# Meeting 4: Can human rights make aid agencies more accountable?

Speakers: Peter Uvin, Fletcher School, Tufts University
Owen Davies QC, Garden Court Chambers

Chair: Sheelagh Stewart, UK Department for International Development

**Meeting Summary**

The first speaker, Peter Uvin, stressed that for something to be a right it must be socially guaranteed. This guarantee can be provided by social and political arrangements as well as through the law. He then outlined a four-part typology describing how development agencies engage with human rights, including: rhetorical repackaging; conditionality; positive support; and a rights-based approach. Uvin concluded by suggesting three fundamental ways that a rights-based approach contributes to development practice and objectives, by: helping to create institutions; providing new ways of seeing and talking; and assisting in getting processes right.

The second speaker, Owen Davies, examined how the courts can be used to increase legal accountability within the development arena. Davies discussed the limits of human rights law, including the European Convention on Human Rights, but argued that it was possible to increase the accountability of aid agencies by means other than a direct human rights challenge. He used the Pergau Dam Case to demonstrate this. He concluded by suggesting that it may also be possible to use international human rights law to hold domestic agencies to account.

The discussion revealed agreement regarding the importance of building institutions and establishing processes to guarantee rights in low-income countries. Within a rights-based approach, it was felt that there is a tension between the claim that 'process is everything' and advocating that aid agencies should use their relative power to achieve results. The importance of domestic accountability processes was highlighted; but so too was the need for increased accountability within aid agencies themselves. Are aid agencies also duty bearers? The possibility of using non-UK law was discussed, including in relation to the humanitarian agenda.

# Peter Uvin

First of all, I want to say that, in this debate, it is very important to realise that having a right is not the same as having enough of something. For example, having the right to food is not the same as having enough to eat. We can follow Henry Shue in this respect in saying that, for something to be a right, it must be *socially guaranteed*. He defines a social guarantee as the social and political arrangements that exist in order to be able to enjoy the substance of a right, particularly something that is not in one's own power to arrange. I do not know if this is the best definition but the notion of social guarantee is critically important.

Evidently the law is a great way to create guarantees, at least if it is enforced, but it is not necessarily the only way. Societies contain many things that are not written down in the law but, instead, follow from jointly-shared values, such as norms at the level of the family, community or country, or guarantees that come from organisations that have certain mandates. So the law is one, but not the only, way to provide the social guarantee that I would consider to be a right.

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In my recent book, *Human Rights and Development*, I look at what happens when development folk start taking rights seriously and I distinguish between four levels (Uvin, 2004):

i. rhetorical repackaging;
ii. conditionality;
iii. positive support;
iv. a rights-based approach.

## Rhetorical repackaging

The first, and most popular, level at which the development community engages with rights is to basically say that whatever they were already doing was human rights work. I can find numerous wonderful quotes from the World Bank, the UNDP and other development agencies that demonstrate this simple rhetorical repackaging. This comes partly from the fact that, in development, we basically compete for the moral high ground because we have no other way of competing with each other or of judging or measuring our effectiveness. However, it is quite evident that with rhetorical repackaging there is no particular change in accountability.

## Conditionality

The second level is where something may start actually changing. This is the level that most people would think of if they were asked, 'what would it mean to take human rights more seriously in the practice of development?' Most would spontaneously think of conditionality. Who do we *not* give aid to? When do we start twisting arms, and whose? Generally it is assumed that there is quite a lot of power in conditionality, particularly in aid-dependent African countries.

However, aid conditionality is, by and large, now considered to be a failure. The evidence suggests that, after twenty years of trying, even the strongest type of conditionality – economic conditionality exercised by the Bretton Wood Institutions, which have power, a clear agenda and the world's banking system behind them – has not worked. I believe that this is even truer of political conditionality, that is, human rights conditionality.

There are four issues relating to the failure of conditionality:

*i. It is unethical*.

*ii. It is never fully implemented*. Even if we say that conditionality is a good thing and that it has been well designed, it is never really applied for all kinds of reasons. It may be that a country has other interests and goals that conflict with human rights and which result in different types of assessments. There can also be 'good' as well as 'bad' reasons to explain why conditionality is never fully implemented. For example, all players in a country may share a sincere desire to promote democracy and peace but they may differ on how they think this can realistically be achieved. In many countries, there may not necessarily be a clear understanding of what is going on. For example, in Rwanda it is by no means clear that there is much agreement about recent trends, opportunities or margins for manoeuvre, even between those who share the same aims. So, different assessments can also explain why countries apply conditionality differently. Furthermore, when they do, they tend to undermine each other, dramatically limiting their impact, as was the case in Rwanda.

*iii. It does not produce the desired results*. Even if countries are working together to apply pressure to a government, the results are often temporary. They reflect merely strategic compliance. The government pretends that it agrees but what it is doing with its right hand, it is often undoing with its left. This is to be expected because the types of things that we try to affect through human rights conditionality are some of the most complicated and deep social dynamics, which are not typically amenable to influence through short-term external pressure. If such dynamics do change, it is because of internal changes in power, interests, preferences, ideologies, and so on, which do not usually happen in relatively short bursts.

*iv. It destroys that which it seeks to achieve*. It has been argued that an even more detrimental impact of conditionality is that, not only does it not produce the desired result, it actually produces results counter those sought. It creates a situation, for example, whereby the important issues are decided through dialogue between governments and foreign donors rather than between governments and their own citizens, which is the level it should occur at if it is to be consistent with human rights and systems of domestic accountability

and representation, etc. Instead, conditionality creates externally-dominated relations of governance.

Therefore, for all these reasons, conditionality does not actually work. It is a dream, a desire for short cuts and absolute power. It is a beautiful, alluring idea that we can use 'our' money to buy social outcomes, and it does not work. The situation is made more difficult still because human rights are indeterminate. It is relatively easy to know when they have been violated but it is much harder to know when progress is being made towards meeting them. What shape ought human rights take in a particular society? What does it mean to be 10% better on rights today then yesterday? Of course, nothing happens suddenly and completely in either developed or developing societies. So how do we know if we are moving forward?

It is also difficult to judge whether there are margins for manoeuvre. Is the progress being made in a particular place good progress? Could more have been achieved given our starting point? (This is important if we are to be realistic.) Human rights conditionality is often over-sensitive. For example, during the past ten years, every single report about Rwanda by human rights organisations has consistently advocated increased pressure and the termination of aid. However, if aid had been cut off in 1995, we would not have much leverage today.

