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INFORMATION AND HUMAN RIGHTS

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PRESENTATION



SUR 18 was produced in collaboration with the organizations **Article 19** (Brazil and United Kingdom) and **Fundar** (Mexico). In this issue's thematic dossier, we have published articles that analyze the many relationships between information and human rights, with the ultimate goal of answering the questions: What is the relationship between human rights and information and how can information be used to guarantee human rights? This issue also carries articles on other topics related to today's human rights agenda.

Thematic dossier: Information and Human Rights

Until recently, many human rights organizations from the Global South concentrated their activities on the defense of freedoms threatened by dictatorial regimes. In this context, their main strategy was whistleblowing, closely linked to the constant search for access to information on violations and the production of a counter narrative capable of including human rights concerns in political debates. Since they found no resonance in their own governments, the organizations very often directed their whistleblowing reports to foreign governments and international organizations, in an attempt to persuade them to exert external pressure on their own countries.*

Following the democratization of many societies in the Global South, human rights organizations began to reinvent their relationship with the State and with the system's other actors, as well as how they engaged with the population of the countries where they were operating. But the persistence of violations even after the fall of the dictatorships and the lack of transparency of many governments from the South meant that the production of counter narratives continued to be the main working tool of these organizations. Information, therefore, was still their primary raw material, since combating human rights violations necessarily requires knowledge of them (locations where they occur, the main agents involved, the nature of the victims and the frequency of occurrences etc.). Their reports, however, previously submitted to foreign governments and international organizations, were now directed at local actors, with the expectation that, armed with information about the violations and endowed with voting power and other channels of participation, they themselves would exert pressure on their governments. Furthermore, after democratization, in addition to combating abuses, many human rights organizations from the Global South aspired to become legitimate actors in the formulation of public policies to guarantee human rights, particularly the rights of minorities that are very often not represented by the majority voting system.

In this context, the information produced by the public authorities, in the form of internal reports, became fundamental for the work of civil society. These days, organizations want data not only on rights violations committed by the State, such as statistics on torture and po-

lice violence, but also activities related to public management and administration. Sometimes, they want to know about decision-making processes (how and when decisions are made to build new infrastructure in the country, for example, or the process for determining how the country will vote in the UN Human Rights Council), while at other times they are more interested in the results (how many prisoners there are in given city or region, or the size of the budget to be allocated to public health). Therefore, access to information was transformed into one of the main claims of social organizations working in a wide range of fields, and the issue of publicity and transparency of the State became a key one. This movement has scored some significant victories in recent years, and a growing number of governments have committed to the principles of Open Government** or approved different versions of freedom of information laws.***

This legislation has played an important role in the field of transitional justice, by permitting that human rights violations committed by dictatorial governments finally come to light and, in some cases, that those responsible for the violations are brought to justice. In their article **Access to Information, Access to Justice: The Challenges to Accountability in Peru**, Jo-Marie Burt and Casey Cagley examine, with a focus on Peru, the obstacles faced by citizens pursuing justice for atrocities committed in the past.

As the case of Peru examined by Burt and Cagley demonstrates, the approval of new freedom of information laws no doubt represents important progress, but the implementation of this legislation has also shown that it is not enough to make governments truly transparent. Very often, the laws only require governments to release data in response to a freedom of information request. They do not, therefore, require the State to produce reports that

**The Open Government Partnership is an initiative created by eight countries (South Africa, Brazil, South Korea, United States, Philippines, Indonesia, Mexico, Norway and United Kingdom) to promote government transparency. The Declaration of Open Government was signed by the initial eight members in 2011, and by the end of 2012 the network had been joined by 57 nations (Available at: <http://www.state.gov/r/pa/prs/ps/2012/09/198255.htm>). The initiative takes into account the different stages of public transparency in each of the member countries, which is why each country has its own plan of action for implementing the principles of open government. More information on the initiative is available at: <http://www.opengovpartnership.org>.

***In 1990, only 13 countries had some form of Freedom of Information legislation (Cf. Toby Mendel. 2007. Access to information: the existing State of affairs around the world. In VILLANUEVA, Ernesto. *Derecho de la información, culturas y sistemas jurídicos comparados*. México: Universidad Nacional Autónoma de México). By 2010, however, approximately 70 countries had adopted such a law. (Cf. Roberts, Alasdair S. 2010. A Great and Revolutionary Law? The First Four Years of India's Right to Information Act. *Public Administration Review*, vol.70, n. 6, p. 25-933.). Among them, South Africa (2000), Brazil (2012), Colombia (2012), South Korea (1998), India (2005), Indonesia (2010), Mexico (2002) and Peru (2003).

*K. Sikkink coined the term "boomerang effect" to describe this type of work by civil society organizations from countries living under non-democratic regimes.

make the existing data intelligible, nor to release the information on their own accord. The problem is exacerbated when the State does not even produce the data that is essential for the social control of its activities. Another area in which transparency is deficient is information on private actors that are subsidized by public funding, such as mining companies, or that operate public concessions, such as telecommunications providers.

Many organizations from the South have spent time producing reports that translate government data into comprehensible information that can inform the working strategies of organized civil society or the political decisions of citizens. Human rights organizations have also pressured their governments to measure their performance against indicators that can help identify and combat inequalities in access to rights. This is the topic of the article by Laura Pautassi, entitled **Monitoring Access to Information from the Perspective of Human Rights Indicators**, in which the author discusses the mechanism adopted recently by the Inter-American System of Human Rights concerning the obligation of States-Parties to provide information under article 19 of the Protocol of San Salvador.

The relationship between information and human rights, however, is not limited to the field of government transparency. The lack of free access to information produced in the private sphere can also intensify power imbalances or even restrict access to rights for particularly vulnerable groups. The clearest example of this last risk is the pharmaceutical industry, which charges astronomical prices for medicines protected by patent laws, effectively preventing access to health for entire populations. The privatization of scientific production by publishers of academic journals is another example. The issue gained notoriety recently with the death of Aaron Swartz, an American activist who allegedly committed suicide while he was the defendant in a prolonged case of copyright violation. Sérgio Amadeu da Silveira opens this issue of SUR with a profile of Swartz (**Aaron Swartz and the Battles for Freedom of Knowledge**), linking his life to the current struggles for freedom of knowledge given the toughening of intellectual property laws and the efforts of the copyright industry to subordinate human rights to the control of the sources of creation.

