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- **Fernande Raine**  
The measurement challenge in human rights
- **Mario Melo**  
Recent advances in the justiciability of indigenous rights in the Inter-American System of Human Rights
- **Isabela Figueroa**  
Indigenous peoples versus oil companies:  
Constitutional control within resistance
- **Robert Archer**  
The strengths of different traditions: What can be gained and what might be lost by combining rights and development?
- **J. Paul Martin**  
Development and rights revisited: Lessons from Africa
- **Michelle Ratton Sanchez**  
Brief observations on the mechanisms for NGO participation in the WTO
- **Justice C. Nwobike**  
Pharmaceutical corporations and access to drugs in developing countries: The way forward
- **Clóvis Roberto Zimmermann**  
Social programs from a human rights perspective: The case of the Lula administration's family grant in Brazil
- **Christof Heyns, David Padilla and Leo Zwaak**  
A schematic comparison of regional human rights systems: An update
- **Book Review**



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## CONTENTS

FERNANDE RAINÉ	<b>7</b>	The measurement challenge in human rights
MARIO MELO	<b>31</b>	Recent advances in the justiciability of indigenous rights in the Inter-American System of Human Rights
ISABELA FIGUEROA	<b>51</b>	Indigenous peoples versus oil companies: Constitutional control within resistance
ROBERT ARCHER	<b>81</b>	The strengths of different traditions: What can be gained and what might be lost by combining rights and development?
J. PAUL MARTIN	<b>91</b>	Development and rights revisited: Lessons from Africa
MICHELLE RATTON SANCHEZ	<b>103</b>	Brief observations on the mechanisms for NGO participation in the WTO
JUSTICE C. NWOBIKE	<b>127</b>	Pharmaceutical corporations and access to drugs in developing countries: The way forward
CLÓVIS ROBERTO ZIMMERMANN	<b>145</b>	Social programs from a human rights perspective: The case of the Lula administration's family grant in Brazil
CHRISTOF HEYNS, DAVID PADILLA and LEO ZWAAK	<b>163</b>	A schematic comparison of regional human rights systems: An update
BOOK REVIEW	<b>172</b>	<i>Mary Robinson, a voice for human rights</i> (Kevin Boyle ed.). Reviewed by Florian Hoffmann

FERNANDE RAINE

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#### ABSTRACT

Up until recently, the human rights movement has been reluctant to engage on the topic of measurement, highlighting the difficulties involved and resisting pressure from donors to comply with impact assessment standards developed in other fields. This paper argues that measurement techniques are, indeed, very problem specific and that they must be linked to a refined understanding of the mechanics of a problem. Given the need for progress on the pressing issues of human rights, it is all the more important that civil society organizations move out of their defensive position regarding measurement and begin developing models for the two large measurement challenges: (1) how do we size the problem and understand how it is developing over time? and (2) how do we understand the impact that we are having on the problem itself? This paper outlines how Civil Society Organizations can increase their effectiveness by using measurement and data to gain a clearer idea of what problem they are trying to solve, a better idea of how to mark their progress in striving toward that goal, and an understanding of what place their efforts have in a broader context of civil society problem-solvers. While addressing the specific difficulties that human rights organizations face in the process of self-evaluation, this paper proposes steps that would guide human rights organizations on the road to increasing their impact.

#### KEYWORDS

Impact assessment – Measurement – Performance – Human rights – Data collection



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# THE MEASUREMENT CHALLENGE IN HUMAN RIGHTS

Fernande Raine

## Introduction

Over the past two decades, the playing field in human rights has changed dramatically. The number of organizations working on human rights issues has grown at a staggering pace. Civil society in many countries (excluding some large and important ones) now has a voice, and has developed instruments geared towards social change as they have witnessed an ever-expanding freedom to operate. A growing number of small, sometimes highly innovative and agile organizations have entered the playing field, while some of the larger organizations have further expanded in size, level of influence, and sophistication. As large corporations reach out to the community of citizen organizations new partnerships are becoming possible to jointly craft solutions to public problems. The internet has created opportunities to network and exchange information and ideas that would have been impossible a mere ten years ago. Some progress seems to have been made in the mainstreaming of the language of human rights in other fields. Rights-based approaches in the areas of development, health, de-mining and others have gained currency in individual governments as well as in international agencies and organizations. These trends represent a tremendous opportunity for organizations in the field of human rights.

However these rights-based approaches also represent a challenge. From the point of view of donors and volunteers, the question on where to allocate their resources has become more difficult. There are more organizations to

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*See the notes to this text as from page 26.*

choose from in the field of human rights, and as other fields appropriate rights-language, there seem to be more options for achieving progress on human rights issues, and fewer options for supporting organizations that are operating under an explicit human rights-banner. Donors – whether governments, foundations or individuals – are ever more determined to give their support to something that works, and regarding the communication of impact, they are becoming more demanding. So far, the human rights movement has been on the defensive, criticizing the metrics imposed upon them as missing the essence of their work. Much of this criticism is justified: an exaggerated focus on numbers and on quantifiable measures of success tends to blur the vision for current and future impact, much of which is not measurable. Take, for example, the ever increasing role of individuals known as ‘social entrepreneurs’. These are high-leverage individual change-makers, whose keys to success are their personal qualities of persistence, creativity, and alliance-building skills, combined with a genuinely new and scaleable idea, but these qualities can not be captured with a number or a plan.<sup>1</sup>

This paper argues that it is high time for the human rights community to change their defensive position of critiquing donor-imposed metrics to a more constructive one; a position in which organizations develop a combination of quantitative and qualitative impact metrics, one that they feel makes sense; and then find a method to communicate their position. If there are aspects of work that are still not quantifiable, a message must be crafted and communicated as to why those aspects remain strong levers of change. It is true that donors are interested in this agenda, and that measurement techniques for funds received are a key tool for creating accountability. It is also true, however, that impact assessment acts as a tool for creating accountability to those people in whose name and interest human rights organizations advocate for social change. Impact indicators are no more than a useful by-product in the far more fundamental process of making the mechanics of a problem transparent, and of comprehending the levers of change, which, in turn, enable the cooperation and division of labor between organizations as well as a thoughtful stewarding of resources. In short, this paper shall outline how measurement techniques for human rights organizations could be developed, and why they should develop these techniques as a matter of duty to the individuals and groups of people whose rights they are claiming to defend.

Whether described in terms of “performance measurement,” “impact evaluation,” or “organizational effectiveness,” the underlying process is the same: it is a systematic assessment by human rights organizations of where they fit into the community of problem-solvers, as well as how well they are fulfilling their own missions. None of the many reasons that are – legitimately – brought



forth as limiting factors can hold up against the strong reasons that speak for it. Unless each organization is able to show that it is using the most powerful levers possible to achieve its intended outcome, and unless it understands the link between its daily actions and the goal that it is hoping to affect, progress toward the much-needed systemic change will remain too slow. As one author bluntly put it, “If you don’t care about how well you are doing something, or about what impact you are having, why bother to do it at all?”<sup>2</sup>

## Current thinking on impact assessment

Due to their dependency on external funding, almost every organization with a societal mission has some sort of reporting system in place on outcomes. Over the past ten years, however, the pressure has grown on organizations of all sizes and orientations to become more explicit and outcome-oriented in communicating their effectiveness. Civil society organizations (CSOs) have been pressed to develop more transparent reporting on two levels: the *internal* level of organizational performance, i.e. how well the organization’s structure, resources, and processes are equipped to perform its tasks, and the *external* level of results, i.e. how well the organization achieves its intended *impact*. The issue of both internal organizational performance and that of impact measurement have been the subjects of volumes of theoretical analysis and practical research.<sup>3</sup>

A number of historical trends have driven this increased interest in the transparency and impact measurement of CSOs. One example of this is the expanding role of the CSO in regional, national, and international policymaking. Not only has the number of CSOs increased (in some parts of the world exponentially), but some CSOs have grown to a level at which they have taken on roles previously filled by government institutions, and are actively influencing policy. This has raised questions about their legitimacy as well as their authority to take advocacy actions in someone else’s name.<sup>4</sup> Better performance metrics and more rigorous reporting on impact are hailed as vital steps towards building greater accountability and legitimacy.

Thanks to the internet and the birth of the “global information society,” there has been an increase in awareness among CSOs and in the societies in different parts of the world from which they draw their support, of the need for systemic change; making all the more necessary the judicious allocation of scarce resources. Images of human rights transgressions are beamed real-time into peoples’ living rooms, featured in films and articles, and shown in photographs. This creates a seemingly endless menu of the need for action.

At the same time, the growing salience and awareness of these problems has broadened the base of individuals and institutions that feel responsible for

responding to these social needs.<sup>5</sup> As corporations and individual entrepreneurs become involved in the social field as philanthropists, problem-solvers, and investors, their standards of accountability carry over into the sector they are newly interacting with. Evaluative and organizational concepts imported from the competitive and productivity-driven private sector are increasingly being called upon to guarantee that each dollar achieves the maximum “bang for the buck.”<sup>6</sup> New forms of philanthropy, including ‘venture philanthropy’ and ‘social investing’ with some concepts of social return on investment (some are more refined and some less); a culture of strategic planning and impact indicators in organizations of all sizes has been created. Foundations have developed frameworks from which they can assess and communicate the impact of their grantees. Some foundations are even beginning to publicize their own performance as donors and as supporters of their grantees’ development.<sup>7</sup>

There are a number of challenges being created by this debate, which will be outlined below in more detail. A wide variety of voices are pursuing the issue with a broad range of ideas on what impact assessment should look like, forcing CSOs into the cumbersome process of evaluating their work through a variety of templates, and reporting differently to different sponsors. In addition, the transmuting of frameworks of measurement from the private sector to the civil sector is not always possible, and to provide transparent accounting of operations and impact is far more difficult in the social sphere. Creating social change is simply not as linear a process as that of producing widgets, and there are no market-mechanisms to capture and reward increases in social shareholder values.

### *The discussion in other fields*

The topic of impact assessment and organizational effectiveness has nonetheless been gaining traction in some distinct sub-sectors of civil society. A full history on the discussion of accountability and measurement would go beyond the limits of this article, but a brief overview might serve to highlight the areas in which a discussion has taken off on some of the lessons for CSOs to learn in the field of human rights.

Partially fueled by the anglo-saxon philanthropic model that closely intertwines so-called “nonprofits” with the corporate and entrepreneurial world, CSOs in the United States and the United Kingdom have been particularly engaged in the development of internal evaluation and measurement techniques. Large nonprofit umbrella organizations and CSOs, such as the United Way and Save the Children UK, have adopted systematic approaches over the past 10 years for internal evaluation and measurement, and have restructured their engagement models to engender cultures of performance among their grantees

and members.<sup>8</sup> The English-speaking academic community devoted to the study of nonprofit organizations has enthusiastically taken on this topic and produced a vast amount of literature for organizations in the nonprofit sector, providing guidelines and frameworks on how to create internal evaluation systems and become “high-performing.”<sup>9</sup> The past 10 years have witnessed an explosion in academic research, capacity-building initiatives, and conferences regarding impact and organizational effectiveness, and a number of journals dedicated solely to these issues have sprung up.<sup>10</sup> These trends have inspired the birth of an entire industry of performance-focused consulting firms who target foundations and nonprofits as clients.<sup>11</sup> Strategic planning, impact assessment, and accountability are buzz-words and they have a hopeful ring of progressiveness, innovation, and quality.

Citizen sectors of the US and the British are, of course, not the only ones discussing impact measurement and accountability. By the late nineties, impact assessment was already very high on the radar screen of civil society organizations around the world, driven in part by the interest of their international funding partners. A comprehensive study commissioned by the Organization for Economic Cooperation and Development (OECD) highlighted impact assessment practices by non-governmental organizations (NGOs) in 25 sample countries from around the world and concluded that impact assessment practices were developing in all of those 25 reviewed countries.<sup>12</sup> Civil society organizations and networks themselves have taken on leadership in this issue, often working in close cooperation with academic institutions to strengthen their methodology on the issue. In India, one such example is PRIA. Building on its expertise in providing development assistance, it has created both online resources and training for civil society organizations, including literature and training on how to measure impact.<sup>13</sup>

The international development community took on the issue of accountability in the late 1980s, as it attempted to increase its influence on projects carried out by the World Bank, and also, but to a lesser degree, the IMF.<sup>14</sup> While the discussions of the past 10 years on accountability have not yet penetrated the majority of regional and national organizations, most large international development organizations have succeeded in collaborating with academic researchers as well as International Finance Institutions to improve their understanding of what works, and of how to report on practices and outcomes.<sup>15</sup> Here too, it was not merely a matter of insight into intrinsic values driving the development of techniques for impact and value assessment. Far more critical in pushing this process along was pressure from constituents and taxpayers in democratic societies in some of the large donor nations, to assure that accountability for the resources was committed to development, both at home and abroad.

Finally, humanitarian aid agencies took on the issue of performance measurement when they found themselves faced with a number of challenges to their legitimacy, beginning with the failure of humanitarian aid in Rwanda and continuing with a number of scandals in large international organizations in the early 1990s.<sup>16</sup> A perfect example of such publicly inspired progress was the scandal surrounding the effect and effectiveness of child-sponsorship agencies in 1994. An article in the *Washington Post* triggered public outrage, and an inquiry into the child sponsorship model led to a joint undertaking to create a code of conduct and systems of accountability among child sponsorship organizations. It was the funding constituents, i.e. the thousands of individuals who had pledged donations to sponsor a child, who demanded to know whether their money had had an effect. These challenges led the community of humanitarian aid organizations to engage in very serious discussions on evaluation and accountability.<sup>17</sup> Among the most active organizations are Oxfam, CARE, Save the Children, and the ICRC.

A couple of lessons can be learned through these thumbnail sketches of instances in which progress was made towards improved impact assessment. Academics can and do play a vital supporting role, and donors and supporters are not only the triggers but are also often partners in the process; and this process is far from easy. Even a basic agreement for a framework of action and accountability took several years for the child-sponsorship community to reach, but the organizations all agree that they are much stronger for it, providing more value to the children at risk.

Yet despite the increasing pressure and burgeoning literature on the subject, CSOs – particularly in the human rights field – still do not share a “culture of indicators.”<sup>18</sup> There is anything but a clear sense among human rights CSOs on what performance measurement actually means, and on how it should be done. While admirable efforts have been launched to promote an exchange of best practices, human rights CSOs have been reluctant to address the issues of organizational effectiveness and impact assessment, leaving each organization struggling to develop an approach on its own.<sup>19</sup>

### **Impediments to impact assessment in the field of human rights**

Given the pressures outlined above and the increasing attention that other members in the world of civil society are paying to impact assessment, why is it that most human rights organizations have stayed on the fringes of the discussion for so long? One factor is surely that the academic and practitioner communities in the field of human rights have been busy forming a clarification of the mandate of human rights organizations; another is the expansion of the frontiers of what

is considered to be their scope. Although some, including Amnesty International, are now turning their attention to the issue of measurement,<sup>20</sup> many human rights organizations are still actively engaged in redefining their role in the world. To the extent that these organizations are now reaching conclusions,<sup>21</sup> the time is ripe for discussions on measurement, as they must decide how they will pursue their newly clarified missions.

There are, however, a host of other challenges that the human rights movement faces in tackling the measurement issue, some of which are specific to the human rights field, others of which are shared by any CSO.<sup>22</sup> The general obstacles that all civil society organizations face include:

- **Balancing donors' demands with organizational needs.** Due to the pressure from donors on the issue of measurement, many organizations have been forced into a kind of redundant bookkeeping, in which they must report along the fairly narrow project-focused guidelines suggested by their funders, *and* keep track of their impact on the constituencies they consider to be most helpful. Hence they end up with two sets of metrics: one for the donor, and another for themselves.
- **Adapting private-sector tools to the citizen sector.** Defining concrete, focused goals and distinct groups of stakeholders is much more difficult in civil society when using evaluation frameworks usually drawn from business. Opportunities for so-called “quantum leaps” which permit organizations to have a tremendous impact, can be hindered by precise advance planning if the original plan had outlined a different course of action.
- **Capturing the importance of leadership.** While analysts' ratings of corporations always pay close attention to the personalities leading the organizations, there is a resistance in civil society to acknowledge the importance of the individual in driving social change. Acknowledging the importance of the personal skills needed to make a push for social change goes against the culture of celebrating good-will, and it is exceedingly difficult to factor into impact assessment frameworks.<sup>23</sup>
- **Overcoming the cultural gap.** Measurement seems foreign to the culture of the civil society field. Civil society organizations are usually less interested in producing material products than in encouraging better, more inclusive processes. The fundamentally process-oriented goals of civil society organizations are difficult to reconcile with methodologies used in outcome-oriented evaluations.
- **Managing scarce resources.** CSOs are chronically short of human resources and the time needed for full assessments of the organization's plans and processes. In addition, because the funder community has

not yet broadly realized the importance of building capacity in this area, it remains very difficult to raise money for internal training and organizational development.<sup>24</sup>

- **Overcoming the prevalence of non-systematic impact assessment.** Activists generally rely on a gut-sense of effectiveness. The abundance of individual testimonies from beneficiaries often provide a sense of progress that is sufficient enough to give an organization the sense of security it needs to know that it is making a difference. What these testimonies do not reflect, however, is a communication of whether the strategy that was used was the best option available, and/or if any kind of systemic change is represented by these testimonies.
- **Addressing language barriers.** Most of the literature and support on the topic is in the English language, so that – even if a CSO representatives can speak English – the literature and support are often inaccessible to non-academic readers.<sup>25</sup>

In addition to these general obstacles to civil society organizations, a list of the specific difficulties faced by human rights organizations in tackling the issue of internal progress assessment is long enough to give pause to even the strongest-willed advocate of the importance of measurement:<sup>26</sup>

- **Balancing transparency and security.** In certain circumstances, transparency on methods and techniques can endanger organizations that work in high-risk environments. Human rights advocates in many countries where, arguably, their work is most needed, regularly face personal threats and organized attempts to shut their organizations down. In these cases, transparency would not only endanger the personal security of individuals, but also compromise the long-term effectiveness of the organization's campaign.
- **Allowing for flexible responses.** Human rights organizations often find it hard to plan actions in detail, since the breadth of their mandate forces them to remain flexible to react as issues develop. Unexpected changes and outcomes are a regular occurrence, making linear planning models insufficient.<sup>27</sup>
- **Acknowledging the collaborative nature of advocacy.** Given the variety of factors, individuals and institutions that influence any change in systems, it is often very difficult for organizations to take credit for a specific result.
- **Empowering others to take credit.** Much human rights work is geared toward effecting policy change. In many cases, the government agency or official who needs to make the policy change would be politically and personally compromised if it were acknowledged that pressure from the

human rights community played a role in changing his or her mind. In these cases, no matter how certain the human rights organization might be about the immediacy of its effect, claiming it might limit its access to that channel of influence in the future.

- **Acknowledging the long-term nature of the impact.** Effective advocacy campaigns and human rights interventions must frame their goals with attention to both short-term objectives (e.g. a radio program or a training session on domestic violence) and long-term, transformational, systemic goals (e.g. changing attitudes about women's rights).
- **Accommodating the culture of values-based volunteerism.** The human rights movement – particularly in the northern hemisphere – carries a long-standing volunteer tradition; an emotionally motivated support base for whom the talk of measurement and effectiveness is largely irrelevant in their ability to feel like they have “done good.”
- **Appreciating the contextual nature of human rights work.** It is difficult to compare human rights techniques in different countries, because so much of the work is culturally and contextually specific. Working towards eradication of domestic violence in a society in which women are largely working in their homes will, for example, require very different strategies than in a society in which women have a stronger role and voice in the public sphere.

Instead of constituting arguments against impact assessment as a whole, these points should become design elements and guiding principles in the drive toward creating frameworks for assessment.

### **Why is impact assessment necessary despite these obstacles?**

The key reasons that the human rights movement should overcome these obstacles and develop a culture of impact measurement are neither to please donors, nor to follow a trend. Instead, human rights organizations should feel impelled to take action and to mainstream the culture of measurement into their systems due to these five reasons, which are intrinsic to the human rights movement:

- a. the need for continuous (and growing) support,
- b. the moral obligation to fulfill promises made,
- c. the need for more collaboration, both regionally and transnationally,
- d. the ever-lengthening list of problems that must be addressed, yet a limited base of resources, and
- e. the generational changes that lie ahead.

### *a. The need for support*

Without statistics on the resources that human rights organizations enjoy, a clear picture is difficult to draw on current trends of support. It is, however, anecdotally clear that human rights organizations constantly feel tightly constrained for financial and volunteer resources. It is also clear that it is part of human nature to feel like the time and resources one dedicates to a cause are making a difference, and that there is hardly anything in the social arena more elating and empowering than the experience of success. Clear goals and indicators for performance, and of impact over time, can play a tremendously important role as tools for motivation and empowerment for both volunteers and potential donors. The reinvigorating of underpaid staff, donors and volunteers for their roles can be achieved if there is a sense that through their work they have contributed to the solution of a problem.

### *b. The moral obligation*

An organization's success depends on a variety of support: donations of time from volunteers; recognition from those whom one is trying to serve; funds from donors; acknowledgement and actions by policy makers; increased awareness of a specific human rights issue among the general population – in short – positive signs of acknowledgement from stakeholders, who might be called an organization's community of accountability. Every sign of support that a CSO receives includes the expectation that the CSO will deliver on its promise to be part of a solution. Unless an organization understands just how well it is moving a lever of change, it is not holding itself sufficiently accountable; which indicates that it is falling short in its obligations to its stakeholders.

The most important stakeholder for every human rights organization is the one to whom the human rights organizations hold their primary *moral* obligation: the population group or set of individuals whose rights they claim to defend. If ten dollars would allow a family of the indigenous population in the Amazon to survive for a month, and one is spending ten dollars on a campaign to defend that group's rights to the land they live on, the moral obligation one holds to that family – and to all other indigenous Amazonian families – is to make sure that the 10 campaign dollars being spent will get them closer to generating income for that group.

### *c. The need for collaboration*

Joint action on a specific topic within a country or region has always been a central element of how human rights organizations work. Due to improvements in communication technology and the globalization of human rights work,



there is an intensifying call for collaboration across the globe. In order for such collaboration to make sense, however, it is essential that each organization engaged in a partnership understands just what it brings to the partnership, as well as which of its techniques work most effectively. Each organization entering the relationship must understand (and be able to “sell”) the specific benefits of the toolkits it uses, or be able to recognize the advantages of the other’s approach, and be able to incorporate them into its own. Without a clear sense of how organizations operate or what their key strengths are, it becomes very difficult to divide labor among partners in an effective way.

#### *d. The challenge of limited resources*

Human rights activism must be about effective systematic change. In order to leverage scarce resources in tackling ever-growing and increasingly complex problems, human rights organizations must be able to exchange ideas on what strategies and tactics work best. This is quite simple to do on the programmatic level, i.e. on the level of how one literacy program compares with the next in expanding the reach of education. However it is much more difficult – yet necessary – on the strategic and systemic levels, where one must be able to not only assess the direct impact of a certain action, but also the indirect impact of certain activities. Focusing narrowly on the programmatic level can blind one to seeing how the various elements of a problem are interrelated, and to an understanding of which levers must be moved together. A prime example of such interdependency is the issue of child labor and trafficking. Without taking into account what alternatives exist for children who are removed from the workforce, anti-child-labor activism can end up increasing the risk to children of being trafficked.<sup>28</sup> As mentioned above, a successful example of cross-issue learning networks brought together by the wish to define roles and responsibilities in eradicating problems might motivate organizations in other fields to follow suit.

#### *e. The challenge of generational change*

The 1980s and 1990s were a boom-time in civil societies and those years witnessed the creation of countless human rights organizations around the world. So it is a given that in the upcoming decade many CSOs will be faced with a transition of leadership. Unless organizations can manage to create structures and processes that are independent of the presence and charisma of their founding individuals, the human rights movement will be facing a large-scale loss of leadership in the foreseeable future. Internal organizational assessment and impact analysis techniques can be a great help in preventing any gaps in

the foundations on which an organization stands, and make it much more likely to survive the loss of its original leaders.<sup>29</sup>

Finally, the question is not one of whether or not internal assessments of performance and measurement of impact will be important in the future. The question is simply whether CSOs in human rights can move out of the defensive position they are in now—in which donors' demands dictate how CSOs produce evidence of their impact—to a more pro-active one in which CSOs define for themselves what metrics and assessment techniques make sense for their missions. Closing the current gap between the “evaluators” and the organizations in the field can only occur if—and when—CSOs take active steps to formulate what they see as the right approach to assessment of organizational processes and impact in their branch of work.

How can human rights organizations move toward a culture of understanding and one of communicating impact? If the arguments above are convincing, and one were to agree that this is something important for human rights organizations to subscribe to, what are the next steps? There are two separate and key steps that must be taken. The first is a collective endeavor of mapping out the mechanics of specific problems, i.e. understanding an issue's drivers, and how to most effectively address each driver. The second step is to create models of impact assessment for each individual organization.

### **Mapping the mechanics of the problem**

In order for CSOs to understand how well they are doing at achieving their goals, they must first understand their organization's place in the broader context of problem-solvers. Collaborative problem-mapping is an important exercise in enabling individual organizations to understand their role in effecting broader societal change. As an example, take the problem of human trafficking. Hundreds of organizations in just as many countries are targeting the issue, but they certainly do not operate within a framework of understanding what all the factors that drive the numbers of trafficked persons are, nor how they can be addressed. Therefore, when an international network of CSOs began searching the online portal of Changemakers.net for the best practices in the field of human trafficking, their first step was to break the problem down into problem drivers and strategies. This is but one possible way of framing the issue, but the mere fact that this collaborative practice was begun and helped to organize thinking about different tactics and strategies sets a precedent for future work.<sup>30</sup>

The beauty of any such map is that it can structure a discussion on long-term, systematic collaboration in a way that is not otherwise possible. How important is each driver in a given context? What are the sources of information and data-collection techniques for measuring change? What are the different

strategies to address each sub-piece? How much do they cost? Which strategies address multiple drivers? Which pieces of the problem are currently being entirely under-addressed?

Developing, refining and adapting these problem maps to specific contexts can and should involve academics and foundations in addition to CSOs. Academic researchers can play important parts on several levels: in collecting data on the relative importance of each driver; in creating a framework for data collection and interpretation; in researching best practices; and finally, in helping to build capacity based on the lessons gleaned from all this research. Foundations can play a role by supporting and encouraging these collaborative endeavors, and then by applying the lessons they have learned to their funding strategies. But it is the CSOs who, out of their will to effect social change, must drive this process. Many previous initiatives have failed to take off because CSOs perceived them to be driven by the wrong institutions (i.e. donors and private sector firms). Other fatal flaws have included overly “managerial” language; a focus on technicalities; and a failure to account for the importance of values. Some such initiatives have encouraged CSOs to undergo a process of introspection in order to achieve more legitimacy and accountability outside their immediate networks of supporters and beneficiaries—for example, with governments or businesses – which many CSOs see as secondary to their goals.<sup>31</sup> Only when seen as a tool for improving collaboration, and for maximizing the leverage of the scarce resources available in the field of human rights, will this process be able to succeed and take root.

This kind of problem-mapping provides a context for an organization’s own internal impact assessments. Each organization must ask itself how effective it is in addressing the rights issues it has identified as its area of concern. Now that the problem has been mapped, how do we fit it into the landscape? The point is not just to create metrics or to encourage lip-service to performance assessment. It is to help in creating a well-rooted *culture of impact measurement*, by developing a tool that will enable human rights organizations to guide themselves through the culture-changing process.<sup>32</sup>

When making suggestions on how human rights organizations across the field should think about performance measurement, it is wise to listen to the query of the doubter, who asks: “Why do we need a *collaborative* approach to mapping problems or on the framing of our thinking on organizational effectiveness and impact measurement? Will that not inadvertently encourage competitiveness in a field that relies for its strength on inter-organizational alliances? Is self-evaluation not something that organizations should do – as they please – on an individual basis?” The answer to this query must be a resounding “no,” because CSOs that are serious about tracking their impact, and serious about maximizing their effectiveness in achieving real societal change,

need to know how they fit into the broader civil society mosaic of their chosen topic area. What is more, only a collaborative effort, with the buy-in of role models and the leading organizations in the field, can give individual CSOs the standing they need in order for donors to take their views on self-assessment seriously. When demonstrating their impact to donors and critics, only cooperation will allow CSOs to move from a defensive position to a proactive one. And finally, collaboration will minimize the effort each individual organization expends as it attains expertise in self-evaluation.

It is also illusory to deny that competitive forces are at work, even in the field of human rights. Not all approaches to a specific problem are created equal. Although comparisons invariably look like those of apples-to-oranges, some organizations are more effective than others, and some strategies work better than others. If 50 CSOs are committed to helping victims of domestic violence, for example, there will be a large variation among them as to what strategies they use and how effective they are. Much depends on the change-model, the context, and the individual change-leader, as well as on his or her team. Human rights organizations face competition for resources, so they have to be able to demonstrate to their constituents and to themselves that their approach is among the best of the possible alternatives toward solving the problem. After having grown out of membership organizations, or of being composed of former victims of human rights abuses, this is a cultural leap that will require some time for the organizations and their members to make. But again, the first steps to take are: to acknowledge that there are different levers to be pulled; and that, yes, we must divvy up the work; and to recognize that a clear understanding of the problem is the necessary first step towards understanding our effect on it.

### **Designing an impact-assessment framework**

“There are many roads to Rome” in developing an impact-assessment framework. What we are describing here can not serve as a full-fledged how-to guide. Instead, this is intended to serve as a tool for building institutional momentum and as a model for organizations in the field of human rights as they embark on their process of developing such tools. The core of this idea is that impact indicators cannot, and should not, attempt to be created out of thin air. Once an organization has taken time to figure out how the problem is structured it can embark on the journey toward impact indicators, which by necessity consists of three distinct stages. First is the *evaluation* of the organization’s mission (or strategy), its network of support, and its operations. The second stage consists of *defining* the *indicators* that capture the organization’s performance in these

three areas. Finally, the third stage involves the creation of a mechanism for *reporting and feedback* that will allow for learning throughout the broader regional and international communities of human rights organizations. Ideally, if an organization is doing its job well, indicators of good organizational performance will feed into the overall map of the problem to correlate with the projected and expected effect on one of the drivers of the rights-related issue.

***Stage One: Evaluating the mission, support networks, and operations***

The proposed model for guiding an organization through this evaluation level is based on what is known as the “strategic triangle,”<sup>33</sup> which highlights the three key dimensions of any change-oriented social organization which must be aligned: the mission and its values; the support network that the organization will draw upon in the service of the mission; and the organization’s operational capacity in meeting its goals.

Mission	Networks of support	Operational capacity
What is the problem my organization is trying to solve? What is the scope of our work? What is the lever that my organization is trying to move? What programs do we use to move that lever? How effective are those programs? Do all of my programs align with my mission?	Who are our main allies? How do we generate support and legitimacy? Who are our beneficiaries? Who are our sources of revenue and work?	How well are the processes in our organization aligned with the results we would like to achieve (Human resources, information technology, finances)? Do we have the resources we need to succeed?

*Mission*

Many organizations claim to have what they call performance measurement techniques, and yet have not undergone the series of necessary analytic steps to make sure that they are actually measuring *impact*, and not just tracking activity. Relying on what has been called a “cherished theory of change,”<sup>34</sup> many organizations do not have a refined understanding of their agency, and of the effects of their work. Instead, they produce voluminous reports on how many women they have counseled or children they have enrolled in school, without truly understanding whether those activities actually helped achieve their ultimate goal of reducing domestic violence and increasing literacy rates. In the field of measurement, the message from experts is clear: evaluation systems that are not closely tied to clear mission statements and an understanding of

what impact the organization aims to have are doomed to failure.<sup>35</sup> CSOs interested in self-evaluation must first of all define their mission statements.

It is important to underline the value of preceding this mission review with a collaborative discussion on how the problem breaks down, so that the mission's discussion can be defined within the context of a community of organizations, and a multitude of successful strategies. Having clearly defined the mission's scope, the challenge is to evaluate the activities of the organization by using a criterion of whether or not (and how effectively) they contribute to achieving the defined goal. Mission clarification is a time-consuming process requiring the participation of the whole organization. Only then will the process be driven by a vision of the higher contribution to the public good; thus it will be a project in which all members of the organization are willing to participate. After all, performance measurement is not an on-again off-again process, but a deep change in the culture and reporting style of the organization that can take several years to implement.<sup>36</sup>

### *Networks of support*

Human rights organizations rely on a variety of sources, not only for funding but for moral support, recognition, and the legitimacy needed for their policy suggestions to have an effect. Understanding how well the organization is supported and what determines the degree of support it receives must be part of any analysis of its effectiveness and impact. If, for example, membership is declining, yet revenue is growing, the organization should analyze the underlying forces behind those trends – which could be anything from the loss of broad popular appeal of the issue, to a decline in membership outreach activities due to the successful recruitment of a major donor. Any organization that depends on a narrow number of donors and does not have a broad base of citizen support risks losing touch with the people whom it is trying to serve. It also risks falling short in its responsibility to raise awareness among the local population of the problem it is trying to solve. Thinking creatively about how to mobilize resources – whether monetary, volunteer, or in-kind – allows organizations to not only diversify their funding base, but encourages them to rethink their outreach strategies.<sup>37</sup>

### *Operational capacity*

Finally, an organization must take a close look at its internal structure and resources, to determine whether it has enough financial and human resources to accomplish the objectives it has defined. Here, too, lurks a common trap: that of simplifying this analysis into the relationship of “overhead costs” to

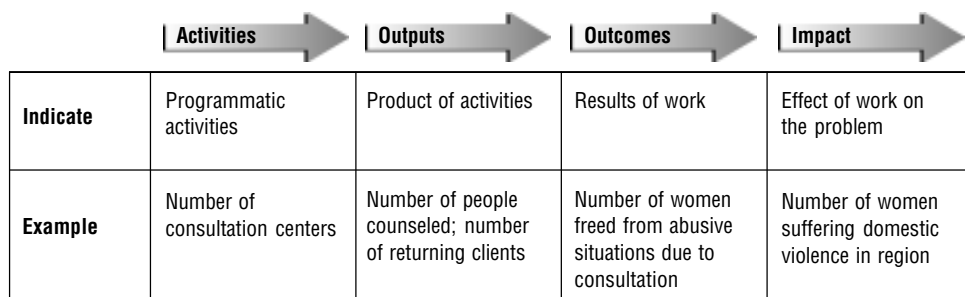
“program costs”. For many organizations in the field of human rights (and in the social sector as a whole) the “overhead” might mean where the most value is created, i.e. the people, their skills; their activities might be exactly where the most mission-related impact is achieved. Therefore the analysis of capacity should focus on the organization’s ability to combine its capital, its human resources, and its knowledge, in a way that maximizes the amount of impact it can deliver.<sup>38</sup>

*Stage Two:  
Defining indicators of progress*

Once a CSO has completed the first evaluative step – having clarified its mission and reviewed the resources and support it can call upon in the service of that mission – the organization can move to step two: defining indicators that capture the nature of the progress it hopes to achieve. These indicators must be sensitive to the four specific levels of activity that lead to impact: activities, output, outcomes and impact (see chart below).

On the levels of activities, outputs, and outcomes, finding indicators of progress is quite straightforward once the process of clarifying one’s mission has been completed.<sup>39</sup> The CSO must simply make sure that indicators of performance and impact are based on a clearly demonstrable relationship between the organization’s activities and the realization of its goals, as described in the mission statement.

Considerably more challenging is the development of indicators for the last stage: impact. Yet it is the impact stage that really shows how successful the organization will be at achieving its ultimate mission. The impact indicators at the end of this chain must be relatively simple, and it is advisable to pick just four or five strong indicators; and not give in to the temptation of creating a long list of issues and indicators that the organization is trying to affect. These are the numbers that the organization will use to communicate its impact to the outside world. They should impart a perception of the degree to which the organization has been able to affect policy, to change minds, to affect lives. An



ongoing evaluation of impact will most likely need to include qualitative and quantitative elements, and incorporate the viewpoints of a variety of stakeholders, including the organization's staff, the beneficiaries, and the supporters of the organization. Only through a combination of numbers and stories can the richness of an organization's impact on society be captured.

This is obviously the hardest set of indicators to define, and the one that must strike a balance between wanting to define societal impact and the need to be honest about agency. As pressure toward impact metrics grows, some organizations might feel themselves pressured to claim impacts they can not even be sure they had. A nonprofit dedicated to building inner-city playgrounds, for example, was pressured to create a link between its play spaces and combating juvenile obesity – a tenuous link at best, and one that no one in the organization felt comfortable with. Many of the long-term changes in the field of human rights are equally difficult to track. How does one measure a change in attitudes and shifts in values, even before the policy has changed? Would one need to declare the campaign to end the death penalty a failure, for example, simply because capital punishment still exists in the US? Or could one point to the fact that much has changed in how the courts are limiting the use of capital punishment, and celebrate the possible changes that a campaign against it might bring in the medium term? Here, much research needs to be done – and some is already underway – to find guidelines for capturing impact measurements on some of the human rights programs that are most difficult to track.<sup>40</sup>

### *Stage Three:*

#### *Creating communities of learning*

The most neglected role in the literature on performance measurement and organizational effectiveness is the important part that can be played by learning communities. CSOs do not need to solitarily embark on self-assessment endeavors. First, there are networks of academics and consultants with long experience in self-evaluation in both the for-profit and the not-for-profit fields, and they can help CSOs think through in greater detail what sorts of self-evaluation templates would suit them best. Secondly, CSOs have much to learn from one another. Regular communication and exchanges of experience between CSOs undergoing the same processes can be extremely helpful, not only for avoiding a repetition of mistakes, but also to share in the positive learning that occurs. Again, as mentioned above, foundations can and must play a major role in making this kind of learning possible. It is critical to the human rights community to have funders functioning as partners, not as remote donors.



## Conclusion

Proposals for impact assessment, as put forward here, rely on different justifications. This paper suggests that human rights impact assessments must be internally motivated, and driven by a desire to answer these questions: “What is your organization trying to achieve, and how? How does it fit into the broader field of CSOs working on this problem? Is your organization strengthened on a daily basis through knowledge of how it is succeeding at moving the levers of change?”

In addition, it is critical to reconceptualize the space for the impact measurement discussion. It may not be allocated solely, or even primarily, into the realm of donor-grantee relations. Instead, the issue of impact assessment is a matter that primarily affects relationships between CSOs, as well as between organizations and their constituents. Far too often the reasons for impact measurements that fall through the cracks are neglecting the need for cooperation and an organization’s failure in its moral responsibility to do the best job it possibly can.

The various steps proposed are not simple, nor are they steps that will be completed in a short period of time. But if the expected return were not so great, this daunting process would certainly not be worth proposing. The price that is being asked of the movement is an investment of some time, and to put some shared thinking into a joint effort – together with the relevant academic community – on:

- a. creating maps describing the drivers of specific human rights problems and discussing the strengths and co-dependency of the various strategies used to target them;
- b. creating a template for the self-assessment of effectiveness that human rights organizations can use to understand how effectively they are addressing the problems they have identified as their own.

The return that improved measurement techniques might bring is no less than an increase in collaboration; an invigoration of the members of the human rights movement; more donor support, and accelerated social change. What could be more worth an investment of resources and time?

## NOTES

1. My special thanks to Eleanor Benko, L. David Brown, Kate Desormeau, Michael Ignatieff and Laura Klivans for contributing their thoughts to this article, and to Juana Kweitel for helping to prepare it for publication. On this phenomenon, first detected and mobilized by Ashoka—Innovators for the Public, see the excellent study by David Bornstein, *How to change the world: Social entrepreneurs and the power of new ideas*, Oxford, Oxford University Press, 2004.
2. J. Shapiro, *Monitoring and Evaluation Toolkit*, CIVICUS, 2004, available at <[www.civicus.org/new/media/Monitoring%20and%20Evaluation.doc](http://www.civicus.org/new/media/Monitoring%20and%20Evaluation.doc)>.
3. Some of the most recent works include Jessica E. Sowa, Sally Coleman Selden, and Jodi R. Sandfort, "No Longer Unmeasurable? A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness," *Nonprofit and Voluntary Sector Quarterly*, 33:4, Dec 2004, pp. 711-728; J. Cutt, and V. Murray, *Accountability and Effectiveness Evaluation in Nonprofit Organizations*, London, Routledge, 2000; Robert S. Kaplan, "Strategic Performance Measurement and Management in Nonprofit Organizations," *Nonprofit Management & Leadership*, 11:3, Spring 2001, pp. 353-370; and Christine Letts, William P. Ryan and Allen Grossman, *High Performance Nonprofit Organizations: Managing Upstream for Greater Impact*, New York: John Wiley & Sons, 1999.
4. See Hugo Slim, "By What Authority? The Legitimacy and Accountability of Nongovernmental Organizations," *The Journal of Humanitarian Assistance*, 2002.
5. The issue of who is responsible for delivering on the promise of human rights has just recently become a focus of analysis and debate. See, e.g., Andrew Kuper, ed., *Global Responsibilities: Who Must Deliver on Human Rights?*, New York, Routledge, 2005.
6. For a good discussion on the transfer of for-profit models into the nonprofit sector see Rob Paton, Jane Foot and Geoff Payne, "What Happens When Nonprofits Use Quality Models for Self-Assessment," *Nonprofit Management and Leadership* 11:1, Fall 2000; and Robert S. Kaplan, *op. cit.*, 2001.
7. On the Hewlett Foundation's self-analysis, see the "Grantee Perception Report," Center for Effective Philanthropy, 2003, Available at <[www.hewlett.org](http://www.hewlett.org)>. Not all of this interest in the foundation community has been productive. Indeed, "the grantmaking practices of many foundations actually undermine the ability of nonprofits to develop the capacity for sustained high-performance." Christine Letts, et al., *op. cit.*s, 1999, pp. 169-170.
8. See, for example, the research conducted internally by United Way, "Agency Experiences with Outcome Measurement: Survey Results," United Way of America, 2000.
9. See Center for the Study of Global Governance (LSE) and Center for Civil Society (UCLA), *Global Civil Society Report*, London, Sage Publications, 2004; Christine Letts, et al., *op. cit.*; Robert Kaplan, *op. cit.*; and Jessica E. Sowa, et al., *op. cit.*, pp. 711-728.
10. Academic Journals dedicated to performance evaluation include *Evaluation and Program Planning*, *American Journal of Evaluation*, *Evaluation Practice*, *New Directions for Program Evaluation*, *Educational Evaluator and Researcher*, *the Evaluation Exchange*. The research and writing on these

subjects and trends have, however, neither literally nor conceptually been translated into non-English speaking markets.