Alternatively, the trigger for conditionality can be too insensitive, in which case agencies are looking at absolutes that they truly consider to be their bottom line. This may not be a bad idea. It is certainly a more realistic way of maintaining relations. But then, of course, this would be unacceptable to the human rights community because, in order to have a bottom line that everyone can agree on, it is likely to be one that is very low indeed and it may not look consistent with human rights at all. I think that a bottom line is important, not necessarily because it can be used to change a situation (because, as I said, I do not believe that conditionality produces results) but because we all have a point at which we no longer want to be complicit, whether this is as a donor, an agency or an individual. I think that it is more of a personal statement of the point at which you say, 'no, I am not working with them or on this anymore'. This is not because you think that this will change what is happening but because there is a place for principle.

Therefore, we need to make complicated judgements that necessarily appear *ad hoc* and for which, in its absolutism, the human rights edifice is totally unprepared. The human rights edifice does not enable us to make choices between human rights, to judge little bits of progress or to make trade offs. These things are ill-suited to an ideology that is beautiful but absolute.

Supposedly, people are now thinking of more participatory partnerships and instruments (and these are particularly popular in the UK). For example, some people are pushing for PRSPs to have a bigger human rights component – the idea being that, if there is a broad consultation around the PRSP involving both the government and civil society, we may be able to overcome some of the weaknesses attached to conditionality that were previously discussed.

Memorandums of Understandings (MoUs) are similar tools, whereby donors make a partnership with a recipient country and say, 'we are in this together for the next 10 years, for the next 20 years potentially. Let's agree on some joint benchmarks. You tell us what goals you want to reach and, in return, we will really stand by them'. I have not seen such MoUs work. It is very difficult to terminate assistance, even under the conditions of the understanding, because such a large amount of political capital is invested in creating them.

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## Positive support

The third level of donor engagement with human rights is what I call positive support. It is at this level that an agency will start spending some real money on human rights. I will not say anything more about positive support as I could talk about it for three hours and still only have scratched the surface.

## A rights-based approach

The fourth, and final, level is what one could call a rights-based approach. It is at this level that a new paradigm is supposedly developed – where rights and development become so integrated they are like different strands of the same fabric. It is at this point that we no longer need to instrumentalise one for the other. They are the same. We can understand this to mean two things:

*i.* *Different aims* are set for aid: charity becomes a right; beggars become claimants, as it is so often said; aid now focuses more on structural and political aims.
ii. Not only are different aims set but also *different processes* are used to reach those aims. The process should also conform to human rights, which clearly means a more critical attitude about what we are willing to accept and how you should behave to reach certain goals.

I want to approach this differently by saying that a rights-based approach to development might mean three things. It is a way of:

i. helping to create institutions (this is the most important);
ii. seeing and talking; and
iii. getting processes right.

Firstly, let us simply state that we all agree (or at least I hope we do) that development and development co-operation is about building institutions. It is not about money, needs, economic growth, or seeds and trees. People can do these things. They really can find their own seeds – that is not the difficult part. The really difficult thing is getting institutions right. However, the problem in many countries is that an

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institutional set-up exists that produces extremely sub-optimal outcomes. I have just returned from a few weeks in Burundi, where the talk is about needs and the money and investments that are required to meet them. But the real problem with Burundi is that it has a set of institutions that systematically create incentives to cheat for all people (from the very poor to the very wealthy, with the latter of course being much better armed in this struggle), to not trust the system, to enrich themselves before it is too late, to not believe that tomorrow could be like today and, hence, to protect themselves in advance against it, and so on. What we therefore need to do in a country like Burundi is to work on institutions.

How do we talk about creating institutions to Burundians? How do we even sell it to a donor? There are major issues of communication. How do we start considering institutional change with people who are stuck within those institutions? There are also major issues of strategy. Which institutions do we start with? What should they look like? There are issues of tactics. Where do we start? Are there windows of opportunity? What will be fastest? Where will we see some change? And then there are questions of ethics. Who has the power to engage? Who sets the agenda? If we use power, how do we use it intelligently?

These things make development very difficult and it is for this reason that it is much easier to talk in technical terms. This is tough stuff to talk about and, I think to some extent, that human rights provide us with one possible language. It is a language that is clear and translates quite easily across countries. It does have its fair share of problems but most people, in most places, recognise human rights quite easily and find them desirable. The language of rights can be used in discussions at all levels and people will understand. People also have a strong sense of where they would like to start, of what they consider the most important, the most pressing constraints and blocks.

I also think that the human rights vision can, to some extent, allow us to address communication, tactical, strategic and, even, ethical issues. It is a vision that can tell us about both legal and non-legal socially-grounded mechanisms for change. It is able to address all sorts of national-level legal work and also, what Laure-Hélène Piron called, the 'social mobilisation' part. And even from within, in the sense of looking at our own agencies, the accountability focus of human rights keeps us self-critical and on our toes. I think this is therefore the advantage of human rights. It is a small one, an instrumental one but, nonetheless, it is an advantage.

Secondly, human rights can be used as a heuristic device. For example, if I go to a village in Burundi and ask people the question, 'how can food production be increased here?' or 'how can we work with you on creating a right to food?' the answers will be very different. Some might be the same – about markets and prices – but others will, quite clearly, be different. Therefore, using human rights language is basically a different way of talking about what we do. It allows us to use political language without being overly interventionist. So I believe that a rights-based approach is not merely about legal claims and abstract categories of rights; it is more a tool that can crystalise the moral imagination.

Thirdly, I believe that process is everything. This is partially related to what I said earlier about institutions. We do not really have much to give in the business of development; we have a little money, a little concern, we work in a few places. These are not going to solve the problems of poverty and exclusion worldwide. They are not going to conquer problems such as hunger and discrimination. At the best, what we really have are policy experiments that allow us to learn from certain ways of doing things and to talk to people about new ideas about how to do things better or more efficiently. So, it really is process that is crucial, not solutions or outcomes, and human rights allow us to think about process more intelligently and much more critically. Human rights raise the bar of development practice.