Since the internet has taken on a crucial role in the production and dissemination of information, it is natural for it to have become a battleground between the public interest and private interests, as illustrated by the Swartz case. On this point, civil society and governments have sought to adopt regulations intended to balance these two sides of the scale, such as so-called Internet Freedom, the subject of another article in this issue. In **Internet Freedom is not Enough: Towards an Internet Based on Human Rights**, Alberto J. Cerda Silva argues that the measures proposed by this set of public and private initiatives are not sufficient to achieve their proposed goal, which is to contribute to the progressive realization of human rights and the functioning of democratic societies.

The importance of the internet as a vehicle of communication and information also means that internet access is now a key aspect of economic and social inclusion. To correct inequalities in this area, civil society organizations and governments have created programs aimed at the so-called "digital inclusion" of groups that face difficulty accessing the web. Fernanda Ribeiro Rosa, in another article from this issue's dossier on Information and Human Rights, **Digital Inclusion as Public Policy: Disputes in the Human Rights Field**, defends the importance of address-

ing digital inclusion as a social right, which, based on the dialogue in the field of education and the concept of digital literacy, goes beyond simple access to ICT and incorporates other social skills and practices that are necessary in the current informational stage of society.

Non-thematic articles

This issue also carries five additional articles on other relevant topics for today's human rights agenda.

In **Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil**, Pétalla Brandão Timo examines a particularly relevant contemporary issue: the human rights violations that have occurred in Brazil as a result of the implementation of mega development projects, such as the Belo Monte hydroelectric complex, and preparations for mega-events like the 2014 World Cup.

Two articles address economic and social rights. In **Land Rights as Human Rights: The Case for a Specific Right to Land**, Jérémie Gilbert offers arguments for the incorporation of the right to land as a human right in international treaties, since to date it still only appears associated with other rights. In **Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo**, Daniel W. Liang Wang and Octavio Luiz Motta Ferraz analyze legal cases related to the right to health in São Paulo in which the litigants are represented by public defenders and prosecutors, in order to determine whether the cases have benefited the most disadvantaged citizens and contributed to the expansion of access to health.

Another article looks at the principal UN mechanism for the international monitoring of human rights. In **The United Nations Human Rights Council: Six Years on**, Marisa Viegas e Silva critically examines the changes introduced to this UN body in the first six years of its work.

In **Human Rights, Extradition and the Death Penalty: Reflections on the Stand-Off between Botswana and South Africa**, Obonye Jonas examines the deadlock between the two African nations concerning the extradition of Botswana citizens who are imprisoned in South Africa and accused in their country of origin of crimes that carry the death penalty.

Finally, Antonio Moreira Maués, in **Supra-Legality of International Human Rights Treaties and Constitutional Interpretation**, analyzes the impacts of a decision in 2008 by the Supreme Court on the hierarchy of international human rights treaties in Brazilian law, when the court adopted the thesis of supra-legality.



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ABSTRACT

The article analyzes how production of and access to information form part of the process of developing and using human rights indicators, particularly in terms of their integration into the mechanism recently created in the Inter-American human rights system that corresponds to States Parties' reporting obligations in light of Article 19 of the Protocol of San Salvador. Next, the article analyzes the adopted indicators, the categories and crosscutting principles that complement the system of indicators, and how the standard of production of and access to information operates within that context. Finally, taking into account the principles of the interdependence, universality, and indivisibility of human rights, it identifies ways to strengthen and achieve a robust institution framework for economic, social and cultural rights (ESCR).

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KEYWORDS

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MONITORING ACCESS TO INFORMATION FROM THE PERSPECTIVE OF HUMAN RIGHTS INDICATORS

Laura Pautassi

1 Introduction

The first decade of the twenty-first century has seen numerous advances in the development of instruments that can assess the degree to which States are complying with human rights law. While there is consensus that the “full realization of a human right” exists insofar as effective mechanisms—be they administrative, judicial, or quasi-judicial—are available so that every person can demand respect for, protection, and effectiveness of a right, whether it be a civil or political right (CPR) or an economic, social, or cultural right (ESCR), the debate is over how to measure compliance or a decline in compliance.

The full realization of rights is therefore linked to a State’s compliance with negative and positive obligations, and this generates tension, especially in terms of agreeing to the parameters that will be used to determine the degree of compliance with obligations that need to be fulfilled in order to achieve full realization of the right. And that is where defining standards to interpret the scope of each right, from which levels of compliance with those obligations can be determined, in turn enables the development of indicators to measure a State’s compliance.

The standards, which are fundamental declarations about the desired result—based on an interpretation of a human rights treaty or a national constitution—are not designed to be directly verified (ABRAMOVICH, 2007). The definition of each standard includes the conditions necessary to be able to apply the obligations contained within the right; indicators are thus an indispensable tool by which to empirically reflect a State’s compliance with its obligations. In other words, human rights indicators are measurement tools—both quantitative and qualitative—that reflect the efforts undertaken by a State to fulfil human rights.

Conceptually and methodologically, defining human rights indicators

Notes to this text start on page 71.

starts with identifying the dimensions of different human rights, which are then translated into categories and variables that may be observed. However, because these deal with human rights, there are certain complexities, which are even more visible when it comes to ESCR because they contain obligations to act, with goals and results to achieve. This differentiates them from social indicators, because those identify—and quantify—a phenomenon in and of itself, and establish scales, behaviors, indices, and variables related to that phenomenon, with some interrelationships between the relevant areas (education, health, work, welfare), whereas human rights indicators, conceptually speaking, arise from the principle of the interdependence, indivisibility, and universality of human rights¹ such that they not only quantify but also qualify the behavior of States and establish relationships between civil and political rights and progress made in fulfilling ESCR. All three types of rights are characterized by comprehensiveness, which covers State responsibility in the three branches of government: executive, legislative, and judicial. This difference between socioeconomic indicators and human rights indicators applies in turn to the instruments of measurement: the former measure the degree of development achieved, whereas the latter measure whether progress has indeed been made.