**11.** Not only have the leading strategy consulting firms begun offering their assistance (usually pro-bono) in this field (See, for example, the report by McKinsey&Co. "Effective Capacity Building in Nonprofit Organizations," report prepared for Venture Philanthropy Partners, August 2001, <<http://www.vpppartners.org/learning/reports/capacity>>). New companies have sprung into this niche, including Bridgespan (a spin-off of the consulting firm Bain & Co.), Givingworks, and New Sector Alliance.

**12.** Searching for Impact and Methods: NGO Evaluation Synthesis Study. A Report Prepared for the OECD/DAC Expert Group on Evaluation. Helsinki, 1997.

**13.** <<http://www.pria.org/cgi-bin/index.htm>>

**14.** Jonathan A. Fox and L. David Brown, *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements*, Cambridge: MIT Press, 1998 2ff.

**15.** L. David Brown and Mark H. Moore, "Accountability, Strategy, and International Nongovernmental Organizations," *Nonprofit and Voluntary Sector Quarterly* 30.3 (2001): 569-587. See also Tina Wallace, *Standardising Development*, Oxford: Worldview, 1997.

**16.** Margaret Gibelman, Sheldon R. Gelman, "Very Public Scandals: Nongovernmental Organizations in Trouble," *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, Vol. 12, No. 1, 2001.

**17.** The late 1990s witnessed a tremendous amount of activity among humanitarian organizations on this issue, spawning a number of large international initiatives focused on creating a code of conduct (SPHERE, see <[www.sphere.org](http://www.sphere.org)>), accountability standards, (HAP—Humanitarian Accountability Project) and professional learning networks (ALNAP, the Active Learning Network). See Dorothea Hilhorst, Wageningen University, "Being Good at Doing Good? Review of Debates and Initiatives Concerning the Quality of Humanitarian Assistance," paper presented to the Netherlands Ministry of Foreign Affairs international working conference on enhancing the quality of humanitarian assistance, 12 October 2001.

**18.** See Nancy Thede, "Human Rights and Statistics: Some Reflections on the no-Man's Land between Concept and Indicator," *Statistical Journal of the United Nations ECE* 18, p. 2001, 269-70.

**19.** The Geneva-based International Council on Human Rights Policy has conducted two major research efforts on the issue of measurement and accountability in the field, with reluctant engagement from CSOs (interview Mike Dotteridge, March 10, 2005). The Center for Victims of Torture has developed a "New Tactics" program aimed at gathering and sharing ideas for 'best practice' approaches to specific challenges in the Human Rights field, which includes only one example of internal assessment techniques (DANIDA). See <[www.ichrp.org](http://www.ichrp.org)> and <[www.cvt.org](http://www.cvt.org)>.

**20.** Amnesty International, for example, is undertaking a movement-wide effort to establish an approach to impact assessment. See internal report: *AI<sup>2</sup>: Assessing AI's impact for Human Rights*, 2005.

**21.** See, for example, the internal debates at Oxfam and Amnesty, as discussed in Claude E. Welch, *NGOs and Human Rights: Promise and Performance* (Philadelphia, 2000)

22. For an analysis of some of these barriers see Christine Letts et al., op. cit., p. 32-35.
23. The largest network of leading social entrepreneurs, Ashoka, places great emphasis on these individual qualities in its selection process and then maps impact by analyzing the idea's reach, including how many organizations have replicated the idea and whether it has affected national policy. See <[www.ashoka.org/global/measuring.cfm](http://www.ashoka.org/global/measuring.cfm)>.
24. An exception to this is the field of support for individual leading human rights advocates and social entrepreneurs. For instance, Ashoka, Reebok and the RFK Memorial Foundation all partner with their fellows and awardees to work on these issues.
25. Some of the rare exceptions to this are the "tools" provided by Civicus for CSOs (<[www.civicus.org](http://www.civicus.org)>), and a civil-society focused joint publication produced by McKinsey & Co. and Ashoka on Business Planning, which includes sections on performance measurement and management and has been published in Spanish and Portuguese. See McKinsey & Co. and Ashoka, *Empreendimentos Sociais Sustentáveis - Como elaborar planos de negócio para Organizações da Sociedade Civil*, Sao Paulo: Peiropolis, 2001.
26. Some of these factors are listed in a presentation by Dr. Linda Kelly, "International Advocacy: Measuring Performance and Effectiveness," paper presented at the 2002 Australian Evaluation Society International Conference, Oct./Nov. 2002.
27. Alan Fowler, "Assessing Development Impact and Organizational performance," in Alan Fowler, *Striking a Balance*, Earthscan: London, 1997.
28. Interview with Mike Dottridge, March 8, 2005.
29. Hugo Slim, "By What Authority", p. 109.
30. See, for example, the work done by Ashoka fellows on the issue of human trafficking: <[endtrafficking@changemakers.net](mailto:endtrafficking@changemakers.net)>.
31. See for example the elaborate undertaking by the Keystone (formerly ACCESS) coalition around creating reporting standards for nonprofit organizations around the world, to make the effectiveness of organizations more comparable to potential investors. See <<http://www.accountability.org.uk/>>.
32. A number of compendia of analytical tools and models already exist, outlining a broad array of diagnostic checklists and elaborate frameworks, some looking like enormous spider-webs, some looking like the switching system for Victoria Station, some even presented as three dimensional cubes. See, for example, P.F. Drucker, *The Drucker Foundation Self-Assessment Tool: Participant's Workbook* (San Francisco: Jossey-Bass, 1998); James Cutt and Vic Murray: *Accountability and Effectiveness Evaluation in Non-Profit Organizations*, London/NY: Routledge, 2000.
33. This framework appears in several forms, including the "strategic triangle" described in Mark H. Moore, *Creating Public Value*, Cambridge: Harvard University Press, 1996, and the "value, capacity, and support three circles model," described in Herman B. "Dutch" Leonard, "A Short Note on Public Sector Strategy-Building," Kennedy School of Government research report/working paper, 2002.
34. I owe this term to S. "Dutch" Leonard.

- 35.** This argument was made with particular force by John C. Sawhill and David Williamson, "Mission Impossible? Measuring Success in Nonprofit Organizations," *Nonprofit Management and Leadership*, Spring, 2001.
- 36.** The average time to implementation is quoted in one study as requiring 3.5 years. Rob Paton, Jane Foot, and Geoff Payne, "What Happens When Nonprofits Use Quality Models for Self-Assessment?" *Nonprofit Management & Leadership* 11:1, Fall, 2000.
- 37.** For an example of a global attempt to encourage more citizen based resource mobilization see <[www.citizenbase.org](http://www.citizenbase.org)>, an initiative run by Ashoka and Changemakers.
- 38.** For a recent, very comprehensive compendium of research on performance evaluation systems see Wholey, Joseph *et al*, *Handbook of Practical Program Evaluation*, San Francisco, 2004.
- 39.** This analysis has also been given a variety of names, from "logic frame" to a "theory of change." There are a number of frameworks aimed at alleviating these processes of connecting activities to the mission through a series of stages and of creating corresponding indicators. Among the most popular are the "Theory of Change Model" (Frumkin), and the "Logframe" (i.e. logical framework) model. On the theory of change model see Peter Frumkin, *On Being Nonprofit: A Conceptual and Policy Primer*. Harvard University Press, 2002. The "logframe", or logic frame model (which was initially developed by USAID) has become increasingly popular among foundations, who encourage their grantees to map their work along this framework. As such, it has so far remained not in internally motivated, but a donor-driven process that does not provide the necessary level of institutional engagement and learning. These are discussed at length in chapter one of Wholey *et alii*, *op. cit.*, 2002.
- 40.** Two of the most ambitious international impact measurement endeavors currently underway are the Carr Center for Human Rights Policy's Measurement and Human Rights program, see <[www.ksg.harvard.edu/cchrp](http://www.ksg.harvard.edu/cchrp)> and the OECD's Metagora Project, see <[www.metagora.org](http://www.metagora.org)>.

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#### ABSTRACT

This paper reviews the primary advances in the Inter-American System of Human Rights in recent years in regard to the rights of indigenous populations. From a critical point of view, it sets out to decipher the most important jurisprudence and juridical grounds on which the Inter-American Court has based its latest decisions on territorial, economic, social and cultural rights of indigenous populations, as well as indigenous political rights and reparations for violations of their human rights. (Original in Spanish.)

#### KEYWORDS

The Inter-American System of Human Rights – Indigenous rights – Indigenous territory – Economic, social and cultural rights – Political rights – Reparations.



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# RECENT ADVANCES IN THE JUSTICIABILITY OF INDIGENOUS RIGHTS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

Mario Melo

## Introduction

Although indigenous rights have been a fundamental matter of interest to the Inter-American System of Human Rights since its creation<sup>1</sup>, between the years 2001 and 2005 the Inter-American Court of Human Rights (from here on referred to as “the Court” or “the Inter-American Court”) resolved several cases that envelop such rights, and the Court has developed lines of jurisprudence that imply significant advances in many ways.

Undoubtedly, the *Awas Tingni*<sup>2</sup> case is a model for new approaches on the part of international justice in the treatment of rights that titularly correspond, collectively, to indigenous communities in virtue of their ethnic and cultural particularities in relation to society as a whole. Judicial decisions in cases such as *Plan de Sánchez*,<sup>3</sup> *Moiwana*,<sup>4</sup> *Yakye Axa*<sup>5</sup> and *Yatama*<sup>6</sup> have permitted the Court to strengthen its analysis and make advances in applications on the various rights tied to territory, ethnic identity and political participation.

Beginning with an analysis of these decisions, it is possible to reflect on the importance of the Inter-American System of Human Rights in the development of rights in the region; on the limits and potentialities in the required demands of economic, social and cultural rights; and on ethnic and cultural dimensions in the reparations for violations to the human rights of indigenous populations.

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*See the notes to this text as from page 47.*

## The changing interpretations of human rights

A careful reading of the American Convention of Human Rights (from here on: “American Convention”) leaves one with an impression that the restricted circumference and capacity of the catalogue of rights to which it is dedicated is not enough to protect indigenous populations, who have a special significance on the American continent, in accord with requirements imposed by particularities in the ethnic and cultural features they present. Neither has the Inter-American System, until now, put in place international instruments containing specific references on the rights of indigenous peoples.<sup>7</sup>

However, the problematical issues of indigenous Americans, historically submitted to secular processes of domination, exploitation and discrimination, are still pressing. In recent decades, the world has been witness to grave situations in various regions of America, in which, either by direct actions of the State, or by omissions on the part of governors in meeting obligations; indigenous populations have lost their lives, their integrity, their identity, their land – their means of sustenance and cultural reproduction.

In confronting these situations, the Inter-American Commission and the Inter-American Court of Human Rights have been required to act in several circumstances in recent years. As their fundamental mandate is to learn about and resolve violations to the rights set apart in the American Convention (article 33 of the Convention), they have appropriately resorted to the characteristic of progressivity<sup>8</sup> in those human rights that, through intervention by jurisprudence, are endowed by the American Convention with the necessary sense and scope to provide special protection to this important segment of the American population.

To achieve this goal, the Court developed a method of interpretation for instruments of human rights based on three criteria:

1. Polysemy of juridical terms:

The juridical terms employed in the wording of an instrument of human rights have “autonomous” meaning, sense and scope that is not comparable to those that are expressed in internal law.

2. The instruments of human rights are living instruments:

As such, they should be interpreted in a manner that is not rigid or static but in harmony with the evolution of life conditions.<sup>9</sup>



3. The integration of *corpus juris* of the international law on human rights:<sup>10</sup>

It is useful and appropriate to use other international treaties on human rights, different than those of the American Convention<sup>11</sup> to consider the matter being examined within the measure of the evolution of human rights in international law.

The juridical foundation of the Court to establish the first two criteria mentioned in the interpretation of the American Convention are, in the opinion of Judge García Ramírez,<sup>12</sup> in the principle contained in article 31.1 of the Vienna Convention on the Rights of Treaties that obligate the interpretation of a treaty to “good faith in accordance with current meanings to be ascribed to the terms of the treaty in the context therein and taking into account its object and purpose.” Also, in the opinion of García Ramírez, in the *pro homine* rule (in respect of men), inherent in the international law of human rights – frequently invoked in the jurisprudence of the Court – which conveys a greater and better protection of the people, with the ultimate purpose to preserve the dignity, to secure fundamental rights and to encourage the development of all human beings.”<sup>13</sup>

Regarding the third criterion that has been identified, its legal foundation is the third item carved into article 31 of the Vienna Convention on the Law of Treaties, which obligates the interpretation of treaties in accordance with the system to which they are inscribed,<sup>14</sup> and to the proper rules of interpretation as established in article 29 of the American Convention.

*Article 29. Rules of Interpretation*

*No provision of this Convention shall be interpreted to:*

*a. permit any of the States party to this accord, or any group or person to suppress the enjoyment or exercise of the rights and liberties recognized by this Convention, or to limit them to a greater extent than is provided for herein;*

*b. restrict enjoyment or exercise of any right or liberty recognized by virtue of the laws of any of the States party to either this accord or any other convention to which one of the declared states is a party;*

*c. exclude other rights or guarantees that are inherent to all humans or derived from a democratic form representative of government; and*

*d. exclude or limit the effects produced by the American Declaration on the Rights and Obligations of Men and other international acts of the same nature.*

*(American Convention)*

## The right to private property and its evolutive interpretation

With this method of interpretation, the Court has been able to develop the sense and scope of the right to private property, consecrated in article 21 of the American Convention, in such a way that permits it to embrace dimensions such as collective property, territoriality, hereditariness and inviolability, which are inseparable when taking into account the ample guarantees of this right in the context of indigenous peoples.<sup>15</sup>

The Court order from a strict legal sense:

*Article 21. The right to private property*

*1. Every person has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society.*

*2. No one shall be deprived of his property, except by virtue of fair compensation, and for the reasons of social interest or public use, and in these cases, according to methods established by law.*

*3. Profit in any amount as well as any other form of exploitation of one man by another is to be prohibited by law.*

*(American Convention)*

The mere act of reading the wording of this article, leaves no doubt that the American Convention protects the rights to private property in much the same way it is conceived by classical civil law. The first item of the article says that “everyone” (meaning “every” natural or legal person, individually considered) has the right to the use and enjoyment of his property” (that is to say, has the privilege to exercise authority over the property he or she owns).

But the sense and scope stipulated through civil law on private property rights are not sufficient to contain the much wider aggregate of realities that must be seen by the international law on human rights. The Inter-American Court has had to understand that the right to private property, in the international law on human rights, has a significance distinct from the one considered by civil law. Beginning with that comprehension, it has interpreted article 21 of the American Convention with a sense and scope that accords with the emerging realities it has had to confront.

In the sphere of Indigenous Rights with which we are now occupied, and in accord with a non-restrictive interpretation of rules that are stated in article 29 of the American Convention, the Inter-American Court on Human Rights considers that:

*[...] article 21 of the Convention protects property in a sense that comprehends, among others, rights to members of indigenous communities within a framework of commonality of possession[...] (item 148 of the Awas Tingni Case Decision)*

The Court has surpassed the individualistic view seen in classical civil law on private property and is able to contain article 21 of the American Convention, the collective dimension of indigenous communal property. To illustrate the new content and scope of article 21, the Court has recourse to the authority of ILO Covenant 169 on the right of indigenous communities to communal property.<sup>16</sup>

The Court understands that the obligation of the State to guarantee the right of every person to the “use and enjoyment of his property” (American Convention, article 21.1) includes the duty to complete surveys and to recognize property rights of indigenous communities and, until such demarcation is performed, should refrain from actions that could affect “the use and enjoyment of the property located in the geographical area where the members of the Community live and realize their activities” (Paragraph 153. Awas Tingni Case Decision).

### **Restrictions to indigenous territorial rights**

The decision in the Yakye Axa case addresses the complicated subject of the conflicts between the special private property rights and those of indigenous property held in common. Because both rights come under the protection of the American Convention, the conflict is always resolved with a restriction of the rights of one of them. The Court sets “the guidelines that define the admissible restrictions to the enjoyment and exercise of these rights: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) they must have as their objective a legitimate goal of a democratic society.”<sup>17</sup>

However, the Court advises that whenever these guidelines are applied, the States must take into account that indigenous territorial rights are of a different nature, as they are intimately related to the survival of indigenous peoples and their members, their identity, their cultural reproduction, their development possibilities and fulfillment of their life plans.<sup>18</sup>

And the restriction to the right of private property in particular favors indigenous communal property, “to be necessary in attaining the collective goal of preservation of cultural identities in a democratic and pluralistic society, in the sense of the American Convention.”<sup>19</sup>

However, the Court clarifies that conflicts between particular “territorial

interests” and those of the state facing indigenous communities are not always resolved in favor of the latter. If the States are unable to avoid restraint of indigenous territorial rights “for specific and justifiable reasons,” compensation granted to the prejudiced party must be oriented principally by the profound significance the land has to indigenous peoples.<sup>20</sup>

### **Territorial, economic, social and cultural rights**

The most important development regarding Indigenous rights that the Inter-American Court has achieved so far has been through the evolutive interpretation of Article 21 of the Convention, which incorporated in the right to private property the indigenous concept of possession.

By so doing, as has been said, it defeats the civilian conception that regards property as an eminently individual right; in order to grant it a new capacity, more in accord with the circumference of human rights, that is to say, a valid style of life that includes diversity and is worthy of a guarantee of protection. Thus, in the decision of the *Awás Tingni Case*, it acknowledges “among the indigenous peoples exists a communitarian tradition in the commonality form of collective ownership of the land, in the sense that the ownership of the land is not centered in the individual but in the group and its community<sup>21</sup>,” and assumes that this form of property also requires its guardianship.

The Court takes a further step and defines the strict relationship between indigenous communities and their traditional territories, including the natural resources found there, and that any immaterial elements contained in them are also protected by article 21 of the American Convention.<sup>22</sup> In effect, it makes an evolutive interpretation of the term “property” as used in the aforementioned article, and explains that it encompasses “corporeal and incorporeal elements and any other immaterial object susceptible to having some value”.<sup>23</sup>

Therefore, article 21 of the American Convention guarantees the enjoyment of immaterial benefits, such as “the special relationship” which the indigenous peoples have with their territories; it does not merely refer to possession or advantages of use, but to the fact that it is “a material and spiritual element they must enjoy completely, inclusive of the preservation of their cultural legacy and its transmission to future generations”.<sup>24</sup>

A relationship of such importance must be “acknowledged and understood to be a fundamental basis of their culture; spiritual life; integrity; their economic survival, and for the preservation and transmission of their culture to their future generations.”

The lack of an effective guarantee on the part of the States for the right of indigenous peoples to have access, to use and completely enjoy their ancestral territories and any natural resources existing therein, endangers the possibility of their leading a dignified life, as it affects their access to their traditional life and foods, clean water and their traditional medicine, as indicated by the Court in its resolution of the Yakye Axa Community case; as, since 1999, deprived of access to their traditional territories, they were made to assume conditions of life that are incompatible with human dignity.<sup>25</sup>

Therefore, the Court understands that to effectively safeguard the communal property of indigenous peoples over their territories and the natural resources found on them, also implies the guarantee of a material and spiritual base on which they can rely for their sustenance, their quality of life, their life plan, their cultural identity and their perspectives for development, with a focus on intergenerational equity. Summarizing, the guarantee to indigenous peoples of their territory is the guarantee for their economic, social and cultural rights (from here on referred to as ESCR).<sup>26</sup>

The Inter-American Court resolved the Awas Tingni Case by declaring that the Nicaraguan State had violated article 21 of the American Convention. The Court ordered that they complete delimitation and demarcation and grant official recognition of title on the lands that had been occupied by the community since ancestral times; the use and enjoyment of which had been disturbed by a concession the State had made over the indigenous lands that had never been duly titled in their favor; the State has now been ordered to do so.

The Court also resolved the case of the Yakye Axa Community by declaring that the Paraguayan State had violated the right to the property consecrated in article 21 of the American Convention, and the right to life of the community when it permitted its displacement and impeded the return and access to the resources of its ancestral land in favor of alleged private new owners, and ordered the State to identify and freely return their ancestral lands to the indigenous Community.

In both cases, the Inter-American Court decided upon ESCR and realized the practice of justiciability on these rights.

### **The Yatama case and the political rights of indigenous peoples**

In June 2005, the Inter-American Court passed judgment in the Case of Yatama vs. Nicaragua, taking up the problematical issue of the practice of political rights guaranteed by the American convention as well as by the

Nicaraguan Constitution on the part of members of the indigenous communities.

In that decision, the Court redefined the sense and scope of the political rights guaranteed in article 23 of the American Convention, in agreement with the rights of equality and non-discrimination protected by article 24, by using the criteria established in items a) and b) of article 29 of the American Convention.

Yatama, the political party of members of the indigenous and ethnic communities of the Nicaraguan Atlantic Coast, were impeded from participating in the 2000 municipal elections by the vote-managing organisms in Nicaragua, basing their ban on the supposed non-fulfillment of the requisites of the internal electoral legislation.

The Court declared: “The State violated political rights and the right to equality before the Law, as granted in articles 23 and 24 of the American Convention on Human Rights, in relation to Convention articles 1.1 and 2; prejudicing candidates proposed by YATAMA[...].”

In its analysis, the Court understood that the obligation of the State to guarantee political rights implied that regulations for its exercise and application be carried out according to the principles of equality and non-discrimination.<sup>27</sup> In the case of people who belong to indigenous or ethnic communities, the regulation must also take into account specifications such as their languages, customs and forms of organization, which may be different from the majority of the population.

The Court included in its consideration that the Nicaraguan election laws allow participation in electoral processes only through political parties, imposing upon natives a way of organization that is culturally alien to them, thus violated the internal regulations of Nicaragua, which compel the State to respect the indigenous ways of organization. The requirement for taking part in elections only through a political party was, to the indigenous people, an illegitimate restriction in the exercise of their political rights.

In the same way, all the other requisites for participation in electoral processes, imposed on citizens in general without considering specific conditions, and without considering the specific conditions of the members of indigenous and ethnic communities, who, in order to fulfill these requisites, are placed at a disadvantage compared to other candidates. Thus, for example, the requisite imposed by the Nicaraguan electoral law on political parties to present candidates in 80% of the municipalities in which the electoral process will take place, implied that the indigenous Yatama party had to participate in the elections of non-indigenous municipalities. As such, the requisite could not be complied with, as in purely indigenous communities it constituted an obstacle to its own fulfillment.

## The Court Decision

*225. The Court considers that the State must adopt all necessary measures to guarantee to the members of the ethnic and indigenous communities of the Atlantic Nicaraguan Coast their participation, under conditions of equality, in all decision-making on the affairs and policies that fall within or might fall within their rights, or in the development of said communities, in such a way that they are integrated in the institutions and organs of the government; and have direct participation in proportion to their population in the management of public affairs; in the same manner as if doing so from their own institutions and in accordance with their values, employment, customs and methods of organization, and always in a form that is compatible with those human rights the Convention is dedicated to.*

This decision constitutes an important precedent for analogous situations in which there is a full exercise of rights by members of indigenous and ethnic communities, as it implies that no conditions or requisites can be imposed on them that ignore their cultural peculiarities.

## Reparation

As a consequence of the evolutive interpretation of Article 21 of the American Convention, which begins with a resolution in which the Inter-American Court addresses the particular dimension that the indigenous people have toward the ownership of land and property, the aforesaid Tribunal has slowly had to accept that violations committed in prejudice to the human rights of indigenous populations provoke different effects than those that can be seen in non-indigenous victims, and therefore, reparations should include measures that repair any damages, as far as possible, to the ethnic identity of the victims as well as to the self-esteem of their communities.

In the *Awas Tingni Case*, the reparations ordered by the Court concentrated on the issues of delimitation, demarcation and the providing of official titles for indigenous lands, and ordered that the State take the necessary measures to create an effective mechanism that would incorporate the customary rights, uses, values and customs of the indigenous communities; and ordering that logically, in this case, they proceed to realize these activities in relation to the territory of the *Awas Tingni*<sup>28</sup> Community, and that, moreover, they indemnify this community, in ready cash, for the prejudices caused by the State for not having acted earlier.<sup>29</sup>

Even though these measures attacked the fundamental problem of an

absence of lawful assurances for the use and enjoyment of the property and territory of the indigenous community, we think that they fell short in repairing the damages to their quality of life, spirituality, identity and the life plan of the community. These damages had been provoked by the disquietude the community suffered to the special relationship they customarily have to their territory, which obligated legal security for their property via delimitation, demarcation, and legal title to their lands.

The Court, as has been said, reached an important development at a fundamental moment of transcendence, beyond the pecuniary, that exists between indigenous peoples and their territory, but at the moment of repairing the effects from not having a guarantee of this relationship, it failed precisely in the pecuniary, fixing a monetary indemnification without a complement of any measure of satisfaction or ethnic reaffirmation.

In the decision of the Yakye Axa Case, the Court has made some advances in this type of reparation. Measures were arranged securing the special relationship between the community and its ancestral territory, such as the adoption of mechanisms for internal rights to guarantee the effective enjoyment of indigenous property rights; In the case of the Yakye Axa Community, the identification and free delivery of its ancestral territory, the guarantee of subsistence to the community until the concretion of the delivery of their land and a statute for a program and a fund for community development.<sup>30</sup>

As supplements, the Court ordered two measures of satisfaction: a public act of recognition of the responsibility of the state, and the publication and diffusion of the relevant parts of the decision.<sup>31</sup> In our judgment, these measures were not sufficient, but in some manner they have had the effect of reaffirmation of the self-esteem of a community that has suffered taunts and humiliation.

In the Moiwana Case, referring to the massacre of members of the community which obliged the survivors to flee their territory, abandoning the cadavers of relatives and friends, without having the opportunity to perform their traditional spiritual rites which they are obligated to do in order to obtain rest for their dead, the Court, besides taking measures to reassure the relationship between community and territory, analogous to the decisions it made in the two previous cases, also ordered two measures of satisfaction clearly oriented to restore the ethnic self-esteem of the N'djuka people: a public apology and the recognition of responsibility on the part of the State and the establishment of a monument in memorial.<sup>32</sup>

In this case, the immaterial damages which the Court gained for the community survivors were very grave and they link to the relevant characteristics of the N'djuka culture, such as feelings of humiliation, anger



and fear that were provoked at the time by impediments in the law that were conducive to the sanctioning of those guilty of the massacre, and in proportion to their impunity, could lead the offended spirits to take vengeance for their debts. They were also afraid of contracting spiritual illnesses as a consequence of not having realized adequate burial rites for the massacre victims and, by supposition, the abrupt interruption of the connection of the community with its territory due to the forced displacement they had been subject to immediately following the massacre. Confronting these effects, the Court introduced, as a way to make reparations, an indemnification in currency.<sup>33</sup>

Looking at analogous incidents, the brutal and indiscriminate massacre of indigenous Maya Achí men, women and children from the Plan of Sanchez Community, the Court adopted more advanced measures for satisfaction. In the first place, it clearly defined the impact the massacre had on the culture and ethnic identity of surviving members of the community:

*49.12 With the death of the women and the elders, who were the oral transmitters of the Maya Achí culture, their skills and knowledge could not be passed on to new generations, which provoked an actual cultural void. Orphans did not receive the formation traditionally inherited from their ancestors. At the same time, the militarization and repression that the law submitted the survivors of the massacre to, especially, the young, led to a loss of trust and faith in the traditions and knowledge of their ancestors. (Plan de Sánchez Case Decision)*

Still worse, the community was not able to perform adequate funerary rituals for the massacre victims, which caused grave suffering in their relatives and an alteration in their process of mourning. Neither ceremony nor traditional rite of the Maya culture could be freely performed, due to the vigilance and repression by the military that followed the massacre.<sup>34</sup>

In general, the Court observed that practices and values intrinsic to Maya culture, such as decision-making by consensus, the respect and the service, had been displaced by authoritarian practices and an arbitrary use of power, linked to the militarization of their day to day lives that finished by provoking the severance of group unity and a loss of reference.<sup>35</sup>

In view of this situation, the Court adopted reparatory measures on two levels: on the individual plane, through a pecuniary indemnification, and on the collective plane, through the following measures for satisfaction:

- a) Resume investigations to permit the victims to know the truth about the massacre.
- b) Have a public act for the acknowledgement of responsibilities and

- in memory of the massacre victims.
- c) Translate all of the Court decisions into the Maya Achí language and make them public.
  - d) Create a housing and development program.
  - e) Offer medical and psychological treatment.

The measure concerning the translation of the Court's decision into the vernacular language and the effect of its distribution is very important, because on one hand it contributes to the reconstruction of the memory of the Maya Achí people and puts within their reach access to the decisions in which all the facts have been collected, analyzed and authorized, and on the other hand because it contributes to the reaffirmation of their injured identity, because having the decisions in their own language permits their appropriation, as an element of justice, on the part of the Maya Achi people.

Likewise, the Court considered that the immaterial damages provoked by the inadequate guarantees to the rights of the candidates of the political party of the indigenous Yatama to participate in local elections with conditions equal to others, provoked a grave impact to their individual self-esteem, due to the high valorization their culture places on the electoral process. The sense that they were suffering discrimination provoked a feeling of demoralization in them and led them to believe that, just as always in the rest of their lives they had felt excluded, they were now still being excluded.<sup>36</sup>

The Court, among the other reparatory measures adopted, ordered the State to reform the electoral requisites, so that "the members of indigenous and ethnic communities participate in the electoral processes in an effective way, while taking into account their traditions, uses and customs."<sup>37</sup>

The Court has been reiterative when stating that judgment itself constitutes reparation. Without a doubt, this is true, but it is still too soon to know whether the level of fulfillment of reparatory measures ordered corresponds to the expectations generated by the performance of justice.

### **Free, informed and prior consent: A pendent challenge in the Court.**

Although there have been important advances on the rights of the indigenous in the Inter-American System, it is also possible to identify, in the same field, some challenges that have not yet been addressed or resolved.

Perhaps the most important challenge is the one that fully recognizes the rights of indigenous peoples in decisions adopted by the State that directly affect their rights and territory, without the State having consulted

them, and without the State having considered the indigenous right to “free, informed and prior consent.”

This right, which appears as article XXI.2 in the Plan of the American Declaration on the Rights of Indigenous Peoples that has been discussed since 1997 in the compass of the OAS<sup>38</sup>, has been recognized by the Inter-American Commission of Human Rights in its reports on the situation of human rights in diverse countries of the continent,<sup>39</sup> and includes those on the level of contentious, as in the case 11.140 Mary and Carry Dann vs. the United States.<sup>40</sup> The Court has pronounced in the following sense:

*Art. 140. The Commission first considered that Articles XVIII and XXIII of the American Declaration in particular obligate the member States to guarantee that full determination of the extent to which indigenous complaints maintain interests in the lands to which they have traditionally held title and occupied and used, is based upon a process of full information and mutual consent on the part of the entire indigenous community. This requires, at the least, that all members of the community have been fully and fairly informed of the nature and consequences of the process and offered a true opportunity to participate both individually and collectively[...].*

*Art. 141. On the contrary, due to the weight of the action, and in consequence of the anxiety in the Dann case to intervene, a clear collective interest in the Western Shoshone territory may not have been justly satisfied through the legal proceedings initiated by the Temoak Group, the courts in the last instance did not undertake any measures to address the substance of these objections but rather disregarded them, on the basis of the celerity of the processes of the ICC. In the opinion of the Commission and in the context of the present case, this was not sufficient for the State to meet its particular obligation to ensure that the condition of the Western Shoshone traditional lands had been determined through a process of both informed and mutual consent on the part of the people of the Western Shoshone in their totality.*

This publication of the Commission has particular importance, since it puts an end to the controversy due to the United States of North America not recognizing the authority of the Inter-American Court. In equal conditions, the Commission pronounced judgment in their report on the background judgment in the Case of Maya Indigenous Communities of the Toledo District, Belize.<sup>41</sup> In the latter case, the IACHR considered:

*5. In the report, having examined the evidence and arguments presented on behalf of the parties, the Commission concluded that the State violated the*

*right to property protected by Article XXIII of the American Declaration, and the right to equality protected by Article II of the American Declaration, to the detriment of the Maya people, by not taking effective measures to delimitate boundaries and to officially recognize their right to communal property on lands they have traditionally occupied and used, and by executing logging and oil concessions to third parties allowing the use of the property and resources that could be enclosed within the lands which must still be delimited, demarcated and titled, without having neither consulted the Maya people nor having obtained their informed consent. The Commission also concluded that the State violated the right to judicial protection guaranteed by Article XVIII of the American Declaration to the detriment of the Maya people, by rendering judicial proceedings brought by them ineffectual through a root of unreasonable delay.*

The strict relationship and interdependence between territory, previous consultation, previous consent and economic, social and cultural rights are very explicit in the Report of the IACHR.

*153. In addition, the Commission reached the conclusion that the State, by agreeing to logging and oil concessions for third parties to make use of the property and resources that could fall within the lands which must still be delimited and granted official titles, or otherwise clarified and protected, without the informed consent of the Maya people, and with the resulting environmental damage, to the detriment of the Maya people further violated their right to property, protected by Article XXIII of the American Declaration.*

*154. Finally, the Commission observes the affirmation of the Petitioners that the failure of the State to engage in meaningful consultations with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, further constitute violations of several other rights under international law, including the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the rights of a family and its protection under Article VI of the American Declaration, the right to the preservation of health and well-being under Article XI of the American Declaration, and the right to consultation implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of free determination.*

*155. In its analysis in this case, the Commission has emphasized the exceptional nature of the right to property as it applies to indigenous people, whereby the*

*land traditionally used and occupied by these communities plays a primordial role in their physical, cultural and spiritual life. As previously recognized by the Commission in reference to the right of property and the right of equality, the free exercise of these rights is essential for the enjoyment and perpetuation of their culture". Analogically, the concept of family and religion within the context of indigenous communities, including the Maya people, is intimately linked to their traditional lands, where their ancestral burial grounds, places of religious significance and customary dignity, are related to the occupation and use of their physical territories. Furthermore, in its analysis, the Commission has specifically concluded in this case that the duty to consult is a fundamental component of the State's obligations to give effect to the right of communal property to the Maya people in the lands they have traditionally used and occupied.*

The Court, in compensation, has not yet published its decision in respect to this theme. In the *Awat Tingni Case*, it has not made any statement regarding the argument presented by the Inter-American Commission in its closing speech, in the sense that "by ignoring and rejecting the territorial claim of the Community, and by agreeing to a concession for logging within a land that traditionally belongs to the Community without a consultation for its opinion, "the State violated a combination" of the following articles protected in the Convention: 4 (right to life); 11 (protection of honor and dignity); 12 (freedom of conscience and religion); 16 (freedom of association); 17 (protection of the family); 22 (right of circulation and residence); and 23 (political rights)." The Court limited itself to referring to only its own Decisions regarding the right to property and the right to legal protection of the members of the *Awat Tingni Community* and, moreover, rejected the violation to the rights protected by the aforementioned articles, because the Commission had not given foundations for them in its closing arguments.

## **Method of conclusions**

a) The Inter-American System of Human Rights is demonstrating its importance in the dynamics of the process that is amplifying and deepening the international protection of human rights, in the measures of its decisions, through the evolutive interpretations of the American Convention, it has been able to extend the significance and scope of the rights protected in it, in order to contain in an ample manner the new realities it must confront.

While the amplification of the coverage of human rights in the region and in the international system moves at an excessively slow pace in the process of generating new international instruments, the legal system is more agile and perhaps even more effective.

b) The important advances that the Inter-American Court has made in the development of the right to property in relation to indigenous territories, have been oriented by the comprehension of their territory as a base of both the material and spiritual foundations of the indigenous peoples' economic, social and cultural rights.

By this standard, the decisions that have been published in recent years by the Court, tutelary of a special relationship between indigenous peoples and their territory, and overcoming in practice any doctrinal debate on the justiciability of ESCR, demonstrate that these rights are susceptible to protection by international justice. Decisions such as those of *Awas Tingni* and *Yakye Axa* are shining ESCR decisions, as they protect the quality of life as a collective right of the communities, inseparably bound to their territory.

c) The decisions that have been reviewed in this work clearly show that the violations to human rights produce different presumptions when committed against indigenous populations, and so require reparatory measures founded on their ethnic particularities. There is still a long way to go in this matter. Nevertheless, the principle measure adopted by the Court to repair immaterial damage is by pecuniary indemnification. It is worth asking about what undesirable impacts this type of measure might have on the life of communities with little contact with the market economy.

Creativity is imperative in the search for new attempts at measures of satisfaction that comply with the objective of restoring the situations caused from the severe damage to the self-esteem and the ethnic identity of indigenous communities and peoples that have been subject to violations of their human rights.

In cases such as *Plan de Sánchez*, ethnically appropriate measures were thought of. That would be the line worth exploring.

d) There will probably be new cases of indigenous rights linked to the exploitation of the natural resources within their territories, that will potentially arrive for resolution by the Inter-American Court in the next few years, presenting opportunities for this high court to publish jurisprudence regarding the right to consultation and free, informed and prior consent, all of which will undoubtedly be of great importance in guaranteeing the territory of the indigenous peoples, as the material basis of their lives and of their economic, social and cultural rights.

## NOTES

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1. See for example: Inter-American Commission of Human Rights, Report on the Situation of Human Rights in a Segment of Nicaraguan Population of Miskit Origin, November 9, 1983 and Inter-American Commission of Human Rights, *Decision No 12/85*, Case No. 7615 vs. Brazil. (*Yanomami Case*), March 5, 1985. "The reports by the Inter-American Commission of Human Rights and the decisions passed by the Inter-American Court of Human Rights are available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>".
2. Inter-American Court of Human Rights, *Case of the Mayagna Community (Sumo) Awas Tingni vs. Nicaragua*, Decision from August 31, 2001, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
3. Inter-American Court of Human Rights, *Case of Plan de Sánchez Massacre vs. Guatemala*, Decision from November 19, 2004 (Reparations), available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
4. Inter-American Court of Human Rights, *Case of the Moiwana Community vs. Nicaragua*, Decision from June 15, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
5. Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community vs. Paraguay*, Decision from June 17, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
6. Inter-American Court of Human Rights, *Case of Yatama vs. Nicaragua*, Decision from June 23, 2005, available on the Internet at <[www.cidh.org](http://www.cidh.org)> and at <[www.corteidh.or.cr](http://www.corteidh.or.cr)>.
7. In 1989, the General Assembly of the OAS agreed upon the creation of an inter-American instrument on the rights of indigenous peoples. Since 1992, the Inter-American Commission has begun the elaboration process of a project tending to the American Declaration of Indigenous Peoples. So far, the Commission has approved a 1995 draft and its modifications, approved in 1997, are still under discussion. Fergus Mackay, *Los derechos de los pueblos indígenas en el sistema internacional*, 1. ed, Lima, APRODEH, 1999.
8. "The bases of progressivity lie in the conception of international protection itself. The various instruments about it contain explicit statements of will on the need of new development that will increase and consolidate every aspect covered in them." Pedro Nikken, *Introducción a la protección internacional de los derechos humanos - XIX Curso interamericano de derechos humanos*, San José, Costa Rica, IIDH, July 19-28, 2001.
9. "The terms of an international treaty on human rights have autonomous meaning, and, as such, they cannot be collated with the sense they have in internal law. Besides, such treaties on human rights are living instruments, the interpretation of which has to comply with the evolution of time and, in particular, with the present life conditions" (Inter-American Court of Human Rights, *Awas Tingni Decision*, quoted, par. 146.)
10. The Inter-American Court of Human Rights has stated this criterion at the Consultive Opinion (Opinión Consultiva OC-18/03. *Condición Jurídica y Derechos de los migrantes indocumentados.*)

11. "In the present case, in view of the scope of quoted article 21 of the Convention, the Court considers it useful and appropriate to make use of other international treaties different from the American Convention, such as ILO Covenant 169, to interpret its provisions according to the evolution of the inter-American system, considering the corresponding development of Human Rights International Law" (*Yakye Axa Decision*, quoted, par. 127.)
12. Concurring reasoned vote by Judge Sergio García Ramírez to the *Awás Tingni* Case Decision. Inter-American Court of Human Rights, *Awás Tingni Decision*, quoted.
13. *Idem*.
14. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 126.
15. However, the right to property is not the only one whose meaning and scope the Inter-American Court has widened - thanks to an evolutive interpretation- in order to embrace the particular realities of indigenous peoples. In the *Yatama* Case, which refers to political rights, the Court considered that articles 23 and 24 of the American Convention incorporate the right of the members of indigenous and ethnic communities to a practice of their political rights "according to their values, uses, customs and forms of organization, whenever they are compatible with the human rights codified in the Convention" (paragraph 225, *Yatama Case Decision*). The first of such articles refers to the right to take part in the management of public affairs, to vote and be voted through authentic public elections with a universal, equal and secret vote, and to have access to public office in equal conditions; and the second refers to equality before the law.
16. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 130.
17. *Ibid.*, par. 144.
18. *Ibid.*, par. 146 and 147.
19. *Ibid.*, par. 148.
20. *Ibid.*, par. 149.
21. Inter-American Court of Human Rights, *Awás Tingni Case Decision*, quoted, par. 149.
22. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, par. 137.
23. Inter-American Court of Human Rights, *Awás Tingni Case Decision*, quoted, par. 144.
24. *Ibid.*, par. 149.
25. Inter-American Court of Human Rights, *Sentencia Caso Yakye Axa*, quoted, par. 167 and 168.
26. "The safeguard of the right to communal property of indigenous peoples must take into account that the land is tightly bound to their traditions and oral expressions, habits and languages, arts and rituals, to their knowledge and uses related to nature, cooking arts, common law, clothing, philosophy and values. Depending on their environment, their integration with nature and their history, the members of indigenous communities transmit this immaterial cultural heritage from generation to generation, and it is constantly re-created by the members of the communities and of the indigenous groups." *Ibid.*, par. 154.
27. Inter-American Court of Human Rights, *Yatama Case vs. Nicaragua*, Decision passed on June 23, 2005, quoted, par. 201.