# Owen Davies QC

In the long line of distinguished speakers that have appeared in this series, and that will appear, I do not think there is anyone amongst them who is a jobbing lawyer like I am. I have just come from the Old Bailey, where I was defending somebody for murder, and I will return there as soon as this is over. I also do not think it would go down awfully well if I was to address the judge with respect to a right that I say my client has and said, 'M'lord, it is not in order to enforce this right, it is just to crystalise your moral imagination'. The point that I want to make is that there is an aspect to the argument that is very practical and I am, what I consider to be, a practical lawyer who has some experience in using the law in the furtherance of laudable motives.

It is particularly good to see on the attendance list the wide variety of interests that are represented today. I want to bear this in mind because, ultimately, the only aim that I have in coming here is to increase awareness of the opportunities for legal accountability in your areas of work and the possibilities of utilising legal challenges. Of course, you are all working in the area of what we would call human rights. Human rights may not be well defined in terms that are either directly enforceable or indeed recognised as stand-alone rights but the point that I want to make is that there have been good examples in this country and abroad of practical measures that seek to use the courts as a focus for argument and to call agencies to account.

## Increasing accountability through legal challenges

I may have been invited here because, exactly 10 years ago, I was sitting in a little room in Kings Cross with members of the World Development Movement. They had a problem with a dam that was going to be built in Malaysia, the Pergau Dam, which, on the government's own reckoning, were it built with British overseas aid, would have made Malaysian people pay US$100 million more than was necessary for their electricity over the 35-year life of the dam. It is 10 years since that case was decided and it was of the greatest embarrassment to the government at the time (and anyone who wants to read how embarrassing it was should read Douglas Hurd's autobiography where it features very largely). But, as far as I know, this has been the only case where, in relation to aid being given to another state, there has been a successful challenge to the way that money was being, or was proposed to be, spent.

The point that I want to make is that there are agencies, such as Save the Children or Greenpeace, who in the appropriate circumstances have been able to use legal challenges to produce dramatic results. Otherwise, I would not be in this business. The Pergau Dam case, as I understand it, immediately released £316 million for the world's poor that was to be spent on the erection of an irrelevance. The only thing that I got out of it was a t-shirt and I wear it with pride. And, it seems to me, that it is astounding to think that in the past 10 years those of us who operate in this area have not been approached with the possibility of making a similar challenge. Sometimes the advice would need to be, 'forget it'. Sometimes the advice would be that this is not really about that but we could do this. It may appear that there is human rights challenge, and there may well be a human rights challenge, but it may require a different approach than the law to actually put it in its strongest way.

## The limits of human rights arguments

Now, in order to explain simply the issue at hand, because ultimately the most effective things are extremely simple in my experience, it is quite evident that I know more about law than I do about development. So my perspective is of a different nature. The first point that I want to make is about the limits of human rights and the care with which we ought to adopt a human rights argument.

For instance, the King of Greece brought a case in relation to what he claimed was the unlawful taking of his property – a number of large houses or palaces in Greece that the government succeeding the fascists had taken in order to put to public use. Now the arguments that he deployed were human rights arguments. He put these arguments to the European Court of Human Rights in Strasbourg and won on the basis of asserting his human rights, even though the property that had been taken from him had been taken by a democratic state for the use of its people. The human right that he relied upon was the First Protocol of the European Convention on Human Rights and his property was returned. Now we may not like that. We may think it is not the sort of right that we are talking about but it is a human right. The right to the peaceful enjoyment of our property (Council of Europe, 1950: Art. 1).

The second point arising out of this is that, very frequently, the areas that you are working in depend upon conflicting human rights. On the day after the Iraqi elections, who will be able to say whether the proportionate expenditure of UK public money has been properly spent in securing political rights for Iraqis in relation to the amount of money that is being spent to prevent the decimation of people in Africa through disease and hunger? Some rights are political and others are economic and social and there can be difficulties if a person asserts one right and then finds that it conflicts with another, which may be the right to not live in poverty.

## Using 'hard' and 'soft' law

My primary interest is in accountability. I take it for granted that we are endowed with human rights but that sometimes we may have to think in terms other than human rights law in order to assist the cause of development. It is important to understand the distinction between what

practising lawyers call 'soft law' and 'hard law'. If there is a statute that outlines what a government may, or may not, do, that is called hard law. If there is a Convention, a Declaration of the General Assembly or something that has otherwise not been made part of our law, then this is generally speaking soft law. It can include fairly important law but, if a lawyer went to Mr Justice at the Old Bailey and said this is what the law says and it is a Declaration of the United Nation's General Assembly, he would say, 'go away'.

So, to illustrate this point, before the present government incorporated the European Convention of Human Rights (ECHR) into domestic law, the convention was soft law and was therefore not directly applicable. In the years leading up to its incorporation it could be looked at for assistance in interpreting an Act of Parliament that was otherwise ambiguous or incomplete but, once it was incorporated into our law, it became hard law. So when we are considering human rights accountability and a decision that we may not like, or a decision we would like to have made, we need to look at the distinction between hard and soft law. Hard law is much easier to enforce than soft law.

## The European Convention on Human Rights

If we are talking about human rights, so far as it is hard law that is now part of the law of this land (so-called Black Letter hard law), we would now include the ECHR or the Human Rights Act. However, there is wide misunderstanding about whether it can be used by us as an agency in relation to conduct outside this country. The fact is that there are two things that limit the usefulness of the ECHR:

i. Article 1 limits the observance of rights to essentially the jurisdiction, that is the territorial boundaries, of the states in question.
ii. A distinction must be made between positive and negative rights and most of the rights in the ECHR are negative rights.

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Negative rights are very different to those that development actors are interested in, which are positive rights. Development professionals may want to say, 'this man has a right to education, this is the way in which we wish to observe it, this is the agency that is supposed to be doing something about it and this is why we are holding that agency to account and how'. And, as soon as we arrive at a position where we are saying that we are interested in positive rights and their enforcement outside our country, we are, I'm afraid, generally speaking in the area of soft law.

## Using legal challenges to increase accountability

The Pergau Dam case was a government decision to grant a lot of money for purposes that the government's adviser, Permanent Secretary Sir Tim Lankaster (who is the hero of this whole case), described in this way: 'Supporting the project with aid funds would not in his view be consistent with policy statements by Ministers to Parliament about the basic objectives of the aid programme and the way aid funds are managed, which is also the context in which Parliament voted aid monies. Nor did the project meet well established criteria by which public investments should be assessed...' Now it is that decision, or that advice that was followed by the decision in question, that gave rise to a true issue of accountability. It was done in legal terms and it succeeded. Look at the Overseas Development and Cooperation Act (1980), which is the statute under which the provision made: '1(1) The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature'.

