure that treaties protecting economic, social and cultural rights can depend on an effective system of monitoring that includes reports, individual petitions, and communications between states. It is important

to add the system of *in loco* investigations, which are only considered in the Convention against Torture and the Facultative Protocol to the CEDAW. From this point of view, it is fundamental to encourage states to accept these mechanisms, as it is no longer admissible that states accept rights but renege on their guarantees of protection.

In addition to these mechanisms, it is crucial to promote the elaboration of technical/scientific indicators to evaluate the implementation and observance of economic, social and cultural rights, particularly with regard to their necessary advancement and the prevention of social regression.

Another strategy is to promote visits by special UN and OAS investigators regarding issues related to economic, social and cultural rights. Thematic reports represent an effective way of catalyzing attention and providing visibility of given violations of human rights, as well as of making recommendations. More than symbolizing an appraisal of the human rights situation in a given country, the greatest contribution that such investigators can make in drawing up reports is the use of these reports as instruments for securing internal advances in the regime that protects human rights in the country in question. On this point, we may observe the positive impact on Brazil of the visit by the UN investigator of torture in 2000. To this, we may add the impact of the visit to Brazil in 2002 of the investigator into food rights.

We may also highlight the unprecedented experience in Brazil of adopting thematic reports on economic, social and cultural rights, inspired by the UN investigations on the following issues: (a) health; (b) housing; (c) education; (d) food; (e) work and (f) the environment. As in the UN system, the proposal is that such investigations appraise the situation of these rights and highlight recommendations for ensuring the full exercise of the same.

In short, efforts are necessary to optimize the justiciability and enforceability of economic, social and cultural rights, so as to strengthen the implementation of the right to social inclusion.

4. Incorporating the social human rights agenda into the agenda of international financial institutions, regional economic organizations and of the private sector

In order to meet the challenges of implementing human rights, it is not sufficient merely to concentrate on the state. The Declaration on the Right to Development and the International Covenant on Economic, Social, and Cultural Rights themselves emphasize both the need to adopt national programs and policies and for international cooperation. The 4th article of the Declaration highlights the fact that effective international cooperation is essential for providing developing countries with the means to promote the right to development.

Within the context of economic globalization, there is a pressing need for non-governmental agents to incorporate human rights into their agendas. Three fundamental types of actor have emerged: (a) international financial agencies, (b) regional economic groupings and (c) the private sector.

With regard to the international financial agencies, there is the challenge of ensuring that human rights permeate macroeconomic policy in such a way as to involve fiscal, monetary and exchange rate policies. International economic institutions should focus their attention on the human dimension of their activities, and the heavy impact that their policies can have on local economies, especially in an increasingly globalized world (Cf. Mary Robinson).¹²

While the international financial agencies are linked to the United Nations system as specialized agencies, the World Bank and the International Monetary Fund, for instance, have so far failed to formulate a specific human rights policy. Such a policy is an imperative for achieving the propositions of the UN, and above all, for achieving the coherent ethics and set of principles that are required to guide their activity.

There is a need to supersede the paradoxes arising from the conflict between the inclusion principle that aims to promote human rights and that is enshrined in the relevant UN treaties that protect human rights (notably the International Covenant on Economic, Social, and Cultural Rights), and the exclusion effects of the actions dictated particularly by the International Monetary Fund, in so far as its policy, within the framework of the so-called “conditionality” clauses, in actual fact submits developing countries to structural adjustment models that are incompatible with human rights.¹³ In addition, there is a need to strengthen democratization, transparency and accountability of these institutions.¹⁴ It may be noted that

48% of the IMF's voting rights are concentrated in the hands of 7 states (US, Japan, France, UK, Saudi Arabia, China and Russia), while at the World Bank, 46% of the voting rights are concentrated in the hands of the same states (see Human Development Report 2002). In the critical view of Joseph E. Stiglitz (pp. 21-22): "... we have a system that might be called global governance without global government, one in which a few institutions – the World Bank, the IMF, the WTO – and a few players – the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests – dominate the scene, but in which many of those affected by their decisions are left almost voiceless. It's time to change some of the rules governing the international economic order ...".

With regard to the regional economic groupings, one will here also encounter the paradoxes that arise from the tensions between the exclusive character of the process of economic globalization and the movements that attempt to reinforce democracy and human rights as parameters which provide an ethical and moral backing to the creation of a new international order. On the side, stands the exclusion process of economic globalization; and on the other, one is witness to the emergence of the inclusive process of internationalization of human rights, in addition to the process of incorporation of democratic clauses and human rights by regional economic groupings. While the formation of economic groupings with a regional reach, such as the European Union and Mercosur, has attempted to promote not only economic integration and cooperation, but also, subsequently and gradually, the consolidation of democracy and the implementation of human rights in the respective regions (which is more evident in the European Union, but still only incipient in Mercosur), it will be observed that democratic and human rights clauses have not been incorporated into the agenda of the economic globalization process.

With regard to the private sector, there is also a need to emphasize its social responsibility, especially within multinational companies, in so far as these constitute the major beneficiaries of the globalization process, it being sufficient to cite the fact that of the 100 largest economies in the world, 51 are multinational companies and 49 are national states. It is important, for example, to encourage companies to adopt codes of human rights with regard to their commercial activity; and

to impose commercial sanctions on companies that violate social rights, adopting the “Tobin tax” on international financial investments, as well as imposing other measures.

5. Strengthening the responsibility of the state in the implementation of economic, social and cultural rights, as well as the right to social inclusion, and poverty as a violation of human rights

Given the serious risks of dismantling the public sector social policies, there is a need to redefine the role of the state in order to take account of the impact of economic globalization. There is a need to strengthen the responsibility of the state with regard to the implementation of economic, social and cultural rights.

As Asbjorn Eide (p. 383) warns: “Paths can and must be found that enable the state to ensure that it guarantees respect and protection for economic, social and cultural rights, so as to preserve the conditions for a relatively free market economy. Government action must promote social equality, confront social inequalities, compensate the imbalances created by markets and guarantee sustainable human development. Governments and markets must complement each other”.¹⁵

In the same sense, Jack Donnelly (1998, p. 160) points out that: “Free markets are analogous in economic terms to political systems based on majority rule, without, however, observing the rights of minorities. From this point of view, social policies are essential for ensuring that minorities, which are deprived or disadvantaged by the market, receive a minimum level of respect in the economic sphere. ... Markets seek efficiency and not social justice or human rights for all”.¹⁶

We may also add that the enforcement of economic, social and cultural rights is not only a moral obligation of states, but also a legal obligation, based on international treaties that protect human rights, particularly the International Covenant on Economic, Social, and Cultural Rights. States have thus a duty to respect, protect and implement the economic, social and cultural rights determined in the Covenant. The same Covenant, which currently has 145 signatory countries, establishes an extensive catalog of rights, including the right to work and just wages, the right to form and join unions, the right to an adequate standard of living, the right to housing,

the right to education, to social security, to health, etc. In the terms established in the Covenant, these rights are to be realized progressively, being dependent on the actions of the state, which must adopt all measures, to the extent of its available resources,¹⁷ with a view to the progressive realization in full of these rights (Article 2, Paragraph 1 of the Covenant).¹⁸ As David Trubek affirms: “Social rights as social welfare rights imply a view according to which the government has the obligation of guaranteeing such conditions for all individuals in an adequate manner”.

Here again it should be stressed that, due to the indivisibility of human rights, the violation of economic, social and cultural rights entails the violation of civil and political rights, which explains why economic and social vulnerability leads to the vulnerability of civil and political rights. In the words of Amartya Sen (1999, p. 8): “The negation of economic liberty, in the form of extreme poverty, makes individuals vulnerable to violations of other forms of liberty. ... The negation of economic liberty implies the negation of social and political liberty”.

If civil and political rights maintain governments within reasonable democratic limits, economic and social rights establish adequate limits for the markets. Markets and elections are not sufficient in themselves to ensure human rights for all (Donnelly, 1998, p. 160).

6. Strengthening the State of Law and the construction of peace in global/regional/local spheres, through a culture of human rights

Finally, it should be emphasized that in a post-September 11 and post-Iraq War context, the challenge has emerged of sustaining the efforts to build a “state of international law” in an arena that is promoting an international “police state”, fundamentally guided by the principle of international force and security. The risk is that the fight against terror will jeopardize the civilizing function of rights, liberties and guarantees, given the clamor for maximum security. It is enough to note the new security doctrine adopted by the USA based on: (a) unilateralism; (b) preventive strikes and (c) the hegemony of US military power. We may observe the nefarious consequences for the international order if each one of the almost two hundred states were to invoke for itself

the right to carry out “preventive strikes” on the basis of unilateralism. This would be tantamount to the demise of International Law, resurrecting the hobbesian “state of nature” in its very essence, in which war is the dominant expression, and peace is limited to be the absence of war.

The pretext of waging war on the so-called “empire of evil” has above all promoted the “evil of empire”. Surveys demonstrate the perverse impact of the post-September 11 era in the formation of a global agenda that tends to impose restrictions on rights and liberties. By way of example, we may cite the survey published by *The Economist*¹⁹ on legislation approved in a number of countries that expands the application of capital punishment and other penalties, permits indefensible discrimination, undermines due legal process and the right to a public and just trial, allows extradition without guaranteeing rights, and imposes restrictions on freedom of assembly and freedom of expression.

Against the risk of state terrorism and the confrontation of terror with the instruments of terror itself, there is only one way forward – the constructive path of consolidating the boundaries of an international “state of law”. An international state of law will only prevail under the primacy of legality, with an “empire of law” that has the power of the word and the legitimacy of the consensus.

In this context, marked by the end of defined bipolarities (since the end of the Cold War), by the uncertain fate of international organizations and by the power of a single global superpower, the equilibrium of the international order will require the revival of multilateralism and the strengthening of international civil society based on cosmopolitan solidarity. These are the only forces capable of detaining the high level of discretionary power within the empire, and of civilizing this reckless “state of nature”, so as to allow the empire of law to tame its destructive and irrational tendencies.

Faced with these challenges, we shall end by affirming our belief in the implementation of human rights as the rationality of resistance and the only liberating platform in our time. Today, more than ever, there is a clear need to invent a new order that is more democratic and egalitarian, capable of celebrating the interdependence between democracy, development and human rights, and which, above all, is centered on the value of the absolute prevalence of human dignity.

NOTES

1. On the same subject see also: Celso Lafer, 1988, p. 134. Likewise, Ignacy Sachs (1998a, p. 156) claims that "it can never be too strongly emphasized that the emergence of rights is the outcome of struggle, that rights are conquered, sometimes on the barricades, within a historical process full of vicissitudes, by means of which, needs and aspirations are articulated as demands and banners of struggle, before they are recognized as rights". According to Allan Rosas (1995, p. 243), "The concept of human rights is always a progressive one. ... The debate on what are human rights and how they should be defined is part and parcel of our history, past and present".
2. The same author adds (p. 441): "Basic individual rights are not the exclusive domain of the state, but constitute a legitimate concern of the international community".
3. For Celso Lafer (1999, p. 145), from an *ex parte principe* view founded on the rights of subjects in relation to the state, there has been a shift to an *ex parte populi* view, based on promoting the notion of the rights of citizens.
4. The authors add: "There is a variety of new subjects that international law has absorbed under the conditions mentioned above: political, economic, social, cultural, scientific, technical, etc. This book nevertheless shows that three of them deserve highlighting: the protection and guaranteeing of the Rights of Man, development and economic and political integration". In the view of Hector Fix-Zamudio (p. 184) "... the establishment of international organizations to protect human rights that the noted Italian treaty writer, Mauro Cappelletti has termed, 'transnational constitutional jurisdiction', has, as a judicial check on the constitutionality of legislative clauses and on concrete acts of authority, influenced Internal Law, particularly in the sphere of human rights, and has projected itself into an international and also community context".
5. It may be noted that the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child consider not only civil and political rights, but also social, economic and cultural rights, endorsing the idea of the indivisibility of human rights.
6. See "Deepening Democracy in a Fragmented World". In: *Human Development Report*, UNDP, 2002.
7. The author adds: "Development is about transforming societies, improving the lives of the poor, enabling everyone to have a chance at success and access to health care and education" (p. 252).

8. According to data from the “Vital Signs” report by the Worldwatch Institute (2003), income inequalities are reflected in health indicators: infant mortality in poor countries is 13 times that of rich countries; maternal mortality is 150 times higher in LDCs than in industrialized countries. Lack of clean water and basic sanitation kills 1.7 million individuals per year (of which 90% are children), while 1.6 million individuals die from diseases arising from the use of fossil fuels for heating and the preparation of food. The report also highlights the fact that almost all armed conflicts are concentrated in the developing world, which has produced 80% of all refugees over the last decade.

9. In conceiving development as freedom, Amartya Sen (pp. 35-36; 297) maintains that: “In this sense, the expansion of liberties is seen both as 1) an end in itself and 2) the main meaning of development. Such ends may be respectively termed the constitutive and the instrumental function of liberty with regard to development. The constitutive function of liberty is related to the importance of substantive liberty for the elevation of human life. Substantive liberties include elementary capacities such as avoiding privation due to hunger, malnutrition, avoidable mortality, premature death and liberties associated with education, political participation, prohibition of censorship, etc. From this constitutive perspective, development involves the expansion of human liberties”. On the right to development see also Karel Vasak.

10. With regard to international civil society, it should be noted that of the 738 NGOs registered at the 1999 Seattle conference, 87% were from industrialized countries. This statistic reveals the asymmetries that still exist with regard to the composition of international civil society itself on the issue of North-South relations.

11. Many states are still presenting heavy resistance to accepting facultative clauses that refer to individual petitions and communications between states. According to 2001 data, it is sufficient to highlight the fact that: (a) of the 147 states that signed the International Covenant on Civil and Political Rights, only 97 accepted the mechanism of individual petitions (having ratified the Facultative Protocol to this end); (b) of the 124 states that signed the Convention against Torture, only 43 states accepted the mechanism of communications between states and individual petitions (in the terms of articles 21 and 22 of the Convention); (c) of the 157 states that signed the Convention on the Elimination of all forms of Racial Discrimination, only 34 states accepted the mechanism of individual petitions (in the terms of article 14 of the Convention); and finally; (d) of the 168 states signing the Convention on Eliminating all forms of Discrimination against Women, only 21 states accepted the mechanism of individual petitions, having ratified the Facultative Protocol to the Convention on the Elimination of all forms of

Discrimination against Women, only 21 accepted the mechanism of individual petitioning, and ratified the Facultative Protocol to this end.

12. Mary Robinson adds: "By way of example, an economist has already warned that trade and exchange rate policy can have a greater impact on the development of children's rights than the reach of the budget dedicated to health and education. An incompetent central bank director can do more harm to children's rights than an incompetent minister of education".

13. Jeffrey Sachs notes (pp. 1329-30): "Some 700 million individuals – the poorest – are in debt to the rich countries. The so-called 'highly indebted poor countries' form a group of 42 financially bankrupt and largely disorganized economies. These owe more than US\$ 100 billion in unpaid debts to the World Bank, the International Monetary Fund, other development banks and governments ... Many of these loans were made to tyrannical regimes to respond to the propositions of the Cold War. Many reflect erroneous ideas of the past. ... Jubilee 2000, an organization supported by individuals as varied as Pope John Paul II, Jesse Jackson and the rock singer Bono, have called for the elimination of the foreign debt of the world's poorest countries. The idea is frequently viewed as unrealistic, but it is the realists who fail to understand the economic opportunities of today's world. ... In 1996, the IMF and the World Bank announced a program of major impact, albeit without establishing a genuine dialog with the affected countries. Three years later, these plans failed. Only two countries, Bolivia and Uganda, received US\$ 200 million, while 40 countries are still waiting in line. Over the same period, the stock markets of the rich countries grew by over US\$ 5 trillion, more than 50 times the debt of the 42 poor countries. It is thus a cruel game that the richest countries play in protesting that they have no way of canceling the debts".

14. On this subject, see Joseph E. Stiglitz. According to the author: "When crises hit, the IMF prescribed outmoded, inappropriate, if standard solutions, without considering the effects they would have on the people in the countries told to follow these policies. Rarely did I see forecasts about what the policies would do to poverty. Rarely did I see thoughtful discussions and analyses of the consequences of alternative policies. There was a single prescription. Alternative opinions were not sought. Open, frank discussion was discouraged – there is no room for it. Ideology guided policy prescription and countries were expected to follow the IMF guidelines without debate. These attitudes made me cringe. It was not that they often produced poor results; they were antidemocratic" (p. xiv).

15. The author adds: "Where income is distributed equally and opportunities are

reasonably similar, individuals are in a stronger position to negotiate their interests and there is less need for public expenditure by the state. Where, on the other hand, income is inequitably distributed, the demand for equal opportunities and the equal exercise of economic, social and cultural rights requires greater public expenditure, based on progressive taxation and other measures. Paradoxically, however, taxation for public expenditure appears to be more welcome in egalitarian societies than in societies where wealth is unequally distributed" (p. 40).

16. Jack Donnelly (2001, p. 153): "The relief of poverty and the adoption of compensatory policies are functions of the state and not of the market. These are demands related to justice, rights and obligations, and not to efficiency. ... Markets are simply unable to deal with them – because they have no vocation for this".

17. It should be highlighted that both social, civic and political rights require both negative and positive services by the state, the view being simplistic and erroneous that social rights merely require positive services, while civic and political rights require negative ones, or merely the inactivity of the state. By way of example, we should enquire as to the cost of the security apparatus through which classical civil rights are guaranteed, such as the right to liberty and the right to property, or the cost of the electoral apparatus that makes political rights possible, or the justice apparatus that guarantees the right of access to the Judiciary. That is, civil and political rights are not restricted to demanding the mere inactivity of the state, since their implementation requires guided public sector policies that also entail a cost.

18. The expression "progressive application" has frequently been wrongly interpreted. In its "General Comment n. 3" (1990), on the nature of the state's obligations relating to Article 2, Paragraph 1, the Commission on Economic, Social and Cultural Rights (UN Doc. E/1991/23) affirmed that if the expression "progressive realization" constitutes a recognition of the fact that the full realization of social, economic and cultural rights cannot be achieved in a short period of time, this expression should be interpreted in the light of its central objective, which is to establish clear obligations for participating states, in the sense of adopting measures as rapidly as possible in order to realize these rights.

19. "For Whom the Liberty Bell Tolls", *The Economist*, August 31, 2002, pp. 18-20.

BIBLIOGRAPHY

- ARENDR, Hannah. *As origens do totalitarismo*. Trans. Roberto Raposo. São Paulo: Cia. das Letras, 1989.
- BEDJAOU, Mohammed. "The Right to Development". In: _____ . *International Law: Achievements and Prospects*, 1991.
- BOBBIO, Norberto. *Era dos direitos*. Trans. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1988.
- BUERGENTHAL, Thomas. "Prólogo". In: A.A. CANÇADO TRINDADE. *A proteção internacional dos direitos humanos: fundamentos jurídicos e instrumentos básicos*, p. xxxi. São Paulo: Saraiva, 1991.
- DONNELLY, Jack. *International Human Rights*. Colorado: Westview Press, 1998.
- _____. "Ethics and International Human Rights". In: DONNELLY, *Ethics and International Affairs*. Japan: United Nations University Press, 2001.
- EIDE, Asbjorn. "Economic, Social and Cultural Rights as Human Rights"; "Obstacles and Goals to be Pursued". In: A. EIDE et al., *Economic, Social and Cultural Rights*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995.
- EIDE, Asbjorn & ROSAS, Allan. "Economic, Social and Cultural Rights: A Universal Challenge". In: A. EIDE et al., *Economic, Social and Cultural Rights*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995.
- ESPIELL, Hector Gros. *Los derechos económicos, sociales y culturales en el sistema interamericano*. San Jose: Libro Libre, 1986.
- FARMER, Paul. *Pathologies of Power*. Berkeley: University of California Press, 2003.
- FIX-ZAMUDIO, Hector. *Protección jurídica de los derechos humanos*. Mexico: Comisión Nacional de Derechos Humanos, 1991.
- FRASER, Nancy. *Redistribución, reconocimiento y participación: hacia un concepto integrado de la justicia*. In: UNESCO. *Informe Mundial sobre la Cultura*, 2000-2001.
- HENKIN, Louis et al. *International Law: Cases and Materials*. 3rd ed. Minnesota: West Publishing, 1993.

LAFER, Celso. *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt*. São Paulo: Companhia das Letras, 1988.

_____. *Comércio, desarmamento, direitos humanos: reflexões sobre uma experiência diplomática*. São Paulo: Paz e Terra, 1999.

PEREIRA, André Gonçalves & QUADROS, Fausto de. *Manual de direito internacional público*. 3rd ed. Coimbra: Livraria Almedina, 1993.

PIOVESAN, Flavia & PIMENTEL, Silvia. *Contribuição a partir da perspectiva de gênero ao Relatório Alternativo sobre o PIDESC, Brasil*. São Paulo: Cladem, 2002.

ROBINSON, Mary. *Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension*. Zurich, July, 1, 1999. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/00F71A933C5C3673F802567A100581224?opendocument>. Last access on April 19, 2004.

ROSAS, Allan. "So-Called Rights of the Third Generation". In: A. EIDE et al., 1995, p. 243.

_____. "The Right to Development". In: A. EIDE et al., pp. 254-255, 1995.

SACHS, Ignacy. "Desenvolvimento, direitos humanos e cidadania". In: P.S. PINHEIRO & S.P. GUIMARÃES (org.). *Direitos humanos no século XXI*. Instituto de Pesquisa de Relações Internacionais and Fundação Alexandre de Gusmão, 1998a.

_____. "O desenvolvimento enquanto apropriação dos direitos humanos". *Estudos Avançados*, 12 (33), p. 149, 1998b.

SACHS, Jeffrey. "Release the Poorest Countries for Debt Bondage". *International Herald Tribune*, 12-13 June 1999, p. 8, *apud* H. STEINER & P. ALSTON, *International Human Rights in Context: Law, Politics and Morals*. 2nd ed. Oxford: Oxford University Press, 2000.

SANTOS, Boaventura de Souza. "Introdução: para ampliar o cânone do reconhecimento, da diferença e da igualdade"; "Por uma concepção multicultural de direitos humanos". In: _____, *Reconhecer para libertar: os caminhos do cosmopolitismo multicultural*. Rio de Janeiro: Civilização Brasileira, 2003.

- SEN, Amartya. *Development as Freedom*. New York: Alfred A. Knopf, 1999.
- _____. "Foreword". In: P. FARMER, *Pathologies of Power*. Berkeley: University of California Press, 2003.
- SIKKINK, Kathryn. "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America". In: *International Organizations*. Massachusetts: IO Foundation/Massachusetts Institute of Technology, 1993.
- STIGLITZ, Joseph E. *Globalization and its Discontents*. New York/ London: WW Norton Company, 2003.
- TRINDADE, Antônio Augusto Cançado. *A proteção internacional dos direitos humanos: fundamentos jurídicos e instrumentos básicos*. São Paulo: Saraiva, 1991.
- TRUBEK, David. "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs". In: T. MERON (ed.), *Human Rights in International Law: Legal and Policy Issues*, p. 207. Oxford, Clarendon Press, 1984.
- UNDP (United Nations Development Programme). *Human Development Report 2002*. New York/Oxford: Oxford University Press, 2002.
- VASAK, Karel. *For the Third Generation of Human Rights*. The Rights of Solidarity, International Institute of Human Rights, 1979.

Translation:
Regina de Barros Carvalho
and Jonathan Morris

OSCAR VILHENA VIEIRA

Coordinator of Sur – Human Rights University Network and Associate Professor of Law, Catholic University of São Paulo and Getúlio Vargas Foundation, in São Paulo

A. SCOTT DUPREE

Director of Programs at Conectas Human Rights

ABSTRACT

Why do our societies still accept and even perpetuate human rights violations? The first part of this paper discusses why individuals respect or do not respect other people's rights.

Disrespect for rights emerges, among other factors, from persistent inequality that creates moral exclusion and, consequently, promotes the invisibility and demonization of those who struggle for their rights.

The second part of this paper explores the role of civil society, which, with its variety of interests, provides for a plural discourse, publicizes injustice, protects private space, interacts directly with legal and political systems and drives social innovation. Towards an agenda for strengthening the future human rights discourse, the authors suggest three strategies: improving communication and educational capacity, investing in innovative models, and building and strengthening networks that will ensure an active dialogue among diversities.

REFLECTIONS ON CIVIL SOCIETY AND HUMAN RIGHTS

Oscar Vilhena Vieira and A. Scott DuPree



PART 1

The continuing challenge of human rights

In the last half century, the language of human rights has become commonplace. It became, to the dismay of many, a political tool during the Cold War period and entered into foreign policy as a highly selective weapon to use against one's enemies. Looking on the positive side, the Cold War period played an enormous role in making the human rights language heard around the world. It is doubtful that the United Nations alone could have carried out such an effective dissemination.

The demand for a just international system is, arguably, at a peak today. The global peace protest on February 15, 2003 brought together millions on all continents not just to demonstrate against the then impending war against Iraq but also in support of the United Nations system. A reason for this sense of injustice, among others, is that we have failed to end violations of basic human rights. Social, cultural, civil, economic and political rights are incorporated in international and national legal systems but enjoyed in reality by few.

Why is there this continuing disrespect for rights? And how can we change this?

Who must respect human rights?

The first question may seem obvious but it is worth exploring: who needs to respect human rights? That is, who is responsible for the continuing lack of respect?

One common answer to this question is that the state must respect human rights. This is correct. The worst abuses, omissions and transgressions are the responsibility of the state. The state here is taken as the governing authority (including the police, the courts, the legislature, the public services and foreign policy) arising from some form of social compact. The presence and power of state authority is so prevalent in all spheres of our lives that human rights are often conceived as a set of principles or contracts between the state and those governed by it.

It is argued here, however, that human rights go beyond the state-citizen relationship for three reasons: (1) they require individual, voluntary submission to a correlated obligation to respect the rights of others; (2) they are both positively and negatively affected by non-state authorities; and (3) the shrinking mandates of states around the world further reduce the state's role. In recognition of the broad set of actors who must respect rights, Article 28 of the Universal Declaration of Human Rights explicitly mentions "a social and international order" that implies other actors, including individuals, communities, other non-state authorities, corporations and the international community at large.

First of all, respect for human rights is the responsibility of individuals. Even the greatest abuses of human rights are often, but not always, the fault of an individual. The action of individuals is magnified through access to state, corporate or informal authority. The separation of individuals from the contexts in which they are formed, nurtured and thrive is folly. But clearly individuals must respect rights.

The illusion of the state as the only responsible party for human rights should be further dispelled. Authority arises from any power that one individual or group has over another, not just state authority. Social groups have this authority over their members. The state can restrict or discourage their abuses but it is not immune from the power they exert. Our hypothesis must explain also why these social

forces, both formalized and informal groupings that compose a level of “authority”, do not respect human rights.

The private sector assumes *de facto* control of many areas critical for human rights, and to this extent an exclusive focus on state authority does not explain why people’s rights are not respected. The enormous struggles for the creation of a concept of the social responsibility of the corporate sector in the last decades should serve to illustrate the need for a human rights discussion that includes and transcends the state/citizen duality. The Global Compact, promoted by the UN, is one example of such a discussion.

Returning to our question, we seek a reason for why we (keeping in mind that the “we” here includes individuals, state, private sector and social groups) choose to respect or not respect human rights. We will start by examining reasons for people to respect human rights.

Why do people respect human rights?

Three reasons to respect rights are posited for the purpose of this paper: cognitive, instrumental and moral reasons.

Cognitive reasons. We need to know what rights are. Information is critical for making choices. It comes to us through diverse cultural, media and educational sources. Information about human rights must link individuals with the universalized principles and integrate human rights, or be clear where it does not, within contextually developed values.

This is not a trivial matter. In many societies and languages, the words and terms of the rights vocabulary either do not exist or are being invented. The concept that people are endowed with rights is often contrary to day-to-day experience, existing privileges, religious and hierarchical entitlements and cultural systems. This is true not just of extreme practices such as female genital mutilation or caste systems, but also of such perceived rights in various societies to bear arms, punish with the death penalty or use children as soldiers.