In light of the obligations assumed by the States in terms of ESCR, not only with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, but also with regard to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”, or PSS), and in other human rights instruments, it has become necessary to have instruments to evaluate state conduct. In fact, the definition and use of indicators is not only a useful tool, but also an unavoidable obligation, especially if the goal is adequate supervision and monitoring of compliance with the obligations set forth in instruments ratified by the States.

What was stated earlier by way of introduction is also linked to a fundamental precondition for the use of indicators as a method to oversee compliance with human rights: the production of information. And the availability of that information, which includes the production and dissemination of public information, in turn requires efforts by the State to generate sources that will allow the use of indicators, because this is part of a State’s obligation to inform, both at the request of its citizens and before the international bodies that have the mandate to review periodic reports. In other words, it is a positive obligation of the State, and it will be analyzed as a crosscutting category of compliance with rights. However, while there has been significant progress in developing statistical systems and other public information sources, there is still a major deficit in most Latin American countries.

As demonstrated throughout this article, the production of and access to information forms part of the process of developing and using human rights indicators. Moreover, this obligation has been included in a mechanism recently created in the Inter-American System of Human Rights (IASHR), which corresponds to States’ reporting obligations under Article 19 of the Protocol of

San Salvador, about the measures taken to fulfill ESCRs. I refer specifically to the indicators that were approved to measure the obligations established in that instrument, which aim to evaluate the degree of compliance with a first grouping of rights (right to health, to social security, to education) (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

Given the importance of the Protocol of San Salvador, since it is the primary instrument of social rights within the Inter-American system, what follows is an analysis of the type of indicator definitions that have been adopted to measure the rights in question, and the categories and cross-cutting principles incorporated in that system of indicators, which is the way to monitor compliance with state obligations. In that context, the standard of production and access to information is central, and will be analyzed and highlighted throughout the article, in order to ultimately suggest ways to guarantee the right of access to public information.

2 ESCR and keys for measurement

The definition of human rights indicators, particularly those for ESCR, is founded on – and justified by – several bases, both conceptual and empirical. First, and directly linked to the very definition of ESCR, are both the text of the ICESCR, with the interpretations adopted by the international monitoring body—the Committee on Economic, Social and Cultural Rights (CESCR)²—and the Protocol of San Salvador (PSS), with the Working Group that serves as a regional monitoring body to analyze the national reports provided for in the PSS (WG).

In both of them, it is established that States commit to undertaking the measures necessary to fulfill the content of the rights to the maximum of their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1999, art. 1³). That is to say, the need for measurement is established under the unavoidable premise that the satisfaction of ESCR is only achieved in the long term because, in order to measure the obligation to make progress and the ban on backsliding, it is necessary to measure the scope of the right (for example, coverage of the education sector) in comparison to earlier and later levels of coverage, and with results (using the same example, the percentage enrolled in school, and those who complete primary school, disaggregated by sex, ethnicity, and geographic zone; and the illiteracy rate among those over age 15, by sex, ethnicity, age group, geographic area).

Thus, the indicators that are chosen must be appropriate to be able to capture that dynamic process, which means having elements that allow one to measure whether progress was made or whether there was a decline relative to a previous situation or exercise of rights.

In the case of the Protocol of San Salvador, which entered into effect on November 16, 1999,⁴ it incorporated a list of ESCR in the regional human rights structure, while also setting up two mechanisms to oversee compliance: it established a system to receive individual complaints of alleged violations of

the right to freedom of association (article 8.1) and education (article 13), and it established a second mechanism that consisted of a system of periodic reports on the progressive measures that States have adopted to ensure respect for the rights established therein (article 19 PSS).

However, the delay between the passage of the Protocol and its entry into force meant that it did not get the necessary push to be able to initiate appropriate monitoring in a timely manner; the OAS General Assembly did not approve the “Standards for the preparation of the periodic reports pursuant to the Protocol of San Salvador” until 2005 (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2005). These standards established the use of periodic reports from State Parties, containing progress indicators, as a way to verify compliance with the obligations set forth in the PSS. However, the General Assembly decided that the reporting would not start until a Working Group (hereafter referred to as WG) was established—and its composition agreed—to analyze these periodic reports, and also determined that the same body would approve the progress indicators against which the State Parties should report. Consequently, and for that purpose, it mandated that the Inter-American Commission on Human Rights (IACHR) propose indicators for evaluating the reports of the States.

In 2007, the IACHR presented the document “Guidelines for preparation of progress indicators in the area of economic, social, and cultural rights” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2008) where, in contrast to other international monitoring mechanisms that have adopted indicators (NACIONES UNIDAS, 2008 y 2006), the proposal combined progress indicators—that use qualitative indicators of progress—with crosscutting categories that pertain to all rights, and then applied them to two rights: social security and health. At the same time, adopting a human rights perspective, it established a link between commitments made by the States in the human rights instruments and internal public policies. This, was well received by different human rights advocates, academics, and specialized agencies, and it became the main regional basis for progress indicators.⁵

In parallel, the Group’s members were appointed and, in May 2010, the General Assembly decided that it was operational and commissioned the drafting of a new proposal for process indicators, based on the Standards (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2005) and the IACHR document (2008). The WG divided the different rights in the Protocol into two groupings; a first includes the right to health (art. 10, PSS), social security (art. 9, PSS) and education (art. 13 PSS), and for these, indicators were established in an initial document, postponing indicators for a second grouping comprised of the right to work and trade union rights (art. 6; 7 and 8 PSS), the right to adequate nutrition (art. 12 PSS), the right to a healthy environment (art. 11 PSS) and the right to the benefits of culture (art. 14 PSS).⁶ The WG also determined that each grouping of rights, and each right itself, should consider gender equality, the specific rights of boys, girls, and adolescents, the elderly, persons with disabilities, ethnic and cultural diversity, and the involvement of civil society organizations in the formulation of legislative proposals and public policies, which correspond to the other rights established by the Protocol (articles 15 to 18). Thus, the WG offers States a gradual

but comprehensive process for defining indicators for all of the obligations in the Protocol, and facilitates dialogue and the participation of a range of government and social actors, as well as organizations and the general public.

