Human Rights and Poverty Reduction: Realities, Controversies and Strategies

An ODI Meeting Series

Edited by Tammie O'Neil

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Preface

The Rights in Action Programme was established at ODI in 2003 by a team of researchers who shared a common interest in exploring the practical value of human rights for poverty reduction and humanitarian protection. Establishing common positions about issues such as the relative importance of different rights regimes or the conceptual or operational value of human rights for poverty reduction and humanitarian action has been challenging because of the multidisciplinary nature of the team and its range of research interests. However, whilst this diversity of perspectives had made consensus difficult, it has also greatly contributed to the richness of our discussions and the strength of our conclusions.

These tensions are writ large when projected onto the development and humanitarian fields. However, so too are the potential rewards. The central purpose of ODI's meeting series on Human Rights and Poverty Reduction was therefore to promote interdisciplinary dialogue and, to this end, we attempted to bring together professionals from different disciplines within each of the series' nine meetings, including economists, lawyers, doctors, NGO campaigners, trade unionists and academics. The series was held between January and March 2005 and was organised in two parts. The first four meetings addressed conceptual issues, such as: are the human rights and Millennium Development Goals (MDGs) frameworks contradictory?; or can human rights be used to increase the accountability of aid agencies? The next five meetings then focused on specific sectors and contexts – water, HIV/AIDS, forestry, fragile states and humanitarian crises – in order to examine some of the practical issues involved in utilising a rights perspective.

This volume brings together the products of this meeting series: overview summaries of the meetings, the edited transcripts of the presentations and the background papers that were commissioned to accompany the series. Many people were involved in the organisation of the series and the production of this collection. I would like to thank the chairs, speakers and participants who contributed to the series and the UK Department for International Development for co-funding the series; the Rights in Action team and the Communications Office who were involved in the organisation of the series and its outputs; Roo Griffiths for editing the background papers; Pippa Leask, Joanna Adcock and Chris Taylor for layout and design; and Tammie O'Neil for managing and editing this publication and for her support in the establishment of the Rights in Action Programme.

If you would like to listen to any of the meetings or download the background papers or speakers' presentations, please visit the Rights in Action website: www.odi.org.uk/rights.

Laure-Hélène Piron
Rights in Action Programme Manager
2003-2006

Abbreviations

CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CI	Conservation International
CRC	Convention on the Rights of the Child
DAC	Development Assistance Committee (OECD)
DFID	UK Department for International Development
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
EU	European Union
FBW	Free Basic Water Policy (South Africa)
FLEG	forest law enforcement and governance
FLEGT	forest law enforcement, governance and trade
GEAR	Growth, Reconstruction, Employment and Development (GEAR)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICDP	International Conservation and Development Project
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDTs	International Development Targets
IHL	International Humanitarian Law
ILO	International Labour Organization
IRWM	integrated water resource management
MDGs	Millennium Development Goals
MoU	Memorandum of Understanding
NGO	non-government organisation
OCHA	UN Office for the Coordination of Humanitarian Affairs
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
PROFOR	Program on Forests
PRSPs	Poverty Reduction Strategy Papers
RBA	rights-based approach
TNC	The Nature Conservancy
UN	United Nations
UNHCR	United Nations' High Commissioner for Refugees
UNMIK	United Nations' Interim Administration Mission in Kosovo
UNTAET	United Nations' Transitional Administration in East Timor
UPC	Union of Patriotic Congolese
UPE	Universal Primary Education
USAID	United States Agency for International Development
WHO	World Health Organization
WTO	World Trade Organization
WWF	World Wildlife Foundation

Introduction

Tammie O'Neil*

The contributions to the Human Rights and Poverty Reduction meeting series are a rich source of ideas and information. It would be difficult to do full justice to these. This introduction will therefore simply synthesise the main debates that emerged during the course of the series and reflect on whether it achieved its three main objectives:

i.   To stimulate debate regarding the realities of the relationship between human rights and poverty reduction.
ii. To provide space to discuss some of the controversies.
iii. To generate constructive ideas about possible strategies for implementation of rights-based approaches to development.

1. Realities

As emphasised by a number of the speakers (Maxwell, Archer, McKay), a consensus now exists that development can no longer be narrowly conceptualised as economic development or growth. Development is instead understood as meaning human development. Accordingly, the effectiveness of development interventions and outcomes is measured by their ability to respond to the multidimensional nature of poverty. Once framed in these terms, human rights become a constitutive element of development and human rights violations become both a cause and symptom of poverty. Many of the meetings were instructive about the scale of the denial of human rights that lies buried under the canvass of poverty: the 8000 people who die everyday because they have AIDS but have been denied the necessary education or treatment; the inability of a vast number of children in China to access their right to education simply because they are internal migrants; the acts of commission or omission on parts of governments that lead to the denial of basic rights such as the rights to water, food or shelter.

However, it is also the case that there is continuing suspicion about the appropriateness and practical value of a human rights perspective within the development field. The infrequency of the interdisciplinary conversations between development and human rights professionals has served to heighten this suspicion. This lack of dialogue is particularly acute in some areas. Part of the reason for this relates to the challenges associated with multidisciplinary dialogue and work. As emphasised by Robert Archer, there are complex cultural and intellectual issues involved in bringing together human rights and other development discourses at both the analytical and operational levels owing to the absence of reciprocal knowledge about the history and internal debates of other disciplines. There are also challenges resulting from what are sometimes fundamental differences in approach. Katarina Tomasevski contrasted the pessimistic nature of human rights professionals, who by nature look for abuses of power, with the optimism of their development counterparts, who need to believe that progress is possible. Robert Archer and Peter Uvin both made the point that the human rights framework only allows us to think in one tense; it is absolutist and therefore has difficulty in dealing with the trade offs and deferred progress inherent in development processes.

2. Controversies

Inter-disciplinary controversies

Therefore, despite the growing evidence regarding the relationship between human rights and development, the existence of seemingly intractable interdisciplinary positions and irreconcilable differences means that the relevance of human rights to development theory and practice remains controversial. Three meetings in particular embodied this point.

As a professional group, economists wield a considerable amount of influence over which development discourses are dominant. There exists a generally held belief that human rights are not affordable and that, by introducing perverse incentives, they will impinge on economic efficiency and growth, and therefore the achievement of development objectives. The meeting on 'Reconciling Rights, Growth and Inequality' addressed this issue. Drawing on the work of Amartya Sen, Andy McKay argued that, whilst important, growth is not an end

> '… human rights become a constitutive element of development and human rights violations become both a cause and symptom of poverty.'

> '… the human rights framework only allows us to think in one tense; it … has difficulty in dealing with the trade offs and deferred progress inherent in development processes.'

in itself. Instead, it is a means for achieving other objectives, in particular the expansion of rights and freedoms. He also stressed that, whilst trade-offs certainly existed, these are not inevitable; rights were not necessarily in conflict with growth and can in fact help to promote it. The language of inequality and discrimination provided an important basis for dialogue. Similarly, Bill Brett made the case that workers rights are affordable and, rather than using development and globalisation as justification for the suppression of workers rights, there is a need to anchor them in the ILO concept of 'decent work'.

'The different scope and time frames of the human rights and humanitarian frameworks poses a challenge ...'

The possible tension between a human rights approach and the approach of other professional groups appeared acute in two other related meetings: one on protecting rights in conflicts and fragile states and another on humanitarian crises. In both meetings the difficulty of combining multiple objectives and roles was stressed. The different scope and time frames of the human rights and humanitarian frameworks poses a challenge: the indivisibility of human rights was presented as necessarily leading to a wider agenda than the humanitarian's primary concern with basic subsistence and safety. Humanitarians also expected these to be achieved in shorter periods than envisaged for the fulfilment of economic and social rights. Other tensions also emerged. Andy Carl suggested that, in conflict situations, the roles of the convenor – who brings together opposing parties – and human rights advocate – who lobbies for a particular position – could not be combined and that, when attempted, it was the power to convene that was usually lost. Similarly, Andrew Bonwick argued that, whilst humanitarian advocacy – involving both negotiation and, where effective, denouncement – was an essential element of humanitarian action, human rights advocacy – advocating specifically for the fulfilment of human rights – was not necessarily a compatible or effective companion. Furthermore, both speakers claimed that there are difficulties in simultaneously working towards the goals of justice and peace. Anneke Van Woudenberg took another position. She argued that justice versus peace is a false dichotomy and that justice *can* be promoted in difficult conflict situations. More fundamentally, she suggested that the context in which humanitarians work has changed, that new strategies are required in responding to this and that a human rights-based approach has much to offer.

Conceptual controversies

Human rights are conceptually challenging. It is therefore not surprising that several conceptual controversies surfaced during the meetings. Two will be highlighted here. As already suggested, a number of difficulties arise from the absolutism of human rights, particularly in the context of development processes that demand difficult choices to be made. However, whilst such trade offs are real, a number of the speakers argued that this does not necessarily invalidate a human rights-based approach to development. As highlighted by Christine Chinkin, the need to prioritise is, in fact, recognised within human rights discourse through the concept of the 'progressive realisation' of economic, social and cultural rights. Nevertheless, she also emphasised that some rights are not subject to progressive realisation and that states therefore have an immediate obligation to realise them. These include minimum core standards and non-derogable rights such as non-discrimination. Other speakers (Archer, Tomasevski) presented such absolutes as a strength of the human rights framework, precisely because they could act as a corrective to development trade-offs, not least by prioritising the position of the most marginalised within communities. In the context of such debates, Adrian Wood highlighted the benefits of mutual engagement by suggesting that human rights professionals can learn something from economists about trade-offs and, conversely, human rights professionals can contribute to how economists think about outcomes.

'... the need to prioritise is recognised within human rights discourse ...'

The second reoccurring conceptual controversy related to the role of non-state actors and their potential to both contribute to and frustrate the realisation of human rights. One of the central stands in this debate was the prominent position of international actors vis-à-vis domestic actors within developing countries. The validity of the human rights framework is partly dependent on the identification of an agency that has a duty to fulfil a corresponding right. That this is usually the state is problematic because, in developing countries, the state is often weak or, in some cases, virtually absent and is therefore unable or unwilling to meet its human rights obligations. A second problem is that there exists a host of other actors operating in developing countries, such as international financial institutions, who are prominant but who are not formally identified as duty-bearers.

An example was provided by Christine Chinkin. She noted that post-conflict situations are instances of extraordinary international intervention in the affairs of another country. The

prominent place given to human rights in post-Cold War peace settlements has largely been a reflection of the priorities of the international mediators rather than the result of domestic consultation. More disturbing is that the international bodies acting within a newly-constituted state do not themselves always give priority to those commitments that they insist the state respects and, in extreme cases, may themselves violate human rights standards. Other speakers also provided examples of the ability of external actors to shape development agendas. Lyla Mehta spoke about '"behind the border" policy convergences' which allow international financial institutions to exert considerable sway in relation to domestic policy. The contested nature of the meaning of some rights, in this case water, has meant that the dominant development players have had considerable influence in the debate about what water is and how access to it should be implemented. Mac Chapin also posed some challenging questions about who has the ability to frame development debates, using the marginalisation of indigenous peoples by large conservation organisations to vividly illustrate the point.

The important point here is that the strength of the human rights framework in establishing accountabilities is considerably weakened if it is not possible to hold the dominant actors to account. As key development actors, the lack of accountability of bilateral and multilateral donors to the recipients and beneficiaries of aid is therefore troubling. However, whilst most donors are unwilling to accept legal obligations under the human rights framework, human rights can contribute in other ways to increased accountability within development practice. Owen Davies used the Pergau Dam case to demonstrate that, even if a direct human rights challenge is unlikely to be effective, it is still possible to use legal argument to hold an aid agency to account in relation to human rights concerns. Considering the ways in which donor agencies use human rights within their development assistance, Peter Uvin claimed that it is only at the level of a human rights-based approach that a significant change in accountabilities occurs. This is both in terms of donors own internal accountabilities and, more fundamentally, by building domestic accountability between state and citizen in developing countries through a focus on institutions and processes. This is clearly important given the potential for aid to undermine domestic accountability by reinforcing external accountability relationships

Controversy in practice
The meetings did not only attend to conceptual issues; they also considered the practical application of human rights within development. As might be expected, there was plenty of controversy here too. Again, two will be highlighted.

The legal framework is a pivotal element of the human rights construction. A number of speakers suggested that this presented a challenge because the legal framework itself can be problematic in some sectors and in some countries. In the case of the forest sector, David Brown explained that, as forests are usually perceived as being a sovereign resource, national law is primary and international law is usually not applicable in relation to individual claims. Even when domestic legal channels are available, the reality is that many poor people are unable to access the legal system. Lyla Mehta pointed out that this can be because they are poorly informed about their rights – although, as John Mackinnon observed, when there is high-level political commitment it is possible to make entitlements widely known even in low-income and primarily rural countries, as demonstrated by the demand for universal primary education in Uganda. However, both speakers also suggested that, even when poor people know about their rights, they may lack the resources to seek legal redress or, conversely, the justice system may lack the capacity to cope with the demands placed upon with it, with Rwanda being a case in point.

Despite such difficulties, a number of the speakers established the value and uses of the law. Andrew Bonwick outlined three roles for international law, as: a benchmark; a means of assigning responsibility; and a way of adding weight to moral persuasion. Katarina Tomasevski made a strong case for the importance of domestic legal enforcement in the context of development, arguing, *inter alia*, that it has been successful in exposing that discrimination on the basis of characteristics such as gender or race, rather than poverty, often underlies human rights violations. She also claimed that we need law as a neutral arbiter; human rights law does not dictate the design of development strategies but it does provide a yardstick for assessing government performance and establishes the right to challenge and hold government to account when it abuses its powers. Simon Maxwell also noted that, even when justice is not widely accessible, legislation can change administrative practice and affect rights at a local level. Finally, as established by Robert Archer, justiciability is only

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one, and an often subordinate, element of the human rights framework.

Two meetings in the series looked at the practical application of rights in the natural resource sector, with both unearthing issues relating to the implementation of rights. Lyla Mehta reviewed the case of the right to water in South Africa – unusual because the South African government has recognised the right to water and entrenched it in the constitution. Whilst Lyla Mehta applauded this move, she also identified a number of reasons why difficulties remained in the implementation of this right. These included resource constraints and weak institutional capacity. However, importantly, she also stressed that discussions about affordability were not simply technocratic exercises; governments and bureaucracies make political choices about what should be prioritised. The presence or absence of political will is therefore a determining factor in the realisation of rights.

In many ways the South African case is clearly exceptional but, as elsewhere, it reminds us that that a number of rights regimes are usually in operation and that human rights are often not in the ascendance. This fact seems particularly acute in relation to the natural resource sector. For instance, Bruce Lankford described how the World Bank had supported the introduction of a formal (paper) rights system in South Tanzania but that this programme had failed to meet its primary objectives and had, instead, undermined access to water. Like Mac Chapin, he suggested that the participation of local communities in the design of new systems is essential to ensure the fair and efficient allocation of water for all.

3. Strategies

Although many of the meetings reflected on the difficulties involved in utilising a human rights framework, they also reinforced the benefits of doing so. Robert Archer made the most forceful case, stating that human rights are the most holistic framework for addressing development issues, including new aid modalities: the legal authority, objectivity and political legitimacy of the international human rights system means that its principles and standards provide powerful criteria for assessing development priorities, processes and outcomes. The core human rights principles of equality and accountability could also provide innovative guides for development action. For instance, attention to the rights of the most vulnerable and marginalised individuals and communities is a non-negotiable component of the human rights construction. As Robert Archer observed, adopting a human rights-based approach directs the attention of policy-makers and development planners to the potential losers in the development process, an important gain in the current MDG-dominated landscape. As well as legitimising the claims of the most marginalised, however, the human rights framework also establishes that governments are accountable for meeting such claims and for the losses that may result from development processes. Human rights therefore introduce accountabilities that are absent from discourses grounded in, potentially transient, political commitments. In both respects, therefore, a number of the speakers (Maxwell, Archer, Tomasevski) asserted that the MDGs would be strengthened by rooting them in the human rights framework.

Some speakers in the series went further, however. A human rights-based approach not only suggests new ways of programming but may actually be essential to the success of some development interventions. In the meeting on HIV/AIDS, both speakers constructed a persuasive (and mutually consistent) case for the impossibility of meeting the MDG on HIV/AIDS unless human rights are placed at the core of the approach. They established that HIV spreads in 'spaces of powerlessness, exclusion, poverty and conflict' (Dhaliwal) and that particular (marginalised) groups are most vulnerable to infection because poverty, discrimination and other rights violations constitute the biggest barriers to HIV/AIDS prevention, care and treatment. Above all, they argued that the HIV/AIDS epidemic cannot be combated without a holistic approach. This does not mean that human rights necessarily take priority over public health concerns but it does mean that restricting rights in the name of public health must be shown to be absolutely necessary and constitute the least restrictive measure possible. Human rights and public health approaches are therefore complementary: public health programmes cannot be effective in the area of HIV/AIDS if the rights and dignity of the most vulnerable are not respected.

The meeting on HIV/AIDS provided an example of the contribution of human rights at a sectoral level. However, a more generic and fundamental contribution of human rights to development processes and outcomes was also advanced: human rights are central to building

'The presence or absence of political will is a determining factor in the realisation of rights.'

'... human rights are central to building the types of institutions and processes needed for sustainable development.'

the types of institutions and processes needed for sustainable development. It is only by directing the lines of accountability inwards to focus on the relationship between state and citizen – the crux of the human rights construction – that developmental incentives will be created and sustainability ensured. This point was made most strongly by Peter Uvin, who argued that the core problem in developing countries is the existence of institutions that systematically create incentives that are anti-developmental. Others echoed this point. David Brown pointed out that, through their attention to processes, human rights can provide a necessary corrective to the overemphasis on outcomes within development. The underlying message was that aid agencies are not able to directly deliver change but, when they work to strengthen accountabilities, they can facilitate those domestic processes that have the potential of doing so.

Finally, whilst the thrust of the series was about how development actors and discourses can engage with human rights, the reverse is also true. For much of the world's population, development processes and humanitarian crises provide the context in which human rights are realised or violated and it is therefore essential that human rights professionals also take development seriously and engage with its ideas and processes. As observed by Andy Carl, if human rights are to play a role in conflict resolution, reform of the UN system – to enable it to be more demand-led and more accessible to local communities – is indispensable. The dysfunctional nature of the international human rights system is a further constraint on the ability of human rights playing a more constructive role within development. The establishment of a Human Rights Council, as agreed at the 2005 UN Millennium Summit, is essential to bolster the credibility of the system.

'... strategic engagement between the fields of human rights, development and humanitarianism is not only feasible but ... unavoidable if we are to achieve sustainable development outcomes.'

4. Conversion, convergence or strategic engagement?

Robert Archer outlined two approaches to interdisciplinary engagement: conversion and convergence. Conversion implies that the values and traditions of one discipline are paramount; convergence that different disciplinary foundations are compatible and therefore capable of merging. In its pure form, a human right-based approach demands full convergence because human rights are understood as being constituent of development. This is the position taken in the UN's 2003 Interagency Common Understanding on a Human Rights-based Approach.

This degree of convergence is too much for most development specialists, many of whom dispute the realism and relevance of a human right-based approach to development at both the conceptual and operational levels. However, it is consistent to reject a human rights-based approach but still assert that human rights are nevertheless deeply embedded in the meaning of development and that human rights are important tools for achieving development objectives. Less that a human rights-based approach remains a worthwhile strategy. The dichotomy established by the type of question that asks 'conversion or convergence' is therefore not necessary, but neither is inevitable conflict. A more realistic approach is one of *strategic engagement*. An approach that:

i.   considers whether different disciplines or frameworks share joint concerns;
ii. identifies way in which they can contribute to the realisation of the other's objectives; and
iii. establishes complementarities that form the basis for dialogue and joint-working.

The meeting series demonstrated that such strategic engagement between the fields of human rights, development and humanitarianism is not only feasible but in many cases unavoidable if we are to achieve sustainable development outcomes.

Endnotes
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Meeting 1: Human rights and the Millennium Development Goals: contradictory frameworks?

Speakers: Simon Maxwell, Overseas Development Institute
Robert Archer, International Council on Human Rights Policy

Chair: Baroness Whitaker

Meeting Summary

Simon Maxwell opened the meeting series by asking whether the existence of either a human rights-based approach or the Millennium Development Goals (MDGs) makes the other superfluous. Whilst acknowledging that human rights is not one of the intellectual frameworks generally utilised to discuss the MDGs, he emphasised that the MDGs are anchored in the Millennium Declaration and a wider discourse on poverty reduction, and that both of these have strong affiliations with the human rights framework. Maxwell outlined some of the potential risks emanating from the MDG construction but argued that it also has elements that adds to the human rights framework. A synthesis would be of benefit to both approaches. Maxwell concluded by outlining why these are in fact complementary agendas.

The second speaker, Robert Archer, reminded us of the difficulties involved in inter-disciplinary conversations, not least because of the challenge of reconciling their diverse historical traditions. However, Archer also believed that that there is no inherent conflict between human rights and the MDGs as long as the MDGs are situated within their historical context, in particular the Millennium Declaration. What does cause difficulties from a human rights perspective is the presentation of the MDGs as global aspirations rather than as practical tools based on political consensus. Nevertheless, Archer believed that the foundations of the human rights and development traditions are essentially compatible and this makes convergence possible. He summarised the added value of the human rights framework as being its legal precision and authority, its objectivity and legitimacy, and its emphasis on fairness and accountability.

The call for a common language to be found across disciplines was echoed during the discussion, as was the need for human rights and development practitioners to engage in each other's processes. The appropriate level for human rights obligations was raised and, in particular, the overemphasis on national, rather than international, obligation was questioned. Finally, a plea was made to situate discussions about rights within the (local) context in which poor people actually experience them.

Simon Maxwell

There are two questions implicit in the title of this meeting.

First, if we have the Millennium Development Goals (MDGs), can we just dispense with a rights-based approach? That is, if we are strongly focused on reducing poverty and meeting the other MDGs, does anything useful remain in rights?

Conversely (and equally cheeky), why bother with the MDGs at all if we have a rights-based approach that already does the job? Would it not have been much better if, first, the Development Assistance Committee (DAC) of the OECD and then others, such as Clare Short and the United Nations, had not bothered with the MDGs, but had instead focused on the Universal Declaration of Human Rights, the 1966 Covenants,[1] the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child.

These are the questions that we are going to try to explore during the course of this series.

I am going to say something quickly about our trajectory on rights at ODI, because it raises some points and makes some links, for example to work by DFID. I will then say something about the MDGs and, finally, will come to the question of whether either the MDGs or a rights-based approach are superfluous or whether they can actually work together.

ODI work on rights

ODI last looked at the question of rights-based approaches to development in 1999, with a series of meetings entitled 'What Can We Do with a Rights-based Approach to Development?'.[2] We did not have the MDGs in 1999 but we did have something very similar – the International Development Targets (IDTs) – which eventually became the MDGs. These were already in the public domain and had been the basis of DFID's 1997 White Paper, so this was not a trivial question. We were looking at the question of whether there was 'value-added' to a rights-based approach (and I will return in a moment to the question of whether the answer to that question was 'yes').

We then had a series of projects at ODI on rights, including: *To Claim Our Rights*, led by Andy Norton (Moser et al., 2001), which looks at the links between rights and livelihoods; a paper commissioned by Andy on the work of Amartya Sen on rights, *Economic Theory, Freedom and Human Rights*, written by Polly Vizard (ODI, 2001); and another paper, again led by Andy Norton, *What's Behind the Budget* (Elson and Norton, 2002), which looks at the relationship between rights, politics and accountability in the budget process.[3] Out of that body of work, we now have a cross-cutting programme at ODI on 'Rights in Action'[4] led by Laure-Hélène Piron and her colleagues, who are responsible for this series.

'... human rights are practical and real and help us to do things that we might not have otherwise done.'

The core rights framework is well-known.[5] This is a list of the six debates that we focused on the last time we looked at this question, in 1999:
i.   Are some rights more important than others, particularly whether civil and political rights outrank or trump economic, social and cultural rights?
ii. How can individual and collective rights be balanced?
iii. Can we unpack 'progressive realisation' – a key phrase in the human rights literature, that acknowledges that we cannot immediately achieve every right and directs attention to how to get there step by step.
iv. Who are the duty-bearers? A key feature in the whole debate on rights is that some people have rights and others obligations, and that those with obligations are usually taken to be the governments who sign the treaties and the covenants - but are there any other duty-bearers, for example, the World Bank, the international aid donors and, perhaps, some NGOs?
v.   How can accountability be discussed without performance standards?
vi. Does accountability imply justiciability?

At the end of our 1999 series we came up with a series of principles to guide our further discussion on rights. These were that:
• it was worthwhile to take a holistic approach, including both civil and political and economic, social and cultural rights;
• we needed to look at the relationship between individual and collective rights;
• the international community had, at least, a moral duty, if not a legal duty, to support rights in partnership with states;
• performance standards were needed; and
• although justiciability is at the heart of the debate, there are also many other complementary initiatives that should be undertaken, involving reporting, monitoring, public debate and greater citizen participation.

DFID work on rights

Work by DFID provides a useful illustration of how these issues can be applied in practice.

In 2000, DFID produced a policy brief, *Realising Human Rights for Poor People* (DFID, 2000), which reflects many of these debates and principles, and focuses on three key ideas that we would like to take forward in this series of meetings: the importance of participation; the importance of inclusion; and the idea of fulfilling obligations. These reflect a compromise between two different perspectives within the rights discourse. One is 'rights as struggle', as a vehicle for mobilising people and raising the level of participation. The other is 'rights as law, administrative practice and justiciability'.

A recent review of the integration of human rights in DFID's work, carried out by Laure-Hélène Piron

and Francis Watkins (2004), provides very interesting case studies and examples of what is being done at country level. They examine (i) the normative framework, (ii) the analytical framework and (iii) the operational issues involved in taking rights seriously. This body of work illustrates an approach and a set of principles that takes the ideas of human rights, which are sometimes very abstract, right down to the level of country programming and individual projects. And, as the examples in the DFID review demonstrate, human rights are practical and real and help us to do things that we might not have otherwise done.

Figure: Interactive dimensions of poverty and well-being

PROTECTIVE
Security
Vulnerability

ECONOMIC
Consumption
Income
Assets

Gender
Environment

POLITICAL
Rights
Influence
Freedom

HUMAN
Health
Education
Nutrition

SOCIO-
CULTURAL
Status
Dignity
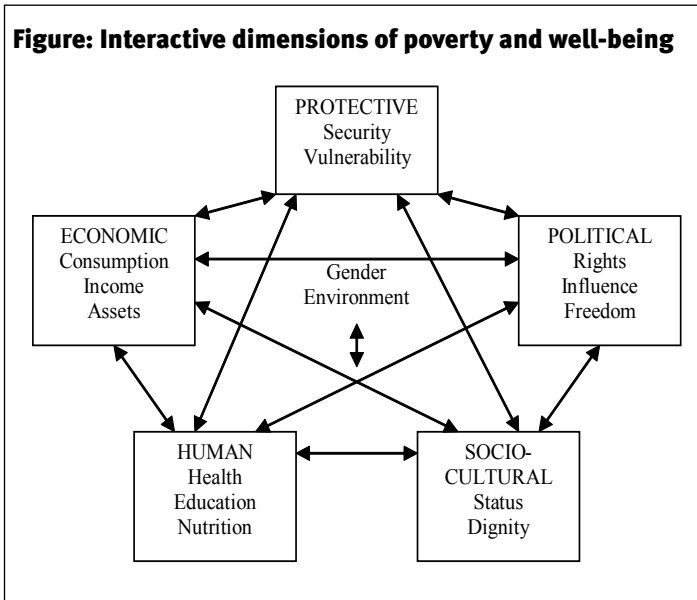
An alternative approach: the MDGs

So, what is different about the MDGs and the streams of programming associated with them?

The goals are well known and have also stimulated new programme ideas. A good example is the work of the Millennium Project in New York, led by Jeff Sachs. The Millennium Project's taskforce reports go through the subjects topic by topic (Millennium Project, 2005). It is interesting to ask: how many times is the word 'rights' mentioned? Some of the reports do not mention the word 'rights' at all but some of them do. In particular, rights appear in the hunger report, in the context of a discussion about land rights and access to water, and in the HIV/AIDS and the child and maternal health reports, because there is quite a discussion in these about reproductive rights. But I think it is fair to say that the rights discourse is not the driving motor behind the discussion of how to reach the MDGs. Rights appear but they are not the most important intellectual framework for discussing the MDGs.

So, are we setting off on a different trajectory altogether? Well, not entirely. The MDGs are, of course, part of something much bigger. They sit at the top of a pyramid, underneath which is a strategy for reaching the goals, which can be found in the World Development Report 2000/2001 (World Bank, 2000) or the OECD's DAC guidelines on poverty reduction (OECD, 2001). This strategy is implemented through Poverty Reduction Strategy Papers and a whole series of technologies for delivering aid – Medium-Term Expenditure Frameworks, General Budget Support, and so on – all underpinned by results-based performance evaluation (Maxwell, 2003).

Through the discussion about the MDG debate within ODI over the past few years, we have identified a number of risks with this construction (ibid.). Four are relevant to the rights debate and illustrate why a dialogue between the two communities is worthwhile:

i. The very idea of targets is controversial, not just in the development field, but also more widely within public administration. They tend to oversimplify and distort and there is a risk of distorting development practice.
ii. There is a question about where citizenship and participation fit in. In the MDGs debate, participation and citizenship are sometimes viewed more instrumentally – as a way of reaching the target of halving income poverty by 2015 – than they would be in the human rights debate. However, in broader definitions of poverty, for example that adopted in the DAC guidelines, participation features as an end in its own right.
iii. The question of who participates, on what terms and to what effect, and whose views are weighted and the method for doing this, is present in both rights and MDG debates.
iv. And, finally, the issue of partnership, which is much debated within the MDG discussion and echoes the question about duty-bearers and rights-holders in the human rights debate. Who actually has the right to expect what of the international aid donors when they try to pursue the MDGs?

Comparing rights and the MDGs

We are now in a position to compare the rights and MDG agendas and highlight conflict and complementarities between the two.

'... in terms of the basic ideological framework there is not a great deal to choose between the rights and MDG agendas.'

Rights	MDGs
Good on participation	Good on participation
Good on inclusion	Good on inclusion
Comprehensive	Selective
Obligatory	Optional
Clear national accountability (but not international)	Undefined accountability (except through partnership)

First, at least with a broader view of poverty, there is not much to choose between the rights agenda and the MDGs on participation and inclusion. Sometimes rights people will argue that participation and inclusion will not get onto the agenda without a rights-based approach. In a narrow interpretation of the MDGs that might be true but I prefer to go back to the Millennium Declaration, passed by the UN in 2000, which the MDGs are embedded within. This has a much stronger vision of inclusion and participation, citizenship if you like, than simply the narrow income target of the MDGs. The implication is that in terms of the basic ideological framework there is not a great deal to choose between the rights and MDG agendas.

Second, however, the MDGs are much more selective in practice than the rights-based approach, for example focusing on poverty reduction, primary education, maternal mortality and other key indicators. It is worth debating whether this matters or not. Perhaps we have to be selective in order to be practical but, if so, what is in and what is out? What is missing from the MDG agenda that is in the rights agenda? Maybe, if we were writing the MDGs again, there would be some elements we would want to pull out of the rights list and bring into the MDG list.

Third, another difference is that the rights agenda is relatively open-ended whereas the MDG agenda is much more target-driven. Now, I am usually quite critical of targets, for reasons that I have explained very briefly and have written about more generally, but it is also quite difficult to be stuck with a very open-ended commitment to progressive realisation. The rights literature and legislation, and the work of the human rights bodies in Geneva, talk about taking measures that are deliberate, concrete and targeted. There are some famous cases in the courts around the world where those words have been tested – the well-known South African housing case is often cited in this connection – but progressive realisation is a bit fuzzy, is it not? On the other hand, having targets mean that planners have something to get their teeth into. There is some value in that. And so, in that sense, I think the MDGs are adding something and making something more concrete that helps the rights discourse.

Fourth, the MDGs are essentially optional. They rely on the political leadership of governments and on the way that they are driven from below by campaigns such as the 'Make Poverty History'

> '... can we have the best of both worlds. Is it possible to be comprehensive, target-driven and accountable?'

campaign. The rights agenda offers us something very different and that is a sense of duty-bearing: an obligation that people have to meet rights. That leads into a very different kind of conversation, not 'wouldn't it be nice if all children went to school', but 'children have a right to go to school'. There is an obligation, at least on national governments, to move towards that and to ask 'how to do it?'.

Finally, there is the question of accountability. In the rights discourse, there is clear accountability at the level of national governments, but it is much fuzzier at the level of NGOs, international agencies, etc. In the MDG case, there is no formal accountability at any level, other than through political process. Partnership becomes a key word but, as we know from discussions over many years, the way that partnership is used in the development context does not have very many obligations embedded in it. DFID is now moving towards having independent arbitration of partnership agreements with some of its big recipients, where there is a commitment on both sides that is subject to independent verification (Rwanda is one), but that is still some way from having the kind of appeal to the European Court of Human Rights that might arise with a rights approach. The Cotonou Agreement is probably the strongest example of a legal partnership to be found in the aid world, but even that is relatively weak. So, here we have a strong illustration from the rights discourse of how we could take the MDGs forward.

Looking down this list, there are some areas where rights are strong and others where the MDGs are better. The challenge we face over the coming weeks in this meeting series is to see whether we can have the best of both worlds. Is it possible, for example, to be comprehensive, target-driven and accountable? We can make progress in bringing these two agendas together, which is why I finish by saying that these are not contradictory agendas: they are complementary frameworks.

Endnotes

1   The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
2   http://www.odi.org.uk/speeches/index. html#spr1999.
3   http://www.odi.org.uk/rights/publications. html.
4   www.odi.org.uk/rights
5   See ODI (1999) and Appendix 1.

Robert Archer

First of all, let me just say where I come from. For the past seven years I have been Director of the International Council on Human Rights Policy, which looks at policy issues confronted by organisations working in the field of human rights. We have been doing some work on governance, poverty and rights and also on poverty reduction programmes and rights. Where our interest has really been is in that difficult, but interesting, frontier between human rights and other disciplines – the difficulties with communication and the issues with reconciling historically different institutional conditions. My own background, coming from human rights, but not as a lawyer, and also having a background in development, influences the remarks that I am going to make today. I am going to begin by making some comments about the Millennium Development Goals (MDGs) and the Millennium Declaration. I will then say something about Poverty Reduction Strategy Papers (PRSPs) (and therefore go outside of the limited framework) and conclude by talking about what rights can offer and where it may still have weaknesses.

International Development Targets

Let me begin by taking a step back. It is useful, I think, to mention the International Development Targets (IDTs). They were introduced by the OECD governments at a time after the Cold War when, at national level, governments were adopting a poverty focus in their development work and also coming to grips with notions of good governance. This was a good half dozen years before the Millennium Declaration (UN, 2000).

There are three interesting things to note about the IDTs:
i.   when those reforms were made and policies were introduced by the OECD DAC, human rights were absent from the picture. I think those discussions were largely irrelevant to human rights organisations and human rights organisations were largely irrelevant to those debates;
ii. these decisions were made voluntarily. The OECD governments, without any external political pressure, undertook the initiatives. They reflected what they felt were the limits of the politically possible rather than what was economically possible. As such, they were, in my view, a quite imaginative and courageous step to take and the key advantage is that they are focused targets; they are practical objectives;
iii. the language that was adopted when they were introduced was the beginning of the language of participation and consultation, of ownership and partnership. The first reaction of my NGO colleagues was to say, 'hang on a minute, governments are stealing our clothes. We have fought for these ideas for twenty years and they will dilute them and probably distort them'. There was feeling that there was seizure of legitimate authority by governments.

Millennium Development Goals

However, six years later, when the MDGs were adopted, much had changed. Firstly, they were adopted by heads of state and, secondly, by that time there had been a great deal of change in terms of human rights. It was the same period that Kofi Annan mainstreamed human rights and the UN agencies began to struggle to bring human rights into their programming. Also by that time, many national governments, including the UK, had signalled their willingness to integrate human rights within foreign and development policy. So there was an important transformation, not only of the scale and legitimacy of the goals but in their relationship to human rights.

The mainstreaming process has been very difficult. It has been complicated and not only at UN level. It has also been very difficult at national and NGO level. There are complex cultural and intellectual issues to address and, in most cases (and I would say this was certainly true of Office of the High Commissioner of Human Rights), institutions were not ready and were not willing to begin a process of operationalising human rights principles within their work. And we are still, in my view, at the beginning of that process. I think where people position themselves in the different debates about the MDGs and human rights, and indeed about the relevance of human rights to development, depends on the time-scale in which this discussion is taking place and my own view is that we are at the beginning of a very long process.

In this context, what then can be said about the MDGs and the Millennium Declaration? My first general comment is that they are, at the moment, hybrid animals. They are both practical, politically-calibrated targets identified by the DAC and, at the same time, they are increasingly framed as global aspirations, emblematic expressions of moral intent. We are ceaselessly asked to unite around them; they are being reified (if not deified). This is potentially very damaging because, as aspirations, they are wholly inadequate. We cannot aspire to *halve* the number of people who are destitute. Many critics of the MDGs react so negatively precisely because of this shift and human rights organisations are no exception.

However, the position is even more difficult than that because many human rights activists are not familiar with the history of development and they are unaware of the complexity of thinking that underlies the bold headline statements that are given publicity. And this is one of the key issues for us to address in the current phase of discussion – the simple lack of knowledge of the history and internal debates within different disciplines. Human rights activists and intellectuals are unfamiliar with the history of development and it is characteristic that, for example, many of them think they have brought ideas such as empowerment, participation and accountability

'They are both practical, politically-calibrated targets ... and ... they are also increasingly framed as global aspirations ...'

to the attention of development and governance experts. Of course that is not true but, if that is the thinking, it creates many tensions and this really needs to be shared and understood.

A more specific issue arises in relation to the form the MDGs take. They are not written in human rights language. This is for the obvious reason that they were drafted for another purpose – for a development purpose and in a development context. In principle this is not problematic but it does mean that it is very important to read them, firstly, in terms of their practical and tactical purpose and, secondly, alongside the Millennium Declaration. However, it is true, I think, that the language as it stands, and as it is given publicity, lends itself to a narrow quantitative understanding of development and draws attention away from qualitative dimensions. I think that we are, to some extent, seeing this in the reporting for the MDGs and this is an area where the absence of the language of rights is one indicator of a trend that needs to be reversed. I also think that, as it stands, the language is a lost opportunity for education. We are asked to put the MDGs at the forefront of the public eye but, abstracted from an analytical and qualitative context, they have little explanatory meaning. So, the general position is that the MDGs are valuable and important but that they need to be understood for what they are; they should not be turned into fixed, static objectives but, rather, be seen as way marks in the process and I think that, if we do not do that, there will be damaging consequences.

Millennium Declaration

Let me turn now to the Millennium Declaration. This is an important but classically imperfect text, particularly from the human rights perspective. It does affirm human rights principles and, if the MDGs are framed by the Millennium Declaration, that is extremely helpful. But it affirms those principles in very general terms. It mentions some areas of human rights specifically but in a scattered and haphazard manner. Just to give one example. Employment is mentioned – a huge issue for economic and social development and also for human rights – but only once and then only to urge governments to address youth employment. You could not build a coherent strategy in relation to work – or the right to work – on the basis of the specific commitments in the Millennium Declaration. You could only do it (though you could do it) by referring to the very general affirmations in the Universal Declaration on Human Rights.

So, from a human rights perspective, there is a difficulty on two grounds. Firstly, the document is in a sense arbitrary and incomplete, however understandable that may be given its political character. Secondly, it therefore fails to reflect the systemic character of human rights law and thinking and, in particular, its emphasis on the links between all human rights. Again, this is not a problem if the Millennium Declaration is not read as a complete agenda for action, still less as a statement of human rights priorities. Like the MDGs, it should be seen for what it was: an

'... the MDGs ... should not be turned into fixed, static objectives but, rather, be seen as way marks in the process ...'

important moment of consensus that reaffirmed certain very general values and highlighted other issues of contemporary concern. It is important but unbalanced.

Human rights and development: conversion or convergence?

Let me turn now to the place of human rights in these discussions and their relevance to development and poverty reduction programmes. Qualitative dimensions of development have again come to the fore because of the new approach that the World Bank and governments have adopted in the PRSPs. In many ways, the PRSP debate has revived some of the battles about ownership of values, which I mentioned earlier. There are vertical contests, if you like, around notions of participation, ownership and partnership between civil society organisations, national governments and the World Bank. But there are also interesting struggles for leadership between disciplines. In particular, following mainstreaming, human rights is perceived by some development economists, medical professionals, environmentalists, etc. to have made a (legitimate or illegitimate) claim for intellectual leadership – and, it must be said, some human rights advocates support this claim.

At its broadest, however, there are two main schools: those who follow a conversion model and those who believe in convergence. While the first group considers that human rights should trump other values and traditions, the second considers that development, governance and other policy frameworks are capable of, or have been, converging with the human rights framework, and that the foundations of their traditions are highly compatible. They therefore tend to think that debate should focus on consistency and complementarity rather than competition. I guess people in this room will belong to both parties. To be clear, I am a converger.

Poverty Reduction Strategy Papers

Thinking about that, it is helpful to make a few remarks about PRSPs, considered in relation to previous generations of poverty reduction programmes. The first is that we should be careful not to fight old wars and, in doing so, fail to assess the new environment correctly. Current arguments – both vertical and horizontal – often turn on who legitimately owns values. Who decides when 'national ownership' has been achieved or that 'consultation' or 'participation' has been accomplished satisfactorily? In these discussions, it is very easy to fall into a lose-lose debate, when each side lays claim to be the arbiter of a standard and in so doing denies the legitimacy of others. Yet, without some degree of agreement, it is clear that everyone will lose. If no one can tell whether communities have been properly consulted, no policy based on consultation is likely to be successful.

These are in fact the new policy challenges set by the poverty reduction strategy model. The approach itself should be welcomed. In

principle, it is a considerable step forward, an enormous advance relative to early structural adjustment programmes. But, as with each previous generation of programmes, it will set new challenges and we have not begun to answer those questions clearly and, until we do, national governments, as well as the World Bank and other donors, will find themselves engaged alongside civil society in extremely unproductive arguments about legitimacy.

It will not be an easy discussion. If we speak about consultation or participation in decision-making, for example, quantitative or simple democratic criteria will not be adequate. Different levels and types of consultation should be expected for different categories of decision and different voices should expect to be given different weight. When choosing between two sites for a bridge, who is consulted about what aspects of this decision and whose word has more decisive weight? If a community voices opposition to a decision, which is nevertheless taken by government, when can that decision still be considered democratically legitimate (and when not)? No government manages these questions perfectly or even well; yet PRSPs seem to expect poor countries and poor communities to engage successfully in complex negotiations of this sort. To what degree are these expectations fair, testable or even rationally constructed?

Strengths of the human rights framework

I think in answering these questions, the human rights principles and methods that have been developed offer the most complete and holistic framework that is available to the international community for assessing performance in areas of social policy and participation. If we want to judge whether decision-making systems are participatory, inclusive, non-discriminatory, consultative, etc., it is at least one of the best points to start from. Its standards are universally applicable (or attempt to be), which underpins its claim to fairness and legitimacy, and also objectivity. Moreover, states have accepted that its standards are legitimate; they have legal status, certainly when governments have ratified them. In addition, because they have legal status, they are relatively precise in their formulation and remit. Authorities can determine what conduct is or is not required, because terms are shared, negotiation is possible and eventually, yes, judicial procedures can settle disputes and provide remedies.

I am not arguing that the new challenges raised by PRSPs or their successors will be settled in a clear way by glancing at human rights standards. This is clearly untrue; these issues will generate difficulties at least as great as those already associated with mainstreaming. But, if criteria draw upon human rights standards and principles, their elaboration is likely to acquire a higher degree of legal authority, political legitimacy and precision. And justiciability is only one, often subordinate, element in that mix of qualities. This is the first strength of human rights.

The second strength of human rights is fundamental to its value to the development process, though, if not contextualised, it can also be a point of analytical weakness. Development, however framed, is a long, mucky process in which the fortunes and prospects of some individuals and communities are enhanced while those of others are threatened or harmed and, in all circumstances, thrown about. If applied well, what human rights principles and methods do is to prevent slow large-scale progress from masking the loss or marginalisation of individuals or minorities. However positive development progress is, the human rights framework encourages or requires planners and observers to identify and do something about the people whose interests or prospects suffer. This is, notoriously, something that big development has been bad at. It is the point of sharpest friction between grassroots activists and central planners. It is the Achilles heel of the World Bank and multilateral institutions. It is the point where policy commitments to participation and inclusion are perceived by 'beneficiary' communities to collapse into rhetoric.

Human rights does not, of course, solve all the problems of loss and cost that minorities and individuals suffer when development is successful in promoting sustainable progress for large numbers of people. Essentially, however, it requires authorities to:
- identify people at risk and assess the cost and damage they have suffered;
- accept certain responsibilities towards those people, including their right to remedies in many cases; and
- be accountable for what has been done (or not done) on both the above counts.

Accountability is at the heart of remedy and it is impossible without transparent communication of information. These two things, as well as the requirement that the dignity and interests of all people should be considered, are at the centre of the human rights framework. Again, justiciability is an element in its application but often a subordinate one. It is indeed important to be able to settle disputes and provide redress through courts; actually doing so may not be the most important thing, however.

It will be said that other approaches share this interest in accountability and transparency – governance theory, for example. This is quite correct. Similarly, development thinkers have independently identified the importance of participation and consultation, even if human rights activists do not always know this. The point is that this should be expected. Certainly, if human rights really are of universal application, it would be astonishing if good governance and good development practice were not broadly consistent with human rights principles. Indeed, if they were not convergent, it would be a rather persuasive reason for suspecting that human rights principles did not have the wide application and legitimacy that their adherents claim. Where

'... if criteria draw upon human rights standards and principles, their elaboration is likely to acquire a higher degree of legal authority, political legitimacy and precision.'

human rights add value is in the areas I mentioned earlier: its legal precision; its legal authority; its legitimacy, both at the level of governments and for the public; its objectivity – its emphasis on fairness and equity for all human beings; and its central focus on accountability of those in positions of authority. This means, in practice, that, if a fault of omission or violation of rights can be shown, it can also be shown that someone can be held responsible or has a duty to take remedial action. Other frameworks share many of the same values but have not been elaborated legally and politically or been accorded legal and political authority to the same extent. These are the strengths of human rights.