To the extent that human rights are not respected because of a lack of understanding, it is critical to invest in education. But cognition is not only a result of formal education. Dialogue

and active participation in the evolution of a rights language is key to a supportive cognitive logic. Education, in this sense, creates a common language. It does not force people to follow the rules of human rights but enables them to make informed choices. Cognitive reason, thus, is a necessary but non-compelling force in the logic of human rights. Suffice it to say that some of the greatest violations of human rights in modern history have taken place in the best educated societies.

Instrumental reason. People respect rights to attain rewards or escape punishment. Taking a narrow instrumental view, respect for rights is reinforced if disrespecting them is clearly damaging to one's image, physical well-being or integrity and respecting them is likewise beneficial. To have an instrumental value, respecting rights must make one better off. Through this instrumental reasoning, called utilitarianism in the tradition of Bentham, individuals seek to maximize social and economic utility. Three instrumental reasons bear discussion – state coercion, peer pressure and reciprocity.

1. To the extent that people fear and expect punishment or reward from the state they will respect a rule of law incorporating human rights. This could be called the hobbesian argument. This could be called the hobbesian argument. State coercion can be an effective instrument for human rights in some circumstances and is also a necessary condition because there will always exist some degree of antisocial behavior that cannot be otherwise controlled. But people also respect rights in the absence of coercion. It would be untenable for any society to bear the cost of the level of state coercion that would be needed to ensure compliance with all legal rights. Imagine, for instance, if the threat of a fine or worse were the only reason people do not run red lights. Much more compelling is the instinct to avoid an accident coupled with understanding of why following the rule will help us to do that.

The spectrum of punishment or reward that states can use as instruments has been reduced over the last decades. States maintain a monopoly over violence (war) and punishment (legal systems) but their action has been visibly reduced in the area of social services, most particularly employment, education, health, social security and other areas connected with

ponderously under-respected social and economic rights.

Likewise, while a part of the solution, we should not forget that states have been the worst abusers of human rights. We must both strengthen restricted and positive state coercion while seeking accountability and reasonable limits on state authority.

2. Instrumental reasons extend beyond legal frameworks. People are part of groups and communities that shape and determine their actions. A second instrumental reason for respecting human rights is an expectation of retaliation or benefit from a community to which one belongs. For obvious reasons, peer pressure is a complex and indirect reason for human rights. Individuals do not belong to only one group. They are influenced by many – very few of which have anything to do with rights. But the closeness and participation of individuals in groups suggests that peer pressure has considerable influence.

3. We impart to others the rights that we wish for them to impart to us. Reciprocity is theoretically friendly to difference. It gives us a reason to expect that necessarily different people should be treated as we would like to be treated. We listen, thus, because we want to be heard and we respect property because we want to hold on to our own property. Reciprocity does not assert any transcendental quality of good and evil. It does not imply that murder, torture, starvation, illiteracy and preventable illness are bad in themselves. What it does assert is that I cannot accept these things for others unless I accept them also for myself. It neither affirms nor denies the existence of a deeper moral framework. Beyond this, it has little to say about situations of unequal worth. Reciprocity as a reason to respect human rights is unstable. Starting from a structure of mutual advantage, individuals have an incentive to cheat, that is “what is in my interest is that everybody else cooperates and I defect.” In other words, that everybody else adheres to rules that are mutually advantageous if generally adhered to and I break them whenever it is to my advantage to do so.¹

Moral reasons. People respect rights because they believe humans are endowed with equal moral value. Rights make no sense unless we accept a moral, fundamental human

1. See Brian Barry, *Justice as Impartiality*, Oxford, 1999, p. 51, for more discussion of this aspect of reciprocity.

dignity and that every human deserves to be treated as an end and not a means. This is the Kantian argument to respect rights. Morality is easy to grasp but is resistant to reductionism. A moral reason to respect rights can be framed from a more procedural perspective; we have to respect other people's rights because, by democratic consensus, we agree that humans are endowed with them, regardless of status, social condition, race or whatever other differences exist.

The point is that human rights must have a moral authority as minimalist, operating principles – not as a utopian vision. As we have witnessed in the last decade in Rwanda, Kosovo, Colombia and Myanmar, to take only a few examples, we are still far from realizing these protections. Without such, millions of people will continue to fall victim to unbridled power and ambition.

In summary, we propose key elements of explaining respect for rights include: knowing what they are and reflecting upon them; symmetry and consonance with instrumental logic; and the belief in the equal, moral dignity of all humans. Practically, these three conditions imply that human rights norms themselves are dynamic, and arise out of social processes. Jürgen Habermas, in his development of a discourse ethics, theorizes as to how such a process looks: “For a norm to be valid, the consequences and side effects that its general observance can be expected to have for the satisfaction of the particular interests of each person affected must be such that all those who affected can accept them freely”.² The validation of norms from diverse perspectives ensures that the cognitive, instrumental and moral authority of a respect for rights is implanted deeply within the grain of society. Thus, we see ongoing social discourse as the process that creates the logical conditions for the respect of human rights.

Why do people not respect other people's rights?

One of the most pressing issues for those who would promote human rights today is social and economic inequality. Actual inequality is staggering and growing. As an illustration, we consider economic inequality measured by access to financial resources (we could just as well discuss persistent inequalities arising from religious, social, class, gender, race or sexual

2. Jürgen Habermas, *Moral Consciousness and Communicative Action*, p. 120. Massachusetts Institute of Technology, 1990.

preferences). About one in five people in the world live on less than one dollar a day. In countries like Brazil, the richest one percent controls the same amount of resources as the poorest 50 percent. As the Human Development Reports published by the United Nations Development Programme show, lack of resources means also lack of proper education, health conditions, housing, water and other sanitary conditions. The absence of these basic conditions for the majority creates a situation of disparity and inferiority between those with access and those without. The same circumstances can be found in both central and peripheral nations.

Both economic and social inequality trigger moral exclusion. They reduce the perception of equal worth of every human being, destroying the conditions for the respect of human rights. In the 2002 Brazilian presidential campaign, a key candidate declared, he would “defend human rights, but would also defend right (law-abiding) human beings.”³ This is to say that people can be less than human if they do not fit into the category of valuable people. It is still all too easy to secure our own good by focusing on an easy enemy. Rights under such circumstances can often appear a farce, an issue of power for those who are among the lucky few negotiating the terms for those excluded. Moral exclusion manifests itself through two distinct characteristics:

Invisibility of those who are devalued. Their actual pain and suffering is not shared by those who are valued. While they exist as a collective force (economically as a means to production, politically as a subject of governance) they have little voice and few direct means to move or constrain those who are on top. Their opaque and silent submission to highly hierarchical realities makes them invisible. This invisibility is strengthened over time by a cultural reinforcement that is often accepted and even deepened with the collusion of members of the invisible groups. Negative perceptions of capacity and inequality become the *statu quo* and are, thus, imbedded in all levels of action and impervious to change.

Demonization of those who are being devalued and who would challenge the *statu quo*. The sheer force and numbers of devalued populations – whether seeking religious or race

3. “... defender direitos humanos, mas também os seres humanos ‘direitos’”, José Serra, as reported in *Folha de S. Paulo*, September 17, 2002.

equality; trying to attain goods, such as land, employment or health services; or behaving in an anti-social manner – are a direct threat to wealthier or better endowed elements of society with a stake in maintaining or expanding existing privileges. In this way, the efforts of the devalued appear as the problem that needs to be eliminated. Violence is often the instrument used to deal with those who challenge injustice.

Policies, social practices and even laws that deny equal worth to those in vulnerable groups are still commonplace. In order to make them viable, they are always justified in terms of a social priority or as economic imperatives. The fear engendered in the United States, for example, after the September 11, 2001 attack on the World Trade Center allowed the US government to ignore the rights of Afghani soldiers captured in the subsequent retributive war against that country and to wage a global campaign against demonized enemies whether or not it could be justified by international law. In the developing world, minimum social rights are being disregarded in the name of orthodox economic principles. To some extent, fear for national and international security trumps human rights. But a strong social base in which human rights are understood, consistent with systems of reward and benefit and part of the moral language, will provide minimalist limits.

The consequences of this process of devaluation of humanity are very negative for the realization of human rights – and are at least a partial answer to why human rights are not respected in the world today. Those on the bottom of the social pyramid, whose rights should be protected, are treated as objects or enemies. At the same time, the impunity and privilege of those on the top is reinforced. The problem is the need to develop the logic of human rights – call it an ethical cosmopolitanism – that would convince individuals, groups and societies to treat every individual as an end of equal intrinsic worth. This would be a cosmopolitanism in which human rights are well integrated into curricula (cognitive reason), promoted through enforcement and reward systems (instrumental reason) and made obvious through a shared norm of the dignity of humanity (moral reason).

Following on the Habermas quote above, we emphasize the notion that the realization of human rights has both moral

and political dynamics realized through social discourse. This discourse ethics necessitates actual dialogue and structures for enabling ongoing exchange in order for a norm to be seen from all perspectives. It requires symmetry, impartiality and openness that must be driven by voluntary association, which maximizes the choice and the full participation of the individual. We turn to civil society as the natural environment in which such diverse perspectives and the dialogue about norms is an ongoing process. The logic of civil society is the action of individuals and groups to express and realize the valid and diverse desires and needs of society. The next sections of this paper will reflect on the role of civil society in constructing a global ethical cosmopolitanism for the realization of human rights.

PART 2

Civil society and human rights

What do we understand by civil society and why do we think a strong civil society is important for ensuring respect of human rights? The expression “civil society” has been appropriated by different and sometimes opposite intellectual and political traditions.

From a normative perspective, we define civil society as the sphere of life that has not been colonized by the **instrumental ethos** of the state and the market. In the machiavellian tradition, the struggle for power between and within states is based on a strategic way of acting, where the legitimacy of the means is measured by the results. This instrumental ethos collides with the morality of rights in which people are an end in themselves and cannot morally be used for the achievement of other objectives. In the market, this instrumental ethos also prevails since the logic of the economy is the maximization of benefits (economic benefits) with minimal resources, where people (workers) are a means for producing profits. In a world dominated by the market and states, the ongoing social, political and economic discourse that takes place within civil society is critical for creating and strengthening the conditions necessary for the respect of human rights. This is not to diminish the strategic importance of developing good, democratic governance and

corporate social responsibility. But more responsive human rights models will only emerge through the catalyst of a healthy civil society.

The definition of civil society proposed by Jan Aart Scholte is a useful starting point: “Civil society is the political space where voluntary associations explicitly seek to shape the rules (in terms of specific policies, wider norms and deeper social structures) that govern one or the other aspect of social life”.⁴

Organizations and associations of civil society assume different forms with one common feature: they amplify the voices of particular interests and are natural advocates for devalued or invisible groups. Jean Cohen and Andrew Arato suggest four features of civil society that we take as a framework for understanding the breadth of potential impact of the human rights discourse that takes place in civil society: publicity (institutions of culture and communication), plurality (differentiation of interest and form), privacy (an environment supportive to the development and expression of the individual) and legality (the structure of basic laws and rights that enable publicity, plurality and privacy).⁵

Associations seeking human rights often emerged as a response to governmental abuse, generalized or specific restrictions on human rights or other adverse circumstances. The movement includes a range of organizations that formulate a discourse of emancipation and social justice in terms of rights. Human rights-oriented associations have made a strategic decision to promote human rights discourse as opposed to other political forms of action. The divisions within these associations reflect the development of these concepts in United Nations treaties along these divisions: civil and political rights (participation in government, protection of individual security, association and expression, access to justice), social and economic rights (income, employment, education and training, health services, access to information) and cultural rights.

How is civil society a critical human rights actor?

Progress in human rights requires the establishment of conditions conducive to their respect. These conditions create norms that take on cognitive, instrumental and moral aspects, which arise from an ongoing dialogue that engages

4. Jan Aart Scholte, *Civil Society and Democracy in Global Governance*. CSGR Working Paper n. 65/01, Centre for the Study of Globalization and Regionalization. University of Warwick, January 2001.

5. Jean L Cohen and Andrew Arato. *Civil Society and Political Theory*, p. 347. Massachusetts Institute of Technology, 1994.

diverse perspectives and constantly recreates these norms as dynamic and universal principles. If one is seeking justice, it is impossible to skip this process, because the dialogue itself is a component of justice. The realization of rights is a process and cannot be effected solely through incorporation of rights in national and international legal structures. Civil society creates and recreates the conditions for validating and realizing human rights. We emphasize five aspects of this action: (1) providing a sphere of action for all social groups; (2) making injustice public; (3) protecting private spaces from state and market incursion; (4) intervening and interacting directly with legal and political systems; and (5) driving social innovation.

Providing a discourse of plurality. Human rights discourse must be practical, responsive and accessible to a plurality of perspectives. This discourse needs to engage devalued and invisible groups as proponents for the change that they perceive as necessary to justice. Obviously, civil society is the home to conflicting claims for justice and one aspect of the dialogue is a negotiation between various rights and in the distribution of resources invested in solutions. For example, both personal security and fair treatment under the law can be seen as keys to provide justice to an individual. The individual will view these rights from a different perspective depending on whether he or she is living in a state of insecurity or is directly affected by a legal action. The human rights discourse is not a mechanism for the resolution of these issues; it is a space within which they can be resolved through the interaction and dialogue of all those affected by a given problem.

Making injustice public. Civil society groups are good watchdogs for injustice because they give voice to perspectives and vantage points that are otherwise unheard. For this to be true, association and dialogue must be open and with minimal intervention. In this fashion, civil society assists in the realization of human rights by bringing injustice into the public sphere. A problem can arise when more influential and powerful groups within civil society itself drown out the voices of the less powerful. This can be partly counteracted by the associative principle – individuals

associate on various levels and with various interests based on their own social and private needs for expression – and because the strength of civil society arises directly from the co-existence of diverse perspectives. In this way, diverse groups act on human rights by publicizing and bringing to light injustice and advocating or exerting pressure for change. Groups can exert pressure by producing and providing information, educating the public and others, proposing public policies and taking legal action.

Protecting private space. Civil society defines a space for individual expression and development that is separate from the citizen or consumer logic of the state and market. Individuality is expressed through association or non-participation and is, thus, largely elective. In terms of rights, this view of the individual is critical because it conceives a person as the end in him/herself. Human rights groups protect this space by seeking the positivist conditions necessary to enable individual expression and reinforcing the limits of state and market action.

Intervening and interacting directly with legal and political systems. To some extent, in every country and on the international level, law and public policy conducive to the realization of human rights have been promulgated. The laws and norms embodied in these systems are only effective to the extent that they are used, refined, supported, and thereby validated by civil society. Human rights groups have participated directly in this process by bringing legal cases before the courts, by providing information and data critical to the refinement of public policy and by proposing new mechanisms or the eradication of ineffective ones, with a view to the creation of a supportive framework for human rights. This intervention should be strategic, with a focus on paradigmatic change and pressure on government policy to be more consistent with the ongoing human rights discourse.

Driving social innovation. Social innovation is a proactive human rights approach that must take place on manageable levels, where dialogue, feedback and results are open and accountable to diverse perspectives. Innovation happens

through the creation of models on smaller scales that show the possibility of solutions to intractable issues of justice on larger scales. Social innovation in civil society emerges as a direct response to localized injustices. Innovators are deeply aware and involved with those affected by this injustice and, working with them, try out and invent approaches for their resolution. This happened in South Africa, for example, with the Social Change Assistance Trust, which created and supported community legal assistance structures during the apartheid era that demonstrated inexpensive, minimal infrastructure could be provided in rural areas to make justice accessible.⁶ It is happening in Brazil today, with various social groups seeking more effective ways to use the court system and the Constitution for the redress of long-standing injustice. The Pro Bono Institute⁷ that provides high quality volunteer lawyers to social groups is one example in which the authors are involved.

In short, civil society is a key player in creating the conditions for the realization of human rights. It promotes human rights discourse that validates rights norms, particularly by including devalued and invisible groups. The forms of this discourse are also diverse, and give rise to diverse strategies and means through which the logics of human rights can be realized in society. This brief discussion of the role of civil society leaves one, however, with an obvious question: if civil society is a powerful and important actor in the realization of human rights, what is keeping it from being effective?

What prevents civil society from achieving a stronger impact in human rights?

Flexibility, diversity and volunteerism, some of the strengths of civil society, are also its weakness. Civil society, neither protected nor powerful in relation to the state and market, is largely divided and lacks financial and other resources. Several of these characteristics are reflected in the challenges of the human rights movement today. This paper discusses three: fragmentation (both thematic and geographical), neutralization of discourse and resource dependency that will be sketched out below:

6. For information on the SCAT model, see the *Sourcebook on Foundation Building*, Synergos Institute, 2000 or <www.scat.org.za>. Last access on April 19, 2004.

7. For more information about the Pro Bono Institute (São Paulo, Brazil), visit <<http://www.institutoprobono.org.br>>. Last access on May 14, 2004.

Fragmentation

Fragmentation of the rights movement has created a competition for space, voice and resources that breaks the solidarity around human rights. In order to become more effective, human rights organizations must seek ways to strengthen joint action and discourse among diverse actors.

Human rights groups are working on a variety of themes and issues; including torture, police abuse, HIV/Aids, housing, social and economic rights, discrimination, and even such themes as environmental protection and development. The thematic fragmentation has both a positive and a very negative aspect. The **positive** aspect is that the diversity of action and involvement reflects the diversity of interests within a social discourse leading to a relevant framework of human rights. Their work covers many areas of importance to devalued populations, giving voice to invisible groups and bringing to light those who are forgotten or ignored. The **negative** aspects are several: (1) the diversity of interest can create a competition for public attention and resources needed in addressing particular rights issues, thereby diminishing the sense of a shared human rights cause; and (2) associated to the first is the channeling of social energy in different directions, impoverishing social discourse.

Another division that must be dealt with runs South/North. It is less related to geography than to a conceptual “peripheral” access to resources of the majority of the world’s population. Some international agreements, such as those on human rights, have counted on little participation from peripheral populations in the past (it should be noted that UN conferences [e.g.: Rio de Janeiro 1992, Vienna 1993, Beijing 1995 and Durban 2001], have marked a welcome increase in the participation of the South). Southern actors need to become stronger proponents within the international human rights movement. Recognizing that the strongest organizations naturally grew up in the shadow of international government agencies and the resources and power of the North, we must bring human rights home. The South must participate to a greater extent on the international level of human rights action because it is in great need of human rights protections and approaches, and its populations are those who are least served within the existing rights legal infrastructure.

An aspect of the South/North divide is the need to reinforce the credibility of local human rights organizations in the South with their own governments and societies. They often work in the shadow of or as subsidiaries to Northern organization, relying on the advocacy of organizations based in Washington, New York, London, Paris and Geneva. Secrecy, of course, is a survival strategy in countries that are actively repressing human rights and human rights advocates. But it is not a good strategy once minimal protections have been achieved because human rights must be made public and visible. Human rights organizations in the South must improve their reach and credibility within their own contexts and in the international arena.

Neutralization of the Discourse

Human rights gained momentum in struggles against authoritarian regimes in Latin America, Europe, Africa and Asia. In the North, human rights are an important subtext at this exact moment. Human rights organizations need to understand and act in the political space.

Once crises are over, human rights organizations often recede into the background. Some of the most skilled leaders move into government; others, having accomplished what they set out to do, abandon the social sphere altogether. But after the establishment of democratic structures and the rule of law, the human rights movement faces its most onerous challenges in translating rights into reality. Here, in the end of a repressive period, we confuse the struggle for rights with a revolution that can be won with a constitutional document, a voting booth and a free press. There is more need than ever for specific policies, wider norms and deeper social structures to realize human rights. These must be tested and must grow out of the communities where we live in partnership with government and with the private sector.

That is why it is a mistake for human rights organizations to seek political neutrality (to the extent that this is possible) to make their discourse more acceptable and credible to the public and the state. While the political neutralization of discourse avoids conflict, it also avoids critical debate.

Of course, human rights organizations should avoid partisan struggles but they also must understand them. Removal from

the political sphere de-legitimizes the struggle of those who are seeking change through political means. In this way, social justice movements in the Chiapas in Mexico, the landless movement in Brazil, the HIV/Aids movement in South Africa and other social “uprisings” are approached cautiously by some human rights organizations. Human rights must be relevant to the real demands of the disenfranchised. The realization of rights springs from deep, gradual and ongoing processes of social negotiation. The professionalization of human rights – acquiring skills, capacity and institutional support – is an important activity – but it should be complemented by the mainstreaming of human rights in the political sphere and stronger linkages with social justice movements.

Resource Dependency and Funder-Oriented Action

The needs for financial and other resources grow as organizations start to act in new areas, as their workforce transforms from voluntary activists to professional, highly trained advocates, and as the challenges require longer term approaches. Nevertheless, only a handful of foundations and other donors are investing in human rights, and among this group, fewer are willing to invest in more heterodox, smaller, transient organizations.

Resources are being raised from governments and government groupings (North American and European governments and to some extent other regional groupings and some governments in the global south), foundations set up by the private sector, family foundations and individuals. The source of the funding has a significant impact on the conceptualization of priorities and the definition of human rights themselves. For example, US government funding has traditionally emphasized civil and political rights over social and economic rights, reflecting that country’s vision on human rights.⁸

The competition for these scarce resources creates a perverse cycle where human rights organizations adapt their initiatives and language to funding priorities. Resources are channeled to those organizations that are viewed as reliable in terms of the scope of a funding mandate. But the problem with resources is not that funding organizations have priorities, it is the over-reliance on few sources of funding.

8. See *Supporting Human Rights and Democracy: the US Record 2002 – 2003* on the US State Department website for more information: <<http://www.state.gov/g/drl/rls/shrd/2002/>>. Last access on April 19, 2004.

Human rights organizations are tempted to monopolize the discourse for their own credibility and survival. One way to reverse this is for funders to adopt strategies to catalyze open dialogue and links between human rights movements of various sizes, ages and geographic scope and to assist in developing more sustainable funding.

But beyond this, the human rights movement must expand the full spectrum of its resources: contributed ideas, expertise, knowledge, time, space and commitment. Strategic financial resources can leverage these contributions but not replace them.

How can human rights movements strengthen their action?

The future human rights movement should strategically focus on reinforcing and deepening the validation of norms that lead to creating a logic for the respect of human rights. Its action, as discussed above, must promote this infusion through participation of a plurality of perspectives, publicity of injustice, engagement with the state justice infrastructure, protecting private space and promoting social innovation. Fragmentation, neutralization of the discourse and resource dependency are impediments standing in the way of progress in each of these areas. In reflecting on the way forward, we believe that there are several important strategies that will pay off with greater impact and results.

Improve our capacity for communication and education

Neither modern communications nor educational systems are today focused on promoting social discourse or the diffusion of human rights information. Human rights organizations need to improve their capacity to make use of these systems as they exist, to broaden the reach of social dialogue.

This means continuing and improving educational initiatives that introduce people to the language of human rights, but also pioneering proactive dialogues with governments, the private sector and other social movements. New forms of accessible media – manuals, handbooks, school curricula, music and art – in which the human rights movement must become fluent have opened up. Simple exposure to human rights, the potential benefits and the worth of humanity is a critical message that needs to enter into the

variety of educational experience designed to reach a bigger audience.

In addition to the promotion of principles and language into accessible forms, it must be realized that human rights is not a closed body of knowledge. By making use of existing communication and education systems, we must seek out ways to build ongoing feedback mechanisms and continuing dialogue.

Invest in socially innovative models

Human rights organizations are becoming increasingly skilled at publicizing injustice, as they should be. The negative story of human rights, however, needs to be balanced with the existence of viable alternatives. We believe that this calls for a proactive approach. On civil and political rights, for example, models need to be created to show how judicial systems can be opened for better access, how criminal offenders can be fairly treated, how more citizens can participate in government, how to redress discriminatory practices. In the area of economic and social rights, in addition to continued pressure for the government and market to take action toward their realization, we also need models to show how we can attain them. The innovation of approaches to human rights on a small scale will pay off in demonstrating that better large-scale systems are possible and will provide human rights organizations with a much stronger position.

Build human rights networks that heal fragmentation and strengthen resource use

Through their identification with and participation in networks, human rights organizations exchange information, learn from the experience of others, stimulate international solidarity and create an environment for dialogue that favors equal protagonism in the universal discourse of human rights. By definition, networks are horizontal. They facilitate but do not monopolize discourse, improve the capacity of individual organizations to use resources effectively and provide opportunity to less visible groups. Many, many networks exist today, ranging from those with formal membership to those that are so loosely constructed it is

difficult to give them a name. What we mean by networking is to take the actuality of the social process as critical for the realization of human rights. This engagement has to happen across levels of society with individuals, community groups, universities, government agencies and corporations; it also means active and constant dialogue with a variety of interests and not just those that agree with us.

A concluding reflection

This paper set out to explore why people do not respect rights and to provide some practical ideas about changing this situation. Towards this, we have suggested that the logical framework for rights is in need of development and that a promising path lies in understanding respect for human rights as something that emerges from a process that must be continually realized through social discourse. This has implications for the human rights movement today. While it has achieved some successes, particularly in the areas of advocacy and education, it could be much more effective as a convener of under-represented groups and perspectives and in fostering space for the strengthening of human rights norms.

These arguments do not provide any single easy answer. They suggest some reason to be optimistic, however, if the awakening consciousness of civil society in many parts of the world can lead to greater respect for human rights. Putting faith in a process of social discourse may be insufficient for those whose rights are violated today but without this process their situations will remain invisible and the universal moral dignity underlying their rights will not overcome the stage of a theoretical construct. Optimism is warranted because the social processes discussed in this paper are attainable and in some cases under way.

JEREMY SARKIN

Senior Professor of Law and Deputy Dean, Law Faculty,
University of the Western Cape, South Africa

ABSTRACT

Reparations for human rights and humanitarian abuses are a key challenge domestically and internationally. While there have been recent developments both in the theory and the practice of reparations for abuses committed in various places around the world, many of the violations committed in Africa, and elsewhere, during colonial times remain unresolved. This article reviews these developments and contextualizes them against the background of cases being litigated by Africans for abuses perpetrated against them in the colonial and apartheid era. Thus, cases being brought by Namibians and South Africans, in the United States in terms of the Alien Torts Claims Act, and other laws, as well as in other jurisdictions are examined. This is done to determine their likelihood of success in the light of the legal problems these cases have to meet. The political contexts of the cases are also examined, as well as why multinationals rather than states are usually pursued.

THE COMING OF AGE OF CLAIMS FOR REPARATIONS FOR HUMAN RIGHTS ABUSES COMMITTED IN THE SOUTH

Jeremy Sarkin



Questions relating to accountability for human rights abuses have never been more in the news or more favourably viewed than at present.¹ Both criminal and civil processes have seen major developments over the last few years.² Criminal accountability has been established at both the international and domestic levels.³ The creation of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) has resulted in criminal accountability for gross human rights violations becoming far more of a reality. Domestically, the way states deal with past human rights abuses is often dependent on the way in which political change has occurred and the way the state deals with the tensions between justice,⁴ truth and reconciliation.⁵

The issues of apology and reparation for violations committed during colonialism,⁶ slavery and apartheid have also never been so high on the agenda. This is seen to be a critical issue, as during the years of colonialism and apartheid untold numbers of human rights abuses occurred in the race to possess and exploit the resources of the colonized countries. The crimes committed in the process of carving out the spoils for the colonizers include crimes against humanity,⁷ war crimes,⁸ genocide (even before the word was coined),⁹ extermination, disappearances, torture, forced removals,

See the notes to this text as from page 103.

The references of the sources quoted in this text will be found on page 118.

slavery, racial discrimination, cruel, inhuman or degrading treatment, and more. In fact, a key issue, and a defense that has been raised by the countries or corporations that perpetrated these deeds, is that the crimes committed at that time were not then defined as crimes. It is contended that only later were they defined as such.¹⁰

Many countries where colonialism occurred are still underdeveloped¹¹ and the legacy of the colonial years is still a major feature of the landscape in these places.¹² In some countries, certain communities assert that the way in which they were exploited in the past is the reason why they now suffer economic as well as other hardships.

In this vein, the issue of compensation for victims of human rights abuses has become a critical concern for these countries and the individuals who live there. Until recently, it was believed that remedies were not available and that the only mechanism to achieve some type of redress was to get some measure of foreign aid from the former colonial masters, who could be made to feel guilty about the past and, consequently, provide such assistance.