The World Development Movement was advised to put forward a challenge on the basis of a straightforward statutory construction case and it succeeded. So, first of all, it may well be that an imaginative tangential challenge in relation to accountability may be more appropriate and effective than the obvious one. Secondly, people who represent pressure groups or independent NGOs now have the standing to bring these challenges to court. Since the Greenpeace and the World Development Movement cases, the government can no longer say that agencies cannot argue these cases because, if not the Save the Children's Fund or the Anti-Slavery Society, who can challenge the way that our public authority is spending money purportedly in pursuance of legitimate objectives. And the third point is that it was not actually possible at that time to make a challenge in terms of human rights.

Now this brings me to the point that I want to make in relation to jurisprudence. In the run up to the final incorporation of the ECHR, we often argued ECHR points in order to assist judges in shifting interpretation towards European human rights jurisprudence. That is no longer necessary. However, I happen to think that if the Pergau Dam case or something similar arose now (and supposing that Sir Tim Lankaster had not said that this is not economic but we were able to furnish evidence to show that aid was not actually fulfilling the objectives of what is known by development), we might be able to use quite a lot of soft law to say what development means. If we were able to demonstrate that what aid is being spent on does not come within the meaning of development, we may well be able to persuade a court that it was not in fulfilment of a statutory objective. Therefore, if I have expressed the negative side of the use of human rights, there is of course the other side of the coin – that the possibilities to which judges are open are boundless nowadays and I would encourage development professionals to approach well-disposed lawyers to argue your cases. Thank you.

# The role of human rights in promoting donor accountability

*Laure-Hélène Piron**

## 1. Introduction

The aid industry is characterised by a serious deficit of effective accountability mechanisms, in particular to individuals and communities in countries that receive assistance. Power relations between recipient governments and donor agencies are highly unequal. There is often a lack of transparency with regards to how aid agencies allocate financial resources, set priorities, and assess performance, and little information about the kinds of actions they take to hold individual agency staff to account and provide redress for failed projects or wider negative impacts.

This background paper examines the extent to which human rights can be used to hold aid agencies to account in a meaningful way. The focus is on bilateral and multilateral organisations providing development aid.[1] Human rights accountability can be understood in a narrow or broader sense. It can be taken to mean accountability through the use of established human rights mechanisms, at the international, regional or domestic level, focusing on agreed human rights standards. However, given the ongoing legal debates as to the extent to which aid agencies can be said to be legally obligated under the human rights framework (e.g. issues of extra-territoriality or restrictions on the mandate of the international financial institutions), this paper principally examines non-legal channels of accountability. Human rights-based approaches can make a contribution to mainstream accountability frameworks, for example by complementing financial or macro-level results-based orientations with a concern for impacts on individuals, or by the effectiveness of redress mechanisms.

Aid agencies can be held to account for the processes they follow and the outcomes to which they contribute. For example, it is now widely accepted that they need to adopt participatory processes and minimise the negative impacts that the interventions they fund might cause. Human rights can add another dimension to internal guidelines or policy frameworks, for example by making it clear that non-discrimination is not only instrumentally valuable, as it can help contribute to poverty reduction, but also of value in itself and that aid agencies can be held accountable on this basis.

Aid agencies accountability frameworks operate at several levels. First, there is domestic accountability to taxpayers (for bilateral aid agencies – and indirectly for multilateral agencies through funding received from bilateral agencies) or to shareholders (for international development banks). For example, the UK Secretary of State for International Development is accountable to Parliament, and thus the electorate, for the use of public monies. Although this dimension of accountability is not the main focus of this paper, it is by far the most powerful and can be used to strengthen the other dimensions discussed later. Secondly, accountability can be towards the recipients and beneficiaries of aid, such as governments that receive loans or grants and individuals or communities that benefit from projects or policy reforms. This channel of accountability tends to be underdeveloped, and human rights can play an important role here. This is the main focus of the paper. Thirdly, agencies can be held to account by their peers and the international community more generally, such as through peer reviews of the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD) or pressure to achieve the Millennium Development Goals (MDGs), as in the current MDG review process.

## 2. Domestic donor accountability

The formal accountability of governmental agencies can operate at several levels (Macrae et al., 2002: 48):

- *Political/strategic*: executive to electorate, for macro policy objectives and overall allocation of aid resources.
- *Legal*: under domestic or international law, but this depends on the law being clear and setting obligations that can be acted upon.
- *Managerial*: civil servants to ministers for delivering on macro-level objectives.
- *Financial*: civil servants to ministers for the use of public resources in policy implementation.
- *Contractual*: contractors/implementers to aid agencies for delivering a programme under the terms of the contract.

Informal accountability channels (through the media, NGOs, academics, public opinion) can also play a role, but mostly as correctives to the other dimensions. Whether or not agencies have adopted human rights policies (and are serious about implementing them), and whether or not human rights and other international mechanisms have rendered judgements on particular situations, these public accountability mechanisms can use human rights norms to assess the performance of donor agencies. For example, there can be public outcries at the lack of action to prevent or stop genocide or deaths on a massive scale, as in Rwanda in 1994 or in Darfur currently. Action could be required by UN Security Council resolutions and entail responses beyond the responsibility of aid agencies. However, the lack of appropriate or effective steps taken by aid agencies in these situations is still morally unacceptable. This accountability will, however, mostly be to the public of developed countries. As raised in another background paper for this series, the incentives of Western NGOs, for example,

may not always coincide with the interests of the poor in developing countries, as with environmental lobbies (Brown et al., 2005).

Political accountability depends on the nature of the political system within donor countries. Parliamentary accountability is, for example, possibly more powerful in the Netherlands than in the UK. This is illustrated by the case of Rwanda, where the Dutch Parliament plays a greater role in monitoring aid allocation and political developments. Parliamentary accountability can be responsive to informal accountability channels, for example, the role played by NGOs in the Netherlands to encourage debate on Rwanda.