Weaknesses of the human rights framework

Let me briefly address areas where I believe human rights have potential or practical weaknesses.

- First of all, human rights tend to think in one tense. They emphasise individual violations now; it is not very good at thinking about long-term progress or deferred progress. Therefore, compared with development thinking, there are real problems of communication.

- A second weakness is that human rights activists find it difficult to negotiate. Owing to the fact that the human rights framework is inherently systemic, which most other intellectual frameworks are not, human rights specialists make judgements on particular matters taking account of the whole body of human rights laws and principles; hence, the importance of indivisibility to them. Therefore, whilst human rights actors take a decision in the context of an entire system of thought, other disciplines find the acceptance of certain principles difficult. This undoubtedly makes communication very difficult.

- A third criticism is that, in a world of limited resources, human rights analysts find it difficult to choose between two goods or two imperfect goods – between building a school or a hospital or a road. Again, the belief that rights are interdependent makes it very hard for human rights specialists to set aside one right in order to benefit another. This is partly a matter of practice, of developing experience in taking such decisions, but partly it is inherent because one of the core strengths of human rights is focus on disadvantage and discrimination. Rights activists will always tend to be more alert to the right that is set aside.

- I find two other criticisms of human rights not very serious. One, that human rights are 'political', is not very interesting because aid conditionality is also highly political and is, in practice, less objective and open more open to the criticism. The other criticism is that human rights are 'normative'.

In conclusion, whether we are talking about the MDGs or about the larger discussion between human rights and poverty reduction, there has been an enormous movement in the last ten years. A great deal of thought is now going on and a great deal of progress is occurring but there is still a very long way to go, and it is very indicative that most of the reports that are coming out on the MDGs, and most development reports, still do not engage in a consistent and deep way with human rights. Many of them do not mention human rights at all. But, equally, human rights writing do not engage very well with the MDGs or some of the most interesting and creative thinking coming out of development. There is still a wide gap; even when people are talking to each other, communication is difficult. There is not adequate engagement. So we have come a long way but there is further still to go.

'... if human rights really are of universal application, it would be astonishing if good governance and good development practice were not broadly consistent with human rights principles.'

Girls' education through a human rights lens: What can be done differently, what can be made better?

Katarina Tomasevski*

1. Introduction

If rights-based, education can be a means to attain gender equality. Otherwise, it tends to transmit gender inequality to the next generation. Rights-based education is a passkey for full and equal enjoyment of all human rights, which adds a qualitative dimension to the existing global focus on quantitative targets. At the turn of the millennium, global strategies converged around the goal of eliminating gender disparities in basic education by the year 2005.[1] Statistically speaking, this target will not be attained. Moreover, previous experiences have shown that it is easier to attain gender parity than to sustain it. Human rights can help in sustaining progress by enforcing equal rights of girls and reinforcing the corresponding governmental obligations.

An illustration of what can happen without human rights protection is the case of Tatu Shabani, who was sentenced in 2003 to six months in prison for not attending school.[2] Tatu had been a pupil of Mkuyuni primary school in Morogoro, in Tanzania. She was expelled after she became pregnant: pregnancy was a disciplinary offence. After her expulsion, she could no longer go to school. Tatu was in a 'Catch-22' situation, in breach of the law on compulsory school attendance but unable to comply with that law. It is not clear how Tatu's case will figure in education statistics but, legally, she became a delinquent by the mere fact that she had become pregnant as a primary school pupil. Pregnancy ended both her childhood and her education.

This case highlights the rationale behind a human rights approach to education, that of dealing with obstacles beyond – not only within – education. There has been an endless stream of policies and statements on what can be done. Human rights spell out what should be done, using as a yardstick global minimum standards that most states in the world have accepted. Thus, human rights complement and strengthen development priorities. The key features of human rights law are outlined in Table 1, through a comparison with the Millennium Development Goals (MDGs) as the best known blueprint for prioritising development efforts.

Table 1: Differences between human rights law and MDGs

Who?	**Obligations of the state** International human rights obligations form part of the law of the land. They pertain to the state and are not affected by changes of government.	**Political commitments of a government** Changes of government through electoral or non-democratic means routinely alter political commitments.
What?	**Human rights are grounded in the rule of law** Guaranteed rights can be claimed by the population as well as by other states since they form a part of international law.	**No remedy for the lack of performance** Where monitoring reveals that targets have not been attained, there is no access to justice for those who would have benefited, because MDGs do not create entitlements.
When?	**Obligations are immediate** Minimum global standards are binding upon governments. If beyond their capacity, they can seek international aid.	**Long-term goals** The year 2015 takes away the immediacy characterising human rights.
How?	**Legal responsibility** Human rights bestow upon individuals the right to hold government legally responsible for violations, both domestically and internationally.	**Monitoring** Accurate and up-to-date data do not exist where they are most needed, while attainment benchmarks anticipate continued deprivation and rights deficit.
How much?	**All rights for all girls and women** Full and equal enjoyment of all human rights and the elimination of all forms of discrimination against women have not yet been attained anywhere, and are therefore continuous obligations of all governments.	**Specified quantitative targets** Benchmarks have been defined as 'feasible in even the poorest countries' (UN, 2004: para. 77) leaving out too many quantitative (e.g. prevalence of child marriage) and all qualitative benchmarks (e.g. aims and contents of education).

Differences highlighted in Table 1 do not undermine the core that is shared by global development strategies and international human rights law. Indeed, the focus on poverty reduction enables the right to education to be a powerful tool in making a

change in the lives of girls and women. Poverty has been universally affirmed as a key obstacle to the enjoyment of human rights, and it has a visible gender profile. The main reason for this is the fact that poverty results from violations of human rights, including the right to education, which disproportionately affect girls and women. Various grounds of discrimination combine, trapping girls in a vicious downward circle of denied rights. Denial of the right to education leads to exclusion from the labour market and marginalisation into the informal sector or unpaid work. This perpetuates and increases women's poverty. This circular relationship requires human rights mainstreaming.

The focus of global strategies on the means of education, i.e. all girls should start and finish primary school, can be usefully complemented by specifying the ends of their education. In addition, since education is a lever to provide girls with choices in life, primary schooling may not be enough. Worse, it can in fact obliterate choice if a girl is taught that her destiny is to be a submissive wife and mother. In the words of Sheikh Abdul-Aziz al-Aqil, 'the Muslim woman is a precious jewel whom only her rightful owner can possess, for he has paid dearly for that' (Hirst, 1999).

2. Applying human rights law to mould education: step by step

International human rights law lays down a three-way set of criteria, whereby girls should have an equal right to education and equal rights in education, and their equal rights should be promoted through education. The first step in meeting these requirements consists of overcoming their exclusion from education. The global priority for girls' education has made large indents into this exclusion, with promises to bring it to an end. The subsequent step is often the segregation of girls into separate schools. The third step typically comprises assimilation of girls into schools designed for boys, then moving towards adapting education to suit girls.

Separate schools for girls and boys were an international norm as late as 1960. At the time, the UNESCO Convention on Discrimination in Education legitimised separation on the grounds of sex, religion and language. The rapporteur for that Convention explained that 'the separation of schools for pupils of the two sexes was still too widespread in practice for the Convention to be able to affirm that, at the international level, it amounted to a proscribed form of discrimination' (Juvigny, 1963: 18). For various reasons, segregation in education persists, despite the fact that (in the famous words of the US Supreme Court) separate is always unequal. However, its human rights impact is not assessed.

Integrating girls into mainstream schools without altering curricula and textbooks perpetuates the stereotypes that impede gender equality. School textbooks tend to portray women as staying at home while men are making history. A survey regarding women in primary school textbooks has revealed that in Peru, for example, women are mentioned ten times less than men (Valdes and Gomariz, 1995: 105). In Croatia, a study of secondary school textbooks has shown that sons are the subject of 42% of the material on family life, and daughters of only 17%.[3] A study of school textbooks in Tanzania revealed that girls doing domestic chores constituted the favourite topic for explaining to children English and Kiswahili grammar (Mbilinyi, 1996: 93-94). This type of analysis is the first step towards change, which is taking place rapidly in many countries and in all regions of the world. There are, however, obstacles.

The change of terminology, from 'sex' to 'gender', challenges the historically constructed inferior role of women in public and private life, in politics and in the family, within and outside of school, in the labour market and in the military. The purpose of human rights is to challenge and change this discriminatory heritage. However, difficulties begin with the very language: in many languages, the term 'gender' cannot be translated. And the necessary process reaches far beyond linguistics, into investigating the ways in which different societies perceive what gender relations are and what they should be.

At a lower level of abstraction, an illustration of obstacles is governmental response to girls or female teachers wearing headscarves. Turkey's commitment to secularism in education has brought about a ban on headscarves; breaching this ban entails denial of access to education. The International Labour Organization (ILO) has assessed negative effects of lack of education on women's employment: 'women's level of education is very low in Turkey (one out of every two women jobseekers has only a primary school education), as is their level of participation in the workforce' (Tomasevski, 2002: paras 57-58).

Adapting education to the equal rights of girls necessitates women's voices in decision-making. In the Philippines, for example, 'women's disproportionate under-representation in top-level positions continues to be evident. This is particularly observed in the education sector where women constitute the majority of the schoolteachers but are not equitably represented as the positions go up' (CEDAW, 1996: para. 162).

3. School first: freeing girls from child marriage

Human rights research has demonstrated that the biggest obstacles to girls' education lie beyond the education sector. Indeed, those most frequently identified by governments in their reports under human rights treaties are early marriage, pregnancy and unpaid household work (Tomasevski, 2002).

As the respective governments themselves have reported, in Gabon 'children aged 10 could be married' (CRC, 2001a: para. 71), although the legally set minimum age is 15. In Eritrea, the minimum age for marriage is 18 but 'girls are often betrothed between the ages of 8 and 14' (CRC, 2002: para. 70). Tanzania has stated that 'Islamic law in Zanzibar seems to recognise the possibility that girl children may be married before they reach puberty and without their consent' (CRC, 2000a: para. 161). In Niger, girls are married at puberty, as young as nine (CRC, 2001b: para. 18). A similar situation has been described by Mozambique (CRC, 2001c: para. 69).

Rural communities usually consider that a girl is no longer a child when she has her first menstruation. This is when initiation rites take place or are concluded and she is ready for married life. Some rural communities practise initiation rites on girls even before their first menstruation, sometimes when they are only seven years old.

Through marriage, girls of primary school age not only are precluded from school, but also lose their rights as children. Child marriage transforms a school girl into an adult, even if she is only seven years old. As the Committee on the Rights of the Child noted regarding Madagascar, married girls are 'considered as adults and therefore no longer eligible' to enjoy the rights they should have as children, including the right to education (CRC, 1996a: para. 235). Cutting off girls' education so early deprives them of adolescence and burdens them with adult responsibilities long before they are able to cope. The child rights rationale requires prolonging the rights of the child to the age of 18. Applied in education, this would alter not only the practice but also the very design of education strategies.

4. Opposing legalised discrimination against girls

The process of change does not always head in the direction of raising the minimum age for marriage. Yemen has exemplified this by lowering the age from 18 to 15 so that the age is the same for boys and girls: 'The minimum age of maturity for men [is set] at 10 years, on the attainment of puberty, and for women at 9 years, also on the attainment of puberty' (CRC, 1998: para. 6). In the Democratic Republic of Congo, 'the marriageable age has been reduced from 16 to under 14 years' (CRC, 2000: paras 69 and 81).

As well as a marriage age which can be much too low, a comparison of domestic laws reveals that legalised discrimination continues in many parts of the world. Table 2 highlights how often the minimum age for marriage is lower for girls than for boys.

Table 2: Minimum ages for marriage for girls and boys

Americas	Asia	Western and other
Argentina 16/18	Armenia 17/18	Austria 15/18
Bolivia 14/16	Cambodia 18/20	Japan 16/18
Chile 12/14	China 20/22	Liechtenstein 18/20
Guatemala 14/16	Indonesia 16/19	Luxembourg 16/18
Mexico 14/16	Korea 16/18	Moldova 14/16
Nicaragua 14/15	Kyrgyzstan 17/18	Monaco 15/18
Suriname 13/15	Turkey 14/15	Poland 16/18
	Uzbekistan 16/17	Romania 15/18
	Vietnam 18/20	

Note: In a slowly increasing number of countries there is no difference in the minimum age for marriage.
Source: Melchiorre (2004).

The discriminatory practice of setting a lower minimum age for marriage for girls than for boys demonstrates that a global consensus, necessary for the elimination of child marriage, has yet to be attained. The wording of two pertinent human rights treaties nudges governments to prohibit and eliminate child marriage. However, the Convention on the Elimination on All Forms of Discrimination against Women (CEDAW) has been accompanied by reservations regarding the continuation of religious and customary laws, especially with respect to marriage and family (Tomasevski, 1999: 16 and 37). The Convention on the Rights of the Child (CRC) has triggered similar reservations regarding laws and practices that legitimise girls being married when they should be at school (Tomasevski, 1995: 275-81). Peer pressure has proved to be an effective way of translating human rights law into practice. This is comprised of governmental objections to such reservations as incompatible with global human rights standards, and of assistance in removing obstacles which impede change.

The Committee on the Rights of the Child constantly reminds governments of the necessity to bestow equal rights upon girls. For India, it has noted that 'religion-based personal status laws perpetuate gender inequality in areas such as marriage' (CRC, 2000c: para. 64). In Bangladesh, the statutory minimum age of marriage set at 18 does not apply to the majority of the population. Official statistics record 10 as the minimum age for marriage: '5 per cent of 10-14-year olds and 48 per cent of 15-19-year olds are currently married' (CRC, 2001d: paras 208 and 222).

5. Education of child mothers for the sake of the rights of both children

The Charter on the Rights and Welfare of the African Child requires states to ensure that girls who become mothers before completing their primary education 'have an opportunity to continue with their education on the basis of their individual ability' (Organization of African Unity, 1990: Article 11(6)). Translating this obligation into practice necessitates enforcing the right to education of pregnant girls and child-mothers. The Supreme Court of Colombia has confirmed that there should be an alteration of school regulations which envisaged penalisation of pregnancy by suspension from education. The Court has found that 'the conversion of pregnancy - through school regulations – into a grounds for punishment violates fundamental rights to equality, privacy, free development of personality, and to education'.[4] The Committee on the Rights of the Child has formulated its view on the expulsion of pregnant schoolchildren by using Lesotho as the case in point: 'such action is not only discriminatory against girls but also a violation of the right to education' (CRC, 2001e: para. 53).

Change is neither fast nor easy, and therefore requires governmental prioritisation. There are frequent clashes between societal norms, which pressurise girls into early pregnancy, and legal norms, which aim to keep them in school. In Malawi, 'girls are encouraged to marry early and ridiculed if they continue with their education' (CRC, 2001f: para. 66). Parents, teachers and community leaders tend to support the expulsion of pregnant girls from school, rationalising this choice by stating the need to uphold moral norms that prohibit teenage sex; pregnancy is treated as irrefutable proof that this norm has been breached. Adult men, including teachers, who seem to be responsible for most teenage pregnancies have remained beyond the remit of punishment. Societal norms are not automatically changed through the adoption of international or domestic guarantees of equal rights for girls, nor are they altered through democratic decision-making, in which girls would not have a voice in any case. Law provides a powerful lever for change.

The law, however, cannot supplant the resources that are needed to eliminate discrimination against girls exacerbated by poverty. Indeed, poverty is closely associated with adolescent childbearing: 'In Indonesia, the Philippines and Viet Nam, the poorest adolescents are nearly seven times as likely to have children as their better-off counterparts.' (UNFPA, 2002: 37.) Donor priorities can transform girls' right to education from rhetoric into reality, supporting the elimination of financial obstacles so that all girls – no matter how poor – can complete their schooling.

6. Eliminating gender discrimination through investment in prolonged girls' education

Research into the effects of education on poverty reduction has demonstrated the importance of continuing with secondary education, as opposed to just completing primary education. Moreover, without secondary and university education there will be a lack of teachers, meaning primary education is doomed to extinction. For girls in many countries, the problem of a shortage of female teachers is not the only issue here. Similar research findings show that secondary education helps to eliminate child marriage and/or early childbearing. Education statistically decreases fertility levels when it is at least seven years long (UN, 1995; Singh and Samara, 1996: 153).

The length of schooling is, of course, only one component; the content of education is crucially important. A statement by the government of Laos, whereby 'women's duties include bringing up children, as well as other household duties' (CRC, 1996b: para. 74) illustrates continued resistance to changing gender roles. Governments should take the lead here, because parental investment in a daughter's education may be negatively influenced by custom. In Bangladesh, 'marriage of a female child often entails a considerable financial burden on the parents, and it is often perceived that investments made in the education of the girl child may not benefit her own family but the family of her husband and in-laws' (CRC, 1995: para. 52).

Education is not financially self-sustaining, especially basic schooling for the poor. Hence, it has been made into governmental responsibility. What girls can do with their education later determines whether such education will prove to have been financially sustainable. Moreover, education influences private choices made by the parents and the girls themselves. If women cannot be employed or self-employed, own land, open a bank account, or get a bank loan, if they are denied freedom to marry or not to marry, if they are deprived of political representation, education alone will have little effect on their lives. All other human rights – or the lack thereof – profoundly affect education.

The right to education has been shown to act as a corrective to the free market, with a growing acceptance of the necessity for government intervention. The importance of free public education for girls has been summarised by the government of Lebanon thus (CRC, 2000: para. 209):

It is worth pointing out that there is a connection between the preponderance of females over males in free education, as females outnumber males in State education in particular (and most of them are from low-income families). By contrast, there is a higher ratio of males to females in private fee-paying education (and the proportion of those from middle- and high-income families is appreciably higher than is the case in State education). This suggests that males take preference over females when the family has to pay fees to educate their children. The high cost of education and the diminishing role of the State school may therefore result in the practice of discrimination against females, as well as breaches of the

principle of equal educational opportunities for both sexes.

The unwillingness of parents to send their daughters to primary school has often been traced to the absence of an economic rationale for investing in their daughters' education. Parental motivations for sending children to school can be undermined by 'a double loss: first they cannot participate in farming and herding and thus contribute to subsistence, and, second, they might be able to get a job after school but would be unwilling to accept farming again' (Hagberg, 2000: 38). This has also been noted by the parents in Burundi: 'Since girls cannot get jobs if they have only primary education, parents ask: why pay for them to sit six years in classroom, when they could be at home working?' (Jackson, 2000: 29). Similarly, research in South America has confirmed that, in rural areas, 'a sizeable proportion of parents perceive education as irrelevant to their children's future and thus prefer that they work' (Salazar et al., 1998: 148). Such obstacles to parental motivations do not disappear spontaneously with growing wealth, as Saudi Arabia illustrates: 'Is there any logical justification for spending huge amounts of money on women's education when thousands of female graduates face the prospect of either remaining at home or entering a single profession, girls' education, which is already overcrowded?' (Al-Rashid, 1999).

Human rights provide helpful guidance, requiring examination of the entire legal status of girls and women in society, as well as the sources of law which determine it. In many countries, interpersonal relations between individuals, and within families and communities, are governed by religious law or societal custom. In duty-based societies, communitarian values take precedence over realisation of individual rights. Hence, a broad range of factors, and their confluence, shape the effects and impacts of educational strategies. Inconsistencies among education laws, and laws regulating family status and women's economic and labour status, impede effective and self-sustaining change (UN, 1997: 42). Human rights mainstreaming makes a huge difference. It brings all the rights of all girls and women to bear on the way that education is designed and practised. The economic rights of girls and women, in particular, influence the effectiveness of education in poverty reduction.

7. Summary

Rights-based education necessitates moving equal rights of girls and women from the margins to the core of education strategies. The reason for this is that education operates as multiplier, enhancing the enjoyment of all rights and freedoms where the right to education is effectively guaranteed, as opposed to depriving people – especially girls and women – of the enjoyment of many – if not all – rights and freedoms where the right to education is violated.

The ultimate goal is ambitious. Increasing the quantity of education for increased numbers of girls and women does not necessarily have a positive impact on equality. Rather, the impact can be negative if the girls are taught about their own unworthiness, if they are precluded from applying their education to enhancing their political or economic rights and their freedom from forced or child marriage (Tomasevski, 2001). Rights-based education necessitates adjustment of the purpose and content of education to the equal rights of girls and women, no less than translating human rights into educational strategy and practice, and moving beyond equal access to education and equality in education, to education for equality.

Endnotes

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1 The Education for All (EFA) strategy includes a commitment to eliminating gender disparities in primary and secondary education by 2005 and achieving gender equality in education by 2015 (World Education Forum, 2000). This commitment has been reinforced through its adoption as one of the Millennium Development Goals. For an overview of all globally agreed targets regarding gender equality, see UNIFEM (2003: 4-5).

2 Criminal case No. 322 of 2003 at the Primary Court in Morogoro Region, Tanzania.

3 Summarised results of the research project, entitled Portrayal of Women in Croatian Textbooks, carried out by a team led by Branislava Baranovic of the Institute for Social Research, are available on the website of women's human rights group B.a.B.e. (Be active, Be emancipated) at htpp://members.tripod.com/ ~CRWOWOMEN/augustoo.htm.

4 Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v. Collegio Cuidad de Cali. No. T-177814, 11, Corte Constitucional de Colombia (November 1998).

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Meeting 2: Economic and social rights: legally enforceable rights?

Speakers: Katarina Tomasevski, Lund University
John Mackinnon, Freelance Economic Consultant

Chair: Michael Anderson, UK Department for International Development

Meeting Summary

The first speaker, Katarina Tomasevski, stressed the difficulties involved in developing a common language that can be used by both development professionals and human right lawyers because of their different starting points; whilst the former need to be optimists, the latter are by nature pessimists. She outlined a number of concerns with quantitative development targets from a human rights perspective. Tomasevski concluded by demonstrating the importance of human rights law to the realisation of economic and social rights by setting out three of its strengths: the creation of legal obligations for states; their immediate and continuing nature; and the association of freedom with responsibility.

The second speaker, John Mackinnon, highlighted how human rights contribute conceptually to the approaches taken by economists. He then asked whether human rights add something in practice by strengthening our ability to combat poverty. In doing so, he noted the difficulties relating to translating legal commitments into actual benefits for poor people in low-income countries. Mackinnon concluded by presenting a five-part taxonomy of rights comprising traditional human rights, extended negative rights, positive service rights, positive process rights and property rights, and described some of the complexities of each in practice in the context of poverty reduction.

Whilst the distinction between positive and negative rights was challenged during the discussion, there was some agreement that it could be useful in practice. The need to make decisions regarding public policy priorities, and the value of the concept of 'progressive realisation' in relation to this, was discussed. Concern was expressed with what was perceived to be a narrow focus on gender over human rights by many aid agencies. A number of issues regarding the best mechanisms for implementation were raised, including the importance of public information and accountability structures grounded in the rule of law.

Katarina Tomasevski

I am extremely pleased to be here because it enables me to explain some of the difficulties that occur when human rights lawyers and development professionals try to talk to one another. A common language has yet to be developed. To begin with, their starting points are completely different. If you work in development, you have to be an optimist; you have to believe that development is possible and that governments are committed to it. If you work in human rights, you have to be a pessimist because your job is to look for abuses of power. These opposite positions illustrate the difficulties in trying to develop a common language.

Human rights and development targets

I will illustrate these difficulties by saying how, as a human rights lawyer, I view some of the current development targets. When I hear the pledge to halve the number of people in poverty, my first reaction is fear. Will the other half be killed or left to starve? Will they be defined as the 'superfluous poor'? People can be eliminated in much gentler, but not necessarily less harmful, ways. They can be eliminated statistically. A discussion I had with officials at the Ministry of Education in the People's Republic of China about education statistics demonstrates this. In China, primary education is compulsory and, with 99% of children at school, the statistics look fantastic. However, I looked out of the window and pointed to the street children who were obviously not at school and asked, 'what about them?'. The reply was that they did not count because they are internal migrants. But how many internal migrants are there in China? 100 million? 140 million? No one really knows. My fear therefore is that there are a large number of children in China who are not attending school but who do not count because they are not included in the official statistics. They do not exist statistically and therefore their fate is unlikely to be represented by Chinese statistics, which may nevertheless portray success in the achievement of quantitative targets.

A second concern relating to the pledge to halve the number of people living in poverty is that it affirms in advance of the target year that, even if we only consider the people included in the statistics, half will remain in extreme poverty in 2015. One half will benefit from poverty-eradication measures and the other half will not. But what are the criteria for deciding who is in each half? The human rights approach would alter the premise of this promise. First, it would challenge the acceptance of the denial of human rights today in the name of a future development target. Second, it would question the acceptance of a statistical victory whereby poverty continues for the half who fails to benefit from whatever development interventions might be used to attain the target. Denying equal rights recalls the apartheid system, which granted and denied rights according to pigmentation. This amounted to saying: 'the whiter you are, the more rights you have; the darker you are, the fewer rights you have'. Because the vast majority of the poor are not white, the criteria may inadvertently legitimise racially-discriminatory policies that have not yet been eliminated from many countries in the world.

Another form of discrimination that continues to be widespread is the denial of equal rights to women. It is a reminder that abuses of power continue and are often open, legal and institutionalised. Unequal rights for women are the rule rather than the exception, particularly in relation to their economic rights. This is illustrated by global statistics that show how little property is owned by women. Quite often, women are not even treated as people but are instead the property of their husbands or fathers. One court case heard by the Supreme Court of Cameroon in 1998, which I cite in my background paper (Tomasevski, this volume), involved a husband who had inherited his wife. The wife had been treated as a part of his deceased brothers property and he was legally claiming that she return to him because she was his. This example alerts us to the fact that, if women are to benefit from anti-poverty measures, we must ensure that they are deemed to be people with rights rather than chattel.

The third point that I would like to make about global quantative targets is that they remind me of the former Yugoslavia, a centrally-planned economy in which I worked as a young university professor. I learnt from the Dean of my Law School how to cope with quantitative targets. When the time came for reporting, I began to diligently count the number of books, pencils, students, etc. that we needed to account for. The Dean told me that I needed a telephone directory instead because the way to comply with reporting on quantitative targets was to open a telephone directory and copy the random numbers into the report. Nobody knew the real numbers and so nobody could check.

For example, in Colombia, the statistics relating to people cannot be accurate because nobody knows how many Colombians there are. The last census was 14 years ago and the country has had four decades of violent conflict. Today, seemingly precise statistics can be produced on any topic using mathematical modelling and nobody can dispute their accuracy because nobody has counted the people. This is a substantial improvement on copying random figures from a telephone directory but does not resolve the disjuncture between generated statistics and reality.

Advantages to legal enforcement

I move now to my final and most important point, namely, why it is that I claim that the law has advantages, particularly in terms of the enforcement of economic and social rights. One of its strengths is that it creates obligations for states. The Millennium Development Goals (MDGs) and their associated quantitative targets are political commitments made by governments and are not

'... if women are to benefit from antipoverty measures, we must ensure that they are deemed to be people with rights rather than chattel.'

binding in the event of a change of government. It is not unusual for a new government to fail to honour the commitments of its predecessor. By contrast, human rights law is sustained beyond changes of government because parliament creates obligations that bind the state. This means that people continue to be entitled to justice if the states' obligations corresponding to their rights are not duly performed. This is one of the benefits of using what I call pro-poor law rather than merely development goals or targets.

The second advantage of the law is that the obligations it creates are immediate and continuing. What concerns me (again to use an example from education) is that the promise of education for all the world's children has been made at least once every ten years during the past five decades and every single one has been betrayed. The difference between human rights lawyers and development professionals is apparent here. Human rights lawyers look at previous promises and diagnose more of the same. By contrast, development is forward looking and uses the most recent promise as its baseline date. Another difference is that, for a human rights lawyer, the promise that all children will complete primary education by the year 2015 means a denial that they have a right to education today. The principal advantage of having rights, in this case the right to education, is that a betrayal of promises on the part of the state, through the failure to meet its obligations, entails legal responsibility. My background paper summarises cases whereby betrayed promises have become expensive for governments. The political price is the determination that a government is a human rights violator. The financial price is compensation for the victim and the deployment of resources so that similar violations do not occur in the future.

Law is symmetrical and rights entail duties, while freedom entails responsibility. Welfare rights cannot function without welfare duties because the legal responsibility of states is premised on their willingness and ability to generate necessary revenue. Of course, our diverse world cannot support a one-size-fits-all model. Within the European Union, we are able to guarantee the right to holidays with pay because our economies can sustain this right. Since before I was born, people have been saying that Nordic welfare rights are unsustainable. The Swedish Prime Minister has described the welfare state model as a bumble bee. By scientific criteria, a bumble bee cannot fly but this does not prevent it from flying. It is the same with the welfare-state model. Why does it fly? Because rights give people a stake and they accept the associated duties because these sustain rights. Welfare rights cannot be taken from the Nordic system and implanted in Ethiopia or Peru without also transplanting the associated duties. Thus, international human rights law postulates progressive realisation of economic and social rights.

Finally, human rights law associates freedom with responsibility. It does not encroach on the government's discretion to design and apply development strategies. Human rights lawyers neither posses nor claim expertise in designing budgets or costing vaccination campaigns. Rather, law is a yardstick for assessing governments' performance and for measuring whether their performance matches their postulated priorities. Its novelty lies in its definition of the poor as people with rights rather than objects of development interventions. Their enforceable rights strengthen governments' accountability.

The need for law can also be demonstrated with examples from the European Union. Through the European Stability Pact, EU governments pledged to implement their obligations, including the limits on the size of their fiscal deficit. Did they? No. They will therefore have to be dragged before the European Court of Justice or their constitutional courts because they have to be forced to implement what they had solemnly promised to do. We need law as a neutral arbiter. Rather than taking over the function of designing budgets or fiscal policy from government, it ensures that governments' powers to do so are not abused.

Again, this means doing what we do best in human rights and that is looking for abuses of power, seeing how to prevent them and, if abuses have been detected, to hold up decision-making processes and call the government to account. This is the biggest and proudest success of human rights because legal enforcement operates on two levels. The right to challenge and to hold the government to account has been accepted, albeit grudgingly, as the pillar of the rule of law.

'The principal advantage of having rights ... is that a betrayal of promises on the part of the state ... entails legal responsibility.'

John Mackinnon

The first question that I will be looking at is whether a human rights-based approach substitutes for other socio-economic approaches to poverty reduction. Should we think of replacing the given structure that we work with as economists, be that utilitarian or capability theory, etc., with a more general human rights-based approach? A second question, and a rather more modest aim, is whether a human rights-based approach strengthens what we are otherwise already doing in poverty reduction. My third, and final, question is whether there are problems. Are there cases where a human rights-based approach conflicts with aspects of poverty reduction? While I do not think that there are conflicts in principle, there can be in practice.

The concept of human rights in the perspective of poverty reduction

Firstly, a word on what human rights are. The previous speaker focused on practical applications but, thinking this through, I found that one needed to say a little about theory. Broadly speaking, economists, whether they are traditional, utilitarian, neo-classical or capability theorists inspired by Amartya Sen (and there are less differences between those views than people often imagine), work by assuming that people have a certain set of preferences and that they try to expand their choices. How do human rights factor into this? Well, one way of looking at this is to say that human rights really just rephrase it in a different language and therefore do not add much conceptually. However, there are other ways of understanding human rights and I have noted three:

i.   The traditional view of human rights as a limit on the state. In this formulation, there are desirable things that we would want to promote but there are also certain fundamental limits that the state should not go beyond in the way it tries to influence people's lives.

ii. Thinking about human rights as a condition of choice. Yes, we want to increase people's choices but a human right might be something that people must have before they are equipped to make a sensible choice – for instance, without basic education people's choices will not be informed.

iii. There is a notion of human rights that covers the range of decisions that people take. For instance, one of the frequent objections to economistic measures of poverty is that a woman may have a quite high income and/or expenditure but still have very limited choice about how those expenditures are allocated. This is a case where human rights do seem to inject something beyond what a standard economistic measure is able to (though the capabilities approach was partly developed with this case in mind). Spelling out these ideas indicates that there are a number of different intellectual traditions that have fed into the idea of human rights and these can conflict. I will be providing examples of this.

'It is a mistake to think that it is particularly difficult to spread information about an entitlement. It is actually quite easy to make a society aware of one.'

Another point is about who benefits from rights. I think it is important to bear in mind that some rights are important, not because they are in the interest of the person who has the right, but because they are in a broader social interest or the interest of other people. Freedom of speech, I think, is an important example. The most fundamental arguments for the freedom of speech do not necessarily turn on the interests of the speaker. While economists have a terminology for this in terms of 'externalities', the practical importance of this right for economic performance has been little discussed except in Amartya Sen's work on the role of a free press in preventing acute famine.

The practical importance of human rights
So, what do human rights do in practice? Even if the idea of human rights does not add anything conceptually, even if human rights were simply a way of dressing up what economists or capability theorists have already said, they might still add something practically. I think they do. We might start by thinking of human rights as being a set of general moral entitlements with corresponding obligations but we can also see them as being practically implemented through international commitments and/or national legal or political commitments.

The point that I want to make quite strongly here is that it is my experience that legal commitments can sit on the books for a very long time in the kinds of low-income countries that we are referring to. The legal system is simply overstressed to begin with. Statutes do not necessarily translate into benefits for society through the implementation of actual obligations, except to the extent that what is in the law can capture the public imagination. This is quite difficult to predict, however.

For instance, I was quite taken aback on a recent trip to India. Some Indian states have introduced quite progressive ideas about land inheritance into their legislation. Knowledge of this had reached even the male farmers whom I met in a village and they were asking interesting questions such as, 'are we going to have to bequeath land to daughters as well as sons'. Therefore, something that is on the statute book but is probably not that legally enforceable has nevertheless caught people's imagination. It is controversial, and may or may not survive, but it has certainly injected an idea into that society.

In other cases, however, I think that it is political commitment that has made a real difference, as demonstrated by the example of primary education in Uganda. Uganda introduced essentially free primary education and, three years later, essentially free primary health care. This led to a quite startling increase in demand, which was greater than anyone had imagined. Gross enrolment rates jumped, more or less overnight, from 75% to about 150%. This was the result of a

single speech given by the President, who people were inclined to believe. How long the Ugandan government retains that credibility partly depends on the extent to which it delivers on these things but the power of a single public announcement saying, 'you are going to get this free service, turn up and demand it', can be enormous. It is a mistake to think that it is particularly difficult to spread information about an entitlement. It is actually quite easy to make a society aware of one.

Human rights and poverty reduction: a taxonomy

My next step in thinking about this was to develop a schema of the types of rights that are introduced in a human rights-based approach to development:

i.   *Traditional human rights*, such as freedom from political repression, freedom from arbitrary arrest, freedom from political and civil violence, the right to a fair trial, freedom from torture, and so on. Pretty much everybody agrees that those are appropriate types of human rights.

ii. *Extended set of negative rights*. Again, these focus on things – restrictions or violence – that should not be done to people, rather than positive entitlements, and include things like freedom from domestic violence, freedom from cultural discrimination, working conditions, etc.

iii. *Positive service rights*, which typically include rights such as education and health or, as looked at by the UN declaration on human rights, those such as housing, clothing and water. I have also included productive services but with a question mark next to them, and I will come back to this later as it raises an important point about whether the current rhetoric is privileging some services relative to others.

iv. Rights that might be described as *positive process rights*, such as participation, consultation, and so on.

v.   *Property rights*. Are property rights human rights? This is an indelible question and one that is addressed in recent work by the UN's Office of the High Commissioner for Human Rights (OHCHR), which achieves more than I expected on this. For instance, it says that it is one thing to say that the procedure by which property is allocated does not violate people's rights, in the sense that, for instance, women can inherit their own property. It is another thing to say that women actually have property rights because a legal system can exist whereby women are fully entitled to own property but 90% of land continues to be owned by men. This important point is often missed in discussion of 'property rights'.

Traditional human rights

What I wanted to do was briefly set out some of the complexities that define these questions of rights in the context of poverty reduction strategies. I think that everyone who works on conflict-affected societies now considers conflict as the

single biggest cause of poverty in that context. In Uganda, for instance, where the Northern part of the country has been afflicted by conflict for the past twenty years, there has been a steady widening of the gap between the North and the rest of the country. In this context, it is difficult to assess who is responsible for negative rights and for ending the conflict, and how these rights can be fulfilled. Political consensus regarding this is certainly absent from Ugandan society. For instance, the role that military action should play in assuring security is a controversial question and the evidence in Uganda is actually mixed. There are cases where military action has produced dramatic improvements to security and there have been other cases where it has basically failed to deliver any improvements and has made the situation worse.

The human rights approach therefore needs to be complemented by conflict resolution. Simply saying people have a right to security does not tell us how they actually achieve this right in conflict situations. This raises questions about whether we can find an institutional way of addressing human rights while conflicts are going on. The worst episodes of human rights violations in the countries that I have worked in recently have been during conflict. Whilst the best thing is obviously to eliminate conflict, given how long and intractable some of these conflicts have been, there is also a question about whether one could develop some system of restraint even during periods of civil conflict.

In terms of legal process, in some contexts there can be resource constraints even in relation to very basic rights. For instance, in the Rwandan case, there are a large number of people in prison suspected of committing murder during the genocide. Not only do they suffer but their families suffer. Women in Rwanda, or a significant sub-set of the Rwandan female population, are spending their time delivering lunch to their husbands in prisons. But the question of how you resolve this situation raises tensions between the right to timely trial and other types of rights, such as rights of due process and the rights of victims. It has been calculated that it would take about 72,000 years to deal with all the Rwandan genocide suspects under the UN system. A more rapid response is needed, not only within the international arena, but also within the normal functioning of any criminal justice system.

Consideration of the rights of the accused in isolation might suggest that there should be an element of amnesty or that those accused should be released pending trial rather than being held for a period of several years or more. But the rights of actual and potential victims and the needs for national security and reconciliation are at least equally important. The general point that emerges is that even what seem basic and simple human rights, such as the right to due process and timely trial, can be resource-constrained and that, in this context, there can be difficult trade-offs between the rights of different groups that

'... even what seem basic and simple human rights ... can be resource-constrained and ... there can be difficult trade-offs between the rights of different groups.'

would not emerge in a less resource-constrained environment.

Similarly, in order for the rule of law to be upheld, it is necessary for there to be an adequate police force. However, there is a serious question in some low-income countries about whether it is better or not to have a police force. If you look, for instance, at participatory studies in Bihar (India), the view that the police add to insecurity emerges quite strongly. Until recently, in Uganda, many urban residents' main contact with the police was through traffic fines that were widely perceived to be corruptly administered and arbitrary. (This problem has been addressed by changing the system of payment of the fines; a sign that simple accounting changes can sometimes have strong implications for relations between the citizen and the state.) Given the resource constraints, the right to policing as a service is actually a double-edged sword.

Lawyers can sometimes be reluctant to extend the mandate of the lowest, cheapest levels of the legal system, a process which is actually taking place in Uganda as a result of criminal justice reform. Here, local council courts have had their mandates extended and, I think, this offers cheaper, quicker and, generally, better justice for a lot of poor people. At the same time, there are concerns that the local courts may represent more conservative views, with implications for human rights. If, for instance, a woman has been beaten by her husband and goes to the local court, it is very often her husband's friends who will be running the court and she will be gently advised to return home. So, there is a trade off.

Extended negative rights

I would like to also raise some issues in relation to extended negative rights. The implementation of rights, such as the right to cultural values and to be educated in your mother tongue, has made a real difference to primary schools enrolment in Ethiopia. It is a practical issue, as well as being a cultural issue in its own right. I also think that mobility is an important extended negative right. This right has sometimes been restricted because of security concerns, as was the case in the years immediately following the genocide in Rwanda. It has also been traditionally denied under a number of quite authoritarian regimes, including the Derg (the communist government that fell in 1991) in Ethiopia. Some of the least responsible development economics that I have seen has been by people who think that urban migration is a problem and have therefore recommended restricting or prohibiting it. This is an extremely powerful way of increasing rural impoverishment; in most of the poorest countries, all the indicators suggest that rural areas are on average poorer than urban areas, and restriction of the flow of people to urban areas reduces the options available to people in rural areas.

The prevention of polygamy is another extended negative right and one which highlights a tension. Some official reports suggest that oppressive practices should be prohibited and many people would view polygamy, as it functions in practice, as a highly oppressive practice. This raises the question of how we think about polygamy and the rights of adults to do what they choose, vis-à-vis property rights and the rights of autonomy of women.

I also think that it is important in the debate on human rights to recognise that there is not necessarily a liberal consensus in the societies that one is looking at. For instance, the idea of restraint on the powers of the state is an idea that is applied very differently in different countries within Europe (as the headscarf issue shows), and is applied differently again in many developing countries. In the Uganda case, for instance, there is, apparently, a strong popular demand that adultery should be illegal under the constitution – something that would now seem surprising in a European context.

Positive service rights

I think the application of human rights is at its most problematic in relation to positive rights. First of all, there is the question of whether one is talking about rights to services or outcomes. It is easier to apply the structure of rights and obligations to the delivery of a service than it is to an outcome but, ultimately, it is the outcome that is most important. This is a tension within human rights and also within all public settings. If you are going to talk about service rights, there is a major question of prioritisation. Something that concerns me in relation to human rights-based approaches is that there is an assumption that things like health and education are rights but little is said about the right to agricultural technology, for instance. In fact, the case for the right to agricultural technology may be *de facto* as strong as the case for education. In some contexts, it might be more beneficial to health to improve agricultural technology than to build more health clinics. In my view, agricultural technology is something that has been massively underinvested in. However, I do not think that this sort of question can be resolved within a human rights-based approach. It needs the kind of cost-benefit analysis that economists have, in principle, been doing for a long time. The movement away from econometric ways of thinking has actually led to an underestimation of the importance of really trying to quantify these trade offs and we may be getting some things dramatically wrong.

Property rights

I turn now to property rights, an area where there is, in my opinion, a lot of confusion. Broadly speaking, there is an increasing consensus that explicit discrimination in relation to property rights should end. However, the question of whether there is a right to non-discriminatory practice is more controversial in some societies. There is also a complementary question about interpreting existing rights. For instance, the colonial regime in Uganda established a rather unusual kind of tenure in parts of the country, known as *mailo*, under which most of the property rights effectively

'It is easier to apply the structure of rights and obligations to the delivery of a service than it is to an outcome but, ultimately, it is the outcome that is most important.'

rested with the tenants and the residual rights of 'owners' were very limited (tenants could sell the tenancy and had secure tenure), and rent was controlled and very low. How to treat this form of tenancy when modernising the system raises a conflict of interests between 'owners' and 'tenants' with potentially major impacts on poverty.

Finally, there is the question of whether human rights have relevance in relation to the distribution of assets and, in a sense, this is a question of how politically radical human rights are prepared to be. Both human rights and economics provide enough intellectual ammunition to be radical as you like. In other words, you can make a solid case for the redistribution of property, but people working in different disciplines are likely to put this case in different ways. The attraction of a human rights-based approach in this context is the idea of identifying a minimal level of property that everyone should have access to and it might be possible to aim at implementing this without massive redistribution in the structure of wealth (simply because the existing inequality of wealth in most societies means that a large proportional increase in the wealth of the poorest could be funded by a much smaller reduction in the wealth of the better-off). It may also be quite beneficial. I think there is scope for some quite creative work in this area, which may lead to something like a minimum level of wealth as an implementable guaranteed right.

'Both human rights and economics provide enough intellectual ammunition to be radical as you like.'

Strengthening pro-poor law: Legal enforcement of economic and social rights

Katarina Tomasevski*

1. Introduction

Over the last two decades, a number of bilateral and multilateral donors have adopted rights-based approaches to development. The relative recentness of this process requires a sharing of knowledge and experience across professional and disciplinary boundaries. This paper focuses on the pillar of human rights work, exposing and opposing violations of economic and social rights. Its purpose is to summarise key lessons of human rights litigation that can support anti-poverty policies, using an array of real-life cases from different corners of the world.

Enforcing human rights is benefited by the mobilising power of the human face and the human fate of victims, and conveys their courage in challenging abuses of power. Unlike anti-poverty strategies, which rely on statistics and which tend to be numbing rather than mobilising, exposing and opposing human rights violations portrays victims as individuals. This helps people understand the obstacles that poor people – especially women – face, and their experiences in challenging and eliminating these obstacles.

The most important feature of legal enforcement is the fact that authorities are already committed to the rights in question under the country's constitutions and laws. The rule of law requires no more of them, but also no less, than to translate their commitments into reality. And yet, these authorities often have to be forced to comply. Otherwise, there is room left for the law to be transgressed with impunity, something which happens often when the victims of violations are poor.

This feature of legal enforcement forms a conceptual bridge to anti-poverty strategies, in that the poor are victimised by violations much more than the rich. Sharing experiences becomes easier because the underlying logic is similar. Making the law work for the poor often necessitates international action to facilitate change. Universality of human rights legitimises and supports such action. Legitimacy derives from minimum human rights standards laid down by the states themselves. Because the key precepts are intended for global application, they have been field-tested in different corners of the world, creating a wealth of experience.

2. The rule of law

The insistence on the rule of law in human rights stems from the fact that governance is the exercise of power and human rights are safeguards against the abuse of power. Two consequences flow from the grounding of human rights in the rule of law.

First, the postulate of equal rights aims to provide those who are disempowered with a legal entitlement. Thus, children have stronger entitlements than adults. For example, human rights obligations regarding street children reach beyond preventing abuses of physical power by the police, exemplified by 'social cleansing', to include 'access to conditions that guarantee [the children's] dignified existence'.[1] That children cannot develop unless they are nourished, housed, clothed, and educated is self-evident. Indeed, the establishment of the rights of the child has been one of the major global successes in the field of human rights, with the convention spelling them out accepted by 192 countries. Parents have the primary responsibility for their children, but children should not be left to die if their parents are abusive or if they are parentless. Children acquire political rights with adulthood; in most countries, they are legally deprived of the right to claim and defend their own rights. A case in Nepal illustrates this: child labourers were precluded by law from forming a trade union to vindicate their labour rights, because they were children. Owing to the armed conflict and the consequent paralysis of public authorities, this case has not as yet been adjudicated. An older case in Tanzania tackled women's status as perpetual children, minors in law, and modified discriminatory customary law so as to affirm that women had the right to acquire and sell land.[2]

The second consequence of the rule of law is that only those rights bestowed upon people by law can be legally enforced. Legally recognised economic and social rights are few. Comparative analyses of country constitutions show that the most recognised right is the right to education, followed by the right to health; the right to housing is included in the constitutions of half of the countries in the world. The right to work forms part of the heritage of Soviet-inspired constitutions and is not recognised by the European Union. This is also the practice of the International Labour Organization, whose Declaration on Fundamental Principles and Rights at Work affirms freedom of association, freedom from forced and child labour, and freedom from discrimination. The Constitutional Court of Benin has confirmed that the right to work 'cannot be due from the State'.[3] However, trade union freedoms form part of global minimum guarantees and are legally enforced nationally and internationally. As early as 1985, the ILO rejected laws demanding that at least 60% of members of a trade union should

be literate, so as to enable agricultural workers to defend their economic and social rights.[4]

Many more economic and social rights, such as the right to development or the right to lifelong learning, have been advocated through human rights activism in the past four decades. Labelling a phenomenon a human rights violation is as popular a mobilisation tool as is the inclusion of the rhetoric of rights in demands for additional entitlements. However, many violations of economic and social rights do not revolve around state-provided benefits. An illustrative violation is the prevention of people with disabilities from earning their own livelihood. The Constitutional Court of Senegal invalidated in 2000 an automatic exclusion of all physically disabled people from teaching.[5]

3. Judicial action against distorted governmental priorities

Colombia's rich constitutional jurisprudence in safeguarding economic and social rights offers fascinating cases. Alongside violations of individual rights, the Court diagnoses situations of unconstitutionality, where governmental policies and budgetary allocations impede the realisation of guaranteed rights.