The issue of reparations has become more important, not simply for the money that is being sought but also because reparations are seen to fulfill at least three functions. Firstly, it directly assists victims coping with financial loss they have suffered; secondly, it provides official acknowledgement of what happened in the past; and thirdly, it may act as a deterrent to the perpetration of human rights abuses in the future.¹³

One reason why reparations for these abuses have become an issue of considerable significance is that there has been a growing awareness and acceptance internationally of the need for and right to reparations for victims of human rights violations. Many international human rights instruments recognize that a victim is entitled to a remedy, which includes the means for full rehabilitation.¹⁴ In fact, the receiving of some reparation for harm suffered is a well-established principle of international law.¹⁵ Such a right is now also found in regional human rights instruments and in the jurisprudence of regional human rights courts.¹⁶ What is also developing is the notion in international human rights law that, in principle, this law governs the conduct of state actors as well as private parties, including juridical bodies such as

corporations. There is also a growing acceptance of the principles of universal jurisdiction.¹⁷

These developments have been bolstered by claims and payments made recently in a number of cases related to the Holocaust.¹⁸ These claims and their significance will be discussed later. In addition, a growing number of civil cases are being filed in relation to these types of violations. The majority of these are in the United States under the Alien Torts Claims Act.¹⁹

There are also at least three major cases against multinationals pending in the courts of the United States²⁰ for violations committed during the colonial and apartheid periods. One suit has been filed by the Herero people of Namibia, for violations committed in that country in the early twentieth century, and two claims have been filed by South African victims for violations committed during the apartheid era.

Another reason why the issue of reparations is now so topical is the fact that the matter of reparations for slavery and colonialism was a major and highly contested agenda item at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban (South Africa) from August 31, until September 8, 2001.²¹ Quite a considerable part of the World Conference was devoted to these themes. A formal apology, coupled with an undertaking to effect reparations in some way, has been requested from those who were the beneficiaries of slavery and colonialism.²² The WCAR declaration²³ has many sections relevant to the issues under discussion.²⁴

This paper examines the issue of reparations for colonialism and apartheid. It does so on the understanding that, while world opinion or moral authority might be that there are very valid reasons for countries that were colonizers to pay reparations, it is unlikely that these states will acknowledge and apologize for past human rights abuses or be willing to pay reparations for these. If reparations are forthcoming in the future this will be the result of the political climate changing and agreement being reached.²⁵ For this reason, it is more likely that multinational corporations or other companies who conducted business and benefited where violations were committed, or are seen to have benefited during those years, will be sued. As has been noted by Joel Paul:

Why has international law turned its gaze to multinational corporations at this time and in this way? After all, many of the claims against multinational companies arise out of the Holocaust and the Second World War. After more than a half century, why are litigants seeking redress from these corporate giants? One simple answer to the question is that the companies may be the only tortfeasors still available to provide any compensation. The individual bad actors are often dead, missing, beyond the jurisdictional reach of domestic courts, or unable to satisfy large damage claims. The immortality of the multinational corporate entity, its size, wealth and omnipresence in a variety of jurisdictions make it uniquely attractive as a defendant.²⁶

These institutions are also pursued as it is unlikely that international courts will permit such cases before them. For a variety of reasons, these courts are not really available for victims who seek redress. This is unlikely to change. In any case, victims have difficulty in gaining access to these courts as, in the main, they do not permit non-state actors to litigate before them and private corporate entities bear almost no obligations under public international law ... The long and the short of it is that the legal status of MNCs under international law has not advanced significantly in [a] quarter century.²⁷

At the level of state liability, reparations are at present a political issue rather than a legal one.²⁸ As a consequence of the difficulties in pursuing state actors,²⁹ victims often view corporations rather than governments as easier targets for such claims.³⁰ Part of the reason for this is that multinational corporations often have assets in jurisdictions that have easier procedural rules for litigation. While claims by victims of human rights abuses have until now been relatively limited, there has been a major growth in such claims over the last five years. The precedent cases relating to World War II claims have resulted in victims, who did not see such possibilities previously, taking legal steps to seek redress. As Ellinikos has noted: “eventually as business leaders are now finding out, somebody has to take responsibility”.³¹ Thus, the case that is being made, especially in litigation, is against corporations for the role they played, and the manner in which they benefited from acts committed in particular countries in the past. While the United States system for allowing foreigners to sue in its courts, mostly under the Alien Torts Claims Act, is evaluated

in this article, it is not an extensive evaluation of those laws but rather an overview of the types of cases that have been filed and what possibilities exist for claims relating to colonialism and apartheid. The focus is, thus, rather on what we can learn, for possible cases in these areas in the future, from the cases already brought. Why the United States is the major site of such litigation is also explored to some degree, to determine whether the courts in other countries have similarities that may be applicable to these types of cases. Additionally, the lessons and possibilities raised by the US cases may be relevant for the bringing of lawsuits in either the US or other countries.

The role of multinational corporations in the committing of human rights abuses

The role of multinational corporations in their conduct of business in the Third World is very controversial. Their role, especially in the colonial era, is even more contentious than their role in many parts of the world today. As Jonathan Charney has noted: “TNC involvement, particularly with third world governments, has often resulted in substantial TNC influence on host governments, and that influence has not always served those governments’ best interests”.³²

In many instances where plaintiffs allege that corporations have been implicated in human rights abuses, the claim is not that the violations were committed by the company itself or its agents.³³ However, this is not always true of human rights abuses that occurred during colonialism or of the activities of companies that made use of slaves. While it is generally the case that the abuses were committed by local state actors and that the company’s participation was in regard to its complicity in the human rights violations,³⁴ there are cases of direct involvement.

A corporation’s awareness of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations, and continued partnership with a host government, could give rise to accomplice liability. Thus, it could be that such an entity may be liable directly for human rights violations as an accomplice or as a joint actor with a state actor (e.g. security forces) in a venture that violates international law.³⁵

Anita Ramasastry³⁶ considers the precedents on the issue of corporate complicity by reviewing the United States Military Tribunal (USMT) at the Nuremberg prosecution of two bankers. There the Tribunal found that: “Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint ... but the transaction can hardly be said to be a crime ... we are not prepared to state that such loans constitute a violation of [international] law”. The Tribunal, therefore, emphasized a key distinction between providing capital and active participation in Nazi crimes.

A critical question is whether corporations have the obligation to respect human rights. The debate on the duty of corporations is now very advanced, and few argue that corporations have no role.³⁷ The current question is what the duty is of corporations *vis à vis* their role and the manner in which they benefited during colonialism and apartheid. The answer could be a clear position from 1948, when the Universal Declaration of Human Rights was adopted. This instrument demands that “every individual and every organ of society ... promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”.³⁸

In this regard, Clapham & Jerbi claim that although “companies may not be in the habit of referring to themselves as ‘organs of society,’ they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration”.³⁹

Professor Louis Henkin has seized upon the same language in the UNDHR, emphasizing that: “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all”.⁴⁰ The International Court of Justice in the Barcelona Traction, Light and Power Co. case found that the legal personality of a transnational corporation is equal to that of a regular citizen.⁴¹ Professor Steven Ratner has approached the issue, asking: “Can decision makers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of responsibility?”.⁴²

Ratner argues that “the unique role for states in securing some rights ... does not preclude duties for corporations with respect to other, related rights ...”.⁴³ Thus, duties on states are not simply transferable to corporations, but the same human rights that create duties for states may impose the same or different duties upon corporate actors.⁴⁴

Ratner also explores, among other things, how corporations could or should be held responsible for acts of governments, subsidiaries or other actors in the stream of commerce.⁴⁵ In a related inquiry, Anita Ramasastry questions: “How broadly should the accomplices net be cast? ... What about the fear of deterring investment, especially in developing countries? And practically, how can corporations make decisions about moving forward with international investments, when they fear that their very presence in a country that may have a questionable government may rise to the level of complicity?”⁴⁶

As Steven Ratner has observed: “Simply extending the state’s duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations. Just as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interests”.⁴⁷

A key question, often asked in regard to colonialism and apartheid, is what duties were owed then. Other significant issues are procedural problems, such as statutes of limitations on how far back claimants are entitled to bring a claim.

The development of the notion and acceptance of reparations

Historically, claiming reparations for damages that have been suffered is not an issue of recent vintage. In fact, at the conclusion of warfare, agreements were often reached in terms of which a payment or a forfeit of land was a consequence. What is a recent phenomenon, however, is for reparations or damages to be paid to individuals. It is in the post-World War II era that such reparations began, at first negotiated and later because of the enactment of a statute or because of the decisions of courts of law. At the level of statute, various countries have made provision for reparations to be paid in the wake of human

rights abuses. Such countries include Argentina, Chile and South Africa.

For a number of years, there has also been a solid movement internationally towards recognizing a legal basis for victims of human rights and humanitarian abuses to claim reparations. There has, for example, been an ongoing effort to establish international principles on reparations. In 1989, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities selected Professor Theo Van Boven to determine whether a set of basic principles and guidelines on remedies for gross human rights violations could be drafted. A draft version of the Basic Principles and Guidelines on the Right to Reparation followed.⁴⁸ As a result of the UN Commission on Human Rights' 1998 session, Professor Cherif Bassiouni was appointed to prepare a draft for the next session so that the principles could be clarified and sent to the UN General Assembly for approval. This task is still in the process of being completed, but the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law"⁴⁹ is at an advanced stage.⁵⁰

In various regions of the world there have also been initiatives towards obtaining reparations. An example is the 1992 process in Africa where Chief Moshood Abiola of Nigeria activated the establishment of the Organization of African Unity (OAU) Group of Eminent Persons for Reparations. The OAU mandated them to press forward with ensuring that reparations for the African slave trade were made. In 1993, the group assembled the First Pan-African Conference on Reparations in Abuja, Nigeria. The Abuja Declaration further committed the OAU to attempt to obtain reparations for slavery.

What has also occurred is that the two international tribunals in the 1990s set up to adjudicate on gross human rights violations in Yugoslavia and Rwanda have come to accept reparations as a right. The governing statutes of the two tribunals,⁵¹ in fact, established such rights for victims. Indeed, the Rome Statute, which governs the International Criminal Court provides greater rights for victims to compensation than ever before.

As far as individual claims are concerned, it is the post-World War II era that defines the movement towards the

granting of reparations for violations of human rights. It was at the end of the 1940s that the German government discussed the issue of reparations with the Israeli government, and the Conference on Jewish Material Claims against Germany resulted in the Luxembourg Treaty with Israel in 1952 and the enactment in 1953 of the Final Federal Compensation Law. In terms of this agreement, Germany agreed to pay \$714 million to Israel to support the assimilation of displaced and impoverished refugees from Germany or areas formerly under German control.⁵² The treaty required individual compensation as well as payment of \$110 million to the Conference of Jewish Material Claims against Germany for victims. The process ran from 1952 until 1965. Another limited reparations scheme was agreed to in 1993 to assist some of those left out of earlier agreements.

Two other important examples of reparations occurred in the United States. The first concerns reparations paid by the US government as a result of the internment of Japanese-Americans during the Second World War.⁵³ The second concerns compensation paid to the Aleut Indians, thousands of whom were relocated from South-East Alaska during the same period as the internment of the Japanese-Americans. Both of these communities negotiated for nearly 50 years to secure compensation reparations. It was in the 1980s that the Americans passed a law – the Civil Rights Act – which permitted reparations to be given to Japanese-Americans.

What is especially relevant for claims relating to events that occurred many years ago is that the Aleut Indians obtained damages for the children of survivors as well as for the villages that were affected by the relocations even though it took almost 50 years for this to happen.

It was recognized that the problems that had been caused by the relocation not only affected the communities at the time but also that these events were still having effects four or five decades later. It was determined that those consequences would continue for the foreseeable future.

The movement towards the obtaining of reparations by individuals was assisted by two court cases in the 1980s. In the first case, *Filartiga v. Pena-Irala*,⁵⁴ the US courts recognized that aliens could sue for reparations for human rights abuses committed against them by individuals who were not citizens of the US. The court noted that the “international community

has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture”.⁵⁵ This case has had enormous consequences and it and its progeny will be examined in detail below.

The other major case was the Inter-American Court of Human Rights decision of Velásquez-Rodríguez, in which the court decided that individuals who had had human rights violations perpetrated against them would be able to pursue damages claims against perpetrators, because “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions even when those agents act outside the sphere of their authority or violate internal law”.⁵⁶

However, there have been failures in other courts to claim damages for events that happened 50 or more years ago. It is largely the US courts that have been sympathetic to some extent to this type of litigation.

Many ex-Comfort Women from Korea and other countries have filed suit against the Japanese government in the courts in Japan.⁵⁷ Of those cases only one was successful, but it, too, was overturned later by the High Court.

Major developments in the move to obtain reparations occurred when the Holocaust cases were filed in the US. The first of these claims occurred in October 1996, when a class action lawsuit was filed in the federal district court of Brooklyn, New York against the Swiss banks – Credit Suisse, Union Bank of Switzerland and Swiss Bank Corporation. All the filed cases were brought together in 1997 as *In re* Holocaust Victim Assets Litigation. The consolidated claim alleged that the banks did not return assets deposited with them, the banks traded in looted assets and the banks benefited by trading in goods made by slave labor. The case was settled in 1998 with a payment by the banks of \$1.5 billion. Not only Jews benefited in terms of the settlement but also homosexuals, physically or mentally disabled or handicapped persons, the Romani (Gipsy) peoples and Jehovah’s Witnesses.⁵⁸

The Holocaust cases against the Swiss banks were followed up with suits filed against German and Austrian banks in June 1998. These cases were launched by Holocaust survivors, American citizens, who filed a class action lawsuit against Deutsche Bank and Dresdner Bank, alleging profiteering from the looting of gold and other property belonging to Jews. All

the cases were merged in March 1999 as *In re Austrian and German Bank Holocaust Litigation*.⁵⁹ French banks or banks that had branches in France during the war, such as the British bank, Barclays, were also sued. A settlement agreement was reached with them in 2001. Also sued by Holocaust survivors were more than a dozen European insurers.⁶⁰ Nor were German corporations spared. Former slave laborers also launched cases against a whole host of German companies. However, a number of these were dismissed on the basis that they were excluded by statutes of limitations or because of treaties signed by Germany and the Allied powers at the conclusion of the war. A settlement was reached, however, relating to slave labor for about \$5 billion on the condition that all other slave labor cases would be dropped. The US government also agreed to intercede in any future lawsuits filed against Germany in relation to claims arising from World War II.⁶¹

The suits filed against German companies have also resulted in cases being filed by soldiers captured by the Japanese during the war as well as by civilians against Japanese companies. During the war, thousands of American, British, Canadian, Australian and New Zealand prisoners of war were used as slave labor by Japanese companies, including Mitsubishi, Mitsui, Nippon Steel and Kawasaki Heavy Industries. Also used as slave labor were Chinese, Korean, Vietnamese and Filipino civilians.⁶²

To get around the length of time between injury and claim, the state of California enacted a law in July 1999⁶³ that permitted any action by a “prisoner-of-war of the Nazi regime, its allies or sympathizers” to “recover compensation for labor performed as a Second World War slave victim ... from any entity or successor in interest thereof, for whom that labor was performed”. The statute was enacted, when it seemed that the case against the German companies was not proceeding. It permitted such lawsuits to be filed until 2010.⁶⁴ The courts there were thus able to deal with these claims.⁶⁵ The claims by all former allied soldiers were dismissed in 2001, however, after the US government intervened in the case, on the basis that in terms of the 1951 Peace Treaty with Japan, the US and other Allied powers had relinquished all of their claims against Japan, including those against Japanese companies.

As far as the civilian claims were concerned, the court ruled later that as far as the Filipinos were concerned, they also were

excluded as the Philippines had also ratified the treaty. The court also dismissed the other claims and declared the California statute unconstitutional as it was held to be an encroachment on the powers of the federal government to perform foreign policy.⁶⁶

A number of other cases were also filed before the US courts. One case saw foreign civilians sue Japanese companies for having used them as slave labor, and another saw former comfort women sue. Both were dismissed in 2001 and are being appealed.

A case that goes further back in time is one which saw a number of descendants of Armenians (mostly US citizens), who died in the Armenian genocide that occurred around World War I, and who had purchased insurance policies from European and American insurance companies, sue the New York Life Insurance Company.⁶⁷

In *Marootian v. New York Life Insurance Company* it was argued that time barred the proceedings and that the policies had clauses stating that the French or English courts had jurisdiction in the event of litigation. Once again, California enacted a statute permitting suits relating to Armenian genocide-era policies and extended the time limit to 2010. This case was then settled. The lessons from the case are, nevertheless, important as the time limit for claims was shifted to almost 100 years ago. In addition, the beneficiaries were not those who had taken out the policies.⁶⁸

Recently tens of thousands of Russians who were forced into Nazi slave labor camps during World War II were able to share in a 427 million Euro payout. Almost 500,000 people applied to the foundation, while the relevant authorities had planned for just 57,000 claims.

Thus, it does seem as though there are possibilities for litigation for claims going back to the beginning of the twentieth century or possibly earlier.⁶⁹ This is a key issue as it is a potential obstacle for possible claims that relate to events during colonialism, as 1885 is an important point, marking the carving up of Africa by the various European powers. Although colonial occupation occurred before this time, it was the Berlin Conference of 1884-1885 that saw clarity as to which European country would occupy which part of Africa.⁷⁰ The General Act of the Berlin Conference on Africa in Chapter I noted: "All the powers exercising sovereign rights or influence

in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being and to help in suppressing slavery, and especially the Slave Trade”.

The issue of reparations or damages for slavery is much more difficult.⁷¹ Such an action would be for events that occurred much earlier, and also for individuals where there may not even be direct descent. These problems were seen to be critical when a 1995 case filed by African American plaintiffs was dismissed.⁷² The Ninth Circuit, affirming this, noted that the United States had sovereign immunity, the claims were too long ago and the plaintiffs themselves could not claim as they themselves were never slaves. The court stated: Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this country is inexcusable. This Court, however, is unable to identify legally any cognizable basis upon which plaintiff’s claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff’s grievances.⁷³

It is therefore clear that it cannot be the courts only where such claims ought to be brought for resolution. Clearly, many of these issues are political rather than legal. The courts are not the only avenue where these claims can be, and should be, pursued. It is at the political level, in the legislatures and in other fora (including the forum of national and international public opinion) that efforts can be made.

In this regard, there have been attempts, each year since 1989, to introduce legislation in the US Congress to deal with the legacy of slavery. The bill, H.R. 40 “The Commission to Study Reparations Proposals for African Americans Act”, seeks the establishment of “a commission to examine the institution of slavery, subsequent *de jure* and *de facto* racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies ...”.⁷⁴ Other efforts have also been made in various individual US states, and there has been an attempt in the US Congress to make an apology for slavery.

Using the courts as a means to obtain reparations or damages

Using the courts as a means to obtain damages or reparations for these types of claims is a relatively recent phenomenon. It mostly emerges out of the US *Filartiga* decision in 1980.⁷⁵ In fact, almost all of the relevant litigation has occurred in common law, rather than civil law, jurisdictions.⁷⁶ As one commentator has explained:

*With the exception of one action brought in Quebec against a Canadian corporation registered in Montreal, all of the claims so far have been brought in common law jurisdictions. The established legal cultural links between Anglo-Saxon lawyers and procedural rules, such as those that determine what defendants have to disclose in litigation, may be contributory factors. But for the longer term it is not unlikely, as legal practitioners' understanding of the relevant principles of law evolves, that cases will emerge in the civil law systems of European Union (EU) member states such as the Netherlands or France.*⁷⁷

However, by far and away the majority of these types of cases are being brought in the United States under the Aliens Torts Claims Act (ATCA).⁷⁸ As Beth Stephens explains: “Civil human rights litigation in the United States is the natural product of a legal culture that relies on private lawsuits both as a means to obtain compensation for injuries and also as a tool to address societal problems”.⁷⁹ Pointing out that the *Filartiga* decision⁸⁰ “has been called the *Brown v. Board of Education* of transnational law litigation, invoking the legacy of the great civil rights cases that dismantled legal segregation across the United States”,⁸¹ Stephens notes an “absence of core *Filartiga* cases” elsewhere.⁸² “Indeed”, Stephens writes, “despite a great deal of interest in the *Filartiga* doctrine in England, a British international law study group recently concluded that the likelihood of such litigation in Britain was slim”.⁸³ In an attempt to explain this phenomenon, Stephens offers a list of five factors that render US courts the most attractive arena for international human rights litigation. These include:

- no penalty for losing;
- contingency fees;

- punitive damages;
- default judgments; and
- broad discovery rules.⁸⁴

Stephens has also noted that the “the use of civil litigation as a means of impacting human rights policies is a natural development in the US legal system”.⁸⁵ The fact that the system of jury trials is advantageous to litigants in these types of cases should also be noted. The nature of the US legal system is thus a critical determinant as to why so many of these cases have been brought before the courts in that country. As Lord Denning observed: “As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune”.⁸⁶

Using the courts in the United States of America to pursue perpetrators

While the United States has various laws⁸⁷ that permit victims of human rights abuses committed outside the US to be sued, it is the Alien Torts Claims Act that has been used the most.

This law was enacted in 1789 as part of the Judiciary Act and has since generated a considerable number of suits alleging violations of human rights committed in countries outside America by state and non-state agents. The key provision that has elicited increasing international attention stipulates that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

While there have been many successes since the 1980 case of *Filartiga v. Pena-Irala*⁸⁸ for claims in terms of the ATCA, Ramsey⁸⁹ provides a useful overview of some of the issues and critiques related to the application of the ATCA. Ramsey argues that “the sheer number of controversial points upon which corporate ATCA litigation rests may suggest that expansive application of ATCA liability is a project requiring much judicial sympathy for its success”.⁹⁰ While Ramsey does not suggest that this is a reason to reject ATCA litigation, he does advise caution in the area of expansive ATCA litigation, as there is a whole host of doctrines⁹¹ that permit judges to dismiss ATCA claims even if subject-matter and personal jurisdiction have been established.⁹² These include the international comity

doctrine, which is premised on respecting the legislative, executive or judicial acts of another nation,⁹³ as well as the doctrines relating to political questions, *forum non conveniens*⁹⁴ and acts of state, which prohibit US courts from reviewing the validity of the public acts of a recognized foreign sovereign that are carried out in the foreign territory.

However, the courts are not applying these doctrines strictly, as can be seen in *Kadic v. Karadzic*.⁹⁵ Here the court stated that while the act of state doctrine might be applicable to some cases brought under the ATCA, it doubted “that the acts of even a state official, taken in violation of a nation’s fundamental law and wholly unratiﬁed by that nation’s government, could properly be characterized as an act of state”.⁹⁶

This case also has relevance for the question of whether private actors could fall under the ATCA provisions. *Kadic v. Karadzic* expanded the scope of the Act by holding that acts committed by non-state actors also fell squarely within its ambit. The Court of Appeals observed that: “the law of nations as understood in the modern era does not confine its reach to state action. Instead, certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”.⁹⁷ The court found that certain violations of the law of nations provided for by the Act, such as piracy, slave trade, slavery and forced labor, genocide, war crimes and other offences of ‘universal concern’, did not require state involvement. Thus, private actors could be held liable for such activities as well as other gross human rights violations.

In *Doe v. Unocal*,⁹⁸ a case involving farmers from Myanmar/Burma, suing the oil companies, Unocal and Total SA, operating in Burma/Myanmar, it was argued that these companies were engaged in a joint venture of gas exploitation with the military government of the country. To clear the way for a pipeline, the government had forcibly relocated villages, displaced local inhabitants from their homelands, and tortured and forced people to work on the project.⁹⁹ It was argued, therefore, that the corporations were liable for these violations since they funded the repressive regime and the project with full knowledge of the abuses, and derived benefit from them.¹⁰⁰ It was alleged that “in the course of its actions on behalf of a joint venture ... the regime carried out a program of violence and intimidation against area villagers”. It was further alleged

that “women and girls in the ... region have been targets of rape and other sexual abuse by regime officials, both when left behind after male family members have been taken away to perform forced labor and when they themselves have been subjected to forced labor”.¹⁰¹ In its decision in September 2002,¹⁰² the court declared that “forced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required”. Making a finding on a question of material fact regarding Unocal’s liability under the ATCA for aiding and abetting the Burma/Myanmar military regime in subjecting plaintiffs to forced labor,¹⁰³ the 2002 Unocal decision reversed the earlier summary judgment previously won by Unocal, holding that “the standard for aiding and abetting under the ATCA is ... knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime”.¹⁰⁴

The court in *Iwanova v. Ford Motor Co.* examined circumstances where the company acted in close co-operation with Nazi officials in compelling civilians to perform forced labor. The court found that the fact that the company pursued its own economic interests did not preclude a determination that Ford Motor Co. acted as an agent of, or in concert with, the German government, and that no logical reason existed for not allowing private individuals and corporations to be sued for universally condemned violations of international law even if they were not acting “under color of law”.¹⁰⁵

In *Wiwa v. Royal Dutch Petroleum Co.*¹⁰⁶ the plaintiffs alleged that Royal Dutch Shell was complicit in acts of torture, arbitrary arrest, detention and killing in the Ogoni region of Nigeria. The plaintiffs claimed that they and their next of kin “were imprisoned, tortured and killed by the Nigerian government in violation of the law of nations at the instigation of [defendant Shell companies], in reprisal for their political opposition to the defendant’s oil exploration activities”. It was further claimed that Royal Dutch Shell “provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on villages, procured at least some of these attacks, participated in the fabrication of murder charges ..., bribed witnesses to give false testimony against them”.¹⁰⁷ The Second Circuit’s ruling in this case has had a major effect on the *forum non conveniens* principle, making it easier to bring an action based

on a foreign human rights violation despite the availability of an alternative forum.¹⁰⁸ The court's reasoning stresses the concern of the United States in supporting human rights abroad, and that this principle imposes a different standard of inconvenience on wealthy parties than on poorer ones.¹⁰⁹

In *Beanal v. Freeport-McMoran, Inc.*¹¹⁰ it was alleged that Freeport-McMoran committed human rights violations, environmental torts, genocide and cultural genocide while conducting mining activities in Indonesia. Plaintiffs alleged that Freeport companies: "systematically engaged in a corporate policy both directly and indirectly through third parties that has resulted in human rights violations against the Amungme tribe and other Indigenous tribal people. Said actions include extra-judicial killing, torture, surveillance and threats of death, severe physical pain and suffering by and through its security personnel employed in connection with its operation at the Grasberg mine". The case was dismissed, however, as the court found that there were insufficient facts concerning abuses to make out a cause of action.

Also relevant to possible claims in the US for events that occurred during colonialism and apartheid are issues in the Foreign Sovereign Immunities Act (FSIA). This Act contains the rules governing whether and how states can be sued. It is relevant as far as the present discussion is concerned in that there is one exception to an immunity given to a state or its officials: this is the commercial activity exception. The FSIA provides that sovereign immunity shall not be granted when "the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

The United States Supreme Court in *Saudi Arabia v. Nelson*¹¹¹ that a state conducts commercial activity within the definition of FSIA when it acts as though it is a private citizen in the marketplace; in this regard, it is important to look at the activity performed rather than its purpose.

The court in *Adler v. Federal Republic of Nigeria*,¹¹² however, considered the meaning of "in connection with a commercial activity", in contrast to the finding in *Saudi Arabia v. Nelson*, which looked at the issues by examining the phrase "commercial activity". Thus, states in Africa, for example, could sue where there is a connection to commercial activity.

However, it must have had a direct effect on the US. In some cases, for example slavery, this is clear; in others, it would be more difficult to establish.