Legal accountability depends on the strength and clarity of the legal framework governing aid agencies. Agencies can be held accountable under such frameworks, though these may not always include explicit reference to human rights as a statutory objective of development aid. However, legal strategies have been used on occasion to hold donor governments to account, as in the UK Pergau Dam scandal. Even if they do not explicitly use human rights legislation, such strategies can provide responses to human rights concerns (Davies, 2005). The situation is more complex regarding legal accountability under international/regional law or legal frameworks in recipient countries. It is clear that donor agencies should, at a minimum, respect constitutional, statutory or regulatory standards in the countries where they operate, and that these can include minimum human rights standards. Whether this obligation to respect recipients' frameworks is legal, rather than moral or good practice, depends on rules governing the operations of aid agencies overseas, including the application of diplomatic status. In some cases, standards imposed as a result of the donor country's own legal framework could be higher than those in the recipient country (e.g. possibly labour standards). A final challenge is the distinction between holding legally to account overseas (i) an agency in general (e.g. the negative impact of an aid intervention) or (ii) individual staff – for criminal and other acts both during and outside the course of their duties.

Within aid agencies, managerial and financial accountability are amongst the most powerful in terms of governing day-to-day decisions. Introducing human rights within policy frameworks, resource allocation criteria, guidelines, procedures and monitoring and evaluation systems is thus key in serving as an entry point for human rights accountability. High-level ministerial commitments to human rights, or external NGO pressure, may have relatively limited impact unless officials within aid agencies know how, and are incentivised, to respect and promote human rights. For example, in 1998, the Swiss Agency for Development and Cooperation (SDC) adopted 'binding' human rights guidelines. The practical meaning of the binding nature of the policy was neither clarified nor translated into new procedures. The guidelines were also not disseminated in a way that facilitated operationalisation. As a result, they provided a rather weak accountability mechanism (Piron and Court, 2003).

The main challenge is that other policy frameworks often dominate internal incentive structures. For example, the achievement of the MDGs and the disbursement of increasing level of aid drive the internal incentives within the UK Department for International Development (DFID). Whereas a concern for monitoring impacts on the MDGs can be found through the 'cascading' results-based management system (Public Service Agreement, Service Delivery Agreement, Directors Delivery Plans, Regional/Country Assistance Plans), human rights commitments are rarely explicit and may often depend on staff capacity and interest at the country level, for example to tackle social exclusion in Latin America or Asia programmes (Piron and Watkins, 2004).

At the strategic/political level too, human rights constitute only one aspect of the domestic accountability framework guiding aid policies and implementation. Since the adoption of the 'war on terror' in particular, security and anti-terrorism concerns have influenced aid policies more explicitly. In countries such as Nepal or Uganda, donors have been involved in providing military assistance, theoretically to assist in resolving internal conflicts, sometimes through their aid programmes when legal and policy frameworks permit it. This is now associated with countries adopting restrictive legislation and policies limiting civil liberties in the name of fighting terrorism – on the part of both donors (such as the United Kingdom or the United States) and recipients (in this example, both Nepal and Uganda).

However, whether or not agencies have adopted explicit 'human rights-based approaches', the governments to which they provide assistance are themselves bound by their own human rights obligations. The current shift in the aid discourse, towards partnerships and national ownership, thus potentially provides the strongest entry point for human rights accountability: assisting partner governments in meeting their own human rights commitments rather than presenting it as an external requirement of aid agencies or the Western public.

## 3. Government-to-government accountability

Putting partner governments in the driving seat

Traditional approaches to aid management have prioritised accountability to donor agencies on the part of the recipient governments, or the contractors that deliver an aid intervention (e.g. technical cooperation officer, NGO or private sector company implementing a donor-funded project). Accountability of the contractors and aid agencies to recipient governments

has tended to be weaker. Recipient government accountability for the use of donor resources to their own populations as the ultimate beneficiaries of aid can also be weak.

New approaches to aid are aiming to put developing country governments at the centre of the accountability frameworks so that they effectively become in charge of the use of aid resources. This has inspired the shift to aid modalities, such as general budget support or poverty reduction strategies, meant to enhance recipient country ownership. De-emphasising accountability to donors so as to reduce their influence has become an objective, and the discourse is shifting towards one aiming for 'partnership' among more equal players with shared commitments (see, for example, UN, 2002 or DAC, 2005).

This current policy environment is, as a result, highly compatible with the human rights framework under which accountability is principally one of governments towards their own citizens, rather than focusing on the (contested) legal human rights obligations of aid agencies. For example, pooled, predictable funding channelled through government systems can make use of domestic accountability structures (such as elections, domestic audits, local committees) and 'provide the basis for government to start offering some services (for example, primary education or a public works programme) on the basis of rights' or universal, credible benefits which only the state – not aid agencies or NGOs – can provide (Uvin, 2004: 107). The main challenge is that reforms to improve aid effectiveness have tended to be rather technical, focusing on improving public expenditure management or policy-making capacity, and have not always put human rights commitments as a central part of national ownership (Piron, 2004a).

**Moving away from negative conditionality…**

Human rights commitments of recipient governments and donors have tended to play a limited role in the design and monitoring of new aid modalities, in part because human rights tend to be viewed as principally introducing 'negative conditionalities' which go against a relationship based on partnership and ownership. Policy or political conditions are often attached to aid, so that donors can account to their domestic constituencies for the use of resources. Human rights clauses and other mechanisms have been used so as to provide for political dialogue and the eventual suspension of aid when governments commit serious human rights violations. This is the case under the Cotonou Agreement, for example, where human rights are considered as an 'essential element' of the treaty and thus of the partnership between Europe and African, Caribbean and Pacific Countries. Article 8 provides for political dialogue, whereas Articles 96/97 provide for suspension as a last resort (Cotonou Agreement, 2000). Given the fungibility of aid, and the political sign of support to a regime provided by large aid programmes, donors are under pressure to terminate aid relations (or only use non-state channels) when serious violations are committed. This is one of the three reasons why aid might get suspended under the recent UK policy on conditionality (DFID et al., 2005: 3). Although aid agencies will argue that they cannot be directly held responsible for the actions of recipient governments, they do recognise the role that they can play in supporting such governments. The genocide in Rwanda, for example, prompted SDC to reflect on its high level of assistance since the 1960s and its limited responses to the deterioration in the pre-1994 situation (Voyame et al., 1996).