The Court ruled in February 2004 that formal constitutional guarantees related to economic and social rights of the internally displaced had not been translated into governmental policies and supported by appropriate budgetary allocations. The plight of the internally displaced, after four decades of armed conflict and political violence, was known to all. Nevertheless, they were marginalised rather than prioritised. The Constitutional Court, in the words of Manuel José Cepeda, who delivered the judgment, faulted the government for its denial of the constitutionally guaranteed rights of the displaced. As a consequence, an unknown but large number of the displaced, probably over a million, were neither registered nor informed of their rights. Only a minority were provided with humanitarian assistance or housing, while budgetary allocations were diminished rather than increased with time. Having defined this situation as unconstitutional, the Court has elaborated the list of basic rights of the displaced and laid down a timeframe for the government's compliance with its human rights obligations.[6] The government was ordered to develop a time-bound plan within 54 days, and to allocate resources and secure the basic rights of the internally displaced under the continued supervision of the Court. This paradigmatic case has highlighted the core purpose of enforcement: halting and reversing governmental practice of denial of basic rights to a large, dispersed, impoverished and politically voiceless population.

This case illustrates two important considerations. First, unlike releasing an arbitrarily detained person, securing the right to education or health requires extensive and efficient institutional infrastructure which cannot be created overnight. Secondly, the task of the Court is to enforce the constitutional obligations of the government. These include policy design and implementation, which remain the government's prerogative as long as the constitutionally mandated minimum standards are met.

4. How to tackle development harmful to human rights?

Protection against harmful development interventions has generated a great deal of human rights jurisprudence. A retrospective assessment of the exploitation of natural resources in Nigeria has found violations of human rights through 'the destructive and selfish role played by oil development, closely tied with the repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population'.[7]

Impoverishment resulting from forced displacement or a poisonous industry has been a particularly frequent cause of challenges to violations of economic and social rights. It is never easy to balance legitimate but conflicting priorities. The closure of a polluting tannery brings 'unemployment and loss of revenue' but environmental protection may have 'greater importance to the people', as the Supreme Court of India ruled in 1987.[8]

A particularly helpful innovation has been the establishment of global minimum standards, such as those of the World Bank Inspection Panel, because they are tailored to development and allow challenging decisions made on a supra-national level. Sometimes, the very filing of a case, and the expected publicity surrounding it, leads to the rectification of prospective harm to economic and social rights. For example, a request was filed in 1999 by CELS (Centro de Estudios Legales Y Sociales) in Argentina because budgetary reductions were threatening to annihilate a programme assisting the poorest to grow their own food. This resulted in an immediate change: the budget for the programme was doubled (Argentina: Special Structural Adjustment Loan 4405-AR).

Economic and social rights may be worded as individual entitlements or as corresponding governmental obligations. The Supreme Court of India has made huge strides throughout the past decades in specifying how constitutionally defined governmental obligations should be enforced. In May 1986, Chief Justice Bhagwati pointed out that the law had 'a social purpose and an economic mission'. At the time, a judicial definition of freedom from hunger required identifying governmental human rights obligations to prevent starvation deaths during a famine. This was not an aspect of charity or state benevolence, the Court explained, but a constitutional obligation to 'mitigate hunger, poverty, starvation deaths'. The state had to

undertake adequate measures but could accomplish no more than mitigation.[9] To clarify governmental responsibility in the elimination of child labour, the Court has also acknowledged that this cannot be achieved without tackling underlying poverty. In terms of hazardous child labour, the Court suggested alternatives: ensuring work for an adult family member in lieu of the child, or a stipend to the family in order to enable the child to attend school.[10] Rectifying divergent policies of consecutive governments, however, has proved to be a long-term process, requiring patience and persistence. The Supreme Court ruled on education in 1993, stating that education was a fundamental right, albeit not absolute, as it was 'subject to limits of economic capacity and development of the state'. It posited that 'every child/citizen of this country has a right to free education until he completes the age of fourteen years'.[11] However, it took until 2002 to constitutionalise this right, and the implementing legislation to ensure it for all school-age children is still being drafted.

5. How can women escape poverty if they are precluded from owning anything?

Often, the reason that women are poorer than men amongst the rural poor is the existence of a denial of their rights to inherit and own land. More often than not, it is customary law that denies daughters or wives land rights, and the courts in individual countries may uphold such discriminatory exclusions. Indeed, the Supreme Court of Zimbabwe did exactly that. It stated that 'a lady' could not inherit her father's estate 'when there is a man'.[12]

This case highlighted the importance of the universality of human rights. International human rights law operates vertically and horizontally. Vertically, human rights law defines the protection of the people *from* their government and *by* their government. Horizontally, it provides a solid legal basis for donors to demand that other states comply with human rights obligations *vis-à-vis* their population. Most importantly, international human rights law has taken away from individual governments the role of arbiter. Since non-discrimination is the key human rights principle, women should not remain 'rights-less'. Indeed, the Protocol to the CEDAW Convention (Convention on the Elimination of All Forms of Discrimination against Women) has instituted access to two types of international remedy. One bestows upon victims the right to pursue their case internationally when violations of their rights were not remedied domestically; another enables inquiries into grave and systematic violations of women's rights with a broad-based right of initiative. The CEDAW Convention explicitly lists women's economic and social rights; the Protocol came into force rapidly for more than 70 countries and is open to others. This has added a gender-specific component to international complaints procedures. Together, these procedures bestow upon individuals the right to hold governments legally accountable for failure to implement human rights obligations, both domestically and internationally.

6. Coping with the last vestiges of the Cold War: subsidy instead of liberty

Self-assessments by the governments of Cuba or North Korea offer an image that all economic and social rights are guaranteed to all. This model continues the Cold War notion of 'rights' as government-provided, often imposed, services. However, there is no freedom to complain. Indeed, both governments are on the agenda of the United Nations Commission on Human Rights for violations.

Global ideological disputes during the Cold War legitimised this extreme as well as the other, epitomised by the US, which denied that economic and social rights were human rights. The United Nations imported guarantees of all-encompassing, fully subsidised public services into some of the older human rights instruments. However, human rights jurisprudence has clarified that education can be made compulsory only when freedom of choice is guaranteed, and that public health measures (such as vaccination) can be made obligatory only under strictly defined conditions.

7. The free or for-fee dilemma

Two post-Cold War changes have profoundly affected economic and social rights. One is the obliteration of the previous expectation that the state will provide all public services to everybody, free of charge. The other is the institutionalisation of legal duality of services, whereby these continue as recognised rights but are also traded, domestically and internationally. The combined effects of these two changes have generated more heat than light, owing to the fact that they are new and the practice of state has not yet settled. As was seen in Bolivia, in the aftermath of the shift from the supply of water as a free public service to a freely traded service, the absence of human rights safeguards can trigger a profound, painful and prolonged crisis. The background was privatisation of water supply, with major involvement of international agencies and multinational companies, which steeply increased prices (Secretary General, 2003: paras 36-7).

In economic and social rights, the corresponding obligation of governments is to enable people to provide for themselves and, exceptionally, to be providers of the last resort. Taxation is a duty, enforced in particular under the European Convention on Human Rights. The human rights discourse tends to be hostile towards the concept of individual duties, although these represent the logical consequence of rights. It is hard to imagine how any state would raise the revenue to finance health, education, water and sanitation, or assistance for those too young or too old to work, were it not for taxation. The European Court of Human Rights has legitimised 'the States' power to pass whatever fiscal laws they considered desirable' so as to

secure the payment of taxes, provided that judicial remedies exist lest taxation amounts to arbitrary confiscation.[13] This is a reminder that most services are paid for, whether through taxation or direct charges. However, the difference between taxation and direct charges is fundamental. The human rights jurisprudence regarding taxation has affirmed the principle of ability to contribute: those with insufficient income are not taxed. The imposition of charges for basic public services (such as vaccination of children or primary schooling) upon those who cannot pay them amounts, then, to regressive taxation. Legal challenges have been mounted in countries as different as the Czech Republic[14] and the Dominican Republic.[15] Their scarcity is the result of the absence of information on the rights that people should have, or the absence of the rule of law, which invalidates formally proclaimed constitutional rights.

8. Translating law into practice: the realm of the possible

Law is symmetrical. No government can be legally obliged to do the impossible. The illogic of burdening any actor with obligations it cannot perform would collapse the rule of law. Accordingly, universal human rights are few and the corresponding governmental obligations are set at a minimum feasible in all corners of the world. Governmental obligations corresponding to economic and social rights are defined in terms of progressive realisation. Although the European Court of Justice can state that 'the right to paid leave is a social right conferred on all workers by Community law',[16] paid leave is a distant dream for many workers in many developing countries. Even more important than the list of enforceable substantive rights is the notion of progressive realisation, which mandates improvement. However, economic circumstances change and curtailing acquired social rights may become necessary. In a case concerning old-age pensions of previous public employees, the Inter-American Court of Human Rights ruled that the rights of a privileged minority had to be balanced against the misery of the majority, who did not enjoy any pension rights.[17]

In education, the universal minimum is defined as primary schooling. When a government is unable to ensure all-encompassing free and compulsory primary education, it should develop a strategy for doing so and seek international assistance. Pre-school education is not defined as a right in most countries. Post-primary education is subject to progressive realisation and guarantees vary. Education which is legally defined as compulsory should be free; laws vary regarding university education. Indeed, in most countries the latter is not free, although jurisprudence in Argentina and Venezuela has confirmed that it should be.

In health, the right itself is defined in relative terms, as the highest attainable standard of health. Judicial interpretations of the right to health have focused on public health, such as vaccination or prevention of epidemics. Entitlements to health services vary enormously. The huge difference between wealthy and poor countries has been reflected in the judicial protection against expulsion of an AIDS patient from the United Kingdom to St Kitts, on the grounds that he would not have had an effective entitlement to health services in the latter.[18]

With regard to housing, a frequent misconception is that having the right to housing means obtaining free housing at the government's expense. The Constitutional Court of South Africa has clarified that the government should realise the right to housing progressively, through a 'reasonable provision within its available resources'. This necessitates strengthening 'the capacity of institutions responsible for implementing the programme'. However, excluding from the programme those 'with no access to land, no roof over their heads, and who are living in intolerable conditions' cannot qualify as reasonable.[19]

By definition, progressive realisation has to do with differences in the stage of development and, especially, financial constraints. As put by Mark Malloch Brown, 'you cannot legislate good health and jobs. You need an economy strong enough to provide them' (UNDP, 2000: iii). Nonetheless, the government can ensure that resources that can be invested in health or education do not disappear through corruption. Paradoxically, the government itself can be the principal culprit. It took a change of government in Zambia for the parliament to remove in 2002 the immunity of former President Chiluba, so as to start proceedings for corruption. Lesotho made the headlines that same year with the first convictions in a major bribery scandal concerning the Highlands Water Project.

9. Focus on poverty caused by discrimination

Commentaries of the jurisprudence of South Africa's Constitutional Court regarding economic and social rights have often depicted these as 'rights of the poor.' There and elsewhere, previous human rights litigation was seen to vindicate individual liberties while ignoring the plight of the poor. The racial and gender profile of poverty facilitated human rights litigation by demonstrating that discrimination – rather than poverty – was at issue. Those who could not – still cannot – afford to finance their own housing, education or health services tended to be both black and female. Both domestically and internationally, legal enforcement of economic and social rights has been particularly successful in exposing and opposing discrimination on the grounds of gender, race, and indigenous or minority status. This results from the human rights principle of equality. The primary characteristic of human rights is that no particular feature attaching to any individual can affect his or her entitlement to human rights. Although social and economic rights should be realised progressively, it is settled jurisprudence that non-discrimination applies fully and immediately.

Much of the jurisprudence related to women's rights is recent. Denials of property rights to women were overturned by the Supreme Court of Vanuatu in 1994,[20] as was a company policy as late as 1997 in the Philippines not to employ married women.[21] Women's legal situations can be much worse where they are treated as property of their husband. In Cameroon in 1998, the Supreme Court dismissed as contrary to the CEDAW Convention a husband's demand for a judicial order to force his levirate wife to return to him on the grounds that she was part of his late brother's property.[22]

As early as 1977, the Inter-American Commission on Human Rights ruled that indigenous health rights could be violated through inappropriate development policies.[23] Gross abuses, such as massacres of indigenous communities in the exploitation of gold or timber, generated jurisprudence specifying governmental obligations.[24] Protection of indigenous land rights as an economic and environmental base has entailed adjudication of collective complaints mounted by indigenous communities to vindicate their 'communal ownership of the collective property of land'.[25] Indigenous land rights have been constitutionalised in countries such as Brazil and the Philippines, followed by complex delimitation, demarcation and formalisation of land titles.

One of the most controversial issues in discrimination is the differentiation between citizens and non-citizens concerning economic and social rights, a bone of contention in countries as different as Latvia and Côte d'Ivoire. The International Covenant on Economic, Social and Cultural Rights has explicitly affirmed that developing countries may determine the extent of guarantees to non-citizens. Developed countries do this also, prompting numerous legal challenges with, as yet, unsettled jurisprudence.

10. Judicial activism and judicial restraint

Human rights guarantees act as correctives for budgetary allocations. This is explicitly anticipated in mandating the deployment of 'the maximum available resources' for progressive realisation of economic and social rights. The International Covenant on Economic, Social and Cultural Rights obliges in Article 2 each party to take steps 'to the maximum of its available resources', both domestically and also 'through international assistance and cooperation'. The Convention on the Rights of the Child stipulates in Article 4: 'With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.' This formulation indicates why legal enforcement is crucial. It would be impossible to define in the abstract those resources that might be 'available' for investment in economic and social rights or to specify what 'the maximum' might be. Moreover, the boundaries of the judiciary are defined by the remits of the legislature and the executive. Judges do not have constituencies whose interests they should articulate and defend. Furthermore, they are lawyers. No constitution in the world has empowered (or is likely to) the judiciary to design and adopt the government's budget. However, the judiciary *can* furnish safeguards against misappropriation of the budget, as was shown in the early, precedent-setting case against the Estate of Ferdinand E. Marcos, which succeeded in returning some of the misappropriated funds to the Philippines.[26]

Accountability necessitates explicit standards against which a government's performance is measured, and procedures to ensure that these standards are met. In assessing whether a government has complied with its obligation to invest the available resources to their maximum for the progressive realisation of human rights, constitutional courts have advanced the common, global understanding of economic and social rights and the corresponding governmental obligations. Three important clarifications stem from this jurisprudence.

First, human rights obligations do not necessarily prevail over other obligations of the state. This has been affirmed in the Philippines, in a unique case of weighting repayment of foreign debt against the constitutional priority for education. A group of senators challenged in 1991 the constitutionality of the budgetary allocation of P86 billion for debt servicing as compared with P27 billion for education. The Constitution of the Philippines obliges the government to assign the highest budgetary priority to education. The issue to be decided was whether debt servicing, at more than three times the budgetary allocation for education, was unconstitutional. The Court found that education should obtain the largest allocation as the Constitution required, but that debt servicing was necessary for the creditworthiness of the country and, thus, the survival of its economy.[27] This highlights the need to integrate human rights in the policies and practices of creditors and donors.

Secondly, the courts are not empowered nor are lawyers equipped to address inherently political decisions, such as budgetary priorities, or areas such as health or education where the executive has the professional expertise lacking to the courts. The Constitutional Court of South Africa has defined the boundaries that the judiciary should not cross. In the area of health, it has emphasised that 'a holistic approach to the larger needs of society' may often prevail over an individual right to health services.[28] Moreover, it has added that 'in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum standards should be nor for deciding how public revenues should most effectively be spent'.[29]

Thirdly, the courts are required to uphold the rule of law. This includes holding the executive accountable for keeping within the law and, for constitutional courts, also verifying whether the legislation is in conformity with the constitution.

The practice of the Constitutional Court of Hungary, for example, has confirmed that the Court should protect social rights against austerity measures justified by economic crises. In a widely publicised case, the Court invalidated in 1995 large parts of the austerity package negotiated with the IMF.[30] It ruled that respecting parliamentary powers to determine how social rights should be actualised did not preclude the Court from ensuring that no violation occurred. The Court has acknowledged that living standards can decrease in response to worsening economic conditions, but also that measures which dramatically and immediately reduce almost all social entitlements are impermissible. The means that, although the government ensures that minimum standards guaranteed by the Constitution are beyond the Court's remit, those affected ought to be provided with time and opportunity to seek alternatives.

11. Pro-poor law to strengthen pro-poor development strategies

The focus on governmental human rights obligations is particularly well suited to poverty reduction, because poverty does not conveniently slice itself into portions pertaining to health, housing, education or food. The Committee on Economic, Social and Cultural Rights (CESCR) has called for a strengthening of the capacity of the judiciary 'to protect the rights of the most vulnerable and disadvantaged groups in society' (CESCR, 1998). An important reason behind the fact that the supply of this type of human rights litigation does not match the range of problems is that human rights litigation remains dangerous. The consistently high casualty rate among human rights lawyers has led to special regional and global procedures for protecting human rights defenders.

Because legal proceedings are routinely lengthy and undertaken only by trained lawyers, ombudsman-type institutions have proved a useful complement. In its first annual report, the Uganda Human Rights Commission (1997: 13) put it thus: 'Most complainants are simply vulnerable people, who say that court procedures are too complicated for them and that they do not have the money to engage private lawyers to pursue their cases'.

In most developing countries, much of the work of national human rights commissions is taken up by economic and social rights. For example, 44.5% of the caseload of Indonesia's Human Rights Commission (2001: 69) was in 2001 classified as 'violations of the right to welfare'. Such institutions tend to provide open access to all potential complainants, a cost-free procedure, and flexibility in methods of work. However, they do not have powers to interpret law and, thus, complement rather than supplant the judiciary.

The judiciary interprets formal, and necessarily abstract, human rights guarantees in specific circumstances. Courts do not act on their own motion but follow complaints of human rights violations or requests for judicial review where a claim has been made that harm to human rights is imminent or inevitable. The interplay between abstract legal norms and factual circumstances enables precise definitions of rights and violations. The government is a party to the case, and can present all factual and legal arguments, and explain and justify its policy decisions or strategic choices. The courts have to provide reasons for their decisions which are, increasingly, reviewed internationally.

Human rights law has affirmed that each individual is the subject of rights and, consequently, has provided a broad basis for claiming and vindicating them. Because no right can exist without remedy, the evolution of human rights law has been accompanied by the establishment of domestic institutions to provide remedies for violations. The experiences of these institutions provide inspiration for replication or adaptation of innovative models for enforcing the rights of the poor and, thus, strengthening anti-poverty policies.

Endnotes

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1 Villagrán Morales vs Guatemala, Series C 79, 1999.
2 Ephrahim vs Holoria Pastory, 1990, LRC (Const.) 757.
3 CC 02/93.
4 Digest of 1985, para. 219.
5 CE No. 12/2000.
6 T-025 de 2004.
7 ACHPR, Case 155/96, decision of 27 October 2001.
8 4 SCC 463.
9 AIR, 1989, SC 677.
10 AIR, 1997, SC 699.
11 SC. 2178, 1993.
12 S.C. 2 0/98, 16 February 1999.
13 Gasus Dosier – und Fördertecknik GmbH vs Netherlands, Series A 306-B, 1995.
14 US 25/94 of 13 June 1995.
15 Case No. 12.189.
16 C-173/99.
17 IACtHR Series C 86.
18 D. vs United Kingdom, judgment of 2 May 1997.
19 CCT 46/01.
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21 G.R. No. 118978, 272 SCRA 596.
22 CASWP/42M/98.
23 IACmHR No. 1802.
24 IACmHR No. 11.706.
25 INCtHR Series C 79.
26 New York Centre for Constitutional Rights Docket, 1987.
27 G.R. No. 94571, 22 April 1991.
28 CCT 32/97.
29 CCT 8/02.
30 43/1995 and 44/1995 (VI.30) AB.

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Meeting 3: Reconciling rights, growth and inequality

Speakers: Lord Brett, International Labour Organisation
Andy McKay, Overseas Development Institute

Chair: Adrian Wood, UK Department for International Development

Meeting Summary

The first speaker, Lord Brett, began by introducing the International Labour Organization (ILO) and its objectives, which are encapsulated in its concept of 'decent work'. He then spoke about the ILO's Declaration on Fundamental Principles and Rights at Work and the debate that had surrounded its adoption. Discussions regarding the social dimensions of globalisation have continued within the ILO since then and Brett highlighted some of the conclusions of the Commission that was established to look at this issue. Brett discussed some of the challenges associated with the implementation of workers' rights and concluded by stressing that fundamental rights are affordable for all countries.

The second speaker, Andy McKay, posed the question of whether rights are detrimental to growth and used the example of labour rights to examine some of the possible tensions. However, whilst recognising the potential trade-offs, McKay argued that these are not always present and there is a great deal of scope for dialogue. Concerns about inequality provide one such inter-disciplinary bridge between rights and economics. McKay then proposed three further bases for dialogue and concluded by stating that there are in fact complementarities between freedom, rights and growth.

Elements of the ILO's approach were challenged during the discussion, in particular their relative inattention to the informal sector and their inability to achieve consensus on the inclusion of health and safety in their Declaration. The importance of a 'community of practice' between development and human rights professionals was again stressed. The Chair concluded by suggesting that economists and human rights professionals can both learn from the other's strengths: economists should recognise that human rights can contribute to outcomes and human rights professionals need to be more aware of the importance of inputs, opportunity costs and trade offs.

Lord Brett

Created as part of the Treaty of Versailles in 1919, the International Labour Organization (ILO) has existed for around 85 years and precedes the UN. It is committed to the defence of workers' rights, freely-chosen employment, democracy, peace and poverty reduction. It is also committed to the principle of tripartism and this is reflected in the ILO's governing body, the Conference, which includes representatives from governments (50%), workers' organisations (25%) and employers' organisations (25%).

The debates about globalisation that have been prominent during the past decade have also been held within the UN. They have exposed a series of areas in which the ILO has historically been active at only a low level or not at all. We are now called upon to have interests and views, not only about workers' rights, but also with regard to issues such as trade and, in particular, the question of export processing zones. In response, we now have declarations concerning multinational enterprises, HIV/AIDS, social security and, currently, the tsunami disaster. We have tried to encapsulate these varied areas of interest in a simple phrase: the concept of decent work. The overarching objective of the ILO has been amended to reflect this and is now the 'promotion of opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity'.

Decent work is a converging focus for the four strategic objectives of the ILO, namely: rights at work, employment, social protection and social dialogue. It is an organising concept which provides an overall framework for putting into action economics and social development. Workers' rights are at the centre because, without them, we will fail in the same way that globalisation is failing because it does not put employment at the centre of policy-making. The belief that a country's level of development can be enhanced by suppressing workers' rights has been discredited. It never had much credence within the ILO but it is an argument that has been used by some governments to justify their decision to not put into practice some of the ILO's fundamental conventions.

The Declaration on Fundamental Principles and Rights at Work

The ILO's Declaration on Fundamental Principles and Rights at Work[1] includes the following core rights:
*   freedom of association and collective bargaining;
*   abolition of child labour;
*   elimination of forced labour; and
*   freedom from discrimination in the workplace.

During the debates surrounding the adoption of the Declaration, the workers put forward a strong argument for health and safety at work being a fundamental right. This argument was defeated, however, because governments and employers took the view that a country's level of development has an impact on its ability to implement health and safety at work. In other words, they were not something that could be applied fundamentally. The four rights that were included in the Declaration can be applied regardless of development status because they are 'enabling' rights.

It has been said that, by having a declaration that states that workers have fundamental rights, the ILO was seeking to implement an international minimum wage. This is untrue; whether there is a minimum wage is for the country in question. If it does exist, it is set at the level that the parties of that country believe it should be according to their level of development. It is not imposed from outside.

So, in 1998, there was a 68-hour debate and it produced a slim, but important, document – the Declaration on Fundamental Principles and Rights at Work. Based on the ILO's fundamental conventions, it said that all member states had an obligation, by virtue of their membership of the ILO and regardless of whether they had ratified the individual conventions, to respect, promote and realise in good faith and in accordance with the constitution those fundamental rights that are the subject of the convention. These include:
*   the freedom of association and effective recognition of the right to organise and collective bargaining (Conventions 87 and 98);
*   the elimination of all forms of forced labour (Convention 29);
*   the effective abolition of child labour (Conventions 138 and 182) (Convention 182 relating to extreme forms of child labour was only adopted five years ago but has already been ratified by over 150 of the 180 countries that exist in the UN system);
*   and the elimination of discrimination in respect to employment and occupation (Conventions 100 and 111).

The Declaration was adopted by all the governments that form the ILO. Although this does not include all the governments that make up either the UN or the OECD, it is still remarkable that arguments contrary to the Declaration continue to exist in other agencies, such as the World Bank or the International Monetary Fund. There appears to be separate governments operating in separate arenas. We should not be surprised by this lack of coherence because it exists within every government, including, on occasion, the ILO itself. However, trade unions are pushing for continuous debate on the social clause to be put into the welfare organisation which, at that stage, was being created from the GATT, in the face of a clear unwillingness on the part of governments and employers to support such a clause.

> 'The belief that a country's level of development can be enhanced by suppressing workers' rights has been discredited.'

What was agreed, however, was that the only place where workers' rights should be ratified and dealt with was the ILO. As the Thai Minister for Labour said in Singapore in 1996, 'if the ILO has no teeth, give it teeth'. Needless to say, the same governments who were anxious for the ILO to have teeth, were not as anxious that it should have any bite. Also, whilst the Declaration (which was first proposed by the employers' organisations) received support and is now obligatory, its effectiveness is dependent on the willingness of governments to ensure implementation.

The social dimensions of globalisation: debates within the ILO

The Declaration also did not end the debate about globalisation within the ILO, and discussions about the social dimensions of world trade and globalisation have continued during the past decade. This has been our most heated debate and, whilst recognising that agreement was probably impossible, we came to the view that it warranted further examination. In 2002, the Director General was therefore given a fairly unique brief to bring together 25 experienced people to form a World Commission on the Social Dimensions of Globalisation. The Commission was co-chaired, uniquely, by two sitting presidents: the Presidents of Finland and Tanzania. The other members included Ministers and international civil servants, academics, trade unionists and industrialists from around the world, as well as, ex-officio, the ILO's Director General and me in my capacity, at the time, as Chairman of the Governing Body.

The mandate of the Commission was to write a report that was could be used both internally within the ILO and also to influence the world (World Commission on the Social Dimensions of Globalization, 2004). I do not know if this has been achieved but it has certainly influenced me. An example of this is the conversations I had with two different groups of people which provided a graphic illustration of the impact of globalisation. First, I was told by a group of very rich German-speaking dairy farmers in Port Alegre, Northern Brazil, that they were going out of business because competition from Eastern European powered milk meant that they could not market the milk from their new $3.25 million creamery. I then heard the same complaint from a small co-operative of farmers in Arusha, Tanzania, who said that they also could not sell their milk in the market place because of subsidised powered milk from the European Union. If I had needed convincing of the inequities of the Common Agricultural Policy (CAP) trading system, this single example would have been more meaningful than any amount of statistics showing how much is spent on agricultural support in the US, Europe and Japan each day.

The centrality of employment

The Commission's report said a number of things that go beyond what the ILO can do, but it also revealed some things that had not been previously obvious. Why is globalisation failing?

The answer is because it is not delivering jobs. The change of government in India demonstrates a political consequence of this. Here, a successful government went into an election boasting of its economic prowess because of its job creation record in Bangalore and finished out of office because 50,000 jobs in Bangalore is small compared to the 6 or 7 million jobs that have disappeared from the same economy across India as a result of market liberalisation. Demography and democracy do not necessarily fit together but, by and large, democracy delivers the message that, if you do not do what people expect, there will be consequences.

One of the primary problems that the Commission found is the lack of coherence within the UN system. This means that, although the ILO has a position on labour rights, the World Bank, which is also part of the UN, may not also adopt these rights. Whilst the World Bank has now accepted labour rights, the IMF is still wavering about the issue of freedom of collective bargaining. The Commission therefore identified a number of incoherencies. For example, although policies on investment and growth exist (whether these are World Bank, IMF or regional policies), there continues to be a lack of recognition of the centrality of jobs. It will not be possible to release the energies and potential contained within globalisation if we do not build jobs into the equation from the beginning.

In this sense, the ILO has taken on the argument regarding rights put forward in the report on globalisation. The report is now a UN resolution and part of the ongoing debate about the Millennium Development Goals (MDGs). It is interesting to note that world employment cannot be found in the MDGs. This begs the question of whether the ILO or the UN was asleep at the time. The idea now is to embed employment in the MDG review, where we will return to our argument that the rights contained in the Declaration on Fundamental Principles and Rights at Work, which the world has adopted, are enabling rights and are therefore not dependent on the level of economic development.

Challenges in implementing workers' rights

One of the challenges involved in implementing workers' rights is the power imbalance between governments, multinational and domestic corporations and trade unions. This exists in the North but, in many cases, it is even more evident in the developing world. The Declaration should, however, provide a boost to governments and enable them to pitch themselves against predatory employment practices, and uphold fair ones, in the knowledge that it does nothing to remove the advantage of a low-wage economy.

China provides a fascinating case in this respect. It is an economic giant doing tremendous things. This raises questions about how a society transforms itself. China has similar checks and balances as other less-developed countries with regard to workers' rights. There is a theoretical

'Why is globalisation failing? The answer is because it is not delivering jobs.'

concept called the right to belong to the All-China Federation of Trade Unionists, which is umbillically linked to the government and to the Communist party. However, this is not going to be a viable proposition in the long term and the question therefore is how will social transformation occur? The answer is that they are bound by the Declaration and what we have to do, I think, is to try to ensure that multinational companies operating in those areas understand, recognise and live up to these obligations.

In addition to the discrepancies within governments, we also have to bear in mind that companies sometimes do not apply the same standards in developing countries as they would expect and honour in their own countries. The best example I have seen was some years ago in Malaysia where a German company did not want to recognise trade unions despite the fact it had trade unionists on its board in Germany.

Therefore, my argument, which has been developed by the ILO, is that the fundamental rights enshrined

'... whether you are a government or a company, you can afford to have basic rights at work and, if you live in a democracy, you cannot afford not to.'

in the Declaration cannot be violated for economic benefit. The remainder of our 185 conventions are developmentally linked and are ratified by governments as they become able to uphold them. I do not believe that fundamental rights should be linked to development and the ILO does not believe that export processing zones, which sell the rights of workers in order to bring inward investments, are a necessity. Most of the research we have done seems to suggest that, when you try to attract investment by providing incentives, it is usually factors such as market access or products that lead to increased investment rather than the incentives themselves. So, our case is very simple: whether you are a government or a company, you can afford to have basic rights at work and, if you live in a democracy, you cannot afford not to.

Endnotes
1   http://www.ilo.org/dyn/declaris/
    DECLARATIONWEB.ISSUESHOME?var_
    language=EN.

Andy McKay

For the next 20 minutes I am going to talk about the extent to which there is complementarity between rights and growth. I come at this from the perspective of an economist who has some familiarity with rights debates. There is a widespread perception of there being a conflict between protecting rights and promoting economic growth. The argument is frequently made that protecting rights is undesirable because it is bad for growth and efficiency. To what extent is this valid?

Are rights detrimental to growth?
We can look at the example of labour rights. For instance, some argue that setting the minimum income guarantee at a very high level can create disincentives because people do not feel the need to be as productive if they have a high income. This illustrates that there are potential trade offs and the nature of economic growth is frequently that some people will lose while other gain because it is about doing things differently. It is about using, for example, new technologies in agricultural production, new varieties of seeds and so on. These changes can bring with them losers as well as winners and frequently do. Growth is also an issue for DFID and other donors. They are committed to both a rights-based approach to development and to the importance of economic growth for achieving poverty reduction. These are therefore important issues for many people.

However, there has in fact been relatively limited work and dialogue about the relationship between rights and economics and, more specifically, between rights and growth. This is one of the reasons why I am presenting at this session. I was looking for experts in this area but there are very few. Mary Robinson, the former UN High Commissioner for Human Rights, identified the discussion between rights and economics as being the key issue in terms of taking forward the rights discourse.

Rights and economics: is there a basis for dialogue?
There are various differences between the two disciplines, including in relation to their perspectives and language. While there has been lots of interdisciplinary work in other areas, discussion between economists and human rights professionals has been lacking. There are also conflicts between, what we might see as, the universal demands of human rights legislation and resource constraints, which are a key issue in economics. Of course we want to ensure that everyone's rights are fulfilled but we live in a resource-constrained environment. Therefore, there are going to be trade offs because what we are really talking about are distributional issues.

However, I would also suggest that there is a lot of scope for dialogue. Trade-offs and choices are not inevitable – they are not always present and there is therefore a basis for dialogue. Amartya Sen is an economist who has done a lot of work on rights, ethics, economics and the interface between these different areas and his work on capabilities and freedoms has been a basis for dialogue between different disciplinary perspectives.

Inequality, discrimination and pro-poor growth
Much of what we are talking about here relates to inequality and I would also suggest that inequality is a key basis for dialogue. In this respect we are thinking not just in terms of income or wage inequality but of all the different dimensions that are relevant to inequality, such as power, access to education, health and so on. Inequality can reflect discrimination because discrimination means that two, otherwise equal, people do not achieve the same outcomes because of discriminatory processes. Therefore discrimination and the denial of rights to specific groups, such as minority groups, is a cause of inequality. Now of course not all inequality is due to discrimination. Inequality in people's incomes, education and health varies for all sorts of reasons, but one of these can be discrimination and the denial of rights.

Inequality also gets us to a concept that is very familiar to economists: the trade off that can sometimes occur between economic efficiency and equity or fairness. So, for example, to take the issue of redistribution of income through the tax system, we would say that this is desirable from an equity point of view and that high levels of taxation can reduce inequality. But we could also say that, if tax levels are excessive, this can be bad for efficiency because it creates disincentives for people to save, invest, work, etc. In these debates about inequality there is also widespread discussion about the relationship between poverty and growth and the mediating impact of inequality. Inequality is a major factor influencing the extent to which growth can be translated into poverty reduction and the achievement of key rights. So inequality provides an important basis for dialogue.

Three bases for dialogue
I am going to suggest that three things provide the basis for dialogue:
i. *Growth is not an end in itself*. This comes from rights discourses and the work of Sen (and common sense!). We do not want growth just to have growth. We want growth to achieve some particular aim or end.
ii. *Growth is nevertheless very important*, including for the purpose of achieving rights and freedoms. This is especially so in low-income countries. For example, most African economies have either failed to grow or have had negative growth over the past twenty years or more. This lack of growth is itself something that can deny freedoms. So growth is very important.
iii. Frequently *freedoms and rights can actually help to promote growth*. There may be trade

'Trade-offs and choices are not inevitable ... there is a basis for dialogue.'

offs of the sort we talked about earlier but these are not always present. Sometimes freedoms and rights are beneficial for growth. I will say a bit more on each of those points before concluding.

Growth is not an end in itself...

Growth is not an end in itself. In a way that is fairly self-evident. Even the raising of peoples' incomes is not an end in itself. The purpose is surely to achieve an expansion of human freedoms, of what people can do and achieve. Growth should therefore be judged in those terms, in terms of the extent to which it expands human freedoms and one of those may, of course, be the right to work. So, if we judge growth in these terms, the type of growth matters. Who benefits? Whose incomes are increasing and whose are not? What is the distributional pattern and is it sustainable or is it just a temporary boom? This relates to the discussion about pro-poor growth and, while there are lots of definitions about what this means exactly, growth that achieves a significant expansion of freedoms for the poor must be what we are talking about. Fundamentally, therefore, it is the expansion of freedoms that are important and growth is only a means to an end.

... but it is important

But it is an important means to an end, especially in low-income countries. Negative growth, which many counties have experienced during the past two decades, constrains freedoms because it means that there are fewer resources available. This is not just for individuals, whose incomes may decrease, or for production or output, etc., but also for governments, who have fewer resources to invest in health, education, infrastructure, and so on. Negative growth can also be a source of conflict because, as resources become scarcer, there can be more tensions over the distribution of those resources.

These types of constraints can also frequently mean that rights objectives cannot be achieved immediately because the necessary resources may simply be unavailable. Although not all rights depend on resources, many do. The provision of education, health, monitoring standards, etc., requires resources. If a country is resource constrained, as low-income countries clearly are, then it is likely that rights objectives cannot be achieved immediately and may need to be realised over a period of time. There therefore needs to be a progressive realisation of rights, with programmes and policies put in place to achieve rights over time. Now that, of course, starts to imply choices. Which first? Which most quickly? How quickly, given the resources available?

The important point about growth is that there can also be a trade off between growth and

'... growth that achieves a significant expansion of freedoms for the poor must be what we are talking about.'

equity. Sometimes we can have patterns of growth that are associated with rising inequality, as demonstrated by the growth experience of China over the past twenty years, which has had rapid, poverty-reducing growth but this has been accompanied by significant increases in inequality. Against this background, how well is China able to protect the rights of people in lagging or inland regions, or in poorer rural areas? Globalisation is another obvious example here. If globalisation and trade policy reform is good for growth (and it is often but not always), do we need to also think about the distributional pattern of that growth? Frequently growth can be associated with increasing inequality. So, again, there are choices.

Rights and freedoms can promote growth

Finally, and importantly, freedoms and rights are not necessarily in conflict with growth and can actually help to promote it. So the trade off that we suggested need not always exist. Going back to inequality, there is increasingly evidence across countries – Brazil, South Africa and so on – that a high level of inequality is bad for growth. The evidence is that these countries have not achieved economic growth or have had lower growth rates relative to countries with significantly less inequality. High inequality, then, can be bad for growth.

Another example is gender empowerment. Gender empowerment is about protecting the rights of women and reducing gender inequality but it is often also good for growth promotion and efficiency. Work by Tim Besley, for example, looks at women-only elections that have been beneficial in some Indian States, not only from an equity point of view but also in terms of pro-growth policies and poverty reduction. Effective service delivery, particularly in terms of the provision of health and education to the poor, is also important for growth. Democratic political institutions are also frequently important for promoting economic efficiency. Another often-cited example (which is not quite related to growth but is relevant nonetheless) is the importance of democracy in the prevention of famine in South Asia.

So, there are many cases where there are in fact complementarities between freedom, rights and growth. There will still be some trade offs but their importance is exaggerated and many complementarities also exist. There is a basis for dialogue. There is a basis for developing a language that accommodates the consideration of rights, economics and growth and allows those working within these disciplines to speak to one another. And there is less of a conflict than it appears at first sight. The three points that I have put forward are a basis for that discussion.

Rights and economic growth: Inevitable conflict or 'common ground'?

Andy McKay and Polly Vizard*

1. Introduction

The need for a process of inter-disciplinary dialogue and consensus-building aimed at establishing the 'common ground' between rights and economics discourses has been highlighted by Mary Robinson, former UN High Commissioner on Human Rights. At the same time, there remains a wide perception of a conflict between realising rights on the one hand and economics concerns on the other – with fundamental freedoms and human rights often viewed as being in tension with development, growth and the optimal allocation of resources. This paper considers this issue specifically in relation to achieving economic growth.

Re-igniting growth, particularly in regions of the world that have experienced little or negative growth (as in much of sub-Saharan Africa), has again become an important focus in international development discussions. This is recognised as a key priority for achieving the Millennium Development Goals (MDGs) (not just in relation to income poverty), as stressed in the 2003 *Human Development Report* (on the MDGs) (UNDP, 2003) and by the UN Millennium Project. Indeed, the main motivation for the proposed scale-up in aid flows is to enable countries to reach self-sustaining growth paths and reduce long-term aid dependence.

However, this growth focus raises concerns, partly based on some past experiences, about whether seeking to achieve and accelerate growth will conflict with the realisation of key rights. This emphasises the now widely recognised fact that the nature of growth matters, in particular its distributional pattern and its sustainability (coupled with the ability to manage downturns). This focus on how to attain broad-based growth is evident in, for example, the recent multi-donor project on Operationalising Pro-Poor Growth (OPPG).[1]

We argue here that there is much less conflict between the realisation of rights and economic concerns than is often assumed. Much of this perception of conflict is a matter of different language and approach, and there is considerable space for dialogue. Rights-based approaches and frameworks of analysis of economic growth are much more compatible than is sometimes supposed by detractors, and they often address very similar issues. This is not to deny that there are still real issues and choices to face, but these arise just as much within a rights approach or within an economic perspective as between the two.

The paper highlights an established and growing body of literature in economics, including identification of ways in which freedoms and rights can be instrumentally important for economic growth (as well as the reverse relationship). The underlying rationale is the identification of the ways in which these established lines of enquiry might be extended and linked more explicitly to a research programme on human rights and economic growth. It is important to note, however, that we deliberately take a broad view of the terms freedoms and rights – their usage in economics is often different from internationally recognised meanings in the field of human rights. Some of the lines of enquiry discussed here do not make explicit reference to the international human rights framework, nor do they necessarily reflect internationally recognised interpretative principles relating to indivisibility, 'progressive realisation' and the 'minimum core'.[2] Nonetheless, the approach we take here maps out a basis for dialogue. This choice is also dictated by the evidence currently available.

This paper briefly discusses the apparent conflict, both in conceptual terms and by drawing on frequently quoted examples of apparent conflict, such as fast growth in China. It then sets out an analytical framework; identifies some of the ways that growth is important in realising freedoms and rights; and denotes the ways in which key freedoms themselves can be instrumentally important for growth. This leads into a review, by way of specific examples of evidence, on the extent to which a rights perspective has helped to achieve freedoms and growth. The conclusion includes identification of priority areas for taking this dialogue forward.

2. Rights and economics – the nature of the apparent conflict

There already exists something of a discourse between economics and rights, notably associated with the work of Professor Amartya Sen; this includes some work on reconciling rights objectives with the need for growth (e.g. Osmani, 2004). The interpretative framework set out by the UN Independent Expert on the Right to Development (RTD) further suggests that the international human rights framework, supported by international law, has implications for the nature and scope of economic growth. For example, the formal RTD model set out by Sengupta (2004: 182-86) captures and formalises the notion of the Right to Development in terms of the phased and integrated realisation of internationally recognised human rights over time, together with a 'modified' measure of economic growth ('representing human rights-compatible growth').[3] The integration of international human rights standards into the Poverty Reduction Strategy Papers' accompanying agreements

between national states and international development organisations, including the World Bank and the IMF, has also recently been emphasised (see, for example OHCHR, 2002, 2004).

There is plenty of intellectual space and common understanding for such a dialogue, and apparent differences are often much less in practice. Thus, economists often assume that because the international human rights framework is a normative framework (relating to things that ought to be the case), insufficient attention is given to costs and other types of feasibility constraints. These constraints imply choices and sequencing, which suggests a conflict with the concepts of indivisibility and interdependence of rights. However, this is largely a misperception. The need for sequencing of policies and programmes is widely recognised in the human rights field, and the international obligations of states in the field of economic and social rights are limited by the principle of 'progressive realisation'. States are not under an international legal obligation to go beyond available resources in achieving the progressive realisation of economic and social rights. They are required to demonstrate 'reasonable effort' – and where resource constraints are binding, this obligation can be discharged through the adoption of policies and programmes that facilitate the achievement of human rights over time.

This approach is reflected, for example, in the jurisprudence of the South African Constitutional Court, which has upheld claims regarding the violation of socio-economic rights in a series of landmark judgements. These cases establish that resource constraints do not relieve the government of the positive obligation to fulfil the socio-economic rights established in Articles 26-29 of the South African Constitution by taking positive measures to eliminate or reduce the large areas of severe deprivation that afflict South Africa. However, the Court has also sought to delimit the nature and scope of the duties that flow from this positive obligation. It has reasoned that where resource constraints are binding, the responsibilities of the state under these Articles can be discharged through the adoption of policies and programmes that facilitate the achievement of human rights over time rather than their immediate fulfilment.[4]

In addition, there exist important misunderstandings of economics, a particular example being the view that economics is primarily concerned with efficiency and growth. In fact, the reality is that there is often a trade-off between efficiency (e.g. growth) and equity (e.g. distribution); this is a fundamental concept of debate in economics, for example in debates around the economic impact of minimum wage legislation. Inequality here is a key point of connection between economics and rights debates.

The perception of a conflict also has many anecdotal examples but, again, the validity or generality of these examples often renders them debateable. The experience of high rates of economic growth in relatively authoritarian states in parts of East Asia during the 1980s and 1990s, together with China's record of economic growth and poverty reduction, are sometimes invoked as evidence of a positive association between economic success and authoritarian forms of government without strong commitment to civil and political rights. However, Sen among others has argued that this view is selective in its use of examples. Even when Singapore and South Korea were growing faster than any other country in Asia, the fastest growing economy in Africa was Botswana – 'a major defender of democracy' (Sen, 1999b). Moreover, as seen below, empirical research fails to establish a positive relationship between authoritarianism and high rates of economic growth.

The case of China's recent rapid growth performance also does not support this view. Drèze and Sen (2002) argue that this does not provide a case for growth without human rights protection on four main grounds:

- There is strong evidence of the importance of democratic forms of government, and recognition of civil and political rights, in famine prevention in India (discussed below).
- Democratic institutions and human rights are important in providing protection against social and economic shocks, seen in the example of the East Asian crisis (discussed below).
- Faster growth in China partly reflects low fertility rates, but it is often argued that this in part reflects coercive population policy. However, this case contrasts with the experience of similar fertility reduction on a voluntary basis in the Indian states of Kerala and Tamil Nadu.
- Without protection of civil and political rights and non-discrimination, it is more likely that population groups will be marginalised and excluded from the benefits of growth. Low educational achievement in Tibet provides a possible example.