From the above discussion of the various cases brought under the ATCA, it does seem that the US courts could be sympathetic to the types of claims that arise out of colonialism and apartheid.¹¹³

Time limits

A major issue for cases concerning human rights abuses committed during colonialism, as well as those committed during apartheid, is the time-line factor. This issue of the length of time between injury and claim is crucial, as often such procedural questions prevent a claim from getting past even the first hurdle.¹¹⁴

The ATCA has no inherent statute of limitations,¹¹⁵ but the Torture Victim Protection Act does. In this regard, the report of the US Senate that accompanied the Torture Victim Protection Act stated that: “A ten year statute of limitations insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, equitable tolling remedies may apply to preserve a claimant’s rights.¹¹⁶ ... The ten-year statute is subject to equitable tolling, including for periods in which the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated”.¹¹⁷

Under federal law, a cause of action, in terms of the time limit to bring such an action, starts running from the time the damage occurs.¹¹⁸ In *Bussineau v. President & Dirs. of Georgetown College*¹¹⁹ the court found that a “cause of action is said to accrue at the time injury occurs”. The court in *Xuncax v. Gramajo*¹²⁰ applied the TVPA period to an ATCA claim.

However, for years the courts have been willing to extend the time limit. In 1947 in *Osbourne v. United States*,¹²¹ the plaintiff had been interned by Japan during WWII and claimed that the statute of limitations did not apply because of “extraordinary circumstance that throughout the period when he ought to have brought suit the courts were unavailable to him as a prisoner in the hands of the enemy”. The court tolled

the limitation period for an injury that occurred immediately prior to his internment because these circumstances were sufficiently extraordinary. In this regard, the court held: “All statutes of limitations are based on the assumption that one with a good cause of action will not delay in bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed”.¹²²

In 1987, the doctrine was extended in *Forti v. Suarez-Mason*. There the court held: “Federal courts have also applied a theory of equitable tolling similar to an ‘impossibility’ doctrine. Where extraordinary events which are beyond plaintiff’s control prevent a plaintiff from bringing his claim, the limitations period is tolled until the barrier caused by these events is removed”.¹²³

The court held that even though the Argentine courts were available, “as a practical matter” the military regime controlled those courts, making it impossible for those wanting to sue to get a fair trial. The court held that: “Equitable tolling occurs under federal law in two types of situations: (1) where defendant’s wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff’s control make it impossible for plaintiff to timely assert his claim”.¹²⁴

In *National Coalition Government of Union of Burma v. Unocal, Inc.*¹²⁵ the court noted that, in applying the *Forti* test for equitable tolling, the court in *Hilao* concluded that fear of intimidation and reprisal were extraordinary circumstances outside the plaintiff’s control.¹²⁶ As such, claims against Marcos for injury from torture, disappearance or summary execution were tolled until he left office. This is a crucial ruling for apartheid and colonialism cases. The Court in *Unocal* applied the *Hilao* ruling to the facts of the case and held that: “Under federal law, equitable tolling is available where (1) defendant’s wrongful conduct prevented plaintiff from asserting the claim; or (2) extraordinary circumstances outside the plaintiff’s control made it impossible to timely assert the claim”. The court further noted that: “In fact, based on the Ninth Circuit’s decision in *Hilao* John Doe I’s claims may well be tolled as long as SLORC remains in power if he can show that he is unable to obtain access to judicial review in Burma”.¹²⁷ This may have major significance for future cases.

In *Iwanova v. Ford Motor Co*¹²⁸ the claims related to World War II forced labor. The plaintiff sued Ford in Germany and its American parent company, seeking compensation for forced labor in Ford's German manufacturing plant. As far as the period to sue was concerned with regard to the German claim, the court held that the limitation period was tolled until 1997 when the moratorium on claims (imposed in various post-war treaties) was finally lifted. This was not alleged with respect to the US Corporation. Thus, it was the treaties that prevented the bringing of claims rather than the fault of the defendant. The Court held that: "equitable tolling may be appropriate, *inter alia*, where the defendant has actively misled the plaintiff. To avoid dismissal, a complainant asserting equitable tolling must contain particularized allegations that the defendant 'actively misled' the plaintiff"¹²⁹.

Although the plaintiff made claims of misrepresentation and concealment¹³⁰ in its brief and in oral argument, because these were not contained in the complaint the court denied the relief.¹³¹ A similar result occurred in *Fishel v. BASF Group*.¹³²

In *Sampson v. Federal Republic of Germany*¹³³ a suit lodged for damages for unlawful detention in a Nazi concentration camp was disqualified because of the length of time between the injury and the bringing of the suit. In *Kalmich v. Bruno*¹³⁴ a claim for the return of property confiscated by the Nazis was time barred.

In *Jane Doe I v. Karadic*¹³⁵ the court found that "the TVPA's limitations period is subject to equitable tolling, including for periods in which the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated". In *Estate of Cabello v. Fernandez-Larios*¹³⁶ the court held that: "Equitable tolling of the TVPA is appropriate in this case because Chilean military authorities deliberately concealed the decedent's burial location from Plaintiffs, who were unable to view the decedent's body until 1990".

In *Cabello vs. Fernandez Larios*¹³⁷ the court held that: "the pre-1990 Chilean government's concealment of the decedent's burial location and the accurate cause of death prevented plaintiffs from bringing this action until 1990. Accordingly, the ten-year limitation period did not begin to accrue until 1990. Since plaintiffs brought this action within ten years, and Defendant has not presented the Court with any

compelling reason to alter its previous ruling that the limitation period commenced in 1990, the Court finds that the claims alleged in the Second Amended Complaint are not time barred”.

Thus, it seems that the time limit may not always be a definite bar to such claims. Plaintiffs will need to show specific circumstances that fit in with the above rulings to ensure that statutes of limitations do not act as obstacles to such cases.

Other jurisdictions

While the majority of cases of this nature have been brought in the US, there has been international human rights litigation in courts elsewhere. This has primarily been in England. Such cases have included:

- Cape plc:¹³⁸ arising from asbestos-related injuries suffered by South African victims during the 1960s and 1970s.
- RTZ:¹³⁹ arising from a Scottish worker’s case of laryngeal cancer contracted from working at defendant’s uranium mine in Namibia.
- Thor Chemical Holdings Ltd.¹⁴⁰ In response to government health and safety criticisms in England, Thor relocated its facility to Natal, South Africa, where it continued to operate with the same deficiencies that necessitated its departure from England, and did little to reduce the danger to workers. Thor became subject to the court’s jurisdiction by serving a defence, which precluded a *forum non conveniens* dismissal, and ended up settling for 1.3 million British pounds.¹⁴¹

The issues in these cases appear to revolve entirely around personal jurisdiction, choice of law and *forum non conveniens*, with the merits not being reached; hence, Stephens’ comment that non-US jurisdictions lack a “core Filartiga” case. The litigation that has occurred in Australia surrounding Broken Hill Proprietary¹⁴² indicates the same problem.

The Hereros of Namibia’s claim for reparations

One of the first cases to be fought on issues relating back to colonial days is the case filed in 2001 in Washington DC by

the Herero People's Reparations Corporation and the Herero tribe, through its Paramount Chief Riruako and other members of the Herero tribe. They¹⁴³ are suing Deutsche Bank, Terex Corporation¹⁴⁴ a.k.a. Orenstein-Koppel and Woermann Line, now known supposedly as Deutsche Afrika-Linien GmbH & Co.¹⁴⁵ While most see South Africa¹⁴⁶ as being responsible for many of the atrocities that have occurred in southern Africa, Namibia's colonial legacy under Germany includes one of the worst atrocities committed – the genocide of nearly 100,000 people at the beginning of the twentieth century. In June 2001 the Herero People's Reparation Corporation filed suit against the corporations for two billion dollars.¹⁴⁷ They accuse these companies, including Woermann Lines, of forming an alliance to exterminate more than 65,000 Hereros between 1904 and 1907.

The case revolves around a genocide committed at the beginning of the twentieth century in Namibia¹⁴⁸ when more than 65,000 Hereros were killed in pursuance of a shoot on sight policy in that country. This policy was announced on 2 October 1904 when General Lothar von Trotha decreed: "The Herero people will have to leave the country. Otherwise I shall force them to do so by means of guns. Within the German boundaries, every Herero, whether found armed or unarmed, with or without cattle, will be shot. I shall not accept any more women or children. I shall drive them back to their people – otherwise I shall order them to be shot. Signed: the Great General of the Mighty Kaiser, von Trotha".

Besides the 65,000 people who were killed, water wells were sealed and poisoned to prevent Herero access to water. Thousands were condemned to slavery¹⁴⁹ on German farms, and surviving Herero women were forced into becoming comfort women for the settlers. German geneticists came to the country to perform racial studies of supposed Herero inferiority. Von Trotha also established five concentration camps, in which the mortality rate was more than 45 per cent.

Von Trotha almost succeeded with the genocide. The Herero population was diminished by about 80 per cent to approximately 16,000 people, the majority in concentration camps. The court papers state: "Foreshadowing with chilling precision the irredeemable horror of the European Holocaust only decades later, the defendants and imperial Germany formed a German commercial enterprise which cold bloodedly

employed explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labour, medical experimentation and the exploitation of women and children in order to advance their common financial interests”.

Thus, the Hereros are suing Deutsche Bank as it is alleged that it was the principal financial and banking entity in German South West Africa. It is alleged that Disconto-Gesellschaft, which was acquired by Deutsche Bank in 1929, combined with Deutsche Bank, controlled virtually all financial and banking operations in German South West Africa from 1890 to 1915. The case asserts that these entities were major and controlling investors, shareholders in and directors of the largest mining and railway operations in German South West Africa during that time. It is further claimed that Deutsche Bank, itself and through Disconto-Gesellschaft, was a critical participant in German colonial enterprises and that Deutsche Bank is directly responsible for and committed crimes against humanity perpetrated against the Hereros. The Hereros are suing Deutsche Bank as they allege that the bank specifically financed the then government and companies linked with Germany’s colonial rule.¹⁵⁰

Terex was also sued, as it is alleged that it is the successor in interest to or merger partner of Orenstein-Koppel Co., the principal railway construction entity in German South West Africa from 1890 to 1915. The court papers state that Arthur Koppel, the principal of Orenstein-Koppel, was a powerful German executive; his business specialised in earth-moving technology and had contracts all over the world at the beginning of the twentieth century. It is alleged that Terex and its predecessors prospered over the 125 years of its existence through organising, participating in and taking advantage of a slave labour system. It is further alleged that they profited enormously from the system and were directly responsible for, and committed, crimes against humanity perpetrated against the Hereros.

The claimants later temporarily withdrew their legal claim for reparations against Terex, as the corporation claimed that it had been under different management at the time the atrocities were committed.¹⁵¹ However, the claimants did then file against the German government.¹⁵² In this regard, Chief Kuaima Riruako stated: “I am suing legitimate governments

and companies who happened to function in the colonial days ... We're equal to the Jews who were destroyed. The Germans paid for spilled Jewish blood. Compensate us, too. It's time to heal the wound".¹⁵³

Also being sued is Woermann Line as it alleged that they controlled virtually all of the shipping into and out of German South West Africa from 1890 to 1915. It is asserted in the plaintiff's claim that Woermann employed slave labor, ran its own concentration camp, was a critical participant in the German colonial enterprise and that "individually and as a member of that enterprise, Woermann is directly responsible for and committed crimes against humanity perpetrated against the Hereros".¹⁵⁴

It is alleged that the Otavi Mines and Railway Company (OMEG) was founded on April 6, 1900, with the legal status of a German Colonial Company whose purpose was the exploitation of copper deposits and the construction of a railway system. Deutsche Bank, it is alleged, was a member of the OMEG governing board from 1900 to 1938. The applicants aver that Disconto-Gesellschaft, one of Germany's largest banks by 1903, was a principal investor in OMEG and that the Woermann Shipping Line had, by 1900, established complete control of the shipping and harbor enterprises in South West Africa. All materials for the OMEG railway were shipped by, and through, Woermann who used the slave and forced labor of over 1,000 people to load and unload ships at Swakopmund.

The case has enormous relevance for a number of reasons. Firstly, it indicates how the German Holocaust was predated by an earlier genocide. Secondly, the case indicates how the courts can be used to pursue human rights violators even in another country. In this regard the Herero Chief has argued that: "We are taking our case to America because it's easier and fairer and we can get support from the public there. Jews could not take their case to Germany, what chance then do we have of succeeding [in Germany]?"¹⁵⁵

Thirdly, the case could be a precursor to a number of other cases where former colonial governments and commercial concerns, which benefited from the period of conquest and domination, are sued by the inhabitants of the territories then under their control. This is because the Hereros were not the only group to be the victims of colonial atrocities. For example, the Belgians under King Leopold II massacred thousands of

Congolese. The French are also guilty of such crimes, as are the British. As Sydney Haring has argued:

... it factually represents one of the best cases possible for opening the question of reparations for colonial oppression against the various imperial powers. The direct founding of this claim in the specific context of Germany's responsibility for reparations for Jewish victims of World War Two era genocide directly raises the question: how is colonial era genocide different from modern European genocide? In an impoverished Africa, it cannot be surprising that the indigenous people there cannot accept the legitimacy of two regimes of international law, one for Europeans, another for Africans. Because the Herero claim is narrow based on a particular – and well-documented – act of twentieth century genocide, in a particular colonial war, against a nation with a record of recidivism at genocide, it is an appropriate case for a reparations claim against Germany.¹⁵⁶

On a visit to Namibia at the beginning of March 1998, German President Roman Herzog said that too much time had passed for Germany to give any formal apology for slaughtering Hereros during colonial rule. Herzog said that German soldiers had acted “incorrectly” between 1904 and 1907 when about 65,000 members of the Herero group were killed for opposing colonialism. Herzog rejected the payment of compensation, stating that this was not possible as international rules for the protection of the civilian population were not in existence at the time of the conflict and no laws protected minority groups during the colonial period.¹⁵⁷ He also said that Germany had significantly assisted Namibia for many years and he pledged that Germany would live up to its special historical responsibility towards Namibia.¹⁵⁸ Germany has also stated that the issue of reparations would not be considered as Namibia was already receiving preferential financial support from Germany.¹⁵⁹

The Namibian Government has not supported the claim of the Hereros. Prime Minister Hage Geingob has said that the approach by Herero leaders to seek compensation only for Herero-speaking Namibians is wrong,¹⁶⁰ and that: “We [Government] are being condemned by the Chief for not taking action. But we cannot just say we want money for the Hereros. Not only the Hereros suffered the consequences of war. All

Namibians suffered and the best would be to help all Namibians by providing roads and schools".¹⁶¹

The Namibian Prime Minister said it was unfortunate that the issue of reparations had been politicized, and questioned why the issue of Herero reparations had not been brought before the Namibian Parliament. However, this has not happened because the Herero accuse the governing SWAPO party of diverting \$500 million in German aid to Ovambo voters.¹⁶² They therefore want Germany to establish a fund to allow Hereros to purchase land and cattle. Gottlob Mbaukua, an opposition party Herero leader in Okahandja, has argued that: "What we are saying is that the Germans, because they only killed the Herero and no one else, must uplift us".¹⁶³

Eckhart Mueller, chairman of the German-Namibian Cultural Organization argues that: "Genocide is a relative term if you are involved in a war and you lose. I think they're taking a long shot to get some money. If not genocide, it will be something else. We must bury the past and look to the future".¹⁶⁴

Victims of apartheid claims

Human rights abuses abounded against South Africa's majority during apartheid. Many people were dispossessed of their land, had their language and culture marginalized, and suffered gross human rights violations.¹⁶⁵ The majority of South Africans were denied access to an enormous variety of amenities, institutions and opportunities, including many places and types of employment, particularly in state institutions. The South African state systematically violated the rights of black people and subjected them to socioeconomic deprivation.¹⁶⁶ Black South Africans were disenfranchised and many were forcibly removed from where they lived and deprived of their citizenship.¹⁶⁷ State employees, and others acting with state sanction and assistance, routinely carried out torture, assault and killings.¹⁶⁸ Many detentions¹⁶⁹ and deaths in custody occurred.¹⁷⁰ Freedom of expression and association were severely limited. As a consequence, in 1973 the UN declared apartheid a crime against humanity. While state action was a major cause of human rights abuses, other actors also contributed to these violations, including multinational corporations who either aided and abetted or benefited from

their relationship with the regime. It has been alleged that more than \$3 billion in profits were transferred out of apartheid South Africa by foreign banks and businesses each year between 1985 and 1993.¹⁷¹ In 1987, an investigation by the UN Commission on Human Rights into the responsibility of multinational corporations for the continued existence of apartheid concluded that “by their complicity, those transnational corporations must be considered accomplices in the crime of apartheid and must be prosecuted for their responsibility in the continuation of that crime”.¹⁷²

South Africa’s process to deal with the past internally has been its Truth and Reconciliation Commission (TRC), wherein victims could testify about abuses committed against them and those who perpetrated human rights abuses could apply for amnesty from criminal prosecution as well as civil liability.¹⁷³ In addition, the TRC held hearings into various sectors including the judiciary, the health sector and political parties. Hearings were also held on the role of business. However, until the two cases brought in the US, which will be discussed below, nothing occurred to pursue multinationals or other corporations who benefited from the system during those years. Reparations to victims have been discussed as an obligation of the state. While recognising that it is required to provide some compensation, the state has, however, not been quick in responding to the TRC’s recommendations about when and how much to pay the 21,000 people who have been deemed to be victims by the TRC.

As far as business is concerned, all that has happened in South Africa is that the TRC reported on the role of business and labour during apartheid. It found that a “vast body of evidence points to a central role for business interests in the elaboration, adoption, implementation and modification of apartheid policies throughout its dismal history”.¹⁷⁴ In reaching this conclusion, the TRC did not lump together, in either its reportage or analysis, all business involvement, but instead attempted to provide a more nuanced and structured – and perhaps, therefore, more credible – indictment¹⁷⁵ of business’ role during apartheid.¹⁷⁶ Accordingly, the TRC divided the culpability of business into three categories:

- First order involvement: “direct involvement with the state in the formulation of oppressive policies or practices

that resulted in low labor costs (or otherwise boosted profits)".¹⁷⁷

- Second order involvement: "knowing that their products or services would be used for morally unacceptable purposes".¹⁷⁸
- Third order involvement: "ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society", but "taken to its logical conclusion, this argument would need to extend also to those businesses that bankrolled opposition parties and funded resistance movements against apartheid. Clearly not all businesses can be tarred with the same brush".¹⁷⁹

One commentator wrote of this categorization: "The TRC found the first two levels reprehensible *per se* ... Yet its nuanced conclusions regarding other businesses reflected an appreciation of the extent to which apartheid clearly benefited them and of the complexity of business interactions with the government. In the end, while concluding that government and business 'co-operated in the building of an economy that benefited whites,' it rejected both a condemnation of all business people as collaborators as well as an exculpation of them for taming and helping end the system".¹⁸⁰

The role of the banks

The TRC Report appears to place banks (both foreign and domestic) in the second and third culpability categories.¹⁸¹ In discussing second-order involvement, the Report notes the example of banks that provided police with covert credit cards, finding that: "A bank that provides a covert credit card to the police to help them with, say, investigations into white-collar fraud, is in a different position to one which knowingly provides covert credit cards to death squads to help them lure their victims".¹⁸²

Nevertheless, the TRC Report found that "there was no obvious attempt on the part of the banking industry to investigate or stop the use being made of their facilities in an environment that was rife with gross human rights violations".¹⁸³ Moreover, the Council of South African Banks (COSAB) "acknowledged that being a bank 'inevitably' meant

doing business with a variety of bodies that were an integral part of the apartheid system".¹⁸⁴ However, the TRC Report did not draw its own conclusions (it quotes but does not clearly adopt the submissions of others) regarding the consequences of a bank's "doing business" with the apartheid regime.

Similar to the first apartheid case, discussed later, and most likely due to the same lack of information, the TRC Report did not attempt the extra step of analyzing any particular transaction or relationship between a bank and an apartheid institution to ascertain: (1) to what extent lending activities aided and abetted oppression; and (2) to what extent banks should have foreseen or known that lending activities would aid and abet oppression.

For example, the Report quoted COSAB's submission to the TRC, which stated that: "By the very nature of their business, banks were involved in every aspect of commerce during the apartheid years. Without them, government and the economy would have come to a standstill. But it would have been an 'all or nothing' decision. There could have been no halfway position. Either you are in the business of banking, or you are not. It does not lie in the mouth of a bank to say that it will accept the instruction of its client to pay one person but not another".¹⁸⁵

Therefore, although the TRC report acknowledged that while "banks were 'knowingly or unknowingly' involved in providing banking services and lending to the apartheid government and its agencies", it also noted that banks "were similarly involved in the movement of funds from overseas donors to organizations resisting apartheid".¹⁸⁶ This manner of allowing the murkiness of the picture to emerge, but without addressing it fully, is equally evident in the TRC's approach to the role of "business" generally.

The role of business

Although finding that the general involvement of business during apartheid spanned all three categories of culpability, the TRC report paid close attention to the dual role of business in (often simultaneously) helping and hindering apartheid. For example, the Report noted that: "[m]any business organisations were uncertain how to react to the economic crisis and political unrest. As COSAB put it: The business

community was caught between a recognition of the inevitability and desirability of significant political reform, and a range of developments which resulted in a great deal of instability and which were, quite simply, bad for business stakeholders”.

Their response to this acute dilemma was, on the one hand, to try to speed up the reform process and facilitate contact between the different political interests – both within and outside of South Africa – and on the other, to fight a rearguard action against the sanctions and disinvestment campaign, and the rising levels of violence, which threatened the economy and job creation.¹⁸⁷

While the Report chronicled efforts by business to accelerate reform – such as “visits by leading business representatives to the ANC in exile”¹⁸⁸ – it also emphasized “rearguard actions” such as business’ involvement with Joint Management Committees (JMCs), which formed part of the National Security Management System.¹⁸⁹ While making clear that the goal of the JMCs was “essentially to prolong white domination”,¹⁹⁰ the report also observed that: “Where [business’] participation resulted in the channeling of resources to townships, the moral issues are more opaque. While JMC-facilitated development in townships was certainly motivated by counter-revolutionary aims, there is an important difference between counter-revolutionary strategies based on providing infrastructure to people, and strategies based on torture and repression. Again, not all businesses played the same role in the process”.¹⁹¹

On the subject of sanctions, the report noted that business’ opposition to sanctions, in addition to arising from profit-driven self-interest, “also stemmed from a belief by some businesses that economic growth rather than the intensification of poverty promotes democracy”.¹⁹² Remarkably, the Report made little attempt to evaluate either this belief itself, how widespread and representative it truly was, or reasons why a self-interested actor might choose to embrace (or claim to embrace) it.

In the TRC’s defense, however, there were few corporations – particularly multinational corporations – that offered to make submissions to the TRC.¹⁹³ In addition, the fact that the TRC was not “in a position to impose – or eliminate – legal, let alone criminal, liability upon corporations”,¹⁹⁴ may have

influenced both its own hesitation to issue condemnations and, in the air of relative impunity, multinational corporations to see fit to ignore the proceedings.

As a result of these processes, two cases have been filed in the United States claiming damages for events during apartheid.

The first apartheid case

In June 2002 thousands of South African claimants filed a class-action suit against several multinational corporations¹⁹⁵ in the Southern District of New York under the Alien Torts Claims Act (ATCA).¹⁹⁶ By August, a lawsuit targeted the following companies as co-conspirators with the apartheid regime: Citigroup, Credit Suisse, UBS, Deutsche Bank, Dresdner Bank, CommerzBank, IBM, Amdahl Corporation, ICL Ltd., Burroughs, Sperry and Unisys (the parent company of Sperry and Burroughs).¹⁹⁷ According to their lawyers, the mining companies Anglo American and De Beers may be added to this list of defendants. In addition, the lawyers have written to over 27 banks and corporations proposing settlement talks.¹⁹⁸ Aside from potential defendants Anglo American and De Beers, the lawsuit does not target domestic businesses.¹⁹⁹

The complaint, originally lodged solely against Swiss and United States banks, contends that “for justice to be done, the financial institutions and companies that fuelled and made possible the apartheid regime’s reign of terror must account for their sins, crimes and profiteering, just as did the companies that fuelled and made possible the Nazi reign of terror”.²⁰⁰ The complaint seeks \$50 billion in damages,²⁰¹ asserting that but for the banks’ loans, the apartheid regime would not have survived as long as it did²⁰² and that the computer companies “knew full well that their equipment, technology and systems were used within the apartheid system in a manner that facilitated and encouraged the violation of human rights and the commissioning of atrocities against the majority of South Africa’s population”.²⁰³

The mining concerns are being targeted to include racist and exploitative labor practices during the apartheid era.

Ed Fagan, the US lawyer leading the case, sent out a press advisory highlighting a portion of the complaint that traces the German banks’ behavior to their Third Reich history.²⁰⁴ Fagan “has been variously described as a champion of lost causes

and an opportunistic show boater”.²⁰⁵ Responses to Fagan and the lawsuit have, not surprisingly, been mixed, with government unreservedly chilly, and news media somewhat less so, but probably not as supportive as Fagan had hoped.²⁰⁶

The second apartheid case

On 12 November 2002 the second case, *Khulumani et al. v. Barclays et al.*,²⁰⁷ was filed in the New York Eastern District Court against eight banks and 12 oil, transport, communications technology and armaments companies from Germany, Switzerland, Britain, the United States, Netherlands and France.²⁰⁸

It was filed on behalf of the Khulumani Support Group and 108 individual “victims of state-sanctioned torture, murder, rape, arbitrary detention, and inhumane treatment”. Jubilee South Africa stated that: “The corporations aided and abetted a crime against humanity whose persistent social damage requires urgent repair ... They made massive profits while the suffering of the victims of apartheid intensified. The banks and businesses have consistently ignored our attempts to engage in discussion about their role in supporting broad social programmes for the reconstruction and development of affected communities and in compensating specific individuals for the damage that the corporations made possible”.²⁰⁹

In their press statement, the plaintiffs averred that they had for four years been attempting, albeit unsuccessfully, to “get multinational banks and businesses that propped up the apartheid state to account for their odious profiteering”. The Khulumani Support Group noted that this case: “is the only route left open to us to ensure that the truth is known about the extent of corporate complicity in apartheid abuses and that justice is delivered to those who suffered. The victims cannot be left to pay for their own suffering. Multinational corporations must be put on notice that complicity in crimes against humanity does not pay”.²¹⁰

In its press release, the Apartheid Debt & Reparations Campaign said: “In this claim, we express our commitment to the future of apartheid’s victims, to the protection of human rights, and to the rule of law ... This suit has been filed after extensive international consideration of its legal and factual basis, and after thorough consultation amongst key

organizations. Further complaints of similar weight in regard to other aspects of apartheid crimes will be filed in coming months”.²¹¹

The US law firm representing the plaintiffs noted in their press release²¹² that the complaint:

... seeks to hold businesses responsible for aiding and abetting the apartheid regime in South Africa in furtherance of the commission of the crimes of apartheid, forced labor, genocide, extrajudicial killing, torture, sexual assault, and unlawful detention. The world community recognized apartheid itself as a crime against humanity and a violation of international law. Apartheid could not have been maintained in the same manner without the participation of the defendants ... The suit is based on common law principles of liability and on the Alien Torts Claims Act, 28 USC. 1350, which grants US courts jurisdiction over certain violations of international law, regardless of where they occur ... Recent historical evidence demonstrates that the involvement of companies in the key industries of mining, transportation, armaments, technology, oil, and financing were not only instrumental to the implementation of the furtherance of the abuses, but were so integrally connected to the abuses themselves that apartheid would probably not have occurred in the same way without their participation.

In South Africa, these two cases have been viewed somewhat contentiously. Former President FW de Klerk has come out against the cases, stating that he will advise the companies to fight the lawsuits. He has also stated these cases would raise false hopes of enrichment among poor South Africans.²¹³

As far as the South African government is concerned, it has stated that it will not support the claims against multinationals cited for having propped up apartheid. Minister of Justice and Constitutional Development, Penuell Maduna, has been quoted as saying that the Cabinet had taken a decision of ‘indifference’, neither supporting nor rejecting the lawsuits. He stated that: “We are not supporting the claims for individual reparations. We are talking to those very same companies named in the lawsuit about investing in post-apartheid SA. The focus is on getting those companies to keep investing in SA to benefit the entire population”.²¹⁴

The South African Minister of Finance, Trevor Manuel,

has stated that the lawsuits cannot solve the problems apartheid caused or account for them: “the enormity of the crime is apartheid itself. And for that there can’t be compensation individually ... This kind of adventurism, when you look for victims ... does not see apartheid itself as a serious violation of human rights, but looks for physical assault, and battery and torture and killings”.²¹⁵

Conclusion

The role of multinational corporations in the perpetration of human rights abuses during the colonial and apartheid eras was considerable. Their role is under greater scrutiny now than at any other time in history. Part of the reason for this is that more and more norms and standards are being developed relating to the conduct of companies in respect of human rights. As this happens, so the role played by corporations in the past is being examined in much finer detail. Another reason for the increased scrutiny and calling to account is the fact there has been a growth of accountability mechanisms at both international and domestic levels. As this scrutiny intensifies, still more attention is being focused on these questions and, as more information emerges, the possibilities for redress expand.