The Group then drafted an initial document that was released for open consultation for about six months, so that States, civil society, different United Nations organizations, universities, social organizations, unions, women's organizations, indigenous groups, communities of African descent, academics, and other interested parties could submit comments. After receiving a number of comments and statements of support, the WG incorporated many of the suggestions and contributions, and drafted the final document, "Progress indicators for measuring rights under the Protocol of San Salvador" (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011), which was submitted in December 2011 for approval by the General Assembly. The resolution approving the document was presented by Argentina and co-sponsored by Peru, and submitted for final approval by the OAS General Assembly in the XLII ordinary session held in Cochabamba, Bolivia in June 2012 (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2012). In that resolution, the countries in the region adopted the document and pledged to submit the first national progress report in June 2014.

It is worth highlighting the significance of this event: that a system of progress indicators was approved in the plenary, operationalizing article 19 of the Protocol. This launched a new mechanism with significant potential, both for States and for civil society, to jointly advance the Inter-American system's ability to measure compliance with ESCR. And this is a mechanism not limited to measurement. Rather, it questions and motivates reviews of the way in which public policies are implemented in all arenas of state action. And in this mechanism, as described below, access to information is key to promoting the good performance of the monitoring system, and also to accountability.

On the other hand, we are facing a field which is still under construction, because, as has been stated already, while there are valuable precedents of indicator systems taking hold in the universal human rights system, in the European Union (HOHNERLEIN, 2010) and in the Inter-American system the challenge is to empower and flesh out these measurement systems and to incorporate new instruments for measuring rights.

At the same time, it has been established that the reports should be prepared through a participatory dialogue with different sectors of civil society (principle of participation) in a complementary way that does not replicate the reports drafted for other human rights protection mechanisms (principle of complementarity). Meanwhile, information about indicators, rights, and reports should be broadly and publically accessible; information about rights will be assumed to be public (principle of publicity) and should be relevant and accurate, avoiding generalizations or confusion with progress indicators or economic development indicators. These principles are strengthened under the premise of respect to the freedom of sovereign States' to choose the means and policies they will use to comply with the obligations assumed in the Protocol (degree of discretion).

3 Qualitative indicators and signs of progress: new keys to interpretation

A first thing to highlight is that the measurement of the implementation of rights implies a *process*, which begins when States develop goals and objectives for development and for compliance with the ESCR that they have ascribed to, both constitutionally and in the Protocol, together with and with the participation of the intended beneficiaries of the social rights (PAUTASSI, 2010). This process is constantly demanded by civil society organizations, particularly human rights organizations and various organizations that specialize in social rights,⁷ who regularly insist on participatory mechanisms and channels, and seek methodologies to exert citizen control over state action (CECCHINI, 2010). In other cases, indicators are set because of a court ruling, as was the case when the Colombian Constitutional Court, noting that the government had not provided sufficient resources nor generated public policies to defend the rights of forcibly displaced persons, ordered that it present detailed information on the policies developed for that vulnerable group, including the rights to food, health, education, freedom and security (UPRIMNY; SANCHEZ, 2010). The highest court asked that comparable indicators be defined to allow verification of the degree of compliance, and to guarantee a culture of accountability.

In fact, indicators are a useful way to articulate and process complaints and claims against the guarantors of rights, but also to formulate public policies and programs that facilitate the effective realization of human rights (NACIONES UNIDAS, 2012). In that sense, the purpose of indicators is to strengthen processes within the States, and thereby overcome the idea of a simple progress report, so that it becomes a useful methodology for the ongoing design and evaluation of public policies, seeking to ensure compliance with all economic, social and cultural rights. The system recently developed in the IAHRs does not promote comparison between States, nor does it aspire to rank their compliance but rather to evaluate each national process separately.

Therefore, the challenge and the opportunity presented by the indicator system is that it does not represent a mere formality regarding compliance with international commitments, but instead is an extremely useful tool for the implementation of a human rights focus, which is already in place in the region—at least in theory—both in terms of internal public policies and in terms of the effective fulfillment of social rights (ABRAMOVICH, 2006). It is also necessary for States to provide certain guarantees upon starting a political dialogue with civil society organizations in the context of this process. In other words, States must inform the channels they will adopt, the indicators that will be used at the start of the dialogue and its subsequent development. In addition, it is important to clarify how each state that ratified the Protocol will widely publicize the process of defining and calculating indicators.

Indicators are quantitative parameters or units of measure that can be achieved and verified in relation to a criterion; in this case, the criterion is defined in relation to the provisions set forth in the Protocol of San Salvador. Unlike the indicators used in the social sciences, indicators used to measure human rights are able to evaluate and quantify the degree of compliance with those obligations defined by the

regulations and standards that arise from the official interpretation of those standards (ABRAMOVICH, 2007). Specifically, rights indicators respond to the normative content of these regulations and standards and to the correlative obligations of States as derived from international human rights standards.

In turn, the interpretive bodies authorized by the Conventions, in this case the PSS Working Group, define the indicators based on an interpretation of the obligations found in the Protocol. But not exclusively so—they are also based on standards previously set by other bodies, like the Committee of the ICESCR, which are an unavoidable reference as regards the interpretation—and specification—of the scope of the obligations contained in each of the ESCR.

The opportunity and the challenge lies in how the body of human rights material allows for the construction of units of measure—both quantitative and qualitative—that are appropriate for evaluating the fulfillment of social rights. The common temptation is to turn to existing socioeconomic development indicators, which are quite useful for measuring a country's development but do not measure compliance with rights. At the same time, many countries in the region have major shortcomings when it comes to the production of statistical information, both in terms of infrastructure and trained staff and in terms of human rights expertise. This, among other reasons, limits the availability of information that can be used to measure a broad set of state obligations, adding further complexity to an already complex system.