3. Linking rights to the analysis of economic growth

In developing an analytical bridge between the analysis of freedoms and rights and the analysis of economic growth, a key distinction can be made between the intrinsic and the instrumental role of freedoms and rights in economic analysis.

- The intrinsic valuation of freedoms and rights focuses on the relevance of rights to the characterisation of growth and development and the evaluation of the benefits of different trajectories for individuals, groups and populations.
- The instrumental valuation of freedoms and rights focuses on the ways in which the recognition of freedoms and rights can influence the nature and scope of economic growth.

The sections that follow provide some examples of the instrumental importance of economic growth for freedoms and

rights, and the instrumental importance of freedoms and rights for economic growth. This paper highlights the need for theoretical development and a robust evidence base relating to the predicated impact of rights-based interventions on economic outcomes. The possible effects of rights recognitions discussed include:

- Equity effects (focusing on the ways in which rights recognitions can strengthen the political influence of vulnerable groups through the political process and by influencing public policy).
- Opportunity effects (focusing on the ways in which rights recognitions can change the institutional environment in which markets function by broadening social opportunity and market access).
- Efficiency effects (focusing on the ways in which rights recognitions can result in improved access to information, but also the ways in which rights recognitions can promote efficient resource allocation by strengthening accountability and ensuring that appropriate 'democratic control mechanisms' are in place).

The examples discussed in the sections that follow also highlight the different types of channels and institutional mechanisms though which rights-based approaches can affect trajectories of economic growth and development. These include:

- The incorporation of freedoms and rights into public policy;
- Codification and judicial enforcement;
- Via social norms, behaviour and choices.

4. The instrumental importance of economic growth for rights

The protection and promotion of most rights requires resources, and this is obviously especially difficult in low-income countries. Where resource constraints are tight and choices need to be made, including among different rights objectives, the principles discussed above of progressive realisation of rights (and hence prioritisation) become important – while still aiming to achieve all rights objectives over time. In these circumstances, growth is important as the key means of providing increased resources (although aid can also play a role to complement this). Good growth performance is therefore important in achieving rights outcomes more quickly and more fully.

But the nature of growth is very important. One issue is that growth needs to be sustained, partly so that the commitment to the progressive realisation of rights can be honoured, but also because there is evidence from a number of studies that downturns often hit poorer groups harder (they are less able to protect themselves against adverse shocks), and that this group can respond less quickly in recovery periods. As such, volatility of growth is likely to compromise its ability to achieve sustained poverty reduction and expansion of key freedoms.

But also of central importance in attaining rights objectives is the distributional pattern of growth (the extent to which the poor participate). Experiences of fast but highly unequal growth in Brazil in the 1970s were associated with little poverty reduction impact (but rather increased inequality), and growth over the 1990s in Pakistan has had limited impact on key human development indicators and gender equality (Easterly, 2001). Clearly, a pattern of pro-poor or shared growth is appropriate for attaining rights objectives as efficiently as possible. Such a pattern of growth implies that the poorest groups are increasing their resources, which itself can enable them to achieve some key freedoms directly. However, better growth performance enables more resources for government (through increased tax revenue). Public actions will often play a central role in achieving key rights objectives; plus it is the governments that are committed to international human rights agreements.

The challenge, of course, is to achieve pro-poor growth – for many countries even growth itself, as well as the pro-poor pattern. These issues are considered in the current multi-donor OPPG project. Cross-country comparisons show that renewed growth in many countries over the last 10-15 years has almost always been associated with reductions in poverty headcount measures, and also with impressive progress in many key freedoms other than income. But over the 1990s and early years of this decade, the draft OPPG synthesis paper shows that growth has also more often than not been accompanied by increasing inequality – so reducing its poverty reducing impact. Such patterns of growth will be less effective at achieving rights objectives. That said, other countries were able to achieve a pro-poor (inequality neutral or reducing) pattern of growth. Indonesia showed strong pro-poor growth performance for 30 years prior to the 1997 crisis (Timmer, 2004), even though this growth was partly based on oil. A government commitment to shared growth over this period translated into impressive poverty reduction in rural areas.

However, it is important also to recognise that some trade-offs between growth and equity can be expected. For example, growth will frequently require increased levels of private sector investment; this can be important for employment creation for unskilled workers but may not bring significant benefits to poorer groups in the short term. Similarly, many means of attaining agricultural growth (for example, new seeds or new cultivation practices) are likely to be more easily accessible to, or willingly adopted by, larger farmers who face less risk and/or are better insured against it. Or trade liberalisation will often promote growth but this can be accompanied by increased inequality. That all said, it is important to note that even inequitable growth can achieve impressive reduction of poverty even for the poorest, as demonstrated by China's recent record. Sometimes, such increases in inequality may be temporary. If they persist, they reduce the future effectiveness of

growth for poverty reduction – and generally for the achievement of other key rights and freedoms.

In addition, there is increasing evidence that high levels of inequality, in income or assets, have adverse impacts on future growth rates themselves (Alesina and Rodrik, 1994; Piketty, 1997; Aghion et al.,1999). The links between equity and growth are also to be considered in the 2006 World Development Report, which will highlight the ways in which inequality weakens the power of growth to reduce poverty. It also sets out the ways in which some forms of inequality can adversely affect efficiency and growth (for example, when the liquidity constraints of the poor result in lower investment rates, or when limited access to insurance markets constrains the production choices of the poor), and the ways in which economic efficiency losses can result from the coexistence of poverty and capital market failure. In addition, the report will suggest that inequality can adversely affect efficiency and growth via political interactions and increased political and social conflict, resulting in instability and inefficient economic choices (World Bank, 2004).

5. The instrumental importance of freedoms and rights for growth

There is increasing evidence, much of it based on cross-country studies, of the importance of key freedoms for growth, as well as for preventing downturns or managing them more effectively. For example, an important study by Barro (1996) confirms the importance of higher schooling levels, higher life expectancy, better maintenance of the rule of law and lower fertility rates (related to female empowerment) as being key determinants of economic growth, and each of these findings has been confirmed by many other empirical studies. There is plenty of evidence that gender inequality, particularly in relation to education, has a substantial adverse impact on growth (World Bank, 2001). Thus Klasen (2001) reports that a significant proportion of the difference in growth rates between East Asia and other regions of the developing world (sub-Saharan Africa, South Asia and the Middle East) reflects the higher gender differentials in education in the latter. The gender gap reduces growth directly (lower human capital) and indirectly (through adverse impacts on fertility and investment).

The importance of effective institutions in promoting and sustaining economic growth is now widely recognised (drawing on recent work by Rodrik among others, e.g. Rodrik et al., 2002), with much of this being about the ability to guarantee key freedoms. These include the rule of law and security of property rights, but also effective arrangements for managing conflict (one of the potentially difficult issues in a high inequality environment) and providing security in economic downturns.

There has been considerable discussion about the impact of democracy on growth, partly based on the perception noted above that a number of high-profile fast growing countries did not have democratic forms of government. Some commentators have argued that introducing democracy in poorer countries may contribute to instability, ethnic division and poor economic performance – and there are examples (Rwanda in the early 1990s) where forced political liberalisation (pushing by donors) is considered by some as being an important contributor to the ensuing civil war and genocide. But the evidence (summarised in Box 2.4, 2002 Human Development Report) in general does not support the view that democracy – or democratic transitions – has an adverse impact on growth. In a recent study, Rodrik and Wacziarg (2004) find that cross-country evidence shows that democratisation has, if anything, a positive impact on economic growth. Moreover, this seems to apply equally powerfully in the poorest countries and in countries with sharp ethnic divisions. The same authors also find that transitions to democracy are associated with lower volatility in growth rates, the importance of which has already been noted.

A more considered analysis of the East Asian experience (Haggard, 1999) highlights that this case demonstrates that democracy did not have an adverse effect on growth, and was important in managing the downturn following the East Asian crisis. Transitions to democratic rule in Korea, Taiwan and Thailand were achieved without any significant effect on economic performance, and democratisation was good for growth in the case of the Philippines. Democratic politics may have contributed to economic problems in Korea and Thailand in the wake of the financial crises, with political conflict in South Korea militating against an effective government reform programme, and weak coalition government in Thailand producing 'serious and recurrent problems for policy making'. However, these political systems also had self-correcting mechanisms, in the form of elections, which authoritarian governments such as Indonesia lacked. Whereas non-democratic governments in Singapore in Hong Kong (with coherent governments and high administrative capacity) handled crisis relatively effectively, Indonesia's difficulties are attributable in part to a highly centralised regime accountable to relatively narrow constituencies and lacking checks and balances on authority and an adequate succession mechanism.

However, institutional quality rather than the political regime *per se* (democracy or not) may be the key factor. A recent OECD study (Borner et al., 2004) suggests that an apparent positive impact of democracy on growth in the statistics is mainly attributable to the relationship between democracy and the security and enforcement of property rights. Institutional quality is therefore key. In analysing the underlying determinants of this, the study finds evidence of the relationship between economic performance, democratic practice and checks on the abuse of power. The analysis here highlights the importance not only of elections but also of 'embedded democratic control mechanisms' (in the form of checks and balances on the exercise of arbitrary government). Although successful growth can occur without these control mechanisms (e.g. in Chile, China and some of the East Asian Tigers), the authors argue that in the absence of such control measures, states

often remain weak and are liable to capture by powerful interest groups. The study also links the quality of institutions to the availability of information – with transparency viewed as reducing information costs, and the proposition that press freedom is positively linked to institutional quality being supported by empirical data Inequality is also found to be a key determinant of institutional quality – a key channel by which inequality can have an adverse impact on growth.

Given the focus on growth as a means of achieving key freedoms and rights, it is also important to consider the factors that influence the distributional pattern of growth as well as its level. Access to key resources for poorer groups (e.g. credit, health care, justice) is clearly a key issue here, given that these factors are likely to be key influences of the ability of the poor to participate in growth. This issue has been much less studied on a cross-country basis (given its more detailed informational requirements), but is considered to some degree in a number of country case studies, including several of those conducted as part of the OPPG study.

6. The instrumental role of rights recognitions in achieving effective economic growth

The two previous sections have highlighted the importance of growth for achieving the key freedoms that constitute intrinsic development objectives, but also the instrumental importance of freedoms for growth itself. Growth is clearly important in this framework; equally clearly, it is not just the rate of growth that matters, but also its distributional pattern and its sustainability (seeking to avoid downturns). To what extent can a rights perspective help in achieving these key freedoms which help attain such growth?

There is, in fact, surprisingly little social science based evidence on the impact of rights-based approaches (as opposed to other factors) in realising the key outcomes they seek to achieve. Much evidence is largely suggestive. We focus on a few cases related to key outcomes that are important for the level, distributional pattern or sustainability of growth.

Primary education

As noted earlier, there is very strong evidence from cross-country growth studies of the important role played by education; primary education is of particular relevance for the poor. There is a growing body of empirical evidence establishing the ways in which the recognition of human rights can be instrumentally important for the achievement of policy goals such as universal education and public health – particularly in situations of female disadvantage and/or entrenched inequality between different population groups. As well as strengthening equity, the instrumental role of rights in promoting education provides an example of the 'opportunity effects' of rights above, that is, the ways in which rights recognitions can change the institutional environment in which markets function by broadening social opportunity and market access.

The Ugandan experience illustrates the ways in which rights recognitions can be instrumentally important for the achievement of the policy goal of universal primary education. The right to education was recognised in the Ugandan Constitution (1995) and, following an election pledge by Museveni, the policy of Universal Primary Education (UPE) was introduced in January 1997, aiming to provide equitable, high-quality universal primary education, with primary school tuitions fees waived for all children from 2003. Whilst important concerns about quality and outcomes remain, UPE is widely recognised as resulting in increased educational allocations and achieving considerable success in increasing overall access, and reducing inequalities in access between gender and income groups. The general importance of elections as an explanatory variable in determining educational expenditure is the subject of a growing body of literature (for a summary, see World Bank 2005: Box 3.9). Whilst in the past the focus of debate has often been on the possible negative implications of higher levels of public expenditure for economic growth (especially in advanced democracies), there is now increased emphasis on the critical role that democratic institutions can have in strengthening public service provision. In the Ugandan context, Stasavage (2005) finds evidence that UPE has been linked to democratic politics, and that this outcome has depended on the salience of education as an issue, as well as on the public's access to information about UPE (especially through the media).

Drèze and Sen (2002) discussion of education in India highlights the role of rights recognitions in achieving population level changes in individual expectations, behaviour and choices. Social norms are a key influence on individual decision-making, and Drèze and Sen's research highlights the possibility of influencing social norms through public discussion and social intervention – including through the recognition of new and strengthened rights. Case studies of the successful expansion of education (especially in the regions of Kerela and Himachal Pradesh) highlight the critical role of the emergence of consensual norms on educational matters in achieving social transformations in this field. Drèze and Sen suggest that the recognition of elementary education as a fundamental right can facilitate acceptance of the view that schooling is an essential part of every child's upbringing (girls as well as boys, and for children in all population groups) – a critical element of achieving emergence of a social consensus on the achievement of universal education (2002: 179-85). Against a general background of structural adjustment and general disengagement of the state, growing and broad-based recognition of elementary education as a fundamental right (as reflected in political campaigns and in recent amendments to the Indian Constitution) has contributed to the relatively rapid expansion of schooling facilities and school participation in India in the 1990s (Drèze, 2004: 1725).

Information

Imperfect, incomplete and asymmetric information are key sources of market failure, hence inefficiency. These will have adverse effects on investment and public and financial sector development, which play a central role in growth. A growing body of research addresses the ways in which individual rights to information (e.g. in the form of Freedom of Information Acts) can help to increase efficiency by increasing the availability and quality of available information. Stiglitz (1999) sets out a theoretical framework for analysing the ways in which the absence of freedom of information can result in inefficient resource allocation and economic inefficiency. He highlights the adverse economic effects of the failure to respect the right to freedom of information, suggesting that less access to information often results in capture by special interests and in corruption by government officials, with strongly adverse consequences for investment and economic growth. Market imperfections give rise to agency problems (e.g. disparities in the actions of managers and interests and shareholders). In the private sector, informational asymmetries can create barriers to the entry of outside managers to takeovers, increasing managerial rents at the expense of shareholders, with the lack of information for outsiders increasing the costs of transition and making it more expensive to change management teams. Similarly, in the public sector, informational asymmetries can place elected officials at an advantage over their competitors. Stiglitz concludes that lack of freedom of information benefits incumbents over rivals, resulting in distortions in private and public decision-making. Strengthening rights to information can reduce the magnitude and consequences of these agency problems, with greater access to information and resulting in better, more efficient, resource allocation.

Accountability

The possible 'efficiency effects' of rights discussed above include not only the ways in which rights recognitions can result in improved access to information, but also the ways in which rights recognitions can promote efficient resource allocation by strengthening accountability and ensuring that appropriate 'democratic control mechanisms' are in place. It is relevant, then, that Stiglitz (2002) links the advantages of increased information to extensions of accountability and transparency in both the corporate and public sectors. He emphasises the participatory processes as a 'public good' – with an active civil society functioning as a check on abuses of power and influence and a source countervailing power – and recommends extensions of individual rights to freedom of information and citizens' rights to legal recourse to sue. Drèze (2004: 1726) also discusses the important role that freedom of information can play in extending public accountability and efficiency. The right to information movement in India, which calls for a blanket right to access to all public records at all times of all citizens, has already led to concrete results in relation to the reduction of corruption in public life. In Rajasthan, for example, the 'Right to Information Movement' has contributed to important steps forward regarding the eradication of corrupt practices in relief works.

These arguments are in fact reflective of a key theme emerging in the development literature, namely, that a range of different complementary institutions (political, economic, legal etc.) is necessary for achieving accountability and efficient resource allocation. Elections are unlikely to be sufficient; other types of extensions of democratic practice (in the form of 'countervailing power mechanisms' and 'democratic control mechanisms') can also be important in reducing corruption and the inequities and inefficiencies associated with elite and interest group capture. For example, the OECD cross-country study on the underlying determinants of economic growth finds evidence of the relationship between the quality of institutions and 'checks and balances' on the abuse of power and the exercise of arbitrary government. Although successful growth can occur without 'embedded democratic control mechanisms' (e.g. in Chile, China and some of the East Asian Tigers), the authors hypothesise that in the absence of such control measures, states often remain weak and are susceptible to capture by powerful elites and interest groups. They find that economic performance in democracies can also be enhanced by 'embedded democratic control mechanisms' and extensions of democratic practice.

Public sector reform

Both the 'efficiency effects' and the 'equity effects' of rights as discussed above are relevant to the design and implementation of a successful programme of public sector reform. The public sector, as the leading provider of education, health and infrastructure, plays a key role in attaining not just growth itself, but specifically pro-poor growth. The efficiency of the public sector is thus of key importance for both efficiency and equity reasons. The role of strengthened accountability mechanisms in reducing corruption and achieving efficient public service delivery is increasingly highlighted in policy advice (e.g. World Development Report, 2004). Increasing the influence of beneficiaries over providers is key to the policy advice, and two types of direct accountability mechanisms have been highlighted for this purpose.

- Accountability-based mechanisms that focus on the extension of choice between service providers (e.g. by extending choice between public sector providers and/or facilitating the use of private and independent providers, sometimes using public finance).
- Accountability-based mechanisms that focus on strengthening 'voice' through extensions of democratic practice (including beneficiary participation, scrutiny and monitoring, direct management, strengthened complaints procedures and rights to information) as a complement and/or a substitute for choice- and exit-based mechanisms.

In the Indian context, Drèze and Sen (2002: 363) discuss the ways in which public sector inefficiency has resulted in systematic public policy failures in education, health and food security. Drawing on case studies, their analysis links persistent

public sector inefficiency to a lack of public sector accountability, highlighting the failure to introduce effective accountability mechanisms in the context of even the most extreme forms of public policy failure (such as public health centres being closed on a work day, or systematic absenteeism by teachers in public schools) and suggests that low accountability in the schooling system has played a role in depriving millions of children of basic education. Their recommendations for a major programme of accountability-based public sector reform in India highlight the important role of 'counter-veiling power structures' in asymmetric power situations – with the possibility of concentrations of power in one domain being checked and restrained by a counter-veiling configuration of forces in another domain. They raise the need for public participation and scrutiny, audits, complaints mechanisms, electoral procedures and legal action in this context. In addition, Drèze and Sen (2002) and Drèze (2004) link discussions about public sector accountability to discussions about human rights. They suggest that invoking human rights, including economic and social rights, can increase 'voice' and provide an additional source of 'counter-veiling power'. The Right to Information movement (discussed above) and the Right to Food campaign in India (discussed below) provide illustrations.

Citizen's needs, the media and political competition

For growth to be pro-poor, it is important that public policies focus on the needs of poor. The 'equity effects' of rights are particularly important here and 'rights recognitions' and extensions of democratic practice are among the underlying determinants of the distributional pattern of growth. An important theme in the literature relates to the ways in which the influence of vulnerable groups on public policy might be strengthened in order to prevent 'capture' by elites and more dominant social groups – including the positive role that extensions of democratic practice can play in increasing the 'voice' of vulnerable groups in electoral democracies. Again, there is an important link with the international human rights framework, and the ways in which the recognition of human rights (including economic and social rights) might function to increase the influence of subordinate groups in collective decision-making.

Besley and Burgess (2002) take the analysis forward by developing a formal framework for analysing the responsiveness of governments to citizens' needs in electoral democracies. The framework addresses the central question of whether the needs of vulnerable citizens are reflected in government policy in situations where vulnerable populations rely on state action for their survival. The underlying theoretical model (based on solutions to political agency problems) links the actions of an incumbent government to re-election incentives – with the question of whether a vulnerable population group has sufficient power to 'swing' electoral outcomes viewed as critical in determining whether government policy is responsive to the demands of the vulnerable population group in question. Besley and Burgess test the hypothesis that having a more informed and politically active electorate strengthens incentives for governments to be responsive to citizens needs, using Indian panel data for 16 major Indian states for the period 1958-92. State governments in India are found to be more responsive to falls in food production and crop flood damage (via food distribution and calamity relief expenditure) where newspaper circulation is higher and electoral accountability is greater.

Political incentives and famine prevention

Famine clearly represents an extreme example of an unsustainable pattern of growth, which can also have major adverse longer-term impacts on growth. Sen (1999a: 178-86 among others) and Drèze and Sen (1989, 2002) have made an important contribution to discussions around these issues by establishing the ways in which democratic forms of government and civil and political rights can provide critical incentives to governments in the context of famine prevention – by disseminating information, facilitating public scrutiny and debate, building up political opposition, increasing pressure on governments, proving for the correction of errors, and helping to precipitate a more effective public policy response. In building up a general picture of an association between democracy and successful famine prevention, Sen has argued that no substantial famine has ever occurred in an independent and democratic country where government tolerates opposition, accepts the electoral press, and can be publicly criticised. In India, for example, the incidence of famines in India until independence in 1947 (for example, the Bengal famine in 1943 killed between two and three million people) contrasts with the post- independence experience following establishment of a multiparty democratic system, where timely public action has helped to effective public policy responses to the threat of famine (e.g. through food for work schemes and public food distribution) and has successfully avoided significant and widespread excess mortality through famine deaths. Drèze cites public action during the Rajasthan drought of 2002-03 as a recent example of this phenomenon (2004: 1727).

Evidence from China further illustrates the ways in which the absence of democracy and civil and political rights can militate against successful famine prevention and contribute to socio-economic shocks that are harmful to growth. When the Great Leap Forward proved to be a mistake, disastrous policies were not corrected for three full years (1958 to 1961), while 23 to 30 million people died. Although evidence relating to a number of different causal factors is relevant here, Drèze and Sen suggest that the failure of public policy to respond effectively to a famine situation fits into a more general pattern of failures of public policy in times of socio-economic crisis. Furthermore, the excesses of the Cultural Revolution in China provide an important exemplar of the ways in which the absence of civil and political rights can contribute to efficiency losses through informational failure. Assumptions at the centre regarding food stocks during this period were considerably greater than food stocks in practice turned out to be – and civil and political rights can have an important informational role in the 'corrections of errors' and 'mistaken assumptions' within complex bureaucratic systems.

The example of the Right to Food campaign in India

Assuring food security is clearly a key ultimate policy objective, but is also important for both growth rates (malnutrition having adverse impacts on production) and for the distributional pattern of growth. The Right to Food campaign in India illustrates the important role that the legal enforcement of human rights can play in promoting both equity and efficiency in food security policy). For example, Drèze and Sen (2002: vii, 336-9) and Drèze (2004: 1723) link the roots of 'nutritional crisis' in India to the influence of organised agricultural interests on food security policy. High 'minimum support prices' for food grains, fixed by government under pressure for influential farmers lobbies, have boosted production and resulted in food buffer stocks increasing to well above official levels amid 'continuation of the severest incidence of under-nourishment in the world'. The Right to Food campaign demonstrates the ways in which legal protection of the right to food under the Indian Constitution can be invoked as a basis for challenging this policy and can function to increase the 'voice' and influence of vulnerable groups vis-à-vis organised agricultural interests in public decision-making.[5]

The Right to Food campaign illustrates the possible 'efficiency effects' as well as the 'equity effects' of the legal codification of human rights. In the Case of People's Union for Civil Liberties, the Indian Supreme Court addressed the occurrence of starvation deaths despite the availability of surplus food reserved for famine situations. The People's Union alleged that, in various locations, established policies and arrangements for preventing starvation deaths were being inadequately and inefficiently implemented – with incomplete coverage of the population at risk, inefficient delivery mechanisms, and inadequate provision for meeting minimum needs. This included uneven implementation of the Famine Codes introduced to protect people from death through starvation under officially recognised famine conditions; the failure of the public food distribution system, restricted to families below the poverty line, to meet minimum nutritional standards; and Food-for-Work programmes with 'labour ceilings' and inadequate cash and food provision. Legal protection of human rights under the Indian Constitution facilitated scrutiny and accountability in relation to public policy. In a ground-breaking interim order, the Supreme Court of India found systematic failure by the government to implement and finance the various policies and arrangements officially in operation.[6]

6. Conclusion

This initial survey has highlighted many of the main issues relating rights concerns and growth issues. It has argued that there is much less of a trade-off between the pursuit of poverty reduction through economic growth and the pursuit of rights objectives, but rather that there are significant complementarities: policies to achieve key rights outcomes can have a positive impact on growth, and in a way which is consistent with contemporary theoretical and empirical work on determinants of growth. This paper only represents a first sketch of available evidence, both in relation to growth and the analysis of the policies to achieve key freedoms and rights. At this point, further work should build on this initial survey, developing both the framework sketched out here and extending the empirical evidence. An important part of this will be to incorporate into this debate more explicitly internationally recognised standards in the field of human rights.

Endnotes

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1　See for example http://www.dfid.gov.uk/news/files/propoorgrowthcasestudies.asp for more details and copies of country case studies completed as part of this project.

2　These principles are discussed, for example, in OHCHR (2004).

3　Sengupta's interpretative framework also raises the notion of a 'human right to economic growth'. This idea has raised various debates in the literature and will not be discussed in this paper.

4　See Articles 26-29 of the Bill of Rights attached to the Constitution of the Republic of South Africa [Act 108 of 1996] www.concourt.gov.za. The jurisprudence discussed here reflects the reasoning in Grootboom vs. Government of the Republic of South Africa (housing) especially paras 41-44, 65-69, 95 and Treatment Action Campaign (TAC) vs. Minister of Health (medical care), Constitutional Court of South Africa, Judgments dated 4 October 2000 and 5 July 2002, especially paras 67-95. Both available at www.concourt.gov.za.

5　It has been argued that various economic and social rights, including shelter, an adequate standard of living, and medical care, are derivable from the right to life under the Indian Constitution. The right to food is arguably derivable from the right to life under Article 21, supported by directive principles.

6　Supreme Court of India, 2001, unreported, 2 May 2003; interim order of the Supreme Court as summarised in COHRE (2003: 24). The Court ordered that Famine Codes be implemented for three months; that Food-for-Work schemes be strengthened through increased grain allocations and finances; and that the access of families below the poverty line to grain at the set price at ration shops be improved and that individuals without means of support (including older persons, widows and disabled adults) be granted ration cards for free grain. State governments were also ordered to implement the 'mid-day meal scheme' in schools on a progressive basis. Significant progress in implementing this scheme is reported in Drèze (2004: 1728).

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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.

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

'... the law is one, but not the only, way to provide the social guarantee that I would consider to be a right.'

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.

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

'... a rights-based approach ... where rights and develop-ment become so integrated they are like different strands of the same fabric.'

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.

> '... human rights language ... allows us to use political language without being overly interventionist.'

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.

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

'... an imaginative tangential challenge in relation to accountability may be more appropriate and effective than the obvious one.'

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

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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 jurisdictional 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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Meeting 5: Why the human rights approach to HIV/AIDS makes all the difference

Speakers: Marianne Haslegrave, Commonwealth Medical Trust
Mandeep Dhaliwal, International HIV/AIDS Alliance

Chair: Tony Barnett, London School of Economics

Meeting Summary

The first speaker, Marianne Haslegrave, opened by emphasising the importance of situating discussion and activities on HIV/AIDS within the framework of the Millennium Development Goals (MDGs). She then moved on to discuss the centrality of human rights, and in particular discrimination, to the prevention and treatment of HIV/AIDS. She outlined the obligations that governments have with respect to human rights and what this means in terms of healthcare provision. Haslegrave concluded by calling for a renewed effort to document the many examples of successful interventions based on a human rights-based approach.

The second speaker, Mandeep Dhaliwal, began by setting the scene in terms of the HIV/AIDS situation in the world today. She then established the relationship between human rights and the prevention and treatment of HIV/AIDS. Dhaliwal argued that human rights and public health approaches are mutually reinforcing and that an integrationist approach is vital to the HIV/AIDS response. She then spoke about some of the issues relating to the scaling up of treatment from a human rights perspective, in particular routine testing and beneficial disclosure. She concluded by demonstrating how stigma and discrimination are fundamental barriers to treatment, care and prevention.

The discussion built on comments made about the obligations of developed countries towards asylum seekers. The need for better prioritisation of resources to ensure equality of treatment in the UK was suggested. The relationship between law and cultural attitudes was a focus for discussion, including the possibility for tensions within the human rights framework in relation to the rights to health and culture. The question of whether the public health agenda has been skewed too far in the direction of human rights, and whether this is in fact counterproductive, was debated.

Marianne Haslegrave

I am the Director of Commat (the Commonwealth Medical Association), which has been working for a number of years on issues related to the prevention of HIV/AIDS in Commonwealth countries. We have also been working on the right to health. My remarks will therefore concentrate on the health aspects of HIV/AIDS, which is the focus of our work. However, in setting the scene, I wish to begin by looking at the Millennium Development Goals (MDGs), which will provide the framework for all our work during the next ten years.

HIV/AIDS and the Millennium Development Goals

In the context of this meeting, I want to look at two of the eight MDGs in particular, remembering that for each goal, there are also a number of targets and indicators to measure progress made in implementing them. First, Goal 1, which is the eradication of extreme poverty and hunger, has a target of halving the proportion of people whose income is less than $1 between 1990 and 2015. This target is going to be extremely difficult to achieve given the growth of HIV/AIDS throughout the world. Second, I want to highlight Goal 6, which is to combat HIV/AIDS, malaria and other diseases, particularly tuberculosis. Target 7 within this goal is to halt and begin to reverse the spread of HIV/AIDS by 2015.

We should also bear in mind that heads of government are going to come together at the United Nations in New York in September to review the progress that has been made in implementing the MDGs and, if we are interested in any issue within the development framework, we need to be watching what might be said and what is going to come out of that meeting. Given its present position as head of the G8 and its upcoming Presidency of the EU, the UK is going to be particularly important. If we are going to use a real human rights-based approach, we need to remember that, while Tony Blair may be focusing on HIV/AIDS in Africa, the pandemic in also happening in other parts of the world.

Vulnerability, discrimination and HIV/AIDS

When we are looking at HIV/AIDS from a human rights perspective, we must first focus on discrimination. According to last year's World AIDS Day Report (UNAIDS, 2004), women are the most vulnerable to discrimination, infection and a lack of treatment and access to care. I would also say that children and adolescents, especially young girls, are also particularly vulnerable. We also know that, when we are talking about those at high risk of infection, we must include refugees, migrants and all people living in poverty because poverty and HIV/AIDS go together. HIV/AIDS is particularly rampant amongst people living on very low incomes and who are forced to seek work in particular sectors, such as sex workers. In some parts of the world, including countries of the former Soviet Union and in Central Asia, there

'... the people who we are really talking about are those that suffer in so many other ways as far as their rights are concerned.'

is also a strong correlation between HIV/AIDS and injecting drug users. We also need to think about minorities and indigenous people, persons who are in detention and men who have sex with men, which is against the law in so many developing countries. In fact, the people who we are really talking about are those that suffer in so many other ways as far as their rights are concerned.

The one common factor for these people is that they are all likely to be discriminated against in relation to access to quality prevention and treatment services. They will also tend to be discriminated against in all areas and will probably not have access to good health services. All human rights treaties are concerned with the elimination of unfair discrimination and, at Commat, we have been examining the various adverse causes affecting health of which the worst is, undoubtedly, HIV/AIDS.

The role of health institutions in the promotion of equality

In their paper 'Poverty, Equity, Human Rights and Health' (Braveman and Gruskin, 2003), Paula Braveman and Sophia Gruskin argue that health institutions can be instrumental in dealing with poverty and health within a framework of equity. They suggest that they are crucial in terms of:

- 'institutionalising the systematic and routine application of equity and human rights perspectives to all health sector actions'. The emphasis here is on *all health sector actions* and ensuring that people who are in danger of being infected with HIV or who are already infected, have access to the relevant parts of the health sector;
- 'strengthening and extending the public health functions, other than healthcare, that create the conditions necessary for health'. Again, this is particularly important when we are looking at people who are infected with HIV because they require long-term care. This also includes interventions to try to prevent infection through, for example, the provision of condoms. We all know the story that, if you add up the number of condoms in Africa, it works out at three per man per year. This is an issue about equity of access and human rights can be used to push governments to make condoms available by pointing out that, by not making them available, they are endangering the right to life;
- 'implementing equitable healthcare financing, which should help reduce poverty while increasing access for the poor'. One of the major problems that we have to deal with is weak healthcare systems caused by a lack of financing. Given the way that donor governments are now looking at general budget support, the question will be whether health financing will go to those areas where it is needed to address the AIDS pandemic;
- 'ensuring that health services respond effectively to the major causes of preventable

ill-health among the poor and disadvantaged'. Once again, if you are not providing extra services, such as access to education or information, the poor and vulnerable will not be protected from infection because one of the major forms of protection is knowing how you get the disease. Therefore, if governments are not ensuring that there is good access to education and, even where there is access, if they are not providing sex education or family-life education or whatever it may be called (and, again, this is an area where rights are being denied), then this will increase the prevalence of HIV/AIDS;

- 'monitoring, advocating and taking action to address the potential health equity and human rights implications of policies in all sectors affecting health, not only the health sector'. This is something that needs to be taken into account when we are looking at health policies as they affect HIV/AIDS. Using the example that I have just given about access to education, it requires a much wider approach than just the health sector.

The importance of the human rights framework to the prevention and treatment of HIV/AIDS

There are seven international human rights instruments of which the most important with respect to HIV/AIDS, are the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The CRC is important, not only because of issues to do with children who are orphaned but, if we are looking at HIV prevention, because it includes children up to age of 18 and therefore also covers adolescents.

What do human rights offer in the prevention and treatment of HIV/AIDS? Human rights guarantee the specific rights of each individual and, in order that they may enjoy those rights, they establish that the state has obligations that correspond to them. They also create mechanisms to monitor states' compliance with their obligations and allow individuals to seek redress for violations of their rights. Basically, when we are talking about human rights, we are focusing on the dignity and integrity of human beings and, the question one has to

ask is, 'are people who are affected or infected by HIV/AIDS treated with dignity?' I think the answer is a resounding 'no' in most cases because those who are infected, and also those who are affected, suffer greatly from discrimination.

Governments have three obligations in relation to human rights:
i.   They should *respect* human rights by not violating rights through their actions.
ii. They should *protect* human rights by preventing others violating human rights. This is something we need to think clearly about when we are looking at issues around HIV/AIDS.
iii. They should *fulfil* human rights by ensuring that they can be enjoyed, for example, by adopting appropriate legislative, administrative or other measures.

When we are looking at obligations regarding the provision of healthcare, we need to spell out what should be provided for people who are infected with HIV in terms of clinics and health-related facilities. We must ask what they need. I have deliberately not gone into issues around access to treatment but, if we are making treatment available, the quality of healthcare services would be of concern to me and it is these types of issues that I would consider. There are two points regarding state obligations that should be highlighted, namely:
i.   ensuring non-discrimination in access to healthcare and the underlying determinants of health; and
ii. government accountability for ensuring that the rights of those who are infected are actually being taken into account.

Finally I would like to mention that there are many examples of successful interventions, such as the work of the Lawyers' Collective in India. We must now gather many other examples that show that it is possible to use a human rights-based approach in a variety of ways, whether this is through litigation through the human rights committees, as has occurred in the Committee on the Rights of the Child which has highlighted the denial of children's rights because of HIV. While it is difficult area in which to work, it is important one and one in which there is much that can be done.

'... are people who are affected or infected by HIV/AIDS treated with dignity?'

Mandeep Dhaliwal

First, I would like to tell you a little bit about the organisation that I work for, International HIV/AIDS Alliance, which is an international non-governmental AIDS organisation based in the UK that supports community action on HIV/AIDS in over 25 developing countries. Much of what I will talk about today is drawn from the experience of the Alliance and the Lawyers Collective HIV Unit, where I used to work before I joined the Alliance five years ago.

A month ago, when I was putting together this presentation, I was preparing a talk for the Commonwealth Lawyers Association on migration, asylum and HIV/AIDS. I will therefore also talk a little bit about this during this presentation because I think that we often talk about HIV/AIDS as an epidemic that is out there, in developing countries, when it is actually something that affects everyone because we live in an increasingly interdependent world. I gave my presentation the title, 'Testing Times', and I think that by the end of it you will understand why. We are in particularly testing times and one that will test our commitments to the principles and values of evidence-based public health and human rights approaches to HIV/AIDS.

I am only going to talk briefly about the HIV/AIDS situation and the human rights framework as Marianne has covered this well. I will then spend some time on the relationship between HIV/AIDS and human rights and, more specifically, on what we have learnt over the years and whether these lessons can be applied to the issues that I am going to discuss in my presentation. I will then focus a little on how some of these issues manifest themselves in terms of HIV policies and programmes, which is where the Alliance's expertise is, looking specifically at issues of consent, confidentiality and discrimination.

At the end of 2004, there were 42 million people living with HIV/AIDS. There were 4.9 million new infections and 3.1 million deaths due to AIDS, with 8,000 people dying each day. Women and girls are amongst the most affected in terms of rising incidence and the burden of caring for the sick, the old or children. What have we learnt during the past 20 years of the epidemic? We have learnt that those who are in some way marginalised are the most vulnerable to HIV/AIDS and that HIV spreads in spaces of powerlessness, exclusion, poverty and conflict.

'... HIV spreads in spaces of powerlessness, exclusion, poverty and conflict.'

The relationship between human rights and HIV/AIDS

What are human rights? Marianne covered some of these so I will only talk about them briefly. There are also a couple of points here that I do not think we adequately reflect on. We talk a lot about state responsibilities and the rights of individuals but I do not think that we talk enough about what human rights are really supposed to be. They are supposed to be based on the principles of humanity. People have rights because they are human. What does that mean? What does this mean in relation to promoting, protecting and fulfilling the human rights of migrants in any nation state because we know that human rights apply across all states boundaries?

Kofi Annan said: 'It was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so'. Often, when we worked in India, we were confronted by people saying, 'this is a Western concept. Indians believe in fate so human rights don't really apply here'. But, interestingly, it was never the people at community level, people living with HIV and who were campaigning for their rights, who said that. It was always people in positions of power who made such comments.

What are some of the key rights that relate to the response to HIV/AIDS? The right to health, equality and non-discrimination, privacy, information, participation, to enjoy the benefits of scientific progress, to be free from torture, work, education, an adequate standard of living and the rights of the child. These rights were well explained in some guidelines issued by the Office of the High Commissioner for Human Rights and UNAIDS (1996), which outline state responsibilities for good HIV programming and how an effective response can be built to HIV/AIDS. These guidelines were further amended in 2002 to include the right to treatment, flowing from the right to health and the right to life.

Often, when we talk about the right to health, we hear language relating to the progressive realisation of the right to health. What does that mean? This specifically acknowledges that the right to health has a resource implication and recognises that many countries will not have the resources to put into place the health services that are required for all its population. So, when we talk about progressive realisation, we are talking about states having concrete plans to make sure that, within their resource constraints, they make the best possible healthcare available for their people in the shortest possible time.

What do we mean by human rights? It was interesting that Marianne mentioned both litigation and advocacy as strategies for promoting human rights. I would like to focus on how human rights come into play in the HIV/AIDS policy-practice continuum. There is a continuum that moves from the international covenants that Marianne outlined, and countries that have signed up to these have an obligation to enact laws at the domestic level that respect the principles found in those covenants, to practice, whereby organisations and actors have a responsibility to shape their policies, services and practices in accordance with the same human rights principles.

So, for example, the Alliance's programme work is based on human rights principles. In the Ukraine, we provide anti-retroviral treatment to former and active drug users and, in Zambia, adolescents and young people are provided with condoms and information on safer sex alongside appropriate user-friendly services for HIV prevention and care. Our founding principles and strategic framework are about helping people realise the right to health, the right to information and the right to access appropriate services. Human rights also help to guide our advocacy work. We advocate for respecting bodily integrity as the basis of HIV testing, for the right to information and equity of access. We also advocate on the basis of the principles of non-discrimination and equity.

Human rights and public health approaches

What do human rights and public health have in common? They share a common objective. They are basically complementary and mutually reinforcing approaches. However, there are differences: human rights actions focus on the rights of individuals and public health addresses the rights of groups. Naturally there are therefore going to be tensions and conflicts but, as with law, these can be balanced on a case-by-case basis. There are two main considerations in terms of restricting rights for public health purposes:

i. Is the restriction absolutely necessary in order to achieve the required public-health outcome/benefit?
ii. Is it is the least restrictive measure possible to achieve the desired outcome?

We therefore recognise that there are necessary public health measures that require the restrictions of rights. However, it must be absolutely necessary, rational and must be the least restrictive measure.

As HIV/AIDS strategies and programmes have been rolled out, we have learnt that, in order for public health programmes to be effective in the area of HIV/AIDS, the rights and dignity of the most vulnerable must be respected. Justice Michael Kirby described this as the 'AIDS paradox'. Interestingly, at a recent session on public health, human rights and development, someone commented that this is not actually a paradox because, when you are working in the area of HIV/AIDS, it is the most obvious and fundamental thing. However, in terms of traditional public health approaches and people's own discrimination and perceptions of the most vulnerable people, I think that it can still be called a paradox.

To summarise what I have covered so far. There are two basic approaches in responding to HIV/AIDS – the 'isolationist' and 'integrationist' approaches (see table). The isolationist approach essentially leads to exclusion and drives people underground and away from prevention and care services and, ultimately, does not lead to the achievement of the desired public health outcome by changing people's behaviour.

Human rights in the context of scaling up treatment

I will now move on to some of the issues that we are confronting today. As treatment is becoming more available, and as there is a push to roll out treatment as quickly as possible and to achieve the target of treating three million people by the end of 2005, the scaling up of treatment can actually be used as a justification for the violation of human rights. One of the big things that we are seeing now is that, in order to put 3 million people on treatment, we have to test many millions more. However, typically, the uptake of testing has presented a challenge in developing countries for a range of reasons.

For some people, this means that we should be scaling up 'routine testing'. What this actually means is that the specific informed consent that has been the traditional model of HIV testing, whereby people are given pre-test counselling in which they are provided with information and asked to return the next day if they wish to have the test, which is then followed by post-test counselling, will no longer be sought. What is now being said is that it is going to be the duty of the healthcare provider – the doctor, the counsellor, etc. – to say that they are offering an HIV test and the onus will be on the patient or the client to opt out.

The interesting thing here is that many of us are saying that this does not take the power dimension, the nature of the relationship between the healthcare worker and patient, into account. How many of us, when we are sick, concerned about our health or have merely ended up in a healthcare facility with a doctor or a nurse, actually have the power to say no. I wonder how many of us in this room would actually say no in that situation. A question therefore exists about how voluntary routine testing is actually going to be and we know from 20 years of experience that voluntariness is an essential component of HIV/AIDS policies and programmes.

Routine testing must also comply with human rights ethics and principles, not because it is the

'Kofi Annan said: "It was never the people who complained of the universality of human rights … It was often their leaders who did so".'

Isolationist Approach	Integrationist Approach
Mandatory testing	Voluntary testing
Isolation of people who are HIV positive	Inclusion of people who are HIV positive
Confidentiality breached	Confidentiality preserved
Discrimination against those who are HIV positive	No discrimination against those who are HIV positive

moral or right thing to do, but because that is the approach that is going to achieve sustained public health benefits. I think Marianne also pointed out that we are not talking about short-term gain. We are talking about something that has a short-term response but that has to be sustained. In that sense, I think that it is therefore a challenging question and we are saying that this is something we need to gather more evidence about as we roll out programmes.

I will just say something about the right to refuse treatment. In many countries, we are seeing that people do not actually believe that HIV/AIDS treatment is going to be available in the future – that the public health system may be providing it this year but will not provide it next year. They have had this experience with tuberculosis programmes. People are therefore refusing treatment but are providers actually listening or is treatment being forced on people? We have seen situations in Zambia where the right to refuse treatment has not been respected, resulting in the wastage of resources and a negative impact on the health of those who does not adhere to the treatment.

Supporting beneficial disclosure

The duty to disclose is also something that has always been a challenging issue. Is the duty to disclose a prevention tool? What impact does it actually have on the provision of care for a chronic condition? And, while we know that a person must have knowledge in order for a duty to arise, the act of omission, of not informing, can endanger another person. This is therefore similar to assessing the significant risk of foreseeable harm. The law recognises that both HIV positive and negative people have rights and duties and that the conflicts, benefits and risks that arise between them need to be balanced.

UNAIDS published a document a couple of years ago called Supporting Beneficial Disclosure, which outlines a process whereby people are empowered to disclose. I have included a quote from a person with HIV who lives with disclosure: 'As for me, the more I am supported to follow through with the disclosure of my status and safer sex, the more I know I'm part of the solution, not the problem. That feeling empowers me. I hope it empowers others' (UNAIDS and WHO, 2000). We often make the mistake in programmes of thinking that confidentiality and disclosure are one-time events, when they are actually something that people live with every day. I think this is really about looking at confidentiality and supporting beneficial disclosure as an important part of providing appropriate care to people.

Stigma and discrimination: barriers to prevention, care and treatment

Stigma and discrimination remain the biggest barriers to HIV/AIDS prevention, care and treatment. I think that some of the most pernicious manifestations of discrimination are the laws that criminalise particular behaviours, such as drug use, sex work or stringent laws around migrants. These deprive people of their rights and make them even more vulnerable, driving them away from prevention, care and treatment services. Interestingly, most incidences of discrimination are experienced in the healthcare setting, such as the refusal to treat, discriminatory or sub-optimal treatment, people being charged more for treatment because they are HIV positive, forced testing, medical threats or the negative attitudes of health workers in general.

The lack of access to anti-retroviral treatment is probably the most blatant form of discrimination that I have seen in the past 20 years. I think that the culpability of the pharmaceutical industry with regard to the international patent regime, which was essentially designed in collaboration with the pharmaceutical industry, is something that we do not talk enough about. We need to really look at how we can fastidiously safeguard the public health flexibilities offered by Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs) and subsequent agreements in order to ensure that people have access to treatment, otherwise, in the long term, we will not be able to sustain HIV treatment or prevention.

We also need to be careful that we do not entrench existing inequalities as we scale-up treatment, for instance in terms of access. We will have to ration treatment but on what basis should we make these decisions? I think the answer has to be by involving the affected communities in the design of the criteria for deciding who gets treatment first and how it will be rolled out. In many developing countries, health workers do not have access to treatment themselves and they are being asked to provide life-saving treatments to others. So how do we ensure that they also have access as part of the scaling-up of treatment? Treatment for marginalised populations, such as sex workers, drug users and men who have sex with men, is something that is always at the bottom of everybody's list. It is much easier to give treatment to the politician, health-worker or NGO elite, which will reinforce the marginalisation of parts of the population and adversely affect our prevention work by not providing treatment for all.