28. Inter-American Court of Human Rights, *Awas Tingni Case Decision*, quoted, par. 164.
29. *Ibid.*, par. 167.
30. Inter-American Court of Human Rights, *Yakye Axa Case Decision*, quoted, resoluteive points 6 to 10.
31. *Ibid.*, resolutory points 11 and 12.
32. Inter-American Court of Human Rights, *Sentencia Caso Moiwana*, quoted, par. 216 to 218.
33. *Ibid.*, par. 195 and 196.
34. Inter-American Court of Human Rights, *Plan de Sánchez Case Decision*, quoted, par. 49.13 & 49.14
35. *Ibid.*, par. 49.16.
36. Inter-American Court of Human Rights, *Yatama Case Decision*, quoted, par. 246.
37. *Ibid.*, resolutory point 12.
38. See OEA/Ser/L/V/II.95 Dic.6, 1997.
39. See e.g.: Inter-American Commission of Human Rights: *Report on the Situation of Human Rights among the Segment of Nicaraguan Population of Miskito Origin*, Second Part, Section E, paragraph 27. 1983; Inter-American Court of Human Rights, *Third Report on the Situation of Human Rights in Colombia*, Chapter X, Rights of Natives, J. Recommendations, 4, 1999 and Inter-American Commission of Human Rights, *Second Report on the Situation of Human Rights in Peru*, Chapter X, Rights of Indigenous Communities, H. Recommendations, 4, 2000.
40. Inter-American Court of Human Rights, *Report No. 75/02*, December 27, 2002.
41. Inter-American Commission of Human Rights, *Report No 40/04, Case 12.053* (Indigenous Maya Communities of the Toledo District vs. Belize), October 12, 2004.

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#### ABSTRACT

The Ecuadorian Constitution, oriented by guidelines of International Law, has established a multi-cultural State, and devotes one of its chapters to the collective rights of the indigenous and Afro-Ecuadorian peoples. Since approval in 1998, new possibilities have arisen regarding claims of such rights before courts, as well as their development in domestic laws.

In Ecuador's Amazonian regions, there are two cases in which indigenous peoples have made use of the new legal mechanisms to defend their collective rights against the oil industry. Both cases demonstrate the aggressiveness with which oil companies –allied with the government and the World Bank - impose their “public relations programs” in indigenous territories, applying the same divide-and-conquer dynamics historically used by the oil industry in the legal arena. (Original in Spanish.)

#### KEYWORDS

Indigenous rights – Indigenous peoples – Ecuadorian Amazon – Oil industry – Right to consultation.



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# INDIGENOUS PEOPLES VERSUS OIL COMPANIES: CONSTITUTIONAL CONTROL WITHIN RESISTANCE

Isabela Figueroa

*I would like to know how white people think, understand why they divide the land. We had never heard someone could own only a part above, because someone else owns a part below. All human beings live above, underneath lie snakes and spirits. I am worried about that.\**

## Introduction

The Ecuadorian Constitution is Latin America's most advanced in terms of acknowledgement of collective rights. Oriented by International Law guidelines, it has established a multi-cultural State and devotes one of its chapters to the collective rights of the indigenous and Afro-Ecuadorian peoples. Since its approval in 1998, the Constitution has opened new possibilities regarding claims of such rights before courts, as well as their development in domestic laws.

In the Amazonian region of Ecuador, there are two cases in which indigenous peoples from the Independent Federation of the Shuar People of Ecuador (FIPSE) and from the Kichwa community of Sarayaku have made use of some of the new legal mechanisms to defend their collective rights against the oil industry. One of the results of such actions has unveiled the aggressiveness with which oil companies impose their "public relations programs" in indigenous territories, clearly exposing that the goal of such programs is to "tame" indigenous resistance in the Jungle and make room for the extraction industry.

The present text exposes the weaknesses of the Ecuadorian Constitution, which have resulted in the mere transfer of the social conflicts among

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\*Narcisca Mashienta, Shuar from the Yuwentza community, Independent Federation of the Shuar People of Ecuador (FIPSE). Comment to the information received during a workshop on collective rights and oil activity, held by FIPSE during February 13 and 14, 1999.

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See the notes to this text as from page 72.

governments, oil companies, and indigenous peoples to the legal arena. Once the Indigenous Peoples resorted to legal strategies to defend themselves from the “public relations programs” through the courts, the Ecuadorian government, sponsored by the World Bank, elaborated and decreed regulations, tending to keep the order previously established by the oil companies in the above-mentioned programs.

Even though relations between indigenous peoples and oil companies are only a part of the extractive industry’s problems in the Amazonian region, their dynamics include global players and illustrate some of the challenges in the build-up of the multi-cultural State conceived in the Ecuadorian Constitution.

### **Ecuador: Country of the Amazon**

In a territory of 274,780 km<sup>2</sup>, Ecuador’s population of 12 million is distributed in four regions: Amazonian (to the West), Sierra, Costa, and Galápagos.

Information regarding the percentage of the indigenous population varies according to different sources. Several polls, using different “ethnic identification” criteria, have offered data ranging from 25 to 40%. Some more recent studies state that the percentage is 35%.<sup>1</sup> Indigenous populations belong to 12 different nationalities which, besides Spanish, speak 11 different languages and are organized in a politically representative network at different levels: local, regional and national. The biggest and most representative national organization is the Confederation of Indigenous Nationalities of Ecuador (CONAIE).

The Amazonian region in Ecuador, with its low demographic density, spreads over 130,000 km<sup>2</sup>, which represents almost half the geographical surface of the country. Most of the inhabitants belong to the Cofán, Secoya, Siona, Huaorani, Eastern Kichwa, Shuar, Achuar, Shiwiar and Zapara nationalities.

The communities are organized into centers and associations which, in turn, constitute federations. Most of these organizations, at a regional level, are represented by the Confederation of Indigenous Nationalities of the Ecuadorian Amazon - CONFENIAE, affiliated with CONAIE.

Since the seventies, and after an unsuccessful proposal of agrarian reform, the Amazonian region was gradually colonized, one of its objectives having been to make it safer for oil exploitation.

### **Ecuador: An oil-producing country**

The Ecuadorian economy depends largely on extraction of oil, whose reserves are mainly located in the Amazonian region. In 2000, income from oil exports represented 41.7% of the total Ecuadorian budget. The price increase of oil multiplies this figure.<sup>2</sup> The first company to operate in Ecuador was Shell, during

the thirties. After looking for large reserves unsuccessfully in the Amazonian region, it left and moved to the Coast.

Over 30 years later, Texaco discovered crude oil in the northern Amazonian region and operated there for 25 years. It is calculated that such operation caused deforestation of 700,000 to 800,000 hectares, and spilled around 300,000 barrels of crude oil, as well as causing several other ecological disasters in the area.<sup>3</sup> These problems still exist and are aggravated day by day, due to the activities of Petroecuador<sup>4</sup>, which operates with the obsolete equipment inherited from Texaco in 1992.<sup>5</sup> The impact of Texaco and Petroecuador affect indigenous peoples and settlers who moved to the region, encouraged by promises of work and government incentives.<sup>6</sup>

The central region is affected both environmentally and socially by more modern contracts, such as the concessions in Kichwa territory, including Sarayaku, but their effects cannot be compared to what Texaco caused in the North. The Southern region, mainly inhabited by the Shuar and Achuar peoples, still resists the beginning of oil activity, in spite of the huge pressure exerted by the companies and the government.

### **Ecuador: A multi-cultural country**

During the 80's, the Amazonian indigenous peoples consolidated organizational groups, which they formed with the support of religious missions. In 1986, they created the Confederation of Indigenous Nationalities of the Ecuadorian Amazon-CONFENIAE, through which they began to express their political claims on land, environment, health, and culture. During the same decade, the CONAIE grew to become a national movement, gradually imposing the indigenous agenda on government decisions.

Since 1990, when CONAIE stirred up a major insurrection in the country, the indigenous issue in Ecuador captured the attention of the international community. A critical discourse concerning continental commemoration of the Spanish conquest ended up consolidating a national political movement, the Multi-National Pachakutik Movement, which obtained 21% of the votes during the 1996 presidential elections, and actively participated in the elaboration of the constitutional text.<sup>7</sup>

The 1998 Ecuadorian Constitution is one of the results of this growing political force. The text brings together “up-to-date sociological and modern philosophical discussions regarding gender, right to difference, identity and communitarianism, but also ecological and legal anthropology issues.”<sup>8</sup>

The consolidation of a national indigenous movement compelled the Ecuadorian state to review its commitments to indigenous rights and the environment. In the Amazonian region,, indigenous peoples' and settlers'

organizations began to denounce the social and environmental impact produced by oil industry development, generating pressures to reform oil industry policies and practices. A lawsuit against Texaco presented in the district of New York was essential to the development of a rights perspective on the relations among oil companies, governments, and affected parties.<sup>9</sup>

### **The '98 Constitution – Ama quilla, ama llulla, ama shua!<sup>10</sup>**

Ecuador is a sovereign, unitary, independent, democratic, multi-cultural and multi-ethnic State, based on the rule of law. That is how the constituents decided that the first article of their Magna Carta should read. The multi-cultural and multi-ethnic concepts have been innovations brought by the 1998 text. Scholars define a multi-cultural and multi-ethnic country as one where more than one people co-exist, in the sense of a historical community, sharing a language and a differentiated culture.<sup>11</sup>

Even though most of the American countries are multi-national and multi-ethnic, very few acknowledge this reality. By declaring itself multi-cultural and multi-ethnic, the State assumes the co-existence of various claims of redistribution of power, cultural rights, and development policies, and commits to bringing them together. Instead of subordinating the interests of some ethnic groups to those of others, the State has to accommodate them under the principles of equity and participation.<sup>12</sup> The Constitution has established guidelines for the development of laws that will acknowledge such reality.

The creation of a chapter devoted to collective rights is the central key to the concept of multi-culturality in the Constitution. Articles 83, 84 and 85 describe a series of constitutional guarantees that safeguard rights such as identity of indigenous peoples, protection of their culture and territories, management of their natural resources, participation in the State, and autonomous development. Even though it is impressive at first sight, the chapter regarding collective rights is not integrated throughout the Magna Carta, since it exists almost as an appendix, defying the political and economic order established by the Constitution itself.

### **Oil activity in the Constitution**

Just as in other countries of the region, the Ecuadorian Constitution reserves the property of subsoil resources to the State. However, oil fields in the Amazonian region are located in the subsoil of lands belonging to indigenous peoples. For these peoples, the concept of land property is integral, as the various aspects of their identity and culture are connected with their feeling of mutual belonging to the land –a perspective that the Constitution also recognizes.

The conflict generated by the Constitution, between traditional property and soil dichotomy, is not only practical but legal, when different parties interpret it. In theory, the generation of this conflict is necessary to foster the creation of policies that will implement interaction processes from different perspectives. In the long run, conflicts should generate dialogue processes and, through them, negotiations that could redistribute decision making power over public policies.

Seven years have passed since the Ecuadorian Constitution came into force. During that time, some indigenous organizations have used legal resources to consolidate their rights and resist the impact of oil companies, placing day-to-day conflicts in the legal arena and demanding protection of their rights. In response, successive governments have developed a legal strategy that ignores multi-cultural rights and achievements attained by indigenous peoples, turning the unequal and abusive relationships that companies establish with indigenous communities into legal rules.

The result of this posture is the co-existence of legal instruments that deal differently with the interaction of indigenous peoples, governments, and oil companies. On the one hand, a series of national and international court decisions back the indigenous perspective. On the other, legal rules adapt to the interests of the oil industry.

In order to understand this contradiction, generated in the legal field, it is necessary to analyze the legal conflicts originating in the Constitution itself. The presentation of the cases that follow, and the answers the Ecuadorian government has found to neutralize their effects, offer an extra element to analyze this contradiction.

### Legal strategies to resist

#### *The FIPSE Shuar People vs. Arco, Burlington and the Ecuadorian State*

With a territory of over 184,000 hectares, the Shuar People of the Independent Federation of Ecuador (FIPSE) live close to the Kutukú mountain range, in the province of Morona Santiago. FIFPS includes 56 *centers* grouped in 10 *associations* with autonomously elected governments.

At the same time, the union of these associations constitutes the Federation, affiliated with CONFENIAE. FIPSE is a political body that represents the communal interests of its more than 7,000 members, defending their rights and interacting with external parties, such as governments and NGOs.

In 1998, the Ecuadorian government hired Arco, an American company, to exploit oil in Plot # 24 -200,000 hectares in the Southern Amazon, comprising – among others- the ancestral FIPSE territory. The contract was negotiated and signed without the knowledge of FIPSE or any other affected people. When the

news broke, and they were informed of the difficulties Northern peoples were facing due to oil exploitation, FIPSE held an Assembly and decided not to allow “any individual negotiation between the company and the communities, without the Assembly’s authorization, given that it is its highest authority.”<sup>13</sup>

Such decision was made public and presented to the Ecuadorian government and to Arco, which ignored it and offered small amounts of money and property to some families in two of the 56 FIPSE communities, without consulting the top leaders of the organization. Instead, the company asked these families to allow them entrance to their lands in order to perform “environmental studies.”<sup>14</sup>

In 1998, resorting to new possibilities brought up by the Constitution, FIPSE presented a constitutional appeal for Legal Protection against Arco, arguing that negotiations between the company and certain individuals violated the precepts of article 84, concerning their own form of political organization. The judge decided that Arco could not approach any community in or outside the FIPSE territory without prior consent by its Assembly, and ordered Arco to respect the political demands of the Federation by addressing only its designated leaders.<sup>15</sup>

Since Arco considered FIPSE’s claims excessive, it appealed the decision. At the same time, openly disobeying the Court’s decision, Arco invited another FIPSE community to sign another “agreement”, but the invitation was ignored. Later on, the Court of Appeals backed the decision in favor of FIPSE.<sup>16</sup>

In 1999, FIPSE asked the National Workers’ Confederation, the Ecuadorian Confederation of Free Unions Organizations (CEOSL) for institutional support to present a claim against Ecuador before the International Labor Organization (ILO), for violation of Convention n. 169. Two years later, the ILO issued a series of recommendations to the Ecuadorian State, aimed at guaranteeing the rights of FIPSE and other Amazonian organizations.<sup>17</sup>

In April 2000, Arco sold its rights on the resources of the Shuar territory to Burlington Resources, a Texas-based oil company. Once again, the negotiation between the State, Arco and Burlington took place without the participation of either FIPSE or other affected parties. When Burlington took charge of the operation, it sent a letter to various FIPSE families, announcing the donation of a solar panel by the Minister of Energy to the communities who decided to cooperate with their work.<sup>18</sup>

In answer to this, FIPSE demanded that the court formally extend its decision to Burlington, which was granted. Immediately after that, Burlington announced that it could not meet the contract terms due to “force majeure”, an unusual classification for the indigenous resistance.<sup>19</sup> Technically speaking, “force majeure” refers to situations that are beyond human control, such as natural disasters.

At the same time, Burlington communicated to Petroecuador that it had hired “personnel in Ecuador, whose main responsibility was to improve relations in Plot 24. Such personnel have experience in Ecuador, having dealt successfully



with tough public relations concerning other oil plots. Burlington assigned a considerable budget to facilitate this task.”<sup>20</sup>

The government accepted the “force majeure” argument. Its complicity with Burlington was evidenced in a confidential document that the oil company sent to the government, stating:

*[...] Important changes have been attained [...] federations have been urged to break the ‘anti-oil pact’, enabling some formerly impossible rapprochements; [...] a considerable number of communities admit that the oil activity is irreversible, in contrast with the message of a group of activists who fostered the idea that a rejection from the local groups was enough to prohibit this kind of public interest projects; we now have a favorable public opinion from most to the opinion leaders, such as local authorities, independent mass medi,a and even some groups from the Church.*<sup>21</sup>

This document made clear that, when companies plan tactics to generate conflicts within the communities, they not only expect the government’s complicity, but also its participation. Burlington suggested that governmental missions promote agreements with the communities and offer training on “public relations” to government employees who work closely with communities, such as professors and local authorities.<sup>22</sup>

In order to obtain these confidential documents and make them public, in 2001 FIPSE, together with FICSH (Federation of the Shuar Peoples) and FINAE (Inter-provincial Federation of the Achuar Nation), presented a *habeas data* petition<sup>23</sup> against Petroecuador. Consequently, Petroecuador handed over the documentation received from the company to the Shuar and Achuar Peoples. The strategy described in the document, together with new infiltrations of the company in Shuar territory, represent such obvious violations of the constitutional injunction, that in 2002 FIPSE presented criminal claims against Burlington, which are still pending decision.

By the end of 2002, after investigating the facts in which the State, Arco, Burlington, and the affected indigenous peoples are involved, the Commission for the Civic Control of Corruption demanded “the Ministry of Energy and Mining to declare the expiration of the participation contract drawn between Arco Oriente Inc. and Petroecuador. It also demanded that the Executive President of Petroecuador declare void the acceptance of the “force majeure” declaration, notified by the contractor 28 months after the expiration of the contract. The declaration of nullity leads to the return of the Plot 24 areas to the Ecuadorian State, and execution of guarantees in favor of Petroecuador.”<sup>24</sup>

In spite of this recommendation, the contract is still in force, as well as the state of “force majeure.” The more than 7,000 members of FIPSE are still resisting the various and incessant actions carried out by Burlington.<sup>25</sup>

### *The Sarayaku people vs. CGC and the Ecuadorian government*

In the province of Pastaza, approximately 2,000 people stand in resistance against the presence of oil companies in their lands, contained in Plot 23. Sarayaku, one of the communities that integrate this plot and a member of the Kichwa Organization OPIP – Organization of the Pastaza Indigenous Peoples- has been against the oil project from the beginning.

The Sarayaku lands include a total of six community groups living on the margins of the Bobonaza River, 100 km away from Puyo, the provincial capital. The ten families who resist are the main focus of a growing international campaign against oil exploitation in the Amazonian region, as well as a violent intimidation campaign to protect the companies involved.<sup>26</sup>

In 1996, the Ecuadorian government granted the Compañía General de Combustibles (CGC) from Argentina, the rights to exploit oil in Plot 23.<sup>27</sup> In 1999, the CGC franchise went through a series of inter-company sales and purchases. The process eventually caused Plot 23 to fall in the hands of an international consortium which, in 2003, included CGC, Burlington Resources from Texas, and Perenco, an Anglo-French company.<sup>28</sup>

Making use of the same strategies adopted by Arco and Burlington in the FIPSE territory, CGC approached the OPIP communities, including Sarayaku, with money and “small projects” offers. In 2002, CGC offered Sarayaku US\$60,000 to obtain its “consent” for a seismic study. The Sarayaku Assembly told the company that it not only rejected their offer, but also decided not to hold any kind of dialogue with them.<sup>29</sup>

As the company and the government pressures on the communities of the region increased, Sarayaku increased its resolve to resist any type of exploitation and division strategy. In 2002, its decision was made public under the “March for the Jungle” slogan, together with a two-month march that began at the community and ended in a press conference in Quito.

In response, CGC offered more “help” to the neighboring communities of Sarayaku, with the purpose of isolating the community from its neighbors. Until January 2003, CGC had promised a grant of US\$350,000 for “social projects” within the OPIP communities.<sup>30</sup> To undermine Sarayaku resistance, CGC invented<sup>31</sup> a body named “independents from Sarayaku”, having some Kichwa individuals sign a document on the following terms: “the undersigned [...] hereby address your authority [the CGC manager] to kindly request all the support our communities, as independents from Sarayaku, require, by means of communitarian projects and employment to be offered during the seismic studies in Plot 23 [...]”<sup>32</sup> A common practice among the Amazonian oil companies, this one attempted to create internal conflicts leading toward the political weakening of the community.

In December 2002, OPIP presented a Constitutional Appeal for Legal Protection against CGC. The case was based on the precedent established by *FIPSE vs. Arco Oriente*. Just like FIPSE, OPIP demanded from the judge that he order the oil company refrain from any negotiation or dialogue with the OPIP members, without previous consent of the organization assembly. Upon receipt of the suit, and as precautionary measure, the judge preliminarily ordered “suspension of present or imminent action affecting the herewith claimed rights.”<sup>33</sup> Even though the merits of the lawsuit should have been decided few days later, it is still unsolved.

In December 2002, a CGC worker reported several Sarayaku leaders to the police for theft and damage to the company headquarters.<sup>34</sup> A copy of the report was sent by CGC to the governor of the province by CGC, who requested that special attention be given to the case.<sup>35</sup> The criminal action that followed such report was discarded by the judge. In January 2003, CGC hired a “security group”, which entered the Sarayaku territory once again to open new exploration fields.<sup>36</sup>

The sustained resistance of the indigenous communities led the government to accept the declaration of “force majeure” also in Plot 23, thus ensuring the suspension of contractual deadlines for CGC.<sup>37</sup>

As hostilities and physical aggression by the company’s security agents and even by the Ecuadorian Armed Forces persisted, and having exhausted every domestic legal remedy, the Sarayaku community resorted to the Inter-American Commission of Human Rights (IACHR) in search of protection measures. In May 2003, the IACHR ordered the Ecuadorian State, among other actions, to take the necessary measures to safeguard the life and integrity of the members of Sarayaku. The government responded that it had no resources to make those recommendations effective.

By December, the situation within the territory had deteriorated so much that Sarayaku complemented its report to the IACHR with a plea to have all the oil activities suspended in Plot 23, plus compensation for damages, and to create a special commission to investigate the case. The IACHR extended its precautionary measures to protect Sarayaku and its members, who were increasingly exposed to a wave of violent attacks. These were later extended to include the Sarayaku lawyer. In January 2004, when the Minister of Energy and Mining was consulted on the subject, he publicly answered the media that “the OAS (Organization of American States) does not give orders here”,<sup>38</sup> and insisted on the commitment that the Ecuadorian government has with CGC and the exploitation of oil in Plot 23.

In May 2004, the IACHR requested the Inter-American Court of Human Rights to take provisional measures regarding the pending claim. In July, the Court issued a series of decisions in favor of the integrity of Sarayaku and of its right to free circulation.<sup>39</sup> Due to the Ecuadorian government’s disregard for the

OAS' jurisdiction over Ecuador, and to the fact that the growing threats against Sarayaku never stopped, in July 2005, the Court took further provisional measures, and reiterated that the state should maintain the previously-adopted measures.<sup>40</sup>

### **Oil companies – The rights of persons**

Oil companies are legal entities with rights and limitations similar to any other legal entity. By excluding the rights of communities to make deals with the mentioned companies, such prohibition also applies to any other legal entity (Provincial Council, Town Hall, Church, NGOs, Army, Tourism companies, Airlines, etc.).<sup>41</sup> This declaration was printed in an anonymous “informative leaflet,” handed out in the province of Morona Santiago, where the FIPSE territory is located just a few days after the Constitutional Injunction issued against Arco..

Although the leaflets were not signed by the company, this institutional confusion reflects its perception of its identity. Inside the Jungle, an oil company behaves as if it were the State, Church, and Army. When Texaco arrived in the Amazonian region, most of the people believed the company was good for its inhabitants. The oil that the company spilled along the roads prevented dust from rising. The company trucks offered people some crude oil for their personal use, which included using it as hair shampoo.<sup>42</sup>

Social practices by the companies have not varied much ever since, but their formats have. If at the beginning of oil exploitation the “conquest” of the Jungle took place under verbal promises, today those relationships are disguised by means of “support” or “communitarian development” agreements.

#### *Legal entity of support and faith*

Even today, the passage of a company through an indigenous village can be as mystical as in Texaco times. This is the case of TecpEcuador, which presented to the State a copy of “the only agreement signed between communities and TecpEcuador S.A. Thanks to this agreement, and owing to the excellent relationship between communities and TecpEcuador S.A., all additional commitments were decided verbally and monitored by a tripartite follow-up commission comprised of members from the community, the company, and the Municipality of Cascales.”<sup>43</sup>

#### *Legal entity as police*

On the other hand, the growing indigenous resistance to accept help from oil companies has compelled the latter to use coercive means to attain their goals. This is the case of Perenco Ecuador Limited which, upon signing a “support

agreement for communitarian development” with the Kichwa Balzayacu community, decided to ensure the efficiency of its donation of 50 water drums, by stating in the same document that “the community, represented by its president and the full Commission, authorizes Perenco to use public force, impose order, and arrest any member of the community who attempts to paralyze construction of the pipeline, for whatsoever reason”.<sup>44</sup>

### *Legal entity that governs*

Lately, some of these agreements are no longer treated as communitarian “support”, but rather as “consultation.” Such is the case, for instance, with the agreement between Perenco and ONHAE –Organization of the Huaorani Nationality of the Ecuadorian Amazon. The document indicates that Perenco performed the consultation, received authorization to build access roads and platforms, and reported on the necessary operations to develop the Yuralpa field.<sup>45</sup> As a result of the mentioned “consultation,” once the communitarian needs were identified and in order to compensate for possible socio-environmental impact, Perenco donated two 25x10-meter production pools, hand nets, and some fish to a community that lives on the margins of an Amazonian tributary.<sup>46</sup>

Rapprochement of companies causes misunderstandings among the communities. Uncertainty about what is being negotiated, why, with whom, and what impact it may all have, can generate tension among the communities, and between them and the local powers. This is foreseen by the companies and by the central government. One of the goals of community liaisons<sup>47</sup> is to weaken the political body of the indigenous organization and to neutralize resistance positions toward the industry. This is what Arco stated in a document addressed to Petroecuador, concerning its actions in the FIPSE lands: “[...]Within this context, the Plot 24 operator has had to plan and develop a patient and meticulous community relations program seeking, on one hand, to modify the social hostility toward the project and, at the same time, to obtain consent from the organizations and communities to begin oil exploitation.”<sup>48</sup>

The answer that both the government and the companies have given to the petitions of Amazonian peoples has been the elaboration of the “Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities”, which only legitimizes such relations, based on the inequality of power between oil companies and indigenous communities, as will be discussed below.

Observing the development of these conflicts and the legal offensive with which the government has responded to the legal petition formulated by indigenous communities emphasizes the dimension of the breach between the multi-cultural country conceived by the Constitution and the economic structure of the State. The Constitution itself describes this structure in its text, while proclaiming collective rights at the same time.

## Yes, but no – Constitutional schizophrenia

The property rights of the State over the subsoil resources versus the collective rights of the peoples over their territories is one of the most conflictive legal issues in the Amazonian region, hand in hand with other matters in which governability rights of the peoples clashes with State powers. Soil dichotomy, plus practical problems, generates doctrinarian conflicts on the nature of indigenous ancestral possession.

### *Inalienable but expropriable lands*

Unlike individual property –of patrimonial and commercial nature-, property that results from ancestral possession is perpetual and its *animus* implies cultural preservation. Its social function is to protect indigenous cultures. Accordingly, it cannot be sold and its title may not lose its validity. The Constitution acknowledged this status, but made an exception: the indigenous property may be declared of public interest, and may be subject to expropriation. If preservation of an indigenous people implies support of its territory, and if this constitutes an essential human right, it is hard to imagine which criteria would justify such exception.

However, the Kichwa community of Eden, whose territory lies within the Oxy impact area, knows quite well the powerful force of oil interests, mixed with the legal term “public interest.” In 1999, they were persuaded to negotiate an oil exploitation permit in their territory with Oxy, under verbal threats of land expropriation by government officials.<sup>49</sup>

### *Non-displacement from their lands, though expropriated*

If the criteria used by the government to justify expropriation is not easy to understand, it is harder still to conceive of the scenario, when this possibility is confronted with the constitutional guarantee of non-displacement, which is granted to indigenous peoples.

## Consultation, participation and the dictionary used by the government

Whoever has witnessed a dialogue between the various government areas and indigenous organizations knows that the government’s answer to the complaints from indigenous organizations is based on the need to exploit crude oil with the dignified mission of “bringing in development.” Whether oil produces economic and social benefits to the country or not, the understanding that the government has of the meaning of development is absolutely blind to the premises of a multi-

cultural State. Regarding the issue of non-renewable resource exploitation, successive governments have shown no predisposition to work toward re-accommodation of power among the different parties that integrate the multicultural State. On the contrary, their actions have tended to preserve the subordination of some to others. Bearing this intention in mind, by the end of 2002, the government decreed a “Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities”

### *Regulation, the easiest way*

The Constitution establishes the right of peoples to be consulted as a fundamental guarantee. The exercise of liberties and fundamental rights has to be regulated by law.<sup>50</sup> However, a law implies negotiations in Congress, and this process takes time. The oil industry is not interested in indigenous times and processes. Therefore, the government chose to deal with the consultation issue by means of a regulation which, due to its nature, can be decreed by the President of the Republic, saving the time it would take to get any kind of consensus in Parliament.

### *The Frankstein document*

As lawyers know, regulations are normally derived from a law, and they specify the law's provisions. In this case, there is no law. The regulations are based on the Law of Environmental Management and the Law of Hydrocarbons. Even though the Law of Environmental Management anticipated a consultation mechanism, it refers to the participation of every individual or legal entity in environmental management, and not the consultation of indigenous peoples, as specified in article 84 of the Constitution. Likewise, the Law of Hydrocarbons does not even mention the right to consultation. The result of this hybrid is a confusing, sterile, and unconstitutional document.

### *Legalizing the unlawful*

The regulations do not define what consultation means. Price Waterhouse Coopers, the company that wrote the text<sup>51</sup>, was not requested to create one that would safeguard rights, but to “establish a uniform procedure for the hydrocarbon-related sector, so that the constitutional right of consultation of indigenous peoples could be applied.”<sup>52</sup>

The jurisprudence of neighboring countries, such as Colombia, and even the few precedents within the country, suggests that the consultation process be carried out according to international guidelines that determine respect for indigenous authority and its organizational forms. This adds to the fact that

consultation, by its nature, should be carried out by the government, as representing the State.

In contrast to all this, but in accordance with the unequal jungle dynamics, Ecuador's applicable regulations determine that the companies themselves shall be the agents to conduct the "consultation" processes.<sup>53</sup> Such consultations can be made through representative organizations or directly to the affected communities.<sup>54</sup> The result of the "consultation" should be expressed in a document that shall be "of mandatory fulfillment by the consulted parties, who herewith remain subject to prosecution by administrative and judicial mechanisms in force in the country."

### *Communitarian liaisons<sup>55</sup> as state agents*

Every indigenous organization from the Amazonian region knows the figure of the "community liaison" from oil companies. His task is to gain acceptance of the presence of the company by the inhabitants of the region where it wishes to start its activities, as quickly as possible. His experience has taught him that the best way to obtain such consent is by means of deceit. And when the latter does not work, he will generate conflicts within the communities, with the purpose of dividing their political organizations.

The Appeals for Protection presented by FIPSE and Sarayaku alleged the illegality of such communitarian relations strategies. Their claims were accepted and the obligation of the companies to dialogue with the indigenous peoples solely through their assigned representatives has become case law in Ecuador.

Provisions contained in the regulations are contrary to this understanding, as they state that the mentioned community liaisons are not only permitted to walk the Jungle in search of dis-organizational strategies, but their actions now comply with the law and their offices should be called "consultation offices".<sup>56</sup>

### *Business as usual*

The result of every process described in the regulations must appear in "resolution and consensus" documents. Such resolutions, before the regulations were in force, were called "cooperation agreements", and they were considered illegal. If previously, as in the FIPSE and Sarayaku cases, leaders could resort to the Judicial Power to protect their constitutional rights, implementation of the regulations certainly obstructs these proceedings.

### *Who guards guardians?*

The Minister of Energy and Mining, who is in charge of assessing the results of the "consultation" proceedings carried out by companies, does not have to follow



any criterion when evaluating the results of said consultations. At least that is what the regulations state. The Minister of Energy and Mining can also decide what kind of information must be made available to the public and to indigenous communities and what may not.<sup>57</sup>

### **Means of taming indigenous resistance**

The Regulations for consultation were the government's second attempt to establish rules for consultation. In 2000, the Ecuadorian government had already included an article on oil consultation in the Law for Investment Promotion and Citizenship Participation, the text of which goes hand in hand with the aggressive policy of welcoming foreign investment stated in the "Opening 2000" plan. On that occasion, pursuant to several legal claims, the Constitutional Court declared article 40 of the afore-mentioned law unconstitutional, among others.<sup>58</sup>

### *World Bank and its interest in indigenous issues*

At that moment, the World Bank had already begun its coordination with the government regarding regulation of indigenous interference with oil exploitation. As a result of its experience with the Ecuador situation, in 2002 the Bank declared that:

*One of the most serious constraints to new investments in this sector [hydrocarbon] is the prevailing socio-political situation in Ecuador. Indigenous people's mistrust due to negative past experience has so far impeded their constructive participation in new industry ventures. To overcome this constraint, indigenous people's knowledge of the industries' legal, technical, economic and environmental developments needs to be enhanced.<sup>59</sup> [note that quotes are not compatible — some are 'and others'].*

The World Bank's interest in indigenous issues in Ecuador goes back to the beginning of the nineties, and increased as the national indigenous movement gained strength. In 1993, the World Bank lent "technical assistance" to the Ecuadorian government for drafting the Agrarian Development Law, and in 2000, it launched the PERPTAL program,<sup>60</sup> whose goal is to promote technical assistance for new changes to the Hydrocarbon Law and to infuse a corporate spirit into Petroecuador, thus promoting oil development by increasing foreign investment.<sup>61</sup>

Concerned with the obstacles and limitations generated by the indigenous peoples, the World Bank financed a program of "tripartite dialogue" and later a "training program," both meant to change the negative perspective of indigenous peoples toward the oil industry.<sup>62</sup> The next step was financing the drafting process of the consultation rules, which, at the beginning, involved participation of the CONFENIAE.

The regulation-drafting process received a series of criticisms and recommendations by indigenous and human rights organizations, due to the inconsistency, both of the process and the partial drafts, with the guidelines established by the Constitution and international documents.<sup>63</sup> For these reasons, the indigenous representatives eventually withdrew from the process. The result is the regulations now in force.

### *Ethnic differences according to the World Bank*

On its website, the World Bank points out the need to neutralize “ethnic differences,, which are considered potential conflicts for their clients. In Ecuador, the chosen path toward this neutralization has been to formalize subordination of “ethnic groups” interest to those of the economic élite. The leaders of the process leading to the regulations have resorted to legal mechanisms to establish what is valid and accepted as fair vindication of indigenous rights, and what is rebelliousness and subversion. As Velasques states regarding the drafting of the Regulation in Ecuador:

*Indigenous rights become a way to manage indigenous opposition to oil development. Racialized categories are set up so that the kind of indigenous rights that insist on the right to say no to oil development becomes an unacceptable kind of right. A more acceptable version of indigenous rights is the right to participate in discussions, improvement and management of oil related projects. This includes rights to participate in Environmental Impact Assessments (EIAs), consultation processes, environmental monitoring, etc. The goal of indigenous rights under neoliberalism is to ensure that indigenous people are “recognized” and neoliberal economic reforms continue.<sup>64</sup>*

### *For whom the World Bank works*

The World Bank Group, whose mission is poverty relief, invests 40% of its budget in non-renewable energy projects, including big hydrocarbon projects in poor countries, carried out by trans-national oil companies. In 2004, World Bank estimated that its investment in oil or coal projects would be well over two billion dollars.<sup>65</sup>

### *The World Bank does not listen to itself*

In 2001, the President of the Bank designated a group of experts to investigate the connection between extractive industries and poverty. Some of the recommendations given by this group of experts were that the World Bank Group should immediately limit the financing of this kind of project in countries where

effective governability and an efficient legal system could not be verified, establishing a goal to cancel financing of any extractive operation until 2008 at the almost.<sup>66</sup>

Every day, for many years, several scholars and NGOs have been reporting the disastrous relationship oil has with poverty relief. In 2004, even The New York Times published an editorial stating: “It has become clear that plenty of poorly governed nations, including Nigeria, Angola, Ecuador and Venezuela, would probably have been better off had they never discovered oil or other valuable minerals. The discovery of these resources usually foments corruption, prevents the development of a diversified economy, props up dictators and fuels wars.”<sup>67</sup>

In spite of this, in August 2004, the World Bank Group decided to ignore the recommendations of its own evaluation and continue financing projects for oil development, without instituting any of the criteria identified by its group of experts.<sup>68</sup>

## Consultation – A still untrodden path

The World Bank and Ecuadorian governments call the processes imposed on communities by oil companies and governments by the name of “consultation.” In fact, consultation is a word that does not define a process *per se*, but rather the use of this word in the legal sense, as referring to the relationship between State and indigenous peoples, has more to do with a concept that implies acknowledgement of a series of guidelines and procedures generated by international law and regional experiences.

### *Consultation and its legal grounds*

It is by no means simple to uniquely define the right of consultation. *Latu sensu*, it can be said that consultation is a mechanism that provides a negotiation process between States emerging from colonization and the indigenous peoples that resisted it.

While it is not yet possible to define a concept of “consultation” that will contain all its legal implications, it can definitely be stated that one of its principles or *sine qua non* conditions is the element of good faith. Such is the understanding of Canadian Courts, as illustrated by the Haida Nation of British Columbia: “In my opinion, the roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal people of Canada.”<sup>69</sup>

In Latin America, the Court of Colombia has developed several criteria regarding the right to be consulted, stating that “it includes the adoption of relations based on communication and understanding, marked by mutual respect and good faith between them (indigenous populations) and public authorities (...).”<sup>70</sup>

Even though the Ecuadorian Constitution expressly deals with consultation in the chapter that refers to collective rights, ILO Covenant 169 (on aboriginal and tribal peoples in independent countries) is the one that most clearly explains this right, thereby establishing the need for adequate procedures, representative institutions and, basically, the principle of good faith.

According to this Covenant, a consultation must exist before a government makes an administrative or legislative decision that will affect indigenous peoples. It exemplifies, though in no way limits, the cases where decisions imply oil or mining activities, displacement of indigenous groups, and the institution of vocational training programs. The ILO understood that, in these three cases, the impact can be so detrimental to the interests that the Covenant seeks to protect, that it chose to specifically name them.

All the criteria present in Covenant 169 have been ignored to create the rules of consultation in force. It is quite common to hear representatives of the national government and workers from oil companies say that “*the right to consultation does not give the right to say no.*” This lie, told time and again, spread rapidly among local authorities and other active players in the Amazonian region.

It is true that a consultation process alone does not determine an oil project. But that is not its purpose. As previously mentioned, the legal basis for consultation is to facilitate negotiation based on good faith. A government should take into account a series of factors before signing a public contract, one of them being its social and environmental effects. The goal of the consultation procedure must be to identify the possible positive and negative impacts of a project, collect the opinion of the potentially-affected parties and, basically, consider them when adopting a State, not a governmental position, regarding a certain project. Therefore, communities have full right to resist the undertaking of any project in their lands, even if, legally, they do not decide on it directly.

### *The right to say no – Free, prior, and informed consent (FPIC)*

The FPIC principle is the result of advances in the rights of indigenous peoples in the international arena. It is based on the right of these peoples to decide upon their own priorities in the development process, and it is a means of safeguarding enjoyment of the mentioned right. MacKay states that FPIC implies consent given freely, prior to final authorization of a project and beginning of activities. The FPIC process should be based on the clear understanding of the full scope of the issues involved in the governmental decision to be made.<sup>71</sup>

Even though FPIC and Consultation are different, they are absolutely inter-related, as they are both means of safeguarding the human rights of indigenous peoples.

Contrary to what some State and oil company agents believe, indigenous peoples have a right to object to oil activity in their territory, if such activity can affect the autonomous development plans of the affected peoples. This does not mean that the Consultation grants indigenous peoples the power to decide upon the existence or non-existence of oil activity in their lands. Such decision, as a last resort, belongs to the government, as representative of the State interests; a multi-cultural State in the case of Ecuador.

The FPIC principle and the right of a people to object a project identified as ecologically, economically, or socially harmful, must integrate the consultation procedure in the case of extractive industries in indigenous lands. MacKay states:

*In short, without the secure and enforceable rights to land, territories and resources, including the right to control the activities affecting them, indigenous peoples' means of sustenance, identity and survival, and their socio-cultural integrity and economic security are permanently threatened. There is therefore complex of interdependent human rights all converging on an inherent to indigenous peoples' various relationships with their traditional lands and territories –lands and territories that form “the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival”- as well as in their status as self-determining entities that necessitates a very high standard of affirmative protection. That standard is the FPIC, which is all the more necessary in relation to EI that have proved in most cases to be highly prejudicial to indigenous peoples' rights and wellbeing.<sup>72</sup>*

### **Instrumentalization of human rights discourse**

The limited treatment that the Ecuadorian government gave to the right to consultation, and to its principles in the case of oil exploitation, shows that when it comes to regulating this activity, international guidelines on indigenous rights are articulated locally to respond specific economic interests.<sup>73</sup>

Thus, the right to be consulted loses its aspect of multi-cultural negotiation, its juridical grounds, and becomes a means of greening the oil companies, preventing indigenous peoples from questioning and discussing the legitimacy of the oil activity and its impact on the enjoyment of basic human rights, such as life, health, cultural integrity, or their environment.<sup>74</sup>

#### *One example will suffice*

The consultation and participation regulations are the only post-Constitutional texts issued thus far, seeking to regulate a conflict between the capitalist system and ancestral communitarian rights. A small number of other initiatives are in progress, but none has been concluded yet. The result of this first experience is far from encouraging.

If the consultation issue, which is so full of potential to offer legitimacy to the process of “conciliation” of different cultural perspectives, has been taken so lightly, and if its results simply perpetuate unequal relationships, Amazonian peoples cannot be expected to believe in the development of the trust-based relationships necessary for the construction of a multi-cultural State.

Maybe this explains to a certain extent their refusal to take part in any kind of negotiation regarding oil activity regulation, such as when CONFENIAE gave up on participating in drafting the regulations.

### **The blood of the earth**

Some Amazonian peoples define oil as the “the blood of the earth.” They explain that it should not be extracted because the Earth loses its warmth and gets cold, annoying the spirits that take care of her. Ancestral indigenous wisdom explains some effects which nowadays concern specialists on the subject. Temperature changes, wars caused by crude oil, growing dependence on oil, even for the production of food, are some of the effects caused by extracting the blood of the earth. The arrival of a pipeline raises various problems. Apart from the relation of such results with the mood of the Jungle spirits, many experts, scholars, and activists have worked on the connection between the decrease and the increase [?] of poverty with extractive activities. As already pointed out, even the World Bank has done so.

#### *Governability criteria according to the World Bank*

The board of experts who reviewed the Bank’s policies regarding extractive industries, recommended that the Bank keep some minimum criteria to be fulfilled by the countries receiving oil industry financing. Such criteria can be summarized as follows:<sup>75</sup>

- Government capacity to manage income with transparency and to maintain economic stability;
- Will to allow independent audits on the income related to the extractive sector;
- Effective conditions for income distribution among local, regional, and national authorities;
- A high-quality legal structure;
- Absence of armed conflict or risk of this type of conflict;
- Respect of the government for labor rules and human rights, in accordance with its commitment to the human rights treaties that it has ratified; and
- Acknowledgement and willingness on the part of the government to protect the internationally-guaranteed rights of indigenous peoples.