Thus, it is critical that States take seriously the importance of promoting the incorporation of a human rights focus into the production of statistical information, qualitative information, and every other information source recognized by established validation mechanisms. That is how the indicators can operationalize the content of ESCRs. Of course, there is no single simple formula to explicitly reflect those norms and crosscutting principles in the selection of indicators (NACIONES UNIDAS, 2012).

The following section schematically analyzes the indicators and signs of progress proposed by the PSS WG to measure progressive compliance with the rights to health, social security, and education.

3.1 Progress indicators: beyond progressivity

For each right that falls under each of the groupings into which the rights addressed by the Protocol are divided, the WG proposes that States organize the required information under a model composed of three types of quantitative indicators (structural, process, and outcome indicators) and also qualitative signs of progress⁸. The latter are qualitative parameters or units of measure that can be achieved and verified in relation to a criterion. Their distinctive characteristic is that they capture the definition of the situation that the social actor himself creates, and the meaning that he or she gives to the evaluated phenomenon. Signs of progress, therefore, become key to, interpreting the facts. Their purpose is precisely to reflect the progressive changes up to the desired point (objective) and keep track of achievements that contribute to that objective (EARL; CARDEN; SMUTYLO, 2002), without being limited to a predetermined category or an existing (statistical) scale

of measurement. They also allow for the participation of rights bearers and the intended beneficiaries of state policies, and bring in a new way to guarantee citizen participation. By combining the two—indicators and signs of progress—one can determine the degree of compliance with each right.

The *structural* indicators identify the mechanisms that the State has in place to implement the rights in the Protocol; in other words, they collect information in order to evaluate how the State's institutional apparatus and legal system are organized to perform the obligations under the Protocol. They also consider whether measures, legal standards, programs or policies exist or have been adopted, or whether public agencies have been created in order to implement those rights.

Process indicators seek to measure the quality and extent of a State's efforts to implement rights, by measuring the coverage and content of specific strategies, programs, or policies aimed at achieving objectives that correspond to the realization of a particular right. These indicators help to directly monitor the application of public policies, and in many cases they can provide information on changes in the quality or coverage of social programs during a given time period, and translate that into figures or percentages, which makes them more dynamic and evolutionary than structural indicators.

Finally, *outcome* indicators seek to measure the impact of government strategies and interventions, indicating how those government activities impact the aspects that define the effectiveness of a right in the Protocol, and provide a quantitatively verifiable and comparable measurement of the state's actions in terms of the progressive realization of rights.

In turn, the WG (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011) proposes to organize indicators into three conceptual categories:

- a. **Incorporation of the right:** in the legal system, and guarantees established by the States,
- b. **Financial context and budgetary commitment:** referring to the availability of state resources for public social spending, and how it is distributed.
- c. **State or institutional capabilities:** that describe the technical-instrumental and distributive aspects of resources within the State apparatus (administrative, technical, political, and institutional capabilities). In other words, it means analyzing under what parameters the State, through its different local and regional branches, deals with a set of social questions. Using state capacity as a category entails reviewing the rules of play within the state apparatus, interagency relations, financial commitments, the division of tasks, and the staff needed to carry out those tasks. Putting social rights into effect depends, among other things, on the capacity of institutional bodies (judicial branches, public ministries, administrative and executive branch agencies, and legislative bodies) to provide the necessary goods, services, and regulations. This category is key, because rights are only realized through the joint action of the state's institutional framework, with various public agencies making their contributions to the achievement of the desired result (ALONSO, 2007).

These categories in turn are complemented by crosscutting human rights norms that apply to all of the rights in the Protocol, and that seek to determine whether the conditions exist in each of the States for people to effectively exercise social rights through the free operation of institutions and deliberative democratic processes. A crosscutting norm can also be considered a “procedural right” that connects to the fulfillment of a given “substantive right” and is therefore defined as corresponding to that right (NACIONES UNIDAS, 2012). As an example, the right of access to information in the context of the substantive right to health can be measured using an indicator like “percentage of health facilities that have in place confidentiality protocols for health information” (process indicator); or, for the right to education, a crosscutting indicator related to access to information could be “mechanisms established to disseminate and increase access to educational statistics and databases” (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

The three crosscutting issues that were defined for the national reports on compliance with the obligations of the protocol of San Salvador are:

- i. **Equality and non-discrimination:** this is an obligation with “immediate effect” arising from ESCR; States are required to guarantee that all of the rights are exercised in conditions of equality and without discrimination, and do everything they can to prevent differential treatment based on factors that are expressly prohibited in the PSS.
- ii. **Access to justice:** broadly interpreted, this includes the examination of the legal and factual possibility of access to administrative and legal demand and protection mechanisms. It involves ascertaining whether the State has provided necessary and sufficient means and mechanisms for people to lodge complaints and file claims and lawsuits, and whether it has guaranteed the means to monitor the process through to the execution and implementation of the ruling.
- iii. **Access to information and political participation:** understood as a key tool for public participation and democratic safeguards, as well as for accountability (horizontal and vertical responsibility) in public policies that implement the rights enshrined in the Protocol. It has to do with States’ obligation to produce—under internationally validated criteria—a sufficient quantity of high quality information, and to guarantee free and public access to anyone who needs it.

These crosscutting themes and categories will be incorporated into a matrix or a set of tables that includes progress indicators for each right as developed by the PSS WG. In accordance with the OAS General Assembly resolution that approved the indicators for the first grouping of rights, indicators are approved with the “...understanding that these are guidelines and criteria for the States parties, who will be able to adapt them to the sources of information available to them in order to comply with the provisions of the Protocol” (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2012, consid. 2).

Similarly, it ordered the States to submit their first reports two years after the aforementioned document was approved, anticipated in June 2014. Within 90 days

after receiving the report from the State Party, the WG will send its remarks and recommendations to the State Party (preliminary conclusions). Subsequently, the State can comment on those preliminary conclusions, and a date will then be set for a public session between the State representative. Civil society and specialized organizations can submit information to the WG, and may participate in the public hearings that the Group convenes. Later, and within 90 days after the session with the State Party, the WG will issue its final conclusions, which must be adopted by consensus, and shall notify the State Party in writing (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

That is as far as the guidelines go in the WG's Indicators Document. But, in order to start the process described throughout this article, it is critical to immediately begin strengthening the capacity of States to produce and disseminate information.