I would like to end with a warning that appeared in a book by Jonathan Mann and Daniel Tarantola (1996) that remains as relevant today: 'Rapidly increasing numbers of people infected with HIV and people with AIDS will be accompanied by intense political, social and economic stresses. Threats to and interference with the human rights and dignity of those infected, those who are ill and those most vulnerable will increase substantially. The temptation to return to coercive public health measures will also intensify'. We probably need to also think about our own policies towards asylum seekers and migrants in the West and the requirement of testing upon entry and differential access to care and treatment. Is this sound public health practice? Are they receiving access to good quality care and treatment from the moment they set foot in the country? Is it not our human rights

'Stigma and discrimination remain the biggest barriers to HIV/AIDS prevention, care and treatment.'

Why a human rights approach to HIV/AIDS makes all the difference

Katarina Tomasevski*

1. Introduction

Today it has almost been forgotten that AIDS, with its epicentre in San Francisco, was initially labelled a 'gay plague', with its consequent mental image of a disease of affluence. Africa was next declared to have been the birthplace of HIV, with racist undertones that still trigger resentment in the continent. The image of HIV/AIDS as a misery-seeking missile, and the knowledge about the vicious circle of further impoverishment it generates, came later.

The first reactions to AIDS and, later, to HIV were panicky, revealing inherent tendencies to find somebody to blame, to dissociate and protect 'us' from 'them', the carriers of a deadly infection. HIV transmission placed on the agenda sexuality and drug addiction, issues with which we cannot deal rationally even at the best of times. Fear of contagion – in its widest possible meaning – led to moral crusades. This exacerbated the panoply of discriminatory, stigmatising, xenophobic, sexist and homophobic prejudice in the 1980s. These initial years of fear were marked by rejection and exclusion: a war was waged against people with HIV/AIDS rather than against the pandemic itself. People who were infected – or suspected of being infected – were precluded from working or marrying, or were isolated in prisons for the rest of their lives as if they were dangerous criminals. They lost their identity, individuality, dignity and privacy and became 'carriers' of a deadly disease, sacrificed ostensibly to protect society.

Roll-back was engendered by human rights safeguards, which were proving necessary in order to cope with the issue. Denial led to statistics which hid the problem and, because HIV/AIDS could not be tackled, it festered. Because people with HIV/AIDS were likely to lose their rights, they avoided health authorities. HIV testing was dangerous because it could lead to the loss of livelihood or even life. AIDS-free certificates were sold on the black market because many countries required them for entry. Again, the perception was that we should keep away 'them', the foreigners, so as to prevent them by legalistic barriers from infecting 'us'.[1] Such measures were by definition ineffective because, unlike with people, viruses cannot be forced to observe national borders or any other legalistic barriers.

As always happens in human rights, numerous and widespread abuses prompted condemnation and the strengthening of human rights safeguards. In HIV/AIDS, these safeguards proved indispensable for both prevention and treatment. Although it took twenty years, human rights protection has finally been declared as the key to reducing vulnerability to HIV/AIDS: 'The full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment [because] it reduces vulnerability to HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS' (UN, 2001). The affirmation of human rights as 'an essential element' was evidence-based: the risk of infection for professional blood donors or through sexual intercourse for young girls cannot be decreased unless and until they have alternative means to secure their livelihoods. Moreover, the erroneous rationale that people who can transmit the infection will do so had led to criminalisation. The awareness of the illogic of criminalising people for the presence of HIV antibodies in their blood led to the shift from exclusion to inclusion. Involving people with HIV/AIDS proved indispensable for both prevention and care.

While prevention was the priority in the first AIDS decade, attention has now shifted to treatment. This has brought us closer to reaching a balance between prevention and treatment. The recent focus on access to medication for people with HIV/AIDS has highlighted the most controversial aspect of the human right to health – the extent to which drugs and medical services can be claimed as human rights. There is no international guarantee of free medication for people with impaired health, and country practices vary a great deal. The global consensus is that medical treatment should be affordable rather than free. Much as in all other health issues, then, the biggest health hazard proved to be poverty. To the knowledge that poverty causes ill health we have added what we learned in the HIV/AIDS pandemic: ill health deepens and broadens poverty. Factual inequalities resulting from impaired health, combined with poverty, create multi-layered obstacles to the enjoyment of all human rights.

Gradually and haltingly, we are making dents in the inverse care law, whereby 'the availability of good medical care tends to vary inversely with the need for it' (Hart, 1971: 405). Agonising debates have ensued about sharing the responsibility for life-sustaining medical treatment between wealthy and poor countries, between public authorities and pharmaceutical companies. In international law, this has required redrawing boundaries between trade law and human rights law, between commercial and public health priorities, so as to accord priority to public health emergencies and to the right to life over private-law protection of intellectual property and commercial interests.

2. Human rights as a corrective for public health measures

Today we are accustomed to compulsory public health measures, such as vaccination or fluoridation of drinking water. However, each of these was the object of fierce public debate when first introduced, and their implementation was accused of infringing individual rights and freedoms. Control of communicable diseases is the oldest and most developed part of public health law. Because health education is a slow process, law is often used as a shortcut, to lay down norms of healthy behaviour and to provide for their enforcement. The aims of public health law are to reduce health hazards and prevent exposure to them, and to improve the capacity of individuals and communities to cope with such hazards whenever prevention fails. In the HIV/AIDS pandemic, the failure of public authorities to ensure the safety of blood transfusion and blood products, of hospitals and pharmaceutical products, generated a great deal of human rights jurisprudence which affirmed state responsibility and defined the rights of victims in cases where the state failed to properly discharge it.

Both international and constitutional human rights guarantees prioritise public health rather than individual access to health services. There are two facets of public health important from the human rights viewpoint:

• On the one hand, protection of public health is one of the universally accepted grounds for limiting individual rights and freedoms. Preventing the spread of communicable diseases may entail deprivation of liberty, interference in privacy and family life, freedom of movement, freedom to manifest one's religion, freedom of information, or freedom of assembly and association.

• On the other hand, such limitations have to be defined by law and can be legally challenged if they unduly restrict human rights. Any restrictions have to be legitimate, necessary and proportionate, subjected to public oversight and judicial review, as in all other areas where the state exercises police powers. Thus, human rights have been accepted as a corrective for public health measures.

Public health, especially in protection from epidemics, comprises numerous coercive, compulsory and discriminatory measures. In communicable diseases, it consists of the exercise of police powers to prevent a spread. Many such measures have been successfully challenged, and often changed, over the HIV/AIDS pandemic. Historically, public health used military terminology, abundant with terms such as surveillance, agent, defence, combat, or the vocabulary of policing, speaking about compulsory testing or contact tracing. Until the advent of human rights, public health spelled out individual obligations rather than rights. As late as 1975, WHO posited that 'the individual is obliged to notify the health authorities when he is suffering from communicable diseases (including venereal diseases) and must undergo examination, treatment, surveillance, isolation, or hospitalization' (WHO, 1983: 100). Gradually, the notion that 'the doctor always knows best' was supplanted by the rule of law, as with all other powers of the state. Nonetheless, people with communicable diseases still await an international bill of rights. Mentally ill people and people with disabilities have obtained formal affirmations of their human rights. We have not yet reached the stage where the rights of the ill are fully recognised, let alone respected and protected.

3. Prevention and the right to know for self-protection

Epidemiological studies have shown that the vast majority of HIV infections worldwide result from sexual intercourse. Sexual practices are the least known and the most difficult facet of human behaviour to influence by public policies. Because a cure for HIV infection is not available, and because the infection is lifelong, it is essential to prevent its further spread. The keystone of prevention has proved to be support for informed and responsible behaviour. Informed behaviour necessitates, however, explicit information about human sexuality; it can be the case that sex education at school remains outlawed.

Endless legal changes have taken place in the past two decades. A number of countries have adopted laws to make public advertising of condoms possible. Courts in many countries have had to rule as to whether sex education can be provided to children so as to enable them to protect themselves from HIV infection. The abyss between forceful demands that schoolchildren be provided with sex education as a matter of right, and denial of this sex education in the name of their parents' rights, defines the scope of the problem. Proponents of both extremes in this debate resort to human rights language in arguing their case. Proponents of children's right to know cite the children's best interests buttressed by public health considerations. International public health experts, convened by the Pan American Health Organization (PAHO/WHO), have found that 'sexuality refers to a core dimension of being human experienced and expressed in all that we are, what we feel, think and do' (PAHO/WHO, 2001: 6). Opponents cite parental rights and public morality, claiming that children should be protected from 'immoral "sex education"' (Pontifical Council for the Family, 2003). As summed up by the government of Lesotho, 'some parents strongly feel that sexual reproduction health education empowers children to be sexually active, whereas others feel that it enables them to make informed decisions' (UN Committee on the Rights of the Child, 1998).

An explicit provision on sex education is contained in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which obliges governments to ensure for girls and women 'access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning'. The Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child (CRC) as affirming children's right to sex education in order to enable 'them to deal positively and responsibly with their sexuality'. It goes on to say:

The Committee wishes to emphasize that effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health related information, including sexual education and information, and that ... States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality. (UN Committee on the Rights of the Child, 1996)

4. Multiple human rights implications of HIV-testing

The discovery and commercial application of tests detecting exposure to HIV, in 1985, triggered a veritable epidemic of laws. Never before were there so many laws relating to a disease: 104 countries, more than two-thirds of the countries in the world, adopted HIV/AIDS-specific laws during the first decade of the AIDS pandemic (Tomasevski, 2000: 198-204). Most of them authorised HIV-testing and restrictions on people identified as HIV-infected. People were susceptible to discrimination in employment, travel, and insurance, and even prohibited from going to school or from marrying. Test results were used for non-medical purposes and to the detriment of the people who had been tested. Moreover, compulsory testing was used often against prisoners, prostitutes and drug-users, who were labelled as 'high-risk groups'.

Because HIV-infected people can remain asymptomatic for a very long time, and because HIV infection can only be detected through blood tests, testing is important for public health surveillance. The lack of safeguards for confidentiality of HIV-testing and for non-discrimination of those testing positive proved the biggest disincentive for voluntary testing programmes. Requirements that people be protected from involuntary testing emerged early and forcefully. They were preceded by international pronouncements against HIV/AIDS-related discrimination, in Europe in 1983 and on the global level in 1988. These facilitated prohibitions of discrimination worldwide but, as yet, elimination of discrimination against people with HIV/AIDS remains a challenge everywhere. However, discrimination has been challenged in all corners of the world, and successfully so.

There are two opposed views on the individual responsibility to know one's own health – including infection – status. In European human rights law, the right not to know has gained a great deal of support.[2] On the global level, UNAIDS has acknowledged that 'stigma and discrimination continue to stop people from having an HIV test' but has nevertheless advocated routine HIV-testing in the context of sexually transmitted infections, pregnancy and 'where HIV is prevalent and antiretroviral treatment available' (UNAIDS/WHO, 2004). Whether individuals can opt out of such routine testing depends on their knowledge of this choice and their capacity to exercise it. Prostitutes are, in particular, victimised by multiple stigma. Changed vocabulary, from 'prostitute' to 'commercial sex worker', helps only a little: the latter term does not translate well into most languages. Moreover, prostitution remains illegal in many countries.

The conditions that make it possible for people to choose or refuse testing, or to refuse risky behaviour whereby they might become infected, require examination of broader legal rules, not only those related to testing. The choices that people really have are outlined by the affirmation or negation of all their rights and freedoms. Denials of women's rights impede the ability to self-protect. For girls and women, obstacles include innumerable practices, such as forced prostitution, honour crimes, life-threatening unsafe abortions, or denial of legal protection against rape on the basis of a girl's or woman's sexual life (UN Human Rights Committee, 2000). International human rights bodies have forcefully objected to the denial of choice to girls and women owing to restrictive legal provisions on access to contraceptive information and services, especially 'to penal law provisions that impede their access to essential health services' (Hendriks, 1998: 401). Prevention messages are routinely based on the assumption that girls and women are free to make choices between safe and unsafe sex: information will make all the difference. Anti-human-rights messages have not disappeared, however. Suffice it to quote an example of advocacy for child marriage: 'To safeguard young people against sexual misbehaviour, early marriages must be encouraged by solving the current social and economic problems which cause marriage to be delayed' (WHO, 1992: 32).

Attempts to forge a common global standard of morality have never succeeded in history and are unlikely to be more successful in future. The guiding principle of taking responsibility for one's own health helps where individuals are free to make choices, and can therefore be held responsible for the choices they have made.

5. Sharing the burden of the pandemic

Whenever the burden of an epidemic is not spread evenly but concentrated in specific populations, whole populations become seen as 'sources of infection'. In the case of Africa, this was exacerbated by an early attribution of blame for the origin of AIDS, something which has resulted in African leaders still questioning scientific evidence regarding HIV/AIDS. Moreover, this uneven burden has been made painfully visible through societal, economic and medical costs of coping with the pandemic.

The absence of an enforceable claim upon a government to allocate a specific amount to health has led to a conclusion that 'the amount a nation can afford to spend on the pursuit of health is what it chooses to spend' (Townsend and Davidson, 1982: 27), confirmed by the World Bank as 'a question of political choice' (World Bank, 1992: xvii). The human rights corrective

stems from the principle whereby the right to health, as with other economic and social rights, should enjoy priority in budgetary allocations. Also, inadequate or even diminished public funding assumes that disposable personal income enables people to pay for necessary health services, which may not be the case. Nevertheless, individual entitlements and corresponding governmental obligations in the provision of health care services remain an object of dispute and litigation, and there is as yet little global consensus. Generally, free health services are recommended in reproductive health and in infant and child healthcare, whereas the criterion of affordability should guide all others (WHO, 2002: 10). Reaching a balance between HIV/AIDS and other priorities is not an easy process, but is a necessary one, as illustrated in Box 1.

Box 1: A difficult balance: antiretroviral treatment and other health needs

Knowledge that free medical treatment can be obtained inevitably leads to claiming it, particularly amongst people whose lives depend on it. Large numbers of demands for access to free medical treatment for people with HIV/AIDS have been filed before domestic courts and the Inter-American Commission on Human Rights in Argentina, Chile, El Salvador, Guatemala, Honduras, and Nicaragua. That people were going to die unless medical treatment and drugs were provided strengthened cases: the right to life was in question. A number of cases were successful, which encouraged additional cases.

Legal arguments debated in such cases inevitably yielded to limited budgets to finance the medication and related health services for people with HIV/AIDS. In the case of El Salvador, the Inter-American Commission on Human Rights granted temporary protective measures (*medidas cautelares*), including antiretroviral medication. It decided so on 29 February 2000, and on 15 March 2000 the government informed the Commission that clinical histories of the applicants were being reviewed with the intention of identifying optimal medical treatment, and that the necessary funds to purchase medication were being sought. Thereafter, the views of the applicants and the government parted ways. The government claimed that it did whatever it could. The petitioners argued the opposite, asserting that the government had not undertaken 'reasonable financial adjustments to permit their purchase and administration'. The Commission has decided to continue examining this case and has provisionally concluded:

> The IACHR is aware of the fact that the people of El Salvador are in the midst of a very difficult period brought on by a series of natural disasters, which has placed enormous demands on the health authorities and officials. In that context, the Inter-American Commission appreciates the efforts of the Salvadoran authorities to address the needs of persons infected with HIV/AIDS in that country. The supply of anti-retroviral medications has been steadily increasing in recent months, and the State has announced that it will continue to adopt the measures necessary in that regard.[3]

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6. Changing law on life-prolonging drugs

A series of human rights challenges at the turn of the millennium has reinforced governmental responsibilities, and related powers, in protecting public health. This has facilitated defining the boundaries between trade law and human rights law. On 1 January 1995, the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement came into force. Its impact was highlighted by a court case in South Africa regarding enhanced availability of HIV/AIDS-related drugs. Thirty-nine pharmaceutical companies, who took the government of South Africa to court for breaching their property rights in 1998, had to withdraw their suit in 2001 owing to the negative publicity that the case generated worldwide (Kongolo, 2001: 601-27). Life-saving drugs are widely perceived as entitlements based on the right to health, which should be prioritised over commercial considerations. Indeed, this hierarchy of values was subsequently embodied in the Doha Declaration on the TRIPs Agreement and Public Health, which has affirmed the 'WTO Members' right to protect public health and, in particular, promote access to medicines for all' (WTO, 2001, 2003).

However, access to free healthcare services and necessary drugs as an individual entitlement does not enjoy full recognition worldwide. International human rights treaties tend to repeat the oldest definition of the right to health from the WHO Constitution as 'the enjoyment of the highest attainable standard of health', with health defined as 'a state of complete physical, mental and social well-being'. The International Covenant on Economic, Social and Cultural Rights is vague on specifying individual entitlements, obliging the states to 'create conditions which would ensure to all medical services and medical attention in the event of sickness'. The African Charter on Human and Peoples' Rights obliges states to ensure that people 'receive medical attention when they are sick'. The Protocol of San Salvador goes further and affirms that health is a public good. It obliges states to extend 'the benefits of health services to all individuals' and urges them to prioritise satisfaction of health needs of 'those whose poverty makes them the most vulnerable'.[4]

The reluctance of governments to guarantee an open-ended individual entitlement is understandable: health needs are limitless. As in other areas, priorities are determined through democratic processes and entrenched in law. Courts worldwide have refrained from interfering in democratically made decisions or professional medical judgements. One example comes from English jurisprudence: 'Difficult and agonizing judgements have to be made as to how a limited budget is best allocated

to the maximum advantage of maximum number of patients. This is not a judgement which the court can make'.[5] Another comes from the Constitutional Court of South Africa. In the case of a terminally ill patient who needed continuous medical treatment to prolong his life, the Court declined to find for him because this 'would have the consequence of prioritizing the treatment of terminal illnesses over other forms of medical care'.[6] In a different case, which revolved around reduction of the risk of HIV-transmission to newly born babies through the administration of antiretroviral drug nevirapine, the Court has defined governmental obligations as follows:

This case concerns particularly those who cannot afford to pay for medical services. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make healthcare services available to them. In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved.[7]

The Court has thus affirmed the priority of prevention over cure, and of children over adults, and – most importantly – its has affirmed government's discretion in resorting to different or better methods of coping with HIV/AIDS as long as these comply with its constitutional obligation to progressively eliminate or at least reduce health hazards, especially those that stem from deprivation.

7. A look back and a look forward

As the inability of medicine to provide a cure for AIDS or a vaccine against HIV infection has shattered unrealistic optimism in science and technology, rethinking the rights and wrongs in responding to HIV/AIDS obtains increased importance. The inability to cure highlights caring, avoiding societal responses that supplant wrongs for rights. Previous epidemics never provided a voice to sufferers. The novelty of the AIDS pandemic is that for the first time in history those infected and affected[8] do have the right to a voice, the right to know, the right to challenge, and the right to participate in policy-making.

HIV/AIDS became a test case for applying human rights in response to a pandemic by showing pertinent problems in their extreme, and also by forging solutions which integrated human rights faster and deeper than anybody thought possible. The best feature of HIV/AIDS is that transmission of HIV infection is preventable, and that prevention is in our hands. However, if progress has been outstanding, advances have been uneven and marred by setbacks.

During the past twenty-five years, the notion of burden-sharing has followed on from the changed knowledge about the pandemic. Initially seen as 'AIDS-free', women became the focus of attention because of their vulnerability to the infection. And yet, much of this vulnerability is manmade, literally so, and can be reduced if women's rights are fully protected, by men and women jointly. A rights-based approach to HIV/AIDS requires translating into practice women's 'right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence' (UN, 1995). Nonetheless, this almost-consensus attained at the 1995 Beijing Conference was immediately undermined by numerous reservations, and during the past decade controversies have increased.

Disagreements as to the formulation of a globally shared vision have increased, resulting from the altered policy of the government of the US. The European Parliament regretted in 2002 the lack of global agreement on 'expanding the access to reproductive health services, including information and education on reproductive and sexual health', and the Council of Europe noted in 2003 that 'clinics close and access to reproductive health services becomes more difficult for lack of funding, less poor women worldwide can afford contraception'. It is a sobering thought that we entered the third millennium without having been able to secure, globally, women's rights to self-protection against HIV infection. This remains an unmet challenge for the third decade of the pandemic.

Endnotes

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1 After HIV tests became available in 1985, Saudi Arabia prohibited entry to HIV-infected people in 1986, and more than 50 countries imposed restrictions on international movement within the subsequent three years. (Duckett and Orkin, 1989).

2 The 1997 Convention on Human Rights and Biomedicine stipulates in Article 10 (2): 'Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.'

3 Inter-American Commission on Human Rights, Report No. 29/01, *Jorge Odir Miranda Cortez et al. versus El Salvador*, Case 12.249, 7 March 2001, para. 48.

4 Excerpts from those and other international instruments are comprised in Alfredsson and Tomasevski (1998).

5 R. versus Cambridge Health Authority, ex parte B. 2 All ER 129 (CA) (1995).

6 Thiagraj Soobramoney versus Minister of Health (KwaZulu-Natal), Case CCT 32/97, judgement of 27 November (1997), Constitutional Court of South Africa.

7 Minister of Health versus Treatment Action Campaign (TAC), Case CCT 8/02, judgement of 5 July (2002), Constitutional Court of South Africa.

8 The chronology of the AIDS pandemic exhibited many changes in vocabulary. Suffice it to provide one example: 'We condemn attempts to label us as "victims", which implies defeat, and we are only occasionally "patients", which implies passivity, helplessness and dependence upon the care of others. We are "people with AIDS"' (PWA Coalition, 1987)

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Meeting 6: Rights and natural resources: contradictions in claiming rights

Speakers: David Brown, Overseas Development Institute
Mac Chapin, Native Lands Centre

Chair: Duncan Brack, Royal Institute for International Affairs

Meeting Summary

The first speaker, David Brown, began by explaining that his primary interest is the role of development assistance in supporting the realisation of claims in the forest sector. He presented a number of reasons why a rights perspective is problematic in this sector, in particular the contention surrounding the legal framework and the illegality debate. Brown also discussed the prioritisation of sustainability by external actors and the consequent categorisation of groups within the forest sector and the subordination of their rights. He concluded by outlining why a rights perspective remains important for the forest sector but stressed that the approach must move beyond the simple application of the law if it is to be pro-poor.

The second speaker, Mac Chapin, focused on the relationship between conservation organisations and indigenous people. He explained that the focus of his recent article on this subject was not explicit abuse by the large conservation NGOs; rather, it was on the increasing exclusion of indigenous people from NGO programmes and the subordination of indigenous people's priorities. Chapin described the process whereby the conservation organisations and their funding sources grew dramatically and discussed the consequences of these developments. He concluded by suggesting that the way forward lay in increasing the accountability of the large conservation NGOs and through donors targeting indigenous people.

The benefits of utilising a rights perspective given the complexity of power dynamics in the forest sector was echoed during the discussion. The need for a progressive realisation of rights was raised but caution was also called for with respect to such claims because of the danger that they might lead to a hierarchy of claimants.

David Brown

I should stress that I am going to be talking about rights perspectives rather than rights-based approaches. There is a slight difference of emphasis and I do not want to be too concerned about the narrow technical and legalistic aspects of the topic. What I am concerned about is looking at the role that development assistance can play in facilitating a shift in perspective in order to realise the legitimate claims that citizenry can make against the state and its derived duty-bearers. An underlying concern is that support should be provided for process rather than policy outcomes. My own view is that, particularly in the conservation field, there is an excessive concern with desirable outcomes as defined by outsiders rather than with governance processes that lead to desirable outcomes. Given the interests of the forestry group at ODI, I will be focusing on forests with high commercial value but what I say might have relevance beyond those.

Rights and the forest sector

For those of you who do not know the forest sector (and I am told that there might be a few here), we need to bear in mind that we are dealing with a resource that is usually managed as the sovereign territory of the state and, because it is a sovereign resource, national law tends to be in the ascendant. The rights-holders, who are the subject of interest, tend to be small-holders and independents. International work covenants therefore do not normally apply to these people, with the result that there is a stream of international law that is not really relevant to their circumstances.

Forests are also an acutely emblematic resource (and I will return to this later) in that they tend to be labels on to which other environmental concerns and crisis narratives can be tagged. It is also an interesting sector in relation to rights because of the multiple interests that it serves and the massive power imbalances that exist within it. A final point is that, as a development assistance sector, the forest sector has been particularly problematic for a long period of time because of the characteristics just described.

The question I would like to address is: how successful has official external aid to the forest sector been in helping to develop a rights regime in a way that promotes good governance and contributes to poverty alleviation? I will be mainly looking at one area – forest law enforcement – but, if we have time, I will turn to some issues to do with wildlife.

ODI's research interests

As background, I would like to situate this presentation within the research interests of the forestry group at ODI. We have a particular concern with governance reform and the contribution that the forest sector can make to it. Within this field, we have an interest in mechanisms of public accountability, in particular mechanisms that

'The starting point is the legal framework but this is itself particularly problematic in this sector ...'

span the international boundary – what might be called 'third dimension accountability'. There has been quite a big debate recently concerning forms of public accountability and, in particular, on what Goetz and Jenkins and others have called 'hybrid' forms of public accountability (Goetz and Jenkins, 2001). These refer to situations where non-governmental actors, who have previously exerted pressures from below, exert horizontal accountability as a substitute for agencies of the state, for instance as independent monitors. We have been researching this issue and will continue to do so in our current programme. What sorts of messages prevail when actors across international frontiers are involved in public accountability within developing countries?

Representing the rights of the poor in the forest sector

The starting point from a rights perspective must be how the rights of the poor are represented in the forest sector. What are society's obligations to the forest-dependent poor? What capacity do the poor have to make claims with respect to resource tenure and in terms of legal processes? I think in both of these areas the answer will usually be: very limited indeed. Resource tenure is obviously a major bridge into the rights language but it tends to be extremely weak in the forest sector because post-colonial governments, like the colonial governments before them, are usually loathe to reinstate the rights which they have taken from the traditional resource users. Rights-holders in the forest sector also tend to have limited leverage in terms of legal process and are unable to claim their rights through this mechanism. We are therefore starting from a fairly low base.

Contesting the legal framework

To begin, I will refer to three quotations relating to rights issues. The first one is a quote from Julia Häusermann speaking some years back at ODI and making a statement that is in some ways uncontroversial: 'The legal framework is the alpha and omega of a rights-based approach' (Häusermann, 1999). Fair enough, but what if the legal framework is fundamentally in contention? The second statement by the World Bank and the WWF Alliance is again not problematic in itself, although it does need some qualification: 'One of the most significant improvements that can be made to forest management (in the tropics) …is simply the enforcement of legislation' (World Bank and WWF Alliance, 2003: 1). Again, this is OK provided that the legislation is also healthy, reasonably consistent and just. The third statement from an IFAW teaching pack does concern me because I think that it is, by and large, factually untrue: 'Question: True or False? Most countries where… bushmeat is a problem do not have laws against hunting or the trade. Answer: False! Many … have very good laws to protect wildlife' (IFAW, 2004).

You can see where I am going with these quotations.

The starting point is the legal framework but this is itself particularly problematic in this sector and cannot be taken as a given. So, if we are promoting rights perspectives in relation to the established legal framework, we have a problem from the outset.

Here are some statistics that further substantiate the point: there are over 900 pieces of legislation in Indonesia relating to the forest sector and there have been over 100 new pieces of legislation enacted in Brazil during the past 25 years. This is an area where new legislation proliferates.

Phases of development assistance and the primacy of sustainability

I turn now to rights within the evolving discourse of development assistance to forestry. We have had various speakers at ODI in the past who have talked about the phases of development assistance within the forestry sector, such as: industrial forestry (1960s-1970s); social/community development forestry (1970s); environmental forestry (1980s); and sustainable management of renewable natural resources (1990s). These are the main phases and they demonstrate the emblematic role of forests in the sense of taking on the issues and crises in other fields. If I were to comment on these successive phases, the first remark would be that there is an amalgam of concerns here and, at least in theory, no single issue is dominant (except in so far as I will qualify that in a moment). However, rights have not been central to these debates. Instead, there have been two continuing foci of interests: sustainable forest management and poverty alleviation.

The next quotation is from the World Bank and the WWF Alliance: 'A basic requirement for implementing SFM is ... a permanent forest estate. However, enforcement of land use designations remains a major challenge. *The rights of local communities* ... interacting with the forest *should generally be respected* – insofar as this does not reduce the flow of desired benefits from the forest' (World Bank and WWF Alliance, 2003: 5). The first part of this statement is standard in technical approaches to sustainable forest management, where the fundamental requirement is to control the parameters and set a clearly defined forest boundary. The second part of the statement may or may not be problematic depending on what is actually implied.

The third part of the statement is unproblematic given the precepts of sustainable forest management but is deeply problematic from the perspective of forest-user rights. You can see that the notion of rights that is being promoted here is not within the conventional definition of the term 'right'. They are not fundamental principles to be respected and upheld whatever the circumstances, and they are clearly contingent on other technical concerns. This happens because of the primacy of the interests of 'future generations', which is widely accepted in sustainable forest management discourse but it is very problematic in the rights discourse. So there is a contradiction

right from the start.

Sustainable forest management is a little out of fashion perhaps but what is in fashion is a lower order interpretation of the same concept – that is, 'legality'. Attention has shifted in the last few years from sustainability – which has proven to be a hard concept to unravel – towards legality, which is assumed to be a rather easier one to handle. Notions of legality in the forest sector inevitably raise problems about the extent of illegality.

Illegality and barriers to legality

I will thus turn now to the promotion of rights perspectives within the current discourse on illegality in the forest sector, in relation to which there has been a fair number of recent policy positions.

What do we mean by 'illegality'? Firstly, there is illegality in the sense of 'forest crime' (and there is a fair amount of straight-forward crime in this sector as anyone who has worked in it knows). I do not think that the label of crime is problematic to the same extent in the forest sector that it is in relation wildlife and bushmeat, where the main players tend to be smaller, more local and have greater claims to act outside the law with some legitimacy. Of course what counts as criminality varies from context to context. For example, in the tropics, logging out of boundaries – outside of licensed areas – is a recurrent problem, in a way that it is not in, say, Canada where water pollution issues are more problematic.

But there is an additional dimension to illegality relating to 'barriers to legality', which I do not think we can avoid in this debate. This has been the subject of quite a lot of recent interest and research, much of it funded by DFID through the Centre for International Forestry Research (CIFOR). Adrian Wells from our group has been involved. This work has emphasised that barriers to legality are a main cause of the high levels of 'illegality'. If we are talking about illegality in the forest sector, we are therefore dealing with a major and complex problem that does not have simple solutions, and which cannot be reduced to 'forest crime'.

Actions to combat illegality have been heavily donor-driven and linked to the forest law enforcement, governance and trade (FLEGT) process. The discussion has centred on the role of independent monitoring and the funding of international environmental watchdogs, together with some industry measures, some pending trade restrictions, such as the European Union voluntary partnership agreements (VPAs), and so on.

FLEGT is still in its early years, and we have to recognise this if we are trying to discern its positive and negative effects. There have obviously been some positive effects, although not all of them are to do with rights. It has created enormous leverage in terms of bringing the governance debate into the open and so there is the prospect of long-term benefits on the governance front. There are also benefits from a rights perspective. It has brought

'... barriers to legality are a main cause of the high levels of "illegality".'

the issue of rights into the public domain and that must be regarded as a positive.

There are problem areas, however. There is a tendency to oversimplify the legal framework and to squeeze out of the discussion some of the complexities that I referred to earlier. How does that happen? Through a number of mechanisms, I suspect, but I do not think that simple distortion by development assistance partners is necessarily the primary one. There has been recognition that this is a complex issue, as I have noted, and not amenable to simplistic solutions. The origin of the problem is that forests are a sovereign resource. Illegality is therefore a sensitive issue to deal with and any attempts to address it tend to call for sequential approaches that deal with the big issues first. This has downstream consequences for other players for whom some of the supposedly 'smaller issues' may well be of great significance.

Anybody who has ever done an evaluation of a conservation project will know the problems that I am talking about here. There are certain issues that you cannot debate within the discourse on legality and illegality. For example, the issue of whether national parks gazetted as a result of external pressure should be counted as a legitimate part of national land use cannot be debated by outsiders once you are 'within the discourse' because they are part of a sovereign process, and sovereign law is not amenable to challenge once it is on the statute books. There is an issue of closure here in the sense of closing down of contentious areas of discussion.

Subordination of local agendas and the 'undeserving' poor
However, there is also another problem in terms of the subordination of local agendas to external ones (which my co-speaker will deal with in detail) and the way in which this reduces the space for local actors to contest their claims. With regards to the poor, my concern is that, within forestry, the notion of rights tends to become subordinated to the demands of sustainable forest management, which itself creates a hierarchy of claims on resources, albeit often a fairly superficial and self-serving one. At the top of the hierarchy there are those whose claims are not problematic, internationally or nationally, which tend to be a small proportion of local users, particularly hunter-gatherers and those who appear to live in harmony with their environment. Local claimants of this type tend to have good public relations, and their interests can easily be championed by outsiders, though not always very effectively. They do have important rights but they tend to be a very small proportion of the population in question. They do not threaten the long-term conservation of forests, and indeed, their livelihoods depend to a large extent on forest conservation.

There is another category – usually a much bigger one – that tends to become characterised as the undeserving poor because the people within it appear to be abusers of their environment.

'A rights perspective puts an emphasis on process rather than outcomes ...'

These are the people who live by slash and burn agriculture and the commercial exploitation of natural resources. Their welfare is not necessarily dependent on forest conservation in ways that outsiders deem to be appropriate for tropical societies. They do not fit easily into the international rights discourse and their interests are being marginalised as a result. This is particular area of concern. When it is challenged, the reply one tends to get is that we have to take care of the interests of future generations and the rights discourse must therefore be subordinated to the need for sustainability.

The case of wildlife
I now turn briefly to the case of wildlife. We can see these tensions even more strongly represented in this instance. I have been dealing with international policy processes around bushmeat management for the past four and half years and I have become increasingly worried about the effects of growing international interest in hunting and bushmeat on the welfare of the poor. We are seeing a major loss of access rights as wildlife rises up the international policy debate. In the past, although people have not usually had formal access rights, their access has been tolerated. As this issue has become more prominent in international policy discourses, however, those access rights are increasingly denied. This has resulted in a major and systematic loss of rights for forest users, particularly in Central Africa.

Here again there is the problem of the idealisation of the poor. In this case a new category of purely 'subsistence users' has been created. Subsistence users are insignificant in Central Africa but it suits certain purposes to imagine that they do exist because, if they did, their needs would be small and finite, which avoids the problem of unsustainable off-take. In fact, most small hunters and trappers produce for the commercial market; they rarely consume much of their catch. Their association with the evils of commerce provides a convenient way to stigmatise them. By contrast, the rights of 'subsistence users' can be promoted as a useful counter-measure (and as proof of the absence of hostility to consumptive use of animal resources) even though they are probably not present in reality.

The point that I am making is that a rights perspective is important in this field, but it is very easily distorted to support external agendas. There are undoubtedly some major international issues of governance to be addressed in relation to illegal logging but there are also some real risks for the poor in the way that these issues are taken up and championed.

Why adopt a rights perspective?
Where can we go from here? I am of the view that a rights perspective is important in itself. If you take a rights approach and then seek to monitor the realisation of claims, then half the battle is already won. A rights perspective also justifies the presence of international players on sovereign territory, in particular in areas

where governance is bad. In the real world, this is likely to be essential. But such an approach does require a real democratic platform and it is this that we are not seeing enough of. There is also far too much external manipulation of local interests. I am rather distrustful of the claims by many environmental and conservations NGOs to represent local constituencies. They may do so but we need stronger evidence of the basis for such claims.

Why should we still adopt a rights perspective? Resource tenure is the main reason. It is still the critical challenge in the forest sector. A rights perspective puts an emphasis on process rather than outcomes and that seems to me to be a healthy development; to shift the policy focus away from the technical solutions which might address the problem of unsustainable management (though only in the short-term) towards the processes that can deliver such sustainability through good governance.

I am also concerned about the danger of 'inversion' in advocacy. In the environmental sector, there is always a great danger that advocacy will be reflected back on to the victims as a form of victim blaming. This is most evident when it comes to advocacy over forest conversion practices, such as slash and burn. A rights perspective should help us to avoid this and should instead encourage what I call an 'upward orientation' of lobbying and advocacy. That would be a definite gain.

However – and to conclude – we have to guard against the simple application of the law through repression. At present there are many claims that the law is unproblematic and what is actually needed is its rigorous application. I am very doubtful of this view. The legal framework is rarely 'pro-poor' in its orientation, and –given the inordinate power of a few stakeholders in the forest sector – its application tends to be profoundly anti-poor. Mere application of the laws is likely, therefore, to be repressive in its effects. It would be perverse if attempts to champion the rights of the poor ended only in the denial of those rights.

'The legal framework is rarely "pro-poor" in its orientation ...'

Mac Chapin

I am going to talk about some of the issues raised in my recent article, 'A Challenge to Conservationists', which appeared in the November 2004 issue of the magazine *Worldwatch* (Chapin, 2004). I wrote this article because I had noticed that in recent years the relations between conservationists and indigenous peoples had been steadily deteriorating. They were not working well together. Put simply, the conservationist NGOs, especially the large ones with substantial amounts of money and the power, were not including indigenous people in their programmes and, when they did, they tended to dominate the relationship and control the agenda. I was seeing this not only in my work with indigenous people throughout Latin American but also in other regions, for example this general trend was also evident in Cameroon and West Papau.

In June 2003, a number of foundations in the US, including the Ford Foundation and some smaller foundations, met to discuss this issue at a gathering of the Consultative Group on Biodiversity. The Ford Foundation announced that it was commissioning a study (Khare and Bray, 2004) to look into what it termed 'abuses' by the three largest conservation groups – World Wildlife Fund (WWF), The Nature Conservancy (TNC), and Conservation International (CI).

Initially, the sole target of the Ford investigation was CI, about which Ford's grantees in the field had received the greatest number of complaints; but later on it was decided to add in WWF and TNC, to add some balance and also to avoid the perception that the study was a bear hunt. I am glad they did because there are structural features that characterise all three NGOs.

Avind Khare, an economist with Forest Trends, and David Bray, an anthropologist at Florida International University, were contracted by Ford to do the study. As it was nearing completion, however, the foundation suddenly embargoed it. Behind the scenes, two Ford board members – Yolanda Kakabadse, head of the International Union for the Conservation of Nature (IUCN), and Kathryn Fuller, President of WWF-US – had seen the terms of reference and requested that the finished study be suppressed.

This was a very bad move. Word immediately leaked out and everyone became curious about the contents of the study, with many beginning to think that it must be equivalent to a cargo of dynamite. This proved to be unwarranted because, when the study became public (Ford was pressured to release it), it was apparent that it was nowhere near as volatile as expected.

The increasing exclusion of indigenous people from conservation programmes

Let me note that, in my article, I was not concerned with the outright abuses of the large conservation NGOs as much as with the way in which they had been increasingly excluding and ignoring indigenous peoples from their programmes. There are abuses, most certainly. For example, a recent article by Michael Cernea and Kai Schmidt-Soltau (2003), both of whom have worked with the World Bank, documents the forced resettlement of pygmies in the Congo Basin, with the solid backing of WWF. There are also rumours of other abuses in other regions.

This was not the focus of my article, however. I was more interested in documenting the steady distancing by the large conservation groups from earlier attempts, begun in the late 1980s, to work closely with indigenous peoples. At that time, there had been a lot of talk about the need to work with indigenous peoples. In the mid-1990s, WWF and INCN produced policies and a joint position statement on indigenous peoples and how they should work with them and respect their traditional knowledge of the environment.

In a sudden wave of activity, the conservationists developed what they called Integrated Conservation and Development Projects (ICDPs) and various kinds of 'community-based conservation'. These approaches became the rage during the late 1980s and early 1990s. Many donors threw their money behind them and there was extensive talk about alliances, partnerships, collaborative relationships, etc., between conservationists and indigenous peoples. This was during the years that everyone was talking about sustainable development.

Whose agenda?

Unfortunately, little of this worked. The various approaches were inventions of the conservationists and they were controlled by the conservationists, without much indigenous input. The conservationists pushed their agendas, not those of their indigenous 'partners'. Although there was talk about the overlapping, and even corresponding, agendas of indigenous peoples and conservationists, in truth there are usually areas of considerable difference.

When you talk to indigenous people throughout the world, they generally say that their first priority is gaining control over their land. They want legal title to their ancestral lands and they want to protect their natural resources. Conservationists, however, invariably say that they cannot get involved in this area because it is 'too political'. Another feature of indigenous agendas is the desire to strengthen their political organisations so that they can defend their land, their natural resources and their cultures. This is also seen by the conservationists as too political. Instead of these indigenous priorities, the conservationists generally want to begin with a management plan for the natural resources. It is not that the indigenous peoples are opposed to the idea of management plans; it is simply that this is not their priority. They want to begin

'The conservationists pushed their agendas, not those of their indigenous "partners".'

with land rights and the strengthening of their political base – then perhaps down the line they can think about management plans. The fact that the conservationists will not help them with their priorities makes for a doomed partnership.

The growth of the conservationists and their funding sources...

Up until the past two decades, WWF, TNC and CI were relatively small and had lean budgets. Founded in 1961 in Switzerland, WWF was initially tiny. It expanded slowly, founding chapters in other countries of Europe, and later moving into developing countries. In the early 1980s, WWF-US had around 25 employees and occupied one floor of a moderately-sized building in Washington, DC. TNC began with an informal group of concerned scientists in the 1940s. In 1961 the Ford Foundation gave them money to appoint a full-time President. (CI came into existence in 1987 as a break-away group from TNC.)

By the second half of the 1980s, all of them had begun to expand dramatically. They began with funding from private foundations and individual donors. Next they started tapping into private corporations and bilateral and multi-lateral donor agencies, diversifying their funding base. WWF now has four floors of a large, and very luxurious, building in Washington, and worldwide WWF boasts more than 4,000 employees. TNC holds the distinction of being the largest and most well-endowed conservationist group in the world, receiving US$ 225 billion from close to 2,000 corporate sponsors in 2002 alone. CI began small but has ballooned in size as a result of its fundraising skills. Over the past few years it has secured more than $550 million from the Gordon & Betty Moore Foundation; other large funders of CI are the MacArthur Foundation, the World Bank, and the Global Environmental Facility (GEF).

How did this transformation take place? The large conservation NGOs:

i. developed large-scale conservation schemes, covering large pieces of real estate. The size of the schemes enables the conservation NGOs to argue that that they need large amounts of money both because of the huge threats to the Earth's biodiversity and also because large schemes are more effective than a number of smaller isolated projects both in terms of impact and cost. CI, for example, recently suggested that it would need $500 million per annum to cover 25 of these schemes. Another feature of these large-scale strategies is that they are very distant from the ground, which means that indigenous peoples simply do not play a role in them;

ii. began mounting extremely aggressive fundraising campaigns. Their growing size meant that they needed to diversify their funding base, particularly because the amount of money available worldwide for conservation has roughly halved since 1980. They have been successful at this. As they have soaked up the lion's share of the available money, all three have grown in both relative and absolute size and wealth. However, whilst they have branched out to include private corporations and bilateral and multilateral donors in their funding strategies, they have also continued to approach foundations and individual donors.

...and the implications

What are the consequences of this trend? Obviously the larger these conservation groups become the more dependent they are on maintaining a certain level of funding. This means that, particularly when tough economic times hit, they have to take to the streets to secure as much cash as they can. The competition, both among the large NGOs and between the large and small NGOs, has become ferocious. The large NGOs have also become extremely territorial, laying claim to large chunks of land and denying access to their rivals. TNC guards the region of Bosawas in Nicaragua; CI controls Guyana and Suriname in South America (in Guyana, their country representative is the former commander of the Guyanese Armed Forces); WCS holds sway over the Bolivian Chaco; and so forth. A similar territoriality is in place with regard to funding sources; an example is the hold CI has on funding from the Moore Foundation.

Another recent shift has been in the rhetoric about strengthening the capacity of local NGOs. For some time, the big international groups talked about the need to support local NGOs. This has now virtually disappeared because the international NGOs realised that, once they had gained experience and a solid track record, these national groups would be able to bring in their own funds and would be in competition with the international NGOs. Consequently, the large international NGOs stopped supporting local groups and have instead established their own in-country offices. These often snatch up the best local talent, which impacts negatively on local capacity. The situation now exists where the local offices of the international NGOs fight amongst themselves over money and power.

Another feature that has emerged is the 'gatekeeper syndrome'. This is where donors, including foundations and bilateral and multilateral agencies, provide funding to one of the large organisations to manage and smaller organisations have to approach them to access it. This arrangement often amounts to a stranglehold. One of the most blatant examples is the Critical Ecosystems Partnership Fund (CEPF), which CI controls. It is bankrolled by the MacArthur Foundation, the GEF, the World Bank and the government of Japan, each of which contributes around $25 million. In theory, the CEPF is supposed to provide funds to local conservation groups in a series of 'critical ecosystems' around the globe. In reality, CI uses the bulk of the money – about 75% – for its own programmes and administration. Outside groups receive what amounts to crumbs.

The political conditions that accompany many of the donations often make good conservation work impossible. Money from the United States Agency

'The political conditions that accompany many of the donations often make good conservation work impossible.'

'There is therefore a need for objective evaluations ... to provide a solid foundation for constructive change.'

for International Development (USAID) often carries stipulations that limit who the recipient NGOs can work with and what can be done. Any NGO working with USAID money in the Andean region of South America must report incidents of drug trafficking – something that is rife in the region and extremely volatile. All three of the largest NGOs take money from oil companies who are drilling in ecologically sensitive regions of the tropics. This limits their ability to oppose such activities, even when the companies are causing ecological havoc.

It is indigenous people who lose the most because of these conflicts of interest. Most indigenous organisations in Latin America are fighting against the destructive exploitative practices of large multinational companies, which are often supported by their government and which therefore brings them into conflict with them also. The conservationists will not make alliances with indigenous peoples when they are receiving money from the likes of Chevron-Texaco, Dow Chemical, Shell, Enron and other such companies. There is a case in Ecuador where Oxfam America, based in Lima, is funding an Ecuadorian group battle against Chevron-Texaco. Chevron-Texaco supports all three big conservation groups.