While negative conditionality can play a role in preventing an association with rights-violating regimes, recent studies of the application of policy and political conditionalities have shown their limited effectiveness, in particular when they are simply considered as 'sticks' to influence government behaviour (Piron and de Renzio, 2005). The wide range of incentives at play, the weak and partial nature of the measures imposed, the lack of coordination and consistency, and the potential negative impacts on the poorest in society have meant that the application of conditionalities has often not led to the intended results. It is now recognised that there is a need to mix positive incentives and negative signals to constitute credible and consistent longer-term strategies, based on dialogue and supporting positive reform efforts, rather than the blunt application of sanctions. This requires donor agencies to develop new skills and incentive structures, based on a proper understanding of domestic politics, agreement with partners of the boundaries of acceptable behaviour, and the ability to engage in complex dialogue, rather than going to the extremes of abrupt suspension of aid or turning a blind eye to human rights violations (ibid). In this 'post-conditionality' approach, human rights have a role to play as part of political dialogue, both by setting some minimum standard for 'principled behaviour' by donors (Uvin, 2004: 172), as well as by recipients, but also by supporting change in a positive manner.

The effective use of 'positive conditionality' can serve to hold aid agencies to account, including through the use of the 'new' aid modalities. The starting point would be a greater understanding of the role that human rights can play as part of a nationally owned agenda on the basis of which aid interventions can be designed. There is a strong congruence between human rights associated with participation and the emphasis on country ownership requiring broad-based participation in the development of poverty reduction strategy papers (PRSPs) on the basis of which aid is increasingly provided, so as to promote ownership beyond the executive and also to take into account the priorities of legislative or decentralised structures or civil society representatives. Improved understanding of the context within which aid is provided has encouraged donors to undertake political economy studies (such as DFID's 'Drivers of Change' work), which can potentially include assessing the level of commitment towards human rights and identifying the role that human rights movements or accountability structures can play to support pro-poor change. Instead of (possibly naively) assuming that recipient governments can be effectively motivated because they are under a legal obligation to respect, protect and fulfil human rights, such assessments can help

identify constraints within bureaucracies and society at large, and positive entry points to promote change. Indicators of human rights commitment, rather than a focus on outcomes, would be a useful adjunct to such studies and allow donors continuously to assess the context of their interventions.

Human rights considerations can also have a positive impact on the level of aid provided. For example, serious domestic shortfalls in funding social programmes contribute to governments' inability progressively to improve the realisation of economic and social rights; donors have a role to play in increasing the volume of available resources (UN, 2002). Sector-wide approaches or general budget support have been used as a way of scaling-up aid; they have tended not to include explicit human rights or social exclusion concerns, but can be used creatively to do so (Curran and Booth, 2005). Policy-oriented support can also form part of an aid package and be used to improve the domestic targeting of resources, so that the needs of vulnerable and excluded groups are given greater priority in line with the principles of equality and non-discrimination and the 'special measures' (such as affirmative action programmes) to compensate for past discrimination.

Although some donors have been keen to provide as much of their resources as possible through budget support, projectised aid still has a role to play in the current aid environment, for example in assisting in the mobilisation of social movements or domestic human rights monitoring projects. For example, in Uganda, DFID is providing the majority of its assistance through general budget support, but has also been a strong supporter of activities to enhance participation in the PRSP revision process, including some to promote the development of appropriate policies for pastoralists (Beall and Piron, 2004). Some human rights projects, however, may continue to reflect the agenda of donor countries, rather than domestic constituencies, such as the apparent focus of the European Foundation for Human Rights and Democracy on civil and political rights, including the death penalty, rather than economic and social rights. They may also lack enough flexibility to respond to emerging opportunities for change in a timely manner.

There is thus a range of ways in which human rights can be used positively in the allocation of aid resources and implementation of programmes, through both old and new aid instruments and modalities, and as a result serve to introduce human rights in accountability mechanisms at a policy/managerial level. They can contribute to building the capacity of domestic actors – both rights-holders and duty-bearers – and allocating funding so as to meet core minimum economic and social rights. There is still a place within this framework to use human rights to identify and mitigate the negative impacts of aid. Yet, this can also be rephrased in terms of whether aid helps governments meet their obligations, in terms of non-retrogression, non-discrimination and non-infringement of core rights, for example. Privatisation programmes or large infrastructural programmes financed by international financial institutions have been criticised because they facilitate governmental non-respect of fundamental rights (such as limited access to water if a fee is charged or forced displacement in order to construct dams). The response needs to be two-pronged. Donors need to develop appropriate policy frameworks to ensure that they are prohibited from funding programmes that would have massive negative impacts (e.g. criticisms of World Bank projects led to the introduction of a number of 'safeguard policies' in the 1990s). They also need appropriate internal managerial accountability frameworks to ensure that these policies are respected and the evaluation findings are implemented (e.g. adequate response by the Bank to the 2004 Extractive Industry Review). Yet, these policy frameworks should not be imposed in a vacuum: they need to be linked to the willingness and capacity of recipient governments themselves to respect, protect and fulfil human rights.

### ...towards mutual accountability

While the new approach to aid puts recipient governments at the centre of the accountability framework, including encouraging greater donor financial transparency, the question of the appropriate use of donor power is still not resolved. For example, a narrow interpretation of 'national ownership' (e.g. limited to ownership of a national plan by a ministry of finance) would not facilitate the use of human rights commitments as a starting point for aid discussions when governmental partners' own commitments to human rights are weak. Donors may then still be considered as pushing 'their own agenda' if they support human rights interventions outside the PRSP; they will be considered weak in terms of their human rights commitment if they ignore these issues altogether.

One suggested solution is the clear establishment of human rights as part of the fundamental commitment of both parties to an aid 'partnership' – donors and recipients – and facilitation of the development of mutual accountability mechanisms where roles and responsibilities of partners are clarified (Piron, 2004a). Such an approach can be found in the UK's new conditionality policy paper, where human rights are not only used as negative conditions on aid justifying suspension, but positively as underpinning the aid partnership (DFID et al., 2005:8). Examples of mutual accountability frameworks include the three separate Memoranda of Understanding signed between the government of Rwanda and those of the Netherlands, Sweden and the UK, which include explicit human rights commitments and benchmarks, and monitoring and dialogue mechanisms, in addition to the framework provided for under the EU Cotonou Agreement, in particular Article 8. In Mozambique, the government and a group of donors providing direct budget support consider commitments to peace and to promoting free, credible and democratic political processes, independence of the judiciary, rule of law, human rights, good governance and probity in public life, including the fight against corruption, (with reference to commitments in the constitution, NEPAD and international agreements) to be underlying principles of governance for the provision of budget

support (Government of Mozambique et al., 2004, emphasis added).