Recently, the reparations movement has been growing in leaps and bounds. On a number of fronts over the last few years, the likelihood of reparations for human rights abuses has become more of a reality. It is, therefore, possible that a solution to the thorny issues of reparations for violations committed a relatively long time ago might be achieved in the future. Developments relating to universal jurisdiction might also assist in this regard. At the domestic level, it is largely the US legal system that permits, or is useful for, foreign claimants seeking redress. However, it is possible that claimants may seek to use the courts in other countries to pursue violators. The time-limit question will be one of the major issues that may hinder these claims. The lessons of other cases, particularly those relating to the Holocaust, show that these types of claims are often successful not because a court makes a finding but because of the pressure placed on defendants who then wish to settle because of the adverse publicity attracted. This has not yet occurred with the claims relating to colonialism or apartheid, but these cases are still in their early stages. The

extent to which they are successful, either in the courtroom or because the defendants settle, will determine whether and how many other cases are filed.

However, these cases are not the panacea to the problems that the affected countries and individuals who live there face, as “virtually no judgments ... have been collected, and many defendants have chosen to flee the United States during the course of the litigation”.²¹⁶ Additionally, the courts are not yet sufficiently disposed towards such cases, and very few have been successfully concluded in the courts. Although it seems that the climate is improving, it will take time for the courts in the United States, or elsewhere, to become more sympathetic towards this type of litigation. It must also be borne in mind that:

Corporations, unlike the other defendants in ATCA lawsuits, have the motivation, money and experience to litigate fully all jurisdictional limits and advantages of corporate structure available to them to avoid a litigation on the merits. In order to circumvent or overcome such corporate defenses, plaintiffs suing MNCs are pushed in two different directions. On the one hand, plaintiffs have to target the behavior of the MNC as it directly led to the alleged human rights violations in the host State (requiring a focus on the MNC operations in and with the host State) because ATCA cases demand a higher than normal factual basis at the initial stages; on the other hand, plaintiffs must concentrate on the MNCs' activity at its corporate headquarters in order to facilitate the court's assertion of personal jurisdiction over the MNC defendant and to avoid impermissible intrusions upon the government of the host State and its relationship with the US. The synthesis of these opposing trends may make life difficult for some human rights litigators, but in the long run will serve to ensure that only meritorious cases, properly heard in the US, will proceed.²¹⁷

Because of these factors, which will stymie or limit such cases for some time to come, the political route for redress will become more important in the future. This will occur as the issues receive more international acceptance and more pressure is brought to bear by those who endured the brunt of colonial and apartheid human rights abuses.

NOTES

1. See generally T. de Pelsmaecker et al., 2002.
2. See generally J. Sarkin & W. Binchy (eds.), 2001.
3. See further J. Sarkin et al., 2001.
4. An example of pursuing a human rights abuser is the prosecution of the former President of Chad, Hissene Habre. See R. Brody, 2001; see also B. Crossette, 1999.
5. See further J. Sarkin, 1996; 1997; 1998; 1999a; 1999b; 1999c; 2000a; 2000b; 2001a; 2003.
6. Most countries in Africa, for example, went through a colonial period under the domination of countries such as France, Germany, Great Britain, Italy, Belgium and Portugal.
7. The concept of crimes against humanity is found in the Martens Clause of the 1899 Hague Convention II and the 1907 Hague Convention IV. The earlier version of the Martens Clause (Preamble, 1899 Hague Convention II) refers to "laws of humanity"; the later version (Additional Protocol I) refers to "principles of humanity". See E. Kwakwa, 1992, 36. The 1907 Convention states that: "Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". An even earlier use of the term is found in the 1868 Saint Petersburg Declaration of an International Military Commission. This declaration limited during war the use of certain explosive or incendiary projectiles, because they were declared "contrary to the laws of humanity".
8. The Convention with Respect to the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1899, are seen as "the first significant modern treaties on *jus in bello*". See S.R. Ratner & J.S. Abrams, 1997, 45. It is relevant only to some degree, because it is binding on the parties that are signatories to them. Where there was war between signatory parties there were provisions that demanded that prisoners of war were treated humanely, and these prisoners "shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them". Article 23 (c) prohibited the killing or wounding of enemies that are unable to defend themselves or have surrendered. Also relevant for future claims could be Convention (IV) in respect of the Laws

and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1907.

9. The term “genocide” only received formal and legal recognition at the Nuremberg trials, although the Charter of the Tribunal did not expressly use the term. The term was coined in the 1940s by Raphael Lemkin. The Genocide Convention was only adopted by the UN General Assembly in 1948.

10. An example of this, which will be dealt with in much greater detail below, is the case of the genocide committed on the Hereros in Namibia at the beginning of the 20th century. The argument made by President Roman Herzog of the Federal Republic of Germany, when visiting Namibia in 1998, was that no crime had been committed as no law existed then which proscribed such conduct.

11. The declaration of the World Conference against Racism held in 2001 recognized in article 158 “that these historical injustices have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries. The Conference recognizes the need to develop programs for the social and economic development of these societies and the Diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect, in the following areas: ... United Nations A, General Assembly Distr., General, A/ Conf. 189/ 24 September 2001, Original: English, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August-8 September 2001. Adopted on September 8, 2001 in Durban, South Africa (Final version released on December 31, 2001).

12. For example, the legacy of the 1884-1885 Berlin conference, where the colonial powers of Europe met in Berlin to carve up Africa among themselves as colonies and dependencies, still has a major effect on the extent to which conflict racks the continent. See J. Sarkin, 2002. It is not surprising that, against the backdrop of these inexcusable and arbitrary colonial border placements and policies of rigid ethnic identity in a pervasive environment of underdevelopment, 20 of the 48 genocides and ‘politicides’ that occurred worldwide between 1945 and 1995 took place in Africa. See H. Solomon, 1999, 34. See further P. Brogan, 1992.

13. N. Kritz, 1998, xxvii.

14. See Universal Declaration of Human Rights Article 8; International Covenant on Civil and Political Rights Article 2(3) (a) and the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment Article 14 (1).

15. See the Chozrow Factory case, Publications of the Permanent Court of International Justice, Collection of Judgments, Series A, No. 9, 21; Series A, No. 17, 29 (June 27, 1928). This case was cited with approval in the

14 February 2002 judgment Democratic Republic of the Congo v. Belgium, where the court held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.

16. An example is the finding of the Inter-American Court of Human Rights decisions in the Velásquez Rodríguez case. See Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Serie C, n. 7, Judgment of July 21, 1989 (Compensatory Damages), paragraph 71. See further C. Tomuschat, 2002.

17. See further K. Rendall, 1998; B. Brown, 2001; R. Brody, 2001; N. Roht-Arriaza, 2001; L. Sadat, 2001 and M. Scharf & T. Fischer, 2001.

18. See M.J. Bazylar, 2002.

19. Cases have also been filed in terms of the Torture Victims Protection Act of 1991. Act 12, 1992, P.L. 102-256, 106 Stat. 73. However, the court in *Beanal v. Freeport-McMoran, Inc.* held that because the TVPA used the term “individual”, Congress did not intend to include corporations as defendants. 969 F. Supp. 362, 382, (E.D. La. 1997).

20. An example of the growth in the number and type of suits filed is one against Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell). In *Wiwa v. Royal Dutch Petroleum*, 96 Civ 8386 (S.D.N.Y., filed November 8, 1996) 226 F.3d 88 (2d Cir. 2000), Shell was charged with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa and John Kpuinen, two of nine leaders of the Movement for the Survival of the Ogoni People (MOSOP), the torture and detention of Owens Wiwa, and the wounding of a woman, peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under the ATCA and the Racketeer Influenced and Corrupt Organizations Act. Another case was brought against President Robert Mugabe of Zimbabwe. This case was, however, objected to by the US government, citing concerns that he might be entitled to diplomatic immunity. See “Zimbabwe president accused of orchestrating terror in United States suit”, *CNN.com*, September 10, 2000. See further F.L. Kirgis, 2000.

21. M. Bossuyt & S. Van de Ginste, 2001.

22. See A.J. Sebok, 2001.

23. United Nations A, General Assembly Distr., General, A/ Conf. 189/ ... 24 September 2001, Original: English, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, 31 August-8 September 2001, Adopted on 8 September 2001 in Durban, South Africa (Final Version Released on December 31, 2001).

24. Just two examples of this are articles 13 and 14. Article 13 reads: “We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences”. Article 14 reads: “We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today”.

25. In the context of the Herero of Namibia’s claim, Harring claims that the “Herero are aware that reparations regimes operant in the world today are political and not legal. But, these political actions have a common history of being moved by extensive legal posturing, creating a powerful moral climate supporting reparations, and shaping public opinion”. S.L. Harring, 2002, 393, 410.

26. J.R. Paul, 2001.

27. S. Zia-Zarifi, 1999, 4, 81, 85. See further B. Frey, 1997.

28. See, for example, L. Fernandez, 1996.

29. See M. Penrose, 2000; A. Perez, 2000; C. Pierson, 2000; and A. Hasson, 2002.

30. There are obstacles that plaintiffs would have to surmount for a claim to succeed against a country. In the US, the Foreign Sovereign Immunities Act often operates to insulate state actors from liability. See further L. Saunders, 2001, 1402. The Supreme Court in *Argentine Republic v. Almerada Hess Shipping Corporation* held that the Act of 1976 established a general immunity of foreign states from suits before American courts. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 (1989).

31. M. Ellinikos, 2001, 35.

32. J. Charney, 1983.

33. C. Forcese, 2002, 26, 487.

34. See the case of *Eastman Kodak Co. v. Kavlin*, where the plaintiff was involved in a contractual dispute with a Bolivian company and claimed a conspiracy on the part of the firm and the Bolivian authorities to imprison him. The District Court observed that “it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power”. 978 F. Supp. 1078 (S.D. Fla. 1997).

35. A. Ramasastry, 2002b, 20, 91.

36. *Id.*, *ibid.*

37. The corporation, at times, could be seen to be an accomplice with the regime that actually carries out the abuses. In this regard, the International Criminal Tribunal for Yugoslavia has found that an accomplice is guilty if “his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. The court furthermore required that the defendant act with knowledge of the underlying act”. Quoted in S.R. Ratner, 2001, 111, 443, 501.

38. A. Clapham & S. Jerbi, 2001, 339, 340 (quoting UNCHR preamble).

39. *Id.* The authors also note that although corporations are not bound by the UNCHR, a number of them are responding to the societal condemnation that arises from violating it by incorporating “an explicit commitment in their business principles” to upholding human rights.

40. L. Henkin, 1999, 25, 17, 25 (as quoted in B. Stephens, 2002, 20, 45).

41. *Barcelona Traction, Light and Power Co., Belgium v. Spain*, INT.GERI 3, paragraph 70 (1970).

42. S.R. Ratner, *op. cit.*, 492.

43. *Id.* at 493.

44. *Id.* at 494.

45. See generally *id.*

46. A. Ramasastry, 2002a, and 2002b.

47. S.R. Ratner, *op. cit.*, 493.

48. T. Van Boven, “Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms”. UN GAOR 4th Comm., 45th Sess., Provisional Agenda

Item 4, paragraph 57, UN Doc. E/CN.4/Sub.2/1993/8 (1993).

49. See UN Commission on Human Rights document E/CN.4/2000/62 of 18 January 2000.

50. See further C. Tomuschat, 2002.

51. In the decision *Prosecutor v. Tadic* IT-94-1-A (July 15, 1999) the tribunal considered international principles for attributing actions of private actors to state actors. The Tribunal held that a State can be held responsible because of its request to a private individual to discharge tasks on its behalf. (Judgment of the Appeals Chamber, at paragraph 119).

52. K. Parker, 1994, 497, 502.

53. Another more recent example where the US government agreed to pay \$5,000 and issue an apology to 2,200 Latin-American Japanese who were removed from Latin America during WWII and held in internment camps in the US. This resulted from a settlement agreement arising out of the case *Mochizuki v. United States* No. 97-924C, 41 Fed. Cl. 54 (1998). See N.T. Saito, 1998.

54. 630 F.2d 876, 880 (2d Cir. 1980).

55. *Ibid.* at 890.

56. 9 Hum. Rts. L.J. 212 (1988).

57. See T. Yu, 1995; T. Tree, 2000, 466-68 and K. Park, 2000.

58. See M.J. Bazylar, 2002.

59. *Id.*, *ibid.*

60. *Id.*, *ibid.*

61. *Id.*, *ibid.*

62. *Id.*, *ibid.*

63. See further R. Foos, 2000.

64. M.J. Bazylar, *op. cit.*, 11.

65. *Id.*, *ibid.*

66. *Id.*, *ibid.*

67. See generally V.N. Dadrian, 1998.

68. M.J. Bazylar, *op. cit.*, 11.

69. Even at that time questions relating to statutes of limitations were being asked. For example Oliver Wendell Holmes asked "What is the justification for

depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" O.W. Holmes, Jr., 1897. This issue will be explored later in more detail.

70. Attended the conference: Austria-Hungary, Germany, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey and the USA.

71. It is a highly controversial issue. See R.W. Tracinski, 2002.

72. *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

73. At 1105. Cited in A. A. Aiyetoro, 2002, 3, 133.

74. *Id.*, 3, 133, 138.

75. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980) where the court found that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found and served with process within United States borders, the ATCA provides jurisdiction". 630 F.2d 876, 880 (2d Cir. 1980).

76. For an analysis of why non-US jurisdictions in general have seen so few civil international human rights claims, see B. Stephens, 2002, 27, 1.

77. H. Ward, 2001, 27, 451, 454-55. For discussion of how Dutch courts might handle the jurisdictional remedies and choice of law issues if cases were brought involving harms suffered in foreign countries, see generally, A. Nollkaemper, 2000 and G. Betlem, 2000.

78. J. Glaberson, 2001.

79. B. Stephens, 2002b, 27, 1, 24.

80. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

81. B. Stephens, *op. cit.*, 13.

82. *Id.*, *ibid.*, 18.

83. *Id.* Obviously the Pinochet process in the UK gives some impetus to the idea of pursuing human rights violators. See R. Brody, 1999. See also C. Nicholls, 2000.

84. B. Stephens, *op. cit.*, 14-16.

85. B. Stephens, 2001.

86. *Smith Kline & French Labs v. Bloch*, 2 All E.R. 72, 74 (Eng. 1983).

87. These include the Torture Victims Protection Act, the Foreign Sovereign Immunities Act (FSIA) and terrorism laws.

88. 630 F.2d 876, 880 (2d Cir. 1980).
89. D.M. Ramsey, 2001, 24, 361.
90. *Id.*, *ibid.*, at 364.
91. These include *forum non conveniens*, international comity, act of state, and the political question doctrines.
92. See generally, E. Gruzen, 2001a e 2001b; and M.D. Ramsey, 2001, 24, 361.
93. *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489-90 (D.N.J. 1999).
94. A.X. Fellmeth, 2002, 5, 241, 249.
95. 70 F.3d 232 (2d Cir. 1995). Here the plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina. They sued the leader of the other forces for having committed gross human rights violations such as genocide and war crimes. See also J. Lu, 1997, 35, 531.
96. At 350.
97. At 239.
98. *Doe v. Unocal Corp.*, 2002 US App. LEXIS 19263 (9th Cir. September 18, 2002) at 32-33.
99. See further J. Sarkin, 2001b.
100. See, e.g., *Doe v. Unocal*, 110 F. Supp. 2d at 1294, 1306-1307 (C.D. Cal. 2000); *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d. 424, 443 (D.N.J. 1999).
101. 963 F. Supp. 880, 885 (C.D. Cal. 1997).
102. *Doe v. Unocal Corp.*, 2002 US App. LEXIS 19263 (9th Cir. September 18, 2002) at 32-33.
103. See *id.* at 35-55.
104. *Id.* at 36.
105. *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d. 424, 445 (D.N.J. 1999).
106. 226 F.3d 88, 93 (2d Cir. 2000).
107. See further A.X. Fellmeth, 2002, 5, 241.
108. *Id.*, *ibid.*
109. *Id.*, *ibid.*
110. 197 F.3d 161 (5th Cir. 1999).
111. 507 US 349 (1993).
112. 107 F.3d 720 (9th Cir. 1997).

113. E. Schrage, 2002.

114. Very relevant to this issue internationally is the fact that the General Assembly, in 1968, adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. See further M. Lippman, 1998. The first sentence of Article 1 states that "no statutory limitation shall apply to the following crimes, irrespective of the date of their commission" following the definitions of war crimes and crimes against humanity. However, Article 2 reads: "If any of the crimes mentioned in Article 1 is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals ..." The key word is "is". Does this mean that the convention only applies prospectively?

115. In *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d at 433-34 the Court found that the Torture Victim Protection Act of 1991, 28 USC 1350, which has a 10-year statute of limitations, was the most comparable statute to the ATCA. See *Iwanova* at 462.

116. US Senate report S. Rep. No. 249, 102d Cong., 1st Sess., (1991) 5.

117. US Senate report S. Rep. No. 249, 102d Cong., 1st Sess., (1991) 11.

118. In *Forti*, at 1549 the court held: "Although the limitations period of a claim under the Alien Tort Statute is governed by state law, because the claim itself is a federal claim, federal equitable tolling doctrines apply".

119. 518 A. 2d 423, 425 (DC App. 1986).

120. 886 F. Supp. 162, 191 (D. Mass. 1995).

121. 164 F. 2d 767 (2d Cir. 1947).

122. At 769. This statement is reproduced in *Forti* at 1550.

123. At 1550.

124. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987).

125. 176 F.R.D. 329, (C.D. Cal. 1997).

126. Citing the Ninth Circuit's ruling in *Hilao v. Estate of Marcos* 103 F. 3d 767 at 772.

127. At 360.

128. 67 F. Supp. 2d 424, 462 (D.N.J. 1999).

129. At 467.

130. See also *Pollack v. Siemens AG*, No. 98CV-5499 (E.D.N.Y.) filed Aug. 30 1998. The *Pollack* complaint alleged significant concealment on the part of the defendant corporations and that important documents were made public only in

the mid-1990s. See J. Roy, 1999. The issue of concealment is also seen to be important; Bilenker, for example, argues that for the claims against banks for World War II acts “the court could apply the ‘fraudulent concealment’ doctrine to the banks’ situation if it finds evidence that the banks in fact concealed essential information from plaintiffs regarding the status of their accounts and the deposits of looted assets”. See S.A. Bilenker, 1997, 21, 251.

131. See: M.J. Bazylar, 2000.

132. Civ. No. 4-96-CV-10449, 1998 US Dist. LEXIS 21230, at 30-31 (S.D. Iowa, Mar. 11, 1998).

133. 975 F. Supp. 1108, 1122 (N.D. III. 1997) *aff’d*, 250 F. 3d 1145 (7th Cir. 2001).

134. 450 F. Supp. 227, 229-30 (N.D. III. 1978).

135. No. 93 Civ. 0878 (PKL), 2000 WL 76861, 1 nr. 3 (S.D.N.Y. Jun. 13, 2000).

136. 157 F. Supp. 2d 1345, 1368 (S.D.Fla., 2001).

137. 205 F. Supp. 2d 1325; (S.D. FLA 2002) 2002 US Dist. LEXIS 10323; 15 Fla. L. Weekly Fed. D 336.

138. See *Lubbe v. Cape plc*, [1999] Int’l Litigation Procedure 113, CA.

139. See *Connelly v. RTZ Corp. plc*, [1996] 2 WLR 251; [1997] 3 WLR 373.

140. See *Ngcobo and others v. Thor Chemical Holdings Ltd. and another*, [1995] TLR 579; *Sithole and others v. Thor Chemical Holdings Ltd. and another*, [1999] TLR 110.

141. For further discussion, see R. Meeran, 1999 and 2000.

142. See *Dagi v. Broken Hill Proprietary Co. Ltd.*, (No. 2) [1997] 1 VR 428.

143. The Herero People’s Reparation Corporation, the Herero tribe by and through its Paramount Chief Kuāima Riruako, 199 individuals and the Chief Hosea Kutako Foundation filed in the Superior Court of the District of Columbia a case captioned *The Herero People’s Reparation Corporation, et al. v. Deutsche Bank AG, et al.*, 01 CA 4447.

144. The Terex claim was later dropped, at least temporarily. See UN Integrated Regional Information Network, 21 Sep. 2001.

145. Various strategies have been attempted to claim reparations for the atrocities committed against the Herero. Speaking at the commemoration of Herero Day at Okahandja in 1999, Chief Riruako stated: “On the threshold of the new millennium the Hereros, as a nation, have decided to take Germany to the International Court for a decision regarding reparations. We also warn the Namibian Government not to stand in our way as we explore this avenue to

justice". Each year in August, the Hereros come together in memory of their fallen heroes who died during the 1904-1907 Herero-German war. See C. Maletsky, 1999.

146. South Africa has also been called on to provide reparations to the Hereros. Herero paramount chief Kuaima Riruako has called on the Namibian government to institute a legal suit, similar to the one of the Hereros against the German government, against their South African counterparts. He has stated that: I'm not quite happy (with the state of affairs against SA). We suffered a lot (at the hands of SA) and we can't let them off the hook. The South Africans responded that it will not pay reparations and compensation to the Herero people in Namibia. Foreign affairs spokesman Ronnie Mamoepa stated that the current South African government was composed of former victims of colonization and apartheid and can you ask for reparation or compensation from the same victims who suffered under those regimes? See C. Maletsky & T. Mokopanele, 2001.

147. On September 19, 2001, plaintiffs filed a similar claim against the Federal Republic of German, see *The Herero Peoples' Reparation Corporation, et al. v. Federal Republic of Germany*, 1:01CV01987CKK.

148. Chief Riruako has expressed dismay at the Namibian government's lack of interest in the Herero case stating that: "For the (Namibian) government or any one to say, 'I'm not part of it' ... must be nuts", he said. See C. Maletsky & T. Mokopanele, 2001.

149. It is interesting to note that the Special Rapporteur to the UN Sub-Commission in 1993, Theo Van Boven notes: "it would be difficult and complex to construe and uphold a legal duty to pay compensation to the descendants of the victims of the slave trade and other early forms of slavery". (E/CN.4/Sub.2/1993/8). He refers to a report of the UN Secretary-General on the Right to Development (E/CN.4/1334) who notes, with regard to "moral duty of reparation to make up for past exploitation by the colonial powers", that "acceptance of such a moral duty is by no means universal".

150. F. Bridgland, 2001.

151. C. Maletsky, 2001.

152. On September 19, 2001, plaintiffs filed against the Federal Republic of Germany. See *The Herero Peoples' Reparation Corporation, et al. v. Federal Republic of Germany*, 1:01CV01987CKK. See also C. Maletsky & T. Mokopanele, 2001.

153. F. Bridgland, 2001.

154. Herero complaint.

155. *The Independent* – London, 9 September 2001.
156. S.L. Haring, 2002, 393, 414-5.
157. C. Maletsky, 2001.
158. "Reparations not on the Table", in *The Namibian*, August 31, 2000.
159. Comments of the spokesperson for the Southern African Development Community (SADC) in the German Parliament, Hans Buttner, during a meeting with Prime Minister Hage Geingob in Windhoek reported in "Reparations not on the Table", in *The Namibian*, August 31, 2000.
160. "Reparations not on the Table", in *The Namibian*, August 31, 2000.
161. *Idem*.
162. T. Bensman, 1999.
163. *Id.*, *ibid*.
164. *Id.*, *ibid*.
165. See J. Sarkin, 1998.
166. J. Sarkin, 1993.
167. See D.D. Mokgatle, 1987.
168. See H. Varney & J. Sarkin, 1996.
169. See J. Sarkin, 1993, 209, 271.
170. M. Coleman (ed.), *A Crime against Humanity: Analysing the Repression of the Apartheid State*, 1998.
171. Calling Apartheid's Profiteers to Account – Njongonkulu Ndungane, Anglican Archbishop of Cape Town Action for Southern Africa <http://www.actsa.org/news/features/011002_reparations.htm>. Last access on April, 19, 2004.
172. *Id.*, *ibid*.
173. See further J. Sarkin, 1996; 1997; 1998; and 2003.
174. Final Report of the Truth and Reconciliation Commission, v. 4, ch. 2, Institutional hearing "Business and Labor" (TRC Report on Business and Labour), paragraph 21.
175. I use the term "indictment" with full knowledge that this was exactly not what the TRC report was intended to be. Nevertheless, the term does not seem altogether inappropriate given that (1) Ntsebeza, who was a TRC commissioner who helped draft the report, is now leading the lawsuit that is in part based on the TRC's findings; and (2) Terry Bell, who provided research for the TRC and

subsequently wrote *Unfinished Business: South Africa Apartheid & Truth*, *infra*, with Ntsebeza, is also involved with the lawsuit.

176. See, e.g., *id.* at paragraph 49 (“Business was not a monolithic block and it can be argued that no single relationship existed between business and apartheid”).

177. TRC Report on Business and Labor at paragraph 23.

178. *Id.* at paragraph 28.

179. *Id.* at paragraph 32.

180. S.R. Ratner, 2001, 111, 443, 503.

181. Although brief mention of banks is made in the Report’s discussion of first-order involvement, the Report shies away from ascribing principal liability to banks. Instead, the Report records without concurring in the view of The Apartheid Debt Coordinating Committee, that “even the seemingly most pristine ... trade loans were tainted by apartheid. The simple fact of trade with South Africa inescapably meant helping to sustain and reproduce ... apartheid. No loan could avoid this institutional contamination”. TRC Report on Business and Labor at paragraph 25.

182. *Id.* at paragraph 28.

183. *Id.* at paragraph 31.

184. *Id.* at paragraph 29.

185. *Id.* at paragraph 35.

186. *Id.* at paragraph 30.

187. *Id.* at paragraph 118.

188. *Id.* at paragraph 119.

189. *Id.* at paragraph 120. It is unclear whether or not MNCs participated in such JMCs with the apartheid regime.

190. *Id.*, *ibid.*

191. *Id.* at paragraph 122.

192. *Id.* at paragraph 123.

193. See e.g. *id.* at paragraph 5 (reporting that multinational oil corporations (which were the largest foreign investors in South Africa) did not respond to the invitation to participate); and paragraph 131 (“The failure of multinational corporations to make submissions at the hearing was greatly regretted in view of their prominent role in South Africa’s economic development under

apartheid. It was left to the AAM Archives Committee to explain the role of foreign firms in South Africa.”).

194. Ratner, 2001, 503.

195. C. Terreblanche, 2002a.

196. A. Ramasastry, 2002.

197. J. Lauria, 2002.

198. B. Boyle, 2002.

199. See *Weekly Mail and Guardian*, July 25, 2002.

200. N. Deane, “South Africans take on the giants”, in *Weekly Mail and Guardian*, June 27, 2002. The article appears to be quoting the complaint.

201. “More join apartheid victims’ suit” in *Star*, June 24, 2002. A letter Fagan sent to the chief executive of Barclay’s Bank in London employs a strikingly less hyperbolic approach: “We hope to enter into a dialogue with you and others and through which we can find a meaningful way that can address both objectively and proportionately the nature and extent of your company’s involvement in South Africa during apartheid and what your company has done to help redress the wrongs that were committed. Entering into this dialogue would be taken as an expression of your company’s desire to work together to find a resolution for the benefit of victims of apartheid”. D. Carew, 2002.