4 Mainstreaming and access to information

As I have emphasized, one of the special characteristics of how indicators are defined in the IAHRIS is the explicit link made between public policies and instruments for measuring human rights. Institutional categories are defined specifically to untangle potential knots that could impede progress in implementing ESCR, which not only puts attention on the political will of governments, but also examines whether effective conditions are in place to be able to implement a development plan that respects all human rights.

At all times, we seek to relate the standards in the Protocol—as well as those in other human rights instruments—to the interagency relationships that exist within the State, to financial capacity and current budgetary commitments, and to the availability of staff to carry forward the process of incorporating a human rights focus that enables the fulfillment of each social right in the Protocol. For example, a structural indicator of state capacity is the existence of measures and actions such as social policies that aim to eradicate political clientelism, which itself is not just a measure of state corruption and a lack of transparency, but also violates the principles of equality and non-discrimination. Similarly, a process indicator of state capacity is the number of complaints that have been received and resolved regarding corruption in access to social plans and programs. In other words, indicators refer to the standards, and the standards refer to the norms in the Protocol; and once indicators are put into place, they provide information on how much progress has been made—or how much backsliding has occurred—in fulfilling rights.⁹

Thus, it is critical to have adequate, accessible, and high quality information in sufficient quantities so as to supply the essential elements for evaluating and then monitoring compliance with State obligations.¹⁰ But of course, for monitoring as well as for drafting and designing public policies, it is necessary to have data and empirical evidence, because these are key inputs for the design of any policy. In other words, it is impossible to even think about developing a policy without having access to sufficient quality information, because without empirical data, one cannot reliably know what the situation or field of intervention is that the future policy seeks to affect.

But, in addition to the diagnostic stage prior to policy formulation, information is also essential for the entire implementation process, and for the process of evaluating

and measuring impact and progress. The evaluation process may be carried out in technical ways, applying various methodological tools aimed at measuring the impact of public policies (ex ante, ex post, and results assessments, among others) in response to the demands and complaints related to verifying the results of public policies, in the context of citizen oversight and monitoring, and civil society transparency and control processes¹¹. Likewise, it is important to connect the production of information to societal demands for accountability and to any legitimate inquiry about policy outcomes, which requires going beyond averages and indices, and disaggregating information at the levels of populations, territories, gender, and ethnicity, in order to shed light on the impacts of public policies (PAUTASSI, 2010).

Accordingly, the countries in the region have undertaken efforts to develop their statistical systems, which have had diverse and varying levels of development; some are more comprehensive than others, some include gender indicators, and others include data that allowed for review of the living conditions of indigenous communities or communities of African descent, and with relatively less qualitative information. However, it is interesting to note that the States have gradually incorporated some mechanisms to collect and use qualitative information, particularly studies of public perception and social service satisfaction surveys, among other things (CECCHINI, 2010).

Indeed, from a perspective of economic, social, and cultural rights, the right of access to information has been enshrined in the American Convention on Human Rights (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 1978, art. 13), in the International Covenant on Civil and Political Rights (NACIONES UNIDAS, 1966, art. 19) and in the Universal Declaration of Human Rights (NACIONES UNIDAS, 1948, art. 19). Furthermore, access to and production of information is part of a standard that takes note of the commitments made by States in terms of carrying out and enforcing the obligations related to each right.

Under the principle of the interdependence of human rights, and to the extent that freedom of expression is an essential prerequisite for every democracy, awareness and dissemination of matters of public interest is critical in order for the citizenry to have the ability to know everything concerning the management of public affairs. The Inter-American Court of Human Rights has said as much, adopting the protection and promotion of a broad concept of freedom of expression, and maintaining that it is a cornerstone for the very existence of a democratic society. It is, in short, a precondition for a community to be sufficiently informed when they exercise their options, and it is indispensable for the formation of public opinion.¹²

The extension of the right to information presupposes the existence of two complementary and inter-dependent factors: i) the right to freely express oneself, and thereby share information, and ii) the right to be informed, which is both the freedom to express ideas and the freedom to receive them. The right to information, as a fundamental right, not only protects the person who shares the information, but rather protects just as strongly the right to receive the information. Only by comprehensively protecting both aspects of communication can the right—and the proper functioning of a democratic system—be guaranteed.

At the same time, the right to receive information can be exercised by citizens in two ways: first, through active behavior, seeking information, investigating, obtaining

access to public or private sources of information; or, second, by acting as a passive subject, waiting for the information, with the right to receive information from those who inform or opine, freely choosing the data and ideas that are of interest.

Meanwhile, the Office of the Special Rapporteur for Freedom of Expression at the Inter-American Commission for Human Rights has determined that Article 13 of the American Convention provides the parameters according to which States should adjust their laws regarding access to information. It establishes that the right to access should be guaranteed by the States, without restriction except in cases that should be examined using strict criteria. Confidentiality is an exception to the rule of publicizing public information, and it should be interpreted strictly. But the interpretation goes even further, by assuming that the state is not only obligated to respect the right by allowing access to archives and databases, but that it also has a positive obligation to produce information under certain circumstances, like in situations where the obligation to produce information is linked to the exercise of rights by persons who have been historically excluded or discriminated against, or in order to be able effectively combat the causes of violations of rights. This is indicated, for example, by the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Belém do Pará) (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1995) which established the obligation of States to “ensure research and the gathering of statistics and other relevant information relating to the causes, consequences, and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eliminate violence against women and to formulate and implement the necessary changes” (article 8h). This requirement to produce information is clearly enforceable as a right.