None of these conditions is present in Ecuador. In view of their absence, as acknowledged by the World Bank board of experts, extractive activities are not adequate to reduce poverty, but could instead have a severely negative impact. In spite of this, fetishism concerning oil and the idea of Ecuador as an oil-producing country is powerful in the collective conscience, even though Ecuadorians' quality of life is not related to the increase in oil production or the increase in oil income; and, further, even though oil prices depend more on outside or unpredictable geopolitical factors than on the relationship between internal supply and demand

## Conclusions

### *Self-determination and disconnection from the State*

The cat and mouse game between oil companies and indigenous communities inserts a new dynamic into the society of Amazonian peoples, which, in the long run, negatively impacts the possibilities of Conciliation. On the one hand, the using legal mechanisms has been effective in consolidating the identity of the peoples and of their political organizations in face of the State but, on the other hand, it has compelled them to invest too much effort and resources in defending themselves against the strategies of the oil industry.

When an indigenous people decides to resort to legal mechanisms to stop abusive actions of oil companies over their lands, it is possible that the immediate political effect produced is positive—communities are mobilized, unity as a people is consolidated, and political alliances are constructed in different levels. This can be observed in the FIPSE and Sarayaku experiences. It can be stated that development of such strategies has contributed to the consolidation of their institutions.

Indigenous self-determination depends on a feeling of disciplined community, not of an objectively-regulated one.<sup>76</sup> When faced with an external threat, this feeling becomes evident and it strengthens the political cohesion of the people. In the FIPSE and Sarayaku cases, this feeling led them to change their historical relations with the State, adopting the precepts granted by the Constitution and resorting to the Judiciary.

They have consolidated their autonomy and explored the limits of the State, but they have gone against the interests of the oil industry. In response to that, successive governments have chosen to maintain pre-constitutional order, thus missing a good opportunity for Conciliation.

Its predictable consequence is weakening the trust that organizations may have had in legal mechanisms and in the State itself.

*Resistance as constitutional control*

In its attempt to establish the concept of an “ideal” State, the ‘98 Constitution has generated several opportunities for debate. Many of them originate in the conflicts that the Constitution itself contains. Oil and mining industry *versus* the rights of the peoples affected by them is one of the most conflictive issues, together with other matters of governability. In this case, as analyzed throughout this paper, the government has chosen to subordinate human rights to the interests of the economic élite.

Indigenous peoples have chosen to put into practice constitutional control, as a means of resistance. This should not be understood as “resistance to oil” or “resistance to the development of the country,” although these could also be legitimate. The fact that they have resorted to legal mechanisms to redress their rights shows that their interest in resistance is directly related to the control of the Constitution, which has been violated by successive governments.

To those who observe the evolution of the indigenous rights discourse in the Americas and their contribution to the construction of a multi-cultural State, the relationship among indigenous peoples, oil companies, and governments offers an important element of analysis, due to the different forces present in such relationship. The result of tensions generated by the FIPSE and Sarayaku cases is still to be determined, and will influence the tenor in which such relations shall be held in the future. It is widely known that the tendencies in the world oil market do not favor the outlook for the indigenous peoples of the Ecuadorian Jungle. It remains to be established if, eventually, they will be able to count on the support of the government to enforce their rights, as recognized by the Constitution.

## NOTES

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1. Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*, Bolivia, Instituto Indigenista Interamericano e Instituto Indigenista de México, 2nd. Edition, 2003.

2. Iván Narváez Quiñónez, document prepared for the Seminar “Repensar el Proceso Petrolero”, organized by the Latin-American School of Social Sciences in Quito, August 2005. “[...] income of the hydrocarbon industry in 2003 represented 14% of GDP (Gross Domestic Product), 35% of exports and 42% of tax revenue. In 2004, oil produced an income of 3,500 million dollars for the State. Between January and October, the World Bank recorded external sales for 3,302.2 millions, although oil product imports and benefits have to be taken into account. However, such figure is higher than 1,407.6 millions compared to the same period in 2003 (1,893.6 millions). Such amount is close to the revenue expected by SRI in 2005 for V.A.T. – 1,795 million dollars, *El Comercio*, December 12, 2006, p. A8.”



3. "The environmental, social, cultural, and economic effects of the Texaco activities were devastating. Daily, Texaco dumped over 4.3 gallons of highly toxic production waters into unprotected wells all over the Oriente province, instead of burying toxic wastes in deep holes, as the company does in the USA. Texaco was also responsible for thirty important spills on the 498-long Trans-Ecuadorian pipeline, running from Oriente to the Western coast of Ecuador, spilling 16.8 million gallons of oil directly into the environment, more than 1.5 times the 10.8 million gallons spilled by the Exxon Valdez in the Prince William Sound in Alaska." Tamara Jezic, "Ecuador: La campaña contra Texaco Oil", in: David Cohen et.al., *Incidencia para la Justicia Social - Guía global de acción y reflexión*, Quito, Abya Ayala, 2001, p. 209.

4. Petroecuador is the State oil company.

5. Joan Kruckewitt, *Oil and cancer in Ecuador: Ecuadorian villagers believe high rates of disease are tied to petroleum pollution, a contention that Chevron disputes*, San Francisco Chronicles, December 13, 2005.

6. "It is extremely difficult to investigate the connection between oil-produced contamination and its impact on health, partly because the effects produced by oil and their various components are diverse and scarcely known, but also for lack of information on contamination in the past, and absence of medical records. Due to such reasons, different impacts on health were examined, instead of focusing only on one of them, for instance, cancer [...]. The results of this study suggests that women living near oil wells and stations are in a worse general health condition than the ones who live farther from them. The results can be summarized as follows: General health conditions. In the two weeks prior to the study, women of the exposed communities presented a bigger frequency of skin fungi, tiredness, and other symptoms than those who live in oil-free communities. During the past 12 months, the women from the exposed communities also presented a bigger frequency of the following symptoms: nose and eye irritation, headaches, sore throat, ear-ache, diarrhea and gastritis. Reproductive Health: Women living near oil wells and stations presented 2.5 times more risk of spontaneous abortions -i.e. 150% more than women who live in uncontaminated communities. Cancer. The San Carlos population runs a much higher risk of suffering cancer than expected, due to the characteristics of its population. The risk was particularly high in larynx, liver, skin, stomach cancer, and lymphoma. It should also be pointed out that this male population runs a higher risk of dying of stomach, liver and skin cancer." Yana Curi. *Informe sobre el impacto de la Actividad petrolera en poblaciones rurales de la Amazonía ecuatoriana*, Coca: Instituto de epidemiología y salud comunitaria Manuel Amunarriz, 2000, p. 47.

7. Gregor B., Cletus, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*. Bolivia, Instituto Indigenista Interamericano, 2nd. Edition, 2003, p. 307.

8. Idem.

9. "In 1993, just as Cristobal Bonifaz, an Ecuador-born US attorney, finished reading *Amazon Crude*, he happened upon a group of Oriente leaders in Massachusetts. That meeting led to the lawsuit, *Aguinda v. Texaco*, in which 15 leaders, representing 30 thousand people affected by the company's activities, brought their case to New York's district court. The *Aguinda* plaintiffs charge that from 1972-1992, Texaco released massive quantities of highly toxic petroleum waste into waters used for bathing, fishing, drinking, and cooking. They also accuse Texaco of spraying the waste onto local roads. In addition, the plaintiffs claimed that Texaco's actions have debilitated their ability to maintain their traditional cultures. The justification for a US-based case was based on a series of legal arguments that underscored how the company's major decisions were made within the court's jurisdiction. Had the case been presented in Ecuador, the plaintiffs could only sue Texaco's local subsidiary, TexPet." Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation, 2004,

unpublished. "The case, which went to United States Court of Appeals for the Second District, only to be sent Ecuadorian courts, could change the way American companies do business abroad." Brian Ellsworth, *Court goes to Oil Fields in Ecuador Pollution Suit*, W1, W7, The New York Times, August 27, 2004.

10. *¡Do not be lazy, do not lie, do not steal!* Kichwa proverb, acknowledged by the Ecuadorian Constitution, article 97, subsection 20.

11. Will Kymlicka, *Ciudadanía Multicultural*, Editora Paidós Ibérica et al, Madrid, 2001, p. 26.

12. *Idem*.

13. Minutes of the FIPSE Extraordinary Assembly, August 13, 1998, Makuma, FIPSE Archives.

14. Cooperation Agreement, signed by Arco and FIPSE in February, 1999, Makuma, FIPSE Archives.

15. Civil Law Judge, Court of Morona Santiago. *Federación Independiente del Pueblo Shuar v. Arco Inc.*, Decision, September 8, 1999: "[...] herewith ordering the immediate execution of the following measures: Arco Oriente, Inc. under contractual obligations in the so-called Bloque 24, shall not approach individuals or base organizations, in or out of the FIPSE territory, without the legitimate consent of the Federation Assembly, through its Board; 2- The defendant is hereby forbidden to promote any approach or meeting with the purpose of holding a dialogue with any individual, Center, or Association belonging to FIPSE, without the legitimate consent of the Federation Assembly, through its Board."

16. Gina Chavez, "Derechos indígenas y justicia social constitucional: Un estudio de caso," CDES *Tarimiat. Firmes en nuestro Territorio*, Quito, CDES, FIPSE & COICA, 2001, p. 46.

17. "In adopting this report, the Committee is aware that the application of the Convention is a matter of importance for the Government, which has taken legislative measures to safeguard the interests of the indigenous and tribal peoples in its territory. The Committee hopes that the Government will continue to maintain close contact with the Committee of Experts on the Application of Conventions and Recommendations and the Office to resolve any difficulties that might arise in this respect. The Committee recommends that the Governing Body approve the present report and that in the light of the conclusions in paragraphs 28 to 44: (a) it request the Government to apply fully Article 15 of the Convention, to establish prior consultations in the cases of exploration and exploitation of hydrocarbons that could affect indigenous and tribal communities and to ensure the participation of the peoples concerned in the various stages of the process, as well as in environmental impact studies and environmental management plans; (b) it urge the Government, in seeking solutions to the problems that still affect the Shuar people as a result of the oil exploration and exploitation activities in the zone of Block 24, to contact the representative institutions or organizations, including the FIPSE, for the purpose of establishing and maintaining a constructive dialogue which will allow the parties concerned to find solutions to the situation facing this people; (c) it request the Government to inform the Committee of Experts in detail, by way of the reports it is required to submit under article 22 of the Constitution of the ILO in relation to this Convention, of developments in respect of the issues on which the representation by the CEOSL is based, and in particular on: (1) The measures taken or envisaged to remedy the situations that gave rise to the complaint, taking into account the need to establish an effective mechanism for prior consultation with the indigenous and tribal peoples as provided in Articles 6 and 15, before undertaking or authorizing any programme for the prospecting or exploitation of the resources that exist on their lands; (2) The measures taken or envisaged to ensure that the required consultations are carried out in compliance with the provisions of Article 6, particularly as regards the representativeness

of the indigenous institutions or organizations consulted; (3) The progress achieved in respect of consultations with the peoples situated in the zone of Block 24, including information on the participation of these peoples in the use, administration and conservation of said resources and in the profits from the oil- producing activities, as well as their perception of fair compensation for any damage caused by the exploration and exploitation of the zone; and (d) it declare closed the procedure initiated before the Governing Body as a result of the submission of the representation." International Labor Organization, *The Committee's Recommendations*, par. 45, Geneva, April 8, 2002.

18. Isabela Figueroa, "Relaciones comunitarias en el Bloque 24: una estrategia de violación de derechos," *Tarimiat - Firmes en nuestro Territorio*, Quito, CDES, FIPSE y COICA, 2nd. Edition, 2002, p. 29.

19. *Amazonía: dos firmas no pueden perforar*, El Comercio, Quito, November 30, 2002. The Burlington representative told El Comercio newspaper that "force majeure basically means to leave the contract with the State stand-by, which is a possibility within the bilateral agreement. It can be resorted to in virtue of situations that escape the control of one of the parties –in this case, of our company-[...] we hope that this self-moratorium with no fixed deadlines is valued by the groups that still dissent from the oil activity." "This clock stop in investments does not affect the oriented policies that look forward to rapprochement and, if possible, agreements with the parties involved."

20. Letter sent by Burlington to Petroecuador, January 2001, and delivered to the Shuar and Achuar nationalities as a result of the *Habeas Data* petition, Court of Pichincha, Civil Law Third Judge, August 21, 2001. FIPSE Archives, Makuma.

21. Idem.

22. Document sent by Burlington to Petroecuador and delivered by Court order to the Shuar and Achuar peoples in the mentioned *Habeas Data* petition. FIPSE Archives, Makuma.

23. Centro de Derechos Económicos y Sociales, "Bloque 24: Derechos Indígenas contra intereses petroleros", *Boletín* n° 10, Quito, 2002, p. 3.

24. Commission for the Civic Control of Corruption (CCCC), "Presuntas irregularidades en la celebración y ejecución del contrato de participación para la exploración de hidrocarburos y explotación de petróleo crudo en el bloque 24 de la Región Amazónica," Investigation Report, Published on November 13, 2002.

25. "The biggest Ecuadorian indigenous organization yesterday reported that transnational oil and mining companies attempt to divide the Amazonia natives to operate freely in that area, and claimed exploitation of those territories should be prohibited. Burlington Oil Company and Lowell mining company, both of them American, promote corruption and violence in the Shuar and Achuar communities to begin with the exploitation in Cordillera del Cóndor and Transkutukú, pointed out the Confederation of Indigenous Nationalities of Ecuador (CONAIE) in a press release." CONAIE states that transnational companies attempt to divide natives, *El Comercio/AP*, February 1<sup>st</sup>, 2006.

26. Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

27. Idem.

28. Idem.

29. CDES, *Síntesis cronológica de la situación del Pueblo Kichwa de Sarayaku en torno a la violación de sus derechos colectivos*, Quito, 2004, unpublished.

30. *Idem.*

31. "On December 31, the General Assembly of the Kichwa People of Sarayaku objected to the signatures as maneuvered and used without consent, and declared that they never met either to create or give consent to any independent community of Sarayaku, the signatures only referred to a medical assistance record, and a gift of medicines, at the moment of a visit." KURAKAS Council of Sarayaku, *Situación actual de la Comunidad Indígena de Sarayaku frente a la Compañía General de Combustibles (CGC), subsidiaria de la Texaco-Chevron*, Sarayaku Archives, unpublished, p. 4.

32. Letter drawn by CGC and signed by 12 members from 2 communities of the Sarayaku Church on August 2, 2002, Archives belonging to Lawyer Bolivar Beltrán, ex-National Director of INDA Ecuador.

33. Pastaza Civil Court Judge, *Decision*, November 29, 2002.

34. Pastaza Judicial Police, *Denuncia por Secuestro hecha por Aragon Antonimo Marcelo*, December 2, 2002.

35. Jennifer Tierney, *María Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

36. CDES, *Síntesis cronológica de la situación del Pueblo Kichwa de Sarayaku en torno a la violación de sus derechos colectivos*, Quito, 2004, unpublished.

37. Jennifer Tierney, *María Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

38. Amnistía Internacional, Ecuador: Temor por la seguridad/amenazas de muerte a defensor de Derechos Humanos, 2004, índice público AMR 28/014/2004, available at <<http://web.amnesty.org/library/index/ESLAMR280072004>>.

39. Inter-American Court of Human Rights, Caso Pueblo Indígena de Sarayaku, Provisional measures requested by the Inter-American Commission of Human Rights regarding the Republic of Ecuador, Resolution from July 6, 2004: Require the state to: "1) adopt, without delays, the necessary measures to protect the life and personal integrity of the members of the indigenous peoples' town members kichwa of Sarayaku and of those who exercised their defense in the required proceedings before the authorities; 2) guarantee the right of free circulation to the members of the town kichwa de Sarayaku; 3) investigate the facts that motivated the adoption of these provisional measures, in order to identify the responsible persons and impose on them the corresponding sanctions; 4) request that the State give participation to the beneficiaries of such measures in their planning and implementation, and that, overall, the State keep them informed on the progress of the execution of the measures ordered by the Inter-American Court of Human Rights; 5) request the State to inform the Inter-American Court of Human Rights, within ten days following notification of the present Resolution, about the cautionary measures adopted in compliance to it; 6) request the Inter-American Commission of Human Rights that the present resolution be transmitted to the beneficiaries of the mentioned measures, and that they be informed on the fact that their observation can be presented within five days, as from the date of notification of the State report; 7) request the Inter-American Commission of Human Rights the presentation of its observations within seven days, as from notification of the State report; 8) request the State, after its first report (resolutive point 5 *supra*), to continue informing the Inter-American Court of Human Rights every two months on the provisional measures adopted, and require the beneficiaries of such measures to present their observations to the mentioned State reports within six weeks as from reception."

40. Inter-American Court of Human Rights, Resolution from June 17, 2005, Provisional Measures requested by the Inter-American Commission on Human Rights regarding the Republic of Ecuador, Case of the Indigenous People of Sarayaku.
41. Leaflet that circulated in the city of Macas, Province of Morona-Santiago – where the FIPSE territory is located- concerning the results of the Appeal for Legal Protection against Arco, FIPSE Archives.
42. Tamara Jezic, "Ecuador: La campaña contra Texaco Oil," in: David Cohen et al., *Incidencia para la Justicia Social. Guía global de acción y reflexión*, Quito, Abya Ayala, 2001, p. 210. Jennifer Tierney, *Maria Aguinda et al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.
43. Document elaborated in November, 2002, suggesting an agreement between TecpEcuador SA, an unidentified community and the Municipality of Cascales, Lawyer Bolivar Beltrán's archives, former National Director of Agrarian Development (INDA), Quito.
44. Document elaborated in July, 2003, suggesting an agreement between Perenco Ecuador Limited and the Balzayacu community, zayacu, Lawyer Bolivar Beltrán's archives, former National Director of Agrarian Development (INDA), Quito.
45. "According to article 88 of the Constitution of the Republic and articles 28 and 29 of the Environmental Management Law, the contractor informed and consulted the members of the Huaorani community of Gareno and its impact area, as well as the ONHAE management, about the mentioned project and the possible socio-environmental impact it may cause. As a result of the consultation process, the ONHAE authorized the construction of access roads and platforms of Nemoca and Waponi/ Ocatoe oil wells, as well as their perforation and further operation. Likewise, Perenco Ecuador Ltd. informed about necessary operations to develop the Yuralpa field. This document indicates an agreement between Perenco and the ONHAE, Lawyer Bolivar Beltrán's archives, former National Director of Agrarian Development (INDA), Quito.
46. *Ibíd.*
47. "Relacionadores Comunitarios" in Spanish.
48. Burlington, 2002 Bloque 24 Program and Annual Budget, Quito, 2002, unpublished, FIPSE Archives, Makuma.
49. Interview with Lawyer Bolivar Beltrán, former National Director of Agrarian Development (INDA), November 2004.
50. Ecuador, Constitution of the Republic of Ecuador, Article 141, provision 1.
51. Mario Melo, *Reflexiones respecto al reglamento de consulta y Participación en Actividades Petroleras*, CDES, Quito, 2003. Unpublished.
52. Ecuador, Consultation and Participation Rules for the performance of hydrocarbon-related activities, Article 1.
53. "The provisions herewith contained are applicable in all the territory of the Republic of Ecuador, for contract bids related to exploration and exploitation of hydrocarbon activities, as defined by corresponding rules, to be performed by PETROECUADOR, its branch offices, and its contractors or associates, as well as by national or foreign companies legally established in the country, duly authorized to carry out the mentioned activities." Ecuador, Consultation and Participation Rules for the performance of hydrocarbon-related activities, Article 2.

54. "Consultation of indigenous peoples, which are auto-defined as Afro-Ecuadorian and as nationalities, be it pre-bidding or for Execution, shall be addressed to indigenous and Afro-Ecuadorian communities located in the direct impact area of the bidding or the project, as corresponds; for which purpose they shall act directly or through legally established organizations representing them."

55. "Relacionadores Comunitarios" in Spanish.

56. Ecuador, "Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities", Article 27: "Immediately after the last publication of the convocation of the prior consultation process, the organism in charge of the bidding or its delegate, shall open a Consultation Office, the full costs of which shall be their responsibility –including technical staff and necessary materials to spread information and collect criteria from indigenous and Afro-Ecuadorian communities and from citizenship."

57. Article 30 – The information that, due to its nature, is considered confidential and protected by intellectual property rights, pursuant to legal and contractual regulations in force, is excepted from what has been established in previous articles, as long as confidentiality lasts, as well as information that does not specifically correspond to the criteria, comments, opinions, and proposals regarding the socio-environmental measures on hydrocarbon activity that generates the consultation.

58. The article proposed in such law stated the following: "Art. 40- After General Provisions, the following numerated articles shall be added: [...] Before execution of plans and programs on hydrocarbon exploration or exploitation of lands assigned by the Ecuadorian State to indigenous, black or Afro-Ecuadorian communities, which might affect the environment, Petroecuador and its branch offices, contractors or associates, shall consult the referred ethnic groups or communities. To this end, they shall promote assemblies or public hearings in order to explain and expose the plans and purposes of their activities, the conditions in which they will be carried out, the duration and the possible direct or indirect environmental impact they might cause the community or its inhabitants. Written record by minutes or public deeds shall be kept of every act, agreement, or covenant generated, as a consequence of consultation regarding exploration and exploitation plans and programs. Once the consultation is held, the corresponding ministry shall adopt the decisions it considers most convenient to the interests of the State."

59. World Bank, *Terms of reference for training program for representatives from indigenous peoples, regional organization on the social and environmental impacts of hydrocarbon projects in Ecuador*, quoted by Teresa Velazques in *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, p. 20, unpublished.

60. World Bank, *Public Enterprise Reform Privatization Technical Assistance*, 2000.

61. Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 18.

62. Hernán Montes, oil and gas economist for the World Bank in Ecuador, quoted by Teresa Velasquez in *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 19

63. Mario Melo, *Reflexiones respecto al reglamento de consulta y participación en actividades petroleras*, Quito, CDES, 2003, unpublished.

64. Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, p. 9, unpublished.
65. Sustainable Energy & Economy Network, *Analysis of World Bank Group Management Response to the Extractive Industries Review – Climate Change and the Extractive Industries*, July, 2004.
66. World Bank, *Extractive Industries and Sustainable Development. World Bank Group Experience Evaluation*, Washington, DC, 2003.
67. The New York Times, "Poor Countries, Rich Resources", Editorial Desk,, August 1<sup>st</sup>, 2004.
68. World Bank, *Striking a better Balance – The World Bank Group and Extractive Industries: The Final Report on the Extractive Industry Review - World Bank Group Management Response*, Washington, DC, September, 2004.
69. Court of Appeals, British Columbia, *Haida Nation v. B.C. and Weyerhaeuser*, Decision, 2002 BCCA 147, p. 33.
70. Constitutional Court of Colombia, Decision SU-039/97.
71. Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and to the World Bank's Extractive Industries Review*, Forest People Programme, 2004, p. 19, Available at <[http://www.forestpeoples.org/documents/law\\_hr/bases/fpic.shtml](http://www.forestpeoples.org/documents/law_hr/bases/fpic.shtml)>.
72. Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and to the World Bank's Extractive Industries Review*, Forest People Programme, 2004, pp. 21, 22, Available at <[http://www.forestpeoples.org/documents/law\\_hr/bases/fpic.shtml](http://www.forestpeoples.org/documents/law_hr/bases/fpic.shtml)>.
73. Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 27.
74. Idem.
75. World Bank, *Extractive Industries and Sustainable Development. Evaluation of the World Bank Group Experience*, Washington, DC, 2003, pp. 48-49.
76. Vine Deloria, quoted by Michael F. Brown, *Who owns native culture*, Cambridge, Massachusetts, London, Harvard University Press, 2003, p. 244: "It [self-determination] involves most of all a strong sense of community discipline and a degree of self-containment and pride that transcends all objective codes, rules and regulations."

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#### ABSTRACT

This paper underlines some of the weaknesses and strengths of human rights and development approaches, in order to indicate a more effective framework to address poverty and exclusion.

#### KEYWORDS

Human Rights – Development – Poverty – Exclusion



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## THE STRENGTHS OF DIFFERENT TRADITIONS: WHAT CAN BE GAINED AND WHAT MIGHT BE LOST BY COMBINING RIGHTS AND DEVELOPMENT?\*

Robert Archer

The policy connections between “human rights” and “development” have been much discussed recently. One reason is that human rights and human rights law have a more prominent place in international policy. Another is that official development policies have come to focus on poverty and its causes much more explicitly, and as a result policy-makers have been drawn into considering the relational character of poverty (“who causes it, who has a responsibility to prevent it?”), which in turn has led some towards a “rights-based approach”. A third is that, coming from the opposite direction, rights activists recognized that, having focused for many years primarily on civil and political rights, they needed to engage no less deeply with social and economic rights if they were to remain relevant. This has led them into contact with development activists and professionals who often have a much deeper experience of working closely with poor people and communities.

Building ties has not been a simple matter, however. Activists and professionals on both sides take pride in their own tradition and its values – and they are rarely familiar with those of the other side. Development professionals have often felt that the highly ordered system that human rights

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See the notes to this text as from page 89.

professionals promote, with its legal language, is invasive and sometimes inappropriate; while rights professionals have been impatient with development's fundamentally pragmatic character.

This situation invites us to reflect carefully on the strengths and weaknesses of rights-based and development approaches. What can be gained by borrowing from one tradition to the other – and what might be lost? In particular, where are the poorest people likely to benefit or lose? This paper examines, lightly, some of the issues.

### **Criticisms of rights**

First of all, then, in what ways are the human rights and development approaches different in character? Unlike political and economic theories, or development and governance models, which are pragmatic, the human rights' approach is systemic in character. It is built around a body of principles, and derives policy from them. Many things follow, including many of the approach's real and claimed weaknesses.

Its systemic approach means that the human rights framework is more transparent and orderly than other frameworks; it is more consistent, more logical. Not for nothing do human rights proponents emphasise the value they attach to universality and interdependence. The system they advance is so powerful, not only because it has wide application, but because rights are consistent with one another (in most cases) and mutually supportive. Freedom of expression underpins both political participation and access to economic and social rights. The right to health care is relevant to achievement of many other rights, not only the right to life, and so forth. It follows, however, that human rights supporters cannot change course easily, are not flexible, do not easily engage in policy-making in one area (provision of water, for instance) without regard for others (education, political participation). They find it difficult to negotiate, to trade. In this they differ from more pragmatic approaches that change their methodologies quickly if it makes sense to do so.

It does not help communication either that many human rights activists are unfamiliar with the history and traditions of other disciplines. For example, they often do not know that development professionals worked for many years to arrive at their notions of participation and inclusion. Many believe that human rights thinkers invented and brought such ideas to development. This lack of knowledge - which, of course, is often mutual – is a major obstacle to straightforward communication across disciplines.

It is unfortunate but not surprising that as a result human rights proponents have earned a reputation for moral grand-standing, for judging

the performances of others without dirtying their hands in the mucky business of development; or that relations between human rights practitioners and professionals rooted in other disciplines – economists, development experts, doctors, governance advisers - are often hedged with private criticisms that underpin the unwillingness of many institutions (NGO, government and international) to engage fully with a rights approach.

What are these criticisms, and are they justified? This paper cannot discuss them in detail, but they do need to be brought into the light and examined, because we will not be able to understand where the human rights framework can be helpful, or needs help, until this has been done. We have space to list a few examples, in illustration.

One is that human rights are “political”. It is claimed that human rights advocates are inherently critical of government, interested in blaming rather than changing. This is one face of the “won’t dirty their hands” critique mentioned above. I don’t think this claim stands up. The role of watchdog is a vital one even if it is inconvenient. Moreover, many more human rights organizations are associating with government institutions in reform processes. Interestingly they are doing so precisely because they see that shaming and blaming will not be enough to transform government or society. In particular, where institutions are indeed incompetent or dysfunctional, shouting at them won’t help. The criticism fails principally, however, because the fault of being “political” can be levelled as tellingly against development agencies. They are said to intervene in other countries, to do so in their own national interest or to suit their own convictions, and to do so unaccountably because of the power their aid budgets bestow.

A second criticism is that human rights methods focus on individuals and on individual rights rather than duties. Leaving aside the right to development and other attempts to promote collective rights, this has some truth. It is a strength of development and economic approaches that they address macro-objectives and long term investments. They can envision large processes of change, and plan through short term disruption and loss towards long term gain.

This links with two other criticisms of human rights advocates - that they think only in the present tense, and allow only unidirectional progress. This approach, it is argued, is deeply at odds with the experience of development. Development advocates are modernists and progressives but they assume that some will suffer in the process, that people living now will suffer some loss for the benefit of the next generation or their children; development is a long, messy process. A realist of this kind thinks human rights advocates are not able to balance benefits for the many against loss for a minority, or great benefits in the future against manageable loss now. As a result (it is claimed), obsessed by detail, rights

advocates fail to see the big picture. They condemn progress that takes one pace back in order to go two steps forward. They are only concerned about violations *now, here*, in this place.

There is some truth in this. Human rights advocates do find it difficult to contextualise loss, and violations, either in space or time – or to relativise the loss of one group of people against the gains of a larger group. This weakness is also a strength, however. It is clearly one of the cardinal failures of much development, and certainly much economic planning, that they have concentrated on long term benefits or benefits to the majority and ignored losses suffered by more invisible communities or minorities. This is a case where the very particular interest that the human rights' approach has for individuals, and for those who suffer discrimination or loss, provides a proper balance, a conscience one might say, for the macro focus of much development and economic planning.

Then, there is the “refusal to choose” criticism. Human rights advocates are said to duck hard decisions, for example between two goods (education or health, roads or sanitation), and to reject the discipline of limited resources and scarcity that economists take for granted.

This is also a more real challenge. For the reasons already mentioned, human rights advocates do find it difficult to trade, to prefer one right at the expense of another. They don't like to allow that a schoolteacher should be employed *instead* of a nurse whose services are equally essential. However justified theoretically, this attitude can encourage a soft or aspirational approach to decision-making.

This said, two comments are relevant. One is that work is now being done – for example within the WHO and in many countries on budget-analysis – which may enable decision-makers to apply human rights principles and methods usefully to decision-making. Secondly, it is a strength of human rights that it perceives progress in an interconnected way. Education cannot be improved successfully without improving health, health cannot be improved without improving access to food, and so forth. This parallel discipline, complementary to the discipline of scarcity, usefully discourages “quick fix” or “single cause” approaches that have plagued many development models in the past.

### **Drawing comparisons that are useful**

We could continue. What emerges from such a list, I think, is that success and failure depend on what standard of judgement is used – and, at present, the standards against which development approaches and human rights approaches are judged are often neither explicit nor shared, and may not be the best or most appropriate ones to use.

For example, neither development nor human rights have a good record when it comes to influencing or profoundly changing worst cases. The very poorest countries, the least strategic and least resourced, have not made the fastest progress towards ending poverty, even when (some would say because) they have received large volumes of aid. The big success stories currently are countries like China, and in the past were countries like Korea. Similarly, human rights reforms work best in states that have the capacity to be rule-based, which have human rights assets” such as an active civil society and a strong judicial tradition. In fact, it is an odd idea to suppose that economic and social development would work best in the poorest and weakest societies, or that human rights reform would advance easily in societies that are most resistant to its values. Yet both movements are most often judged against the worst cases.

It is therefore vital to understand which criticisms are sound, and which ones are “straw targets”. This means assessing the extent to which the development and human rights traditions have the same or different strengths and the same or different weaknesses.

The truth is that no system works in theory: it works in practice, because people make it work and fit it together. A human rights framework that is applied to the letter, without judgement, will produce absurd results. And development plans (especially large ones) that are introduced without judgement produce white elephants and catastrophes, as we know.

We are at the point where we must try things out, work together to see whether we are using the same terms to mean the same things and to see what works. The time for theorizing is not necessarily past, but what is needed most is more experience of tying things out to see what works. Initial experience suggests that the human rights framework will not always be useful but that it does provide helpful political and economic and social tests for planning and taking decisions and then for monitoring and evaluating them.<sup>1</sup>

If this prediction is right, we can foresee ahead of us a rather confused period, in which organizations of different kinds will try out many different ways of working. Some will very consciously apply human rights methods and principles. Others will work in more heterogeneous ways; and many, while applying human rights explicitly, will act in ways that are consistent with human rights. Much good development practice is consistent with the latter approach. The lessons that emerge will be similarly inconsistent and difficult to compare; but where human rights methods and practice do indeed provide benefits (by increasing the effectiveness of policies that are supposed to reduce poverty, or reduce risks for those implementing such policies) they will increasingly be adopted. In such ways, the use of human rights in development will become mundane in ways that it is not today, and human rights activists will perhaps learn to tolerate the piecemeal adoption of human rights methods that development activists are almost certain to prefer.

## Strengths of human rights

In this context, two core strengths of the human rights framework should be underlined.

The first strength is the opposite face of another criticism of human rights: that they are abstract and legalistic. It has been noted that the framework is systemic, and that this is a source of both strength and weaknesses. Reflecting this, the framework also takes a legal form, and this means that it is complex to use.

It is complex, first, because human rights is at once a *popular* language, with which almost everyone can identify – the language of human dignity that is found in the initial statements of the Universal Declaration – and at the same time, a *technical* one. Human rights law sets out rather precise understandings reached by governments through negotiation. These understandings are not romantic: they represent what governments believe to be the realistic limits of their moral and political and economic obligations in relation to their citizens. This political realism is one of the great strengths of human rights. Because the language of rights is grounded on negotiation, and its requirements are relatively precise, it can be used by governments to negotiate with one another.

The collateral of this is that the simple and noble assumptions of human rights are girded with legal conditions that limit their application in practice. This is what makes them realistic, and potentially (if not actually) effective – but it is a second reason why, in practice, their application is complicated and often counterintuitive.

Yet no other public or official language provides anything like the same range of reference, or precision. This makes the human rights framework really very important. Compared to it, development can be morally appealing but does not have the force of law. The same can be said about good government. Human rights law may not be applied (and very often it is not); governments may behave illegally (and very often they do): but the human rights framework offers levers of influence that other discourses lack.

This is also one of the core foundations of human rights' legitimacy. It has deep legitimacy because it has been signed by governments - yet is independent of the interests of a single government and has formal legal authority. The policies of development organizations do not have legitimacy of this sort. Development organizations of all colours are often accused of being illegitimate in important ways – of representing the interests of the powerful, ignoring the sovereignty of poor countries, overriding democratic principles, lacking accountability etc. This is a further reason why those

working on economic and development policy should look carefully at where they can usefully adopt the language of rights.

A second underlying strength is particularly relevant to discussion of poverty. Let us be optimistic and imagine the position ten years from now. The OECD<sup>2</sup> governments (except the US which is about to do so) have signed up to 0.7. The G-8 has agreed to cancel the poorest countries' debt and approved new financial mechanisms that free for development an amount of new money equal to the aid budget. The IMF has revalued its gold reserves. The world has united around "MDGs."<sup>3</sup> What core obstacles would still stand in the way of progress on poverty?

Quite a number of course. But an important one would be capacity: the capacity of poorer countries to absorb and manage, invest and reinvest, much larger flows of resources effectively. This of course is a political as much as an economic problem. Absorption capacity has been a source of political risk since the OECD refocused aid on the very poorest rather than on a wider range of developing countries. It is the same risk that occurs when large donors, impressed by the quality of work of small NGOs, overgive and destroy them.

There is no simple way to grow effective financial and governance institutions quickly. They need to be rooted in societies, and to have earned their legitimacy. This said, human rights can make a distinctive and vital contribution in this area. Here I will refer to yet another criticism, which is particularly misplaced. Human rights advocates are still sometimes blamed for undermining sovereignty and imposing foreign international values on countries. This is a variant of the "human rights are political" argument. It is misplaced because the human rights framework is in fact highly focused on national obligations. It puts the responsibility and authority of national governments at the centre of its arrangements and it does so precisely for the reasons I indicated earlier: the framework was negotiated and agreed by governments in all their realism.<sup>4</sup>

A fundamental merit of the human rights framework is that it puts in place a range of mechanisms and tests that oblige governments to be more transparent and accountable than they would normally wish to be. The big practical tests that the human rights framework requires – inclusiveness (non-discrimination), communication of information, political participation in decisions, and accountability (above all) – all have the effect of sharpening the performance of public (and eventually private) institutions. But they also make them legitimate. If a rights regime is in place, those whom institutions affect have access to information about their policies, are able to make their views known, and can see that the institutions concerned are obliged to report upon and justify their conduct. And again, the system has a legal foundation, with the additional precision and legitimacy that this implies.

Once again, no short cuts are available. There is no magic wand. Human rights activists are as dismayed as everyone else by the glacial pace of most institutional improvement, and as depressed as developmentalists by the ineffectiveness of their advocacy. In the longer term, nevertheless, the human rights framework offers a route towards achieving better institutions, and it is a sounder route than most because it creates mechanisms that generate local and national legitimacy – as well as better performance. The system does not impose foreign values (development does that far more often, and more arbitrarily). It puts the onus firmly on national governments to be publicly accountable. And it does so legitimately, because national governments have signed the standards in question.

This is a second core reason why governance and development professionals should look for ways of drawing on the human rights framework wherever they can when they seek to strengthen capacity and institutional performance. It is not always easier to do so; nor is the human rights framework quicker or more effective. But it builds in political and democratic legitimacy, and this is a priceless commodity if one is seeking sustainable change.

### **Inclusiveness is a common value**

I will end with a final comment about poverty and inclusiveness. I have tried to argue that one of the strengths of human rights is that it focuses on those who are excluded. It requires policy makers to ask: Who has not benefited? Who has been forgotten? Who has been excluded? It offers valuable corrective tools to development planners, who are predisposed to sum progress and overlook the often somewhat invisible minorities who do not benefit.

For very good reasons, development organizations have refocused on poverty in recent years. The political test of development policies now is whether they reduce extreme poverty. I have suggested this creates a political risk – that the wider public could become disillusioned with the whole project (at national level and in donor countries) if quick progress is not made (although quick progress may be impossible).

There is another political risk that both movements ought, however, to avoid. Neither are minority movements. The objective of development is, or ought to be, that the whole of society benefits from it. Of course that must include the very poor, the marginalized and excluded, the least resourced, the most oppressed. They are the acid test of commitment. But *all* should benefit from development and progress, and those who are poor cannot in fact be made better off unless society as a whole prospers. This is a crucial political message, if pro-poor policies are to win the support of the middle class in middle income countries, or of the broader public in industrialised countries.



Development is about everyone, not just the prosperous – but not just the poor either.

The same is true of human rights. Every person is entitled to claim his or her rights. They empower everyone. This is a much broader message than one which focuses only on the very poor, only on political prisoners, only those who suffer systemic discrimination. In this respect, the universality of human rights is central to its credibility. If the project is to work politically, they must have appeal to the prosperous as well as the poor – and must remain relevant to both. In fact this is where their true power lies: we do all benefit if everyone is treated justly, if we all feel safe, if people are protected against extreme poverty, if all are healthy and educated. The obligation to include the excluded is clearly there: it is the acid test of justice. But the legitimacy and authority of the project – and the legitimacy and authority of the development movement too – lie in their universal interest and appeal. If we do not communicate this, we will fail in the end to achieve either.

## NOTES

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1. The International Council recently did some work on the policies of local governments that sketched in some of this experiential reasoning. See international Council on Human Rights Policy, "Local Government and Human Rights", 2005.
2. *Organisation for Economic Co-operation and Development.*
3. *Millennium Development Goals.*
4. Yet again, this strength has generated a weakness. The difficulties of agreeing when international actors can legitimately intervene in the affairs of other countries - peacefully let alone forcefully, to protect life for example - has frequently paralysed policy making. But that is the subject for a different paper.

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#### ABSTRACT

The last fifty years of economic and political development in Africa have resulted in only limited success. Projects lacking essential components, local institutions unable to sustain the activities once the external input disappears, and local actors responding to external stimuli and strategies rather than becoming agents of their own development are some of the reasons for this limited success. This pattern in Africa contrasts with the successful development in Europe that took place after 1945, and later in countries like Israel, Taiwan, Malaysia and the like. Recently this contrast has inspired a new interest in rights-based development and a search for new paradigms and new opportunities to redefine the relationship that exists between “subjects of development” and the external institutions that seek to help them.

#### KEYWORDS

Rights-based development – Africa – Social engineering – Poverty alleviation – Foreign aid.



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## DEVELOPMENT AND RIGHTS REVISITED: LESSONS FROM AFRICA\*

J. Paul Martin

*“People cannot be developed;  
they can only develop themselves.”*

Julius Nyerere, 1968

It is becoming customary within the communities of development and human rights to assume that an integration of human rights will make development projects work better.<sup>1</sup> Unfortunately, this issue is much more complex. Imagine a car that has wonderful lines, fine upholstery, a powerful engine and an affordable price, but it also has an unreliable transmission or a defective braking system. No one would buy such a car and the makers would waste no time in fixing the problems. Unfortunately, defects in development projects are not so easily recognized. As beneficial as a rights perspective might be, simply adding human rights to the development mix does not create an adequate recipe for successful development.

This essay argues that the mindset required to build a good car, or a similar all-encompassing mental process, is also badly needed in the social engineering that takes place in political and economic development projects. Development, like the building of a good car, is the end product of multiple scientific and technological input carefully crafted together to make the end product functional, reliable and cost effective. To be successful every development project depends on the input of a range of other things, notably: a minimum of good governance, the rule of law and human rights, adequate local human and physical capacities, appropriate technology, a receptive host community and a minimum of social order, access to required markets,

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\*Much of the ideas on these pages are distilled from conversations with human rights activists from developing countries.

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See the notes to this text as from page 101.

financing, and equipment; and, to make it sustainable, capacity building. Development projects are rarely subjected to systematic pre-evaluations to ensure that all these components are present.

Beginning with the design, such a process requires thorough testing until all its contributors and participants can stand behind it and are willing to be accountable for the end product or products. At this planning stage a development project must be honestly scrutinized to ensure that (a) all the necessary components are there, (b) they work well together, (c) they have the capacity to overcome likely obstacles and respond to changing demand, and that (d) the project can outlive external and other temporary input. If the car analogy is relevant, effective and sustainable development projects call for planning that addresses *all* the elements and takes into account all the above considerations. This might also be called integrated or comprehensive planning, namely planning that takes into account all the details and the most likely outcome.

Development activities have recently received new impulse from such promotional activities as the Millennium Development Goals, the New Economic Plan for Africa (NEPAD) and the US Millennium Fund, which is designed to channel US development funds towards nations that meet higher standards of democracy and rule of law. At the same time the UN Global Compact is calling upon multinational businesses to be more sensitive to the needs of developing countries, and requesting the World Bank to adopt new strategies in its fight against poverty. Are these new perspectives signs that we are entering a more promising era for economic and political development? Or are they merely the re-packaging of traditional paradigms and strategies?