202. See *Ntzebesa, Mequbela, Molefi, Mpendulo et al. v. Citigroup Inc., UBS A.G., Credit Suisse Group et al. Affidavit in Support of Motion for Preservation of Evidence at 5-6.*

203. C. Terreblanche, 2002b. See also Affidavit at 5-6. In his book, Terry Bell notes how “greater reliance on computer technology was seen as one of the ways of making more efficient the maintenance of the apartheid system”, and why “Botha and his generals ... saw more centralized and efficient information processing as the key”. As Bell explains, and as noted earlier, “close, collaborative ties with international business and the links through South African corporations, were not explored much locally and not at all by the TRC”. Touching on the role of companies such as IBM, Bell writes: “The whole racial classification system, from ‘influx control’ for blacks to the ‘books of life’ for other categories, had been maintained since the 1950s, by electronic hardware and software provided by companies such as Britain’s ICL, IBM of the United States and the Burroughs Corporation. The shortage of military personnel in the 1970s had partially been overcome by the use of computers supplied by ‘Big Blue’, the IBM Corporation. By the time of the bloody decade of the Eighties, South Africa had become the biggest spender in terms of percentage of national wealth (GDP) on computers after the US and Britain”.

In addition, Bell draws the connection between the information infrastructure provided by foreign corporations, and the functioning of the Civil Co-operation Bureau, "the military's full-time murder and terror squad".

204. See "Press Advisory", July 1, 2002, p. 2.

205. Sapa-AFP, "Justice with a hefty price tag" in *Cape Argus*, June 27, 2002.

206. See, e.g. "Govt wise to shun compensation suit" in *The Herald* (EP Herald), June 25, 2002; A. Dasnois, "Fagan's Campaign is unlikely to enrich citizens" in *Star*, July 22, 2002 ("There is a danger that Fagan's campaign will serve his own ends more than those of justice").

207. The Khulumani Support Group is a coalition partner organization in Jubilee SA Khulumani is an organization of about 32,000 victims of gross apartheid human rights violations.

208. From the United States of America (USA) – Citigroup, J.P. Morgan Chase (Chase Manhattan), Caltex Petroleum Corporation, Exxon Mobil Corporation, Fluor Corporation, Ford Motor Corporation, General Motors, International Business Machines (IBM); from the United Kingdom (UK) – Barclays National Bank, British Petroleum P.L.C.; Fujitsu ICL. (previously International Computers Limited); from the Federal Republic of Germany – Commerzbank, Deutsche Bank, Dresdner Bank, Daimler Chrysler, Rheinmetall; from Switzerland – Credit Suisse Group, UBS; from France – Total-Fina-Elf; from The Netherlands – Royal Dutch Shell.

209. Press Release by the Apartheid Debt & Reparations Campaign – Tuesday, 12 November 2002.

210. Press Release Khulumani Support Group 12 November 2002.

211. Press Release Apartheid Debt & Reparations Campaign 12 November 2002.

212. Press Statement by Cohen, Milstein, Hausfeld & Toll – November 12, 2002.

213. "Manuel doubts value of apartheid lawsuits". *SABC News*, November 26, 2002.

214. *id.*, *ibid.* .

215. *id.*, *ibid.*

216. S.R. Ratner & J.S. Abrams, 1997, 211.

217. S. Zia-Zarifi, 1999, 4, 81, 120-1.

BIBLIOGRAPHY

- AIYETORO, A. A. "The Development of the Movement for Reparations for African Descendants". *Journal of Law in Society*, 3, 133 (Winter) 2002.
- BAZYLER, M. J. "Nuremberg in America: Litigating the Holocaust in the United States Courts". *U. Rich. L. Rev.*, 34, 1, 2000.
- _____. "The Holocaust Restitution Movement in Comparative Perspective". *Berkeley J. Int'l L.*, 20, 11, 2002.
- BENSMAN, T. "Tribe Demands Holocaust Reparations; Germany's Genocidal War against Namibia's Herero Was Rehearsal for World War II Atrocities". *The Salt Lake Tribune*, March 18, 1999.
- BETLEM, G. "Transnational Litigation against Multinational Corporations before Dutch Civil Courts". In: M.T. KAMMINGA & S. ZIA-ZARIFI (eds.), *Liability of Multinational Corporations under International Law*. Kluwer Law International, 283-305, 2000.
- BILENKER, S.A. "In Re Holocaust Victim's Assets Litigation: Do the US Courts Have Jurisdiction over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?". *Md. J. Int'l L. & Trade*, 21, 251, 1997.
- BOSSUYT, M. & VAN DE GINSTE, S. "The Issue of Reparation for Slavery and Colonialism and the Durban World Conference against Racism". *Human Rights Law Journal*, 22, 25, 2001.
- BOYLE, B. "At Least 27 Entities on Apartheid Lawsuit List". *Star*, July 12, 2002.
- BRIDGLAND, F. "Germany's Genocide Rehearsal". *The Scotsman*, September 26, 2001.
- BRODY, R. "One Year Later, the 'Pinochet Precedent' puts Tyrants on Notice". *The Boston Globe City Edition*, October 14, 1999, A19. <<http://www.hrw.org/editorials/1999/reed-oped.htm>>. Last access on April 19, 2004.
- _____. "Universal Jurisdiction: Myths, Realities, and Prospects: The Prosecution of Hissene Habre. An African Pinochet". *New England Law Review*, 35, 321 (Winter) 2001.
- BROGAN, P. *World Conflicts – Why and Where They are Happening*. London: Bloomsburg Publishing, 1992.
- BROWN, B. "Universal Jurisdiction: Myths, Realities and Prospects:

- The Evolving Concept of Universal Jurisdiction". *New England Law Review*, 35, 383 (Winter) 2001.
- CAREW, D. "Apartheid 'Collaborator' Companies Asked to Respond to Class Action Lawsuit". *Saturday Weekend Argus*, July 13, 2002.
- CHARNEY, J. "Transnational Corporations and Developing Public International Law". *Duke Law Journal*, 766, 1983.
- CLAPHAM, A. & JERBI, S. "Categories of Corporate Complicity in Human Rights Abuses". *Hastings International and Comparative Law Review* (Spring) 2001.
- CROSSETTE, B. "Dictators Face the Pinochet Syndrome". *The New York Times*, August 22, 1999, section 4, 3.
- DADRAN, V. N. "The Historical and Legal Interconnections between the Armenian Genocide and the Jewish Holocaust: from Impunity to Retributive Justice". *Yale Journal Of International Law*, 503 (Summer) 1998.
- ELLINIKOS, M. "American MNCs Continue to Profit from the Use of Forced and Slave Labor. Begging the Question: Should America Take a Cue from Germany?". *Columbia Journal of Law and Social Problems*, 35, 1, 26 (Fall) 2001.
- FELLMETH, A. X. "Note from the Field: Wiwa vs Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in US Courts?". *Yale H.R. & Dev. L.J.*, 5, 41, 49, 2002.
- FERNANDEZ, L. "Possibilities and Limitations of Reparations for the Victims of Human Rights Violations in South Africa". In: M. RWELAMIRA & G. WERLE (eds.), *Confronting Past Injustices. Approaches to Amnesty, Reparation and Restitution in South Africa and Germany*. pp. 65-78. Durban: Community Law Centre University of the Western Cape, 1996.
- FOOS, R. "Righting Past Wrongs or Interfering in International Relations? World War II-Era Slave Labor Victims Receive State Legal Standing after Fifty Years". *McGeorge L. Rev.*, 31, 221, 232, 2000.
- FORCESE, C. "Alien Torts Claims Act's Achilles Heel: Corporate Complicity, International Law and the Alien Torts Claims Act". *Yale J. Int'l L.*, 26, 487, 2002.
- FREY, B. "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of Human Rights". *Minn. J. Global Trade*, 6, 153, 1997.

- GLABERSON, J. "US Courts Become Arbiters of Global Rights and Wrongs". *New York Times*, 1-421, June 21, 2001.
- GRUZEN, E. "The United States as a Forum for Human Rights Litigation: Is this the Best Solution?". *Transnat'l Law*, 14, 207, 2001a.
- _____. "Development in the Law: Corporate Liability for Violations of International Human Rights Law". *Harv. L. Rev.*, 114, 2025, 2001b.
- HARRING, S. L. "German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?". *West Virginia Law Review* (Winter) 2002.
- HASSON, A. "Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet and Milosevic – Trends in Political Accountability and Transnational Criminal Law". *Boston College International & Comparative Law Review*, 25, 125, 2002.
- HENKIN, L. "The Universal Declaration at 50 and the Challenge of Global Markets". *Brook. J. Int'l L.*, 25, 17, 25, 1999.
- HOLMES JR, O. W. "The Path of the Law". *Harv. L. Rev.*, 10, 457, 476, 1897.
- KIRGIS, F.L. "Alien Torts Claims Act Proceeding against Robert Mugabe". *American Society of International Law Insights*, September 2, 2000.
- KRITZ, N. *The Dilemmas of Transitional Justice*. Washington, DC: United States Institute for Peace, 1998.
- KWAKWA, E. *The International Law of Armed Conflict: Personal and Material Fields of Application*. Dordrecht: Kluwer Academic, 1992.
- LAURIA, J. "Explosive Start to 'Apartheid Victims' Lawsuit". *Sunday Independent*, August 11, 2002.
- LIPPMAN, M. "The Pursuit of Nazi War Criminals in the United States and in other Anglo-American Legal Systems". *Cal. W. Int'l L.J.*, 29, 1, 12, 1998.
- LU, J. "Jurisdiction over Non-State Activity under the Alien Torts Claims Act". *Colum. J. Transnat'l L.*, 35, 531, 1997.
- MALETSKY, C. "International Court Dashes Hereros Reparation Hopes". *The Namibian*, September 8, 1999.
- _____. "Hereros Temporarily Drop Claim in \$2 bn Suit". *Business Day*, September 20, 2001.

- MALETSKY, C. & MOKOPANELE, T. "SA Refuses to Consider Reparation for Hereros". *Business Day*, September 28, 2001.
- MEERAN, R. "Liability of Multinational Corporations: A Critical Stage in the UK". In: M.T. KAMMINGA & S. ZIA-ZARIFI (eds.), *Liability of Multinational Corporations under International Law*. Kluwer Law International, 258-261, 2000.
- _____. "The Unveiling of Transnational Corporations: A Direct Approach". In: M.K. ADDO (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*. Kluwer Law International, 164-169, 1999.
- MOKGATLE, D. D. "The Exclusion of Blacks from the South African Judicial System". *South African Journal on Human Rights*, 3, 44, 1987.
- NICHOLLS, C. "Reflections on Pinochet". *Virginia Journal of International Law*, 41, 140 (Fall) 2000.
- NOLKKAEMPER, A. "Public International Law in Transnational Litigation against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands". In: M.T. KAMMINGA & S. ZIA-ZARIFI (eds.), *Liability of Multinational Corporations under International Law*. Kluwer Law International, 265-282, 2000.
- PARK, K. "Comment, the Unspeakable Experience of Korean Women under Japanese Rule". *Whittier Law Review*, 21, 567, 2000.
- _____. "Compensation for Japan's World War II Rape Victims". *Hastings International and Comparative Law Review*, 497, 502, 1994.
- PAUL, J. R. "Holding Multi-National Corporations Responsible under International Law". *Hastings International and Comparative Law Review*, 285, 291 (Spring) 2001.
- PELSMAEKER, T. de; VAN DER AUWERAERT, P.; SARKIN, J. & VAN DE LANOTTE, J. (eds.). *Social, Economic, and Cultural Rights – An Appraisal of Current International and European Developments*. Antwerpen: Maklu, 2002.
- PENROSE, M. "It's Good to be the King!: Prosecuting Heads of State and former Heads of State under International Law". *Columbia Journal of Transnational Law*, 39, 193, 2000.
- PEREZ, A. "The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution". *Denver Journal of International Law and Policy*, 28, 175 (Spring) 2000.

- PIERSON, C. "Pinochet and the End of Immunity". *Temple International and Comparative Law Journal*, 14, 263 (Fall) 2000.
- RAMASASTRY, A. "Banks and Human Rights: Should Swiss Banks Be Liable for Lending to South Africa's Apartheid Government?". In A. RAMASASTRY, *FindLaw*, July 3, 2002a. <<http://writ.findlaw.com/ramasastry/20020703.html>>. Last access on April 19, 2004.
- _____. "Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations". *Berkeley J. Int'l L.*, 20, 91, 2002b.
- RAMSEY, D.M. "Multinational Corporate Liability under the Alien Torts Claims Act: Some Structural Concerns". *Hastings International and Comparative Law Review*, 24, 361, 2001.
- RATNER, S.R. "Corporations and Human Rights: A Theory of Legal Responsibility". *Yale L.J.*, 2001.
- RATNER, S.R. & ABRAMS, J.S. *Accountability of Human Rights Atrocities in International Law, beyond the Nuremberg Legacy*. Oxford: Clarendon Press, 1997.
- RENDALL, K. "Universal Jurisdiction under International Law". *Texas Law Review*, 66, 785, March 1998.
- ROHT-ARRIAZA, N. "Universal Jurisdiction: Myths, Realities and Prospects: The Pinochet Precedent and Universal Jurisdiction". *New England Law Review*, 35, 311 (Winter) 2001.
- ROY, J. "Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims should Be Litigated". *Scholar*, 1, 153, 1999.
- SADAT, L. "Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction". *New England Law Review*, 35, 241 (Winter) 2001.
- SAITO, N.T. "Justice Held Hostage: US Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study". *Boston College Law Review*, 275, December 1998.
- SARKIN, J. "Can South Africa Afford Justice? The Need and Future of a Public Defender System". *Stellenbosch Law Review*, 4 (2), 261, 1993a.
- _____. "Preventive Detention in South Africa". In: A. HARDING & J. HATCHARD (eds.), *Preventive Detention and*

Security Law: A Comparative Survey. Dordrecht/Boston: Martinus Nijhoff, 1993b.

- _____. "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission". *South African Journal on Human Rights*, 12, 617, 1996.
- _____. "The Truth and Reconciliation Commission in South Africa". *Commonwealth Law Bulletin*, 528, 1997.
- _____. "The Development of a Human Rights Culture in South Africa". *Human Rights Quarterly*, 20(3), 628, 1998.
- _____. "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda". *Human Rights Quarterly*, 21(3), 767, 1999a.
- _____. "Preconditions and Processes for Establishing a Truth and Reconciliation Commission in Rwanda: The Possible Interim Role of Gacaca Community Courts". *Law, Democracy and Development*, 223, 1999b.
- _____. "Transitional Justice and the Prosecution Model: The Experience of Ethiopia". *Law, Democracy and Development*, 253, 1999c.
- _____. "Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community-Based Gacaca Tribunals to Deal with the Past". *International Law Forum*, 112, 2(2), 2000a.
- _____. "Dealing with Past Human Rights Abuses and Promoting Reconciliation in a Future Democratic Burma". *Legal Issues on Burma*, 2, 2(2), 1, 2000b.
- _____. "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*, 45, 2, 143, 2001a.
- _____. "Examining the Competing Constitutional Processes in Burma/Myanmar from a Comparative and International Democratic and Human Rights Perspective". *Asia-Pacific Journal on Human Rights and the Law*, 2 (2), 42-68, 2001b.
- _____. "Finding a Solution for the Problems Created by the Politics of Identity in the Democratic Republic of the Congo (DRC): Designing a Constitutional Framework for Peaceful Co-Operation". In: Konrad Adenauer Foundation (ed.), *The Politics of Identity*, 2002.

- _____. "To Prosecute or not to Prosecute that is the Question? An Examination of the Constitutional and Legal Issues Concerning Criminal Trials for Human Rights Violations Committed in the Apartheid Era and the Giving of Amnesty to those Who Did not Apply or Were Refused Amnesty in Post Truth and Reconciliation Commission South Africa". In: C. VILLA-VICENCIO & E. DOXTADER (eds.), *Amnesty in South Africa* (forth coming), 2003.
- SARKIN, J. & BINCHY, W. (eds.). *Human Rights, the Citizen and the State*. Round Hall: Sweet and Maxwell, 2001.
- SARKIN, J.; VAN DE LANOTTE, J. & HAECK, Y. (eds.). *Resolving the Tensions between Crime and Human Rights: European and South African Perspectives*. Antwerpen: Maklu, 2001.
- SAUNDERS, L. "Rich and Rare Are the Gems they War: Holding de Beers Accountable for Trading Conflict Diamonds". *Fordham International Law Journal*, 1.402, 2001.
- SCHARF, M. & FISCHER, T. "Universal Jurisdiction: Myths, Realities, and Prospects: Foreword". *New England Law Review*, 35, 227 (Winter) 2001.
- SCHRAGE, E. "A Long Way to Find Justice. What Are Burmese Villagers Doing in a California Court?". *Washington Post*, July 14, 2002.
- SEBOK, A.J. "Slavery, Reparations, and Potential Legal Liability: The Hidden Legal Issue behind the UN Racism Conference", September 10, 2001. <<http://writ.news.findlaw.com/sebok/20010910.html>>. Last access on April 19, 2004.
- SOLOMON, H. "Analysing Conflicts". In: *Searching for Peace in Africa: An overview of Conflict Prevention and Management Activities*. Amsterdam, The European Platform for Conflict Prevention and Transformation, 1999.
- STEPHENS, B. "Corporate Liability: Enforcing Human Rights Through Domestic Litigation". *Hastings International and Comparative Law Review*, 24, 401, 413, 2001.
- _____. "The Amorality of Profit: Transnational Corporations and Human Rights". *Berkeley J. Int'l L.*, 20, 45, 2002a.
- _____. "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations". *Yale J. Int'l L.*, 27, 1, 2002b.
- TERREBLANCHE, C. "Anglo and De Beers could be Targeted in Class-Action Suit". *Sunday Independent*, September 29, 2002a.

- _____. "Apartheid Victims File \$35 bn Suit in the US". *Cape Times*, July 2, 2002b.
- TOMUSCHAT, C. "Reparation for Victims of Grave Human Rights Violations". *Tulane Journal of International and Comparative Law*, 10, 157 (Spring) 2002.
- TRACINSKI, R.W. "America's 'Field of the Blackbirds': How the Campaign for Reparations for Slavery Perpetuates Racism". *Journal Of Law In Society*, 3, 145 (Winter) 2002.
- TREE, T. "Comment, International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?". *UCLA J. Int'l L. & Foreign Aff.*, 5, 461, 466-68, 2000.
- VARNEY, H. & SARKIN, J. "Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial". *South African Journal of Criminal Justice*, 10, 141, 1996.
- WARD, H. "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options". *Hastings International and Comparative Law Review*, 2001.
- YU, T. "Comment, Recent Development: Reparations for Former Comfort Women of World War II". *Harvard International Law Journal*, 36, 528, 1995.
- ZIA-ZARIFI, S. "Suing Multinational Corporations in the US for Violating International Law". *UCLA J. Int'l L. & Foreign Aff.*, 4, 81, 120-121, 1999.

VINODH JAICHAND

Advocate of the High Court of South Africa and Deputy-Director of the Irish Centre for Human Rights at the National University of Ireland

ABSTRACT

In order to advance human rights one needs to approach courts to clarify what the content of the rights are for a group of people. When the international and regional human rights norms are internalised through implementation into a domestic system, you have fertile ground for public interest litigation. The suggested conclusion is that there has been a gradual evolution in terms of the development of a body of law on human rights, moving from the international to the regional system.

The article focuses on the practice of public interest litigation in South Africa as it discusses questions of access to justice, clinical legal education, and legal aid to the population. As an illustration of strategies in a public litigation, the author analyses the suit brought against the government by an action campaign for the treatment of Aids.

PUBLIC INTEREST LITIGATION STRATEGIES FOR ADVANCING HUMAN RIGHTS IN DOMESTIC SYSTEMS OF LAW

Vinodh Jaichand



Based on the theme of the colloquium “The Rule of Law and the Construction of Peace”, this presentation is drawn from the perspective of a national human rights law non-governmental organisation. The observations are based on one presumption: that in order to advance human rights one needs to approach courts to clarify what the content of the rights are for a group of people. This point is developed by referring to certain recent experiences in South Africa, some of which are not necessarily unique to that country.¹

In the course of the past few days, much has been said about the development of international human rights law and the use of regional human rights systems. In summary, one might conclude that there has been a gradual evolution in the development of human rights law, from the international to the regional systems. When the international and regional human rights norms are internalised through implementation into a domestic system, fertile ground for public interest litigation will be found.²

“Public Interest Litigation” has been defined as “a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected”.³

The Durban Symposium on Public Interest Law⁴ took a

See the notes to this text
as from page 139.

broader view of public interest law by defining it in terms of what it was not, as a field of law: not public law, not administrative law, not criminal law and not civil law. They used the term as a **way of working with the law** and an attitude **towards** the law. They pointed out that bringing selected cases to the courts is not the only public interest strategy, but it could include law reform, legal education, literacy training and legal services. It is not a field reserved for lawyers because it may involve lobbying, research, advocacy and human rights education. Lastly, public interest litigation is a demonstrated attempt at rights empowerment giving tangible meaning and content to human rights.

The content of the strategy

The law is often a daunting and befuddling business, which never seems to see things from the view of the marginalised, vulnerable or indigent person. Most people think that the law is on their side when courts pronounce on their rights in a positive way that reinforces their belief that human rights are a tangible reality. “Creating this sense of inclusion requires many things including marketing the idea aggressively to the poor” says one critic⁵. In addition, success in the courts goes a long way to bring about positively assertive attitudes, because the marginalised, vulnerable and indigent have grown accustomed to defeat on a regular basis.

A good starting point with regard to strategy in effective public interest litigation may be found in the case of *Minister of Health and Others v Treatment Action Campaign and Others*⁶ in the Constitutional Court of South Africa. An analysis of the strategy employed may assist in formulating a checklist of issues and constituencies that need to be attended to for potential success. A simplistic method of division may be to examine “The Public” as representative of the general opinion, “The Public Interest” as the platform for advocacy and finally, “The Litigation” as the legal issues presented to the court and the results.

The public

The Treatment Action Campaign made the government’s attitude to the treatment of HIV/Aids patients a national

issue.⁷ They mobilised NGO's who had sympathy with the government's indifference to HIV/Aids sufferers by capitalising on the state's inability to articulate a coherent position on the disease.⁸ Concerned citizens took to the streets in large numbers to indicate their impatience with the government's attitude.⁹ People suffering with HIV/Aids were seen as victims of the government's inability to deal with the disease.

As a result, when a Treatment Action Campaign's official smuggled generic HIV/Aids drugs, at a fraction of the usual selling price, into the country, threats of prosecution slowly receded in the face of what appeared to be the act of a courageous individual who was willing to show the hypocrisy of the system.¹⁰ In an earlier action, the Treatment Action Campaign found common cause with the government and opposed the Pharmaceutical Manufacturers Association court action to prevent legislation in support of generic and cheaper HIV/Aids drugs. The Pharmaceutical Manufacturers Association, under pressure, withdrew their application to court. One of the leaders of the Treatment Action Campaign, who is also HIV/Aids positive, refused to take anti-retroviral drugs until they were available in public hospitals and clinics for everyone. The Treatment Action Campaign continued to question the inaction on the part of the government. They now had the "interest of the public" they were seeking.

The public interest

The Treatment Action Campaign then found the ideal legal case they could capitalise on. They found it in the government's policy of failing to provide Nevaripine, a widely-recommended anti-retroviral drug used in reducing mother-to-child transmission, at all state health facilities. They were available at two pilot sites per province. And the victims of this callous state policy were innocent babies. In an application before the Pretoria High Court on 14th December 2001, Judge Chris Botha found that the government had a duty to provide Nevarapine to pregnant women who were HIV positive. The government appealed against this decision on several occasions until the Constitutional Court heard the matter on 2nd and 3rd May

2002. The “public interest” was heightened by what appeared to be the government’s inability to accept defeat gracefully.

The litigation

With regard to the “litigation” aspect, the Treatment Action Campaign assembled the best legal minds on socio-economic rights, which in many countries may not be prosecuted as a right. The Treatment Action Campaign relied on a number of NGO’s: The Legal Resources Centre; the Child Rights Centre; Community Law Centre,¹¹ the Institute for Democracy in South Africa and the Cotlands Baby Sanctuary. The latter three were *amici curiae*, that is, “friends of the Court” who provided clarity on issues before the Court based on their expertise.¹² After the Treatment Action Campaign won before the High Court the government appealed to the Constitutional Court. The Constitutional Court found in favour of Treatment Action Campaign when it held that the government’s program to prevent mother-to-child transmission was unreasonable.

The wider results of the case

A number of other very important principles were stated by the Court in the Treatment Action Campaign case which are equally valuable in this victory for marginalised (HIV/Aids victims), vulnerable (children and mothers) and the indigent (poor people who cannot afford treatment). These principles can be used in a number of cases in the future.

The Constitutional Court, as the highest court in the land, reiterated¹³ that it had the power to adjudicate on socio-economic rights because the Constitution gave them that power. It also said that, within the debate around the separation of powers, it was entitled to examine this issue even if it had a financial implication.¹⁴ The Constitutional Court had previously applied the standard of reasonableness to the socio-economic right in question in *Grootboom*:¹⁵

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are

reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

The usual thinking on social policy matters is that they are executive functions.¹⁶ The Constitutional Court pointed out that most of its decisions have some financial implication. In the *Grootboom* case¹⁷ it reaffirmed what was said previously:¹⁸ that if it ordered legal aid to an accused individual, as a civil right, that too would have a financial implication.

Mr Justice Albie Sachs, one of the 11 justices of the Constitutional Court, in a lecture entitled “Enforcement of Social and Economic Rights” at the Centre for the Study of Human Rights of the London School for Economics¹⁹ said:

The enforcement of social and economic rights is not based on a disregard for all the queries that are raised because they are legitimate queries. It's not a case of the victory of social and economic rights over a conservative philosophy that sees the role of courts to be simply to defend basic liberties. It's based upon a reconciling of deep fundamental principles relating to the role of the courts in the 21st Century. ...

It might be that the statement made, that I heard in Paris not too long ago, might well turn out to be true. The 19th Century was the century in which the executive took command of the state. The 20th Century was the century in which parliament took command of the executive. The 21st Century will be the century in which the judiciary secures the basic rules and processes and values of functioning of both parliament and the executive. I might mention it was a judge that made that prediction. But I think we are entering a new kind of era now and the question is ceasing to be whether or not one can enforce social and economic rights through the courts and the real question is how can it best be done?

In the Treatment Action Campaign case, the Constitutional Court was mindful of the suitability of courts to adjudicate upon socio-economic rights when it stated: “Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role of the court, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate balance”.²⁰

The Constitutional Court, in this case, also undertook a useful examination of the jurisprudence of other jurisdictions on the question of remedies granted where a breach of rights, including socio-economic rights, has taken place. The court looked at the United States, India, Germany, Canada and the United Kingdom and concluded that while three had ordered some form of structural injunction, the United Kingdom and Canada were reluctant to do so, preferring declaratory orders because of the custom of their governments to carry out the wishes of the court.²¹

*In the Grootboom case, Mrs. Irene Grootboom was evicted from her shack on land that was earmarked for low cost housing for people like her and her children. She occupied this land together with a number of other people whose homes were often flooded each year by the seasonal rains. Justice Yacoob of the Constitutional Court found the policy of government to be unreasonable. He stated that reasonableness can be evaluated at the level of legislative programming and its implementation: “Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations”.*²²

Justice Yacoob also added in Grootboom:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic needs. A society must seek to ensure that the bare necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the rights. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.²³

The principles articulated in the Treatment Action Campaign and the Grootboom cases are applicable in future litigation on economic, social and cultural rights.

The networked approach

Generally, the strategy of combined effort or the networked approach is a beneficial process. And it has the additional benefit of providing a collection area for suitable public interest cases.

Access to justice

Lawyers themselves are not always efficient in mobilising public opinion. Community leaders are better at that. In South Africa, an important player in this respect is the community-based paralegal who is an individual drawn from a community and accountable to it. The legal profession in South Africa may soon include the paralegal as a legal service provider under the proposed Legal Practice Bill.

Although the definition of a paralegal is not clear, and the

attorney profession opposes paralegals representing a client without supervision, they are referred to as “barefoot lawyers” who act as citizens’ bureau advisors on legal and quasi-legal matters. They are given training on the mechanics of a law which they assist members of the public with.

While this broadens access to justice through educating people on their rights, the legal service provision aspect raises questions of quality and equality: the rich afford the best and the poor get paralegals. The poor do not know the difference between a lawyer and a paralegal and the results promised by some paralegals are known to be extravagant.