The way forward

What can we do about this? It is a huge and incredibly complex problem, one that involves powerful forces and large amounts of money. I have two modest suggestions:

i. We need to increase our knowledge about what is actually going on in the field. We do not have many objective, thorough evaluations of the big conservation programmes. There is virtually no accountability. What we have is a public-relations smoke screen generated by the conservation organisations on one side and accusations of abuse from critics on the other. There is therefore a need for objective evaluations, including indigenous representation, to provide a solid foundation for constructive change.

ii. Donors must focus on targeting indigenous peoples. A lack of trust and understanding between donors and indigenous peoples will make this difficult and measures must be taken to improve communication and relations. It is also not easy for programmes to reach indigenous peoples because they often live in remote areas. Donors must therefore make the effort to fund them in the most effective way, which means providing grants directly where possible, rather than through intermediaries, and certainly not by using the large international NGOs as gatekeepers.

Public goods and private rights: The illegal logging debate and the rights of the poor

David Brown, Adrian Wells, Cecilia Luttrell and Neil Bird*

1. Introduction

This paper explores the potential for applying rights perspectives in policy development in the tropical forest sector, focusing especially on an area of current concern: forest law enforcement and governance (FLEG). The argument presented here is based on the assumption that where the challenges are largely rights-related, adopting a rights perspective should logically provide a powerful way to address them, with positive effects on both the long-term condition of the forest resource and the distribution of benefits deriving from its exploitation. However, this is easier said than done, as the legal framework in the forest sector is often profoundly anti-poor, if not always in its conception, at least in its operation. In consequence, there is no guarantee that forest law enforcement will improve the welfare of the poor. Indeed, there are good grounds to argue that the reverse is much more likely to occur.

2. What is meant by 'rights in natural resources'?

Beyond its core meaning of 'justifiable claims', the concept of rights has been variously interpreted in the literature. Moser and Norton (2001: 23) set out a framework which draws together a wide variety of perspectives, and which connects universal human rights and duties (which apply to every individual) to the various domains of rights as they are perceived in law. Whereas the former are implemented and monitored inter-governmentally, the latter are enforceable through the courts, both nationally and supra-nationally (e.g. regional bodies such as the European Court of Human Rights). Such laws may derive from varying sources and are not necessarily consistent in their application (for example, customary and statutory laws may well conflict).

In this paper, we adopt an approach to 'rights' that covers not only universal human rights, but also rights as defined in national legal frameworks and implemented through the appropriate regulatory regimes. Although such a broad interpretation runs the risk of threatening the universality that is the defining element of a rights perspective, it has the advantages of focusing attention on the realities of resource claims and access rights, and of making concrete connections between international discourse and the actual livelihoods of the poor.

The concept of rights is particularly important in relation to livelihoods because of the centrality of issues of tenure and control. In the forest sector, long production cycles accentuate the importance of the tenurial regime. Often lacking even the most basic tenurial rights, the forest-dependent poor are not well placed to enjoy broader human rights pertaining to participation and public accountability, even where such rights are ostensibly guaranteed in law (see Bird and Dickson, 2005).

Development assistance has had a rather uneven record in helping local people to reassert their rights in the forest sector. Indeed, the overall trend has often been in favour of an expansion of the claims by the state, to the detriment of resource users. The lack of progress on tenurial rights remains a major obstacle – arguably *the* major obstacle – to improving forest governance.

3. What is special about rights in forests?

Forests are unusual among natural resources in terms of the extent to which external actors claim the right to intervene in their management. While the world's forests may have important global aspects, they are – in practical terms – almost always managed as sovereign resources. The primary duty-bearer is thus the state. However, other parties can also be involved, including international duty-bearers (whose influence over forests tends to be expressed through multilateral agreements and conventions) and private sector duty-bearers (both forest owners and 'derived duty-bearers' such as forest concessionaires).

The international dimension tends increasingly to be dominated by Western environmental interests. There is an emerging and provocative literature on the influence of Western environmentalism on public accountability in the tropical forest sector (see, for example, Brosius, 1997; Chapin, 2004).

The national dimension tends to be dominated by the timber industry. This is often very powerful in the forest sector; in forest-rich countries, there are frequent allegations of 'state capture' by the industry. The industry is often the only major presence in the more isolated rural areas, functioning to all intents and purposes in place of the state. In human rights

language, the duties of such derived duty-bearers relate both to the internal operations of their industrial activities (for example, safety at work) and to the effects of their operations on the livelihoods of the external actors with whom they interact (for example, relating to the damage they may cause to economic activities of rural dwellers, and the denial of public access which they may impose). However, in practice, these obligations may well conflict with – and to be overridden by – commercial claims of types which are powerful in free-market economies.

4. Rights and the issue of 'sustainability'

Tropical forests are particularly prone to motifs which justify external intervention. This derives from their global public goods dimension and the international character of the externalities (the additional benefits and costs) their exploitation generates. Such motifs often take the form of 'crisis narratives', which warn of impending disasters if affairs continue on their downward path. Over the last forty years or so, these crisis narratives have covered issues such as the energy crisis and its implications for the poor (concerns about fuelwood production), the global environment (the role of forest mismanagement in deforestation and desertification), conservation (the loss of forest biodiversity), and climate change (the role of forests as carbon sinks). A repeated call for the sustainable management of forests (SFM) has been one outcome of all these concerns, though the meaning of this is not unproblematic in natural forest environments. Juxtaposing demanding, but often imprecise, technical standards for sustainable management of public lands with other social and political concerns tends (like commercial interest) to downgrade the notion of rights, away from human rights principles (see Box 1).

Box 1: Balancing sustainable forest management and rights

'SFM is clearly not possible where there is extensive deforestation, as this reduces the forest's 'inherent values and productivity. For this reason, a basic requirement for implementing SFM is to have a clear legal definition of forestland, and, most importantly, to designate this forest land as permanent. In much of Africa, the importance of establishing a Permanent Forest Estate is understood. However, enforcement of land use designations remains a major challenge.

Reference to the social dimension of sustainability implies that *the rights of local communities and other stakeholders interacting with the forest should generally be respected* – insofar as this does not reduce the flow of desired benefits from the forest. Defining what is desired also implies democratic processes for deciding how the forest resource should be managed. This necessitates a degree of flexibility on the part of the forest administration which, in most African countries, retains ultimate ownership of the forest resource.' [Emphasis added.]

Source: SGS for World Bank/WWF Alliance (2003)

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5. The issue of 'illegality' in the context of forest rights

Because of the plethora of parties with an interest in the resource, forest legislation tends to be extraordinarily dense and complicated, both nationally and internationally. International human rights instruments, standards and principles affect the interests of forest-dependent populations in a number of areas: protection of the land rights of indigenous and tribal peoples; non-discrimination; equal treatment before the law; and the right to participation in the political process. ILO Convention 169, 'Indigenous and tribal peoples in independent countries' (1991) provides one such instrument, albeit fairly limited in its scope.

The degree to which such instruments are translated into constitutional and statutory law varies among countries, and is difficult to generalise. However, what different systems do tend to have in common is low national ownership. Being largely externally generated, legislation at both national and international levels may not enjoy any real public legitimacy, or be amenable to application in any sensible way. Where the law lacks even superficial legitimacy, attempts to invoke this are unlikely to be effective. At most, this will increase the opportunities for rent-seeking by officials who exploit, to their individual advantage, the price increments that illegality confers in the market place, but with no beneficial effects for the management of the resource. This can damage the interests of the poor in at least two respects: increasing the costs of their compliance, and 'criminalising' their activities in ways that undermine both their livelihoods and the rule of law. Such criminalisation is particularly dangerous where there are no feasible legal alternatives.

The concept of 'legality' thus needs to be treated with caution, and views about the importance of suppressing 'illegal activities' need to be tempered by a recognition that such labels are often external constructs which do not automatically guarantee the presence of legal choices. Similarly, merely establishing a right of ownership does not necessarily confer on the holder an ability to benefit from that right. This fact has been at the heart of many of the problems encountered in community forestry, and many of the challenges the movement now faces (see Box 2).

The backdrop for any study of pro-poor rights in the forest sector is, therefore, one of ill-defined boundaries and relationships, ambiguities and contradictions in the regulatory regime, and massive differences in the power of stakeholders to influence

the application of the law. All these factors have implications for the pursuit of pro-poor rights.

Box 2: The power of state/private sector alliances in Central American forestry

In Nicaragua, constitutional and legislative provisions exist for the demarcation and titling of indigenous territories. Yet the state continued to grant industrial logging concessions on community lands without fulfilling these requirements. The Inter-American Court subsequently found Nicaragua in violation of the American Convention on Human Rights, including the right to property, for not ensuring that an effective mechanism for demarcation and titling was in place.

Despite being in possession of usufruct rights, small-scale forest producers in Honduras are frequently unable to meet transaction costs of securing permits and other approvals, owing to regulatory complexity and bureaucratic corruption. This forces reliance on well resourced timber traders to secure permits and other approvals. This in turn fuels collusion between traders and public officials, and elite capture of community forest management rights as a means to 'legalise' illegal timber production.

A conclusion that can be drawn from these two examples is that establishing rights may have little practical value unless supported by the state. As the Honduras case shows, where the state is not enabling, the poor may have little option but to collude with those who control the resource.

Source: Wells et al. (2004).

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6. The movement for forest law enforcement and governance (FLEG)

Over the last four years, and at an accelerating pace, the thrust of development assistance to forestry has been focused on illegal logging and its suppression. A series of international initiatives have been launched (the G8 Action Programme on Forests [1999]; the US President's Initiative against Illegal Logging [2003]; the EU Action Plan for FLEGT [2003]; the regional FLEG processes [Asia, 2001; Africa, 2003; Latin America [pending]); and a number of bilateral agreements allied to FLEG (by e.g. UK, Norway, Finland and Indonesia [respectively, 2001; 2002; 2002). Timber-producing countries now find themselves under increasing pressure, from their development partners, international NGOs and consumer countries, to prove the legality of their timber exports. This represents something of a departure from the established principle (in which the onus of responsibility usually rests with the proof of illegality, not the confirmation of legality).

A range of donor-funded projects and programmes has already been funded in support of FLEG. Public attention in the West has been particularly drawn to the various attempts to use private sector and NGO providers (both national and international) to apply checks and balances on public institutions, as a form of global 'hybrid accountability' (see Goetz and Jenkins, 2001; Brown et al., 2004).

There is no doubt that illegality is a major problem in the tropical forest sector, often amounting to flagrant criminal activity (Box 3). In this regard, it provides further evidence of the low levels of governance and popular rights enjoyed in many forest-rich states. Its effects are felt at a number of levels, including loss of national revenues, distortion of international markets, and long-term damage to the condition of a resource on which the poor depend disproportionately. However, it does not necessarily follow that attempts to address the problem will automatically improve the welfare of the poor, nor strengthen their rights, and specific conditions may need to be met for these outcomes to be achieved. The next section considers some of the emerging issues, both positive and negative, as judged by the single standard of the promotion of the rights of the poor.

Some positives
The FLEG movement is intended to serve multiple purposes and benefit numerous actors, not only the forest-dependent poor. From a donor perspective, it may provide a powerful tool for leveraging broad governance reforms and introducing discipline into a sector well known for its anarchic tendencies. These reforms could generate wider benefits for the citizenry at large: for example, as regards overall public accountability and transparency, and enhanced revenue capture. Similarly, for the timber industry (or at least, its better operators), it could lead to an improved environment for future investment, both from improvements to the long-term condition of production forests and by creating a more realistic pricing regime that can sustain the investments needed for sound management.

Yet it is precisely because its focus is not necessarily, or only, on the rights of the poor that the movement needs to be carefully monitored; at first sight, it would appear to conform to a long line of forest sector initiatives where developmental and pro-poor agendas are grafted rather unsatisfactorily onto other and pre-existing concerns and interests.

In a comprehensive series of recent publications (themselves an output of FLEG-related work, and supported by DFID and PROFOR – the Program on Forests), a CIFOR-led team of researchers has drawn attention to the dangers that preoccupation with legality can entail in such complex legal environments, and the risks which are posed for the livelihoods of the poor (see Box 4).

Box 3: The extent and nature of illegality and 'forest crime'

The scale of illegality

- Percentage of the national/regional trade that is illegal: Cambodia [94%]; Amazon [90%]; Bolivia [90%]; Myanmar [80%]; Indonesia [>51%]; Cameroon [50%].
- Cameroon: Loss of government revenue estimated to be c. £56 million per year, and damages owing because of illegality, c$465million/year.
- Canada: Estimated that between C$300 million and C$1bn is lost to theft and fraud each year (1990 to 1995).
- Effects on timber markets:
- Estimated that 23–30% of international hardwood lumber and ply is traded illegally, depressing world prices by 7–16%.
- Losses to the US economy by the depressive effects of illegal competition estimated to be c. US$460 million/year.

Sources: Forest Trends (2003); Auzel et al. (2001); Flynn (2004).

The nature of illegality
Illegality as 'forest crime' typically means:

- Harvesting without, or fraudulent use of, title.
- Logging out of boundaries/encroachment on protected areas.
- Logging of unauthorised or undersized species.
- Excess harvest.
- False declarations of harvest.
- Non-compliance with licence, non respect of contract conditions.
- Pollution of the environment through industrial activities.

However, there are also some important barriers to legality which inhibit law-abiding citizens from operating 'legally' (see Box 4).

Box 4: Barriers to legality

These barriers include:

- *Complex and inconsistent laws*
  Environmental issues are typically subject to numerous competing jurisdictions, which profoundly affect the potential for effective forest management. Federal, state and municipal governments may have conflicting roles (as in Brazil and Indonesia). Legislation tends to proliferate bewilderingly. Over 900 legal instruments pertain to forest management in Indonesia (CIFOR, 2003). In Brazil, 141 new legal instruments were established in the period 1965 to 1998.

- *Regulations that victimise the poor*
  Regulations are often so impractical or out of tune with reality that they undermine the rule of law; e.g. expensive permits which need to be applied for in capital cities to allow the killing of one low-value game animal or the cutting of a single tree. Tree-cutting regulations are often biased towards the needs of industry (as in Cameroon, where industrial concessionaires are allowed three years of felling to cover the cost of preparing management plans, but communities have to pre-finance plans themselves).

- *Failure of the law to recognise legitimate claims*
  National laws are often ambivalent on the issue of indigenous rights. In Indonesia, the 1999 Forestry Act defines State Forest Lands as those 'unencumbered by rights'. Yet, it is not clear how these can be distinguished from forests with 'rights attached'. In particular, the law classifies customary forests (hutan rakyat) as falling within State Forest Lands. Customary rights are, therefore, seen merely as a form of usufruct on state land, rather than a form of collective ownership (CIFOR, 2003)

- *Unclear distribution of powers between levels of government*
  In Uganda, central government controls conservation areas and logging concessions, and trees on public and private lands, but local governments are responsible for monitoring and stewardship. Rules on sanctions, arbitration and enforcement are unclear (Bazaara, 2003). In Indonesia, Implementing Regulation (PP) 25 of Law 22/99 (now 32/04) on 'Decentralisation' devolves administrative authority for forest management to the regions, including licensing powers. As the same time, the Ministry of Forests has deemed community logging permits issued by the regions as illegal, under Implementing Regulation (PP) 34 of Law 41/99 on Forests. Arguably, PP34 (as a sector regulation) cannot diminish administrative authority devolved under PP25. The courts are still to rule on this, leaving communities in considerable legal uncertainty.

- *Such contradictions lead in turn to lack of coherence in national planning.*
- *Selective use of legal instruments to restrict access to the resource*
  Forest zonation frequently overrides existing claims, in the interests of industrial exploitation. Cameroon's plan de zonage takes customary claims into account only in relation to present usage (thus fallows are disregarded, though they are an essential part of the farming cycle), and seeks to restrict agriculture to narrow slivers of 'non-permanent forest estate', regardless of historical claims or future needs.

See also CIFOR (2003).

Problem areas?

It is apparent from the above discussion that focusing only on formal legal channels by upholding a legal framework which already fails to accommodate local rights could merely compound injustices. State agencies often enforce forest-related regulations more vigorously, and with less respect for the rules, when poor people are involved, leading to a tendency for law reform initiatives to develop into exercises in victim-blaming. Criminalising the vast majority of the resident population is unlikely to serve as a very positive incentive for governance reform.

A particular area of concern is with the ways in which external actors are drawn to some causes but not others in their desire to champion the rights of the forest-dependent poor. For example, Western publics often have no difficulty in identifying with local constituencies when these appear to live in idealised harmony with their environment. Forest-dwellers who live by hunting and gathering, in a primarily subsistence mode, tend to be perceived very positively. However, those elements of the poor who do not appear to support sustainable forest management – for example, peasant farmers who engage in 'slash and burn' agriculture (often by far the numerical majority) – tend to figure much less favourably, and are at best left at the margins of the development narrative, if not openly stigmatised. There is thus a danger that external attempts to champion the poor will end up – perhaps unintentionally – generating a hierarchy of rights claimants, in which the concept of 'rights' is promoted not because of its inherent merits, as a component of universal human rights, but only where it is seen to be supportive of the needs of sustainable forest management. It would be perverse if the notion of the 'deserving poor', as a positive factor in environmental policy, led to the emergence of a counter-category of the 'undeserving poor', with contrary effects.

7. Looking to the future

Tackling forest law enforcement has the potential to leverage greater accountability. But by upholding national laws, it also threatens to compound existing power imbalances. If the focus on legality is to improve the ability of poor people to claim their rights, there is a need to support the development of accountability mechanisms which provide democratic spaces for them to shape and uphold their claims. Box 5 suggests some of the areas in which forest policy can be developed in ways that enhance popular rights.

Box 5: Some areas of interest for policy development

- *Land demarcation and titling*
  Support to land demarcation and titling processes to reduce legal uncertainty, with an emphasis on community titling to minimise the risk of elite capture and an ultimate loss of tenurial rights by the poor.

- *Regulatory frameworks*
  Simplify administrative procedures, to reduce transaction costs of securing and benefiting from rights as well as the risk of capture by elites.

- *Open up and protect legal channels*
  Ensure that the poor have access to legal outlets for their legitimate economic activities, so as to minimise the risk that increased enforcement will merely generate new opportunities for official rent-seeking and corruption.

- *Protect space for the poor*
  Protect access by rural communities to the forest areas on which they depend for their livelihoods, minimising and regulating the involvement of the capital-intensive industry.

- *Monitor the environmental monitors*
  Widen the platforms for public involvement, to ensure that important national debates are not hijacked by well funded and internationally vocal external constituencies.

- *Lengthening time frames for development assistance*
  As community forestry experience shows, establishing the law is only the start – implementing it is a much bigger challenge. By its nature, forest sector activity demands a long time-frame.

- *Institutional mechanism to achieve reforms*

Many of these policy areas presuppose that there are effective institutional mechanisms to secure legal reform. Support is needed in the overseeing of decision-making in the forestry sector by other publicly mandated agencies, and to the capacity of citizens to access these agencies.

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8. Conclusion

A conclusion that can be drawn from this discussion is that, while the record of development assistance in relation to rights promotion may have been mixed to date, it is nevertheless likely to have a vital role to play in promoting rights agendas. Indeed, there are few if any alternative champions of the poor in many forest societies, with the power to resist pressures of the politico-industrial complex. Though development assistance to the forest sector is strongly conditioned by sovereign control of the resource, there is much to be said for strengthening its ability to focus on rights. The holistic framework that a rights perspective demands helps to reconcile the local, national and international dimensions that are crucial to developing equitable forest policy, thereby ensuring an upward and 'non-victim-blaming' orientation for the formulation of environmental advocacy.

To this end, development assistance in the forest sector needs to focus not only on the enforcement strategies that promote sustainable production, but also on the ability of citizens to secure broader legal reform at national and local levels. In this way, a link can be made between social and economic rights (secure tenure and resource access) and fundamental human rights (democratic participation and accountability).

Endnotes

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Meeting 7: Protecting rights in conflict situations and fragile states

Speakers: Andy Carl, Conciliation Resources
Christine Chinkin, London School of Economics and Political Science

Chair: Frances Stewart, University of Oxford

Meeting Summary

The first speaker, Andy Carl, began by talking about the different roles that are at play within the field of conflict resolution and then briefly outlined the work of Conciliation Resources (CR). He used three of CR's projects to illustrate some of the dilemmas involved in thinking about both human rights and conflict resolution. These included consideration of the possibility of either political or military solutions to conflict, the role of the International Criminal Court, the complexities of transitional justice and the potential role of legal and constitutional reform in promoting conflict resolution. Carl concluded by stressing the importance of the principle of 'non-subordination' and the need for meaningful engagement with armed groups.

The second speaker, Christine Chinkin, focused on the role of human rights in post-conflict reconstruction. She discussed the higher profile of human rights in peace settlements since the end of the Cold War and the role of external actors. Chinkin also addressed the question of who exactly are the duty-bearers in post-conflict environments.

She then moved to the primary focus of her presentation: the human rights obligations of post-conflict governments and, in particular, the question of whether derogation from these obligations is possible. She concluded by stressing that a gender approach to post-conflict reconstruction is needed and that the state also has a duty to not prevent people from undertaking self-help measures.

The question of the complementarity between human rights and peace-building provided a focus for the discussion, in particular in relation to the concepts of non-subordination between human rights and conflict resolution and non-derogation of fundamental rights. The importance of participation and local ownership was stressed, both with respect to possible trade offs and in terms of making the international human rights system more demand led. The need for organisations to respond to the potentially increased level of risk that can result from adopting a rights-based approach in conflict environments was noted.

Andy Carl

I am the Director of Conciliation Resources (CR), a conflict resolution organisation working in a number of countries. Firstly, I am going to look at a few concrete areas of experience from my own work. Secondly, I will offer some reflections on the challenges arising from the tensions that result from working at the interface between conflict resolution and human rights.

Roles within conflict resolution

I began thinking about this issue by broadly sketching out an idea that there are a number of roles within the field of conflict resolution, and that these are undertaken by multiple actors in the different phases of the conflict cycle:

i. The primary focus is usually on the role of mediator, who controls the process. I think that most conflict resolution organisations and interventions are not actually about mediation but they are talked about as if they were.

ii. The second type of role is that of facilitator. This is someone who shares responsibility for the process with the negotiating parties and is best exemplified by the Norwegian role in Sri Lanka.

iii. Finally, there are a number of different experts and resource persons who play various roles at different parts of the conflict cycle. I have bunched these together under the title 'multiple other roles'. I would situate CR's work within this final group.

The work of Conciliation Resources

CR's mission statement states that we 'support groups working at community, national and international levels to prevent violence or transform armed conflict into opportunities for development based on more just relationships'. The organisational goals are to:

i. support people in developing innovative solutions to social, economic and political problems related to armed conflict;

ii. provide opportunities for dialogue and improved relationships across conflict divides and at all social levels including marginalised groups;

iii. influence governments and other decision-makers to employ conflict transformation policies that limit militarisation and include effective mechanisms for public participation; and

iv. improve peacemaking practice and policies by promoting learning from the experiences of peace.

'There is a successful conflict system in place that serves the interests of all that are part of it ...'

CR works in the following areas of the globe: the Caucasus; Fiji, Northern Uganda, West Africa and Colombia and Angola, where we have the Accord programme, which is different from the other programmes in that it documents peace processes in partnership with local organisations to try to promote learning. The reason why we work in such varied areas is because one of the principles underlying our work is that there is no off-the-peg way of doing conflict resolution. Instead, we recognise that there is value in learning from comparative experience and it is therefore important for us to have a range of work.

Conflict in Northern Uganda: Is political or military resolution possible?

One region where we are working is Northern Uganda. (My discussion about the areas in which we work is going to be relatively superficial and will, broadly speaking, assume that there is an understanding about some of the issues in these conflict areas.) You will know that there has been a war in Uganda for 18 years or so, during which time a large amount of the population in the North has been displaced and it is the civilians who are paying the price for the conflict. There is also a problem concerning child soldiers.

There have been a number of attempts to end the war. One currently underway involves a semi-detached representative of the Uganda government who has been trying to reach a ceasefire with the Lord's Resistance Army (LRA). We have been working with a number of different actors who have been playing various third-party roles in the dialogue, including religious and traditional leaders. The Ugandan case raises all kinds of important questions for us. I will highlight some of the broad questions that are asked in relation to Uganda, and which we ask ourselves.

Is a political resolution of the Ugandan conflict possible? Our work is premised on the notion that it is but there are many problems:

i. There is a successful conflict system in place that serves the interests of all that are part of it – Joseph Kony and the LRA, and President Museveni and the UPDF. This means that there is no particular incentive for them to engage with the other parties to seek an end to the conflict.

ii. There is the concept of the 'hurting stalemate'. The LRA have not yet reached this point and therefore the question that the Ugandan government and external actors ask is whether the LRA can be tempted with enough carrots or beaten with enough sticks in order to push them into a process that may lead to settlement. This is a real dilemma – how do you make peace when the main protagonists are not really interested in it?

iii. Is a military solution actually possible? I think that we see the conviction from the UPDF, and also a number of international NGOs, that military action is the only way to defeat the LRA. They measure their success in terms of the number of combatants who come out of the bush, particularly if they catch a big one (of which they have been a number).

There are two broad dilemmas relating to a military solution, however:

i. The people who you are fighting are themselves abducted child soldiers. This terrible paradox leads Uganda to challenge the logic of

militarism more profoundly than any other current conflict.

ii. Placed in the context of the history of this and other conflicts, even if the Ugandan government were able to kill all the members of the LRA high command, would this be a solution? Is there what the Americans like to call a 'one bullet solution'? I think that we only need to look at the situation and challenges in Angola today to realise that militarism is actually a lost opportunity for dialogue rather than a solution.

The role of civil society

In Uganda, civil society plays an important role in engaging and supporting the parties as best they can, in particular the LRA, and in calling on them to respect international law. They also lobby for international intervention and are relatively well known for the Amnesty Law that was passed by the Ugandan Parliament and which they like to talk about as being based on the Acholi traditions for reconciliation. In reality, I think the extent to which reconciliation is central to their culture is exaggerated. There are important studies about how this actually works in reintegrating ex-combatants that demonstrate that this is not an easy process. While these communities do have a fantastic capacity for cohesiveness, not all ex-combatants are forgiven. Furthermore, the role of the traditional leaders is more one of putting a stamp on the fact that a conflict has been resolved or that a community has forgiven a combatant, than of mediator.

The International Criminal Court: a disincentive to peace?

As we also know, the International Criminal Court (ICC), at President Museveni's invitation, has taken the Ugandan conflict as one of its first interventions. This is causing certain problems, the biggest of which is its potential impact on the engagement of the LRA in a peace process. As a member state, the Ugandan government is using the ICC as an instrument of war, as another way of defeating the LRA militarily and politically. The problem, however, is not simply one of justice or impunity but also of timing because the ICC intervention is proving to be a disincentive for the LRA high command to even sign up to a cease fire.

The involvement of the ICC raises the question of what comes next. The Ugandan government have privately said to the LR high command that they will be able to find a way to suspend the involvement of the ICC. However, whilst it may be deferred, it cannot be suspended and, whilst the LRA high command may be psychopaths, they are not stupid and they will also know this. They are therefore looking for countries where they might be able to seek refuge and there are not that many obvious contenders in the region.

The principle of non-subordination

This story, which is very much in the public domain, is probably one of the most important illustrations of the potential clashes in pursuing both a human rights and conflict-sensitive approach. This leads me to the first observation that I would like to make. There is not only a strong need for sensitisation between humanitarian, human rights and conflict-resolution approaches, but also for accepting the principle of non-subordination. Peace is not subordinate to human rights, human rights should not be subordinate to peace-making, and neither should be subordinate to protection of the civilian population. I think therefore that we should accept the principle that none of the approaches should be compromised because otherwise we find ourselves in impossible inter-disciplinary discussions. I think there is also need for recognition that these approaches are different and therefore there is a need for dialogue before important decisions are taken. This is, of course, a symptom of the broader problem of the total lack of communication, coordination and coherence between the convenors in a conflict situation.

The need for meaningful engagement

It is also important for us to acknowledge that most civil wars end through some form of dialogue, which requires some mediation with the combatants. This requires an increased understanding of what such a process actually involves. It is not enough to simply issue indictments and hope that they will somehow result in a resolution. Rather, we must think through the importance of engagement and what this actually means in practice. And I would start by stating the obvious. In order to engage meaningfully, there is a need for the parties to understand each other and for us to develop a greater understanding of the non-state actors involved and the choices that they make in engaging in peace initiatives.

The question of how we, as external actors, move beyond the use of blunt instruments and conditionalities – the sticks and carrots – is a key peace-keeping challenge in Uganda. We need to be more creative in thinking about the tools that we have to influence processes. We also need to recognise that a process is created and that steps, opportunities and capacities can be supported that lead the parties in a conflict towards a settlement. This has logic of its own.

Sierra Leone: experiments in transitional justice

As we do not have much time, I will just highlight some of the key issues in some of the other countries in which CR is working. Sierra Leone raises a different set of issues to Uganda. When I was there recently I again heard about problems relating to the experiments in transitional justice. Another example is the disconnect between the lack of reparations for many of the victims of the war and the housing and resettlement privileges enjoyed by those who enter the witness protection programme. A final example is that the report of the Truth and Reconciliation Commission was withdrawn soon after it was published and there is uncertainty about when it will be seen again. It is a tragedy that the process is in such disarray.

I would like to make a quick point about the notion

'There is not only a strong need for ... accepting the principle of non-subordination.'

'How can the human rights system be reformed so that it has a more demand-led approach?'

of how actors in a conflict deal with their past. People obviously begin dealing with their past the moment they have been traumatised. This process is not something that begins after five or ten years when the development industry is prepared to start a programme on it. I also think that we must be careful when we talk about transitional justice issues and not refer to state and society interchangeably. There are things that a state and a government are able to do but there are things that only society can do and I think that we are often sloppy in terms of our language. The Truth and Reconciliation Commission and the special report in Sierra Leone last year highlight that an outsider is unable to deal with your past for you.

Fiji: using the legal framework to promote conflict resolution

Fiji is another area where we have worked for some time. We began by supporting a group of people doing conflict-prevention work, highlighting options for constitutional reform in Fiji, an ethnically-divided society. After a series of coups, however, the role of this group shifted from conciliation to more forceful human rights advocacy, which narrowed the space of their work enormously. While both the role of convenor and human rights advocate has proved exceptionally important in Fiji, unsurprisingly, it is not possible to do both at the same time. If the roles are combined, it is the role of conciliator that becomes untenable. In this particular case, the group we were working with lost the power to convene across sectors of society.

This was an interesting project in terms of framing a conflict resolution project within a legal framework

of constitutional reform, which consequently reaffirmed the rule of law rather than challenging it. However, there is a question about whether, if you do human rights education work in the context of such gross injustice, further division with be promoted in the absence of positive political change. In Fiji there was a coup but further division did not occur because the Indo-Fijian community did not rise up.

Fiji also exposed me to some of the enormous challenges that still remain in terms of the reform of the UN system, in particular the need to strengthen it and make it more accessible to local communities, which is crucial if human rights are to have a place within conflict resolution. In Fiji, it was particularly clear that local communities lacked somewhere to turn when the situation did explode. How can the human rights system be reformed so that it has a more demand-led approach?

To conclude, I would like to emphasise a number of the points I have made. Firstly, the point about the principle of non-subordination should be reiterated because it is something that I think we must develop further. Secondly, I would stress the importance of there being diverse roles in peace-making and the value of complementarity between the role of conciliation and of advocacy. Thirdly, we need to think more about the case for engaging with armed groups (which is not made any easier by proscribing them and branding them as terrorist groups). Finally, local participation in, and ownership of, these processes is of paramount importance.

Christine Chinkin

I am an academic and, probably even worse, a lawyer. I think there is a problem in that lawyers can sound absolutist and, perhaps, impracticable, although of course the law is itself not always certain because there are many grey areas and even areas where the law is incoherent and contradictory.

I was asked to look in particular at the post-conflict context and thus, unlike the previous speaker, I am now assuming that there has been some sort of peace agreement or settlement and that we are now looking at the role of human rights in post-conflict reconstruction. More specifically, I was asked to look at the issue of whether the state is allowed to derogate from its human rights obligations during the initial post-conflict stage because its other priorities mean that it cannot be expected to conform fully with those obligations. I would like to note at the outset that to break a conflict into discrete categories of pre-, during and post-conflict is clearly to distort reality. What is post-conflict can become pre-conflict or, if successful, it can be a pre-emptive stage that prevents a further cycle.

Before I talk about derogation, I would like to make three preliminary points about:
i.   the role of human rights in peace settlements;
ii. the degree of international intervention in the post-conflict context; and
iii. the complications that arise from the existence of more than one applicable international legal regime in post-conflict situations.

The role of human rights in peace settlements

Human rights have been given a much higher profile as part of peace settlements in the numerous peace processes across the world since the end of the Cold War. There has been a repeated commitment within peace processes to the mantra of the rule of law, human rights and democracy, especially when international mediators/facilitators have been involved. This is the framework that is supposed to form the basis of the future post-conflict society but of course it is really part of a particular vision of reconstruction in accordance with free market principles and the provision of a basis for foreign investment.

There are a number of examples but the Dayton Peace Agreement is the perhaps the clearest. Some 15 human rights treaties were annexed to the General Framework Agreement and introduced as part and parcel of the constitution of the highly-fragile state of Bosnia-Herzegovina. Further internal structures were specifically created by the international community, for instance a national Human Rights Commission with a chamber and ombudsperson, and the European Convention on Human Rights was given formal status as supreme law. There was therefore an enormous formal commitment to human rights but essentially this was an imposed commitment originating with the international mediators at Dayton (however thousands of miles they might be from Sarajevo) and with no reference to civil society groups or people within the society of the newly-constituted state.

We see this process over and over again. I was looking through some peace agreements this morning and the agreements from places as distinct as Guatemala, El Salvador, Cambodia and Liberia all contain references to human rights obligations. We also see a similar situation when conflicts are, at least formally, ended by a Security Council Resolution. For example, in 1999 UNTAET was established as the transitional administration in East Timor. Among its priorities was the requirement that it be responsible for human rights issues in East Timor, including the creation of independent Timorese human rights institutions. It was a similar situation in relation to UNMIK in Kosovo.

To follow up on what has just been said by the previous speaker, it is important to acknowledge that this is not just about transitional justice and ensuring accountability for human rights violations that took place during a previous regime, it is also about providing the basis for the reconstructed/reconstituted state. Therefore, at the formal level at least, there is the notion that there is a transitional moment, a pivotal moment, where there is a peace agreement and there is going to be a newly reconstructed state and the opportunity has to be seized to entrench human rights within the future structures of that state, otherwise this moment may not arise again.

International intervention in the post-conflict context

This leads on to my second point, which is that the post-conflict situation is a moment of extraordinary international intervention into the affairs of another territory, involving a large number of international agencies. This raises the question of whose duty it is to ensure respect for human rights in the post-conflict period? Clearly, the government remains the duty-bearer (and, incidentally, as a matter of international law, a government is bound by the international obligations of the previous government). If we again take the example of East Timor, independence was gained in May 2002 and by December 2003 it had entered into a large number of international agreements, which means that the government is bound by those obligations.

But what about the mass of international bodies that is also involved? There are major issues that we could explore but it should be first noted that the international organisations themselves do not always give priority to the human rights obligations that they are supposedly operating under. This creates an impression that, in practice, these are things that can be negotiated

'There was therefore an enormous formal commitment to human rights but essentially this was an imposed commitment originating with the international mediators ...'

away, that they are not necessarily the highest priority and that other imperatives can displace human rights obligations. There are a number of examples where the international community's commitment to human rights is less than one might of thought from the terms of the particular peace agreement.

To take the example of the establishment of a police force, the capacity building and training of which is often seen as absolutely fundamental to reconstruction, along with the other basic institutions of law and order. In the case of East Timor, the Regulation for the Police Service included a clause making it obligatory for the police to comply with international standards only as far as practicable. This is therefore an example of the international agencies creating an open-ended exception that basically undermines any sort of long-term commitment to human rights.

An even worse situation is of course when the international agencies themselves violate human rights standards. There are many examples, including in relation to peace-keeping and international police forces, but also more broadly, relating to the sexual abuse of children and women within a post-conflict area. The trafficking of people is also becoming an all-to-frequent accompaniment to post-conflict reconstruction and this also, and not infrequently, involves international personnel. In the context of such adverse examples, it is difficult to say that human rights are supposed to be respected in a post-conflict territory.

There are also issues around the accountability of international bodies and personnel (or frequently, in practice, the lack of accountability). This is extremely counterproductive when these are the very agencies that are also claiming that there should be accountability through the International Criminal Court (ICC) or through some other form of international criminal process for offences that were committed during a conflict. I think therefore that there is a huge issue around the accountability of international agencies, whether they are able to ensure a genuine commitment to human rights during the post-conflict stage and their relationship with the local population. There is far too much of the notion that the international representatives are imposing top-down standards that they do not always respect themselves and that there is not enough attention given to grassroots building of human rights standards coming from the local population.

'... there is not enough attention given to grassroots building of human rights standards ...'

Multiple international legal regimes
Complications result from the fact that there is more than one applicable international law regime in post-conflict societies. International humanitarian law may still be applicable. If there is situation of occupation, as there was in Iraq for example, certainly up to 2004 and arguably later, obligations exist vis-à-vis the role of the occupier and the local population. Furthermore, obligations can exist in relation to refugee law and from obligations in respect of internally-displaced

persons. Therefore there may be a host of different international obligations alongside the human rights ones.

Derogation and the obligations of post-conflict governments
To turn more specifically to the human rights obligations of a post-conflict government.
• Whoever forms the government is bound by the human rights obligations to which the state is a party;
• Under international law, derogation from these rights is strictly limited. The government cannot say that it wants to derogate human rights standards because it has other priorities; only certain human rights treaties allow for any form of derogation. So, for example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) does allow derogation but only where 'there is a public emergency threatening the life of the nation that has been publicly announced'. Such an announcement would clearly be completely at odds with the assertion that a country is now in the stage of post-conflict reconstruction in which, presumably, the emergency of the conflict has ended. It is therefore unsurprising that states do not announce an emergency at this point. Even if they did make such an announcement, it would be unlikely that it would be accepted as fitting within that particular definition.
• Any derogation would need to be proportionate to the exigencies of the situation – a government cannot simply derogate across the board – and certain rights are non-derogable. Whilst the Human Rights Committee has been quite rigid on what constitutes derogation in the past, it is nevertheless a problem that it is highly unlikely that a state in this position will carry out its reporting commitments to the Human Rights Committee and so it is equally unlikely that there will in fact be any follow up to a particular situation. For instance, Rwanda has made derogations of this sort but failed to report in 1995, which has meant that there has been no analysis or response by a monitoring body.

There is a further paradox that needs to be highlighted. Whilst there has been a heavy emphasis on human rights within peace treaties, this has, in reality, meant civil and political rights, particularly in relation to elections, rather than a commitment to economic and social rights, which is what is in fact most needed in post-conflict situations. Under the economic and social rights instruments no derogation is generally allowed but, within the treaties themselves, economic and social rights are made subject to availability of resources under the requirement of progressive realisation. States are therefore able to say that they have not got the available resources and so are unable to realise these rights at this point in time.

Minimum core obligation
I think that it is important to note that, within the UN Committee on Economic, Social and Cultural

Rights, there has been an assertion that there is what is called a minimum core obligation that is applicable at all times. This minimum core obligation is, at the very least, the provision of the minimum essential levels of each of the various rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and any significant denial of the basic attributes, such as essential foodstuffs, primary healthcare and basic shelter and housing, etc., is a violation of the obligations under the Covenant. Furthermore, and I think importantly, the Committee has also said that certain economic and social rights are immediate and can not in fact be delayed by reference to progressive realisation because they are not dependent on relevant resources. An example would be the principle of non-discrimination in the fulfilment of various economic and social rights and, in particular, that there should be non-discrimination in access to whatever provision is being made in the immediate post-conflict situation.

I would like to make two final points:

i. I think that it is also important that, under the ICESCR, the obligation to respect and protect the rights of the Covenant also requires the state not to deprive people of the measures they themselves are taking to enjoy these particular rights. The state should not therefore prevent access to self-help measures, which are frequently built up during a conflict, without providing viable alternatives.

ii. This issue is particularly important in the context of discrimination against women. One of the major features of post-conflict society is demographic change. Frequently in post conflict societies there are large numbers of women-headed households and, of course, it is often women who have had to maintain essentials during conflict through self-help measures. I would argue that any formal process that interrupts these is a violation of the ICESCR. It would seem that ultimately what we are really talking about at the post-conflict stage is the requirement of security, whether this means legal, physical, human, economic, or gender security, and I think that it is absolutely essential that we take a gender approach in looking at ways that human security can be maintained across all of these different dimensions. This will ensure not only the overall post-conflict reconstruction but also that the rights of women are given a high priority within that post-conflict reconstruction model.

'... certain economic and social rights are immediate and can not in fact be delayed by reference to progressive realisation because they are not dependent on relevant resources.'

Protecting rights in conflict situations and fragile states

Clare Lockhart*

1. Introduction and summary

The concept of human rights has a range of potential applications in conflict situations and weak institutional environments. In conflict situations, wherever civilians are at risk, there is by definition an infringement of the individual's right to personal security, and in most cases infringements of a number of other rights. Post-conflict situations and weak institutional environments are also defined largely by the state's inability to meet the basic needs of its population. In this paper, two sets of questions will be examined concurrently: how rights can best be protected in conflict and post-conflict situations; and the extent to which a rights framework can help guide policy interventions in these contexts.

Protection of civilians and provision of basic services during conflict
Although the infringement of human rights on a widespread scale is a given in conflict situations and fragile states, there remains a debate as to what extent rights-based approaches[1] or policy frameworks provide useful tools in these contexts for guiding policy formulation and design of interventions by the international community. First, a rights-based approach is implicit in the set of principles established for guiding the protection of civilians. Secondly, a rights-based approach is often claimed to underlie the provision of humanitarian assistance to meet basic needs for the population in conflict situations.

Focus and sequencing in a post-conflict phase
A more challenging set of conceptual issues arises during situations of transition from war to peace. In such circumstances, there is general agreement that it is necessary to focus and sequence interventions, given the limited capacity for implementation. There are thus choices that must be made regarding different sets of policy issues, which may put different sets of rights in tension with each other. The 'peace before justice' imperative may lead to the prioritisation of the political process, with political compromises, above bringing perpetrators of atrocities to justice or the satisfaction of basic needs.

Who should provide state functions to fulfil and protect rights in transition phases?
A second set of questions relates to the question of the resumption of the capacity of the state to carry out a range of functions, from the provision of health and education services, to regulation of the private sector and the environment, to public borrowing and financial management. In transition situations where state institutions are inherently weak after years of conflict, there will be a question as to how to sequence the building of state capacity to deliver these services, and how or whether external agents should substitute for these functions in the short run. Trade-offs may become apparent if the provision of services by other actors in the short run will undermine the state's capacity to carry out these functions in the future. Here, a useful approach could be to agree on roles and responsibilities over an agreed-upon timeframe, in order to fulfil basic needs among actors.

A rights-based approach can be useful in identifying which functions should be allocated to which actor. In a rights-based framework, the primary duty-bearer for the realisation of rights is the state. Accordingly, under a rights-based approach, the state has primary responsibility for the formulation and implementation of policy. Where other actors are assigned responsibility for the provision of state functions in a transitional context, such as policing or the delivery of health services, a strategy for the transfer of these functions back to the state should be devised from the start.

Rights or citizenship
An alternative to a rights-based framework is one which focuses on the construction of citizenship – in terms of both rights and duties – as central in a transition situation. The restoration of the bonds of citizenship and the trust of the citizens in the state might be seen as an overarching goal in a post-conflict situation. In this framework, it becomes essential that the state recovers the ability to deliver certain services to its citizens, in an even-handed way and on the basis of transparent criteria.

This approach argues for a very different approach to a post-conflict situation than recently employed in a number of countries; it is the formulation and implementation of a small number of carefully sequenced national programmes as managed by the government, rather than the delivery of a number of small 'quick impact projects' by external actors, that will foster the trust of the citizen in the state as an impartial and fair agent in allocation of resources. The approach would also argue for the use of the budget as the instrument of resource allocation and policy design. First, this allows for a connection to be made at a fundamental level between revenue and expenditure, or duties and rights. Secondly, it allows for allocations to be made on a transparent basis on a national scale.

The above approach argues for the state to carry the right and responsibility for implementing policy, unless another actor is assigned this responsibility for a defined period with a clear handover strategy. It then becomes incumbent on the international community to support the strengthening of state capacity to carry out these functions. Here, a viable model could be one whereby a state contracts the private sector or NGOs to implement policies to increase its capacity.

Policing the red lines
In a fragile context, especially with a newly established government or policy flux, policing the 'red lines' of acceptable governance becomes a critical role for the international community. There exist various configurations and models for the allocation of monitoring and policing functions, for the exercise of power and authority across different international actors.

2. Rights in a conflict situation: protection of civilians

The 'protection of civilians' agenda has been developed over the past few years in recognition of the need to identify new approaches and strategies for the international community to ensure protection of civilians during and after conflict. In 1999, the Security Council, recognising the different vulnerabilities of civilians during and after conflict, turned its attention to ways in which the international community could better ensure the protection of civilians during conflict.[2] This focus grew in part out of the identification of civilians as deliberate targets of warfare rather than incidental victims.

The concept of protection of human rights is at the centre of this agenda. 'Protection' was defined by the ICRC in 1999 as encompassing 'all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and spirit of relevant bodies of law i.e. human rights law, international humanitarian law and refugee law' (ICRC, 1999). Accordingly, protection is defined in terms of upholding human rights as well as preventing death.

Protection of civilians after war covers protection from a range of threats to security and well-being, including kidnapping, looting, siege, mutilation, rape and gender-based violence, forced migration, ethnic cleansing and genocide, environmental damage, landmines, unexploded ordnances (UXOs) and small arms, and the secondary effects of conflict, such as disease, malnutrition, starvation and denial of basic services.

International humanitarian law prohibits attacks on civilians, forced displacement, use of certain weapons, and practices of torture, through the Geneva Conventions and the Additional Protocols of 1977. While the law is comprehensive and unambiguous, protection of civilians is not ensured, as breaches result from the flouting of these provisions by state and non-state actors.

In its protection agenda, the UN Office for the Coordination of Humanitarian Affairs (OCHA) identifies a series of areas for intervention or monitoring. The first of these is humanitarian access, whereby access of humanitarian actors to a civilian population should be attained, through agreement with parties to the conflict. The second area identified is justice and reconciliation, whereby standards of protection should be upheld by the force of law, and violations regularly and reliably sanctioned, for example through the establishment of ad hoc tribunals. Other areas identified are forced displacement, land mines, small arms, and women and children.