Modern economic and political development derives its inspiration from the Marshall Plan, which was launched in 1947 following World War II. This plan to re-build Europe ushered in the first 'golden era' of modern development activities. Secretary of State George Marshall defined its purpose as "the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist". The US Congress authorized more than \$13 billion a year for this purpose between 1948 and 1951, which was close to ten per cent of the annual Federal budget. The United States provided the dollars and Europe provided the infrastructure and the skilled workforce.<sup>2</sup> One of the unforeseen yet most lasting benefits of the program has been the degree to which it has promoted the collaboration and cooperation among participating European states, leading eventually to the European Union and the various other alliances that characterize modern Europe. So successful was the project that it quickly became a metaphor, the normative

paradigm and the model used to advance development programs in other parts of the world.

Over the last fifty years the Marshall Plan paradigm has underpinned, consciously or unconsciously, a myriad of development schemes for other parts of the world. Among success stories where major external investments and other forms of development aid brought strong economic and political growth are countries like Israel and the “Asian tigers,” Taiwan, S. Korea, Malaysia, Singapore and Thailand. As in Europe in 1945, these successful countries all possessed important pre-conditions, for example their skills and educational preparedness; and equally important, their economic and political development were guided by *domestic* political leaders and *domestic* entrepreneurs, albeit assisted by external expertise and financing.

Why then have the economies of the vast majority of the other developing countries languished, when they were also beneficiaries of substantial external financial and technical development aid? Studies have evaluated the reasons why only some, rather than all the other countries have advanced economically and politically. Their findings are extensive, identifying especially the lack of preparedness on the part of recipient countries with respect to their endogenous levels of education, skills, entrepreneurship, infrastructure and government. Where these spheres of preparedness are strong, the recipient countries appear to possess the necessary capabilities to take control of and re-fuel the process of advancement. This contrasts dramatically with the 100 or so of today’s poorest countries whose educational systems are not able to locally produce the qualified professionals needed to run the country, nor the skilled workers needed to support more advanced industries. These are countries whose communications, healthcare, utilities and other infrastructure are all inadequate to sustain major investments; and whose governmental institutions, procedures and personnel are poorly adapted to promoting rapid economic change. In many of these countries this situation is accompanied by a sense of fatalism, namely a sense on the part of the citizenship at large that society-wide change is unlikely. In a slightly more optimistic assessment, some of today’s parents in Africa accept the fact that although they are a “lost generation” and that nothing will change in their lifetime – they feel they must do something for their children.

Unfortunately this analysis of development in Africa is not new. One has only to read Rene Dumont’s classic, *False Start in Africa (L’Afrique noir est mal partie)*, first published in French in 1962.<sup>3</sup> An agronomist by profession, Dumont focuses on the need to integrate Africa’s rural populations into national trading economies. He argues that underdevelopment in agriculture seriously affects the entire economy. “It is inseparable from the

lack of industry and underdevelopment in general.”<sup>4</sup> “Progress in agriculture should not be considered as a preliminary to industrialization, but an indispensable corollary.”<sup>5</sup> His book went on to list all the various factors that have contributed and were continuing to contribute to what he called underdevelopment in Africa. He pointed to the then already widening gap between the population at large and the elites; the badly conceived and administered development programs; and such details as timing the vacation periods of Chad schools to coincide with those in France, rather than with farming cycles in Chad. The continuing value of the analysis is its emphasis on the weak entrepreneurial role played by African communities and on the variety of factors that hindered political and economic development in Africa forty five years ago, and still does today.

### The donor and recipient relationship

*“Freedom won for a people by outsiders is lost to those outsiders, however good their intentions, or however much the outsiders had desired to free their oppressed brothers.”<sup>6</sup>*

Julius Nyerere, 1968

Conceptually, the heart of the current development paradigm is that of a relationship between external agents and intended beneficiaries.<sup>7</sup> Putting aside any other implication from adult-child relationships, the development ideal could be compared to the analogy of a child learning to walk. In this analogy the whole effort of the parent is to encourage the child to stand on its own two feet and walk, while the parent provides only the minimum necessary support and then withdraws it as soon as it is safe and possible. At the same time, the parent praises the child’s achievements and glories in every independent step the child takes toward self-reliance. Moral physical support continues in various forms until the child develops all the skills needed to cope with its situation and to become self-reliant, self-assured and eventually fully self-supporting. Is this what happens in development programs? Abstracting from the parent image, is this how external development agents operate?

When the model involves external agents and their intended beneficiaries, the most basic issues are the quality and complexity of the relationships between those agents and beneficiaries. This topic has fascinated me ever since I began research on my dissertation, which probed the relationships between the Sotho people and the different groups of European missionaries, traders and administrators who first settled among them, beginning in 1833. Donor-recipient is obviously too simplistic a term to describe these multi-faceted relationships. In this case, the relationships ranged from an intense initial collaboration between the leader of the Sotho, Moshesh, and the

missionaries who quickly launched a translation of the Bible into Sotho, then continued on, even to the deathbed of Moshesh, when the different groups of missionaries were in competition to baptize him.

The modalities and outcomes of these relationships were remarkably rational throughout, in the sense that each party could be seen to use and adapt the relationship, or elements of it, to its own goals. Equally interesting were the ways in which circumstances beyond their control put one or the other in a weaker or stronger position. These relationships evolved long before concepts of development and rights dominated international parlance, but it does illustrate basic relationship components and mutually beneficial outcomes. Among these were, for example, the missionaries making converts and Moshesh preserving his language and maintaining an independent political entity, even in the face of Boer invasions and later *apartheid*. The arrival of the missionaries in 1833, however, was soon followed by the arrival of the traders, who cultivated, and then profited from the Sothos' attraction to such European products as sugar, soap, clothes, horses and guns. The problem was that the Sotho could only acquire those products by working for the Europeans who had access to the needed currency. This set in motion the extensive labor migration patterns that continue to dominate the region until today, and which are, not so parenthetically, a major factor in the continuing spread of HIV/AIDS in the region.

Lesotho thus became a classic worst-case scenario of underdevelopment: an ostensibly independent country whose economy and external relations were soon completely dependent on economic and political forces outside its control. It was too small to build its own economy, and lacked independent financial and technical resources. Labor remittances from those working in South African industries and homes kept families alive, but the funds quickly exited the economy as families spent their income at the local stores owned by expatriate traders. Neither the missionaries nor the British administrators recognized this situation as a problem. The only contentious issue arose in 1881 when the British first decided that the Sotho had bought too many guns, then they decided to disarm the gun owners, resulting in a war of resistance. Today the country's dependence has been further illustrated by a major development project supported by the World Bank, namely a dam system designed to provide more water and electricity to neighboring regions in South Africa than to Lesotho itself.

*“Man is developing himself when he grows, or earns enough to provide decent conditions for himself and his family; he is not being developed when someone gives him these things.”*

Julius Nyerere 1968<sup>8</sup>

Today not all poor countries are as dependent as Lesotho. But they are all caught up in the complex powerful economic and political forces of a global economy beyond their control. The poorest are also targets for development activities initiated by diverse external agents, such as government development agencies, small NGOs, multinational corporations and international organizations like the World Bank and the UNDP. With their limited professional personnel and desperate social needs, the poorest countries are also the least equipped to ensure that outcomes truly benefit all their citizens. With these poorest countries in mind, what would make possible the opening of a new era in economic and political development? Is a new paradigm necessary? Possible?

Some of the most debated dimensions of the North-South relationship are those comprised of legal and ethical questions. One issue is whether, on the part of rich countries, a legal or moral obligation exists to help poor countries. This debate appeared during negotiations at the UN that led to the passing in 1981 of the Declaration on the Rights to Development; and more recently in a proposal by development economists for a development compact which would impose obligations on both the rich donor nations and recipients.<sup>9</sup> Such an obligation might have been hinted about in the Covenant on Economic, Social and Cultural Rights when it mentioned development being dependent on international support.<sup>10</sup> In practice any imposition of obligation has been – and will no doubt continue to be – resisted by the richer nations.

The actual physical and attitudinal aspects of the relationship are most visible between donor and intended beneficiary when the relationship is literally face-to-face, namely, on the ground in the developing country. With the exception of senior government officials, the in-country external agents and especially the visiting consultants typically live very different lifestyles, benefit from very different levels of income, and have a very different pattern of commitment to the project than do their domestic partners. What is not so obvious is the impact that these visible differences have on the outcome of any given project. Also at issue are the patterns of accountability, and the degree to which local partners are in fact empowered to engage and take over from the in-country external agents. Equally relevant but generally unmeasured is the impact of intangibles, such as attitudes of one toward the other.

Most of us who work in developing countries are familiar with the disparaging remarks expressed by local personnel as they watch the work of external agents whom they know will be paid, no matter what the outcome. Similarly, one also hears remarks by local professionals who feel they could do the job equally well. In fact it is not uncommon to find experts working



in countries other than their own for international salaries, rather than doing the same work in their home country for a local salary. One is also familiar with the local personnel and NGOs who acknowledge that their priorities are largely defined by whether or not they will provide access to the external aid funds coming into the country. These are all modalities, and I would argue undesirable modalities, that, with alternative paradigms, need not be seen as inevitably associated with contemporary externally driven development.

### Where do human rights fit in?

*“A man can defend his rights effectively only when he understands what they are, and how to use the constitutional machinery which exists for the defense of those rights – and knowledge of this kind is part of development.”*

Julius Nyerere 1968<sup>11</sup>

Rights are usually promoted on normative grounds, namely that human activities are necessarily governed by moral and legal standards. The right to life, for example, means that no one can take away another's life with impunity except through following some society-sanctioned processes, self-defense, or in a legal war. Rights that can be claimed universally by all human beings are deemed human rights, no matter what their circumstances, and these claims are established in international law. Thus the corpus of human rights laws elaborated by the UN in the past fifty years legitimately governs, *inter alia*, all development projects and those who would promote them.

Recent writings have identified those rights that are most likely to be jeopardized by economic and political underdevelopment. Such a list would be premised on an overall definition of the goal of development as human development. Rights as defined in the UN Bill of Rights can be used as criteria to measure the human impact of poverty. Included in this normative approach to integrating human rights into development is the instrumental role of rights in the development process itself. This view emphasizes the ways in which civil and political rights on one side, and economic and social rights on the other, are interdependent. Development strategists are thus urged to incorporate in their plans mechanisms to assure accountability, transparency, participatory decision-making, non-discrimination and attention to vulnerable groups, social justice, equity, and empowerment.<sup>12</sup> Human freedom, for example, is seen as both a goal and a means towards development.<sup>13</sup> The danger is that this all adds up to a hefty set of demands, which can easily be portrayed as beyond the resources of a poor government, as well as beyond the mandate of international development agencies or private sector initiatives.

The Covenant on Economic, Social and Cultural Rights, in its second article, emphasizes that it is an obligation of government to implement these rights, and recognizes that this process will take time, but that that a government must show progress in implementing rights. It must also use a maximum of available resources.

*“Without freedom you get no development, and without development you soon lose your freedom.”*

Julius Nyerere<sup>14</sup>

This integrated view of human rights is supported by Amartya Sen<sup>15</sup> who pointed out that human rights, and in his opinion more specifically human freedom, are both the goal and the necessary means; that human development is best attained with human freedom as part of the agency. Human beings able to exercise freedom are more likely and more expeditiously able to achieve greater freedom and thus greater human development. Sen advances empirical arguments for his case based on his earlier findings that throughout history societies with democratic practices have not suffered from severe famine. Other economists such as Jagdish Bhagwati<sup>17</sup> argue that this combination of development and democracy is further promoted by outward-oriented trade policies. His argument is that trade contributes to the observance of civil and political rights, which in turn can be shown to contribute to the economic well-being of an entire society. Only a growing economy can provide the additional resources needed to improve healthcare and education, which in turn are needed to further enrich citizens' capacity to exercise their rights.

There seems to be strong evidence to show that participatory political processes provide the necessary space for the advocacy activities of civil society, notably by NGOs. In developing countries, with limited public education, active and effective domestic NGOs bring knowledge of human rights abuses to public attention more quickly, thus also bring their redress more expeditiously. NGOs are the eyes and ears of socially progressive legislation, argues Jagdish Bhagwati.<sup>17</sup> Their energy has appeared as especially important with respect to some major development schemes, such as the Narmada Dam project in India, and with respect to recent activities in many parts of the world attempting to privatize water supplies. As illustrated in the case of the Chad-Cameroon pipeline, by working with international NGOs, local NGOs can make issues visible to the international community and thus influence the actions of external agents; notably in this case those of Exxon-Mobil and the World Bank.<sup>18</sup> However, the advocacy roles of local NGOs depend upon their actually enjoying

such rights as freedom of association, assembly, speech, access to information etc.

Typically the response of governments to this human rights advocacy is defensive. A high percentage of governments in poor countries regard local and international human rights NGOs with hostility. Some see the NGOs as vehicles of the opposition, or of ethnic or other minorities. Others see NGOs as hostile to the national image, because they collect data and publish overseas reports on abuses that portray the country in an unfavorable light. Others object to NGOs receiving funding from overseas, or even portray the NGOs as being tools of hostile external interests. Others paint NGOs as frustrating legal processes by their being too supportive of the formal rights of criminal processes. Rarely do governments of developing countries see NGOs as working together with them in common tasks to maximize development benefits for their country. Governments therefore ought to recognize that their civil society is an important source of the local entrepreneurship and initiative needed to promote not only their countries' economic growth, but also its political development.

The paradigm proposed here emphasizes the potential in development planning of rights such as individual freedoms and local community participation. Human rights advocacy is only part of the development process. Human rights are, on one hand, a goal, but they are also a part of the process that leads to development. Truly rights-based processes, on the other hand, lead to processes that assure greater economic and political emancipation in the local communities. The challenge today is, however, to make the rights-based approach effective within specific social circumstances. Advocates for human rights must therefore educate themselves about how economic and social institutions work and how they can be used to reduce all types of human rights abuses. Education, and human rights education in particular, are core elements of human rights advocacy and a rights-based development strategy. These forms of education focus on capacity building, that is, putting into place the institutions and personnel able to sustain both the learning and the practices needed to commence and sustain self-reliant, rights-based development.

## **Conclusion**

The purpose of this paper has been to identify human rights as both goals and means in processes to facilitate economic and political emancipation of communities that have been marginalized, and which are still benefiting little from global economics. The emphases have been on (a) the need for inclusive social engineering that develops blueprints that address all the elements, and

(b) a rights-based approach that emphasizes self-help, self-reliance and the input that best encourages such a strategy. Nyerere was able to enunciate the philosophical premises of this paradigm, but he was not able to create the necessary economic and political institutions for the implementation of these processes at the national level. As in the analogy of the car; ideas are not enough. Good will and even hard work are only two of the necessary components. Social science research is not enough. Social engineering for development in Africa needs a detailed new blueprint as well as capacity building at all levels.

Given the limited achievements (compared with other parts of the world) over the last 50 years in the externally-driven development in Africa, a radical change is called for in the paradigms that govern relationships among the indigenous actors, the external agents and the financial institutions. This is not yet visible in the financial provisions of current development planning. Greater priority needs to be given to encouraging and protecting the nascent responsive indigenous forces (individuals, communities, institutions, industries, professionals, etc.), until they are capable of dealing with their more powerful counterparts outside the country. This calls for a new generation of economic planning, for example, one that prevents the precious funds that reach a given country from being quickly, legally and illegally, re-cycled out. Many such pieces need to be in place if development is going to begin to emancipate the world's poorest peoples, both politically and economically. The rights-based approach must, however, be integrated into detailed blueprints that are comprehensive enough to assure more successful individual projects and national development planning.

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#### ABSTRACT

The structures of the multilateral trade system, redefined during the Uruguay Round (1986-1994), have advanced demands for participation by non-state actors, among them non-governmental organizations. This article analyzes World Trade Organization regulations on direct participation by these actors and their evolution in recent years, with brief critical observations on the topic. (Original in Portuguese.)

#### KEYWORDS

World Trade Organization (WTO) – Non-governmental organizations (NGOs) – Participation.



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# BRIEF OBSERVATIONS ON THE MECHANISMS FOR NGO PARTICIPATION IN THE WTO \*

Michelle Ratton Sanchez

## **Introduction: Why talk about participation of non-governmental organizations in the WTO?**

The World Trade Organization (WTO), as an inter-governmental organization, recognizes the predominance of States in its deliberative process. Following this logic, employees of the State bureaucracy of its Members negotiate and make decisions within the scope of the WTO. For the international community, these employees are considered representatives of the government of each Member State. For the internal community of each State, these employees act, by and large, as auxiliary bodies of the Executive or Legislative Branch, exercising a popular indirect mandate grounded in either a prior mandate or an *ex post* control. This is a linear structure of representation, one in which there is a “national filter” in internal/international relations.<sup>1</sup> It was and still is a highly valid structure for relations structured under the inter-state concept of international relations.

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\* This article is based on research presented in the thesis *Demandas por um novo arcabouço sociojurídico na Organização Mundial do Comércio e o caso do Brasil* (Demands for a new socio-juridical framework in the World Trade Organization and the case of Brazil), for which the author obtained her Ph.D. from the São Paulo University Law Faculty in April 2004. Preliminary versions of this text were presented at the *Meeting of the Knowledge Development Group on Trade and Human Rights*, organized by SUR/IDCID in April 2005, and to the course *The case of access to medicine in Brazil*, organized by SUR in November 2005. The research has been updated and supplemented with data on participation up until December 2005.

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See the notes to this text as from page 116.

Nevertheless, recent changes have prompted the emergence of a new logic in international relations, extending beyond the inter-state order: a cosmopolitan logic.<sup>2</sup> One of the most striking elements of this cosmopolitan logic is that while the State remains one of the key actors in the international system, it welcomes participation by other actors that bring with them other structures, forms of action (“non-state”) and, consequently, other forms of regulation for the system.

Among the changes shaping this cosmopolitan logic are: (i) the emergence of new forms of social organization, in virtue of both increased cross-border interaction and the changing role of the State; (ii) a greater interdependence of States, which, in turn, requires a greater regulatory capacity by inter-governmental organizations; and (iii) the consolidation and expansion of certain principles in the game of politics, such as democracy, legitimacy, transparency, accountability and participation, on both national and international levels. These elements constitute a new reality and have prompted significant transformations in the coordination between governmental, non-governmental and inter-governmental organizations.

In the case of the WTO, some of the characteristics of its institutional structure and its *modus operandi* have caused this new logic to be incorporated into the multilateral trade system, among them: the nature of its agreements and its expansion into different areas governing social life; the dynamics and intensity of WTO work, with daily meetings to negotiate and monitor the process of implementing multilateral trade rules; the availability of a dispute settlement mechanism, with the combination of public and private interests; and the possibility for accession of new Members, under alternative rules.<sup>3</sup> These characteristics also promote a more “judicialized” system,<sup>4</sup> in which the culture of observing rules may always be invoked by Members and prevail in trade relations.

In this context, some important questions can today be raised about the relation of inter-state and cosmopolitan logics in the WTO, particularly concerning: (i) the exercise of representation by States in the inter-governmental forum; (ii) the extension of this representation (due to the reduction in the capacity to coordinate all relations on an international level by the “national filter”) and (iii) the possibility of enlisting and/or intensifying the participation of non-state actors in the deliberative process of these kinds fora.<sup>5</sup> I have already examined the first two points in previous articles<sup>6</sup> and here I shall examine point (iii).

Given the disparity between the inter-state and cosmopolitan logics and the confluence of these logics in the structure of the multilateral trade system (which throughout its history has centralized decision making among few of its Members), it becomes important to question the channels of direct participation



open to non-governmental organizations (NGOs)<sup>7</sup> in the WTO. Furthermore, I shall also examine how these channels of participation have evolved over the years, since the creation of the WTO in 1994.

Before embarking on the intended examination, it should first be pointed out that, traditionally, the negotiation and application of multilateral trade system rules used to involve mainly only trade organizations (i.e., representatives of producers, dealers and distributors of goods). But once WTO agreements came into effect and its institutional structure was implemented, for the reasons cited above, this scenario changed and a growing interest has developed among other NGOs in the WTO's decision making process. Within this group, special attention should be paid to those that concern themselves with sustainable development, which are in contrast to the sterile rhetoric of trade liberalization. Included in this category are NGOs working in defense of human rights and the environment. Consequently, growth in not only the presence, but also the profile of NGOs in the WTO's decision making process has, in recent years, triggered important demands to evolve the mechanisms for direct participation by NGOs that have penetrated the legal and social structure of the Organization, as I will point out in the pages ahead.

## **Direct participation by NGOs in the WTO: Implementation and new demands**

### *General provisions for participation*

The provisions for direct participation by NGOs in the WTO are contained in the Marrakesh Agreement<sup>8</sup> and other documents and decisions adopted in the workings of the organization either by Members or by the Secretariat. According to the provisions for participation and the demands presented for their improvement, influences on WTO governance can be seen in three levels: making rules, implementing rules and the process of interpreting rules, with a view to settling disputes.<sup>9</sup> In this subitem, I shall present the cross-cutting provisions that influence all three levels, and, in the other subitems, those specific to each level.

One of the first provisions on direct participation by NGOs in the WTO is contained in Article V.2 of the Marrakesh Agreement. This article determines that the WTO General Council *may* make appropriate arrangements for *consultation and cooperation* with NGOs concerned with matters related to those of the WTO.

In general, the forms of participation in inter-governmental forums can be classified in four categories: (i) information, (ii) consultation, (iii) cooperation, and (iv) deliberation.<sup>10</sup> In the Marrakesh Agreement establishing the WTO,

forms (ii) and (iii) are expressly mentioned. Since the WTO is an inter-governmental forum, actual deliberation (i.e. the right to vote) is restricted to the governments of Member States. Concerning information, it should be noted that, for consultation and cooperation to be possible, the principle of transparency must be considered a fundamental principle of the organization.<sup>11</sup>

The degree of transparency can be evaluated by the exposure given the information, activities and decisions originating from the WTO, and also by the degree in which the organization uses the information and positions submitted by NGOs. The purpose of transparency is to guarantee a degree of predictability to both the proceedings and the results of the deliberative process – from the creation to the application and interpretation of rules.<sup>12</sup> This principle is applicable not only to relations between Members (internal transparency), but also to public opinion in general (external transparency). The majority of the provisions of WTO agreements treat transparency as internal transparency;<sup>13</sup> although, as long as exposure is given, external transparency is often achieved as a consequence.<sup>14</sup>

The first WTO document in which the guarantee of external transparency can be identified is Decision WT/L/160/Rev.1 (1996), relating to procedures for the circulation and derestriction of WTO documents. Under the terms of this decision, the question of timeliness for internal transparency is very different to that for external transparency. This is because, as a general rule, WTO documents, once discussed and negotiated among Members in the Councils and Committees, may only be released to the public after six months.<sup>15</sup>

Bowing to pressure from some quarters of public opinion, including NGOs, and as an important landmark following the collapse of the Seattle Ministerial Conference in 1999, the WTO began a process to review Decision WT/L/160/Rev.1. In 2002, Decision WT/L/452 was approved, reducing the inconsistency in the time it takes to derestrict documents and establishing a rule that WTO documents would be automatically made public.<sup>16</sup> This rule applies to all documents submitted by Members and support material produced by the Secretariat. Exceptions to the rule of immediate publication apply to the minutes of Council and Committee meetings and to documents relating to renegotiation or modification of concessions or the accession of new Members. An exception may also be granted should one be requested by one of the Members or the Dispute Settlement Body.<sup>17</sup>

As an instrument for publishing WTO documents and information, the General Council approved the use of the WTO website, including a section of the site reserved for information specifically for NGOs (*For NGOs*).<sup>18</sup> This instrument enables information to be accessed by the public in general, which, among other actors, includes NGOs.<sup>19</sup>

Besides this virtual format, the General Council also approved, at its WT/

GC/W/29 meeting in 1998, that the Secretariat submit to NGOs the information and reports it regularly distributes to the media. When organizing briefings for NGOs, the General Council recommended that the Secretariat focus on topics of interest to this community.

However, criticism continues to be directed at the current system of information and there are still demands for change, particularly in virtue of its online concentration<sup>20</sup> and its reproduction. Objections have been raised over the way information is reproduced, since only Members and the Secretariat have access to meetings and the responsibility for reproducing the information falls on the Secretariat. This casts doubts on the freedom and the impartiality of the Secretariat to (re)produce the information.

Generally speaking, consultation as a form of participation is provided for only in specific cases and it cannot be said that, like with information, it reaches the public in general. Consultation is provided for in Article V.2 of the Marrakesh Agreement, while guidelines were established by General Council Decision WT/L/162 (1996) and the topic was again addressed in meeting WT/GC/M/29 (1998)<sup>21</sup> and Secretariat Paper WT/INF/30 (2001).<sup>22</sup>

Decision WT/L/162 states that the Secretariat should work more closely with NGOs to enhance the debate on topics related to WTO Agreements. However, the document does not define procedures. Therefore, given the loose wording of Decision WT/L/162, based on the terms “increased dialogue” and “be open”, the Secretariat understands that it has a mandate to define the forms of interaction necessary to comply with the prescribed objectives.<sup>23</sup> If, on the one hand, the positive aspect of this “mandate” is that the Secretariat is more sensitive to the demands of NGOs; on the other hand, the negative aspect is that the forms of interaction employed by the Secretariat may be subject to political pressure, even from one or more Members of the WTO.<sup>24</sup>

Some procedures for participation were defined and clarified in 2001, in Secretariat Paper WT/INF/30, and what occurs today in the WTO is that interactions with NGOs have taken on different formats, ranging from the promotion of longer events (such as courses and symposia) to debates with WTO representatives on a daily basis. But these mechanisms are organized, generally, on an *ad hoc* basis, following no pre-defined agenda and not necessarily being in any way related to negotiations between Members. The organizations involved claim that these forms of participation, rather than lending a contributive character to the negotiation and application of Agreements, are really just another series of specialized events, irrespective of being organized by the WTO Secretariat. This is why there is currently a demand to consolidate these forms of participation in the WTO structure, with well-defined, permanent mechanisms for participation and the least possible amount of interference from Members in the workings of these mechanisms.

Also under criticism is the fact that these events take place only in Geneva, which hampers WTO Secretariat contact with the plurality of NGOs, considering their thematic and regional diversity.<sup>25</sup> Aware of this, some NGOs with the available resources have set up shop or transferred their offices to Geneva in search of this personal proximity with the Secretariat and Member delegations at the WTO.

In addition to this role played by the Secretariat, the General Council Decision recognizes that the coordinators of the work of WTO Councils and Committees may also participate in events promoted by NGOs, although this must always be done in a personal capacity.<sup>26</sup> This has led NGOs to complain that this representation is not institutional.

NGOs may also, in the form of consultation and under the terms of WT/L/162 and WT/GC/M/29, submit position papers on topics being negotiated or on the agreements in force directly to the WTO Secretariat. In this case, the Secretariat receives the papers and, provided they comply with certain formalities,<sup>27</sup> posts them on the *for NGO* section of the WTO website. The Secretariat also prepares a monthly list of all the material that is submitted for the information of all Members, in line with the terms of WT/GC/M/29.

Aware of what little influence these position papers have on the WTO and its Members, NGOs are now calling for these papers to be better organized on the website and, moreover, for the Secretariat to take a more active stance, proposing topics on which to present papers, with more pre-defined timescales and standards.<sup>28</sup> The establishment of a procedure would also help NGOs monitor what happens to their papers and, as such, promote a greater correlation between the work produced by NGOs and the deliberative process coordinated by WTO Members. If this were the case, these mechanisms could progress from the category of information (from NGOs to the WTO and its Members) and be treated as a consultation.

Just as NGOs keep pressure on the WTO to obtain information, they also do so to claim their right to access WTO Council and Committee meetings. Moreover, they request the right to be heard at these meetings, or at least at some of them, and the opportunity to submit written documents. For these demands, proposals have been made to define a single and transparent procedure to enable participation by any and all organizations wishing to do so.<sup>29</sup>

Some proposals also recommend that criteria be presented to distinguish between NGOs engaged with trade issues and those that are not. Although NGOs looking to get involved in WTO activities must be 'concerned with matters related to those of the WTO' to qualify for participation, it is important to make a distinction between organizations that pursue commercial interests (representatives of producers, dealers and distributors of goods) and those that are non-commercial, not only because of the former's direct involvement in

international trade, but also because these organizations (namely trade and services associations) are often able to devote more resources (human and financial) to exercising their participation and they also exclusively represent private interests.

Cooperation, by nature, conveys the idea of steady interaction between the WTO and NGOs and, theoretically, it can be applied both to the stage of joint discussion and analysis for making rules, and to the stage of joint action to implement international commitments. Although it, too, is provided for in Article V of the Marrakesh Agreement, even today there are no instruments in place making this cooperation viable.<sup>30</sup>

The only examples of cooperation mechanisms with NGOs in the WTO are the Advisory Bodies, which have been set up by WTO Directors. To date, three initiatives to create these Bodies have been submitted, two during the mandate of Director General Supachai Panitchpakdi (both in 2003) and one by Director General Mike Moore (in 2001). While an official WTO report was released on the creation and composition of the Informal Council established in 2001, for the two created in 2003 there is no official WTO information available for the public.<sup>31</sup> For this reason, some NGOs, such as Oxfam International and Friends of the Earth, refused the invitation to take part in the Body; both organizations claiming they were not representative enough of civil society to participate in such a restricted group.<sup>32</sup>

With the exception of the Consultative Board created in 2003 that was formed by professionals considered experts in the multilateral trade system, the results of the work of these Advisory Bodies and their opinions have not been published by the WTO.<sup>33</sup> Therefore, not only does this mechanism go unregulated, with no breakdown of the resources spent to contract the professionals and their responsibilities, but also there is no transparency in the conduct of their work, which makes it difficult for interested parties to participate in the selection process, and for NGOs themselves to participate in the different levels of direct participation in the WTO.

### *Processes of rule-making*

In the WTO system, it could be said that the Ministerial Conferences, held every two years, are most closely associated with the rule-making process, as are the talks either leading up to or following these conferences to prepare the agenda or lend continuity to negotiations.

In the Ministerial Conferences, while there may have been no participation mechanisms available in the Uruguay Round, from Singapore onwards a need was noted to establish specific procedures for NGO participation.<sup>34</sup> Besides the original requirement that NGOs develop activities related to those of the

WTO, the list of NGOs selected in advance by the Secretariat must be approved by the General Council (a meeting in which all WTO Members have a seat). An important landmark was the 3rd Ministerial Conference in Seattle (1999), when WTO relations with NGOs started to become clearer and alterations in the forms of regulation started to be realized with more clarity.<sup>35</sup>

Since 1996, participation by NGO representatives has been permitted in the plenary sessions of Ministerial Conferences, while since the 4th Ministerial Conference (2001), it was emphasized that these organizations would not have the right to a voice in the session.<sup>36</sup> Furthermore, since 1998, the General Council has allowed the WTO Secretariat to organize informative meetings (or briefings) for NGOs during the Conference on the progress of the negotiations.<sup>37</sup>

After 1999, additional measures were adopted in response to the intensified demands for participation. Since the 4th Ministerial Conference (2001), closer activities have been developed between the Secretariat and NGOs, notably during the preparatory stage in the run-up to the Ministerial Conference. Among these forms of activities are: (i) briefings, in Geneva, by the Secretariat after meetings between Members; (ii) small debate panels; (iii) the organization of working sessions; and (iv) the possibility of the Secretariat accepting written positions.<sup>38</sup>

These new measures prompted an increase in the activities surrounding the Ministerial Conferences, such as the Symposia organized by the WTO that are open to the general public. During the WTO's first five years, only two Symposia were held, while since 2001 there have been nine. The qualitative difference between those before and those after 2001 is not only in their size, but also in the relation between the discussion topics and the negotiations underway ahead of the Ministerial Conferences.<sup>39</sup> Furthermore, since 2005, the Symposia have begun to be organized almost in partnership with other NGOs, which are responsible for organizing the panel and setting the theme.

In addition to the formal provisions for NGO participation in the WTO, we should not overlook the influence these organizations have had through other informal mechanisms. This is because these mechanisms can also have an impact on the rule-making process. Among them, we can cite the participation of NGOs in the official delegations of Members, either from their country of origin or from another (for attendance at the Ministerial Conferences and also at the preparatory meetings for the Conferences, in Councils and Committees) and in the promotion of parallel events to the Ministerial Conferences for discussion (and criticism) of the multilateral trade system.<sup>40</sup>

Based on this brief description, note that the measures for NGO participation in the rule-making process are restricted to the terms of Article V.2 of the Marrakesh Agreement. It is worth pointing out, however, that this regulatory provision defining procedure (for participation) was introduced

effectively due to pressure from NGOs. Bear in mind, then, that the active character afforded the General Council by Article V.2 only came as a reaction to pressure from NGOs.

Considering that this has been the trend for implementing participation mechanisms, it can be concluded that while this reaction, on the one hand, points to institutional sensitivity, on the other hand it is also capable of causing new mechanisms to be implemented in a way that is not systematized in relation to the structure and the work developed in the WTO.

### *Processes of implementation of the rules*

Within the institutional structure of the WTO, the main mechanisms for the application of rules are the periodic work of the Trade Policy Review Mechanism<sup>41</sup> and the daily work of the WTO Councils and Committees. None of the bodies involved in the application of rules officially provide for NGO participation.

What actually happens is that some NGOs, particularly those with representation in Geneva, manage to get informal access to specific Council and Committee meetings.<sup>42</sup> Another indirect form of NGO influence are the specific studies they prepare on the application of commitments assumed within the WTO and their high-exposure campaigns. Some of this knowledge is expressed in the position papers submitted to the WTO and posted on its website, and also through the participation of NGO representatives in specific WTO activities (such as seats in official meetings guaranteed NGOs during the Ministerial Conferences, for example).

It can also be said that the daily contact with the WTO Secretariat, the debates held by the organization (in Symposia and working groups) and the work of the Advisory Bodies are also mechanisms that promote the involvement of NGOs in the application of rules, even though this occurs indirectly.

Along these brief lines, the analysis of NGO influence on the application of WTO rules demonstrates how little formal influence there has been since the constitution of the WTO in this form of regulation. Instead, their influence is more informal, and there have been few demands for these influences to be formally recognized and made binding.

Three hypotheses may be raised to explain this situation: (i) lack of demand; (ii) less responsiveness of the WTO to this form of regulation; and/or (iii) a certain convenience on the part of the most influential NGOs with this informality. Based on results obtained in prior field research,<sup>43</sup> all three hypotheses can be confirmed, so little future repercussion is expected in this form of participation; even though important mechanisms of ongoing participation by NGOs could be developed at this very level of regulation.

### *The dispute settlement mechanism*

Within the three levels of regulation identified, the WTO Dispute Settlement Body (DSB) is the most “judicialized” of bodies in the organization. This is why it generates so many questions and analysis and draws so much attention from NGOs.<sup>44</sup>

There is no express provision allowing for the possibility of NGO participation in WTO dispute settlement procedure. But, since 1998, some NGOs have submitted, either to the panel or to the Appellate Body, position papers on the topic under analysis in the dispute (called *amicus curiae* briefs). *Amicus curiae* briefs, as applied in common law procedure, contain the views of any individual or body with a strong interest in the case, but not party to the dispute (views relating to a “public interest”).<sup>45</sup>

The acceptance of *amicus curiae* briefs in the DSB is based on the right of the Panels to information, guaranteed in Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>46</sup> This article allows Panels to seek information and/or technical advice from: (i) any individual or body, provided it informs the authorities of the WTO Member in advance, and (ii) any relevant source, in accordance with procedures set forth in Appendix 4 of the DSU.

In 1998, two NGOs submitted the first *amicus curiae* briefs before a DSB Panel set up to analyze case WT/DS58 – Shrimp/Turtles. The Panel only recognized the material when the United States (party to the dispute) attached the positions to its submission and endorsed the positions of the *amicus curiae* briefs in its oral statement.<sup>47</sup>

Upon appeal of this decision, the Appellate Body accepted three more *amicus curiae* briefs and reviewed the Panel’s interpretation of Article 13 of the DSU. According to the interpretation of the Appellate Body, there is a distinction between being “obliged” to accept a position and being “authorized” to accept a position.<sup>48</sup> Therefore, a joint examination of both Articles 12 and 13 of the DSU and of Appendix 3 of the DSU, determined the possibility of accepting *amicus curiae* briefs submitted directly to the Panel or the Appellate Body.<sup>49</sup> This conclusion by the Appellate Body went beyond the literal interpretation of the Panel and made it easier for the dispute settlement mechanism to accept information submitted by NGOs, even though unsolicited.

It is interesting to note that, even after this interpretation by the Appellate Body in the WT/DS58 – Shrimp/Turtles case, some years later, in an analysis of the same dispute, the Panel, concerning the application of measures to observe the recommendations and decisions of the DSB (Recourse to Article 21.5 of the DSU), resumed its initial interpretation of Article 13 of the DSU and only accepted *amicus curiae* briefs attached to the submissions of the parties.<sup>50</sup>



Subsequently, in the Appellate Body ruling on Recourse to Article 21.5 of the DSU, the Appellate Body once again accepted the submission of *amicus curiae* briefs. Procedure for the acceptance *amicus curiae* briefs in this case has swung back and forth, generating insecurity among NGOs over whether or not *amicus curiae* briefs will be accepted in the DSB.

Nevertheless, since it pioneered the analysis, from all the different angles of interpretation listed above, on the submission of unsolicited briefs by NGOs to the WTO dispute settlement mechanism, the WT/DS58 – Shrimp/Turtle dispute became a reference for later dispute decisions. In particular because the number of *amicus curiae* briefs submitted before the DSB has increased significantly over the years.<sup>51</sup>

Since then, the experience with *amicus curiae* briefs in the DSB has prompted the development of some specific procedures for their acceptance. Panels, for example, have adopted as a rule that they will accept positions submitted prior to the hearing with the parties. The Appellate Body even went so far as to define procedure in detail, on deadlines and methods, for the acceptance of *amicus curiae* briefs in its analysis of the WT/DS135 asbestos dispute.<sup>52</sup>

*Amicus curiae* briefs not only enable NGOs to play a part in the dispute settlement mechanism, they also allow for the introduction of new interpretations of WTO agreements.<sup>53</sup> Concerning the *amicus curiae* briefs presented to date, it is possible to note a strong presence of NGOs that represent interests related to consumption, labor and the environment.

From the provisions of Article 13 of the DSU emerge practices and interpretations, at times influenced by NGOs that for some enhance and, for others, go beyond the provisions of the WTO Agreements. This has probably occurred due to the higher degree of “judicialization” of the WTO dispute settlement system, particularly when compared to the nature and evolution of direct NGO participation in the other levels (making and application of rules).

Another important point concerning direct NGO participation in the dispute settlement system is the demand for participation in the hearings. Recently, in September 2005, in the WT/DS320 Hormones and the WT/DS321 Hormones disputes, the Panel decided to publicly broadcast the audience with the parties to the dispute, in accordance with previously defined proceedings<sup>54</sup>. However, the initiative was not considered successful by the Secretariat, since for the 400 seats set aside for the public, the Secretariat received only 207 registrations and there were only 65 attendees.<sup>55</sup>

It should be stressed that, currently, in the process of reviewing the dispute settlement system, demands have been made both to reform Article 13 – either for the purpose of expressly permitting the submission of *amicus curiae* briefs and establishing specific procedure for doing so,<sup>56</sup> or to prevent this practice<sup>57</sup> – and to come up with proposals for holding public hearings. Demands for a

regulation to enshrine participation mechanisms in the DSB have come mainly from the United States and the European Communities.<sup>58</sup> This is, therefore, one of the levels of WTO regulation in which direct participation was on the negotiating agenda of Members. And, as such, it has more chance, at the current time, of being institutionalized and regulated.

### **Final remarks: Limitations of the WTO structure to the incorporation of new demands for participation**

Note that, in the three levels of WTO regulation, the influence from the demands of NGOs fluctuates in accordance with the degree of interest of the actors involved, the identification of one or another of the mechanisms as more efficient by non-state actors (that exert the pressure), the institutional sensitivity of each of the forms of regulation and, finally, in accordance with the responsive capacity of the mechanism in the WTO.

Note also that the more “judicialized” the mechanism, the more responsive it is to the demands of NGOs. While this demonstrates a permeability of the WTO to the changes in the international environment, there are some limitations in its very system that could undermine the process or even cause discord within the organization. These limitations result either from the very institutional composition of the WTO (internal) or from its integration with the elements of the international system (systemic).

Concerning the internal limitation, the first thing to point out is the different degree of “judicialization” among the three levels of WTO regulation. While the dispute settlement structure is more responsive, the executive and legislative bodies (for making and application of rules) are more prone to the political influence of Members.<sup>59</sup>

Another point is that the provisions for participation and the procedure for participation have been defined basically by *soft law*, that is, provisions characterized by a lack of clarity in the definition of obligations and/or the precision of rules and/or the delegation of authority.<sup>60</sup> Besides causing uncertainty over procedure for participation, this also sparks instability since there is no way of enforcing compliance with these forms of participation, should they not be implemented.

The concentration of the vast majority of mechanisms, particularly for the process of making and implementing rules, in one division of the Secretariat also undermines and limits the effective development of the mechanisms for NGO participation in the WTO. Recognition of this possibility for participation requires institutionalization in the WTO structure and a better structured body, with a larger number of people and a greater volume of resources to enshrine the provisions and procedures for NGO participation, as well as to promote technical reports and prospective analyses.<sup>61</sup>

Finally, while not wishing to belabor the point, a third critical aspect of the

system is that recognition of NGO participation requires an increasingly more proactive role by the WTO, including the responsibility to promote a balance in the representation and participation of NGOs, from different regions and sectors, in the WTO's different levels of regulation. The definition of participation mechanisms has a direct relationship with the most present NGOs and their demands.

The systemic limitations refer basically to the tension between the inter-state and cosmopolitan components within the WTO. The inter-state logic, previously guaranteed by a coherent and more stable system, is invoked by the majority of Members to restrict the possibility of NGO participation in the WTO. There are some misgivings over how NGOs may influence the deliberative process, i.e., how the cosmopolitan dynamic is organized and combined with the inter-state logic.<sup>62</sup>

Even though there is resistance from a good many Members, NGO participation in the WTO has occurred either through formal structures or the traditional informal channels. The current precarious regulation of participation has prompted contradictory reactions from Members in discourse and in practice, depending on convenience. In other words, when it comes to deliberation and expression of the inter-state concept of international relations, some Members oppose participation by NGOs, while in the day-to-day game of negotiations and dispute settlement, the same Members adopt a more cosmopolitan approach and accept the working partnership with NGOs in the WTO. This conduct undermines the transparency of the deliberative process (who effectively supports one or other decision) and also undermines the direct co-relation between the rights and duties of the different actors effectively involved in the process.