Such approaches could still be considered to be principally about 'negative conditionality', but they offer a starting point for engaging in dialogue based on explicit commitments, rather than what may be perceived as a one-sided application of standards and sanctions by donors.

In practice, these mutual accountability mechanisms may not yet live up to their intentions. Responsibilities and commitments of recipients are still more detailed and cumbersome than those placed on donors, and complementary actions required by donors to ensure that these new partnerships contribute to the realisation of human rights are often not taken (such as clear and implemented human rights policy frameworks and aid programmes designed so as to help recipients meet their own human rights obligations). The extent to which these mechanisms genuinely deliver greater accountability also remains an issue deserving of continuous monitoring. Challenges include the quality of the processes whereby respect for commitments are monitored, indicators set, and information collected and analysed, and whether the findings are taken seriously and do influence policy dialogue and aid decisions. In addition, the relative ease with which donor funds provided through general budget support can be delayed, cut and suspended, by comparison to projectised aid, undermines its strength as a new aid modality given the possible unpredictability of large flows of aid. This further increases the importance of transparent and well-informed processes in assessing whether the minimum conditions are in place for a new aid partnership and in responding adequately to respect for human rights commitments – or lack thereof (Piron and de Renzio, 2005).

Mutual accountability frameworks at the regional or international level also offer opportunities for enhancing (donor) government to (recipient) government accountability, rather than a narrow recipient-to-donor focus. In addition to various meetings discussing the implementation of the right to development, the UN human rights treaty monitoring bodies are now starting to ask questions to donor governments about their aid and recommending that states ensure that 'international cooperation contributes to the realization of the rights recognized in the Covenant' (UNCESR, 2004a: para 27). For example, a comparison of the UN Committee on Economic and Social Rights concluding observations on Denmark and Spain in 2004 illustrates how it praised the former for its high level of overseas development assistance and reminded the latter of the need to move towards the UN target of 0.7% of GDP (UNCESR 2004b and 2004a.) Peer reviews provided for by the OECD DAC (between donor agencies) or the New Partnership for Africa's Development (between governments) could include a greater focus on meeting human rights obligations.

## 4. Donor accountability to citizens in developing countries

### Building domestic accountability structures

If the current aid paradigm is taken seriously, and if it is accepted that recipient governments should be principally responsible for how aid is used, a question exists as to why direct donor accountability to citizens in developing countries still matters. An initial response is that aid should be directed at building domestic capacity – including domestic (recipient) accountability structures, both within and outside the state. Donors can provide resources to create alternative accountability mechanisms that will counterbalance their own power – as they can distort domestic priorities. For example, as donors have moved to provide resources through national budgets, requiring prioritised (national or sectoral) policy frameworks, this has tended to increase the power of ministries of finance, and downplay the role of parliaments and the judiciaries and other domestic horizontal or vertical accountability structures. 'Compensatory' support to redress the distortionary impacts of powerful donors can thus be justified.

Prominent areas of donor intervention thus include various state accountability structures, including national human rights institutions or enhancing access to justice so as to promote legal accountability and redress mechanisms for the poor and marginalised. Providing funding to civil society organisations, in particular around PRSP processes, is often considered another strategy to build domestic pressure for transparent and responsive use of domestic and aid resources (see the work of the Uganda Debt Network). Yet, the impact of such interventions is at times questionable. The quality of (donor-funded) participation in PRSPs has been challenged from many angles (Stewart and Wang, 2003). Donor aid to civil society organisations is often limited to elite urban NGOs which cannot be said to represent the interests of the poor and cannot address deep social structures. Institutional reform programmes are expensive and take a long time to show impacts.

Strengthening direct donor accountability mechanisms can still be justified, for three reasons: because building domestic accountability structures takes time; because donors still bypass state systems and can be immune to civil society pressure; and, most importantly, because they remain highly influential in how aid and national resources are used and their power has to be checked.

### Improving existing donor accountability mechanisms

There are several ways in which aid agencies can be held to account for the design and impact of their assistance, both in terms of processes and outcomes. At present, few of them make explicit use of human rights standards or mechanisms – possibly because of fear of accepting legal human rights obligations more generally or the resulting enhanced accountability.

The examples provided below illustrate how human rights are already included or could be introduced.

Human rights assessments can provide the baseline data on which to design donor-funded programmes or interventions and assess their impacts. A distinction needs to be drawn between *ex ante* and *ex post* assessments. The former aim to assess the potential impacts of an intervention before it is implemented, whereas the latter will review consequences of implemented policies or projects. Poverty and Social Impact Assessments (PSIAs) create opportunities for mitigating anticipated negative impacts associated with internationally funded reforms, including in the trade area (Howse, 2004). When governments receive loans through the international financial institutions, they are encouraged to undertake such *ex ante* analysis when policy changes are likely to have large distributional impacts. An explicit concern for human rights could improve the extent to which such studies consider the impact of policies on particular social groups, which would require disaggregated data. At present, few studies focus on exclusion but there are opportunities for them to do so, and thus to play a useful role in policy dialogue processes (Curran and Booth, 2005). In addition, such studies need to be associated with effective remedies for affected populations (UN, 2005a). These should not focus narrowly on social safety nets, but make use of wider lessons on various social protection programmes and how they can integrate a human rights-based approach (Piron, 2004b).

Some bilateral organisations, such as NORAD, have adopted human rights assessment methodologies. However, the extent to which such tools effectively inform the design of country programmes and projects is unclear. Step-change, such as introducing human rights in existing assessment or programme design frameworks, rather than developing entirely new tools, may be more effective. Unless these analyses are made publicly available, though, they cannot provide the basis for external accountability. A case could be made, at times, for confidential assessments (see ODI meeting notes, 2005) , but only if they are genuinely used to improve a human rights situation and not hide the absence of adequate donor responses, which would require adequate internal accountability structures.