The IACHR has also indicated that States’ obligation to establish legal arrangements that protect the exercise of the right to information should, at a minimum, include the following content: they must (1) always use as a foundation the principle of maximum disclosure; (2) presume openness regarding meetings and key documents; (3) have broad definitions of the type of information that is accessible, short deadlines and reasonable costs; (4) provide for independent review of denials of requests for information and appeals; (5) have penalties for failure to provide the requested information; and, (6) establish an appropriate procedure for determining exceptions to access.¹³

Accordingly, the right to information applies to the production and dissemination of official statistics, whether those are produced with available administrative records or with more complex statistical tools; in any case, the central role of statistics and other databases is vital to guarantee this right (NACIONES UNIDAS, 2012). The Fundamental Principles of Official Statistics adopted in 1994 by the United Nations Statistical Commission highlighted the obligation of official statistical systems to fulfill people’s right to information, an obligation that applies to public institutions which should share specialized information that is of public interest, while citizens have the corresponding right to request that information. Meanwhile, the third principle States that official statistics should also facilitate a correct interpretation of the data and present information according to scientific standards on the sources, methods and procedures used (NACIONES UNIDAS, 2012).

Given how important it is to a country's institutional functioning that its citizenry be duly informed using information of sufficient quality, quantity, and availability, the right to information firmly guarantees the right of an individual to receive the messages that a third party wants to share; the right also implies that the State and third parties are prohibited from unduly interfering in that communication, and that there is a right to obtain the information necessary to assess authorities' performance and the fulfillment of national goals. For this reason, the ability of a citizen to access the information contained in State files, statistics, or records is a sign of the extent to which he or she has the right to participate in government affairs.

Consideration of the right of access to information has not been ignored by the ICESCR Committee, which, through its observations, has clarified States' obligations to effectively monitor or supervise the degree of effectiveness of ESCR in direct connection with the right to information. In this way, it has indicated that the production of information is a prerequisite for such monitoring, and has mandated that States should reveal information and guarantee access to it, in various fields. Finally, it has established the obligation to develop an action plan or a strategy for making progress in realizing rights. The obligations to monitor, gather information, and prepare an action plan for progressive implementation are immediate steps that are extendible to all of the rights in the agreement.¹⁴ Therefore, limited resources cannot be used as an excuse for noncompliance, which again shows the importance of social rights standards for making progress on the enforceability of rights.

In recent years, progress has also been made in creating observatories to disseminate information linked to civil society complaints,¹⁵ or information generated by specialized United Nations bodies.¹⁶ These observatories focus on issues related to gender, poverty, the environment, children's rights, legal decisions, and other topics, and they play an important role in bringing together demands for access to information with activities to audit and verify compliance with government obligations.¹⁷

In sum, and for the measurement purposes promoted by the indicator system in the Protocol of San Salvador, for each right the States will be required to report—always in a crosscutting manner—on how they guarantee access to information and on how they are making progress in developing and providing sources of information. For example, in the health arena, the structural indicator would be the characteristics, coverage (geographic and thematic), budget, and jurisdiction of the health statistics system, and the States would be asked to report on the frequency and ways in which the information is updated. In terms of process indicators, the States would be asked to report on the coverage of information campaigns, actions, and awareness programs about the effects of alcohol, smoking, and other drug use. Finally, for the result indicator, the States would calculate the percentage of children born with congenital defects as a result of alcohol consumption or drug use; and for a qualitative sign of progress, the States would be required to report on the characteristics and coverage of the media that disseminates information about the rights people have with regard to health care (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011).

Lastly, it should be emphasized again that international monitoring, accountability, and citizen audits alone are insufficient to achieve transformation in how public policies are designed and implemented; rather, it requires effective

transformation in order to fully incorporate a human rights perspective. As Yamin (2010) States, the crucial point for the recognition and guarantee of rights is their legally binding nature—both internationally and domestically—which makes it necessary to translate the strong normative human rights discourse into concrete tools for action and for the provision of rights by all those involved (public decision makers, service providers, and the recipients and users of social services).

5 Indicators, information and monitoring: an unbeatable triad.

Throughout this article, I have presented the primary characteristics of access to information as a crosscutting theme, which, as its name indicates, cuts across the system that monitors compliance—in this case, compliance with the obligations set forth in the Protocol of San Salvador. Since the system is new, with implementation just getting underway, surely during the course of implementation it will be adjusted in order to become more precise, without losing an overarching view of the different themes and categories that should be captured regarding the progressive fulfillment of ESCR. And without prejudice to the possibility—and advisability—of developing indicators for civil and political rights, which, in light of issues surrounding access to and use of information, would complement the broader human rights package.

One of the primary issues that arises in terms of public policies in the region is the need to promote integrated rather than sectoral actions, not just in terms of social policies but also within the broader arena of state action. Many of the piecemeal interventions carried out by different parts of the state apparatus, particularly related to access to and production of information, have led to the development of practices and data that are out of context, and that fail to respect the required comprehensiveness of human rights.

The use and dissemination of human rights indicators as a way to enforce rights has many advantages, some of which have been described in this article; one worth highlighting is that not only will it result in compliance with the reporting requirements to international monitoring mechanisms like the Working Group to Examine the National Reports Envisioned in the PSS, it also has value as a tool for States to “self-assess” their policies, and then begin to transform them, under the principle of reciprocity, so that they are designed in a way that is consistent with a human rights focus. Furthermore, the use of indicators will allow for the creation of new mechanisms for generating and circulating public information among different state agencies, and it will enable the development and dissemination of a new culture of public information.

Developing a new institutional framework within the state apparatus doubtless will require numerous transformative processes, and as yet it is unknown how those will be developed and what course they will take. However, an institutional framework that supports a system of indicators and signs of progress, which will become stronger and more consolidated over time, presents an excellent opportunity to build relationships between the State and civil society, between citizens that support a renewed invigoration of the public sphere, which will certainly be more participatory, more informed, and more democratic.

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NOTES

1. According to the article 5 of the Vienna Declaration and Program of Action (CONFERÊNCIA MUNDIAL DE DIREITOS HUMANOS, 1993, 5).
2. One of the ICESCR Committee's first efforts to develop the indicator system was carried out based on the work of Danilo Türk (1990), then Special Rapporteur of the Commission on Human Rights, who warned of the limitations of the available indicators and said that it was impossible to make global or local comparisons; this suggestion was in turn adopted by the ICESCR Committee.
3. See article 2 of ICESCR.
4. While 19 States signed the Protocol, to date only 16 have deposited an instrument of ratification. It would be a good time for civil society and the different IAHR bodies to promote an active process of ratification of this important instrument.
5. The preparation of this document was led by Commissioner Víctor Abramovich and was approved by the IACHR.
6. The Working Group drafted the second grouping of rights, which was opened for consultation with the States on December 3, 2012 and remained open until September 2013. Once States' comments had been received, the WG analyzed and incorporated the ones that it deemed relevant, and took a new

draft for review and approval by the OAS General Assembly. For more information, or to send comments or concerns to the Working Group, visit <http://www.oas.org/es/sedi/ddse/paginas/index-7_GT.asp>. Last accessed on: May 2013.