This is why, today, reflection on NGO participation needs to be broadened and involve more of the actors that want to increase their direct participation in the WTO, as well as those non-state actors that oppose the institutionalization of these mechanisms. It would also be interesting for the debate on whether to institutionalize the mechanisms of direct participation to be grounded on (i) a comparative analysis with other international organizations, and their successes and failures; (ii) concrete data on the participation of non-state actors in the WTO to date and their influence on the organization's decision making process; (iii) the principles applied in the institutionalization and in the workings of the mechanisms for direct participation in the WTO; and, primarily, (iv) a systemic perspective about what the implications of implementing these mechanisms will be for the integration of the inter-state and cosmopolitan logics, and the impact on the international system as a whole.

## NOTES

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1. The legal arrangement of Brazilian foreign policy, for example, follows the constitutional provision stating that it is the duty of the President of the Republic (Art. 84, Item VIII, of the 1988 Constitution) to represent the country in international negotiations and decision making processes. This responsibility to participate in inter-governmental forums is typically delegated to employees of the Ministry of Foreign Relations (MRE), in accordance with Decree 99.578/90 and Provisional Measure 813/95. The President, just like the National Congress (Art. 49, Item I, of the 1988 Constitution), exercise an *ex post* control on a national level ("national filter").

2. On this subject, see M. R. Sanchez, *Demandas por um novo arcabouço sociojurídico na Organização Mundial do Comércio e o caso do Brasil*, Thesis submitted to the São Paulo University Law Faculty (Tutor: J.E.C.O. Faria) in 2004. For other related articles, see J. Habermas, *The Postnational Constellation: Political Essays* (translated, edited and with introduction by Max Pensky), Cambridge, Polity Press, 2001; J. Habermas, *L'intégration républicaine: essais de théorie politique* (translated by Rainer Rochlitz), Paris, Fayard, 1998; D. Archibugi, D. Held (org.), *Cosmopolitan democracy: an agenda for a new world order*, Cambridge, Polity Press, 1995; Daniele Archibugi et al (org.), *Re-imagining political community*, Cambridge, Polity Press, 1998; J. Rosenau, *Along the domestic-foreign frontier: exploring governance in a turbulent world*, Cambridge, CUP, 1997; G. Teubner (org.), *Global law without a state*, Hants, Ashgate Publishing Ltd/ Dartmouth Publishing Co. Ltd., 1997; P. Kennedy, D. Messner, F. Nuscheler (org.), *Global trends & global governance*, Sterling-VA, Pluto Press/ Development and Peace Foundation, 2002.

3. On the same subject, see M. R. Sanchez, *op. cit.*, 2004, pp. 57-90. For examples of some of these elements and their direct relation with the topic of human rights, see C. Dommen, "Trade and Human Rights: Towards coherence", *SUR International Journal on Human Rights*, no. 3, 2005.

4. Enshrined in the doctrine of international trade is recognition of the transformation from a eminently diplomatic system (GATT) to a system in which the legal aspect prevails (WTO). For articles on these concepts, see E.U. Petersmann, "The dispute settlement system of the World Trade Organization and the evolution of the GATT dispute settlement system since 1948", *Common Market Law Review*, v.31, no.1, 1994, pp.1157-244; A. Reich, "From diplomacy to law: the juridicization of international trade relations", *Northwestern School of Law Journal of International Law & Business*, v.17, 1996-1997, pp. 775-849; R. Shell, "Trade legalism and international relations theory: an analysis of the World Trade Organization", *Duke Law Journal*, v.44, 1995, pp. 829-927; J. Weiler, "The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO dispute settlement", *Harvard Jean Monnet*, no.09/00, 2000 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)>; J. Dunoff, *Mission impossible: resolving the WTO's trilemma*, 2003 <[www.law.berkeley.edu](http://www.law.berkeley.edu)>.

5. See G. Marceau, "Is the WTO open and transparent?", in The Heinrich Böll Foundation (org.), *On the road to the WTO ministerial meeting in Seattle*, Washington, Heinrich Böll Foundation, 1999, pp. 25-44: "The most important point at this juncture of the evolving relationship between the WTO and civil society is that the debate no longer seems to focus on whether NGOs should be involved but rather on how they are indeed given an appropriate role within the WTO."

6. On this subject, see M. R. Sanchez, *op.cit.*, 2004; M. R. Sanchez, *Mudanças nos paradigmas de*

*participação direta de atores não-estatais na OMC e sua influência na formulação da política comercial pelo Estado e pela sociedade brasileiros* (mimeo), 2006 <www.edesp.edu.br>.

7. In this article, for the sake of methodological simplicity, I shall use the formal term “NGO”, as does the WTO, to define the group of actors to which the organization applies a specific treatment. In other articles, I have challenged this classification, on the grounds that it is insufficient to convey the complexity of interests represented in these mechanisms. This is because, in the case of the WTO, many of the actors present in the mechanisms established for participation by “NGOs” do not actually have exclusively “non-governmental” characteristics; for example, also represented in these mechanisms nowadays are associations of members of Parliament, subnational governments, companies and individuals. For an analysis of this debate, see M. R. Sanchez, *op. cit.*, 2004; M R. Sanchez, “Atores não-estatais e sua relação com a Organização Mundial do Comércio”, in AMARAL JUNIOR, A. (org.), *Direito do Comércio Internacional*, São Paulo, Editora Juarez de Oliveira, 2002, pp. 151-70.

8. Approved in Brazil by Decree 1.355/94.

9. Concerning these three forms of participation in the WTO, see F. Roessler, *Are the judicial organs of the WTO overburdened?* (mimeo) (a modified version of “The institutional balance between the judicial and political organs of the WTO” (n/d), in M. Bronckers, R. Quick (org.), *New Directions in International Economic law: essays in honor of John H. Jackson*, Hague/London/Boston, Kluwer Law International, 2001, pp. 325-345). For a more extensive analysis of the influence of NGOs on the creation and application of international rules, see P. Kohona, “The role of non-state entities in the making and implementation of international norms”, *The Journal of World Investment*, v. 2, no. 3, 2001, pp. 537-78.

10. This classification originates from the one proposed by the OECD for civil participation in defining policy at a national level. See OECD – Organization for Economic Co-operation and Development, *Emerging citizens in policy-making: information, consultation and public participation*, Public Management Policy Brief n. 10, Paris, July, 2001. For a more detailed examination of these forms of participation in the WTO, see M. R. Sanchez, *op. cit.*, 2004.

11. We can see here that the principle of transparency is, in the case of the WTO, presented as a responsibility of the international organization. This obligation may be presented as complementary to the one considered a constitutional right in the vast majority of democratic countries, as is the case in Brazil. (see Art. 5, Item XXXIII, of the 1988 Constitution). This is because international negotiations take into consideration the positions presented by all the States involved, while each State, internally, may guarantee the right to information for, and only for, the positions presented by it (since most of this information could be considered worthy of secrecy; in the case of Brazil, see Art. 23 of Law No. 8.159/91 and Art. 5 of Decree 4.553/02). It should also be noted that the principle of transparency in international organizations is related to the debate on the application of democratic principles in these organizations. See R. Howse, “The legitimacy of the World Trade Organization”, in J. Coicaud, V. Heiskanen (org.), *The legitimacy of international organizations*, Tokyo, United Nations University Press, 2001, pp. 355-407.

12. On the topic of transparency and accountability in the WTO, see S. Panitchpakdi, “Balancing competing interests: the future role of the WTO”, in G. Sampson (org.), *The role of the World Trade Organization in global governance*, Tokyo, United Nations Press, 2001, pp. 29-35; P. Sutherland, J.

Sewell, D. Weiner, "Challenges facing the WTO and policies to address global governance", in SAMPSON, G. (org.), *op.cit.*, 2001, pp. 81-111; S. Ostry, "External transparency: the policy process at the national level of the two level game", material prepared for the *WTO Advisory Group*, 2002 <[www.utoronto.ca/cis/ostry.html](http://www.utoronto.ca/cis/ostry.html)>. In relation to international organizations, see the debate promoted by ASIL, *Proceedings of the 92th Annual Meeting: The challenge of non-state actors*, "The accountability of international organizations to non-state actors", ASIL, Washington, 1998, pp. 359-73.

**13.** Among the provisions expressed in the Multilateral Agreements, the general principle of transparency is protected in Article X of GATT-1994, which establishes a commitment for WTO Members to make public all the forms of regulation, as well as administrative procedures related to trade.

**14.** See S. Ostry, "WTO: institutional design for better governance", preliminary version of an article for the seminar *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Kennedy School, Harvard, Boston, June 2-3, 2000 <[www.utoronto.ca/cis/ostry.html](http://www.utoronto.ca/cis/ostry.html)>: "There has been some discussion about "transparency" and the opacity of that word has now been significantly increased by distinguishing between internal transparency (WTO-speak for adapting the traditional negotiating process to include more developing countries) and external transparency (improving access to documents etc. and dealing with demands of the NGO's for more participation)."

**15.** For the publication of a document to be restricted, the information it contains does not necessarily have to be considered confidential in the WTO. Generally speaking, information is considered confidential when it contains non-public strategies and data of Members and their nationals, technical reports from experts and specialized centers submitted to the dispute solution mechanism and trade information of private entities.

**16.** See *WTO moves towards a more open organization* <[www.wto.org](http://www.wto.org)>: "The recent decision, resulting from constructive government cooperation, is indicative of WTO's continuous and progressive efforts to improve our outreach to stakeholders, parliamentarians, civil society, the private sector and media".

**17.** For a detailed comparison of the two documents WT/L/160/Rev.1 (1996), *Procedures for the Circulation and Derestriction of WTO Documents* – Decision adopted by the General Council on 18 July 1996 – Revision, 26 July and WT/L/452 (2002), *Procedures for the Circulation and Derestriction of WTO Documents* – Decision of 14 May 2002, 16 May; see M. R. Sanchez, *op.cit.*, 2004, Appendix 2. To access the full texts of these decisions, and all the other WTO documents mentioned in this article, see <[docsonline.wto.org](http://docsonline.wto.org)>.

**18.** Cf. WT/L/162 (1996), Decision adopted by the General Council on 18 July 1996 – *Guidelines for arrangements with non-governmental organizations*, 23 July; WT/GC/M/29 (1998); General Council – *Minutes of Meeting Held in the Centre William Rappard on 15, 16 and 22 July 1998*, 30 September.

**19.** See One World Trust, a British organization that produced the first report on accountability in inter-governmental organizations. It ranked the WTO website very highly, in virtue of both the volume of available information and the ease of finding what you are looking for. For more details, see One World Trust (2003), *Global Accountability Report*, 20 January <[www.oneworldtrust.org](http://www.oneworldtrust.org)>.

The concept of accountability in the report consists of Member control of governance structures and access to online information.

**20.** This criticism is due largely because the majority of the population of the 149 Members does not possess the technological resources to consult the information online. See UNCTAD – United Nations Conference on Trade and Development, *E-commerce and development report 2003*, UNCTAD/SDTE/ECB/2003/1, 2003, p. 5, only 10% of the world's population has access to the Internet. Furthermore, only 3% of the population of developing countries have access, while in the developed world this figure rises to 32%.

**21.** See WTO – World Trade Organization, *Annual Report*, Geneva, 2002, p. 4: “the existing guidelines on external relations were designed by Members to give the Secretariat an appropriate degree of flexibility to allow responsible NGOs a voice in the dialogue”.

**22.** See WT/INF/30, *WTO Secretariat Activities with NGOs*, 12 April, 2001. WT/L/162 and WT/GC/M/29, *supra*.

**23.** On this, G. Marceau, *op. cit.*, 1999, p.28, confirms the extension of the mandate: “The adoption of fairly broad guidelines left the Secretariat a relatively free hand in defining its relationship with NGOs and has allowed it to become increasingly pro-active in its undertakings with civil society [...]”.

**24.** It has often been asked to what degree this aspect downplays the importance of the WTO Secretariat, particularly given the recurring argument of Members that the WTO is an organization for, and at the service of, Members (only States as they are represented in their diplomatic delegations). P. Willetts, in “Civil society networks in global governance: remedying the World Trade Organization's deviance from global norms”, an article presented to the *Colloquium on International Governance*, Palais des Nations, Geneva, 20 September 2002 <[www.staff.city.ac.uk](http://www.staff.city.ac.uk)>, notes that beyond being a restricted mandate, what carries the most weight is the rhetoric applied in the WTO to undermine the Secretariat's ability to carry out the functions attributed to it: “[...] there is a culture of affirming the Secretariat are no more than administrators: ‘Since decisions are taken by members only, the Secretariat has no decision-making powers’. People at the WTO also like to assert that it is ‘a membership-driven organization’. Neither of these points differentiates the WTO in any legal manner from the UN, but their assertion does matter politically, by limiting the leadership role of the Secretariat.”

**25.** On this regional subject, there is the dilemma of an over-representation from NGOs from the Northern Hemisphere in relation to the South (estimated at 75% from the North and 25% from the South by an official at the *External Relations Division*, in an interview in November 2003). To reduce this disparity, according to information provided in the same interview, the Secretariat has sought to provide travel financing for NGOs from the Southern Hemisphere. The official also explained that it is difficult to know which NGOs from the South to invite, since little is known about them and how they work. Furthermore, since Members from the South have shown the most resistance to increasing NGO participation, they do nothing to help the *External Relations Division* make its selection.

**26.** See WTO News, *External Transparency*, from November 22 2002 <[www.wto.org/english/news\\_e/news00\\_e/gcexternaltrans\\_nov00\\_e.htm](http://www.wto.org/english/news_e/news00_e/gcexternaltrans_nov00_e.htm)>, the WTO and its Secretariat have pursued initiatives to improve these participation mechanisms: “Since the Third Ministerial Conference in Seattle the

Director-General and his Deputies have kept up a comprehensive programme of participation in international meetings with the public and private sectors and NGOs. [...]”

**27.** Among the formalities: papers should address a topic considered to be related to trade (the selection is conducted by the Secretariat) and the title should be submitted in the three official WTO languages – English, French and Spanish <[www.wto.org/english/forums\\_e/ngo\\_e/pospap\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm)>.

**28.** On this subject, see P. Willetts, *op.cit.*, 2002.

**29.** P. Willetts, *op.cit.*, 2002, claims that, as a first step, the WTO should accept all NGOs that have been approved for consultative status by the UN Social and Economic Committee; thereafter, a commission comprised of NGO representatives should define a Code of Conduct for NGOs participating in WTO mechanisms. For an initial period of five years, the WTO should authorize registered NGO representatives to attend meetings of Councils and Committees and the Ministerial Conference. After this period, the General Council, in consultation with NGO representatives, should codify the rules into a WTO Statute for consultative relations with NGOs. On the same subject, see the proposal of the German NGO ECOLOGIC (2003), *Participation of non-governmental organizations in international environment governance: legal basis and practical experience*, an article prepared by Sebastian Oberthür *et al.* It should be noted that these proposals generally draw on the experience of the criteria that applies for participation in other international organizations, which are also currently questioning the mechanisms for permitting direct participation of NGOs, such as, for example, in the UN <[www.un.org/reform/civilsociety.html](http://www.un.org/reform/civilsociety.html)>.

**30.** The wording of Article V.2 was based on Article 87 of the Havana Charter for an International Trade Organization (ITO). However, the generic provisions of the Havana Charter were analyzed by an Executive Committee that specified the forms of cooperation. Chief among them is the possibility for NGOs to attend ITO Council meetings and have the right to address these meetings. For an historical account of the provisions for interaction of NGOs with the ITO and the WTO, see S. Charnovitz, J. Wickham, “Non-governmental organizations and the original international trade regime”, *Journal of World Trade*, v. 29, no. 5, 1995, pp. 111-22.

**31.** On the creation of the Informal Council in 2001, see WTO News, Press/236 (2001). In addition to certain academic institutions, the following NGOs were also part of the 2001 Council: Transparency International, International Institute for Sustainable Development and International Federation of Free Trade Unions. Part of the 2003 Council, in the *NGO Advisory Body* (set up in parallel to the *Business Advisory Body*), were: Consumers International, Consumers Unity and Trust Society, International Federation for Agricultural Producers, WWF International, Third World Network, Christian Aid, International Federation of Free Trade Unions, Public Services International, International Centre for Trade and Sustainable Development and International Institute for Sustainable Development.

**32.** See article *WTO Chief Sets Up Advisory Bodies With Business, NGOs to Boost Dialogue* <[www.geocities.com/ericshire/articles/wto/wr030617.htm](http://www.geocities.com/ericshire/articles/wto/wr030617.htm)>. In one of the working groups for NGOs organized by the Friedrich-Ebert-Stiftung Foundation at the 5th Ministerial Conference, *Making Voices Stronger! Global civil society and democracy in international institutions*, Oxfam once again justified declining the invitation with the argument: “(i) if the WTO intends to have close contact with civil society, it should have started the process to constitute the Council democratically (since



this is one of civil society's main criticisms of the WTO) and exemplified this by launching an open invitation on the Internet; and (ii) in the format that was constituted, the Informal Council would play a relatively ineffective role."

**33.** The report of the Consultative Board is published in *The future of the WTO: addressing institutional challenges in the new millennium* <[www.wto.org/English/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.htm)>. Comments reacting to the proposals presented in the report may be found in *Bridges Weekly*, v. 9, no. 2, 26 January, 2005 <[www.ictsd.org/weekly/05-01-26/story3.htm](http://www.ictsd.org/weekly/05-01-26/story3.htm)>.

**34.** On the subject, see. WT/L/161 (1996), Decision adopted by the General Council – *Rules of procedure for sessions of the Ministerial Conference and meetings of the General Council*, 25 July; WT/L/162 (1996), *supra*.

**35.** In Seattle, the number of NGOs registered to participate in the official space of the Ministerial Conference increased almost fivefold in relation to participation in the previous conference (Geneva, 1998); for details of the NGOs registered in each of the Conferences, see M. R. Sanchez, *op. cit.*, 2004, Appendix A.3(a); for updated statistics, see M. R. Sanchez, *op. cit.*, 2006. See S. George, *The global citizens movement. A new actor for a new politics*, 2001 <[www.tni.org/issues/wto](http://www.tni.org/issues/wto)>: "Seattle is now seen as a watershed first because the media finally accepted there was another voice out there besides governments and business. Citizens might actually have something important to say and say it forcefully [...] From the protestors' side, as opposed to the media's, Seattle can also be seen retrospectively to have marked a turning point. Simply put, we are no longer on the defensive. Just as this mobilization did not start with Seattle, so it will not end with some other singular event like the police-riot in Genoa. It will assume different forms in different places but it is an increasingly international phenomenon, it has taken on a life of its own and is now an organic, permanent presence on the world stage. Although still very young, the movement is fast moving towards maturity and its participants are gaining in knowledge and confidence." See R. Keohane, J. Nye, *The Club Model of Multilateral Cooperation and the WTO: Problems of Democratic Legitimacy*, an article presented to the Center for Business and Government, Harvard University, 2000 <[www.ksg.harvard.edu/cbg](http://www.ksg.harvard.edu/cbg)>, in which they claim that the role of NGOs in Seattle was symbolic of the abandonment of the GATT model: "The failure of the Seattle meetings of the WTO, on several levels is indicative of the reasons for the weakening of the old club system of trade politics." For further remarks, see Ostry, *op. cit.*, 2000; and J. Dunoff, "International law weekend proceedings: civil society at the WTO: the illusion of inclusion?", *ILSA Journal of International & Comparative Law*, v. 7, 2001, pp. 275-84.

**36.** See WT/GC/M/13, General Council – *Minutes of Meeting Held in the Centre William Rappard on 18 July 1996*, 28 August 1996; WT/GC/M/27, General Council – *Minutes of Meeting Held in the Centre William Rappard on 2, 14 April and 17 May 1998*, 22 September 1998; WT/GC/M/65, General Council – *Minutes of Meeting Held in the Centre William Rappard on 8 and 9 May 2001*, 18 June 2001; WT/GC/M/78, General Council – *Minutes of Meeting Held in the Centre William Rappard on 10 February 2003*, 8 March 2003.

**37.** Cf. WT/GC/M/29, 1998, *supra*.

**38.** See WT/INF/30, 2001, *supra*. These measures were taken specifically for the 4<sup>th</sup> Ministerial Conference, but they were repeated for the organization of 5<sup>th</sup> and 6<sup>th</sup> Ministerial Conferences (in 2003 and 2005).

39. The topics of the Symposia were: *Global problems, multilateral solutions* (2005), *Cross-Border Supply of Services* (2005), *Trade and Sustainable Development* (2005); *Multilateralism at a crossroads* (2004), *IT Symposium* (2004); *Challenges ahead on the road to Cancún* (2003); *The Doha Development Agenda and Beyond* (2002); *WTO's 5th Ministerial Conference* (2002); *Symposium on issues confronting the world trade system* (2001); *WTO Trade and Environment Symposium* (1998); *Joint WTO/UNCTAD NGO Symposium to prepare for the High-Level Meeting on Least-Developed Countries* (1997).

40. With a view to identifying some degree of permeability in these mechanisms for participation, note that some points of the WTO agenda today coincide with NGO campaigns; for example, the cases of the Doha agenda for development and the declaration on TRIPS and public health. See Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (2001) and the Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2 (2001).

41. The Trade Policy Review Mechanism is included as Annex 3 of the Marrakesh Agreement establishing the WTO. This mechanism is designed to monitor/supervise the implementation of the commitments assumed by Members within the WTO. Although there are no specific provisions for NGO participation in this mechanism, a good many of the reports are written by agencies of the government of the country under analysis. Accordingly, participation in domestic policy, together with the various Ministries and bodies involved, can be a complementary factor in influencing the process.

42. This, for example, is the case with the Committee on Trade and Environment, which has a fairly close relationship with the NGOs that are most active in the WTO.

43. See M. R. Sanchez, *op. cit.*, 2004, pp. 91 ff and 193 ff.

44. Concerning this judicialization compared with the WTO's other regulatory bodies and its risks, see C. D. Ehlermann, "Six years on the bench of the 'world trade court': some personal experiences as member of the Appellate Body of the World Trade Organization", *Journal of World Trade*, v.36, no.4, 2002, pp.605-39; F. Roessler, *op. cit.*, (n/d); E. U. Petersmann, *op. cit.*, 1994.

45. BLACK'S Law Dictionary, (1990), p. 82: "Amicus Curiae. Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases. Such may be filed by private persons or the government. In appeals to the U.S. courts of appeals, such briefs may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof."

46. For analyses of *amicus curiae* procedure in the DSB, see P. Mavroidis, "Amicus curiae briefs before the WTO: much ado about nothing", *Jean Monnet Working Paper* no. 2/01, 2001 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)>; J. Dunoff, "The Misguided Debate over NGO Participation at the WTO", *Journal of International Economic Law*, vol. 1, no. 3, 1998, pp. 433-56; P. Nichols, "Participation of non-governmental parties in the World Trade Organization: extension of standing in World Trade Organization disputes to non-governmental parties", *University of Pennsylvania Journal of International Economic Law*, v. 17, 1996, pp. 295-329; D. Esty, "Linkages and

governance: NGOs at the World Trade Organization", *University of Pennsylvania Journal of International Economic Law*, v. 19, no. 3, 1998, pp. 709-30; D. Esty, "Non-governmental organizations at the World Trade Organization: cooperation, competition, or exclusion", *Journal of International Economic Law*, v. 1, 1998, pp. 123-48; R. Shell, "Trade legalism and international relations theory: an analysis of the World Trade Organization", *Duke Law Journal*, v. 44, 1995, pp. 829-927.

47. On this subject, see WT/DS58/R, Dispute Settlement Body - *United States - import prohibition of certain shrimp and shrimp products* – Report of the Panel, 15 May 1998, par.3.129 and 7.8, in which the Panel concludes: "Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. [...] If any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so." Comments on the dispute and the interpretation may be found in Mavroidis, op. cit., 2001; E. Hernández-López, "Recent trends and perspectives for non-state actor participation in the World Trade Organization disputes", *Journal of World Trade*, v. 35, no. 3, 2001, pp. 469-98, p. 485; M. Laidhold, "Private party access to the WTO: do recent developments in international trade dispute resolution really give private organizations a voice in the WTO?", *Transnational Lawyer*, v. 12, no. 2, 1999, pp. 427-50, p. 440.

48. WT/DS58/AB/R, Dispute Settlement Body – *United States – import prohibition of certain shrimp and shrimp products* – Report of the Appellate Body 12 October 1998, par.101: "[...] under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU." (emphasis added)

49. WT/DS58/AB/R, 1998, *supra*, par.105: "It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports while not unduly delaying the panel process*." An interpretation that, in its full extent, P. Mavroidis, op. cit., 2001, describes as "acrobatic".

50. See WT/DS58/RW, *United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia* – Report of the Panel, 15 June 2001, par.5.14-5.16.

51. For a list of the disputes that analyzed the subject, see. M. R. Sanchez, op. cit., 2004, Appendices A.2 and A.4(d), with updated information in M. R. Sanchez, op. cit., 2006., Appendix I.

52. To accept an *amicus curiae* brief in this dispute, the Appellate Body grounded its interpretation on Rule 16(1) of the *Working procedure for appellate review*, which contains the working procedure of the Appellate Body, see WT/DS135/AB/R, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* – AB-2000-11 – Report of the Appellate Body, 12 March 2001,

par.50. Under the terms of this rule, the Body may adopt appropriate procedures for the proper analysis of a dispute. See the procedures in place at the time in WT/AB/WP/3, Appellate Body – *Working Procedures for Appellate Review*, 28 February 1997 [the wording of Rule 16(1) remains the same for procedures currently in force, cf. WT/AB/WP/7, *Working Procedures for Appellate Review*, 1 May 2003]. This interpretation seems more plausible, since Article 13 of the DSU explicitly mentions the right of the Panel to seek information they deem appropriate, without making any reference to the Appellate Body.

53. P. Mavroidis, *op.cit.*, 2001, presents the reasons for submitting *amicus curiae* briefs: “These caveats notwithstanding, why would anyone send an *amicus curiae* brief to the WTO? Essentially for two reasons: to provide some information (an opinion how to interpret facts established by others) on the one hand, and to sensitize a court about the interest that a particular case might have for the wider public on the other. This second ground is in fact the bridge between a court and the society.”

54. See WT/DS320/8, *US – Continued Suspension of Obligations in the EC – Hormones Dispute*, 2005, and WT/DS321/8, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, 2005. On the broadcast of the hearing and the proceedings, see <[www.wto.org/english/tratop\\_e/dispu\\_e/public\\_hearing\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/public_hearing_e.htm)>.

55. For a description of these proceedings and some critical observations, see <[subscript.bna.com/SAMPLES/itr.nsf/f6e265388fc7082185256b57005bfe23/04faee4809b58c578525707c007d58e7?OpenDocument](http://subscript.bna.com/SAMPLES/itr.nsf/f6e265388fc7082185256b57005bfe23/04faee4809b58c578525707c007d58e7?OpenDocument)>.

56. On the proposals for reform with this objective, see the document submitted by the European Community for reform: TN/DS/W/1, Dispute Settlement Body – Special Session – *Contribution of the European Communities and its member states to the improvement of the WTO dispute settlement understanding* – Communication from the European Communities, 13 March 2002; and the proposal of the United States: TN/DS/W/13, Dispute Settlement Body – Special Session – *Contribution of the United States to the improvement of the WTO dispute settlement understanding* – Communication from the United States, 28 August 2002, and TN/DS/W/46, Dispute Settlement Body – Special Session – *Negotiations on the Dispute Settlement Understanding, Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO*, Communication from the United States, 11 February 2003. The European Community, in its proposal, reproduces the proceedings pre-established by the Appellate Body in WT/DS135/9, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* – Communication from the Appellate Body, 8 November 2000, and proposes its incorporation into Article 13 of the DSU, under the title Article 3 *bis* – *Amicus curiae submissions*. The United States also support the possibility of submitting *amicus curiae* briefs, although they maintain that a reform of Article 13 of the DSU is not required.

57. For the proposals against the acceptance of unsolicited documents in the DSB, see, in particular, the documents of the African Group: TN/DS/W/15, Dispute Settlement Body – Special Session – *Negotiations on the Dispute Settlement Understanding – Proposal by the African Group*, September 25, 2002; from Kenya: TN/DS/W/42, Dispute Settlement Body – Special Session – *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations – Communication from Kenya*, January 24, 2003; and from India (also representing Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia): TN/DS/W/47, Dispute

Settlement Body- Special Session – Dispute Settlement Understanding Proposals: Legal Text – *Communication from India on behalf of Cuba, Dominican Republic, Honduras, Jamaica and Malaysia*. February 11, 2003.

58. TN/DS/W/1, TN/DS/W/13, TN/DS/W/46, *supra*; and TN/DS/W/25, Dispute Settlement Body – Special Session – *Contribution by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Doha Mandated Review of the Dispute Settlement System*, 27 November 2002; TN/DS/W/41, Dispute Settlement Body – Special Session – *Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding – Communication from Canada*, 24 January 2003.

59. See S. Ostry, “Civil society: consultation in negotiations and implementation of trade liberalization and integrated agreements: an overview of the issue”, article prepared for the seminar *Good practices and social inclusion: a dialogue between Europe and Latin America and the Caribbean*, Milan, March 21-22, 2003 <[www.iadb.org](http://www.iadb.org)>; S. Ostry, *op. cit.*, 2002.

60. See K. Abbott, D. Snidal, “Hard and soft law in international governance”, *International Organization*, v. 54, no. 3, 2000, pp. 421-56, p. 422.

61. As an example, the difficulty of holding events in the form of consultations in locations outside Geneva and, also, of sending representatives to events organized by other organizations is due, largely, to the fact that the *External Relations Division* does not have the budget necessary for travel. As evidence of the lack of budget funds, a limit on travel expenses for 2003 was set at CHF2,500 by the *External Relations Division*. Ostry, *op. cit.*, 1998, p. 29, criticizes the current structure of the Secretariat by comparing it to the institutional structure of other international organizations: “The WTO is au fond like the GATT in being a member-driven organization without a significant knowledge infrastructure, i.e. a secretariat of highly qualified experts able to undertake research directed at policy analysis as in the OECD, the IMF and the World Bank. This analytic deficit virtually precludes policy discussion, and the important peer group pressure it generates, on the issues described above such as regulatory convergence, the role of legal systems, the trade-off between domestic and international objectives and the crucial issue of the state-market frontier, i.e. all the basic aspects of the new agenda.”

62. On this tension, see J. Rosenau, *op. cit.*, 1997, in which the author identifies these relations as the hallmarks of a period of turbulence in the redefinition of the concepts of subjects and forms of organization and regulation of the international system.

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#### ABSTRACT

This article examines the role of pharmaceutical companies in problems related to the access to drugs in many developing countries. It commences with a review of the practice of pharmaceutical companies in barring access to drugs for the HIV/AIDS pandemic and their reluctance to fund research with respect to diseases that are not profitable. It is argued that the only time developing countries are likely to have access to drugs is when their citizens are used for experimental purposes as is being suggested in the Pfizer antibiotic drugs test in Nigeria. The article concludes by calling for the World Health Organization (WHO) to take a leading role in making such pharmaceutical companies more sensitive and accountable to the plight of citizens in these developing countries. This can be achieved by setting up a mechanism modeled along the lines of the “equator principles” applicable to the International Finance Corporation (IFC) and leading financial institutions.

#### KEYWORDS

Human Rights – Health – WHO – Pharmaceutical companies – Developing countries



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# PHARMACEUTICAL CORPORATIONS AND ACCESS TO DRUGS IN DEVELOPING COUNTRIES: THE WAY FORWARD

Justice C. Nwobike

## Introduction

According to a WHO estimate, one third of the world's population lacks regular access to essential medicines with more than 50% of populations in parts of Africa and India lacking access to the most basic and essential drugs<sup>1</sup> Despite India's low drug prices, only 30% of the Indian population has access to medicines and even fewer people would have access with the introduction of pharmaceutical patents.<sup>2</sup>

Access to essential drugs is difficult, and is increasingly so for many of those who need them most, thus hindering a realization of the right to health in many countries.<sup>3</sup> We see that it is not only the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement nor the World Trade Organization (WTO) alone that is causing this situation, but rather pharmaceutical companies or the governments of industrialized countries, acting on behalf of those companies. Patents affect public health provisions mainly through the impact they have on access to medicines. Granting exclusive rights on medicines to Patent holders enables them to charge a premium over and above their marginal costs of production. This makes drugs protected by patents more expensive and at the same time makes them accessible to fewer consumers than similar drugs produced in a competitive environment without patent protection in other countries. For instance 150 mg of the HIV drug fluconazole costs \$55 in India where it has no patent protection as against \$697 in Malaysia, \$703 in Indonesia, and \$817 in the Philippines where it enjoys patent protection.<sup>4</sup> The role of patents in reducing access to drugs includes the fact

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*See the notes to this text as from page 140.*

that patents can hamper the production of the usually less-expensive generic versions of patented drugs, and limit or reduce the possibility for governments to allow compulsory licensing and parallel imports of pharmaceuticals.<sup>5</sup>

Although the TRIPS Agreement<sup>6</sup> itself and the Doha Declaration on TRIPS<sup>7</sup> recognize that WTO member states can adopt measures necessary to cater for their public health needs, there is still some controversy on the permissible scope of flexibility allowed to member states by TRIPS in combating their public health problems.<sup>8</sup> A large number of developing countries have come under direct pressure from either the pharmaceutical companies or developed countries to provide strong patent protection on pharmaceutical products, and to refrain from allowing compulsory licensing and parallel imports.<sup>9</sup> We shall consider a few such instances and thereafter examine the way forward in regulating these undue pressures.

### **Access to drugs in the context of HIV/AIDS<sup>10</sup> epidemic**

Access to drugs (or the lack of access), have been recurrent factors in the quest for a realization of the right to health. The enormity of the problem created by the global HIV/AIDS crisis makes this an even more compelling issue to be addressed. In large measure because of the Global HIV/AIDS crisis, the issue of access to affordable medicines in many of the worlds poor or developing countries is finally receiving the attention it deserves.<sup>11</sup> This is evidenced by the adoption of a resolution by the United Nations Security Council on the AIDS crisis. The resolution, which is the Security Council's first-ever resolution on a health issue, recognizes the efforts of the Member States which have acknowledged the problem of HIV/AIDS, and where applicable, have developed national programs. The resolution also encourages all interested Member States which have not already done so to consider developing, in cooperation with the international community and UNAIDS, where appropriate, effective long-term strategies for HIV/AIDS education, prevention, voluntary and confidential testing and counseling, and treatment of their personnel, as an important part of their preparation for participation in peacekeeping operations.<sup>12</sup> The Security Council resolution was followed by the General Assembly Declaration of Commitment on HIV/AIDS<sup>13</sup>, which recognizes the epidemic as a "global crisis" that calls for "global action."

In 2003, an estimated 4.8 million people (range: 4.2-6.3 million) became newly infected with HIV. This was more new cases of HIV than in any one year before 2003. Today, some 37.8 million people (range: 34.6-42.3 million) are living with HIV, which killed 2.9 million (range: 2.6-3.3 million) in 2003, and has killed more than 20 million since the first cases of AIDS were identified



in 1981.<sup>14</sup> In some industrialized countries, widespread access to antiretroviral medicines has fueled a dangerous myth that AIDS has been defeated. In sub-Saharan Africa, the overall percentage of adults with HIV infection has remained stable in recent years, but the number of people living with HIV is still growing.<sup>15</sup> To date, no curative medicine or preventive vaccine has been successfully developed for the virus, however antiretroviral drugs have been developed, which promote and improve the health and well being of HIV carriers. Providing access to drugs is just one part of tackling AIDS, but it is an important part. It can significantly increase the quality and length of life of people already infected as well as aid in prevention by encouraging others to be tested, and by reducing mother-to-child transmission of the virus.<sup>16</sup> Despite this breakthrough, access to these drugs has remained elusive for most HIV patients in developing countries. This is a direct result of the exorbitant prices imposed. Often the demand for a particular medicine is inelastic, meaning that if people cannot find alternatives they must purchase the product – even if the cost escalates. If they cannot afford the price, they must do without the product and live with the result, which in many cases is death.<sup>17</sup>

### Corporate profits *versus* public health

While discussing the responsibilities of pharmaceutical corporations in relation to access to drugs it is important not to lose sight of the fact that these corporations are set up primarily for profit.<sup>18</sup> The pharmaceutical industry and its government supporters justify patents on medicines and high prices on the grounds that both research and development of pharmaceutical drugs are extremely expensive. Thus far, there is little convincing evidence to support this claim.<sup>19</sup> Even if this claim were supported by facts, what matters here is not that drugs are costly to develop, but rather that the rate of the return on investment is usually very high; and this leads to astronomical profits by pharmaceutical corporations. In addition, taxpayers and governmentally funded institutions often play a key role in discovering new inventions, with the pharmaceutical companies obtaining the patent and reaping the financial rewards after the basic discovery. These institutions are now becoming more reluctant to unconditionally hand over their research. In December 2000, a dispute between the US National Institute of Health (NIH) and Bristol Meyers Squibb became public. NIH is demanding \$9.1 million in royalties from the overseas sales of *didanosine*, used in the treatment of HIV/AIDS.<sup>20</sup>

The most devastating impact of the AIDS epidemic takes place in sub-Saharan Africa. In South Africa, HIV/AIDS has been projected to reduce life expectancy by 20 years by the year 2010, while in Kenya one quarter of the

adult population is HIV positive but fewer than two percent receive anti retroviral treatment. If Kenya were able to import the drug *fluconazole* from Thailand, it could reduce the annual cost of treatment from over \$3,000 to \$104.<sup>21</sup> Despite this alarming state of affairs, attempts by some countries to exercise certain flexibilities under the TRIPS agreement have been strongly opposed by pharmaceutical corporations and their home governments. Intense pressure is brought by very powerful countries on the governments of many other countries (mostly developing and less developed countries) that lack the requisite pharmaceutical capacity, to not adopt certain measures open to them under the Agreement.

### **The big pharmaceutical companies *versus* South Africa**

A classic example of the pharmaceutical corporations opposition to the exercise of the flexibilities TRIPS offers is manifested in a lawsuit filed by 41 pharmaceutical corporations against the government of South Africa. The suit challenged a law seeking to provide access to drugs for the people in the country. The South African Parliament on 31 October 1997 passed the *Medicines and Related Substances Control Act (Medicines Act) No. 90 of 1997*. President Nelson Mandela assented to the Law on 25 November 1997. This Law, which introduced a new legal framework to ensure the availability of drugs in both the public and private health sectors, contains certain key features. The Medicines Act introduces four important elements to contain health care costs to governmental and private sectors. It provides compulsorily for the generic<sup>22</sup> substitution of medicines that are no longer under patent. This means that the pharmacist must offer a patient the generic version of a brand name medicine unless the patient expressly refuses the substitution.<sup>23</sup> Secondly, it empowered the Minister of Health to establish a pricing committee that will set up transparent pricing mechanisms. Pharmaceutical companies will have to justify the prices they charge.<sup>24</sup> Another element introduced by the Act is the parallel importation provision, which allows the government to import the same drug that is being sold at a lower price by the same company – or its licensee – in another country. Finally, the Medicines Act allowed international tendering for medicines used in the public sector.<sup>25</sup> The Act did not go down well with the pharmaceutical corporations operating in South Africa, and on 18 February 1998, the Pharmaceutical Manufacturers Association (PMA) and 41 multinational pharmaceutical corporations went to court to challenge it, on the grounds that the amendments introduced amounted to unfair discrimination, were unconstitutional, *ultra vires* the Patent Act of 1978, and contrary to Article 27 of the TRIPS Agreement on Intellectual Property.

In rebuttal the South African government asserted that it has a constitutional duty to make medicines affordable for its people. The Constitution of the Republic of South Africa, 1996, provides that everyone has the right to have access to healthcare services and no one may be refused emergency medical treatment.<sup>26</sup> The suit led to a mobilization of advocacy groups against the pharmaceutical corporations. The Treatment Action Campaign (TAC) is a renowned South African Civil Society Organization working with and for People Living with AIDS. TAC applied to the Court and was granted leave to file briefs as an *amicus curie*.<sup>27</sup>

In a *volte-face*, the drug companies dropped their suit in April 2001, prompted by the extraordinary wave of public protest that the suit had provoked, the possibility of failure, and perhaps crucially, the fear of a court order forcing disclosure of their real research and development costs. The specter of thirty-nine companies – whose combined profits outweighed the GDP of South Africa – moving to stop a provision of inexpensive drugs for a population in dire need, particularly in relation to HIV/AIDS, did immeasurable damage to the reputation of the drug companies. Currently large pharmaceutical companies are trying to recover from that massive loss of popularity on the ground.<sup>28</sup> Under the terms of the settlement, the South African government has confirmed that its new law will be implemented in a way compliant with the Trade-Related Intellectual Property Rights Agreement (TRIPS). In doing so, it affirmed a need for strong intellectual property protection consistent with international agreements as well as the underlying importance of intellectual property protection as an incentive to innovation. Put simply, intellectual property is not the obstacle to access.<sup>29</sup> Commenting on their withdrawal from the case, the Chief Executive of GlaxoSmithKline, *Jean Pierre Garnier* had this to say:

*The key concern for the industry was that the South African Legislation was vague and ambiguous and in particular, the law appeared to give the government the freedom to override patents of any medicines at their discretion. This would have undermined the industry's ability to provide new and better medicines [...]. In the heated debate around the court case it has been difficult to convey the overwhelming truth that the most significant barriers to comprehensive treatment for HIV/AIDS in the developing world are lack of funding and public healthcare infrastructure.<sup>30</sup>*

The decision to drop the South African Court Case, and some recent announcements about the price reduction of anti-retrovirals can be seen as an attempt by the pharmaceutical industry to avoid having HIV/AIDS become a catalyst for an international movement seeking to address the problems in the TRIPS Agreement. It is submitted that the withdrawal of the case was a face-saving step, as a pronouncement in favor of the South African government

would have precipitated a floodgate of legislation in many other developing countries along the lines of the South African Medicines Act. The statement embodying South Africa's commitment under the terms of the settlement amounts only to a restatement of its existing obligations, under which it exercised the safeguards provided for under the intellectual property rights regime.