Access to information is a central component of accountability. Greater financial transparency on the part of aid agencies, in terms of how much of public monies has been allocated to particular programmes (both government programmes and NGO projects), how they have been disbursed and the impacts they have achieved, could serve to enhance donor accountability. Examples include: public expenditure tracking surveys for social sectors funded through sector-wide approaches; providing information about potential loans to parliaments (when such loans tend to be negotiated with the executive); or making public mid-term reviews and evaluations of donor programmes. These mechanisms can combine donor and governmental accountability when donors use government mechanisms; however, human rights objectives and indicators would be required to ensure human rights – rather than financial – accountability.

Participatory approaches are considered amongst the strongest strategies to ensure direct accountability to aid beneficiaries, for example so as to incorporate a human rights perspective in social impact assessments (Howse, 2004). A range of participatory tools and techniques is now widely available which can make government or NGO agencies delivering aid-funded projects more directly accountable to beneficiaries. When such mechanisms are used to monitor the performance of service delivery by state institutions (e.g. school management committees or local governments), they can contribute to enhancing formal accountability as well as donor accountability. For example, the Northern Ghana Network for Development has facilitated the use of scorecards to assess service providers, in particular in education. Focus groups score the service provider on a number of criteria which have been developed in a participatory manner (e.g. teachers' attendance and punctuality, ability of children to read and write after completing primary education or total costs to parents). Findings are aggregated into 'district scorecards' and public forums are held, with comparisons between districts and sectors to identify weaknesses and stimulate better performance. There are three issues to be noted here: such mechanisms can be developed without references to human rights standards; they need to be institutionalised to provide ongoing accountability (and not limited to the duration of a donor or NGO project); and finally, the risk that participation may be a burden, or at times more cosmetic or manipulative than 'meaningful', and only provide the veneer of legitimacy through consultations.

A unique feature of human rights is the focus on remedies and redress mechanisms. There are few documented mechanisms whereby communities and individuals affected by development interventions can bring a direct complaint to an aid agency, seek a change in the project or policy, and obtain redress or compensation. An example is provided by the World Bank Inspection Panel. Set up in 1993 by the Board of Executive Directors as a response to criticisms from civil society and member governments that the Bank was not respecting its safeguard policies, it is a quasi-independent body which investigates complaints from people affected by Bank projects and ensures that the Bank's operational policies and procedures have been followed. The Panel acts as a non-judicial fact-finding body. In some cases, the outcomes have been described as satisfactory, such as when it resulted in the cancellation of projects (e.g. case of the Arun Dam in Nepal). There is also a sense that it has contributed to improved Bank compliance with its own standards.

However, this mechanism has several limitations and is not fully adequate in terms of providing remedies (Clark, 2002; Magraw, 2003; Schlemmer-Schulte, 2003). As a mechanism of last resort, it handles few cases – according to the Bank's website, only 27 formal requests have been received since 1994. When projects are under implementation, often little

harm mitigation takes place. The Panel depends on discretionary action by the Board/Management and lacks oversight authority over the implementation of remedial measures, for example to check if Management's responses to its findings are appropriate. There is a concern that the Panel cannot review structural adjustment programmes and that it has contributed to 'watering down' policies to lessen its check on Management. Finally, as shown in the Chad-Cameroon case, the Panel is not able to address the full range of claimants' human rights concerns, given the view that the Bank is not subject to international human rights law. The Panel is, however, an important example of an accountability mechanism giving opportunities to citizens in borrowing countries to hold the Bank accountable to its own standards. Other similar mechanisms have been adopted by other development banks, but bilateral agencies do not seem to have such procedures in place.

Mechanisms through which staff from donor agencies can be held to account for their individual actions are not always used and there is limited information in the public domain. Documented abuses by military, civilian or contracted personnel working for UN peace-operations have included violence against the local population in Somalia, trafficking in persons in the Balkans or the 'food for sex' scandal in West Africa. Yet, 'criss-crossing of jurisdicational responsibilities has produced situations where allegations of misconduct and even criminal behaviour often fall through the cracks.' (Spees, 2004: 21). Sending states may not wish to discipline or prosecute their own staff; host countries' legal systems may not be sufficiently effective or there may be political reluctance to use them against international missions; and the public accountability of sub-contracted private security firms is problematic. The UN Secretary General has now adopted a 'zero tolerance' policy, which will require strengthened internal oversight capacity, as well similar action by Member states with regards to their national contingents (UN, 2005b: para 113).

Donor agencies can (and could to a greater extent) be the object of monitoring and advocacy by local actors, including national human rights institutions, media or civil society organisations. Key constraints are: access to quality information, investigative skills, the ability to make practical recommendations that could inform appropriate donor responses, and the need for domestic constituencies to support such efforts. Accountability may well tend to operate via constituencies in donor countries such as when international and domestic human rights NGOs partner to issue reports or the international media pick up and amplify local stories. Local civil society organisations may well be constrained by the fear of criticising the agencies that fund them and, as noted above, may have limited legitimacy in the eyes of the wider public.

Finally, a weak area of public accountability concerns contractual accountability, for example of NGOs, large or small-scale commercial companies, or individual consultants delivering aid projects or technical assistance. Although they are subject to financial and managerial accountability to the donor agency funding the intervention, these individuals and organisations are rarely directly accountable to citizens who will eventually benefit from their technical expertise, or suffer from the negative impacts of inappropriate advice or services.

## 5. Conclusion

This paper has reviewed a range of examples through which human rights can enhance the accountability of aid agencies. First, human rights can be integrated within political or managerial mechanisms in donor countries, in particular policies, guidelines and procedures of aid agencies. These are probably the most powerful incentive structures and this is where attention needs to be placed. Secondly, they can be used to enhance mutual accountability between donors and recipients, by introducing human rights not just as a source of negative conditionality associated with terminating assistance, but also as positively contributing to various 'new' aid modalities and instruments. The strong congruence between enhancing national ownership and the primacy of national governmental accountability for human rights needs to be highlighted. Thirdly, existing accountability mechanisms of aid agencies towards the populations that benefit from the aid are still relatively weak and need to be strengthened.

### Endnotes

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1 Not covered in this paper are important issues concerning assistance provided by international non-governmental organisations (see ICHRP, 2003). In this ODI series of background papers, Lockhart (2005) covers conflict and fragile states and Cotterrell (2005) humanitarian aid.

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