OCHA recognises that the primary responsibility for protection of civilians lies with the relevant states and their government, and that the role of the international community can only be complementary to this. However, it recognises that where governments do not have the resources, will or capacity to do this unaided, armed groups, the private sector, member states, international organisations, civil society and the media can all play a role.

The role envisaged for the international community here includes: the delivery of humanitarian assistance; the monitoring and recording of violations of international humanitarian and human rights law, and reporting of such violations to those responsible and other decision-makers; institution-building, governance and development programmes; and, ultimately, the deployment of peacekeeping troops.

The key challenge in realising the protection agenda lies in the efficacy of implementation, in identifying the priorities and areas for intervention, assigning roles and responsibilities to actors, and developing strategies for implementation. A series of reports, most notably the Brahimi report (UN, 2000), stressed the need in any particular context to focus on a small number of realistic and achievable goals, through the use of a carefully wrought strategy. The 'light footprint' doctrine developed subsequent to the report's completion by Ambassador Brahimi further emphasised the need to maintain a focus on a small number of achievable goals. Here, it might be useful for analysts to distinguish between the role of the UN as a political facilitator – where increasing capacity for analysis and strategic planning within the UN is paramount – and as implementer of services, which often carries a heavier footprint.

A primary need in terms of protection in the aftermath of war (or to facilitate the cessation of war), is the deployment of

peacekeeping forces. A hierarchy of needs approach states that the priority in terms of citizens is protection of lives and provision of basic security. The Brahimi report recognises that the (lack of) willingness of the international community to commit and deploy forces is often the critical constraint in ending civil wars or protecting civilians; it states that no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping is to succeed. However, recent conflicts and post-conflict situations have been marked by a failure of the international community to deploy either sufficient or indeed any forces, even though analysts agreed that this would be the single most significant intervention for the protection of civilians and saving of lives. This raises policy questions: first, as to how to increase the availability and commitment of peacekeeping forces (perhaps through the creation of a standing peacekeeping force and pooled financing for such operations); and secondly, as to whether there are alternative effective strategies for peacekeeping, where international forces are not available. These might include community policing, domestic reconciliation strategies, and political pressure.

The development of the protection of civilians agenda over the last years has marked a change in policy orientation, putting a rights framework at the heart of the UN agency response to crisis. While it provides a useful and appropriate goal, there is a question as to whether the framework of protection of civilians is currently adequate, as it has so far failed to provide guidance on hierarchies of civilians' needs, on locus of responsibility, or on implementation methodologies.

3. Conflict mitigation and prevention

An interesting issue is whether a rights-based approach has any value in seeking to prevent or mitigate conflict. Some argue that the provision of aid in some conflict situations may serve to perpetuate conflict and/or shore up otherwise unsustainable regimes. Another dimension relates to the need, in conflict negotiations, to interact with parties to the conflict, who may themselves be responsible for violations of human rights; an agreement may serve to endorse or legitimise their positions.

4. Rights in a post-conflict context. Peace, justice or service delivery: prioritisation and sequencing interventions in post-conflict situations and fragile states

Human rights considerations and principles are often given high priority and embedded within the text of peace agreements, particularly those facilitated by the UN. These hold newly established governments to their international human rights obligations, reiterate principles of human rights to which the new government must adhere and, in some cases, establish human rights obligations.

In reaching an agreement and in holding the peace thereafter, there arises a potential conflict between the political process, and the imperative of reaching political compromise between actors, and a rule-of-law or justice-based approach which would prioritise the bringing to justice of perpetrators of atrocities. In some contexts, bringing individuals to account too early may compromise a political settlement. Conversely, failing to bring individuals to justice may undermine the trust of citizens at large in the political process. Further, a culture of tolerance of political actors' actions may lead to further perpetration of violence or criminality in an unaccountable climate. Reflections on recent conflicts have led to the conclusion by some that dealing with a narrow group of stakeholders without according sufficient attention to justice and the rule of law has resulted in the takeover of the state by a narrow elite with a stranglehold on the economic and political power of the state, leading to criminalisation of politics and the economy. Some have commented that fundamental principles are breached in the negotiation process because of the compromises that the negotiators perceive as necessary, and call for the need for negotiators to work more closely with the human rights community. It is clear that there needs to be considerable further reflection on strategies to balance the imperatives of peace and justice, and the identification of mechanisms to promote rule of law.

A peace agreement on paper requires practical implementation, and choices as to hierarchy of goals and priorities will need to be made. A second tension can arise between the political and rule of law processes on the one hand (including restoration of security institutions, DDR processes) and the perceived need, on the other hand, to deliver reconstruction activities and restore functioning social services, regulatory functions, and a private sector. Even from a purely practical perspective, sequencing will be necessary, particularly when it comes to positive obligations to set up organisations and processes. Here, sequencing activities over a period of several years, rather than the annual budget cycles of the aid system, could help to delineate a realistic timeframe.

These tensions – between the political imperative of making a peace agreement hold at any cost, the imperatives of bringing individuals to justice for past human rights abuses, and the need to meet economic and social rights through provision of services – give rise to a set of difficult choices that needs to be managed in a post-conflict environment. Given that the UN has institutional responsibility for safeguarding the last of these, and responsibility for one or both of the first two, tensions will arise within the UN itself, where difficult compromises between its own institutions will need to be made.

5. Meeting human rights in a weak institutional environment

Which rights must be met and which should be met: priorities and sequencing?

- The International Bill of Human Rights – comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) – sets out the primary human rights obligations of member states of the UN; a series of other treaties and instruments have also been ratified.
- This set of legal instruments provides a framework for determining which needs must be met, and which should be met. However, they provide little guidance as to determining sequence or hierarchy of rights.
- Non-derogable rights: Article 4 (2) of the ICCPR sets out those groups of rights which can never be restricted nor derogated. These include the rights to be free from: arbitrary deprivation of life; torture and other ill-treatment; slavery; imprisonment for debt; retroactive penalty; non-recognition of the law; and infringement of freedom of thought, conscience, and religion. Article 4 provides for derogation from other rights during periods of national emergency, under strictly limited circumstances.
- Progressive realisation: In a transition environment, it is not possible to restore services and meet all needs immediately. To determine which rights must be met and determine which are desirable over which timeframe in a post-conflict transition context, the concept of progressive realisation of economic and social rights may be of particular use. The ICESCR allows for the progressive realisation of those rights over time, subject to some limitations. First, the principle of non-discrimination still applies to ensure access to each right is being fulfilled. Secondly, there are some rights that must be met at all times, including basic requirements for food and shelter. Thirdly, the state is required not to deprive people of their own strategies for obtaining access to basic goods. Fourthly, the state is obliged to take steps towards implementation of the Covenant. These principles provide a useful framework for assisting the government and international community in determining priorities for restoration of state capacity to meet needs.
- Minimum standards: the Sphere standards: In terms of meeting economic and social rights, the Sphere standards, established in 1997, provide a normative guide to a minimum set of standards that should be met in a disaster context (including both natural disasters and conflict contexts), in five sectors: water supply and sanitation; nutrition; food aid; shelter; and health services. While the standards are a useful tool for providing consensus on a level of intervention, they assume that the provider will be the humanitarian community (through provision of supplies), rather than the government or the communities themselves. Here, it would be useful to make the distinction between meeting needs directly and equipping individuals and communities to meet their own needs through provision of cash alternatives.
- In terms of reaching agreement on a hierarchy of rights, no standardised tools have emerged; a hierarchy of rights will be context specific. Further work may be useful to agree on an assessment methodology to determine when a government is failing to fulfil human rights obligations in a given context, which would allow for entry of humanitarian actors on a transparent and clear basis where necessary. A second tool that might be useful would be a framework to determine a hierarchy of rights and set of minimum standards over time in a given country context. Such approaches could equip donors, UN agencies and NGOs with valuable tools for providing input to planning and budgeting processes, to influence the efficacy of project and programme design.

Who has the responsibility for provision of rights?

The issue of implementation of strategy and policy raises the question of location of responsibility for delivery of economic and social rights.

- The state, under its human rights obligations enshrined in the ICESCR, has the primary duty to fulfil the rights of its citizens.
- As fragile states may not have institutional capability to meet obligations in the short term, the practice of substitution of functions by other actors in the aid community has become common. This involves trade-offs: consideration will need to be given as to whether substitution is necessary in the short term to deliver a specific right or service, as against the impact in undermining state institutions to carry out the function over the longer term.
- Several different parts of the UN system are allocated responsibility for protection of rights, including the Security Council,[3] the General Assembly, the Economic and Social Council, Human Rights Rapporteurs, ad hoc Commissions of Inquiry established by the Commission on Human Rights, and ICRC. The UN, through specially created missions or one of its more than 30 agencies, can intervene to carry out a particular function for a limited duration – either to assume administrative authority in all areas of the state (e.g. Kosovo, East Timor) or to substitute for a particular function, e.g. policing. The Brahimi report cautioned against affording the UN responsibility for implementation of major complex operations without substantial reform, particularly in its approach to recruitment.
- An alternative model is the use of the military in carrying out reconstruction or humanitarian efforts, e.g. in Iraq and Afghanistan and, most recently, the tsunami. An understandable and valid reaction from the humanitarian community has been to stress the importance of keeping a clear line between military intervention and humanitarian activity; however, it is already clear that the military possess significant resources and capabilities, including access to logistical support and strategic planning, and increasingly articulated interest in pre- and post-war planning. While it is a fait accompli that the Pentagon is investing a substantial proportion of its annual US$550bn budget into humanitarian and

reconstruction activities through bodies such as the PRTs, it would seem necessary to examine how synergies can be developed between military intervention and post-conflict state-building activities.

- NGOs have adopted rights-based frameworks in planning their own interventions. A key challenge in this area is the capability of NGOs to meet the criteria of universality or non-discrimination; NGOs will rarely be able to meet all the needs of a population on an equitable basis. Although the NGO community has built up significant capacity in implementation of projects, when planning operations NGOs as service providers will compete with the government for financial and human resources. It should also be remembered that it is not only donors that can contract NGOs; there are also examples of the government entering into the same type of service delivery contracts with NGOs.

A useful tool in weak institutional environments might be a map which sets out over a 5-10 year framework a strategy for increasing state capacity to carry out essential functions. This would have a clear delineation of alternative actors to carry out those functions in the short term, and sunset clauses and strategies to ensure handover to the state. Joint planning operations, as set out in Framework for Cooperation in Peace-Building (UN, 2001b), can be helpful in this regard. A clear framework regarding which actor provides which service to which group of stakeholders over what timeframe could offer clarity for the humanitarian community in transition situations. It would also help in avoiding unhealthy competition for resources and duplication of service delivery. This approach could be reflected in a government- international community compact, monitored over time.

How: a programmatic, rights-based approach to social policy or quick impact projects?
There are two different mental models of delivery of aid in weak institutional environments. One assumes a weak state, and prioritises the imperative of delivering services and realising the human rights of the poor and vulnerable by establishing projects and programmes to deliver aid in the short term. The second posits that in the longer term the state must assume the functions of managing the implementation of policy for its citizens, and prioritises the restoration of capacity of weak state institutions. It is becoming clear that it is necessary to strike a balance between these two models, providing for the long-term strategy of strengthening state institutions, while allowing substitution of functions where required, within delimited areas and timeframes.

The rights-based approach might argue for either model. On the one hand, where it is imperative for basic human needs or rights to be met, a compelling case can be made for intervention in the form of quick impact projects. On the other hand, it is acknowledged by human rights theories that for every right there is a duty-bearer; in the case of the set of human rights acknowledged by the UN system, the duty-bearer is the state. This argues for prioritising investments in the state in order that it may fulfil the rights of its citizens.

There is a question as to whether the provision of aid through multiple projects to deliver a peace-dividend after war in short timeframes is an appropriate strategy in all contexts. First, delivery of aid in such contexts is extremely expensive and may not represent value for money over the longer term. Secondly, delivery of aid in dangerous contexts may divert scarce security resources away from protection of national citizens to protection of aid workers, again increasing the cost of aid. Thirdly, delivery of aid by external actors may serve to undermine the bond between citizen and state. An urgent current issue regards formulating approaches to the delivery of essential services that are cost effective, efficient and support the peace-building process rather than undermine it.

In post-conflict situations, a compelling case can also be made as to there being an overarching need to restore the trust of citizens in their state, and to re-establish the social contract between citizens and the state that will underpin the creation of stability, security and sustainability. Economic inequities and allocation of resources to one group rather than another can cause or exacerbate conflict. A perspective that prioritises citizenship rights would argue for a policy-based, programmatic approach to the allocation of resources. Here, the budget process plays a central role in creating a transparent, accountable mechanism for the allocation of assistance. It also acts as an instrument in bringing transparency to the process of linking the level of revenue collected to the level of public expenditure and standards of service delivery provided, reinforcing the citizen-state relationship.

How much? Cost-effective approaches to realisation of rights in conflict situations
Where large sums of resources are being programmed, whether or not rights are realised will be determined by the efficacy of the implementation process. Here, two factors emerge as important: first, the cost effectiveness of interventions – the more cost effective interventions are, the more people can be reached. The creation of public value will be determined by the efficiency of the delivery process. The second factor is the fairness of allocation. Here, to support the formation of citizenship rights, the allocation of resources must take place against principles of even-handedness, according to criteria across different social, ethnic, geographical, gender and racial divides.

Many of the existing implementation modalities used by the aid business are extremely cost ineffective, sometimes costing more than 90 cents in the dollar in overhead and delivery costs. The inefficiencies are caused by layers of contractual chains, with sub-contracting from agency to agency, each obliged to support head offices and small project units. The project approach, whereby small quick impact projects are delivered on an ad hoc bottom-up basis, can also exacerbate

tensions and conflict, undermining the trust of the citizens in the resource allocation process.

Both these factors argue for the use of policy-based approaches using national programmes. Such approaches mean that the state must either implement or manage through sub-contracting the provision of basic services, such as health or education. Another vehicle for this is the use of community-driven development approaches, whereby the government allocates block grants according to a criteria-based formula to groups of citizens, usually on a geographic basis. Against the allocation of grants, there is a series of simple rules whereby citizens are required to form groups, elect representatives, and account transparently for expenditure. This modality for implementation of resources in a post-conflict situation has the advantage of reducing overheads significantly, enfranchising all citizens in the development process, and ensuring that efficient choices of expenditure are made.

6. Rights and the private sector

Another perspective on the concept of rights in fragile states and post-conflict situations concerns the issue of the private sector. A rights-based approach is potentially relevant for at least two reasons. First, if a model of enfranchising citizens in the state through distribution of expenditure is adopted, increasing the size of the economic pie becomes important. Emphasis is rarely put on the creation of wealth as a priority in fragile state conditions, even though this can have the effect of providing a 'peace dividend' far more effectively and potentially sustainably than redistribution through humanitarian aid alone. Policy prescriptions for creating jobs on a large scale to realise the right to work would require the establishment of labour schemes or instruments to catalyse the growth of industry.

Secondly, the creation of a regulatory regime for the private sector which, follows principles of open and fair competition and allows access to the market regardless of affiliation or identity, is important in any circumstances; it is particularly important for generating the trust of the citizenry. However, it is precisely in fragile states environments that regulatory capacity will by definition be low; in a time of political flux, the propensity for lack of transparency or fair processes may be higher. Fair rules for the allocation of economic and land rights will be especially important to the shape of society and relative power and wealth of different groups.

7. The 'red lines': holding the state to account for protecting human rights

In a conflict or fragile state context, the state is by definition not able to protect or deliver on all the rights of its citizens. However, once a transition path is articulated as a matter of government policy, and/or agreed with the international community, the latter can play a crucial role in holding the government accountable to its promises and to international standards of human rights across many areas of governance.

It can do this through a number of mechanisms, e.g. reviews and analysis through government or non-governmental channels; increasing transparency through issuing such reports publicly; issuing public statements through its officials and rapporteurs; imposing conditionalities on its aid against certain 'non-derogable' standards; and political pressure.

Roles and responsibilities, for monitoring different aspects of state performance or fulfilment of human rights through implementation of policies and protection of citizens, can be assigned to an array of international organisations. These include the Office of the High Commissioner for Human Rights and its rapporteurs and ad hoc Commissions of Inquiry, as well as rapporteurs from a number of other UN agencies. Non-governmental watchdogs, such as Human Rights Watch, Transparency International and Amnesty International, can also play a valuable role in monitoring adherence to human rights standards. Investigative journalism and media reports can also play a useful accountability role.

A challenging set of questions arises as to which sets of standards should be applied and enforced in a conflict or fragile state situation. Political and civil liberty standards are sometimes afforded a higher priority than economic and social rights, when the state is beginning to reacquire the capacity to deliver social services. The concept of a minimum set of standards to apply can be useful.

8. Conclusion

In terms of seeking to protect rights in conflict and post-conflict situations, it is clear that a number of tools have emerged and are being deployed by the international community, ranging from military intervention and diplomatic pressure through to humanitarian activities.

The uses of rights-based frameworks or approaches may have some value in some contexts. First, they can help enforce a minimum set of standards for protection of civilians' rights, although it is clear that there needs to be further work on defining what constitutes a minimum set of rights in a particular context. Secondly, a rights-based framework could lead analysis towards a concept of citizenship rights that would inform the need to programme aid on an equitable basis across

a given territory, through national mechanisms. Thirdly, an emphasis on rights might also focus attention on the state as the primary duty-bearer of those rights and, accordingly, on establishment of state capabilities in post-conflict situations. Lastly, given resource scarcity, rights-based approaches might highlight for policy-makers the need to make trade-offs between implementation mechanisms and cost effectiveness in delivery, in order to increase the collective ability to satisfy rights.

Endnotes

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1   A 'rights based approach to development', according to OHCHR, is a conceptual framework for the process of human development which is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.
2   The Report of the Secretary General of 30 March 2001 on the Protection of Civilians in Armed Conflict called for the establishment of a 'culture of protection' (UN, 2001a).
3   The Security Council must play a leading role in protecting civilians in wartime, by urging belligerents to adhere strictly to the recognised standards of international humanitarian and human rights law. It also has responsibility for providing the necessary resources for life-saving aid and assistance, by ensuring that peacekeeping mandates provide for the protection of civilians. The General Assembly plays a role in reaffirming and advancing the normative framework upon which the international system is built, and urging its individual member states to ensure and promote compliance with these norms.

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Meeting 8: Advocates or Aid Workers? Approaches to Human Rights in Humanitarian Crises

Speakers: Anneke Van Woudenberg, Human Rights Watch
Andrew Bonwick, Oxfam

Chair: James Darcy, Overseas Development Institute

Meeting Summary

The first speaker, Anneke Van Woudenberg, made the case for human rights being central to humanitarian assistance. Drawing on her experiences in the Democratic Republic of Congo, she argued that people are now demanding their human rights rather than simply accepting humanitarian assistance. Van Woudenberg stressed that humanitarian actors do not operate within a political vacuum and this makes neutrality inherently difficult and advocacy necessary. The changed context in which humanitarian assistance takes place also has implications for the most appropriate nature of that assistance. In conclusion, Van Woudenberg argued that humanitarian actors should support the promotion of both peace and justice.

For the second speaker, Andrew Bonwick, the fundamental question was not whether human rights are applicable in humanitarian crises but whether they are helpful. Whilst acknowledging the overlap between human rights and humanitarian agendas, Bonwick argued that the humanitarian agenda necessarily focuses on a much narrower set of concerns and this meant choices as to which human rights are prioritised. Humanitarian advocacy is seen as a fundamental part of humanitarian work but this operates on different timescales to direct assistance and does not need to be equated with human rights advocacy. Bonwick discussed the role of law in humanitarian crises, suggesting that it is a tool that humanitarians can use but it is an imperfect one.

The relationship between human rights and humanitarian need was a central theme in the discussion, with the suggestion that the Sphere Project can be a tool for a rights-based approach in practice. The example of women's rights was used to illustrate how a rights perspective and language can add value to an approach based on needs. Another topic of debate was whether or not there is a hierarchy of rights? Some argued that civil and political rights take precedence over economic and social rights in conflict environments. Others suggested that this is a false dichotomy and that it does not reflect priorities on the ground, which arise according to the specific context.

Anneke Van Woudenberg

This topic is one that hugely interests me having worked first for Oxfam and now for Human Rights Watch. It has been interesting to see the difference in approaches and, now that I am using human rights more in my work, I have given a lot of thought to the things that I wish I had done differently when I was a Country Director for Oxfam. I will therefore refer to some of the experiences that I gained in this position and, since it is the area that I know best, most of my concrete examples will be from the Great Lakes Region of Africa and, in particular, the Democratic Republic of Congo (DRC). As you would expect, I will be making the case for human rights to become much more central to humanitarian assistance. Even though there are differences, I would also often situate human rights people within the body of humanitarian organisations.

Rights not handouts

Let me begin by describing something that recently happened which was a great surprise to me. In December 2004, Rwanda troops staged a short reinvasion of the Congo. A town called Kanyabayonga in the Eastern province of North Kivu was the key frontline and there was massive fighting here for about four to five days as Congolese troops came face-to-face with the renegade soldiers. The UN became involved and their peacekeepers stopped the fighting and created a buffer zone. Aid agencies then arrived to provide assistance. However, for the first time that I am aware in Congo, people demonstrated in the streets of Kanyabayonga saying that they did not want aid or food, they wanted peace and to be able to live without people killing them or raping their daughters and wives. This was the first time I had seen a demonstration of literally thousands of people in the Congo and it is telling because, in my mind, it shows that the Congolese, and quite often people throughout Africa, are beginning to demand their rights rather than accepting just humanitarian assistance and food handouts. I believe that there is no alternative to using human rights in our humanitarian work. It raises many questions, such as what is the most effective way to do it and what does it mean in practice? However, the very principle of human rights being at the centre of humanitarian work is critical for me.

When we talk about human rights in chronic humanitarian conflicts, we predominantly talk about the worst abuses, such as the right to life, the right to be free of torture, rape, arbitrary arrest, etc. This does not mean that other rights are not equally important but most of the examples that I have personally seen as a humanitarian and human rights worker have been the most egregious cases. I think it is these that we should focus on today rather than other rights, such as the right to health, which are less well defined in practice.

'... we do not work in a political vacuum and we are being naïve when we think that we do.'

Neutrality versus impartiality

In order for us to talk about how human rights can become useful in humanitarian work, we need to talk first about what I would term the 'neutrality versus impartiality' issue. This has always been a major part of the debate for me and it is something that has prevented humanitarian agencies from being as effective as they might be in difficult situations. I will give you a few examples. The underlying point I want to make is that we do not work in a political vacuum and we are being naïve when we think that we do.

In places, such as the Sudan, Congo or Burundi, the political situation is extremely difficult and we cannot assume that we are neutral actors who are either above politics or able to ignore them. I think therefore that we must instead come out on the side of impartiality. This means that we should not take sides but that we must speak out when we witness things, whether this is rape, torture, deliberate killings or ethnic cleansing. It is important for both human rights and humanitarian agencies to speak out.

We should also not be naïve. I believe that humanitarian agencies are increasingly open to manipulation. It is because we do not work in a political vacuum that aid is becoming a tool that combatant forces frequently use. In this situation, a human rights-based approach can improve an agency's ability to resist manipulation. To provide an example, I will tell you the story about what happened in a place called Ituri in North-Eastern Congo a couple of years ago and which is continuing today.

The need for human rights advocacy

Ituri in North-Eastern Congo is often called its bloodiest corner because of the scale of the fighting. According to UN statistics, over 60,000 people have died through direct violence, though I suspect the number is much higher. Whatever the exact figures, the death toll is particularly high and these are not people who are dying of starvation. They are victims of direct violence, people who have been massacred, tortured or summarily executed. Two groups, representing different ethnic groups, are predominate in the fighting and, in 2002, one of them, the Hema UPC (Union of Patriotic Congolese) armed group, took control of the major town of Bunia. This was also the town where most of the aid agencies were based and the situation changed very suddenly for them because they now had to deal with an extremist group who were promoting an extremist mono-ethnic agenda.

The UPC armed group took a number of actions. Firstly, they stopped aid assistance going to the Lendu ethnic group, who they considered to be their enemy. Secondly, they used relatively sophisticated propaganda to taint humanitarian aid accusing aid agencies of supporting their enemies. This meant that the humanitarian

agencies needed to be much more careful in dealing with the UPC, including security considerations. Thirdly, the UPC directed aid to their preferred areas, which were predominantly areas where the Hema people lived. This excluded the Lendu people who were in many ways much needier. The Lendu were chased into very remote areas, which in any case was making humanitarian access more difficult, but it was clear that direct manipulation was occurring.

These events were accompanied by significant debates within the aid community about how to proceed: should we pull out, should we insist on going to areas of the highest need, or should we simply attempt to provide the best assistance that we can under the circumstances? As a human rights person (and with hindsight), I now feel that our reaction at the time was uncoordinated and, as humanitarian agencies, we failed to speak with one voice. There is also no doubt in my mind that aid agencies were manipulated during this time. Had we spoken with a more impartial voice, one that focused on the need to help both sides but also on the need to respect human rights and therefore to speak out against the manipulation that we were witnessing, I think the results might have been different. But we did not and, instead, the different agencies went in different directions and the results were destructive sadly. Tens of thousands of the Lendu died. Many of us knew it was happening. It should have been a time for greater advocacy, for speaking out about what was happening and denouncing the manipulation of aid, but we felt that it was very difficult to do this.

We have recently seen a similar situation in Sudan where there have also been difficult debates about whether humanitarian agencies should speak out or whether it is better to not do so publicly in order to continue giving aid, which may provide short-term assistance but does not help people in the long term. I think that one of the difficulties we face in a number of these situations is that advocacy becomes about humanitarian access and increasing aid flows. This tends to be a more traditional view of what advocacy can be in an extreme conflict situation. These are important issues but, as a joint human rights and humanitarian community, we have rarely gone further that this. I think that there is much more to be gained by doing so. Sudan has been an interesting example of where a more coordinated approach has occurred on a few occasions but everyone that works in these conflict situations can do more to promote such a coordinated view because we rarely speak out as one community.

The changed context of humanitarian assistance

Humanitarian actors also face difficulties as a result of the context in which we work today. Short-term life-saving assistance situations are rare. In Africa, we predominantly face complex long-term situations, such as Burundi, Congo, Sudan, Liberia and so on, where it is not about providing assistance for six months to save lives but, instead, a much longer-term programme is needed because the abuses are entrenched. In these situations we often start to become part of the scenery and this results in a different set of challenges, such as donor fatigue. Again, I think that a human rights framework could be used more often to change the nature and the terms of the debate. This would increase our potential impact.

Peace and justice

Finally, I would like to briefly touch on what is often called the 'peace versus justice' agenda or, what I would like to term, the 'peace *and* justice' agenda because, for me, they go hand in hand. In a number of complex conflicts today, we are coming across some very difficult questions, which we perhaps did not need to deal with a number of years ago, about how to promote justice in difficult conflict situations. Working within aid and humanitarian agencies, we frequently see things and collect information that becomes incredibly useful in terms of future justice, both short-term localised justice and much longer-term international justice.

The work of the International Criminal Court raises more difficult questions about what we do with the information that we collect. What do we do when we know that human rights have been abused? What do we do when we have documented such abuses, perhaps privately or for our agency, and this information becomes very important for the human rights agenda? I think that we are going to be forced to think more about such issues and it is important that agencies develop a clear policy in relation to this.

I would certainly promote humanitarian agencies becoming more active with respect to justice. This does not mean suddenly denouncing the military commander that you may have been dealing with for years in order to get humanitarian access, but it does mean finding private or public ways to make sure that information is not lost and that it is used to ensure that justice can one day be achieved. For me, this is very much part of the issue of making rights central to the work that we do in our agency, although I acknowledge that we must be careful in the way that we do this.

For Human Rights Watch, this is less of an issue because we write reports, we openly denounce abuses and we do local and behind-the-scenes advocacy. For organisations, such as Oxfam, Save the Children or Christian Aid, however, I can see that this debate and its solutions are more difficult. Nevertheless, I would argue that we cannot run away from these issues anymore and that it is absolutely essential that we start to use human rights much more in our public and private advocacy. I believe that they are complementary and that we need to find more ways for human rights and humanitarian agencies to work together. We would be naïve to think that we can ignore these issues because they have become part and parcel of the work that we do.

'Had we spoken with a more impartial voice, one that focused on the need to help both sides but also on the need to respect human rights ... I think the results might have been different.'

Andrew Bonwick

I do not think there is any disagreement amongst lawyers that human rights apply in humanitarian crises. In its Nicaragua decision, the International Court of Justice actually said that international humanitarian law measures the extent to which human rights obligations are met in conflict situations. I think that this is something we can therefore accept as a given and move on. However, the key question is whether human rights actually help in humanitarian crises (and I am thinking primarily about conflict situations).

I will look at three things. Firstly, I will look at the human rights and humanitarian agendas. Secondly, I will look at humanitarian assistance and humanitarian advocacy. (I do not want automatically to equate humanitarian advocacy with human rights work because, although there is a clear overlap, they are not the same.) Thirdly, and this is perhaps when we are looking more purely at human rights. I will look at the utility of international law, in particular the use of human rights and international humanitarian law in conflict situations.

Human rights and humanitarian agendas

Firstly, I will talk about agendas. Anneke talked about the desire of the people of Congo for safety rather than food; the same situation arose in Srebrenica in 1995. When the people who had survived the massacre were asked whether they were hungry or thirsty, they replied that of course they were because they had been under siege for two years and most had spent several days in transit under very difficult conditions. However, when they were asked the broader question, 'what are your main concerns', the reply was two-fold: 'are we safe here?' and 'where is my family?'. It is very clear, and not new, that people are expressing the need for safety as their primary concern.

In a similar vein, Darfur is currently being described as a 'human rights crisis' but do the people of Darfur see their situation this way or are they also expressing the need to be safe? At times I find it odd that we equate widespread attacks on civilians, rape and the other atrocities that are occurring in Darfur with the right of an English schoolgirl to wear a particular type of school uniform. Does using the language of human rights cloud, rather than add clarity, to the issues?

We are told that all human rights are equally important. Human rights groups tell us that human rights are indivisible, inalienable and universal. They do cover the right of an English schoolgirl to choose what to wear to school in accordance with her religious values. The humanitarian agenda is much narrower, however, with its core comprising of basic subsistence and basic safety. We have to make choices and, for humanitarians, some rights are undoubtedly more important than others.

The place of justice

Where does justice fit into this? Anneke talked

about humanitarian agencies testifying to the International Criminal Court (ICC). However, whether or not they testify is actually not something humanitarian agencies can make a choice about because they are under obligation to do so if asked. The Rome Statute of the ICC makes an exception only for the International Committee of the Red Cross. But, when humanitarians look at the International Criminal Court (and Oxfam strongly supports its use), we see it primarily as a means to an end and not as an end in itself. Do we think that referral to the ICC will increase our ability to ensure the basic safety of the people of Northern Uganda? Even in human rights terms, justice is not a fundamental right but is instead one that is derogable. The whole area of human rights around due process and justice is optional in human rights terms and, I think, certainly as humanitarians, we should view it this way. So, the actual clash is not about what we should include in our humanitarian or human rights agendas but what we should consider more or less important for now and what we should leave out.

Human rights and humanitarian advocacy

Secondly, I will address how we should actually go about meeting the need for basic subsistence and safety. What is the role of humanitarian assistance and advocacy? In Rwanda, we were told that humanitarian action could not substitute for political action. Two weeks ago the UN released a real-time evaluation of their response in Darfur and they said exactly the same thing. And, as we have also seen in Darfur, political action is often a precondition for humanitarian action to be effective. Many aid agencies, in particular the UN, spent several months at the beginning of 2004 unable to gain access to provide even basic services – water, food, medical care –precisely because the government in Khartuom was denying access. The only way that access was secured was through political action, primarily through the UN Security Council and the subsequent international intervention.

However, we should not assume that humanitarian advocacy is only, or primarily, about public denouncement. It is as much about the negotiations that humanitarians carry out with, for example, a district officer to enable them to be able to work in a particular place. So, for me, humanitarian advocacy is a necessary part of humanitarian action but this does not mean that we are necessarily talking about human rights. I think we could question the effectiveness of advocacy and ask whether the work of the Security Council has actually increased the safety of people in Darfur. Humanitarians are an impatient bunch of people and when we ask these questions we are looking for quick results. We want to see improvements in public health, in food provisions and nutritional status over the course of a few weeks or months. The timescales of humanitarian advocacy are much longer. I actually worked with Anneke in the Congo and we spent three years lobbying for

'... the key question is whether human rights actually help in humanitarian crises.'

the deployment of a peacekeeping force to the North-Eastern Congo. These are the timescales which we are often forced to look at for effective humanitarian action. But, again, I do not equate that with human rights because it is a core part of our humanitarian work.

Neutrality and impartiality

What are the dilemmas associated with humanitarian advocacy? I do not see any conflict between the principles of impartiality and assistance based only on need and carrying this assistance out in an open manner. However, it is perhaps a little more difficult when we come to neutrality. If we look back at the Red Cross definition of neutrality, which is the authoritative statement on the subject, there is actually two parts to it. The first says that we shall not take a political side in a given argument and the second that we shall not take part in any controversy of a political nature. This is a little bit of a retort to George Bush's, 'are you with us or against us?'. For humanitarians there is no question of taking a party political side in a given argument. As humanitarian advocates, however, we necessarily have to take part in political controversies. This is not a case of whose side you are on because your side is those who are in need of basic subsistence and safety. It is therefore a little bit of a fallacy to say that humanitarian agencies need to be apolitical but they certainly need to not be party political.

Are there any dilemmas relating to humanitarian advocacy in practice? Towards the end of last year, Oxfam's director in Sudan was asked to leave the country because of a statement that Oxfam had made saying that the Security Council was being weak in its response to the Darfur crisis. There are therefore very real issues associated with speaking out. There are real issues relating to whether or not an agency is allowed to operate and having your country director thrown out of a country is actually not the most challenging to deal with because much more severe threats to the security of our staff are often made. People have been attacked and are putting their lives at risk as a result of taking very open positions on political decisions. When looking at humanitarian action and human rights, I think it is worth noting that, beyond the international agencies, the vast majority of human rights agencies, such as Human Rights Watch or Amnesty International, put their lives on the line in countries in which they operate on a daily basis in order to defend human rights. However, humanitarians are considerably more risk averse because we need to balance the ability of our organisation to continue working with our ability to speak out.

The utility of international law

Thirdly, I will briefly talk about international law. I have a book here by Rosalyn Higgins (1995) called *Problems and Process*. Higgins was the head of the law department at the London School of Economics and is now a judge at the International Court of Justice. She talks about international law as a process rather than a series of principles:

'International law is a process of decision-making with appropriate reliance on appropriate trends of past decision-making in the light of current context and desired outcomes'. She goes on to say that rules-based lawyers, including many humanitarian and human rights advocates, will be constantly frustrated if they simply look at the rules and decry their violation. In contrast, those people who view the law much more as a process have better opportunities to bring moral values into the law and to help the law reflect modern thinking.

Over the past couple of years, I think that we have seen international law being used to undermine humanitarian values. In response, the need for humanitarian and human rights agencies to defend the broader, and more humanitarian, view of the law has become apparent. But looking back over the past 15 years we have seen large chunks of the law move in the exact opposite direction. The Security Council refused to even look at the 1960s Biafra crisis because it said that it was within the domestic jurisdiction of the State of Nigeria, and thus not their concern. Today we do not even ask the question, it is a given that the Security Council should be involved in Darfur.

If we think that we have a role as humanitarians to help the law evolve, how do we think we should be using it? From my perspective, three uses of international law are important for humanitarian workers:

i. *The law is a benchmark.* It tells us what treatment people can expect to receive in a conflict situation. In some conflicts this is obvious. You do not need to be a lawyer to know that it is wrong to be raped, massacred, shot and so on. At other times it is more complex. For example, if we take the plight of a group of Iranian-Kurdish refugees in Iraq during the recent conflict. They gathered on the border with Jordan where they were not in physical danger but living conditions were terrible and they lacked the means of subsistence. Should they be allowed to cross into Jordan? In such instances, a fairly precise application of the law can help us to understand what is acceptable or not. It should also be remembered that law is a tool of states and, if we are trying to influence states, we need to be able to speak their language.

ii. *The law is very useful for finding out who is responsible* for a given state of affairs, locally, nationally and internationally. Whose actions or inactions are causing a crisis? Again, the law can help analytically because, if we are acting as humanitarian advocates, we need to know who we should be directing our advocacy towards and whether they accept that it their responsibility to act.

iii. *The law can be used to persuade*: 'You need to do this because the law says that you need to do it or because you have agreed to it in the past by becoming party to a treaty that says that you will act in a particular way'. This is an important argument but it is also a fundamentally weak one because few people actually like being told that they must behave

'... humanitarian advocacy is a necessary part of humanitarian action but this does not mean that we are necessarily talking about human rights.'

> '… humanitarians are considerably more risk averse because we need to balance the ability of our organisation to continue working with our ability to speak out.'

in a certain way. Therefore, when we are using the law as an argument, we need to be able to complement it with political arguments (it is in your interest to do this) or moral arguments (it is the right think to do). The law is a tool we can therefore use in our humanitarian advocacy. Human rights are also a tool we can use in our humanitarian advocacy but it is a weak tool.

I am going to conclude here. To sum up, I think that there is a great degree of overlap between human rights and humanitarian agendas but it is not total. The difficulty for human rights and humanitarian agencies is in thinking about what to leave out rather than what to include, particularly with regard to justice. It is undisputable that advocacy is a necessary part of humanitarian action. Even those agencies that tend not to involve themselves in advocacy necessarily negotiate simply in order to operate in a given area. Of course, we need to think about the timescales for carrying out this advocacy, which could be several years, and this is difficult for humanitarian agencies because they like to think in terms of weeks and months. Finally the law can be used as a tool to help us reach the outcomes that we desire. However, there is also some danger in this because it can become an excuse for inaction. By this I mean that, if we are in position to save lives or to intervene effectively, even if this does step outside the human rights framework, as humanitarians we feel (and Oxfam certainly feels) obliged to go ahead anyway and not to wait for those responsible to carry out their duties.

Approaches to human rights in humanitarian crises

Lin Cotterrell*

1. Introduction

In recent years, an increasing number of humanitarian actors, including governments, official donors, UN agencies and NGOs, have adopted the language of human rights and human rights-based approaches (HRBA) in their policies and programming. In part, this trend is a response to criticisms that humanitarian action was failing to promote human rights. To date, however, there has been relatively little research on how far human rights can – or should – contribute towards humanitarian outcomes. There are also some very real questions about how far human rights instruments can be applied in situations of violent insecurity.

The first section of this paper examines the relationship between human rights law and international humanitarian law (IHL). It suggests that IHL is fundamentally pragmatic, intended to limit the suffering that war inflicts but not in itself to protect the more ambitious claims of human rights. Human rights law, on the other hand, deals primarily with the relationship between the individual and the state during peacetime. As a result, there is a risk that those suffering from human rights abuses during situations of conflict and violent insecurity may be left without effective protection in international law. This paper suggests that more needs to be done to adapt human rights instruments to these contexts, and draws on examples of recent legal initiatives to extend human rights protection to the victims of conflict and insecurity.

For operational agencies, the question of what to do in the meantime remains to be answered. The following sections consider the strategies available to agencies seeking to promote human rights in situations of violent insecurity, including political advocacy and HRBA to humanitarian programming. The paper suggests that whilst sharing a common core of concern, human rights and humanitarian agendas may at times conflict, so that difficult choices may have to be made. A clearer understanding of the trade-offs and limitations in pursuing a HRBA in humanitarian crises is vital to informing these real-time decisions.

2. Human rights, international humanitarian law and conflict

When faced with widespread human rights violations in situations of conflict, it is often assumed that what is needed is more effective enforcement of human rights law and principles. In reality, it may be that the legal framework for the protection of human rights in conflict situations needs to be revisited if it is to provide an effective basis on which to act or to advocate. The following sections explore the applicability of human rights law to situations of conflict; the scope of international humanitarian law in terms of protecting human rights; and the increasing convergence between these two bodies of law as attempts are made to bridge the protection gap in conflict-related crises.

Human rights law and conflict

Human rights are both a moral and a legal construct, formalised in the international system through a range of legal and diplomatic instruments. These instruments derive their authority directly from the voluntary agreement of sovereign states. The conventions themselves are not binding on those states which are not signatories and only the UN Convention on the Rights of the Child has been nearly universally ratified.

The human rights legal framework evolved as a means of limiting the arbitrary or excessive power of the state against the individual. The changing nature of war and the state in the post-Cold War world presents significant challenges to this. Particularly since the 1990s, the most acute threats may stem from lack of protection afforded by weak, failed or fractured states, and the arbitrary or excessive use of force by non-state actors. There is a need, therefore, to develop an effective framework of international law that can be universally applied – across contexts and across the increasingly blurred divide between peace and war. Central to this is the challenge of binding not only all states, but also non-state actors.

International human rights law is primarily concerned with the relationship between the individual and the state in times of peace; its direct application to situations of armed conflict or violent insecurity is limited (Dugard, 1998). Unlike under humanitarian law, states are permitted to derogate from certain civil and political rights under conditions of 'public emergency', except for a certain core of fundamental rights laid down in each treaty, including the right to life, the prohibition on torture and inhuman punishment or treatment, the prohibition on slavery, and the principle of non-discrimination. However, it could be argued that even fundamental, non-derogable rights, such as the right to life, are inevitably violated by war. Since human rights are not based on a particular context, determining what constitutes arbitrary deprivation of life requires a greater level of detail than the provisions of human rights law provide.

Human rights law constitutes a powerful political tool in structuring the relationship between the individual and the state.

However, in weak or failed states, or where part of the territory is contested, the capacity or will to fulfil the sovereign responsibility of protection may be absent. In such cases, the state may retain legal capacity but it has 'for all practical purposes lost the ability to exercise it … there is no body which can commit the State in an effective and legally binding way' (Thurer, 1999). As a result, states in which individual rights are most vulnerable to violation may be precisely those which are least able to offer protection (ibid.).

Furthermore, whilst human rights law includes both prohibitions and duties to act (including the provision of basic healthcare and education), these rights are subject to the state's capacity to deliver. The requirement that economic and social rights are to be realised progressively recognises the fact that it is not possible legally to require someone to do something which is beyond their means. Since human rights law requires strong and stable government, 'it seems impossible to envisage meaningful human rights protection in a failed state' (Kracht, 1999).

Perhaps the most pressing limitation of human rights law is that it is primarily concerned with the organisation of state power vis-à-vis the individual (Kolb, 1998). It therefore has little to say about the duties of other parties, including belligerents, non-state actors and humanitarian actors during conflict. In situations of violent insecurity, non-state actors are often the primary abusers of human rights. They may also be in de facto control of significant parts of the country or population, sometimes for prolonged periods, and yet not subject to the same legal obligations as state authorities to protect the human rights of civilians in areas under their control.

The difficulty for human rights organisations relying on legal remedy is that, in the face of gross violations, advocacy may be reduced to a mantra of 'stop doing that', without any provision to support the duty-bearer or to substitute for them. By the same token, economic and social rights have tended to be largely absent from the agendas of international human rights organisations. Whilst some have in recent years begun to address economic and social rights, the focus is on violations which can be address using the same methodology and criteria as for civil and political rights. This means being able 'to identify a rights violation, a violator, and a remedy to address the violation'.[1] In complex emergencies, this discourse leads more naturally to punitive than to remedial or palliative approaches. For their part, humanitarian actors tend to operate in contexts where the state lacks the will or capacity to remedy the situation, and their options range between assisting state actors (the duty-bearers) and substituting for them. Neither of these approaches, however, is adequate to address issues of civilian protection in situations such as Darfur, where agencies are having to look for new strategies to address protection issues in their advocacy and programming.

Humanitarian law and conflict
International humanitarian law is embodied in the Geneva Conventions of 1949, nearly universally ratified, and their Additional Protocols of 1977. The second Additional Protocol applies to situations of non-international conflict and builds on the provisions of Common Article 3 of the 1949 Geneva Conventions. Some of the Protocol's provisions constitute principles of customary law and so are binding on all parties to a civil war. Common Article 3 itself has customary legal status and provides a core minimum set of protective provisions for those who take no direct part in hostilities.[2]

Humanitarian law is designed specifically for situations of armed conflict but does not in itself protect human rights. This is because, firstly, it applies only to particular categories of people (prisoners of war, the wounded and sick, non-combatants and civilians), by virtue of their protected status under the law. It does not apply to all humans by virtue of their humanity. Secondly, human rights have never effectively been framed within the legal duties of humanitarian law (Saulnier, 2004). Rights conferred by IHL are derived from the duties which the law imposes and not the other way round; the focus is not on the rights of the individual but on the obligations of particular duty-bearers. Humanitarian law does not offer individual redress or compensation to individuals on the basis of rights. Perhaps most importantly, the scope of IHL is much narrower than human rights and it does not address many of the human rights enshrined in the Covenants.

Nonetheless, in many respects, IHL may be better placed than human rights law to realise basic rights in conflict. IHL includes, for example, a prohibition on starvation as a weapon of war, and a duty on those in control of a territory both to provide for a population's needs and to permit external relief.

IHL, unlike human rights law, applies to any party to a conflict: it can bind non-state actors.[3] The provisions of IHL provide specific, detailed rules governing both the conduct of belligerents and their duties towards those affected by the conflict. This level of detail is lacking in human rights law. For example, IHL clearly defines roles in relation to missing persons during wartime, yet human rights law is underdeveloped in terms of the duties of states to provide information about detainees or search for missing persons towards missing persons (Heintze, 2004: 795), offering limited means to address 'disappearances'.

Towards a convergence between human rights and humanitarian law
Neither IHL nor international human rights law alone provides an adequate legal framework for the protection of human rights during conflict. In recognition of this, agencies and advocates are increasingly drawing on both bodies of law to find the best legal means available. IHL, for example, has been used to interpret the meaning of human rights provisions during

conflict. For example, IHL provisions on the indiscriminate use of landmines or the use of chemical weapons have been used to interpret the human rights prohibition against the arbitrary deprivation of life. In this sense, IHL has been seen as a complement to human rights law (see, for example, Bruscoli, 2002).

In recent years, human rights organisations have also recognised the importance of IHL. Amnesty International used IHL to assess a government military action for the first time in 1996 in southern Lebanon (Brett, 1998). Since that time, much of the advocacy work of international human rights and humanitarian agencies has emphasised a convergence between the two bodies of law; the distinction between IHL and human rights law is no longer seen as particularly important.