### **Developed countries: Unilateral sanctions and double standards**

It is no longer in doubt that flexibilities exist within the TRIPS framework which give governments of WTO Member countries room to fulfill the public health needs of their inhabitants. However the pressure from some developed countries has made it almost impossible for developing countries to exercise these flexibilities. This problem is reflected in the nature of bilateral agreements signed with developing countries to extend patent protections over the established 20-year term<sup>31</sup> or in the outright threat of an imposition of trade sanctions on countries that have adopted measures to promote public health under the intellectual property regime. The United States of America is notorious for this. A renowned human rights NGO, Human Rights Watch, has expressed concern that the U.S.-Morocco FTA will make it impossible for Morocco to use the flexibilities contained in TRIPS "to the full." According to the statement:

*There are credible reports that the United States is seeking an extension to the twenty-year patent term required by the TRIPS, as well as exclusive rights for drug companies to pharmaceutical test data. Each of these provisions would diminish Morocco's ability to hasten market entry of affordable generic medicines. It is hypocritical for the United States as a member of the WTO to pursue bilateral trade policies that undercut precisely those flexibilities whose full use the Doha Declaration encourages.<sup>32</sup>*

In January 2000, the Pharmaceutical Research and Manufacturers of America (PhRMA) filed a petition with the United States Trade Representative (USTR) claiming widespread and systematic non-compliance with world patent rules in India, Egypt, Argentina and Brazil. The use of price controls and compulsory licenses allowing the generic production of brand-name drugs were identified as major problems, especially in India. Four months later, the USTR placed Brazil and Argentina on the 'Special 301' Priority Watch List – in effect, a short-list of candidates for unilateral trade sanctions. The annual 'Special 301' review also warned that future actions would be brought against other countries, including Israel, Egypt and the Dominican Republic.<sup>33</sup>

Another strategy that has been ‘creatively’ developed by pharmaceutical corporations to extend their patents is to produce a variation on a drug already under an existing patent, and then obtain a patent for the new product, which in any case would not have cost much in terms of research and development when compared with the cost of their initial research. In 1999, Smithkline Beecham (now GlaxoSmithkline) secured a new patent on its 20-year-old best-selling drug, Augmentin, by modifying the pediatric version.<sup>34</sup> Although the old form will be available off-patent, extensive marketing is likely to induce doctors to prescribe the new drug when it comes on the market.

It is interesting to note that when faced with similar situations of disease threat, developed countries, in a bid to promote and enhance the public health of their own citizens, have adopted measures identical to measures they consistently seek to prevent developing countries from adopting. During the period following the terrorist attacks of September 11, 2001, a few anthrax cases in the US raised fears of biological terrorist attacks. The United States and Canada threatened to issue compulsory licenses for the manufacture of *Cipro* – the only known cure for anthrax – which is produced under patent by Bayer, a German pharmaceutical company, unless it was sold to them at discounted prices. According to Sarah Joseph, it is interesting to note how quickly the United States and Canada acted to threaten the Bayer patent, and how quick media commentators were to question Bayer’s profit margin on *Cipro* at a time when the United States had thirteen anthrax cases with three deaths, and Canada had no cases at all. The North American anthrax threat was not an emergency on par with the devastating effects of HIV/AIDS in the developing world. The North American response was probably legitimate under the circumstances. However, it blatantly displayed hypocrisy on the part of the West regarding their acceptability of patent relaxation in the context of health emergencies confronting “us” in the developed world, as opposed to the context of the health emergencies constantly confronting “them” in the developing world.<sup>35</sup>

In spite of the pressure, the crusade to make the drugs used for the treatment of HIV/AIDS related diseases continues to record modest achievements. Recently, GlaxoSmithKline, one of the world’s leading manufacturers of ARV medicines, granted a voluntary license under its patents for the manufacture and sale of antiretrovirals (ARVs) containing *Zidovudine* and/or *lamivudine* in the public and private sectors in Kenya and other countries in East Africa to Cosmos Limited, a Kenyan pharmaceutical company. GSK currently sells *zidovudine* (sold as *Retrovir*®), *lumivudine* (sold as *Epivir*®) and the combination of the two molecules (sold as *Combivir*®) across the region.<sup>36</sup> However, a lot still needs to be done by pharmaceutical companies to ensure an increased access to HIV/AIDS drugs to complement the WHO and UNAIDS initiatives in tackling the epidemic.

## Pharmaceutical corporations and neglected diseases

Neglected diseases are those diseases that “affect almost exclusively poor and powerless people living in rural parts of low income countries”.<sup>37</sup> The UN Special Rapporteur on the right to health has undertaken pioneering work on human rights and neglected diseases. He states that neglected diseases result from several problems which include: the lack of access to medicines and mechanisms for neglected diseases for poor people living in developing countries because of the high cost of the drugs; scarcity of resources; geographical inaccessibility, particularly in rural areas; and the inadequacies of the health systems.<sup>38</sup> Another reason is the “so-called 10/90 gap, which refers to the phenomenon whereby only 10% of global health research is focused on the conditions which account for 90% of the global burden of disease.”<sup>39</sup> Diseases which occur mainly in the poor communities of developing countries have attracted particularly little research and development. The market mechanism, which increasingly determines research and development, fails to respond to these so-called “neglected diseases” since they do not promise a good return on investments.<sup>40</sup> A great deal of research and development is put into drugs for chronic, ongoing conditions, like heart disease or high cholesterol, as opposed to cures and vaccines which do not have the same ongoing market potential.<sup>41</sup>

The essence of the intellectual property regime is to guarantee a reward for the invention to the inventor, as well as an opportunity to recover the investments for research leading to the invention. Intellectual property protection can, however, affect the enjoyment of the right to health and related human rights in a number of ways. Importantly, intellectual property protection can affect medical research, and this can bear upon access to medicines. For example, patent protection can promote medical research by helping the pharmaceutical industry shoulder the costs of testing, developing and approving drugs. However, the commercial motivation of intellectual property rights encourages research, first and foremost, towards “profitable” diseases, while diseases that predominantly affect people in poor countries - such as river blindness - remain under-researched.<sup>42</sup>

The possibility of recouping research and development costs by excluding competition from the market through the use of intellectual property rights assumes that there is a market for new medicines in the first place. That neglected diseases are overwhelmingly suffered by poor people in poor countries underlines the fact that there is little or no market potential for medicines to fight these diseases, simply because the sufferers are unable to pay. Intellectual property protection does not provide any incentive to invest in research and development

in relation to neglected diseases. Given that the adoption of the TRIPS Agreement has placed incentives for medical research squarely on the trade agenda, the question of the enjoyment of the right to health for people suffering from neglected diseases has now also become a trade issue.<sup>43</sup>

### **Pfizer's antibiotic drugs test in Nigeria: A case study**

In 1996, there was an outbreak of meningitis in Kano, Northern Nigeria. On learning of the outbreak, Pfizer sent in a six-member research team to the infectious disease hospital in Kano. The drug company utilized the opportunity of the crisis to conduct medical experimentation of its antibiotic, *trovan*, as part of its effort to determine whether the drug, which had never been tested on children, would be an effective treatment for the disease. Under the experiment, 100 children were treated with *trovan*, while another 100 were treated with *ceftriaxone*, the standard drug for the treatment of meningitis.<sup>44</sup> When *trovan* was developed in 1996, tests were carried out, and when it was introduced into the market in 1998 it became one of the most prescribed antibiotics in the United States, earning more than \$160 million the first year. However, reports of liver damage led the U.S. Food and Drugs Administration to recommend in 1999 that it be used only for severely ill patients in institutions. Its use on children had not been approved.<sup>45</sup>

Of the children who took part in the trial a total of 11 died, and others suffered different forms of disabilities – including brain damage, paralysis and deafness.<sup>46</sup> More than 30 families whose children took part in the drug test have sued Pfizer in a Federal District Court in Manhattan under the Aliens Tort Claim Act seeking damages and continuing medical care for the children involved, and an order restraining Pfizer from conducting illegal experimentation anywhere in the world.<sup>47</sup> Plaintiffs allege that Pfizer selected their children to participate in a medical experiment for a new, untested and unproved drug without their prior and informed consent. They claim that Pfizer failed to inform them that they had an option for an alternative treatment, as Doctors without Borders were providing free treatment in the same hospital with *Chloramfenicol*, a cheaper antibiotic that is internationally recommended for bacterial meningitis; nor were they informed that they were free to refuse to be part of the exercise.<sup>48</sup> This practice was in violation of the Nuremberg Code of 1947 and the World Medical Association Declaration of Helsinki,<sup>49</sup> which require that anyone seeking to conduct medical tests on human subjects must explain the purpose, risks and methods of the study and obtain each subject's voluntary consent to participate. Pfizer maintains that the tests were conducted fairly and

professionally, and that the clinical trials were effective in saving lives.<sup>50</sup> The company produced a letter from the hospital stating that the hospital's ethics committee had approved the *trovan* study. Interestingly, the plaintiffs contend that the letter was written a year later and then backdated – and that at the time of the Pfizer trial the hospital had neither an ethics committee nor the letterhead on which the letter was written.<sup>51</sup>

This case raises a number of issues. The pertinent question is, “does Pfizer have any right-to-health-related duties to the subjects of its experimentation?” If a duty does exist, has it been breached? A sedate perusal of the relevant human rights instrument will reveal some interesting provisions. Article 7 of the ICCPR provides that: “no one shall be subjected to torture nor to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected, without his free consent, to medical or scientific experimentation.” The Human Rights Committee explains that article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of State parties generally contain little or no information on this point. More attention should be given to the need and the means of ensuring an observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent,<sup>52</sup> and in particular, those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.<sup>53</sup>

The Nuremberg Code, which was developed by the judgment of the War Crimes Tribunal in Nuremberg, lays down 10 standards to which physicians must conform when carrying out experiments on human subjects. The Code provides *inter alia*:

*The voluntary consent of the human subject is absolutely essential. This means that the person involved should have the legal capacity to give consent, should be so situated as to be able to exercise free power or choice, without the intervention of any element of force, fraud, deceit, duress, overreaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved to enable him to make an understanding and enlightened decision.<sup>54</sup> The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility, which may not be delegated to another with impunity.<sup>55</sup>*

Without pre-empting the outcome of the hearing, an analysis of the facts



from the prism of the right to health will reveal that it is difficult to hold that Pfizer has discharged the onus of the company. Before the general outbreak of meningitis in Kano, there had been sporadic and sparse cases and the company had initiated no intervention. It is curious that the company did not deem it fit to enter into consultations with the relevant authorities and obtain the prior and informed consent of the subjects. The circumstances of the general disease outbreak and the company's intervention; the situation of families whose children were sick and desperately in need of a medical treatment which many of them could not afford because of poverty, would seem to suggest that it was impracticable to obtain the nature of consent which the instruments mentioned above envisage. While the suit is still pending in court, the fallout of the exercise has had more grave negative implications for the realization of the right to health in Nigeria. Most states in the Northern part of Nigeria have continued to boycott the nationwide polio vaccination exercise as a rumor has spread that the vaccinations have side effects that are detrimental to health and can lead to disabilities and damage to health. The Pfizer tests in Kano continue to be cited as an example, and in a society where the literacy level is low and the degree of poverty is high, millions are not able to take advantage of the benefit of the free immunization offered by the government. This undoubtedly will affect the progressive realization of the right to health of Nigerians and the UN Millennium Development Goals (MDGs).

### **Conclusion: The way forward**

It is important to state that while pharmaceutical companies qualify as multinational corporations, the time has come to begin to treat issues relating to them differently from other classes of transnational corporations. This is because beyond the general principles of human rights, which cut across the operations of such corporations, the specific rights involved, as well as the manifestations of their violations, are obviously different. A corporation involved in the extractive industry will confront issues like environmental degradation, suppression of locals with private security outfits, and other labor issues. These do not in anyway involve intellectual property, which is at the crux of the duty of pharmaceutical companies in relation to an access to drugs.

It is important to take a cursory look at the views of pharmaceutical corporations themselves. Daniel Vasela, President and CEO of Novartis, argues there are three dimensions of responsibility with differing degrees of commitment. The first is the fulfillment of responsibility in the context of normal business activities, which he refers to as essential. The second is ambitious

corporate citizenship standards, and last are the additional desirables which the company is not expected to undertake, but which it may engage in.<sup>56</sup>

The human rights responsibilities of pharmaceutical companies are therefore to include the respect of human rights within their operations. To this end, they must observe international human rights norms as one of the organs of society mentioned in the preamble of the 1948 Universal Declaration of Human Rights (UDHR). For a corporation, the duty to respect the right to health may require the corporation to abstain from operations that may cause environmental problems that are detrimental to the health of employees, and to people residing on the land where the corporation operates. Moreover, where corporations knowingly market unhealthy products, a violation of their obligation to respect the right to health will occur. An example of the latter is the aggressive marketing of powdered milk by multinationals in developing countries. For pharmaceutical corporations this includes a duty to not carry out medical experimentation on human subjects without obtaining their prior and informed consent, as required by various human rights instruments. The pharmaceutical companies should also have an obligation to make drugs affordable, especially in the context of epidemics like AIDS. This requires them to make their drugs available and affordable through low-cost pricing of drugs, and through the granting of voluntary licenses to other pharmaceutical companies to produce affordable drugs for consumption, especially in developing countries. They are also duty bound not to insist on the enforcement of intellectual property regimes that inhibit States from abiding by any obligations they have under international human rights instruments. A human rights approach further establishes a requirement for the state to protect its citizens from the negative effects of intellectual property. To do so, governments need to undertake a very rigorous and disaggregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure non-discrimination as the end result. When making choices and decisions, it calls for particular sensitivity to the effect on those groups whose welfare tends to be absent from the decision-making calculus about intellectual property: the poor, the disadvantaged, racial, ethnic and linguistic minorities, women, rural residents.

The duty to protect the right to health will come into play especially with regard to the underlying determinants of the right to health such as food and nutrition, housing, access to safe potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. The duty to protect may require a corporation to adopt guidelines in order to

ensure that its activities and the activities of its business partners will not lead to violations of any other individual's right to health.<sup>57</sup>

To this end, it is recommended that the World Health Organization (WHO), which is the UN agency charged with health promotion, play a leading role. Although it has been involved in initiatives with private partnerships, a sector-wide, comprehensive, and all embracing mechanism needs to be established. This mechanism should be modeled along the lines of, and draw from the experience of – the “equator principles”. The principles embody commitments adopted by the International Finance Corporation (IFC) and leading financial institutions, as a framework for managing environmental and social issues in project financing.<sup>58</sup> The speed with which financial institutions are adhering to the principles shows that the industry has come to accept them as very desirable. From the preamble, banks commit to “not provide loans directly to projects where the borrower will not or is unable to comply with our environmental and social policies and procedures.”<sup>59</sup>

Under this arrangement, the issue of access to drugs and neglected diseases can be addressed. The establishment of a fund, to which pharmaceutical corporations would be required to contribute an agreed percentage of their profits – which would in turn be devoted to research for neglected diseases – would ensure research even when there is no profit involved. Also, the reliance on a specific percentage of profits as contributions would ensure equity, as each company would contribute in accordance with its size and resources. The development of this mechanism will have to be gradual, and participation of all stakeholders, particularly pharmaceutical companies, is indispensable. This will promote greater compliance among the companies.

The idea that businesses have obligations corresponding to human rights is relatively new, still controversial, and involves some revision of the thinking that is expressed in the central instruments of international human rights law.<sup>60</sup> Companies ought to respect human rights, avoid being complicit in human rights abuses, and within their sphere of influence, do what they can to promote human rights principles. On this there is widespread agreement.<sup>61</sup> The question remains, how can this be enforced?

Attempts at developing codes of conduct that rely purely on voluntarism have not been totally successful in ensuring the accountability of multinational corporations. If self-regulation and market forces were the best means of ensuring respect for human rights one might expect, since this has been the dominant paradigm, the number of abuses attributable to companies to have diminished.<sup>62</sup> But this is not yet the case. Accordingly, there is need to evolve a mandatory mechanism within the international

human rights system. The time has come for a stronger international framework for corporate accountability, and the UN Human Rights Norms for Business are a significant contribution to this. By bringing together in one place all the major international human rights, labor rights, and environmental laws and standards pertaining to global business, and by surveying key international instruments and best practices, the UN Norms provide helpful guidance and leadership opportunities for businesses willing to comply with their legal and ethical responsibilities.<sup>63</sup> It is hoped that the transition from voluntary to mandatory enforcement of the human rights responsibilities of corporations is achieved much sooner than later.

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#### ABSTRACT

The Family Grant has become one of the major programs for reducing hunger in Brazil; for a significant number of poor families, the benefits of this Program are the only possible source of income. From the human rights perspective, however, this Program still presents a series of obstacles, which are reviewed in this essay. (Original in Portuguese.)

#### KEYWORDS

Social policies – Eradication of hunger – Eradication of poverty – Family Grant



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# SOCIAL PROGRAMS FROM A HUMAN RIGHTS PERSPECTIVE: THE CASE OF THE LULA ADMINISTRATION'S FAMILY GRANT IN BRAZIL

Clóvis Roberto Zimmermann

*“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.[...]”*  
(Article 25 of the Universal Declaration of Human Rights, 1948).

## Introduction

The debate on public policies and human rights is relatively new in the field of human rights as well as within the academic sphere, especially in the social sciences. During the last century, greater relevance was awarded to theories with an empirical focus on the behavior of the political and social actors, and state-run action was thus seen as little relevant. With the dismantling of the Soviet system, the ensuing replacement of the Communist institutions, and the organization of new economic blocs (e.g. the European Union), institutions as such came to acquire greater importance in the social sciences.<sup>1</sup> According to Bucci,<sup>2</sup> the need for studies on public policies is becoming manifest as one attempts to make social rights acquire a concrete reality. In the field of economic, social, and cultural rights, the voluntary guidelines approved in 2004 by the FAO (Food and Agriculture Organization of the United Nations)<sup>3</sup> specified the role of institutions in achieving the human right to adequate food: “States [...] should assess the mandate and performance of relevant public institutions, and, where necessary, should establish, reform or improve appropriate institutions and organizational structures and thus contribute to the progressive realization of the right to adequate food within the framework of national food security.”<sup>4</sup> These same guidelines also define certain criteria for the functioning of such institutions, and, especially, citizen participation: “States should ensure that relevant institutions provide for the full and transparent participation of the private sector and of civil society, in particular representatives of groups most affected by food insecurity.”<sup>5</sup>

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See the notes to this text as from page 158.

In this context, the Family Grant Income Transfer Program has become one of the major tools for overcoming hunger and ensuring the human right to food in Brazil. This is a proposal which is being widely praised by social scientists and by several communications media throughout the world. In a recent article published in *The Economist* (September 15, 2005), the Family Grant Program is presented as a new form of confronting an ancient problem, viz. hunger. The magazine stresses the point that the Family Grant has been the best means of assisting the poor, as compared to previously-existing programs. Other studies conducted in Brazil point out that the Program represents a significant support in ensuring a minimum level of food supply to a large number of poor Brazilian families.<sup>6</sup> According to Silva, Yasbek & Giovanni,<sup>7</sup> the Family Grant has a fundamental significance for its beneficiaries, since for many poor families in Brazil, this is their only source of income. As to the issue of the quality of the Program and the number of people benefiting from it (over 8.5 million families up to January 2006), the Program represents a step forward as compared to preceding proposals. Nevertheless, from the viewpoint of human rights, this Program still presents a number of difficulties, which will be discussed in this paper.

### **Public policies for social protection in Brazil**

The major feature of the public policies for social protection in Brazil is the incompatibility between the structural adjustments of the economy to the new international economic order, the social investments of the State and the guarantee of social rights. In this order, neo-liberal thinking does indeed conceive of the need to provide assistance to the poor, but it also faces enormous difficulties in acknowledging public policies as a human right. As a consequence, the principle of social protection policies is more consistent with a humanitarian and philanthropic outlook. "This logic, which has subordinated social policies to economic adjustments and to the rules of the market, has engendered a depoliticized, privatized and re-philanthropicalized profile for Brazilian social policy."<sup>8</sup> This is why, according to Magalhães,<sup>9</sup> state interventions in eradicating hunger and poverty in Brazil are typified by their hesitations, precariousness, and intermittence, whereby they do not in fact ensure the basic social rights of the poor population. The Bismarckian model introduced in Brazil, based on individual contributions, was never fully institutionalized, and is currently undergoing a crisis due to the large degree of informality in the country's economy. For Souza,<sup>10</sup> one of the consequences of this sort of policy is that the benefits of public social protection policies are sometimes limited to the elite, instead of being generalized to the more

underprivileged layers of society. On other occasions, the Brazilian social policies are typified by a high degree of selectivity, focusing on extreme but limited situations, geared to the needs of the poorest among the poor, and appealing more to humanitarian and/or solidarity-oriented actions of the society at large than to the provision of social policies by the State. Furthermore, in the opinion of Yasbek,<sup>11</sup> the appeal to solidarity and to its ethical and humanized components stresses the displacement of social protection actions to the private sphere,<sup>12</sup> and results in a questioning of already-guaranteed rights. As a result, social policies in Brazil lack a clear reference to rights, especially because the Brazilian social protection system is lacking in institutional mechanisms for the administrative accountability of rights. In fact, there is a great discrepancy between the rights ensured in the Constitution and/or in several international conventions ratified by the Brazilian state and the actual access to social policies as a human right.

*Programs for eradicating poverty  
and hunger at the local level*

The implementation of programs for eradicating poverty and hunger at the local level by means of income-transfer programs are originally based on a proposal formulated by Senator Eduardo Suplicy (Workers Party), presented in 1991, which sought to define a legal minimum income for all Brazilian citizens. Senator Suplicy's project motivated a number of articles in the major press and intense debates, dividing opinions and mobilizing adherents and opposition. The project led to the opening of new paths in dealing with hunger and poverty at the local level. Beginning in 1995, several Brazilian municipalities, beginning with Campinas, Ribeirão Preto, and Brasília, introduced Minimum Income Programs, with the purpose of coping with hunger and poverty. Fonseca<sup>13</sup> points out that the projects that were actually implemented differed from Senator Suplicy's original proposal insofar as they introduced conditions and the requirement that the poor families ensure that their children attend school on a regular basis in order to receive the benefits of the Minimum Income.<sup>14</sup> The intellectual mentors of this kind of aid argue that family poverty exerts a great influence on the early entry of children into the labor market, since the costs of maintaining the children in school are very high. It is also argued that, by entering the labor market at an early age, and consequently leaving school at an early age, children become adults with some experience from the labor market, but due to their low level of education, they end up having access only to precarious jobs and therefore to low income. Once they have been included in this vicious circle, these new adults will end by contributing to the poverty maintenance mechanisms, since today's poverty

is presumed to generate the poverty of tomorrow.<sup>15</sup> Even if the goals of these conditions are positive, this kind of policy reinforces the ancient mechanisms of dependency and the absence of autonomy for the poor within the framework of Brazilian social policies.

Besides demanding the maintenance of children in school, the majority of the Minimum Income Programs require a minimum period of residence in the municipality benefited by the program, usually between 2 and 5 years. This condition serves the purpose of inhibiting migration for the sole purpose of obtaining the benefit. Furthermore, the majority of these Programs define a maximum value to be delivered to the families, the most generous reaching a limit of ½ a minimum wage per capita. According to Sposati,<sup>16</sup> there is a tendency to lower this value, which, according to the author, transforms this type of assistance into a sort of “institutionalized alms.” Given the strict eligibility criteria, the Minimum Income Programs reach a very restricted public, leading to a form of selection of the “poorest among the poor,”<sup>17</sup> due to the absence of a rights-based policy.

The study conducted by Lavinias<sup>18</sup> indicates that it is difficult to generalize about the Minimum Income Programs at the local level are, since they demand larger availability of funds, while municipalities with a lesser fiscal capacity – the vast majority of Brazilian municipalities – would find it impossible to set up such programs. In view of this situation, Lavinias underlines the need for greater participation of State governments and of the Federal Government in implementing measures to fight hunger and poverty in Brazil.

### *Programs for eradicating poverty and hunger at the federal level*

According to Bruera, beginning in the 90's, a national food-security policy began to be introduced in Brazil. This occurred as a result of the social mobilization campaign conducted by the Citizen's Action Against Hunger and Destitution and For Life, initiated by the sociologist Herbert de Souza, better known as “Betinho”. During the Itamar Franco Administration (1992-1994), the CONSEA (National Council for Food Security) was set up as a body comprising representatives from all governmental levels and from civil society, which became an entity for consultation and coordination of government policies within the spheres of food security and elimination of hunger.

During its first term of office, the Fernando Henrique Cardoso Administration (1995-1998 and 1999-2002), with the Real Plan and the ensuing economic growth, placed its major bets on the stabilization of the economy as a form of eradicating hunger and poverty in Brazil. At the time, the impacts of economic stabilization were symbolically characterized by

the alleged increase in the consumption of food products, e.g. chicken and yogurt. Given this government's priorities, the advances in the organization of a food-security policy lost their momentum. For Flávio Valente,<sup>19</sup> this represented the adoption of an economicist point of view for overcoming hunger and poverty. According to Valente the policies implemented during the 1<sup>st</sup> year of the Fernando Henrique Cardoso Administration adopted as their priority “[...] the stabilization of the Brazilian economy based on an indiscriminate insertion of the Brazilian economy into the global economy, leaving at a lower level of priority the immediate confrontation of the precarious living conditions of the vast majority of the Brazilian population.”<sup>20</sup>

Starting in the second term of the Fernando Henrique Cardoso Administration, the emphasis shifted and food security policies acquired an explicit relevance. Within the vast range of public programs, a major initiative is the creation of a National Food and Nutrition Policy (PNAN). As a result of this policy, several programs distributing monetary benefits to poor families with children and adolescents at home were set up, especially as an incentive or inducement to access to universal health and education policies.

In 1996, the Child Labor Eradication Program (PETI)<sup>21</sup> was launched, with the purpose of eliminating the work of children and adolescents in charcoal plants, sisal, sugarcane and orange plantations, and in brick-burning facilities. In 1997, after intense debates, the Guaranteed Minimum Income Program was launched, linked to socio-educational actions. This program became operational in 1999. In 2001, it was reformulated, and renamed School Grant,<sup>22</sup> linked to the Ministry of Education. In 2001, the Youth Agent<sup>23</sup> and the Food Grant<sup>24</sup> Programs, linked to the Ministry of Health, were launched. In 2002, the Gas<sup>25</sup> Allowance Program was set up, linked to the Ministry of Mining and Power.

Before creating the programs listed above, the Federal Government maintained a food basket distribution program (initially named Program for Emergency Distribution of Food – PRODEA, and, later, renamed the ‘Food Basket Program’), which reached out to several population groups at risk, including: destitute families; drought victims; landless farm laborers, and indigenous populations with scarce food. The Program reached its peak in 1998, when approx. 30 million food baskets were distributed to 3.9 million families, an action that was certainly motivated by the presidential elections held in the same year.

In 2001, the Food Basket Program was essentially deactivated, and was replaced with programs providing for direct transfer of income to needy families. Initially, this shift – financial resources instead of direct distribution of products – suffered from lack of continuity: the Food Basket Program

was interrupted before the income-transfer programs to the population groups originally benefited by the Food Basket Program were put into practice.

Scholars studying Brazilian social policies have noted the absence of interaction between the various government programs and actions. Over the last two years of the Fernando Henrique Cardoso Administration, these projects were implemented by different ministries, without any coordinating inter-ministerial action. Time and again, these programs would compete amongst each other in terms of liberating funds, e.g.: the School Grant, Child Labor Eradication Program, and Food Grant Programs. These programs were implemented by different ministries, which became a hindrance for optimizing these actions, thus resulting in high operational costs, poor efficiency and absence of any reference to rights.<sup>26</sup> Furthermore, for each municipality a maximum number of families to be benefited under these several programs was defined. Consequently, new families, even if they were extremely vulnerable and, therefore, entitled to the corresponding rights, could not be inserted in the Programs. From a human rights perspective, these families should have had the possibility of requesting the benefits and being covered by the Programs without delay.

For the Special Rapporteur on the right to food under the UN Human Rights Commission, Jean Ziegler,<sup>27</sup> the effects of these Programs on the improvement of the lives of needy families were relatively modest: "With respect to the impact of the program on poor families, one must admit that the current transfer of R\$ 15.00 per child per month has a relatively modest impact on the general levels of malnutrition and poverty, although it does provide some extra income for purchasing food."<sup>28</sup> Given the eligibility criteria, the absence of intersectoriality and of any guarantee of access to the programs as a human right, only a minor portion of the poor population was in fact covered. The innovation represented by the transfer of income was insufficient to reach out to the target public, viz. the majority of the poor population. Consequently, the social programs followed the same logic of traditional public interventions, reproducing a model involving fragmentation, segmentation, focalization, and no access to the programs in terms of a human right to be met.

### *The Zero Hunger Program of the Luiz Inácio Lula da Silva administration*

The main goal of the President elected for the 2003-2006 term of office, Luiz Inácio Lula da Silva, was to implement the Zero Hunger Program. For this purpose, once he took office, Lula created an Extraordinary Ministry

for Food Security and Eradication of Hunger (MESA), the major goal of which was to formulate and coordinate the implementation of a National Policy for Food and Nutritional Security. The creating of this Ministry represented an innovation in terms of public hunger eradication policies. After one year of existence, however, on January 23 2004, this Ministry was extinguished and replaced by the Ministry for Social Development and Eradication of Hunger (MDS). This measure had the intention of increasing intersectorial coordination of the governmental actions in terms of social inclusion, eradication of hunger, eradication of poverty, and of social inequalities. The new Ministry was vested with the competences originally ascribed to the Extraordinary Ministry for Food Security and Eradication of Hunger, to the Ministry of Social Assistance, and to the Executive Secretary of the Family Grant Program, linked to the Office of the President. Among the major tasks of the Ministry for Social Development and Eradication of Hunger is the coordination of the national social development, food and nutritional security, and social assistance and income policies. Furthermore, it is incumbent on the Ministry for Social Development and Eradication of Hunger to articulate actions with the state and municipal governments, as well as to strengthen ties with civil society in the establishment of the guidelines for these policies.

### **From the Food Card Program to the Family Grant**

One of the first and major actions carried out by the Hunger Zero Program was the introduction of the Food Card Program, on October 20, 2003, replaced by the Family Grant Program.<sup>29</sup> The initial intent of this Program was to centralize the several existing income-distribution programs. The Family Grant results therefore from the unification of the Federal Government income transfer programs, viz. the Food Grant (Ministry of Health), the Gas Allowance (Ministry of Mining and Energy), the School Grant (Ministry of Education), and the Food Card (Extraordinary Ministry for Food Security and Eradication of Hunger). The purpose of this unification was to reduce administrative costs, ensuring a coordinated and sector-integrated management. From the viewpoint of human rights, this unification was a step forward, since the centralization in a single program avoids fragmentation and ensures a greater clarity in terms of the public bodies in charge of its implementation. In other words, the centralization makes it easier to define which body a person must contact in order to request inclusion in the Program, a measure essential to facilitate access by the more vulnerable social groups.

The enrollment of beneficiaries of the Family grant is conducted by the City Administration, whilst civil society is in charge of controlling the policies in the form of a council or committee organized by the City Administration. Here, one will notice a difference with the former Food Card Program,<sup>30</sup> since under the Family grant scheme, civil society participates only insofar as it controls public policies, but it no longer plays a deliberative role. The restriction on the participation of civil society is a serious problem from a human rights perspective, given that General Comment No. 12, produced by the Committee for Economic, Social and Cultural Rights of the UN High Commissioner for Human Rights, requires adherence to the principles of transparency, popular participation, and political decentralization in formulating and implementing public policies that aim at meeting the right to food. “The formulation and implementation of national strategies for the right to food require full compliance with the principles of accountability, transparency, participation, decentralization, legislative capacity and independence of the Judiciary.”<sup>31</sup> The Comment points out that participation is essential to the fulfillment of human rights, to the eradication of poverty, and to ensure satisfactory means of life for all persons. In this sense, the State, when formulating public policies and benchmark legislation, must stimulate the active participation of civil society.

### **Barriers to the Family Grant Program from a human rights perspective**

The UN's General Comment No. 12, mentioned above, states that “the right to food is fulfilled when every man, woman and child, singly or in company with others, has uninterrupted physical and economic access to adequate food.” In order to achieve this purpose, each State is obliged to ensure that all individuals under its jurisdiction have access to the minimum essential quantity of food. It should be noted that this quantity must be sufficient, so as to ensure that all citizens are in fact free from hunger. According to Valente,<sup>32</sup> “the right to be free from hunger” is the minimum level of human dignity, which cannot be dissociated from the right to adequate food in terms of quantity but also in terms of quality.

The Income Transfer Programs, e.g. the Minimum Income Program and the Universal Basic Income, are among the major strategies to guarantee that all persons shall have “the right to be free from hunger”, which are requirements set forth by the International Covenant for Economic, Social and Cultural Rights, ratified without reservations by the Brazilian State in 1992.<sup>33</sup> Several scholars have emphasized the relevance of public social protection policies, especially the Minimum Income Programs, for the



eradication of hunger and of poverty.<sup>34</sup> Esping-Andersen<sup>35</sup> stresses the importance of the European social protection system, in the form of the Minimum Income Programs, in relation to the autonomy and independence of human beings in the face of the destructive market mechanisms. In this respect, Habermas<sup>36</sup> points out that the social protection institutions are an integral part of the constitutional democratic State, against which there are no visible alternatives.

### *Providing the Family Grant as a human right*

As in the case of the preceding Administrations, the major weakness of the Family Grant<sup>37</sup> arises from the fact that the Program is not based on a notion of human rights, since access to the Program is not unconditionally ensured to the holders of a right. In other words, the Family Grant does not ensure an unrestricted access to the benefit, since there is a limitation on the number of families<sup>38</sup> to be assisted in each municipality. As already mentioned, this limitation stems from the fact that each municipality is ascribed a maximum number of families to receive the benefit. Once the quota is filled, the insertion of any new families becomes impossible, even if they are extremely vulnerable and, as such, entitled to the right. As a result, the Family Grant is not conceived of based on the notion of ensuring the benefit to all who need it. On the contrary, it adopts a selectivity which is often exclusive. The consequence of this approach is that poor families and individuals are not included in the Program even if they are destitute and have an urgent need to receive the benefit. A tangible example is represented by the over 1,200 families living under plastic-covered huts in the Grajaú Sector, in Goiânia.<sup>39</sup> Furthermore, homeless, Indians, quilombo-dwellers, garbage pickers and other highly vulnerable groups are still excluded from the Program. From a human rights perspective, these persons should be allowed to request the Family Grant benefit and to receive its benefits, without delay. Furthermore, if the benefit is not granted, it should be possible to demand such benefit through the courts.

In view of the facts presented above, it is evident that the logic of the Program is based on the humanitarian discourse of aid and assistance,<sup>40</sup> and not on the provision of human rights. Within the framework of human rights, the Family Grant ought to ensure access to the Program and to the human right to food as a right of all eligible people, and the benefit should be provided to all who are in a state of vulnerability. By the same token, there should not be a time limit to the availability of the Program; on the contrary, it should be designed to assist people for as long as their vulnerability persists, for their entire life if needed.

### *The principle of universality and the conditionalities*

Article 11 of the International Covenant for Economic, Social and Cultural Rights acknowledges the fundamental right of every person to be free from hunger, and imposes on the Signatory States the obligation to implement tangible measures and programs to attain this goal. In the same fashion, General Comment No. 12 establishes that the right to adequate food is of essential importance for the enjoyment of the other rights. It must be applied to “the person and his/her family”, and shall not imply any restriction on the validation of this right against individuals or families headed by women. In other words, the right to adequate food is a right inherent to each and every person, irrespective of ethnic background, gender, race, and individual contribution. It is an individual right, to be universally and unconditionally guaranteed to every human being. According to Flávia Piovesan, universality “appeals to the universal reach of human rights, based on the belief that the condition of being a person is the sole requirement for entitlement to rights, since a human being is essentially a moral being, with a unique existence and dignity.”<sup>41</sup>

The Family grant imposes certain conditions on the granting of the benefit, to wit: supervision of the health and nutritional status of the families and school attendance and access to nutritional education.<sup>42</sup> From a human rights perspective, a right cannot be subject to set-offs, requirements or conditionalities, since the status of being a person is the sole requirement for entitlement. The responsibility to provide and ensure the quality of such services to the holders of such rights is vested in the relevant public authorities. The obligation to comply with the conditionalities (schools, health centers) is also the responsibility of such authorities, and not of the persons.<sup>43</sup> For this reason, the Program ought to review its notion of imposing conditions and obligations on its beneficiaries, since the title to a right can never be conditional. The State must not punish and, under no circumstances, can it exclude beneficiaries from the Program if the conditions defined and/or imposed are not met. The municipalities, states, and other governmental bodies ought to be held accountable for not fulfilling their obligation to ensure access to rights currently subject to conditionalities.

### *The amount of the Family Grant as compared to the costs of the Basic Food Basket*

Analysts of Income Transfer and Social Protection Programs in Brazil stress the modest amounts transferred by the State to the beneficiaries of the Family Grant. Therefore, the cost of the Domestic Food Basket was proposed as a

criterion for evaluating the public Income Transfer policies. In the case of Brazil, the Interunion Department of Statistics and Socio-economic Studies (DIEESE) follows on a monthly basis the price evolution of thirteen food items, as well as of the monthly costs a person must undertake to purchase them. The DIEESE surveys evaluate how much an adult worker would need to earn to cover his/her minimum food needs (Minimum Essential Ration). The Domestic Food Basket calculates the upkeep and the well-being of an adult, containing balanced quantities of proteins, calories, iron, calcium, and phosphorus. According to these parameters, the amounts distributed under Minimum Income Programs, e.g. the Family Grant, should take as their criterion the cost of the Domestic Food Basket.

But the value of the Family Grant Program infringes the human right to food, since it is insufficient to still the hunger of a Brazilian family, as shown by the data for the DIEESE Domestic Food Basket. The Domestic Food Basket survey conducted by the DIEESE in June 2005, in sixteen state capitals in Brazil, indicates that an adult worker would need R\$ 159.29 to cover his minimum food needs (Minimum Essential Ration). The value of this basket would be sufficient to support one adult.

For the Brazilian State to minimally comply with the human right to food, especially in terms of its obligation to take tangible action to eradicate hunger, it would have to increase the value of the Family Grant to the equivalent of the DIEESE Domestic Food Basket (the value of the Family Grant is currently set at a maximum of R\$ 95.00 per family). As a signatory of the International Covenant for Economic, Social and Cultural Rights, Brazil is under an obligation to ensure that the individuals and their families have access to a minimum essential quantity of food, sufficient to ensure that they are free from hunger.

### *Decentralization and administrative accountability*

The enforcement of economic, social and cultural rights, and, in particular, the human right to food, requires a new institutional framework for providing these rights, involving decentralization, social participation, administrative accountability, and transparent allotment of funds. According to Valente,<sup>44</sup> there is a need for articulating Federal programs with initiatives taken at State and Municipal levels. In the opinion of Salamanca,<sup>45</sup> even in a time of economic globalization, the city administrations exert a fundamental role in the enforceability of Economic, Social and Cultural Rights. Souza,<sup>46</sup> indicates that the Brazilian experience in local governance has been marked by a “powerful institutional innovation” and by a complex system of

intergovernmental relationships, especially between the Federal Administration and the Municipal Administrations. These innovations initially came into being under the redemocratization process, and, subsequently, as a result of decisions made by the governments themselves, both at Federal and at local levels. "Despite the unequal capacity of Brazilian municipalities in taking part in this new institutionality, there are indications that point towards changes in the form of exercising local governance."<sup>47</sup> According to this author, these indications point toward a greater involvement of local governments and communities in providing universal social services and public assets for common use, including the Family Grant, as an indispensable tool for ensuring the right to food.

In order to attain this goal, the Family Grant must be provided by a new institutional framework, *i.e.*, by bodies or institutions within the municipalities, with a well defined and transparent set of responsibilities, the purpose of which would be not only to facilitate access to the Program, but also to demand such access from the government bodies. In this sense, studies should be conducted regarding the immediate implementation of instruments to guarantee the administrative demandability of the rights of those entitled to the Family Grant.. Furthermore, there should be information available and public bodies to which to resort to avert any discrimination as to access and/or in the event of any interruption in the Program. Such information must be available in a clear form, accessible to the titleholders of the rights involved, and especially to the most vulnerable among them. At present, the Family Grant does not provide mechanisms for universal access to the Program, particularly so that the titleholders of the right to food can complain and demand their rights when they are being infringed and/or remain protected.

### **Final remarks**

As compared to the social programs preceding the Family Grant, the latter represents a major step forward in eradicating hunger in Brazil. This Program has brought about an improvement in the nourishment of a great number of poor Brazilian families. However, from a human rights perspective, the Family Grant still has a number of draw-backs. From this perspective, one must take into account that a human right cannot be conditioned by set-offs, demands, or conditionalities. More serious than the imposition of set-offs as such is the punishment of the holder of a right, specifically, his/her exclusion as beneficiary of the Program for not having complied with the conditionalities. This represents, indeed, a grievous infringement of human rights, given that, as pointed out above, a human right cannot be bound by

the fulfillment of demands or by other forms of conduct. Aside from the issue of conditionalities, the value of the benefit granted by the Family Grant Program is insufficient to guarantee that all persons living in the country are free from hunger. In other words, the amount transferred by the Program is too low to guarantee the right to adequate food, primarily with respect to providing a minimum quantity of food. In view of this fact, the criterion to be used to evaluate the Program must be the cost of the Domestic Food Basket, which calculates the value that each adult person requires on a monthly basis in order to provide for his/her minimum nutritional needs.

Besides increasing the actual value, the Program must provide specific mechanisms of accessibility, with clear references to the public bodies charged with providing such access. Accessibility means that all citizens must be included in the Program when their rights are being infringed or not provided for. Within the framework of human rights, these persons must have the possibility of requesting the benefit and must be granted such benefit within a short period of time. If the benefit is not granted, it must be possible to demand such benefit through the courts.

Finally, from the human rights perspective, the Brazilian social programs ought to be designed, formulated, and conceived in a universal and unrestricted form, in which the conditions of a person are the sole requirement for determining a given right. Besides universal provisioning, social programs must ensure access mechanisms in the event of infringement, which are efficient, speedy, and aimed at including the holders of rights in the programs without any major delay or bureaucracy.

## NOTES

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1. Thus, a greater emphasis is now placed on the role of the State and on institutions, giving rise to the neo-institutionalist theory and to its three versions: historical institutionalism, the institutionalism of rational choice, and the sociological institutionalism. The neo-institutionalist theory has brought back to the public policy debate the central role of the institutions and of the different management models. The central roles of the institutions is underlined in a phrase by March & Olsen, "the organization of political life makes a difference" (see James March & Johan Olsen, *Rediscovering institutions - The organizational basis of politics*, New York, The Free Press, 1989, p. 159). As a result, the different typologies of public policies are emphasized, following a typology proposed by Esping-Andersen. On the one hand, institutions are taken as regulators of conflicts of interest, seen by some scholars as "opening" of institutional channels for the participation of political actors. On the other hand, some authors underline the ideal of "limitation" in the participation channels and the increased efficiency of state action (the technocratic vision).