7. The input submitted by civil society can be found on the IACHR web page, and the comments on the WG document—including letters of support for the mechanism—can be found on the SEDI-OAS web page (http://www.oas.org/es/sedi/ddse/paginas/index-7_GT.asp). Last accessed on: May 2013.

8. This follows the core concepts of the OEA-GTPSS document (2011).

9. It is worth highlighting the important advances made by civil society in all of the country capitals in terms of indicator development, especially in the field of international transparency; for example, in Colombia, there's the National Integrity System, or accountability and monitoring commitments related to access to information (<http://www.transparenciacolombia.org.co>).

10. It is possible to structure the individual components of each right in a way that links them to the related governmental obligations, and this has been done in the system of the four As: the availability of services, institutions or measures for the enjoyment of the right in question; accessibility, meaning a guarantee that the right can be exercised without discrimination; acceptability, meaning that the State is responsible for guaranteeing adequate quality of the services that it provides; and adaptability, which requires that States provide services that are adapted to the needs of the rights (TOMASEVSKI, 2001). This system 4-A scheme, established a relationships between the content of the right and its very nature with the positive and negative obligations of the States, but it also incorporated the idea of the enforceability of the right by establishing the need to respect these issues when designing a public policy in the social arena. See Abramovich (2006), Vázquez and Delaplace (2011).

11. The accountability tools developed by Global Integrity (<http://www.globalintegrity.org>) and the World Bank's efforts in the area of access to information (<http://datacatalog.worldbank.org/>) feature prominently; see, among others, De Janvry, and Dethier (2012) and Knack and Manning (2002) and World Bank (2007). In the last publication, the World Bank proposes the application and implementation of a human rights focus in social programs, particularly in order

to stimulate the participation of the intended beneficiaries, but without reviewing—from a human rights perspective—the limitations of those programs when it comes to human rights, especially regarding the standard of universality.

12. Advisory Opinion OC-5/85, from 11/13/1985, Series A, N° 5.

13. Cf. Comisión Interamericana de Derechos Humanos. Relatoría para la libertad de expresión. Acceso a la información pública en las Américas. Aportes de la Relatoría para la libertad de expresión de la Comisión Interamericana de Derechos Humanos, p. 12.

14. OG N° 1, points 3 and 4. Cf., cited in Abramovich and Courtis (2002).

15. The Center for Economic and Social Rights (CESR) has developed a framework that is comprised of four steps for analyzing various aspects of the obligation to fulfill economic and social rights. Known as OPERA (Outcomes, Policy Efforts, Results, and Assessment), it incorporates different measures for specific human rights principles and standards (<http://www.cesr.org/>).

16. Many specialized organizations have databases with socioeconomic indicators, and are making progress on human rights indicators. Among others, it is worth highlighting the following: the Office of the United Nations High Commissioner for Human Rights has developed the universal human rights index (<http://uhri.ohchr.org/>); ECLAC's Gender Equality Observatory for Latin America and the Caribbean has a system based on three types of women's autonomy: physical, economic, and decisionmaking autonomy (www.cepal.org/cl/mujer); the UNDP human development indicators (<http://hdrstats.undp.org/en/tables/default.html>); UNICEF's monitoring of the rights of boys, girls, adolescents and women (<http://www.childinfo.org/>); UNESCO's educational statistics (<http://stats.uis.unesco.org/unesco/TableViewer>) and those from the International Labor Organizations's world of work and union rights (<http://www.ilo.org/stat/lang--en/index.htm>).

17. These are some of the many initiatives that have been developed in six countries in the region (Argentina, Bolivia, Chile, Colombia, Ecuador and Peru), starting with the design of an Observatory of Legal Decisions regarding the rights of women, with a database that facilitates access to information to better understand the relationship between litigation and the public provision of social services. Equipo Latinoamericano de Justicia y Género, ELA (www.ela.org.ar).

RESUMO

O artigo analisa de que maneira a produção e o acesso à informação se enquadram no processo de elaboração e utilização de indicadores em matéria de direitos humanos, particularmente em sua integração ao recente mecanismo criado no sistema interamericano de direitos humanos, correspondente às obrigações dos Estados Partes de prestar informações, por exigência do artigo 19 do Protocolo de San Salvador. Desse modo, o artigo analisa os indicadores adotados, as categorias e princípios transversais que complementam o sistema de indicadores, e como funciona nesse contexto o padrão de produção e acesso à informação. Por último, levando em conta os princípios de interdependência, universalidade e indivisibilidade dos direitos humanos, identificam-se aspectos necessários para fortalecer e conseguir uma institucionalidade robusta em direitos econômicos, sociais e culturais (DESC).

PALAVRAS-CHAVE

Acesso à informação – Indicadores – Direitos econômicos, sociais e culturais

RESUMEN

El artículo analiza de qué manera la producción y acceso a la información se enmarca dentro del proceso de elaboración y utilización de indicadores en materia de derechos humanos, particularmente en su integración dentro del reciente mecanismo conformado en el sistema interamericano de derechos humanos, correspondiente a las obligaciones de informar que tienen los Estados Partes en virtud del artículo 19 del Protocolo de San Salvador. En concordancia, el artículo analiza los indicadores que adopta, las categorías y principios transversales que complementan el sistema de indicadores, y cómo opera en dicho contexto el estándar de producción y acceso a la información. Por último, tomando en cuenta los principios de interdependencia, universalidad e indivisibilidad de los derechos humanos se identifican aspectos necesarios para fortalecer y lograr una institucionalidad robusta en materia de derechos económicos, sociales y culturales (DESC).

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