If, as the draft Legal Practice Bill proposes, most of the paralegals migrate towards the legal profession, a very important link with the community will be severed. That would be a great loss because they have been the source of good cases: the Grootboom case came from a paralegal office.

Non-governmental organizations that provide legal assistance are also vital to the public interest litigation strategy. In South Africa, there are a number of such entities providing this service. Already mentioned is the Legal Resources Centre, which is a highly successful public interest NGO and was the instructing attorney in the Treatment Action Campaign case. Others include the Black Sash, the oldest human rights NGO in South Africa, and Lawyers for Human Rights. If we take the Durban Symposium on Public Interest Law definition, Lawyers for Human Rights meets many of their criteria for public interest law practice. The organisation provides legal advice, litigation, education and advocacy on human rights issues.

Lawyers for Human Rights, too, has been involved in previous landmark public interest cases, including the Makwanyane²⁴ case, which abolished the death penalty, in which it was an *amicus curiae*. Most recently, it was successful in having core aspects of the new Immigration Act concerning the arrest and detention of non-nationals declared unconstitutional.²⁵ Under its Security of Farm Workers Project, it set the precedent that a husband may receive his right to remain on a farm through the right of his wife under the right to family life.²⁶

Clinical legal education

Legal advice and assistance is a vital component of public interest law. But such a service is expensive. For NGO's not dealing with legal questions, it is vital to have in their network access to sound legal advice. Many law students, in many parts of the world, undertake to provide this kind of service in University Law Clinics, under supervision, as part of their training. Apart from the United States, there are not many other countries that have Student Practice Rules that permit this.²⁷ In South Africa, the various law clinics have formed their own association that tender for work for the poor and compete with NGO's for funds to improve their service.

Legal aid

While there is some form of legal aid in most countries, there are difficulties in meeting the demand with specified levels of resources, which limit the work that can be done. The South African Legal Aid Board underwent major transformation from a *judicare*²⁸ system to a salaried model with Justice Centres being set up in all major cities and in some rural areas. The *judicare* model became unworkable as lawyers' claims were not processed on time.²⁹ The system for verifying the claims was cumbersome and time-consuming. Then the Legal Aid Board decided to cut the rates and many lawyers felt betrayed. They thought of the system as a means of supplementing their incomes, not as a service to the poor, marginalized and vulnerable sectors of our society. Jeremy Sarkin³⁰ states that during "the 1997/8 financial year 196,749 people received legal aid at a cost of R210 million. Of these, 193,177 were represented by private lawyers".

The Justice Centres are currently staffed by salaried lawyers and support staff, who undertake legal representation of some types of cases only, at a fixed and predictable cost. Because the threshold of the means test of the Legal Aid Board is so low, many fail to qualify for state assistance. They form the major portion of any group needing assistance and have been referred to as the "gap group".

Pro bono publico

One way to address the dire shortage of quality advice is to introduce, or reintroduce in many cases, the idea of *pro bono* work where it becomes an integral part of the social responsibility of every individual lawyer.³¹ The Deputy Chief Justice of South Africa summarized the need appropriately: “Our society needs to have confidence in our courts and other structures designed for the delivery of justice. That confidence is enhanced by the ability of the courts to reach and come to the assistance of the poorest of the poor and the weakest of the weak. The capacity of the judiciary and the courts to do so will be severely impaired if there is insufficient and ineffective involvement in the interaction between the courts and the people who need legal services”.³²

The practice of *pro bono* work is found in many legal systems, often as an act of charity, but it is seldom institutionalised. It is possible to create the obligation for lawyers to undertake this work as part of their duties. A law society (or any legal governing body) could refuse to issue a certificate to practice in any given year if a requisite number of hours of work are not concluded on behalf of the poor, marginalised and vulnerable people. Another provision could be that a lawyer who tenders for government or municipal work must disclose her/his *pro bono* record.

The legal profession should see *pro bono* work “not as an act of charity, nor as a marketing tool, but as a deliberate step in building the sort of society we want, in which all our people can exercise their rights”.³³ Means must be found to recognise and acknowledge their contribution where they exceed the minimum requirements, through awards or advertisements of their names in the newspapers.

Central to this working is an organised operation with a database of needs and a list of service providers. Linked to this could be the non-legal NGO's, the Legal Aid system, paralegals and legal NGO's who are looking for the right test case for public interest cases. The system must be set up not to excuse the state from its responsibility to provide legal representation, but to supplement the existing system of legal aid. Pro Bono Conferences in Argentina, South

Africa and Chile have already canvassed many of these ideas. A conference for Brazil and one for Australia are currently being planned.

Some concluding remarks

The role of civil society organizations in South Africa combined with the organized legal profession provides a useful illustration of how their contributions to human rights have improved and strengthened the rights of a particular group of people. The impact of legal victories on socio-economic rights in one domestic jurisdiction reverberate around the world in solidarity with other poor, vulnerable and marginalized people. One commentator said the following: “One of the most exciting developments, however, is the justiciability of economic and social rights at the domestic level. Examples of the enforcement of cultural rights exist in Canada and Europe, but economic and social rights have long been seen as matters of policy and thus open to being given low prioritization. Elevating these from the arena of policy to the realms of rights opens a new dimension, which can put substantive meaning in the concept of the indivisibility of all human rights.”³⁴

The challenge in many other jurisdictions is perhaps more fundamental: to create some measure of enforceability of socio-economic rights through constitutional protection. But constitutions are frames in which all rights are supposed to be pictured: the interdependent and indivisible civil and political rights, and economic, social and cultural rights. Let us not be confused into thinking that there is no picture, if there is no frame. States have undertaken obligations under the International Covenant on Economic, Social and Cultural Rights “to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put into place.”³⁵

A closer examination of many jurisdictions may reveal that

there is protection for some of these rights in administrative law or in individual pieces of legislation.³⁶ The Committee on Economic, Social and Cultural Rights affirmed this when it said: “The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State have a legitimate expectation, based on the principles of good faith, that all administrative authorities will take into account of the requirements of the Covenant in their decision-making”.

Clarifying the content of the rights requires a strategy not unlike the one just discussed. In this respect, the issue of access to justice is pivotal together with the co-operation from a range of civil society actors which has been illustrated by recent experiences in South Africa. Some may wish to categorize the approach of the Treatment Action Campaign on HIV/Aids as a social movement. Neil Stammers says: “Social movements have typically been defined as collective actors constituted by individuals who understand themselves to share some common interest and who identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction”.³⁷

He goes on to state that there is a potential role for social movements in the reconstruction of Human Rights³⁸ and finally quotes Richard Devlin: “If human rights are to be understood as a challenge to power, as a mode of resistance to domination, then we must confront power in all its manifestations”.³⁹

NOTES

1. Public interest litigation is well established in the United States, Canada and India, for example. For the Indian experience see Circle of Rights at <<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>>. Last access on April 15, 2004.
2. It is interesting to note that "the international system has had its greatest impact where treaty norms have been made part of the domestic law more or less spontaneously (for example as part of constitutional and legislative reform), and not as a result of norm enforcement (through reporting, individual complaints, or confidential inquiry procedures)". Christof Heyns & Frans Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level". *Human Rights Quarterly* 23.3 (2001) 483 at 486.
3. *Black's Law Dictionary*.
4. Held from June 29 to July 8, 1997 under the auspices of the Public Interest Law Initiative, Columbia University, sponsored by the Ford Foundation and the Open Society Institute at the University of Natal, Durban, South Africa <<http://www.pili.org/publications/durban/preface.html>>. Last access on April 15, 2004.
5. Hernando de Soto, "The Economist versus the Terrorist" <http://www.economist.com/people/PrinterFriendly.cfm?Story_ID1559905>. Last access on April 15, 2004.
6. Case number CCT 8/02; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).
7. President Thabo Mbeki was reported to have questioned the link between HIV and AIDS which appears to have had an impact on the Minister of Health's programme of action against the disease.
8. "Health authorities and President Thabo Mbeki have incurred criticism for apparently failing to recognize the magnitude of a problem that could devastate the population according to some medical prognoses." Claire Keeton, "South African government ordered to provide Nevaparine". <<http://www.q.co.za/2001/2001/12/14-tacwins.html>>. Last access on April 15, 2004.
9. Sally Sara of the Australian Broadcasting Corporation reported on one of many demonstrations on 27 November 2001 on the day the High Court of Pretoria was due to hear the matter: "The demonstrators carried white crosses in memory of people who have already died from the epidemic ...".
10. A film on the life of Zackie Achmat was made, titled "It's my Life". See

<<http://www.q.co.za/2001/2001/11/28-STEPSzachie.html>>.

Last access on April 15, 2004.

11. In a press release on April 30, 2002 issued by the Community Law Centre, it stated that they “believed that pregnant women with HIV are entitled to it on the basis of a core right enjoyed by everyone to have access to an essential level of health care service, including reproductive health care, consistent with human dignity. Those who were wealthy automatically enjoy this access, but the poor can only enjoy meaningful access to this right if the State provides it to them free of charge. Every child is also entitled to the basic health care needed to reduce the risk of mother-to-child transmission of HIV”.

12. The Human Rights Commission, originally cited as an *amicus* in the case, “was noted for its absence – indeed amidst allegations that it withdrew as a result of governmental pressure” according to Dr Rachel Murray of University of London’s Birkbeck College. See “Is the HRC Playing Fair?” by Michael Morris: <<http://allafrica.com/stories/200303210601.html>>. Last access on April 15, 2004.

13. *Soobramoney v. Minister of Health, KwaZulu – Natal* 1998 (1) SA; 1997 (12) BCLR 1969 (cc) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA (CC); 2000 (11) BCLR 1169 (CC).

14. See note 18.

15. See note 13, at paragraph 41.

16. See Kevin Hopkins, “Shattering the Divide – When Judges Go Too Far”. <<http://www.derebus.org.za/archives/2002Mar/articles/dicide.htm>>. Last access on April 15, 2004.

17. See note 13.

18. *Ex parte* Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).

19. *Enforcement of Social and Economic Rights*, 27th February 2003. Centre for the Study of Human Rights, London School for Economics. Draft transcript.

20. See note 6, at paragraph 38.

21. See note 6, paragraphs 107 to 111.

22. See note 13, at paragraph 42.

23. See note 13, at paragraph 44.

24. 1995 (3) SA 391 (CC).

25. Press release dated April 22, 2003: *Lawyers for Human Rights and Others v. Minister of Home Affairs and Others*.

26. *Conradie v. Hanekom LCC 8 / RR.*
27. Jeremy Sarkin, "Promoting Access to Justice" 41 *Indicator SA* Vol. 19, n. 3, December 2002 at 44.
28. Lawyers in private practice were hired to represent certain clients who meet the requirements of the means test. They were paid by the Legal Aid Board on a case by case basis.
29. Jeremy Sarkin, note 27 above at 42.
30. See note 21, at 41.
31. Vinodh Jaichand, "A Social and Moral Responsibility", 37 *Indicator SA* Vol. 19, n. 3, December 2002 and "LHR Calls on Lawyers to Embark on Pro Bono Work", *De Rebus*, February 2002.
32. Justice Pius Langa, "Making Rights a Reality", 38 *Indicator SA* Vol. 19, n. 3, December 2002 at 39.
33. Geoff Budlender, "Proposals for a New System", 50 *Indicator SA* Vol. 19, n. 3, December 2002 at 51.
34. Roland Rich, "Solidarity Rights Give Way to Solidifying Rights", *Academy of Social Sciences*, 2002, 25 at 31.
35. Paragraph 2, General Comment Number 9 (Nineteenth Session, 1998). Report of the Committee on Economic, Social and Cultural Rights, UN doc.E/1999/22, pp. 117-121.
36. *Idem*, paragraph 9.
37. Neil Stammers, "Social Movements and the Social Construction of Human Rights". *Human Rights Quarterly*, 21.4 (1999), 980 at 983.
38. See note 37, at 1003/4.
39. See note 37, at 1008.

PAUL CHEVIGNY

The Anne B. & Joel S. Ehrenkranz Professor at
New York University Law School

ABSTRACT

This paper concerns the way the United States government has taken advantage of the situation after September 11, 2001, to increase surveillance over the activities of persons, both at the local and national level, to bring prosecutions where formerly people were left alone, to engage in round-ups of aliens and citizens, and to detain persons suspected of terrorism indefinitely and without trial or the assistance of counsel.

REPRESSION IN THE UNITED STATES AFTER THE SEPTEMBER 11 ATTACK*

Paul Chevigny



The attack on the World Trade Center in New York City two years ago was horrible, an atrocious event of unprecedented proportions. It was a devastating blow for people in the US, who have not experienced a major attack by foreign agents within their own country for literally generations.

All of this is beyond dispute. My point here is that the local and federal US authorities have taken advantage of the outrage and fear produced by the attacks to try to take over control of the people and even of the politics of the country. They treat complaints of the sort that I am making here as acts of disloyalty. Three months after the attacks, the US Attorney General stated: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They provide ammunition to America's enemies and uncertainties to America's friends".¹

Although there have been many actions against aliens and foreign terrorists since September 11, I think the purpose to control the American people and advance a repressive domestic agenda is clear. It has been conducted through limitations on privacy and more generally on the rights of suspects, through massive discrimination against

*Talk given at the IBCCrim (Instituto Brasileiro de Ciências Criminais) Conference in October 2003.

1. Testimony of John Ashcroft, December 6, 2001.

aliens of Arab and Muslim origin, through repressive prosecutions and through interference with habeas corpus. On the other hand, I do not want to exaggerate; fortunately, the scope of the repression has been limited because there has been some resistance by the public, in the courts and even within the government itself.

It is also clear that many of the tools for repression existed before September 11, and even before the present administration came into office. The tools were primed by laws against terrorism adopted during the Clinton administration; and also by old immigration laws, which have always been potentially repressive, as well as by laws about intelligence services concerning aliens. It is true that the Federal government has adopted new laws, e.g. USA Patriot Act, about which you may have heard, and about which I will speak in a moment, but such new legislation only introduces incremental changes. For the most part, the national and local governments have taken advantage of the repressive potential of existing laws; NGO's like the American Civil Liberties Union had been warning us for years about the dangers of those laws.

I know that you here in Brazil as well as visitors from other nations for the most part do not face such problems and are not directly affected by them; for you my presentation is foreign news, interesting, perhaps, but somewhat distant. As far as I am able to, I will therefore relate the problems the Latin American experiences. The contemporary acts of the US Government are not comparable to the legal and extra-legal repression which was current in the Southern Cone some twenty years ago. But some of them will nevertheless be chillingly familiar for many. These include the detention of hundreds of people who were held for long periods, their names unknown to the public. Another tactic that many of you will recognize has been the practice of removing suspects from criminal actions and, on the pretext of security, placing them under military custody, hindering them from being released by habeas corpus and subjecting them to ceaseless interrogation sessions.

You might be familiar with the response of some of the courts. In several cases, the judges have rejected repressive measures by the government. But in the majority of cases,

judges do their best to approve government action if they can, even if they privately might not agree. They hesitate to interfere with the acts of the executive because they are afraid that their orders will be disobeyed. They see no point in weakening their legitimacy by making orders that will be defied in the name of a war on terror.

In some cases the actions of the US government have been in conflict with international humanitarian law or human rights. Those standards are never mentioned by the government and rarely by anyone else in the country except experts in international law.

Intrusions in people's privacy

The high tide of public protest against government intrusions on privacy occurred at the end of the sixties and the beginning of the seventies in the last century. At that time, when the government claimed the power to tap the wires of radical groups in the country, the Supreme Court held that the Constitution required the government to get a judicial warrant based on a showing of probable cause to believe that a crime had been or would be committed.² It was clear at that time, however, that foreign intelligence, not to be used in a domestic criminal case, could be collected with fewer restrictions; the Constitution does not extend to foreigners who are not in the country. A special court was established to grant orders to collect foreign intelligence using a low standard, almost the simple request of the government. Thousands of such orders have been granted over the years.

At about the same time, in the seventies, limitations on police spying against political groups in the US were developed. A famous Senate report recounted the abuses of federal agents in provoking crimes, producing dissension in political groups and disseminating damaging information to outsiders.³ Similar practices were found in state and city police departments, including New York's. After much litigation, a compromise sort of "truce" was reached that generally recognized that the police should not be permitted to spy for political reasons alone, but only based on information that points toward a crime.

The federal and local governments have taken advantage

2. *US v. US District Court*, 407 US 297 (1972).

3. Final Report of the Select Committee to Study Gov'tl Operations with respect to Intelligence Activities, Sen. Rep. 94-755 (1976).

of the public fear after September 11 to permit greater intrusions by electronic means as well as by informers and infiltration, not just in foreign intelligence, but in domestic criminal cases and against domestic political activists.

Now it is permissible for the government to use orders from the foreign intelligence court in domestic criminal cases. A section of the USA Patriot Act, passed immediately after September 11, provides that the foreign intelligence court can order a wiretap if the investigation has a domestic as well as a foreign purpose; the provision was almost invisible in the law, requiring the change of only two words in the old law authorizing foreign intelligence wiretaps.⁴

The foreign intelligence court can also be used for more generalized political spying. The USA Patriot Act permits the foreign intelligence court to grant an order to produce documents in connection with an investigation. This seemingly innocent provision can be used, for example, to ask libraries to reveal what books have been taken out by readers, without being able to tell the readers that they are under investigation. After a storm of criticism, Attorney General Ashcroft announced in September of this year that the Department of Justice had never “used” the Act to force libraries to give up records, claiming that he wanted to counter “distortion and misinformation” concerning the Act.⁵ It may be literally true that the government has never gone to court to get an order to force a library to give information, but an earlier survey of libraries revealed that the FBI had sought information on hundreds of readers.⁶ When there is a law on the books permitting the authorities to coerce the information, it seems unlikely that a librarian would refuse a “voluntary” request. Do I need to add that librarians are both frightened and confused?

At the same time, the government is changing the standards for political surveillance and infiltration by the police, trying to roll back the changes made in the seventies. The Attorney General changed the guidelines for the FBI to open investigations of domestic groups, requiring only “reasonable indication” of criminal activity, or even less for a preliminary inquiry.

Efforts to weaken the protections against political spying have reached the local level in several cities, most recently in New York. In the seventies, a federal lawsuit was brought

4. USA Patriot Act sec. 218. Nancy Chang, “How Democracy Dies: The War on Our Civil Liberties”. In: Cynthia Brown (ed.), *Lost Liberties*. New York: New Press 2003, 43.

5. Eric Lichtblau, “US Says It Has Not Used New Library Records Law”. *New York Times*, September 19, 2003, A20.

6. USA Patriot Act sec. 215. Nancy Chang, *op. cit.*, 44.

against the New York City police, claiming that they had abused their investigative powers for political reasons; it was one of a number of cases that led to the “truce” I described above.⁷ In the eighties, the case was settled; the police agreed not to investigate any political or religious group unless they had information that the group was engaged in crime; such investigations were to be approved by an Authority made up of two police officers and one person from outside. The police agreed to limit dissemination of records about political activity. And – very important – the federal court stood ready to enforce the agreement, which we call in our law a “consent decree.” For seventeen years the court’s order prevailed and apparently worked quite well.

A year ago, in the fall of 2002, the police came back to the federal court to dissolve the settlement after all those years, claiming that in light of the threat of terrorism they could no longer operate with a requirement that investigations be based on specific information pointing toward crime, or with restrictions on dissemination. The plaintiffs lawyers, of which I am one, fought this, but the court approved guidelines for investigation like those of the FBI, and then stepped out of the way, not even incorporating the guidelines in its decision.

Then a small but significant scandal occurred. It turned out that the police had been arresting people at demonstrations in New York against war during the spring of this year, and had been asking them intimidating questions about their political affiliations. Nothing to do with terrorism, nothing to do with foreign influence, just citizens opposed to foreign policy. Peaceful demonstrators in New York were astounded and also frightened; many of them wanted to complain to the court. We went back to court, and the judge, very annoyed by the police tactics, incorporated the new guidelines for investigation into his decision, giving them the force of a court order.

All of these changes in the protections of privacy are significant – the weak warrant requirement for wiretaps in criminal cases and for information from libraries and other institutions, as well as the weakened protections against spying. The most important thing about them, however, the point I want to emphasize to you, is that the changes

7. Chevigny, “Politics and Law in the Control of Local Surveillance”. 69 *Cornell Law Review* 735-784 (1984) describes the situation as it was twenty years ago.

have not been principally directed against foreign terrorism. The foreign intelligence warrants can now be used in domestic matters. The FBI guidelines I discussed above that were changed are not used in investigations of foreign terrorism. The FBI has a special set of guidelines for those investigations that are secret and have been secret for years; I have no idea what they provide. The guidelines that were changed are those for domestic crime and other matters. As this is written, the *New York Times* reports that the new powers have been used extensively in domestic criminal matters.⁸ And the story I have told you about the changes in New York is an example of how the changes are intended to reach the people, the people in the US who do not agree with the government.

8. Eric Lichtblau, "US Uses Terror Law to Pursue Crimes from Drugs to Swindling". *New York Times*, September 28, 2003, A1.

Criminal cases after September 11

Prosecutions for crimes that have arisen from events since September 2001 are few, partly because the time has actually been short – only two years. Moreover the detentions by the government, which I will speak about in a moment, although they have involved hundreds of people, have revealed very little serious crime. It is because there are not many strong cases to prosecute, although the government would like to find them if it could, that the case I am about to describe has occurred. Or so I believe.

This case concerns a woman lawyer in New York City, Lynne Stewart, who was indicted with two others in 2002, charged with giving "material support" to a foreign terrorist organization and also with defrauding and lying to the US government. These are serious charges. The charge of giving material support to a foreign terrorist organization arises out of anti-terrorism laws passed during the Clinton administration which make it a crime to support any organization that the government has labelled a foreign terrorist organization. The crime does not require any actual aid to terrorists or any intention to aid terrorism. All it requires is that the accused have supported one of the forbidden organizations. Thus for example, if a Muslim charity supports organizations in Palestine, and some of them are violently against Israel, then the charity is going to be labelled a foreign terrorist organization and giving

money to it is going to be a crime. This has happened to a number of Muslim organizations.

One organization labelled terrorist under this law was called the Islamic Group, based in Egypt. Sheik Abdel-Rahman, a Muslim religious leader who was supposed to be active in the group, was a refugee from Egypt. In 1995, the sheik, together with a number of others, was convicted of plotting to bomb public places in New York City, including the World Trade Center. Part of his defense was that his preaching was all rhetoric – he worked in a mosque – and he did not actually plan any acts of violence; the jury did not believe that. He was sentenced to life plus a number of years. Lynne Stewart was one of his lawyers; she has a history of association with radical causes and she was sympathetic with the sheik.

While she was working on the sheik's appeal, in the year 2000, Lynne Stewart went with an Arabic translator to visit the sheik in prison. The visit was electronically recorded; so were Ms. Stewart's telephone conversations with the sheik's followers. Because the sheik was considered a politically dangerous prisoner, Ms. Stewart had to sign a "special administrative measure" of the prison that prevented the sheik from communicating with outsiders. During the visit, the sheik wrote a statement that Ms. Stewart released to the press. She is also accused of having talked loudly in English to cover a conversation in Arabic by the sheik and the translator (Stewart speaks no Arabic), which prevented the government from being able to overhear the conversation. The indictment also claims that she agreed over the telephone to permit a lie to be disseminated that the prison was not giving the sheik proper medical care. She is supposed to have told one of the sheik's followers that no one outside would know the truth.

The government's theory of the case was that Ms. Stewart's visit, including the press statement, together with the telephone call, were "material support" for the Islamic Group. The charge of lying to and defrauding the government grew out of her having signed the special administrative measure. The government claims that she never intended to abide by it, and that she therefore lied and committed fraud when she agreed to it.

Let us step back and look at the politics of the case. It is all based on laws that were in effect before the Bush

administration, but more important it is based on acts that occurred before the Bush administration. They occurred during the Clinton administration, but the government did not think they were important enough to prosecute. After September 11, the government found them important enough to bring them back and make a case out of them. Attorney General Ashcroft himself came to New York to announce the indictment in 2002.

I am sure I do not need to tell you that many criminal defense lawyers in the US were outraged by this prosecution. It is based on acts that are no doubt rash, but that many might have done for a client. Moreover, almost all the evidence is based on electronic listening to Ms. Stewart in the prison and on the telephone. The telephone taps were apparently authorized as foreign intelligence wiretaps of the sort that I mentioned earlier. The listening is probably technically permissible, then, but it illustrates a problem with such tactics. Most of us will say something in an unguarded moment, like, “probably no one on the outside will hear about it”, without supposing that we are going to be indicted for conspiracy. The listening makes it extremely difficult to work effectively as a lawyer, intimidates us all and puts us all constantly on guard against government spying. Attorney General Ashcroft hammered the point home by introducing a general regulation authorizing the government to monitor communications between prisoners and their lawyers in all cases, whether they involve terrorism or foreign relations or not.⁹ Once again, September 11 is being used as an excuse for a general limitation on the effectiveness of defense lawyers.

One of the best lawyers in the country agreed to defend Ms. Stewart, and he has persuaded the court to dismiss some of the charges. In August the trial court ruled that Ms. Stewart’s words and acts were not “material support” for an organization, similar to contributing funds. If the meaning of the words included acts like those of Ms. Stewart, he held, they would make the meaning of the law too vague to define a crime. This is no doubt a great relief to the defense bar; Stewart is, however, still charged with lying and fraud about the special administrative regulation. And we still don’t know what is the scope of the crime of “material support” for a foreign terrorist organization.

9. 28 Code of Fed. Regulations sec. 501. 3d. Chang, op. cit., 38.

While the Bush administration was getting the Stewart case ready, they also moved to expand the scope of the anti-terrorism laws. The USA Patriot Act defines “domestic terrorism” as criminal acts that are dangerous to life that “appear to be intended ... to influence government policy by coercion”.¹⁰ There have been no prosecutions for this crime so far, but it seems clear that the administration is trying to use the fear created by acts of international terrorism to extend to acts of violent domestic protest, like the riots in Seattle over international trade and finance.

10. USA Patriot Act sec 802;
18 US Code sec. 1331.

Detentions since September 11

Detentions have been much more widespread than criminal prosecutions. They are perhaps the largest sign of repression up to the present time, although it is too early to tell what the future will hold. Immediately after September 11, the government began rounding up hundreds of persons, mostly aliens, and virtually all of them, so far as we can tell, with Muslim or Arabic last names. For example, two US citizens who have Arabic-sounding names, were arrested returning from a trip to Mexico and detained, one of them for two months.¹¹

11. Kate Martin, “Secret Arrests and Preventive Detention”. In: Cynthia Brown, *op. cit.*, p. 77.

These hundreds were detained on several excuses: minor criminal charges, immigration violations; some were just detained on a vague claim that they were “material witnesses”, a phrase that permits a witness to be detained under American law. The truth is, however, that we do not know exactly how many were detained, what they were detained for, who they are, or what happened to them, because the government simply refused to give any information to the public. As individuals, if their families could find them, they could eventually communicate with them and get the services of a lawyer. The Attorney General increased the secrecy by decreeing that immigration proceedings in the cases were to be closed to the press and public.¹² Although there were many complaints from well-known human rights organizations, the government’s tactic was fairly successful, which would probably not have surprised a lawyer in Latin America; so long as government acts are secret, it is difficult for the public to focus on the actions. These hundreds of detainees received very little

12. *Id.* at 79-80.

sympathy from the public because they were just a vague group of unidentified people; it was supposed that most of them were aliens who had violated their immigration status and were going to be deported. Actually hundreds were finally released into the United States. The status of the persons was largely a pretext; it seems that the same secret tactics could have been used even if most of those detained had been citizens.

NGO's in the US, supported by the press, brought a case to force the government to give the names and the charges, and a judge ruled at first that the government would have to give the names. But the government appealed the order and the appeals court in Washington, DC held that the NGO's had no right to get the names. In making that decision, the court said, "It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role".¹³

13. Center for National Security Studies v. US Dept. of Justice, (D.C. Cir 2003) Case #02-5254, 02-5300.

The appeals court relied on recent cases from other courts that take a similar position that they cannot interfere with executive decisions. The result for the hundreds detained after September 11 was unfortunate. When the government keeps its acts from the public, when its acts are not transparent, there are likely to be hidden abuses against those in custody, as lawyers in Latin America know from experience. This was exactly what the press and the NGO's feared in the case of those detained, and it turned out they were right. Although by this time most of the detainees have been released – some were deported from the United States although hundreds were released into the United States – in the spring of this year the Inspector General of the Justice Department issued a report criticizing the way they had been treated.