2. See Maria Paula Dalari Bucci, "Buscando um conceito de políticas públicas para a concretização dos direitos humanos," In: Bucci et al. (Org.), *Direitos humanos e políticas públicas*, São Paulo, Pólis, 2001, p. 7. [See various other FN titles, as well.]

3. At the World Food Summit, five years later (2002), the heads of State and Government invited the FAO Council to set up an intergovernmental work group, including participants from civil society. The purpose of this work group was to draw a series of voluntary guidelines in support of the Member States' efforts to progressively achieve the Right to Adequate Food, within the framework of national food security.

4. V. FAO, *Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security*, Rome, 2004, Guideline 5.1.

5. *Ibid.*, Guideline 5.4.

6. See Clóvis Roberto Zimmermann, *Combate à fome e o direito humano à alimentação no Brasil: O Programa Fome Zero do governo Lula*, Passo Fundo: Passografic, 2004, p. 81.

7. Maria Ozanira da Silva e Silva; Maria Carmelita Yasbek; Geraldo di Giovanni, *A política social brasileira no século XXI: A prevalência dos programas de transferência de renda*, São Paulo: Cortez, 2004, p. 212.

8. Maria Carmelita Yasbek, "O Programa Fome Zero no contexto das políticas sociais brasileiras", *São Paulo em Perspectiva*, São Paulo, Fundação Seade, v. 18 , n. 2, 2004, p. 105.

9. Rosana Magalhães, "Integração, exclusão e solidariedade no debate contemporâneo sobre as políticas sociais", *Cadernos de Saúde pública*, Rio de Janeiro, v. 17, n. 3, pp. 569-579, May/June 2001, p. 577.

10. Marcelo M. Coelho de Souza, *A transposição de teoria sobre a institucionalização do welfare state para o caso dos países subdesenvolvidos* (text for discussion no. 695), Rio de Janeiro: IPEA, 1999, p. 13.

11. Maria Carmelita Yasbek, *op. cit.*, p. 105.

12. Given its general features, the Brazilian social protection system is inserted in what has become

known as the residual welfare state. This definition implies that, whenever human beings are unable to fulfill their right to food within the framework of the market, as in the case of loss of employment, such persons can resort to two entities that provide assistance in the cases of hunger and poverty: Church and Family. In this case, it is not the social protection network of the State that provides assistance, but the philanthropic entities of the Church and of the relatives. The State abstains itself from guaranteeing rights to needy persons, and the social responsibility is imposed on private entities and natural persons.

**13.** See Ana M. Medeiros da Fonseca, *Família e política de renda mínima*, São Paulo: Editora Cortez, 2001, p. 219.

**14.** In most of the Guaranteed Minimum Income Programs that were implemented, the municipalities only transfer money to families with school-aged children. Other needy groups, such as elderly people, handicapped and others, are not entitled to the benefit.

**15.** Idem.

**16.** Aldaíza Sposati, "Sobre os programas brasileiros de garantia de renda mínima – PGRM", In: Aldaíza Sposati, (Org.), *Renda mínima e crise mundial: Saída ou agravamento*, São Paulo, Editora Cortez, 1997, p. 123.

**17.** In Campinas, a city which in 2000 had 969,396 inhabitants, the Minimum Income Program benefited in 2002 only some 2,500 families.

**18.** Lena Lavinas *Programas de garantia de renda mínima: Perspectivas brasileiras* (Text for discussion no. 596). Rio de Janeiro: IPEA, 1998.

**19.** Flávio Valente, "O Direito à Alimentação", In: Benvenuto, Jayme/ Zetterström, Lena (Org.), *Extrema pobreza no Brasil*, São Paulo: Loyola, 2002, p. 79.

**20.** Idem.

**21.** The PETI is directed to families with a *per capita* income of up to ½ minimum salaries, with children between 7 and 14 years of age working in activities deemed degrading or wearing. The value of the benefit is R\$ 25.00 (rural areas) and R\$ 40.00 (urban areas).

**22.** The School Grant was conceived based on the municipal experiences, and transfers R\$ 15.00 to each child between 6 and 15 years of age, up to the a maximum of three children per family. In order to retain the benefit, the family must keep the children at school, thus stimulating education and avoiding child labor.

**23.** The Youth Agent Program is directed to young people aged from 15 to 17, in a situation of poverty and social risk, belonging to families with a *per capita* income of up to ½ minimum salaries. The grant corresponds to a monthly sum of R\$ 65.00.

**24.** The Food Grant is geared to pregnant women, women with children of up to 6 years of age, pertaining to families with a *per capita* income of up to ½ minimum salaries. The grant corresponds to a monthly sum of R\$ 15.00 per child, up to a maximum of three children.

**25.** The Gas Allowance is granted to families with a *per capita* income of up to ½ minimum salary, and represents an amount of R\$ 7.50 per month.

**26.** For a discussion on the social policies as conducted under the Fernando Henrique Cardoso

Administration, see Maria Ozanira da Silva e Silva (Org.), *O comunidade solidária: o não enfrentamento da pobreza no Brasil*, São Paulo: Cortez, 2001.

27. Jean Ziegler, *Relatório do relator especial sobre o direito à alimentação* (Relatório sobre missão ao Brasil), Geneve: United Nations, E/CN. 4/2003/54/Add. 1, 2003, p. 16.

28. Ibid., p. 13.

29. The Family Grant Program transfers to its beneficiaries a fixed sum of R\$ 50.00 to families with a monthly income of up to R\$ 50.00 per person, whether or not they have children. Besides this fixed sum, those who have children aged from 0 to 15 receive a variable benefit of R\$ 15.00 per child, up to a maximum of three children. Thus, taking into account all existing benefits, the Family Grant distributes a maximum amount of R\$ 95.00 per family. Families with a *per capita* monthly income in excess of R\$ 50,00 up to R\$ 100.00 per person, the Family Grant grants a monthly allowance of R\$ 15.00 per child aged 0 to 15, up to a maximum of three benefits. Government sources estimate that, by November 2005, the Family Grant Program was transferring an average of R\$ 65.00 per family. By January 2006, the Program had reached out to a total of 8,644,202 families.

30. The Food Card Program was implemented locally by a Management Committee. The organization, choice, and election of the Management Committee were essential conditions for implementing the Food Card Program. Without the participation of civil society, it could simply not be implemented. Once it had been instated, the task of the Committee was to select families to benefit from the Food Card Program in the specific municipality. In other words, this Committee held deliberative powers in the implementation of the Program.

31. Comitê de Direitos Econômicos, Sociais e Culturais do Alto Comissariado de Direitos Humanos/ Onu. *Comentário Geral número 12 - O direito humano à alimentação* (art.11), Genebra: ONU, 1999, artigo 25.

32. Valente, op. cit., p. 53.

33. The Minimum Income Programs differ from Universal Basic Income. The former represent a transfer of income subject to certain conditions, i.e., families with an income below the official poverty line, unemployed, with a permanent residential address, who send their children to school, etc. The second program sets no conditions for access to the benefit, i.e., all persons living in a given country are entitled to this benefit, irrespective of their economic, social and cultural status.

34. Lavinás, op. cit., and Jürgen Kohl, "Armut und Armutsforschung in der Europäischen Union", In: Glatzer, Wolfgang; Habich, Roland; Mayer, Karl Ulrich (Org.), *Sozialer Wandel und gesellschaftliche Dauerbeobachtung*, Opladen: Leske + Budrich, 2002, pp. 163-179.

35. Esping-Andersen, *The three worlds of welfare capitalism*, Cambridge: Polity Press, 1990.

36. Jürgen Habermas, *Die neue Unübersichtlichkeit*, Frankfurt: Suhrkamp, 1985, p. 152.

37. The very name of the Grant (in the original Portuguese, "*bolsa*", suggestive of a "scholarship") presents serious problems in the light of human rights, since it indicates something that is temporary, with a fixed term to end, without taking into account people's vulnerability. A right cannot be conceived of as a scholarship, as a temporary arrangement, but must be understood as something permanent, to be granted for as long as the state of vulnerability or social exclusion persists.

38. In theory, the Government adopts the notion of expanded family, i.e. the core unit, with the



possible addition of other individuals related to the core unit, forming a domestic group, living under the same roof, and maintaining their economy with the contribution of its several members. In practice, however, only the core family concept is applied.

**39.** Over 22.1% of the homeless declare they have a zero *per capita* income, yet none of these families are receiving the benefits of the Family grant Program (see Clóvis Roberto Zimmermann, "Violação dos direitos humanos e discriminação dos sem teto em Goiânia", *Revista Espaço Acadêmico*, Maringá, Nov. 8 2005, available at: [www.espacoacademico.com.br](http://www.espacoacademico.com.br), Access on Nov 08 2005.

**40.** As a consequence, this Program complies with the criteria adopted by liberal thinking, in which the task of social promotion is transferred to society instead of lying within the sphere of competence of the State.

**41.** Flávia Piovesan, "Direitos econômicos, sociais e culturais e direitos políticos", *Sur: Revista Internacional de Direitos Humanos*, São Paulo, Year 1, n. 1, 2005, p. 22.

**42.** In a recent article, the Minister of Social Development and Eradication of Hunger, Patrus Ananias, defended the conditionalities as a form of ensuring strict compliance with the republican principles. In order to control the conduction of the Program, a Family Grant Supervision Network was set up, involving the Federal Comptroller General, the Audit Court, besides federal prosecutors and attorneys in all counties of the Brazilian territory (see Patrus Ananias, "Bolsa Família é uma história de conquistas", Fortaleza, Disponível em: [www.adital.com.br](http://www.adital.com.br), Access on: Nov. 04 2005.) As a result, public expenditure with this Program has become very high, specially due to the operational costs involved in selecting the beneficiaries and in controlling the conditions. For this reason, in a number of cases, operational costs are higher than the actual transfer for funds to the families.

**43.** There are cases in which there are not schools or health centers in the vicinity of where the poor live. Under such situations, compliance with the conditionalities becomes impossible, since the State does not even offer the services it requires of the beneficiaries.

**44.** Valente, *op. cit.*, p. 103.

**45.** Rosa Emília Salamanca, "Política pública y derechos económicos, sociales y culturales", In: PIDHDD – Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo (Org.), *Para exigir nuestro derechos. Manual de exhibición en des*, Bogotá: PIDHDD, 2004, p. 271.

**46.** Celina Souza, "Governos locais e gestão de políticas sociais universais", *São Paulo em Perspectiva*, São Paulo, Fundação Seade, v. 18, n. 2, 2004, pp. 27-41.

**47.** *Ibid.*, p. 40.

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#### ABSTRACT

There are three regional systems for the protection of human rights, namely: the African, the Inter-American and the European systems. This contribution provides a comparative overview of their salient features and focuses on key procedural and institutional aspects of these systems.

#### KEYWORDS

Regional systems – Human rights – Comparative overview



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## A SCHEMATIC COMPARISON OF REGIONAL HUMAN RIGHTS SYSTEMS: AN UPDATE\*

Christof Heyns, David Padilla and Leo Zwaak

As is well known, human rights can be protected by law on the domestic or the international level. International human rights law, for its part, has different layers, including the global system, in which the United Nations (UN) is the main player, and which is potentially applicable in one form or another to every person in the world; and the regional systems which cover three parts of the world – Africa, the Americas and Europe. If one's rights are not protected on the domestic level, the international system comes into play, and protection can be provided by the global or the regional system (in those parts of the world where there are such systems).

All three regional human rights systems mentioned above form part of regional integration systems with a much broader mandate than just human rights – in the case of Africa, the parent organization is the African Union (AU); in the Americas it is the Organization of American States (OAS); and in Europe it is the Council of Europe (CoE). Other parts of the world also have regional integration bodies, but without a similar human rights mandate.

Although there were initially questions, especially from the UN perspective with its emphasis on universality, about the wisdom of some regions having their own human rights systems, the benefits of having such systems are widely accepted today. Countries from a particular region often have a shared interest in the protection of human rights in that part of the world, and the advantage of proximity in terms of influencing each other's behavior and ensuring compliance with common standards which the global system does not have.

Regional systems also allow for the possibility of regional values to be taken into account when human rights norms are defined - obviously at the

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risk, if this goes too far, of compromising the idea of the universality of human rights. The existence of regional human rights systems allows for enforcement mechanisms which can resonate better with local conditions than a global, universal system of enforcement. A more judicial approach to enforcement may be appropriate in one region, as in Europe, for example, while an approach which also allows room for non-judicial mechanisms such as commissions and peer review may be more appropriate in a region such as Africa. The global system does not have such flexibility.

The treaties that create the regional human rights systems follow the same format. They set out certain norms – individual rights, mostly, but in some cases also duties and peoples’ rights – as binding on states that have joined the system, and then create a monitoring system to ensure compliance with these norms also by states that have joined the system. The classical format of such a monitoring system was set by the European Convention on Human Rights of 1950. In terms of this system once someone has pursued all avenues to have their rights vindicated by the legal system of the country where they find themselves, they can approach a human rights commission created by the regional system. The commission will give the state an opportunity to respond, and then decide whether there has been a violation. This decision does not, however, by itself carry the force of law. To obtain such a result, the case has to proceed to the regional human rights court, where legally binding decisions are issued on whether a state party has violated the treaty.

Since this pattern was set, the Europeans have, by means of a 1998 Protocol, abolished their Commission and left supervision in the hands of the European Court of Human Rights. The Inter-American system continues to function on the basis of a Commission as well as a Court. The African system initially had only a Commission, but the decision to supplement the Commission with an African Human Rights Court was taken by means of a Protocol in 1998.

The three regional human rights systems in operation today share many characteristics, but there are also differences. The schematic exposition provided here gives an overview of how some of the most important aspects of these systems may be compared to one another, focusing on the way in which the enforcement mechanisms are constituted and operate, and the procedures followed.\* Except where otherwise indicated, it sets out the situation in respect of the African, the Inter-American and the European systems as it was at the end of 2005. The usual order in which these systems are presented is reversed, to emphasize that none of these systems necessarily sets the norm.

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\*This is an updated version of C. Heyns, W. Strasser & D. Padilla, “A schematic comparison of regional human rights systems”, *African Human Rights Law Journal*, v. 3, 2003, p. 76.. We would like to pay tribute to Wolfgang Strasser who recently passed away.

**Where two dates are provided behind the name of a treaty, the first one indicates the date when the treaty was adopted, the second the date when it entered into force.**

	<b>AFRICAN</b>	<b>INTER-AMERICAN</b>	<b>EUROPEAN</b>
<b>Regional organisations of which the systems form part</b>	Organization of African Unity (OAU), replaced by the African Union (AU) in July 2002 (53 members)	Organization of American States (OAS), established in 1948 (35 members)	Council of Europe (CoE), established in 1949 (46 members)
<b>General human rights treaties which form the legal base of the systems</b>	<p>African Charter on Human and Peoples' Rights (1981/86), 53 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998/2004), 21 ratifications</p> <p>The Protocol entered into force in January 2004 and the process is underway to establish the Court. The AU Summit has taken a decision in July 2004 to merge the African Human Rights Court with the African Court of Justice. The entries below are based on the 1998 Protocol.</p>	<p>Charter of the OAS (1948/51), 35 ratifications, read together with the American Declaration on the Rights and Duties of Man (1948)</p> <p>American Convention on Human Rights (1969/78), 24 ratifications (21 states accept the compulsory jurisdiction of the Court)</p>	Convention for the Protection of Human Rights and Fundamental Freedoms (1950/53), 45 ratifications, and 13 additional protocols. The Eleventh Protocol created a single court (1994/98).
<b>Specialized additional protocols and other prominent instruments that are part of/supplement the systems</b>	<p>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74), 45 ratifications</p> <p>African Charter on the Rights and Welfare of the Child (1990/99), 37 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005), 13 ratifications (15 ratifications required)</p>	<p>Inter-American Convention to Prevent and Punish Torture (1985/87), 16 ratifications</p> <p>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99), 13 ratifications</p> <p>Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990/91), 8 ratifications</p> <p>Inter-American Convention on Forced Disappearances of Persons (1994/96), 10 ratifications</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), 31 ratifications</p>	<p>European Convention on Extradition (1957/60), 46 ratifications</p> <p>European Convention on Mutual Assistance in Criminal Matters (1959/62), 45 ratifications</p> <p>European Social Charter (1961/65), 27 ratifications</p> <p>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89), 45 ratifications</p> <p>Framework Convention on the Protection of National Minorities (1995/98), 36 ratifications</p> <p>European Social Charter (revised) (1996/99), 19 ratifications</p>

	AFRICAN	INTER-AMERICAN	EUROPEAN
		Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/2001), 15 ratifications	Convention on Human Rights and Biomedicine (1997/99), 19 ratifications European Convention on Nationality (1997/2000), 13 ratifications
Supervisory bodies in respect of general treaties	The Court is yet to be established. The Commission was established in 1987.	The Court was established in 1979. The Commission was established in 1960 and its statute was revised in 1979.	A single Court was established in 1998, taking over from the earlier Commission and Court.
<b>Supervisory bodies based</b>	Court seat: to be determined (It will be in the East Africa region.) Commission: Banjul, The Gambia (It often meets in other parts of Africa.)	Court: San Jose, Costa Rica. In May 2005 the Court held its first extraordinary session (in Paraguay). Commission: Washington DC. (It also occasionally meets in other parts of the Americas.)	Strasbourg, France
<b>Case load: Number of individual communications per year</b>	An average of 10 cases per year has been decided by the Commission since 1988; 13 cases during 2000, 4 during 2001, 3 during 2002, 13 during 2003 and 11 during 2004.	Court: Until 2003 the Court decided on average 4-7 cases per year. In 2004 the Court issued 15 judgments. By October 2005 11 judgments had been notified. It also gives one advisory opinion on average per year. Commission: Approximately 100 cases decided per year. Total number of cases pending at the moment: Approximately 1 000	The Court decides thousands of cases per year, with the case load rapidly increasing. In 2004 the Court delivered: 21191 decisions (1566 chamber decisions including two decisions of the Grand Chamber, one of which concerned the first ever request by the Committee of Ministers for an advisory opinion, and 19 625 committee decisions), and 718 judgments (including 15 judgments of the Grand Chamber). At the end of 2004, 78000 applications were pending before the Court. Communications lodged: 44100
<b>Case load: Number of inter-state complaints heard since inception</b>	Commission: One case admitted	Court: 0 Commission: 0	Court: 13
<b>Contentious/advisory jurisdiction of Courts</b>	Contentious and broad advisory	Contentious and broad advisory	Contentious and limited advisory

	<b>AFRICAN</b>	<b>INTER-AMERICAN</b>	<b>EUROPEAN</b>
<b>Who is able to seize the supervisory bodies in the case of individual complaints</b>	<p>Court: After the Commission has given an opinion, only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of 'direct' access to the Court where the state has made a special declaration.</p> <p>Commission: Not defined in the Charter. It has been interpreted widely to include any person or group of persons or NGOs.</p>	<p>Court: After the Commission has issued a report only states and the Commission can approach the Court. As from 2001, the Commission sends cases to the Court as a matter of standard practice.</p> <p>Commission: Any person or group of persons, or NGO</p>	Any individual, group of individuals or NGO claiming to be a victim of a violation
<b>Number of members of the supervisory bodies</b>	<p>Court: will have 11 members</p> <p>Commission: 11</p>	<p>Court: 7</p> <p>Commission: 7</p>	Equal to the number of state parties to the Convention (45)
<b>Appointment of members of the supervisory bodies</b>	Judges and Commissioners are elected by the AU Assembly of Heads of State and Government.	Judges and Commissioners are elected by the General Assembly of the OAS.	The Parliamentary Assembly of the CoE elects judges from three candidates proposed by each government. There is no restriction on the number of judges of the same nationality.
<b>Meetings of the supervisory bodies</b>	<p>Court: Regularity of sessions to be determined</p> <p>Commission: two regular two-week meetings per year. Three extraordinary sessions have been held.</p>	<p>Court: four regular meetings of two to three weeks per year (one extraordinary session in 2005)</p> <p>Commission: two regular three-week meetings per year and one or two short special sessions</p>	The Court is a permanent body.
<b>Terms of appointment of members of the supervisory bodies</b>	<p>Judges will be appointed for six years, renewable only once. Only the President works full-time.</p> <p>Commissioners are appointed for six years, renewable, part time.</p>	<p>Judges are elected for six-year terms, renewable only once, part time.</p> <p>Commissioners are elected for four-year terms, renewable only once, part time.</p>	Judges are elected for six-year terms, renewable, full-time.
<b>Responsibility for election of chairpersons or presidents</b>	<p>The President is to be elected by the Court (two-year term).</p> <p>The Commission elects its own Chairperson (two-year term).</p>	<p>The President is elected by the Court (two-year term).</p> <p>The Chairperson is elected by the Commission (one-year term).</p>	The President is elected by the Plenary Court (three-year term).

	<b>AFRICAN</b>	<b>INTER-AMERICAN</b>	<b>EUROPEAN</b>
<b>Form in which findings on merits are made in contentious cases; remedies</b>	Court: It will render judgments on whether a violation has occurred, and orders to remedy or compensate violations.  Commission: It issues reports which contain findings on whether violations have occurred and sometimes makes recommendations.	Court: It renders judgments on whether violation occurred; it can order compensation for damages or other reparations.  Commission: It issues reports which contain findings on whether violations have occurred and makes recommendations.	Declaratory judgments are given on whether a violation has occurred. It can order 'just satisfaction'.
<b>Permission required from supervisory bodies to publish their decisions</b>	Court: No  Commission: Requires permission of the Assembly. In practice permission has been granted by the Assembly as a matter of course. However, in 2004 the publication of the Activity Report was suspended due to the inclusion of a report on a fact-finding mission to Zimbabwe to which the government claimed it had not been given the opportunity to respond. Permission to publish the report was given in January 2005.	Court: No  Commission: No	No, decisions and judgments are public.
<b>Power of supervisory bodies to issue interim/provisional/precautionary measures</b>	Court: It will have the power.  Commission: Yes	Court: Yes  Commission: Yes	Yes
<b>Primary political responsibility for monitoring compliance with decisions</b>	Executive Council and Assembly of the AU	General Assembly and Permanent Council of the OAS	CoE Committee of Ministers
<b>Country visits by Commissions</b>	A small number of fact-finding missions and a larger number of promotional country visits	95 on-site fact-finding missions conducted so far	N/A
<b>Commissions adopt reports on state parties by their own initiative</b>	Yes, occasionally following fact-finding missions	Yes, 56 country reports and six special reports adopted so far	N/A
<b>State parties required to submit regular reports to the Commissions</b>	Yes, every two years	No	N/A



	AFRICAN	INTER-AMERICAN	EUROPEAN
<b>Appointment of special rapporteurs by the Commissions</b>	<p>Thematic rapporteurs: Extra-judicial killings, prisons, and women, freedom of expression, human rights defenders, refugees and displaced persons</p> <p>Follow-up committee on torture (Robben Island Guidelines)</p> <p>Working groups: economic, social and cultural rights, indigenous people or communities</p> <p>Country rapporteurs: None</p>	<p>Thematic rapporteurs: Freedom of expression, prison conditions, women, children, displaced persons, indigenous peoples, migrant workers, human rights defenders, Afro descendants and racial discrimination</p> <p>Country rapporteurs: Each OAS member state has a country rapporteur drawn from the Commission members.</p>	N/A
<b>Clusters of rights protected in the general treaties</b>	Civil and political rights as well as some economic, social and cultural rights, and some “third generation” rights	Civil and political rights, socio-economic rights recognized by the Protocol	Civil and political rights and the right to education
<b>Recognition of duties</b>	Yes, extensively	In the American Declaration but not in the American Convention	No, except in relation to the exercise of freedom of expression
<b>Recognition of peoples’ rights</b>	Yes, extensively	No	No
<b>Other bodies which form part of the regional systems</b>	Committee of Experts on the Rights and Welfare of the Child monitors compliance with the African Charter on the Rights and Welfare of the Child.		CoE Commissioner for Human Rights (established in 1999): It monitors and promotes human rights in member states; may undertake country visits; assists member states (only with their agreement) to overcome human rights-related shortcomings.
<b>Approximate number of staff</b>	<p>Court: To be determined</p> <p>Commission: 22 permanent staff members, encompassing the Secretary to the Commission, seven legal officers, a financial/administrative manager, and support staff (finance, administration, public relations, documentation officer, librarian). At the end of 2005 the Commission also had five legal interns.</p>	<p>Court: 15 lawyers, 3 administrative employees, 1 librarian, 1 driver and 1 security guard. Total 26 persons</p> <p>Commission: 24 budgeted posts (2 non-lawyer professionals, 15 lawyers, 8 administrative employees) plus 6 contract lawyers, 8 administrative contract employees, 1 contract part-time librarian, 6 fellows lawyers. Total 45 persons</p>	As of 30 June 2005, total registry staff approximately 348 of which 187 permanent (including 76 lawyers) and 161 on temporary contracts (including 78 lawyers)

	<b>AFRICAN</b>	<b>INTER-AMERICAN</b>	<b>EUROPEAN</b>
<b>Physical facilities</b>	Court: To be determined Commission: Two floors used as offices	Court: Own building Commission: Offices in General Secretariat facilities. 16 individual offices, 1 library, 1 conference room, filing room, 43 computers in total for the Court and the Commission	Five storey building with two wings (16 500 m <sup>2</sup> ), two hearing rooms, five deliberation rooms, library, approximately 600 computers
<b>Annual budget</b>	Court: To be determined The budget for a session of the Commission is roughly US\$ 200 000.	Court: US\$ 1.39 million Commission: US\$ 2.78 million and US\$ 1.28 million in external contributions The Court and the Commission's combined budget of US\$ 4.1 million is 5.4% of the OAS' total budget of US\$ 76.2 million.	41 million Euros The Court's budget is approximately 20% of the CoE core budget.
<b>Other regional human rights fora whose work draws upon/overlaps with the systems</b>	The African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) reviews human rights practices as part of political governance.		European Union (EU): Membership of the CoE and adherence to the European Convention on Human Rights are prerequisites for membership of the EU. The Convention constitutes general principles of the European Union law.  European institutions with roles that affect human rights, and which draw upon the Convention, include: The European Council, the Council of the European Union, the European Commission, the European Parliament, the European Court of Justice and the European Ombudsman.  Organization for Security and Co-operation in Europe (OSCE): Although its standards do not impose enforceable international legal obligations as they are mostly of a political nature, it draws heavily upon the principles of the European Convention. It does provide for a multilateral mechanism for the supervision of the human rights dimension of its work.
<b>Official websites</b>	<a href="http://www.achpr.org">www.achpr.org</a> <a href="http://www.africa-union.org">www.africa-union.org</a>	<a href="http://www.corteidh.or.cr">www.corteidh.or.cr</a> <a href="http://www.cidh.org">www.cidh.org</a>	<a href="http://www.echr.coe.int">www.echr.coe.int</a>
<b>Other useful websites</b>	<a href="http://www.chr.up.ac.za">www.chr.up.ac.za</a> <a href="http://www.issafrica.org">www.issafrica.org</a> <a href="http://www1.umn.edu/humanrts/regional.htm">www1.umn.edu/humanrts/regional.htm</a>	<a href="http://www.iidh.ed.cr">www.iidh.ed.cr</a>	<a href="http://www.coe.int">www.coe.int</a>

	AFRICAN	INTER-AMERICAN	EUROPEAN
<b>Sources (other than websites) where decisions are published</b>	<p>Annual Activity Reports</p> <p><i>African Human Rights Law Reports</i> published by the Centre for Human Rights, University of Pretoria and the Institute for Human Rights and Development in Africa, Banjul, The Gambia</p>	<p>Court: Annual report, decisions series, precautionary measures volume, yearbook (with Commission)</p> <p>Commission: Annual report, country reports, rapporteur reports, yearbook (with Court), CD-Rom</p>	<p>Since 1996, the official European Convention law reports have been the <i>Reports of Judgments and Decisions</i>, published in English and French.</p> <p>Prior to 1996 the official law reports were the <i>Series A Reports</i>. The <i>Series B Reports</i> include the pleadings and other documents.</p> <p>From 1974, selected European Commission decisions have been reproduced in the <i>Decisions and Reports Series</i>.</p> <p>The <i>European Human Rights Reports</i> series includes selected judgments of the Court, as well as some Commission decisions.</p> <p>Decisions and judgments are also available on-line on the Court's official website through the HUDOC database at <a href="http://www.echr.coe.int/Eng/Judgments.htm">www.echr.coe.int/Eng/Judgments.htm</a>. The contents of HUDOC are also accessible via CD-ROM and DVD.</p>
<b>Commonly cited secondary sources on system</b>	<p>M. Evans &amp; R. Murray (eds), <i>The African Charter on Human and Peoples' Rights</i>, Cambridge UP, 2002</p> <p>C. Heyns (ed), <i>Human rights law in Africa</i>, Marthinus Nijhoff, 2004</p> <p>F. Ouguergouz, <i>The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights</i>, Kluwer Law International, 2003</p>	<p>T. Buergenthal &amp; D. Shelton, <i>Protecting human rights in the Americas</i>, NP Engel Publishers, 1995</p> <p>F. Martin et al (eds), <i>International human rights law and practice</i>, Kluwer, 1997</p>	<p>P. van Dijk &amp; GJH van Hoof, <i>Theory and practice of the European Convention on Human Rights</i>, Kluwer, 1998</p> <p>C. Ovey &amp; R. C.A. White, <i>Jacobs and White, the European Convention on Human Rights</i>, Oxford UP, 2002</p> <p>M. Boyle, D. J. Harris &amp; C. Warbrick, <i>Law of the European Convention on Human Rights</i>, Butterworths, 1995</p> <p><i>Yearbook of the European Convention on Human Rights</i>, Kluwer</p>
<b>Some relevant academic journals</b>	<p><i>African Human Rights Law Journal</i></p> <p><i>East African Journal of Peace and Human Rights</i></p>	<p><i>Revista del Instituto Interamericano de Derechos Humanos</i> (articles in English and Spanish)</p>	<p><i>European Human Rights Law Review</i></p> <p><i>Human Rights Law Journal</i></p> <p><i>Netherlands Quarterly of Human Rights</i></p> <p><i>Revue universelle des Droits de l'Homme</i></p>

## BOOK REVIEW

### *Mary Robinson, A Voice for Human Rights*, edited by Kevin Boyle (Philadelphia: University of Pennsylvania Press, 2006)

The stage for this rather unique book is set by none less than UN Secretary-General Kofi Annan, whose very first sentence of his Foreword sums up the qualities of the office and its former holder: “the job of the United Nations High Commissioner for Human Rights is not for the faint of heart”. And faint of heart Mary Robinson, the subject and, in many ways, also object of this collection of public interventions made during her five years in the ‘job’, certainly was not. Which is why the collection’s bland title comes as somewhat a surprise, not least as Kevin Boyle, its editor, has otherwise done a marvelous job in providing everything the reader might desire from this type of publication, be it the abundance of informative annotations, and introductory commentary, the comprehensive index and appendices, or simply the thematic organization which provides a fascinating and accessible overview of the multiple dimensions of UN human rights work. Only the title, *A Voice for Human Rights*, just does not quite do justice to the formidable story that emerges through the many places, people and occasions with which the book deals – with the ‘voice’ metaphor being so commonplace that the title finds itself in the company of such illustrious monographs as *The Voice of Knowledge: a practical guide to inner peace*, or *Songs of the Humpback Whale: a novel in five voices*.

Yet, commonplace is not what Mary Robinson and her term as High Commissioner can be said to have been, neither in terms of her personal endurance in the face of an abundance of challenges, nor in relation to the testing times which marked her term of office. This is why the *prima facie* outmoded format of a collection of public speeches works here to the benefit of the reader, as it permits the presentation of a vast range of topics with a clarity and simplicity that no deeper academic treatment could ever achieve. As a consequence, complex and controversial issues such as ‘mainstreaming’ or ‘human rights in development’ become concepts debatable far beyond the bounds of UN staff, NGO fora, or specialist academic circles. Indeed, *A Voice for Human Rights* is as much an eclectic, if still rather comprehensive human rights *lexicon*, as it is an account of Mary Robinson’s particular contribution “in her own words” (p. IX). That contribution is, as already mentioned, organized into five general thematic parts, which are, in turn, sub-divided into twenty chapters devoted to specific human rights topics. It ends, rather movingly, with Mary Robinson’s farewell speech to her

Geneva staff, and an Afterword by the successor of her successor,<sup>1</sup> Louise Arbour, another powerful woman at the helm of the UN human rights system.

*A Voice for Human Rights* aptly begins with Mary Robinson's overall vision for human rights, in a single chapter which consists largely of her widely-cited 1997 Romanes Lecture at Oxford University in which Robinson, only two months after resigning the Presidency of Ireland, gave her conceptual *entrée* as High Commissioner for Human Rights. In it she offers her reading of the historical trajectory of human rights from the Universal Declaration to the Vienna Conference and the creation of the Office of the High Commissioner for Human Rights (OHCHR) and sets out three important issues on her agenda, namely the further concretization of her office's mandate, the mainstreaming of human rights "into the broad range of the [UN's] activities",<sup>2</sup> and human rights in development. In other pronouncements collected in the 'Visions' chapter she adds to these the indivisibility of human rights as already articulated in the Universal Declaration, and the relationship of (human) responsibilities to human rights, a debate much *en vogue* at that point. What is remarkable about these early visions is their unorthodox and forward-looking character, for all of them transcend the ordinary human rights canon that is normally the (exclusive) focus of the major international human rights actors, whether governmental or non-governmental. What is more remarkable yet is that they came from the (then) international community's top human rights officer, who, as high-level political appointments go, one would not theretofore have expected to take any particularly transgressive position. It is, thus, ironically fitting when Robinson recites a characterization of herself by her Dutch hosts in her acceptance speech of the Erasmus Prize 1999 as "independent-minded and uncompromising, but not one of life's natural mediators" (p. 20).

The collection then moves on to the second part, dedicated to 'Fighting for Equality and Nondiscrimination' and which contains chapters or sections on combating racism, discrimination against women, religious discrimination, the disabled, refugees, migrants, victims of trafficking, and people living with HIV/AIDS. The first chapter goes right *in medias res* by dealing with what was, perhaps, the longest-lasting and most difficult experience in Robinson's five years in the Palais Wilson, namely the preparation, running and subsequent 'digestion' of the *2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance* in Durban, South Africa. Inheriting the commitment to the Conference from her predecessor, and appointed to be its Secretary-General by the General-Assembly, she ended up being implicated, by default, in its partly stormy proceedings, and its only partial success in establishing a common language on controversial issues such as slavery and the slave trade, colonialism, and the potential racial discrimination dimensions of the Israeli-Palestinian conundrum. She did

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1. Her immediate successor was, of course, the Brazilian UN diplomat Sérgio Vieira de Melo, who tragically died in the rubble of the bombed UN Building in Baghdad while on special assignment as the Secretary-General's Special Representative in Iraq in August 2003.

2. Kofi Annan, *Renewing the United Nations: a Program for Reform, Report of the Secretary-General*, A/51?950, 14 July 1997, para. 201, action 15(b).

not escape the wave of criticism of the Conference, but, later, in her Report to the General Assembly's Third Committee, which is included in this collection as is her opening statement in Durban, she affirmed that "we [...] knew that [the difficulties were] precisely the reason why this Conference was so important, why we accepted the challenge to have it, and why we persisted in our efforts until we finally had agreement" (p.40). The other discrimination and exclusion issues addressed by Robinson again represent an engaging mixture of reinvigorating long-standing campaigns, and breaking new ground. Of the former, especially her efforts for women's rights are a continuation of her long-time activism since her days as a pro-contraception campaigner in the Irish Senate. Of the latter, her outspoken stance on inter-religious dialogue, and the rights of people with disabilities and people with HIV/AIDS takes up themes in need of a (and her) push. Only the absence of any specific treatment of sexual orientation is a strange omission, especially given the fact that, as with women's rights, Robinson has campaigned on this issue since her days as an Irish Senator.

The next (third) part is on the 'Dimensions of the Mandate of the High Commissioner', in which she addresses a diversity of issues dealt with in and by the High Commission and its various associate bodies. It is a heterogeneous assemblage of themes that she – and her ever-present editor- have put under this general heading, including human rights defenders, economic, social, and cultural rights, the right to development, children's rights, minorities and indigenous peoples, human rights after conflict, and business and human rights. Yet, all these themes share the common ground of again being innovations, inroads and advancements on top of the more established human rights canon. With regards to human rights defenders, the 1998 Declaration on Human Rights Defenders fell into the early period of her term, and, it would appear from her speeches, corresponds with a deeply-felt personal sympathy with this group of people, with whom she enjoyed close and constructive working relations throughout her mandate – a fact no doubt brought about by her own background as a life-long human rights campaigner. This proximity also made her an early and forceful spokesperson for their special protection when the then incipient 'war on terror' began threatening some human rights activities and activists. Similarly, Robinson has been an ardent defender of economic and social rights, and the related right to development and its interpretation in light of the so called 'rights-based approach to development', as well as of the social (rights) responsibility of businesses. Indeed, it is probably fair to say that, next to the Durban process, issues related to the bringing together of human rights and development have received Robinson's most sustained attention, especially if one includes among these efforts her front-line engagement in the mainstreaming exercise. Her basic premise seems to have been that the "gap between the language of recognition and the reality of respect of these rights" (p. 115) needs to be urgently bridged and she has concentrated a good part of her efforts to that end. The two landmark steps within this broad thematic field, the Global Compact and the Millennium Development Goals (both of 2000), were among the fruits co-seeded by her. Both on the themes of human rights education and children's' rights, Robinson did not shriek from taking on governments for either not realizing the immense benefits (of the former), or not having acted to put into practice their own earlier commitments (in case of

the latter). On indigenous peoples rights, she struggled for their recognition within the Durban process and kept on the pressure to fully recognize these arche-typical third-generation rights. Finally, on human rights after conflict, the collection shows how Robinson reaffirmed OHCHR's commitment to a significant field presence in peace operations as a second, non-development element of the mainstreaming effort.

The book then moves on to its fourth part, on 'Building Human Rights Protection' which brings together her reflections on the UN's human rights machinery and on their relationship with national human rights protection mechanisms. Although formally split into four distinct chapters, this part really corresponds to a general treatment of the nature and functioning of international and national human rights protection. Starting with Robinson's many reflections on her own office and its impossible mandate to "protect and promote all human rights for all",<sup>3</sup> she moves on, via her diverse comments on the existing treaty- and charter-based mechanisms, to statements concerning again the ever increasing field presence of the OHCHR in many countries and regions, as well as her office's role in the setting up of national human rights institutions under the Paris Principles.<sup>4</sup> A number of cross-cutting currents emerge from this vast array of issues, institutions, and operational theaters, notably her ever again articulated concern for the human rights and development nexus, frequently linked up with the OHCHR field presence in volatile regions and peace operations; and her special concern for children, whether in relation to poverty or to armed conflict. In addition, this part also contains her innumerable reactions to the grave human rights and humanitarian crises that coincided with her term, from events in the Democratic Republic of Congo and Burundi, to Chechnya, Kosovo, East Timor, Sierra Leone, and the Middle East, to the September 11 attacks. While it is, in the end, difficult to connect all these issues with each other, or to see how the current UN machinery, for all the improvements implemented or at least brought under way during Robinson's term, could possibly address them all in a remotely adequate way, her apparent motto to be 'a voice for the voiceless' (p. 209) does provide a reassuring guiding thread.

Finally, the book's fifth and last part seeks to deal with what Robinson –and Boyle– see as the Continuing Challenges of international human rights. Its three chapters can be taken to stand for three formidable tests both of the international human rights movement, and of Robinson herself. The first chapter, 'Mainstreaming', as a crucial element of the larger project of UN reform, is a mighty internal task and has been her initial challenge as High Commissioner. 'Terrorism, Peace, and Human Security' is, in turn, perhaps, the principal and most serious threat to human rights in today's world, and it came to be her last great challenge as UN human rights chief. The third chapter, 'Ethical Globalization', is a challenge because it transcends both the ambit of human rights and the duration of her term of office, being, as it were, her principal

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3. Extract from OHCHR's Mission Statement, available at <<http://www.ohchr.org/english/about/mission.htm>>.

4. Formally known as the Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights, A/RES/48/134, 20 December 1993.

post-OHCHR project as a now 'private citizen' (p. 354). As for Mainstreaming, it is, perhaps, one of the most frequently used, but still least understood concepts in UN circles, and Robinson's reflections on three 'mainstream' fields, notably development, peace operations, and environmental protection, sketch out in relatively clear terms what she understands the mainstreaming agenda to contain. It is, in the first place, a new perspective which sees "human rights as both a means and an end" (p. 301) whatever is being 'mainstreamed'. This, in turn, implies certain core features that are associated with rights-based approaches, such as accountability, empowerment, or transparency, as elaborated by Nobel-laureate Amartya Sen, and subsequently adopted for UNDP's *Human Development Index*. Her response to the terrorist conundrum, in turn, are again forward-looking. Condemning in the strongest terms the attacks of September 11, she nonetheless disagrees with Michael Ignatieff's pessimistic statement that "the question after September 11 is whether the era of human rights has come and gone".<sup>5</sup> Instead she immediately attempts to place terrorism into a larger human rights context, pointing to preventive strategies, the need for development in the geographical cradles of terrorism, and endorsing the conceptual attempt to wrest away security from the war-mongers by adding the prefix 'human' to it and making it a more comprehensive way of thematising human society. Indeed, it is 'human security' thus conceived that is to be gained on the battlefields of "deprivation and denial of rights" (p. 337). Lastly, she has made an Ethical Globalization project the main concern of her life after the High Commission. It again brings together some of the issues and positions that she addressed in her High Commission years, notably, development and business ethics, and introduces a new concern, the international trading system. All three chapters are joined up in her idea of 'ethical globalization' which, to her, is "our best hope for building bridges of respect and understanding between people of different cultures, traditions, and walks of life" (p. 349).

This concludes the substantive part of the book, and Kevin Boyle then gracefully drops the curtain with Mary Robinson's Farewell Speech to her Geneva staff, and Louise Arbour's short but succinct Afterword. In all it is a remarkable book, a panorama view of the world between 1997 and 2002, an inadvertent but very useful human rights encyclopedia, a piece of biography, and a grand plea for human rights. Hence, *A Voice for Human Rights* is, perhaps, after all, not such an unfitting title for this book. As its author and protagonist puts it in her Farewell Speech: "it is a time for those who believe in human rights to keep their nerve" (p. 351). She has certainly kept hers!

*Florian Hoffmann\**

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5. Michael Ignatieff, "Is the Human Rights Era Ending?", *The New York Times*, 5, February 2002.

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