It seems that the Inspector General undertook the detailed review, more than three hundred pages, partly because there was so little public information about the detentions. The abuses the inspector found were very much what we would expect under the circumstances. The grounds for suspicion were often next to nothing. The Inspector General gives the example of a Middle Eastern man who ordered a car from a dealer in September, 2001. He was

arrested when he failed to pick up the car, and was not released for six months. In another case, some Middle Eastern men who were construction workers at a school in New York City were stopped for a traffic violation and were arrested because, of course, they had plans for the school in the car. The government took the position that no one could be released until the suspicion of terrorism could be excluded, and as a result they were reluctant to release anyone at all. The detentions were extraordinarily long; the average was more than 80 days, which implies of course that in many cases it was much longer. The three agencies involved – the Federal Bureau of Investigation, the Central Intelligence Agency, and the immigration service – did not have enough staff to process such a large number of persons, and furthermore they were not accustomed to coordinating their work. Without public scrutiny, they had little incentive to expedite the cases.

In many cases, moreover, the inspector reports that the authorities treated those detained as though they had been convicted of terrorist acts, although most of them were not even accused of a crime. Many were detained in a maximum security section of the federal jail in Manhattan. The cells were small, lights and video cameras were on, and when prisoners were out of their cells they were shackled. During the first two weeks after September 11, those detained were unable to contact their families or lawyers at all – they were not permitted to telephone. Some detainees reported that the guards threatened them with phrases like “you are never going to get out of here”.¹⁴

In short, the Inspector General’s report is an extraordinary government document. The inspector recommended a number of changes in procedures for government agencies, but two months later reported that many of them were not being carried out.

The first group of hundreds of detentions, bad as it was, was not the end of the problems for aliens after September 11. The immigration service established a special registration system for men and boys from many countries, mostly Arab or Muslim. Thousands of men have been obliged to go to the authorities to register, and sometimes they are detained without warning. In Los Angeles in December of 2002, the immigration authorities detained 400 people, many of

14. US Dept. of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks” (Washington DC, April 2003).

15. Lawyers Comm for Human Rights, "Imbalance of Powers", 43 (2003).

whom were held under harsh and overcrowded conditions.¹⁵ Wholesale detentions of people just because of their Middle Eastern origins has produced panic and worry in the Muslim community throughout the US.

If the detentions in the US have affected thousands of people, the detentions of so-called enemy combatants have presented the most serious legal issues. In those cases the government has failed or refused to bring any charges, and has also refused to bring the persons before the courts.

In actions against terrorism outside the US, particularly in Afghanistan, the army and other agencies arrested hundreds of people, most of whom were taken to the enclave in Cuba that the United States has carved out at Guantanamo. Although the Cuban government is technically sovereign over Guantanamo, the US has had a lease for a military base there for a hundred years.

Some of the detainees at Guantanamo claim that they were captured virtually by accident, in roundups by local Afghani troops. But they have never been able to get any sort of a hearing in any court. The US has taken a number of positions which are not entirely consistent under international law, but have been generally successful in the American courts and public opinion. Those who were captured in war, it would seem, ought to be treated as prisoners of war under the Geneva Conventions of 1949. Under Article V of the Third Geneva Convention, those detainees whose status is questionable would be entitled to a hearing by a "competent tribunal" to determine their status. But the US has never accepted the title "prisoner of war" for any of the detainees. As you may be aware, a complaint was made on behalf of the detainees to the Inter-American Commission on Human Rights, and on March 12, 2002, the Commission adopted precautionary measures requesting the US "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal". So far as I can determine, the mass media as well as the government in the United States have ignored this important decision.

Rather than have the detainees' status determined by a tribunal, the US government has designated them "enemy combatants", a term with no exact meaning in international law. Some of the detainees sought a writ of habeas corpus

to determine their status, claiming that any person deprived of his liberty by US officials in a place controlled by the US was entitled to the writ. The government argued that Guantanamo was outside the jurisdiction of the United States, and since the detainees did not have the rights of citizens, there was no jurisdiction for a writ of habeas corpus. The Court of Appeals adopted the government's argument and dismissed the petition for habeas corpus.¹⁶

It appears that the government imprisoned people in Guantanamo so that it could claim that there was no jurisdiction in the US courts, and that has been a successful tactic. I believe that the courts are relieved that they can thus avoid reviewing the government's decisions about the reasons for the detentions. But it just leaves open the question what the government wants from the detainees, and about this the government has been clear: it wants intelligence about terrorism. It wants to be able to question the detainees until it is satisfied that it has all possible information; the government has released a few people who seem to have no information. It is clear also why the government is unwilling to call the detainees prisoners of war; if they were such prisoners, they would have no obligation to give information to their captors.

There are two cases of persons who are citizens detained in the United States and are labelled "enemy combatants". They have filed petitions for habeas corpus. Their cases cannot be so easily dismissed as the Guantanamo cases; they squarely present the issue of the powers of the executive. Although few, they are legally significant.

The first case, Hamdi, involves a US citizen who actually fought in Afghanistan on behalf of the Taliban. The President designated him an enemy combatant and sent him to a military detention center. His father brought a petition for habeas corpus to determine his status, and the appeals court issued a narrow opinion.¹⁷ The court held that, being a citizen, he was entitled to petition for a writ of habeas corpus. But the President has the power in time of war to declare him an enemy combatant, the court said, a determination which the courts cannot review; so the court could not grant the petition or help him in any way. Concerning the argument that Hamdi had a right to a hearing under the Geneva Convention, the court simply said that the US courts have

16. *Al Odah v. US* 321 F.2d 1134 (D.C. Cir. 2003).

17. *Hamdi v. Rumsfeld*, 316 F.2d 450 (4th Cir. 2003).

no jurisdiction to hear cases under the Convention. This case is perhaps less alarming because it appears that Hamdi participated in an enemy army.

The other case is much more disturbing. No one claims that Jose Padilla, a US citizen, participated in combat against the US in any recognized sense. He was first arrested as a witness because he was suspected of having knowledge about terrorism, and a lawyer was appointed to represent him. Not a very unusual case these days. Suddenly, because the government suspected him of having an important connection to terrorist plots, Padilla was declared an enemy combatant and sent to military custody. Neither his lawyer nor anyone else was allowed to contact him; he was and is incommunicado. His lawyer sought a writ of habeas corpus. Like the court in the Hamdi case, this new court held that Padilla had the right to file the petition, and that the President had the power to declare him an enemy combatant.¹⁸ But the court went on to say that Padilla had the right to question the basis for that determination, and he had to have access to his lawyer; he could not be held incommunicado. And there is the place where the conflict with the executive was joined.

18. Padilla ex. rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

The government refused to comply with the order and tried to get the judge to change his mind. The judge at the first level of the federal courts was evidently frustrated and even infuriated. But the government has never permitted Padilla to see his lawyer, and the judge at the first level has given up and sent the case for a special appeal, not yet decided. In the course of trying to keep Padilla incommunicado, the government finally explained what its interrogators want. I quote here at length from the statement of an admiral in the Defense Intelligence Agency (DIA):

Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began. Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even

seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example – even if only for a limited duration or for a specific purpose – can undo months of work and may permanently shut down the interrogation process.

It is clear, I think, what this means. The authorities claim that the President has the power to take a person out of the court process and imprison him under military custody. They go on, in effect, to claim that they are not going to torture the man; they are going to question him until they get the answers they want. And if the court tells them they cannot do it as they please, they are going to disobey.

This position has echoes of the legal situation during the repressions in Latin America. The government claims that it can arrest people and put them in military custody at its discretion. While there, they will be incommunicado and will be subjected to questioning without limit. An application for relief in the form of habeas corpus or some similar remedy is technically available but useless; the petitioner can file the application, but if the court grants it, the government is going to defy the court. This puts the courts in an embarrassing position. They have no means of enforcing their orders without the aid of executive power, so if their order in response to a petition for habeas corpus is defied, they are in worse condition than if they never granted the order. They are likely to look for ways to avoid granting the petition.

The sad history of detentions during past periods of repression has led the Inter-American system of international human rights to establish a special place for habeas corpus. As you are probably aware, the Inter-American Court held in the eighties that habeas corpus is such an important, basic right that it cannot be suspended even in time of national emergency; it is not derogable.¹⁹ There is no doubt, I think, that the Court is trying to make it clear to governments in the Western hemisphere that the pattern of seizing and interrogating people, incommunicado and without legal recourse, is the essential tool of repression; if the power of the courts to grant habeas corpus petitions is recognized, the power of repression is vastly weakened. The International

19. Inter-American Court of Human Rights, Advisory Opinions 8/87 and 9/87.

Covenant on Civil and Political Rights has not been so definite; it appears that the protections of habeas corpus may be suspended in time of national emergency, but only if a full declaration of the emergency conditions is made to the Secretary-General of the United Nations.

The US has, of course, made no such declaration, and it is very unlikely that it will. The US Constitution provides that the right to habeas corpus cannot be suspended except “when in cases of rebellion or invasion the public safety may require it”.²⁰ The government has not taken any official position that habeas corpus, or any other right, is suspended; it would be very difficult politically for the government to take that position. Instead it has avoided confronting the problem by taking the position, in effect, that people called enemy combatants are not entitled to the benefits of the writ, even if they are citizens. No doubt the government would say that it is engaged in a war against terrorism and that Padilla has participated in that war; but that implies that any person who is alleged to be connected to foreign terrorism can be detained incommunicado without an effective remedy. It is an extraordinary and dangerous position.

What are the lessons of the parallels between the experiences in the two halves of the hemisphere? They suggest that the responses of governments to serious threats to national security are likely to be similar. The government will take advantage of the threat not only to act against its enemies, but also to control and discipline the mass of the population, citizens as well as aliens. In doing so, it will justify intrusions on privacy, politically motivated prosecutions and massive detentions. It will try to keep as much of its work secret as possible, so that there will be less public protest; and the secrecy itself will both conceal and encourage abuses. Perhaps most important, the government will make it clear to the courts that if they defy the executive, the executive is going to defy them. Even a thoroughly independent judiciary is likely to fear that it is ineffective under those circumstances.

On the other hand, I do not want to paint too bleak a picture. Certainly there are problems in the United States pointing toward repression. Invasions of privacy, increased political surveillance, interference with the work of lawyers,

20. US Constitution, Art. I, sec. 9, clause 2.

harassment of people because of their Arab or Muslim connections, government secrecy and detentions without recourse for purposes of unlimited interrogation are disturbing, indeed intimidating, to the judiciary as well as to the rest of us in the US.

There is an enormous amount of opposition, however, to the measures taken up to now. Thousands march to demonstrate against the government, and dozens like me prepare papers criticizing the government. So far, no serious action has been taken against us. Attorney General Ashcroft has been travelling around the country trying to counter the criticism, which means that it is beginning to worry the government. Some judges, particularly at the lower level, have rejected legal arguments by the government, although the success on appeal has not been good. Nevertheless the appeals process is not finished. And some government officials have gone on record against government abuses, as in the case of the Inspector General's criticism of the detention of aliens.

Although Congress did almost nothing to resist the USA Patriot Act in 2001, some efforts to introduce more repressive programs have been rejected by Congress in the past two years. Some of the intrusive surveillance provisions of the Act are due to expire in 2005.²¹

21. USA Patriot Act sec. 224.

Moreover, the USA Patriot Act has not proved to be a completely repressive measure. In order to allay the fears that were raised by the Act, Congress provided in one section that the Inspector General of the Justice Department was to receive complaints of violations of civil liberties and report on them;²² it is under those provisions that the Inspector General has conducted his investigations. The inspector could have ignored those provisions, or just have gone through the motions of investigation; very few would have noticed. Instead he took his job seriously. As long as there are vigilant citizens and responsible officials, the powers of repression may remain limited.

22. USA Patriot Act, sec 1001.



SERGIO VIEIRA DE MELLO

Born in Rio de Janeiro, in 1948. When he was a student of Philosophy and Social Sciences at the Sorbonne, at 21 of age, he began his brilliant career in the United Nations, in the course of which he accrued an enviable record of successful missions. During most of his career, he worked for the United Nations High Commissioner for Refugees (UNHCR), in Geneva. In 1981, he was appointed senior political adviser to the UN forces in Lebanon. Thereafter, he held several important posts at the UNHCR headquarters, in Cambodia and in East Africa, until he was appointed Assistant High Commissioner for Refugees, in 1996. He briefly acted as special representative of the Secretary-General in Kosovo, and as transitional administrator of East Timor. In September 12, 2002, he was appointed UN High Commissioner for Human Rights, a post from which he took leave of absence in May, 2003, to act as Special Representative of Secretary-General Kofi Annan in Iraq. While fulfilling this last mission, he died under tragic circumstances in August 19, 2003.

Here we present two texts by Mr. De Mello. The first paper comments on the role of the UN in view of the conflict in Iraq and the grievous current threats to human rights and international security. The second text deals with crucial issues for the understanding of human rights as they stand today.

ONLY MEMBER STATES CAN MAKE THE UN WORK

Sergio Vieira de Mello



The military preponderance of the US and Britain must not lead us to think international stability can be ensured by force. If the international system is to be based on something other than might, states will have to return to the institution they built: the UN. That institution is facing a major crisis. We must find ways to overcome it or face harrowing consequences.

The debates over Iraq – before the war and now in its aftermath – have shown the powers of the world unable to speak to each other in a common language. One has seen this most dramatically in global institutions. From the beginning of the UN, the Security Council has been responsible for security, whilst the Commission on Human Rights has sought to protect human rights. Yet, in the case of Iraq, the Council was and, apparently, is still unable to agree about security and the role of the UN. Likewise the Human Rights Commission, now approaching the end of its annual six-week session, is proving itself nearly unable to discuss human rights.

Is there a way to renew, or rediscover, a common language that could take us beyond this impasse? I think there is, provided we can dramatically change the relationship between security and human rights.

The Security Council debate was about weapons of mass

destruction – a classic question of security, one all too familiar to the Council since its inception. It was unable (or unwilling) to imagine its mandate extending beyond this narrow basis. Its debate was not about the many other questions of obvious interest to members, like the lack of democracy in Iraq and the acts of terror visited on political opponents, real or imagined, by its government. The Council found itself unable to talk about a wider subject, which was how to deal with the security dangers posed by a regime that flagrantly violated the human rights of its citizens and, given the tendency brutality has of pushing beyond borders, went on to attack its neighbors. In the end, the main participants in the debate were seen as talking about one issue while in fact having others in mind.

Perhaps Security Council members thought that human rights issues should more properly be discussed in the Commission on Human Rights. But in the current session of the Commission, many of the 53 states represented have been arguing that it should not consider Iraq since the Council was already doing so. Some maintained that Iraqi matters were primarily to do with security, not human rights, and so should remain with the Council. Another line of argument held that human rights in Iraq were primarily a matter of the war – given its toll in civilian lives – and not of human-rights violations that long preceded war. But the manifest desire of most states, here as in New York, has been to avoid opening a discussion of human rights in Iraq.

In the weeks before war began, I spoke with many of the principals involved in the Council debate. It should be obvious, but perhaps deserves mentioning, that none bore ill will toward the UN; none wanted the Security Council to fail in reaching a consensus. What they lacked was a way of talking about the problem – of framing it politically – so that the Council might reach consensus. The impasse at the Commission on Human Rights is similar, perhaps worse.

Both venues lacked a way to conceptualize security in human-rights terms and to recognize that gross violations of human rights are very often at the core of domestic and international insecurity. This is not a new problem. Consider the list of the UN's recent failures, most notably

its inability to prevent genocide in Rwanda and massacre in Srebrenica. What did these have in common?

They were grave emergencies, followed by horrible slaughters, the nature of which did not fit into the conceptual schemes of the Security Council or even of the Commission on Human Rights. They were not threats to international security as conventionally recognized and understood by the Council; nor was the Commission able to have any effect on their terrible progress.

This is the signal political failure of our era: the failure to understand the security threat posed by gross violations of human rights, and the failure to achieve practical consensus in acting against such a threat. Surely we can now see, as we contemplate the loss of thousands of lives in Iraq, that the price of our failure is getting higher. It was already tragically high.

We must look to the member states of the UN, especially to those sitting on the Security Council – and above all to China, France, Russia, the UK and the US – to grapple with this failure and to overcome it in a way that is based on responsibilities, not rivalries. To criticize the UN as such for failing to achieve consensus on Iraq is to miss the point altogether. When member states make a mess of their own rules or disrupt their own collective political architecture, it is wrong to blame the UN or its Secretary-General, whose good offices are not put to use often enough. Kofi Annan has tirelessly advocated consensus on these vital issues, but he cannot force consensus. Nor am I in a position to do so with the Commission on Human Rights, whose mandates are carried out by my office but which I do not direct or control. Power rightly rests with member states. They must find a way to use it in addressing human rights as a core factor in domestic and international security.

The member states of the UN have an opportunity. By their recent actions, they have further revealed some of the shortcomings of the institution they created (as well as highlighting some of its strengths). All states, especially the Security Council members, should take this opportunity to look at their relations squarely and consider the means for reform. Dysfunctional definitions of security have revealed their inutility in the current crisis. At

present, the long-suffering people of Iraq are bearing the pain, first of war, now of a contested and contentious peace. It has to be apparent that the time has arrived for all states to redefine global security – to put human rights at the center of this concept. In doing so, all nations must exercise their responsibility in a way commensurate with their strength. Only then will responsible states, rather than the merely strong powers, be able to bring lasting stability to our world.

FIVE QUESTIONS FOR THE HUMAN RIGHTS FIELD*

Sergio Vieira de Mello



... I will be only mentioning five questions for which I do not know the answers: ... five questions with no answers, or perhaps the beginning of an answer to each. And I could have added more. I thought upon this, but I decided to limit myself to those five, which Scott Malcolmson, who has recently joined my office, has helped me put together. ...

* Edited Speech at Office of the High Commissioner for Human Rights (OHCHR) Symposium. New York, February 18, 2003.

1. Non-state terrorism

The question that was touched upon by many speakers [during the symposium on the OHCHR] is that Mary Robinson¹ used to refer as “the T question”, non-state terrorism.

One could hardly have imagined two years ago that one would be grateful for the predictability of state terrorism, which was relatively comprehensible. One could hardly have imagined how bewildered, how impotent, we were to feel since September 2001, in dealing with this new and horrific form of international criminality. Its crimes have taken forms that are unrecognizably contrary to state terror because state terror, so to speak, can be contained. Non-state terrorism is not containable in the same way. And certainly not through some of the means that are being used to contain it. I will come back to this point later.

If you look at recent acts of non-state terrorism, people

1. UN High Commissioner for Human Rights, 1997-2002.

have tended to reach for very broad explanations, none of which is highly convincing. Faced with an act of state terror, we look to the particular state. With non-state terrorism, we have tended to look much more broadly, to the hierarchy of global power or to the predicament of those parts of our world that are the most miserable. We also tend to look at the situation in the occupied territories in Israel. We have put all these explanations together and yet we are unable to clarify the genesis and the rationale for such forms of terror.

In other words, non-state terrorism is, indeed, not wholly new. In a way, it could be taken as a category into which states can put their opponents and do what they please with the explanation that these are non-state terrorists and, therefore, outside the reach of law. The risks of such abuse are widespread as Mary Robinson and I have reported to the counter-terrorist committee of the Security Council, to which I will be submitting a paper on this subject, based on an opportunistic understanding of the novelty of a group like Al Qaeda.

Nonetheless, non-state terrorism cannot be set to fit easily into Human Rights categories. For instance, large-scale politically motivated killings of civilians meant to instill terror are currently described as aiming at or threatening or undermining human rights. I was even approached by a leading supporter of our office and of the human rights cause, who told me that I should not use the expression “serious violation of human rights” when referring to terrorist acts, because only states could deny human rights.

Now while I appreciate the reasoning for such careful wording, and there are indeed strong reasons to do so, I also believe most people would find such language curious, if not evasive. And I believe that any government intent on repelling such attacks will not be impressed by such conceptual precision.

These are real problems. As human rights defenders, when faced with something new, we must find new responses that are credible to states, but also to human rights activists and to the people outside these two circles – that is to say, the vast majority, who may look to us for guidance. And we must be cautious, yes, but we must be quick and forceful.

2. Limits of growth of rights and rights treaties

The second question is what are the limits of growth of human rights? There can only be so many categories of human rights to be found in the world. Perhaps we are deluding ourselves, particularly in the mechanism of the Human Rights Commission.

I suspect, obviously, there are still other categories or areas to be discovered. In other words, the expansion of rights, more precisely and more humbly, the expansion of rights categories has made the past 25 years an exhilarating time. ...

I think this has been true above all of women rights. It is very true of development rights, to which perhaps we have not paid sufficient attention here, but which will continue to be an issue of contention in the mechanisms of the Human Rights Commission, as I could witness in the meeting of the Working Group on the Right for Development, that held its fourth session in Geneva recently. ...

I attended the inauguration of our new president in Brasilia, on the 1st January and must tell you that I felt proud of being a Brazilian when I heard him state in his inauguration speech to Parliament, that he felt ashamed (he used the word “*vergonha*”, which is fairly strong), and that all Brazilians should feel ashamed as long as other Brazilians suffered from hunger and from the denial of the fundamental economical and social rights, like access to health, access to education and to employment.

On the following morning, he granted me an audience. We spent quite a while discussing this pretty anachronistic separation between civil and political rights and economical and social rights. He said that, paradoxically, in Brazil we had regained most civil and political rights (most, I must underline), before we were able to focus on economical and social rights – where, perhaps, logically, it should have been the other way round.

Yet there is a limit to the expansion of these different types or categories of rights, as there is a limit also to the proliferation of treaties and mechanisms and special procedures.

Japan interestingly at this meeting of the Working Group

on the Right to Development, to which I referred earlier, went as far as suggesting that the right for development was being misused and might lead to, as Japan put it, a futile rerun of the New International Economic Order concept of the 60's and the 70's, i.e. that we were basically wasting our time.

I would suggest that that is not so and that, on the contrary, we have gone far beyond the NIEO's pretty futile debates of the 60's and 70's, which were clearly linked to the days of the Cold War. And if we are deluding ourselves, it is not by trying to address fundamental questions, such as the right to development, but perhaps by diverting our attention to other issues that are somewhat marginal.

I am in full agreement ... that we should engage even more than my predecessors and in these first few months I have in fact engaged the heads of international financial institutions, and indeed the new director-general of the World Trade Organization. It is particularly in these areas that some of the fundamental obstacles to the realization of those rights are to be found, in addition to the need for reforms at the national level, which I think we developing countries should implement. And I am saying this because we all know what is blocking access to cheap drugs to fight HIV/Aids. We all know what it is and where it is being blocked, and it is in Geneva, at the WTO. ...

3. Religion

Let me move on to the third question: Can the human rights milieu come to better terms with religion?

While freedom of religion is of course recognized as a human right, safeguarded by international treaties, freedom of worship is probably the oldest human right of all. And in the course of time it has set a pattern for the concept of group rights as it has set the patterns for super-national and transnational rights. ...

Nonetheless, one has long had the sense in human rights circles that freedom of worship was a vestige as well as precursor. One had a sense that although religious life typically aims far beyond everyday life, it is simultaneously one of the historically richest and most local of human activities.

There is an uneasy fit with the mainstream of human rights thinking. Religion is, for example, an often too aggressive entrance formative to fit comfortably within the category of cultural diversity.

I have been wrestling with these notions in recent weeks and have yet not found any satisfactory answer.

Over the past decades, it seems that we in the human rights world have to recognize an increase in the force of religious feeling, not a decrease. If we premise our approach to religion on the idea that faith will in due course either disappear or become politically insignificant, I think we will be courting failure and fooling ourselves.

Do we advocate freedom of religion or freedom of extreme forms of religion, such as fundamentalism?

The distinction is not a simple one to draw: Christians, Jews and Muslims and possibly other religions (although I have looked for forms of extremism in Buddhism, I have failed to find them) have had their different forms of extremism. When does the advocacy of freedom of worship or indeed of cultural diversity cross the line to advocacy of something that wants or intends to restrict those more general rights for which we fight?

4. The self-interest of states

Let me now move to a fourth question: Can we improve our understanding of the self-interest of states? As states have come to integrate a concern for human rights into their practices (which is undoubtedly true), they have also been learning to manipulate human rights to serve their own purposes.

The dangers here are great. In the end, however, either states will find human rights useful, or, better still, central for their national interest, or human rights will have a somewhat limited and hollow future.

The human rights discourse often seems to yearn for the eventual disappearance of states in favor of universal human rights – or this is at least the somewhat simplistic vision that some people have of human rights rhetoric. By analogy with religion, world government is the scatology of human rights. But in our field, as in theology, the end of time is still far away, we might as well speak of this frankly.

Human rights cannot advance far without states, and we must come to grips with the self-interest of states if human rights are to be successfully mainstreamed. This is not a counsel of despair; rather I think we will be much more successful at advancing rights if we think tangibly about specific states, at specific times, and target our intervention with this in mind. And we must always try to articulate human rights in terms of opportunities as well as obligations. ...

5. Practical results in human rights

Finally, the question of practical results. This question relates to the other four. Our impact must be on lives as they are lived. I state this plainly because this is something which can be plainly seen, as I have in the course of the 34 years that I have spent serving this organization, fortunately not in New York or Geneva only, but mostly in the field.

When we deal with human rights, we are dealing with everyday power. We oppose, yes, many forms of power, we oppose abuses of power, but, inevitably, we also use power. I can think of tactical reasons to pretend otherwise, it is quite possible to do so, but I see no reason to believe otherwise.

As High Commissioner, I am trying to emphasize ... how the presence of the OHCHR in the field can affect the situation on the ground. ... This has been the bulk of my own experience. "How can I make this work now?" is the very difficult question I am trying to answer. How can I merge the highest level of sophistication, which I believe we have, and legal consistency, which I do not think we have, with the daily lives of people who desperately need our help and do not have time to wait? They almost certainly do not need workshops, although this one is definitely useful, because we are in a crisis.

I am saying this because I have noticed that many activities of what I can now call my office in the field are focused towards bringing people together, organizing seminars, organizing workshops. They may be all useful in the short term, but I do not think they have a real longer term impact on the lives of those who need us. And there will be a significant change in the use of our resources in that respect.

Now, if our rules and our debates cannot protect the weak, then what value do they have, what values do meetings such as this have? I do not of course mean to suggest that working for the advancements of human rights is merely an exercise of power, because the human rights movement is not about winning or losing. It is an open project. I can never afford to declare victory, neither can you. On the contrary, we need to renew our commitments to this struggle, and certainly we cannot announce the end of anything. If there is anything we can announce, it is just the very beginning.

I have heard it said that the so-called human rights discourse has become worn out and that the human rights vogue is already passed. I find this ridiculous, as you would. I imagine it might be true if we were ever to believe that we have all the answers. My belief is that we have many of the right questions and the beginning of some of the answers. I have raised old ones and rephrased some. I have not provided you, deliberately, with any answers. I wish I could.

But I thought that by raising these five fundamental questions and leaving them with you, I might in the end receive some clues, some indications from you, that would make me want to continue in this job at the end of the day. I do not think we should be timid, in any way, and this is certainly not a timid audience. This is not a time for smugness nor for cynicism. And let me repeat what I said earlier, that I count on you.

Sur – Human Rights University Network was created in 2002 with the mission of establishing closer links among human rights academics and of promoting greater cooperation between them and the United Nations. The Network has now over 130 associates from 36 countries, including professors, members of international organizations and UN officials.

Sur aims at strengthening and deepening collaboration among academics in human rights, increasing their participation and voice before UN agencies, international organizations and universities. In this context, the Network has created *Sur – International Journal on Human Rights*, with the objective of consolidating a channel of communication and promotion of innovative research. The Journal intends to add another perspective to this debate that considers the singularity of Southern Hemisphere countries.

Sur – International Journal on Human Rights is a biannual academic publication, edited in English, Portuguese and Spanish, and also available in electronic format at <<http://www.surjournal.org>>.



THE FORD FOUNDATION