However, to date, human rights courts have been at best ambiguous in how far they are prepared to employ IHL provisions in their rulings. In 2000, in a case concerning the execution of six unarmed civilians by the Colombian police, for example, the Inter-American Court overturned a position previously taken by the Inter-American Commission on Human Rights on the basis that it was not competent to apply international humanitarian law directly (The 'Los Palmeras' case, Inter-Am.Ct. H.R (Ser.C), No.67 (2000), cited in Heintze, 2004: 804).

Humanitarian law, even if fully utilised by human rights courts, is fundamentally pragmatic in its aims and modest in its ambitions. It does not seek to prevent or influence the course of war, or to judge the justness of its cause, but to set out rules and principles governing its conduct which aim to alleviate the worst of the suffering. Even if it currently offers the best protection available, IHL does not in itself ensure human rights. Recognition of this led the International Court of Justice (ICJ) to the opinion that, since human rights norms could not be applied 'in an unqualified manner' to situations of violent insecurity, human rights needed to be inserted into the structure of international humanitarian law (Heintze, 2004: 797). Given the much greater scope of human rights ambitions, it could be argued that, rather than requiring IHL to carry human rights on its much narrower shoulders, what is needed is an effective convergence of the two branches of law, so that the legal 'grey zones' between the law of peace and the law of war are 'filled by the cumulative application of human rights law and international humanitarian law, thereby guaranteeing at least minimum humanitarian standards' (UN Doc. E/CN.4/Sub.2/1991/55, cited in Heintze, 2004: 791).

This was the viewpoint advocated in the UN Declaration of Minimum Humanitarian Standards in 1990 which laid out a set of principles 'applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances' (Doswald-Beck and Vite, 1993). However, this Declaration is advisory only and has no legal force. It may be that for human rights to take on a greater meaning in conflict situations, it will be necessary to develop human rights law rather than IHL, to incorporate explicit provisions governing the interpretation and application of human rights in situations characterised by violent instability, whether war or a state of 'emergency'. Such provisions may refer to IHL, or go much further in their requirements to apply the same standards of human rights to those affected by conflict. One example of such a development is the UN Convention on the Rights of the Child (CRC) of 1989 and its Optional Protocol relating to armed conflict.

The CRC is one of the only human rights instruments that formally recognises a complementarity between human rights and international humanitarian law. It makes explicit reference to IHL – specifically the provisions of Additional Protocol I, which state that children are exempt from involvement in combat up to the age of 14 years. This provision did not, however, go far enough for the CRC, which aims to secure the 'best interests' of the child up to the age of 18. Thus, the Optional Protocol to the CRC, ratified in 2000, called on state parties to take 'all feasible measures' to ensure that members of their armed forces below the age of 18 took no direct part in hostilities, and that under-18s were not subject to compulsory recruitment. The Optional Protocol is a recognition that humanitarian law may not in itself remove the need for an explicit articulation of how human rights are to be applied in conflict. There are two unusual characteristics of the CRC which make it a model worth following. Firstly, it cross-references IHL, so that parties to the Convention agree also to be held accountable to the relevant provisions of humanitarian law through the treaty's enforcement mechanisms. Secondly, it attempts to adapt the provisions of a human rights treaty explicitly to situations of conflict, so that both the rights of the child and the duties of relevant parties in these contexts are clearly stated.

The CRC has proven to be a particularly useful tool in denouncing human rights violations and persuading belligerents (both state and non-state actors) to change their behaviour. No comparable instrument exists which guarantees the same degree of human rights in conflict. This suggests that further attempts to incorporate the realities of conflict into the normative and legal framework for human rights could carry significant benefits, both in terms of the enforcement of human rights and in offering legitimacy and a clear basis for advocacy.

However, not all advocacy is human rights advocacy, or necessarily employs a human rights framework. Humanitarian advocacy may include an explicit focus on human rights abuses, but its primary aim is what the International Committee of the Red Cross (ICRC) terms 'responsibilisation' – holding duty-bearers to account for the obligations which international law imposes on them. It may also relate to action on the part of those with the power to assist, redress or enforce – whether states or specifically mandated agencies.

Under IHL, the ICRC has a specific mandate in each of these areas, as well as in the dissemination and development of the law itself. The ICRC and the Movement it forms part of adhere to certain fundamental principles, including humanity, impartiality, independence and neutrality. The Office of the High Commissioner for Human Rights can also play an important role in advocacy, for example in urging the UN Security Council to take action in response to widespread human rights violations. The role of operational agencies, however, is less clear. Whilst Unicef receives a special mention in the CRC, and the UN Secretary General's reform programme has included efforts to mainstream human rights throughout all the UN's agencies, their specific role and relationship to international legal instruments remains only weakly articulated. Agencies are left to determine what their specific role in relation to the pursuit of human rights should be in their emergency programmes, and interpretations of what is meant by a human rights-based approach remain highly varied.

3. Human rights-based approaches to humanitarian action

The past decade has seen an increasing number of international NGOs and agencies adopt a HRBA to their work, and many agencies have been active in developing both policies and guidelines for operationalising HRBAs. To date, however, much of the focus has been in relation to development cooperation and programming.[4] There are very few policy statements or agency articulations of what constitutes a HRBA to humanitarian programming, how it would relate to humanitarian principles, or how to overcome the specific difficulties of applying it in situations of conflict.

UNICEF formally adopted a HRBA to programming in 1998, amongst the first UN agencies to do so. The approach means that all UNICEF programmes focus on the realisation of the rights of children and women and are guided by human rights and child rights principles. Programmes focus on developing the capacities of duty-bearers at all levels, as well as the capacities of rights-holders to claim their rights. Equal emphasis is placed on outcomes and the process by which these are achieved, so that participation, local ownership, capacity-building and sustainability are essential characteristics of a HRBA. These are not easy processes to manage in highly fractured, unequal or divided communities, or during emergency situations. By its own admission, the agency still has some way to go in terms of applying a HRBA to its humanitarian programmes.

Save the Children has the longest tradition of a HRBA, first framing its mandate in terms of child rights in 1922. The agency was actively engaged in the development of the CRC and particularly since its ratification in 1990, human rights and humanitarian action have been seen as twin approaches towards the same overarching rights-oriented objectives, each with the common goal of protecting and promoting children's rights in emergencies. For this reason, advocacy is written into Save the Children's work as a core part of programming. This includes identifying and drawing attention to human rights violations, and awareness-raising at the local and international levels. In practice, this carries significant risks and dilemmas for operational agencies, many of which continue to be navigated on a case-by-case basis in the field.

Other multi-mandated NGOs, such as ActionAid, CARE, the Lutheran World Federation and Oxfam have adopted a HRBA in recent years. For these, human rights have been regarded as the necessary link between development and humanitarian work. A HRBA has been seen as a way of addressing root causes and structural issues of marginalisation and poverty. It has also been seen as offering a better framework for analysis and for thinking about and responding to the political, social and economic causes of acute vulnerability and humanitarian need. To this extent, human rights and humanitarian agendas are regarded as essentially compatible and mutually reinforcing, with a HRBA providing the basis for a stronger set of claims by those affected by humanitarian crises: as rights-holders rather than as beneficiaries of charity. Nonetheless, in practice, agencies face a number of difficulties in operationalising both humanitarian principles and a HRBA in crisis environments.

Some of these difficulties are not specific to situations of conflict. For example, the 'indivisibility' of human rights presents significant challenges in terms of resourcing, so that in reality some rights have to be prioritised over others. In emergency settings, given the pressure on agencies to respond quickly and to meet immediate needs, this is even more challenging. Ironically, since all human rights are equal in value, decisions about which rights to prioritise are made effectively by reference to humanitarian need, so that in practice, adopting a HRBA may change little in terms of the content of humanitarian assistance in the immediate term.

Secondly, rights may make conflicting demands, meaning that they cannot be achieved at the same time or that the promotion of one right may be at the expense of another (Freeman, 2002: 5). For example, the increasing tensions between security and liberty rights since 11 September 2001 are testimony to the fact that deciding how to strike a balance between various 'indivisible' rights cannot be settled by reference to rights alone (Saulnier, 2004).

There may also be questions about sequencing, since the fulfilment of some rights is likely to be a prerequisite for being able to meaningfully exercise others. For example, health and nutrition may be necessary for a child to benefit from schooling, and basic literacy and education may be necessary in order to take advantage of certain civil and political rights.

As the previous sections have shown, the challenges of promoting and protecting human rights are even greater in

situations of conflict or violent insecurity. At the legal, policy and programmatic levels, the relationship between a HRBA and humanitarian principles remains one of the most contentious. Both make a set of fairly uncompromising demands on operational agencies. The human rights principle of non-discrimination equates broadly to the humanitarian principle of impartiality, but other aspects of the humanitarian agenda, such as neutrality or the need to secure access to affected populations, may not always imply the same course of action or form of response.

To take an obvious example, throughout the 1990s there was a growing awareness of the potential, first noted in Biafra in the 1960s (Rieff, 2002), for relief aid to become integrated into processes of violence and oppression, feeding into war economies (Angola, Sudan) or playing into the hands of military strategies aimed at forced displacement (Ethiopia, Bosnia). This leads to questions as to whether it is possible to provide humanitarian assistance without supporting abuses. However, as Omaar and de Waal (1994: 19) acknowledge, withholding relief on this basis may be 'tantamount to using starvation as a weapon' and is not only morally unacceptable but illegal under the Geneva Conventions. To date, most agencies do not have formal policies or guidelines available for field staff on what a HRBA to humanitarian action should entail in these situations, and how to make these real-time judgement calls. Whilst it is unlikely that there are any blueprint solutions for this dilemma, this is an area which could undoubtedly benefit from further policy development as well as frank discussion about options available to field staff witnessing violations, and the limitations and risks of various approaches. As Omaar and de Waal conclude, 'Clearly, there is a balance to be struck … There is no easy resolution of the dilemma – what is important … is to recognise that the dilemma is real' (ibid.: 9).

For similar reasons, Rieff (2002) argues that what he sees as the increasing marriage of humanitarian and human rights agendas since the birth of modern humanitarianism in Biafra is an historic mistake. Surveying the increasing complexity of humanitarian engagement in complex crises, the crucial lesson is that not all good objectives can be reconciled (Rieff, 2002: 325). An obvious example is the tension between human rights advocacy and the neutral and impartial provision of relief. The decision facing the ICRC half a century ago – between speaking out about what it knew to be happening to Jews in Nazi-occupied territory, or maintaining its strict interpretation of neutrality – appears in retrospect so clear a failure to respect human rights that it constitutes 'a permanent stain' on the organisation's moral authority (Moorehead, 1998). In Biafra, the same dilemma (between speaking out and maintaining access) led to the formation of Médecins Sans Frontières, yet turned out in retrospect to be much less clear cut (see Edgell, 1975).

Whilst 'responsibilisation' of duty-bearers forms a core part of the humanitarian agenda, the concern is with immediate life-saving interventions to alleviate suffering and protect lives and livelihoods. For this reason, humanitarian action also includes 'assistance' to the duty-bearer to deliver on obligations and 'substitution' for duty-bearers where they are unable or unwilling to comply with obligations. In situations of protracted internal conflict, substitution in the form of large-scale relief operations has often become the norm.

Attempts to resolve contradictions between human rights and humanitarian (or other) agendas have sometimes been made by extending rights to cover neglected moral claims. This underlies, for example, efforts to advocate a right to humanitarian intervention, or a right to relief. It has also been argued that the provision of relief is rights-based in the sense that it fulfils or protects a set of human rights claims (for example, the right to life or survival, food, healthcare, shelter, and so on.) Clearly, the agendas of concern overlap. However, such relief is provided not on the basis of social and economic rights but according to need. The crucial distinction is between the content of a right, such as education, basic health provision or food and sanitation, and the right on the part of the recipient to claim it.

Perhaps the more complex part of the debate is less how and whether humanitarian action relates to human rights, and more the extent to which people's claims to rights can be made effective and on what basis (Darcy, 2004a). In protracted crises, humanitarian agencies have sometimes become the primary providers of welfare services for large sections of a population over long time periods. Recognising this relationship between a right and an effective claim against a duty-bearer, humanitarian organisations have sought to assert the right to a certain standard and quality of assistance, for example through the Sphere Minimum Standards, to which agencies will hold themselves accountable. Such rights are modelled along the lines of consumer rights or patients' charters in public service provision, and have been argued to constitute a form of quasi-contractual rights (Darcy, 2004b).

There is an obvious value in mechanisms to increase accountability, standards of performance, and awareness amongst other parties of the minimum relief requirements of affected populations. What is less obvious is the extent to which being able to claim certain standards from relief providers relates to human rights. Sphere probably represents the most comprehensive attempt to date to operationalise economic and social rights in the absence of state provision. However, the detailed content of the minimum standards was drawn up with reference not to international law (which lacks quantified welfare provisions) but to agency best practice in meeting basic humanitarian needs. Sphere, as a voluntary code developed by humanitarian agencies, applies primarily to the relationship between agencies and beneficiaries in the context of existing interventions and does not constitute a basis for effective claims in areas where agency presence is limited or absent. Its potential as a tool to 'responsibilise' the state or other duty-bearers is probably under-explored. Neither does it reflect the

indivisibility of rights, or the choice of the rights-holder about which rights they want to claim. The point is not that such initiatives are not valuable, or even vital, but that calling a code 'rights-based' does not necessarily imply that it carries the full force of the rights in question.

The protection of civilians, despite being largely absent from Sphere, is another core area in which humanitarian agencies have sought to incorporate human rights concerns. There have been many valuable initiatives in this area over the past few years, particularly since Rwanda.[5] To date, however, there is limited consensus amongst agencies about what protection activities entail, and whether the objective is to ensure the security of recipient populations or the wider aim of protecting the human rights of individuals in crisis-situations. As a result, it is not always clear what agencies are doing differently in relation to protection as a result of adopting a HRBA, and what is simply a matter of better programming in situations of violent insecurity. Nonetheless, both raising awareness of protection issues and mainstreaming these within humanitarian programming are welcome developments.

4. Punitive justice and international intervention

There are two further ways in which agencies have sought to protect and promote human rights in situations of conflict and violent insecurity. These are through the mechanisms of punitive justice, including international criminal tribunals and trials, and through advocating for international military intervention to halt massive human rights abuses in the immediate term.

The ICJ handles disputes between states in relation to major international treaties, including the Genocide Convention. Until the establishment of the International Criminal Court (ICC) in 1998, there had been no comparable international mechanism for bringing individual war criminals to justice. The Rome Statute of the ICC includes provisions from both bodies of law, and has been heralded as a major development in enforcement of IHL and human rights in conflict. Whilst the ICC has not removed states' obligations to bring perpetrators to justice, it can function independently of states in cases of wide-scale and systematic human rights abuses or crimes against humanity. It can thus arbitrate on matters of humanitarian and human rights law where national trials of rights abusers may be hampered a weak or under-resourced judicial system.

The emphasis that human rights organisations place on judicial process is not necessarily shared by humanitarian actors. To hold that formal justice makes a difference to humanitarian outcomes necessitates certain assumptions about the impact of such processes on human rights violators, such as a positive correlation between violations and impunity, or between justice and peace. Such correlations have on occasion been highly contested. In countries such as Cambodia and Mozambique, there has been considerable discomfort about, and resistance to, the idea of criminal trials for crimes committed during these countries' protracted internal wars (Hayner, 2001: 195-99, 201). By contrast in Argentina, mothers of the disappeared marched weekly in the public square demanding information; in Guatemala, national NGOs pursued a strong information and advocacy campaign for a truth commission in advance of the peace negotiations (ibid.: Ch. 12).

Ownership and agency are central to human rights. This requires a conception of moral agency which recognises that the choice of whether or not to claim or exercise a right at the expense of some other valued end is an essential part of having it, as opposed to being the subject of it. However, international human rights organisations have tended to view the process of justice pursued by international courts and tribunals as necessary to peace, even where such processes have been seen by some to threaten a cessation of violence or to be irrelevant to peace and reconciliation. For humanitarian agencies, the process of formal justice has tended to be valued insofar as it is instrumental in improving humanitarian outcomes. For many, the work of the ICC and the dilemmas about how (or even whether) to provide information in support of its investigations has begun to challenge this neutral stance.

Perhaps the most pressing difficulty for operational agencies is that humanitarian crises involve immediate humanitarian needs; timescales for effective legal remedy are likely to be much longer. Where rights are violated and those responsible are not susceptible to pressure and cannot be held immediately to account, both human rights and humanitarian actors are faced with a dilemma of what to do in the meantime. Where the state is both duty-bearer and the violator of human rights, this dilemma may be seen to underlie calls for immediate punitive measures, from sanctions to 'humanitarian' intervention, in the name of rights. The debate about the rights and wrongs of such action is beyond the scope of this paper, but there are two points of particular relevance.

Firstly, human rights law does not distinguish between peace and war, nor in itself authorise enforcement through military means. As a result, interpreting and applying its provisions, the grounds for legitimacy (if any), and the duties of respective parties can only be achieved through recourse to other frameworks and bodies of law. Military intervention is usually justified according to drawn from 'just war' theory, which requires not only a 'just cause' and 'right intention' but also the likely 'effectiveness' and 'proportionality' of the means employed, as a 'last resort' and with 'proper authority' (Brown, 2002). Human Rights Watch uses similar criteria in determining its position in relation to military intervention (ICHRP, 2002). By contrast, Amnesty International has refused to advocate or oppose military action 'under any circumstances, whether or

not that intervention is aimed at preventing human rights abuses' (ibid.).

During almost all of the high-profile human rights crises of the 1990s, international advocacy groups criticised the UN and major states for failing to act decisively (ibid.). At the same time, in terms of taking a position on military intervention, principles and frameworks available left international NGOs with a quagmire of moral confusion. Even after the turn of the decade, and half a dozen military interventions in the name of human rights, a meeting of international NGOs concluded that overall, 'there is plenty of confusion and no shortage of contradiction in NGO responses' (ibid.).

Secondly, using the language of human rights may not be helpful in devising solutions unless the limitations of what humanitarian agencies can achieve in this regard are taken into account. The failure of UN troops, mandated to protect relief supplies, to protect the lives of those in the Bosnian 'safe areas' demonstrated the limitations of a right to relief in the absence of protection of the 'right to life', in terms of safeguarding either human rights or humanitarian outcomes. The Responsibility to Protect report of the International Commission on Intervention and State Sovereignty concluded the need to cast the debate in different terms, not as 'right to intervene' or 'right to relief', but as 'responsibility to protect'. This applies both to the state concerned and – where this state is unable to provide protection or is itself sponsoring human rights abuse – to other states to 'react' to and 'prevent' abuses and to 'rebuild' after an intervention (ICHRP, 2002). In September 2005, the UN World Summit endorsed this concept, representing the first time outside a specific treaty context that states have signed up in a general way to any significant limitation on state sovereignty. The establishment of this principle provides the basis for a fully fledged norm of international customary law.[6] For many agencies, a decade on from the UN's failure to intervene in Rwanda, this represented a remarkable achievement.

The Summit did not, however, agree the specific criteria governing the use of force. The focus also provides little guidance for NGOs on either their specific role in relation to protection, or how to navigate the operational dilemmas of delivering assistance in a politicised and military environment in which their perceived neutrality and independence from governments (which are simultaneously donors and belligerents) cannot fail to be affected. NGOs have an important role to play in pushing for agreement in both of these areas.

The limitations of a classic human rights lens are also relevant to decisions about the most appropriate form of intervention in cases involving protracted internal conflicts and a proliferation of non-state actors (Somalia, Kosovo, Afghanistan). Here the concern is less about protecting the rights of the individual against the state than with the tendency towards increasing fragmentation of power, identity and groups. In Todorov's words, perhaps increasingly, it is not tyranny which is the greatest evil, but anarchy (Todorov, 2002) – characterised by weak, failed or predatory states which lack both the consent or obedience for effective sovereignty and a rule of law capable of ensuring protection within its borders. This is a very different problem statement and necessarily implies a different solution. How effective punitive measures such as sanctions or military intervention are likely to be in such circumstances is not always clear. In such contexts, rights need to be protected not only against the state, but also through action which serves in the longer-term to strengthen, not further fragment or erode, the state's capacity for effective governance. This does not imply simply bolstering or reconstructing a predatory state, but rather efforts to support what remains of the public service infrastructure, or taking account of and utilising alternative channels for providing security, protection and the underlying conditions of peace (Menkhaus and Prendergast, 1995: 14).

These kinds of considerations must also form part of agencies' thinking on whether to advocate for military intervention; concern for the likely chances of success in improving the situation on the ground has formed part of the reasoning of both humanitarian and human rights organisations, for example, in relation to military intervention in Iraq.[7]

5. Conclusion

Over the past decade, human rights and advocacy organisations' increasing attention to IHL has been an extremely valuable development in promoting human rights in situations of violent insecurity. However, the protection afforded to people in these situations under both human rights and humanitarian law remains imperfect. Human rights law is limited in its application to such contexts and lacks the necessary level of detail in its provisions. Humanitarian law does not in itself protect human rights. Recent developments such as the CRC and the ICC suggest some examples of ways to bridge these gaps. Further investment could also be made in increasing awareness amongst agency staff of international humanitarian and human rights law and mechanisms, with more detailed guidance on their implementation in situations of conflict.

Legal protection, however, even where applicable, may not in itself ensure humanitarian outcomes within the timeframes necessary, let alone guarantee the fulfilment of rights. The latter depends on functioning and effective mechanisms of enforcement, incentive or redress, and on political responsiveness to the claims of rights holders. These prerequisites cannot be assumed to exist in situations of armed conflict; other courses of action may be required in the immediate term. Endorsement of the 'responsibility to protect' agenda represents a potentially historic development in the international community's commitment to responding to massive human rights abuses, including genocide and ethnic cleansing. In order to respond effectively, continued pressure to promote and develop the agenda, including criteria governing the use of force,

and strengthened capacity at the international or regional levels, will be crucial to the success of future interventions. Humanitarian assistance has been criticised for negatively impacting on the political contract between rights-holders and the state. Such action in the form of 'assistance' to or 'substitution' of the duty-bearer, however, is not a denial of the importance of the political contract, but recognition that in certain contexts the state may be unable or unwilling to protect or provide for its own people. The aim of humanitarian action in such contexts is immediate life-saving intervention, to allow at least for the survival of individuals deprived of effective rights. As such, humanitarian assistance may be seen as attempting to fill the void between the rhetoric and the reality of human rights, for example, through filling gaps in basic healthcare in the absence of an effective claim. What it does not and cannot do is ensure the protection of rights themselves.

Furthermore, at an operational level, there may be conflicts between speaking out about human rights abuses and maintaining access to affected populations. In the absence of well developed policies or guidelines on implementing a HRBA in crisis situations, there is a risk that the easy conflation of rights and humanitarian agendas may serve to obscure some very real tensions between these agendas in practice. It may also conceal the need for choices to be made about the most appropriate strategies and priorities for international response. Acknowledgement of the dilemmas and increased awareness of the strategies available would seem to be priorities in developing a realistic HRBA to humanitarian programming.

Ultimately, if we are serious about a commitment to human rights in humanitarian crises, we need to recognise the limitations of various frameworks and strategies through which human rights are articulated and applied, and invest in exploring examples of good practice at the legal, policy and programmatic levels so that the continuing challenges and dilemmas can be navigated in the most effective way.

Endnotes

*　At the time of the meeting series, Lin Cotterrell was a Research Officer in the Humanitarian Policy Group at the Overseas Development Institute.

1　See http://www.hrw.org/doc/?t=esc.

2　Though not couched in rights terms, Article 3 is roughly equivalent in scope to the protection afforded by the core non-derogable human rights.

3　Thus, the UN's Special Rapporteur on Sudan used common Article 3 of the Geneva Conventions in an assessment of the conduct of the Sudan People's Liberation Army (SPLA), including indiscriminate attacks on civilians, rape, mutilation and looting (UN Doc. E/EC.4/1994/48, cited in O'Donnell, 1998). The SPLA subsequently agreed to respect Protocol II of the Conventions, which relates to non-international armed conflict, even though it had not been ratified by the Sudanese government. The reports of Special Rapporteurs on torture, extrajudicial executions and violence against women in Colombia in the late 1990s also employed humanitarian law as the necessary basis for addressing violations by non-state actors (O'Donnell, 1998).

4　See for example UN (2003).

5　A fuller discussion of the protection agenda is regrettably beyond the scope of this paper. See Darcy (2005), Protecting civilians: exploring the scope and limitations of humanitarian action, HPG Report (forthcoming)

6　Presentation by Gareth Evans at a meeting organised by the OneWorldTrust on the responsibility to protect, 15 September 2005.

7　See e.g. Human Rights Watch World Report (2004).

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Meeting 9: Rights to water: strengthening the claims of poor people to improved access

Speakers: Lyla Mehta, Institute of Development Studies
Bruce Lankford, University of East Anglia

Chair: Peter Newborne, Overseas Development Institute

Meeting Summary

The first speaker, Lyla Mehta, opened by emphasising that a large number of poor people lack access to rights, including economic and social rights such as the right to water, and provided a number of reasons for this. She argued that the human right to water, and the nature of water itself, remained controversial. Mehta used South Africa's Free Basic Water Policy to discuss the trade offs, challenges and lessons that arose from the implementation of the right to water, particularly emphasising the difficulties associated with an attempt to reconcile rights and markets. She concluded by arguing that financial allocations are the result of social choices and that the Millennium Development Goal on water and sanitation could therefore be met if governments and their citizens chose to prioritise it.

The focus for the second speaker, Bruce Lankford, was the use of rights to allocate water between different users. He discussed a World Bank programme that had supported the introduction of a formal (paper) rights system in southern Tanzania. Lankford argued that this system had failed to manage water allocation in practice and highlighted ten reasons for this. He then suggested how the system might be improved, stressing the need for a three-phase view of water management that recognised the different functions of water and attempted to manage its allocation between different sectors in different seasons. He concluded by distinguishing between rights as a guiding principle and the role that rights took on in practice, suggesting that the objective should be a process that distils water rights into manageable operational strategies.

The question of whether rights or development discourses generate greater social and political change was posed during discussion. It was felt that the MDG framework might have a higher international profile but that the rights framework is more able to support local struggles. The difficulties associated with poor people claiming their rights through formal judicial processes were acknowledged but it was suggested that rights can be a force for social mobilisation nevertheless. It was less clear how the human rights machinery can be used to prevent macroeconomic processes impinging on economic, social and cultural rights.

Lyla Mehta

Today I will address two issues. Firstly, I will talk about the human right to water and what this means in terms of implementation. Secondly, I will discuss access to economic, social and cultural rights and, in particular, the reasons why so many marginalised and poor people lack access to them. I will be focusing on formal, rather than customary, rights.

Access to economic and social rights

So why is this important? People who are concerned with human rights and a rights-based approach to development would usually acknowledge that large numbers of people, and particularly the poor and the marginalised, do not have access to rights. The poor often lack access to positive rights, such the right to water or food. Often this is because governments do not prioritise the imperative to provide education, food, water and housing to all. They may also lack the necessary resources and institutional capacity to do so. Furthermore, as in the case of South Africa, even where such rights are given priority, there can be many implementation problems. These could be called the sins or acts of omission that prevent economic, social and cultural rights from being realised.

The realisation of economic and social rights, such as the right to food, water or education, is clearly fundamental to the achievement of the Millennium Development Goals (MDGs). However, as my case study demonstrates, paradoxes and contradictions arise on the ground for a number of reasons. Firstly, there is often a dual commitment to both markets and rights that compromises basic rights. Secondly, rights violations can be a result of poor institutional capacity, particularly at local level. Thirdly, low resource allocation can impede the realisation of social and economic rights. Fourthly, a lack of effective accountability mechanisms can mean that duty-bearers are not held to account. Finally, states could knowingly put rights as risk as a result of macroeconomic policies that promote cut offs and disconnections. These could be called sins or acts of commission on the part of states (Mehta and Ntshona, 2004).

I will now focus on three subjects. Firstly, I will examine whether there is a human right to water. Secondly, I will provide a more detailed case study of South Africa, the research for which was done together with ODI as part of the 'Sustainable Livelihoods and Southern Africa' project.1 Finally, I will conclude with lessons and challenges.

The human right to water

That there should be a human right to water seems obvious because water is so fundamental to life. It is not explicitly mentioned in the 1948 Universal Declaration on Human Rights, however. Many people have asked why. Is it because the drafters thought that it was so obvious that it did not need to be explicitly mentioned? Many commentators now conclude that it was implicitly mentioned,

because it was acknowledged and because water is fundamental to other basic rights, such as food, health and development. Where it is explicitly mentioned is in the Convention on the Rights of the Child. In 2002 the UN Committee on Economic, Social and Cultural Rights provided a legal interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two covenants of the 1948 Declaration. In its General Comment 15, the Committee explicitly recognised the human right to water and stressed its importance in realising other human rights. The responsibility for the realisation of this right was laid on the state, which was seen to have an obligation to progressively realise the right to water, defined as the 'provision of sufficient, safe and affordable water for everyone'.

However, despite this legal basis, the right to water is still controversial for two reasons:

i.   There is a problematic division between civil and political rights and economic, social and cultural rights. Whilst, in theory, human rights are indivisible, in practice the belief remains that civil and political rights need to be realised before the rights to food, water, etc. Time constraints mean that I cannot go into the debates here but suffice it to say that a lot of these assumptions are flawed because all rights require commitment, political will and resources.

ii. There is an ideological tussle and contestations about what water is – is it a right, a commodity or a good? Of course, in the village context, it is a bit of everything. However, in dominant framings and global policy debates, the notion that water is an economic good is paramount and powerful players, such as the Word Bank or the International Monetary Fund, do not acknowledge the human right to water.

South Africa and the Free Basic Water policy

As the only country that recognises the constitutional right to water, South Africa stands out and should be commended because it goes against the grain of international debates and discourses. Since 2000, the South African Department for Water Affairs and Forestry has been investigating providing a basic level of water free to all citizens and, in 2001, the Free Basic Water (FBW) policy was declared. This policy basically means that all households will get 6000 litres of safe water free per month, assuming that the household size is eight people. This translates to about 25 litres per person per day. This right is legally enshrined in the Constitution and the Water Services Act 107 of 1987 and is funded through 'equitable share', which is Rand 3 billion a year and is transferred from central to the various lower levels of government.

As it is such a progressive policy, many South African bureaucrats understandably become defensive when it is criticised. I would like to state up front that, even though I may be talking about

> '... in dominant framings and global policy debates, the notion that water is an economic good is paramount ...'

problems in the FBW policy, I think the fact that this exists is very good. I am just trying to highlight some of the issues.

There are some contradictions in South Africa's water domain. Even though the FBW goes against the grain of conventional wisdom in the water sector, which would rather see water as an economic good rather than as a human right, I would argue that they are trying to dance to the dual tune of rights and markets. This may be fine in some contexts but what does it mean in the context of providing water to rural areas? In South Africa, as everywhere, there have been 'behind the border' policy convergences, that is, influence from the IMF and the World Bank in support of shifting the role of the state from provider to regulator and the promotion of measures such as privatisation, cost recovery and user fees privatisation. This is not unusual, as anyone who keeps track of the water sector knows.

The South African case is quite interesting because there has been a clear shift from the Reconstruction and Development Programme (RPD) commitments to infrastructure and services for all based on the assumption of universal entitlements towards a cost recovery approach in the Growth, Reconstruction, Employment and Redistribution (GEAR) policies. This has partly led to some controversial measures in the water sector, such as the disconnection of customers and massive price hikes, which can seriously impinge on the right to water. These have also been linked to cholera outbreaks and other problems.

Another problem has arisen when households have used more than the basic amount and then found that they are facing disconnection because they are unable to pay. Often the free amount has not been enough for large families. Moreover, the billing system is often inconsistent and confusing. As a result, there are many legal cases in South Africa examining what has happened when the court found that certain people, usually women and Africans, could not pay, with some commentators arguing that such disconnections are justified and other claiming that these violate their constitutional right to water because there is a right to the basic level of water supply irrespective of the ability to pay.

Something else that happened as a result of the GEAR policy was a decrease in grants and subsidies to local municipalities and city councils. This forced many cash-strapped local authorities to turn towards partnerships, privatisation and the contracting of consultants to maintain water service delivery. There were also a number of increases in the cost of water, with some researchers claiming increases by as much as 300% in several towns as a result of water privatisation.

Implementing Free Basic Water in the Eastern Cape
Let me know turn to the research that I undertook with Zolile Ntshona in the Eastern Cape. This research was part of the DFID funded Sustainable Livelihoods in Southern Africa Programme. We did research in two district municipalities in the Eastern Cape, which is the poorest of South Africa's nine provinces. These district municipalities were part of the former Transkei – the homeland areas – and have very high unemployment and poor access to basic services. The two districts only provide acceptable access to safe water for 13% and 15% of its population respectively.

The FBW policy was conceived at the national level but its implementation largely rests with local authorities and service providers who can interpret the policy according to their capacity and financial resources. When I interviewed bureaucrats from the Eastern Cape in 2002, there was much confusion about the FBW policy and many expressed the feeling that they could not cope with the municipal responsibility because the municipality did not have sufficient financial resources.

Difficulties also arose from the need to monitor water usage under cost recovery programmes. It was expensive to install meters and the 'build, operate, train and transfer' scheme relied on outside consultants and experts and expensive technology. In many cases, it was decided that these difficulties meant that it did not make sense to try to recover costs. As one consultant commented, it is like giving a Rolls Royce to someone who can barely manage with a bicycle.

I will now look at some of the impacts and trade offs. It is clear that there have been positive benefits, such as the improvement in the lives of many women. For example, if we take the case of one 61-year old widowed pensioner, she used to walk to the stream to collect water but she is now able to get water from a tap and use the free basic water for washing, drinking, cooking, etc. On the other hand, many people have argued that 25 litres is at the minimum of what is recommended (the WHO standards range between 50-100 litres, with an absolute minimum of 20) and that it does not provide for vital livelihoods activities. For instance, many people require water to grow their subsistence crops and the 25 litres is not enough to also provide for farming activities during periods of scarcity. In this sense, therefore, the FBW fails to support the right to food.

Another problem was that many people were not aware of their basic right to water and the FBW policy and one could ask whether this then constitutes a right. If an individual is not aware of their right, how can they mobilise around it? These were some of the tricky questions that we encountered.

Lessons and challenges
I will now talk about some of the lessons and challenges. One key lesson was that, in cash-strapped provinces that had a massive backlog, such as the Eastern Cape, it was difficult to combine the provision of free water with cost recovery programmes. The dual commitment to

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rights and markets may have been workable in urban areas where there are bulk consumers of water, making cross-subsidisation possible, but it was difficult in rural areas. However, even in urban areas, cost recovery often ran counter to realising economic and social rights because it led to disconnections. Such disconnections have been the subject of legal interpretation in South Africa. Social policy experts have also joined the debate arguing that markets, as social institutions, may provide more efficient services. This can be at the cost of realising economic and social rights, however.

There has been much mobilisation around rights in the South African case, including the contestation of water disconnections within townships, leading to the involvement of the constitutional court. However, it is clear that the utilisation of legal redress is dependent on the ability to mobilise, access lawyers and present a persuasive case and there have been variable outcomes. It is also clear that there are many difficulties with this course of action in rural areas, such as the Eastern Cape, where people are not even aware of their rights and where the mediators of justice are not really present.

There is also ambiguity about who the duty-bearers actually are in relation to the right to water. The state is still viewed as the primary duty-bearer, despite the proliferation of new actors resulting from economic globalisation. However, if a private actor is responsible for executing a disconnection or refuses to fulfil economic and social rights, who

'... cost recovery often ran counter to realising economic and social rights because it led to disconnections.'

do we hold accountable? The state's attempt to fulfil multiple roles – as enforcer, regulator and facilitator – leads to schizophrenia.

A final point about the implementation of the human right to water is that it largely rests on political will. South Africa has gone a long way in actually enshrining the right to water in its constitution. However, where it needs to pay more attention is in relation to the resource and institutional implications of this obligation. It also needs to address the poverty and livelihood implications in respect of the claim that 25 litres per person per day is not sufficient and the state should be providing 50-100 litres.

Let me conclude by saying that, in order to promote the human right to water and avoid some of the sins of omission and commission that I mentioned earlier, we must look at several issues, such as resource implications, institutional capacity and the issue of politics and political will. Financial allocations are the result of social choices that states, local government and people make. The Water Supply Collaborative Council claims that, through low-cost technology, it would cost US$9-15 billion to achieve the MDG on water and sanitation. This is a lot of money but we should remember that just one of the cruise missile that is being used in Iraq costs about $2.5 million and that the US government spends this amount on defence every 10-15 days.

Endnotes
1   http://www.ids.ac.uk/ids/env/SLSA/index. html

Bruce Lankford

I am going to switch the discussion in two ways: from domestic water rights to productive and environmental rights issues and from a discussion about providing the right to water to how rights are involved in reallocating water between sectors.

Water usage in South Tanzania

I am going to use a case study that I have been involved with Tanzania for 5-6 years.[1] It began with the SMUWC (Sustainable Management of the Usangu Wetland and its Catchments) project, which I helped to design and which led to another DFID-funded project called RIPARWIN (Realising Irrigation Productivity and Releasing Water for Intersectoral Needs) that is coming to the end of its fourth year.

The case study is in South Tanzania in the Great Ruaha river basin, which is well known in Tanzania because it is where about 50-60% of its hydropower is generated, 14% of its rice grown and because it also contains the Ihefu wetland that feeds water though the Ruaha National Park. This river changed from being a perennial river in the 1980s to being a seasonal river in the 1990s and one of the big issues is how to reverse this.

The project that we are studying is essentially about allocation of water between different and competing sectors. There is the Ihefu wetland, which gives rise to a single river that is now seasonal. A series of seasonal and perennial rivers feed into this wetland and the overflow gives rise to the Ruaha River. There is therefore an allocation

of water between rice irrigation, the wetlands, the National Park and then downstream to Mtera/Kidatu hydropower generating stations.

The watershed of the Usangu escarpment generates the water from rainfall and that run off is shared by many sectors as it moves through the river basin. So, for example, we see irrigation intakes trapping water and, at the same time, there has been a switch from traditional to modern intakes as a result of technological change. This is critically important because they are closely associated with donor-funded programmes that I am going to talk about which has overseen the shift from informal to formal water rights. Furthermore, the switch from traditional to modern intakes has resulted in a transformation of their form and function.

Water is also required for other purposes, such as for domestic use, livestock and grazing. It is also used by fisher-people and for the Ihefu wetland, the Ruaha National Park and downstream hydropower. So here we can see six sectors that share this water and the aim of the water rights programme implemented by the World Bank has been to try to manage this allocation. In doing this they have, in a sense, presided over a switch from domestic water rights to one where water rights have become a command and control tool with which to manage allocation. As I will explain, this has been problematic in Tanzania.
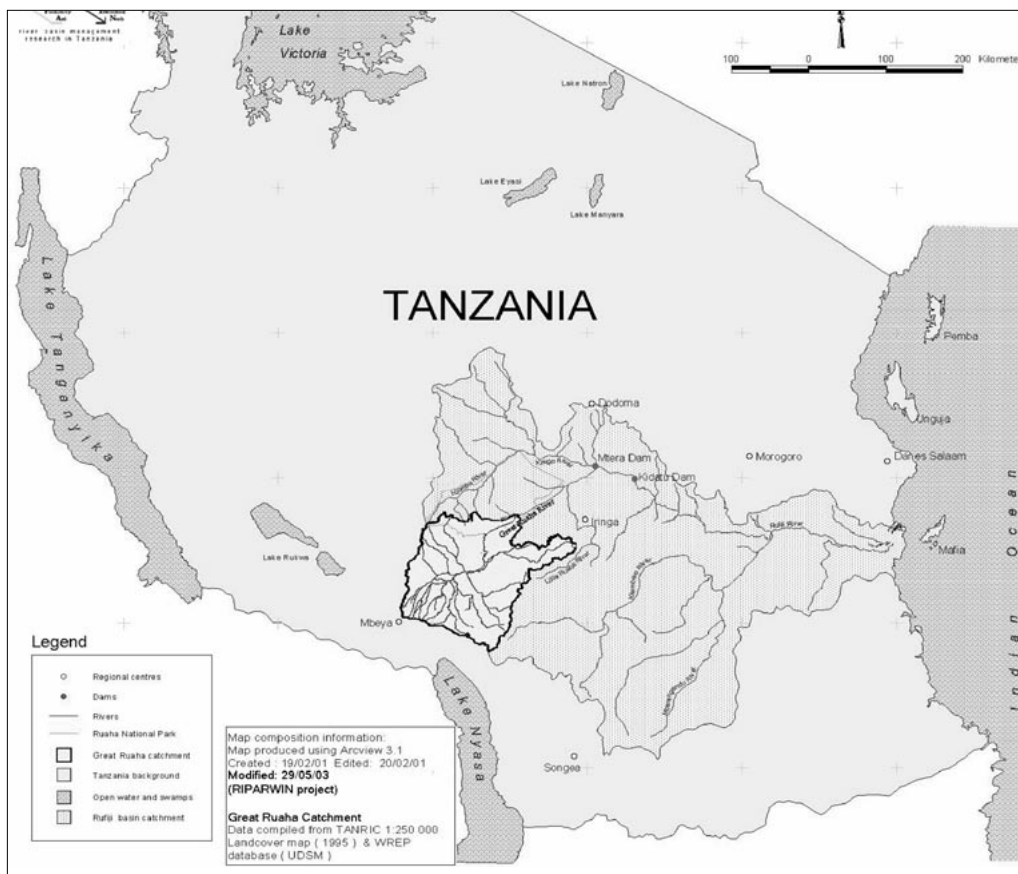
'The paper water rights system appears to have increased conflict.'

Using formal water rights to manage allocation

Inter- and intra-sectoral allocation has been managed mainly through formal water rights issued by the Basin Water Office. These rights attempt to curtail upstream irrigation abstraction to provide an overflow downstream so water is shifted from so-called low- to high-productive uses. However, in reality, abstraction has been affected more by the shift in technology from traditional to modern intakes than by the water rights themselves. The paper water rights system appears to have increased conflict.

In the mid-1990s, water rights were implemented by the World Bank through a large (about US$21 million) programme called the RBMSIIP (River Basin Management and Smallholder Irrigation Improvement Programme). This was essentially experimental integrated water resource management (IWRM). Water rights were expressed as formal flows (e.g. 200 litres per second) that users could purchase. An application cost US$40 and there was a flat rate of $35 per year and a pro rata rate of $0.035 per m3. The rationale, which can be found on the World Bank's website, is the 'enhancement of water fees ... as an incentive for water conservation ... and as a source of funds for water regulation activities, catchment conservation and water resources monitoring' and that 'economic instruments include water pricing, charges, penalties and incentives ... [can] be used to stimulate marketing mechanisms and serve as an incentive to conserve water'. In other words, farmers would somehow derive value from having paid for a water right and, according to the World Bank, this would mean that they would then use less water and more water would therefore shift downstream.

This failed in many ways. It is interesting that some of the programme's objectives could be considered in the first place because they are so ill-designed given the dynamics of the hydrology found in that part of the Tanzania. I will take you through ten fault-lines:

i. the programme did not recognise existing customary water rights;
ii. it failed to accommodate variations in water supply owing to rainfall and seasonality and therefore failed to take into account what happened during the dry season. This meant that, for example, 200 litres/second could be given to one intake, 200 litres/second to another and 500 litres/second to another, etc. but that during the dry season there may only be 200 litres/second available, which could then be legitimately taken by the first upstream intake;
iii. there could be no relationship between the paper water rights and the water that was actually taken because there were no measuring structures in place;
iv. it was not related to the actual discharge capacities of the new intakes;
v. it was not related to the demand of irrigation systems;
vi. when cumulatively added to other water rights,

it bore no relation to the overall supply in the river system during either the wet or dry season;
vii. government could not provide a guarantee for the rights;
viii. it was not related to the services that were provided by government;
ix. it could not be requested and 'bought' by those who could not abstract water such as fisher-people and cattle keepers; and
x. it is very difficult to update the system to reflect the constantly changing situation.

It also created a situation in which users negotiate with the government rather than each other. The outcome of this was that it: legitimised increased abstraction upstream intakes; reduced water for downstream users; was associated with a much higher incidence of conflict; made it much more difficult for local people to rearrange their water supplies during the dry season because some upstream uptakes had claimed water rights; and it cost more to administer the scheme than was received in income. It therefore failed as a cost-recovery, water management and registration tool and it is now a very complex system to refine and retune.

A workable water management system?

As it is highly unlikely that the Tanzanian government is going to throw out this confusing system of paper water rights, the Basin Water Office and I have attempted to think of ways in which it can be built on and improved. I will briefly take you though some ideas that have come out of this discussion based on the three-phase view of water management.

I see water as being divided into three phases:
i. Critical water, which involves very small volumes of water that are needed for domestic uses.
ii. Scarce or medial water, which, in places like southern Africa, usually covers relatively small amounts of water.
iii. Bulk water, which is quite rare and occurs only in wet seasons or years.

I think there is a need to think about the way water has different functions in these three phases and to base any water management system on this. In other words, the rationale of such a system is to manage the trade offs between these different sectors, including domestic usage, in the wet and dry seasons. It is therefore about managing small critical amounts of water in the dry season and bulk water in the wet season.

We have also devised a river basin conflict management tool, which is a game where users fight over glass marbles in the upstream to get all the marbles downstream. Using the tool we could consider three principles to facilitate a meaningful dialogue at catchment level and move forward from the World Bank-instituted rights system:
i. Engage with water users in ways that support and develop water arrangements at the catchment level, and match river basin

'... the need to distinguish between rights as a guiding principle ... and the other roles that rights take on in practice ...'

allocation challenges.

ii. Allocate water permits to match the hydrology, and revised capacity, of all the intakes on the catchment not individual intakes.

iii. Re-design irrigation intakes so they help support allocation of water during the bulk phase (based on maximum intake capacities and formal rights) and allocation of water during the scarce phase (based on adjustment and informal rights). This is the framework for the revision of intakes and for designing the role of formal permits and informal arrangements in wet and dry seasons. The key thing here is, of course, to redesign the intakes so that they match the ability to control abstraction.

Translating principles into practice

An interesting discussion point is the need to distinguish between rights as a guiding principle, which is the characterisation of rights that we often see in texts about IWRM, and the three other roles that rights take on in practice, that is, as a: delivery goal, a water management tool (and in particular how we allow customary rights to play their role in scarce-water phases), and as a formal tool to manage bulk water. I see a disjuncture between rights as guiding principle and rights

as they operate within water management and I think that this World Bank case study shows up those varying deficiencies, which meant that the rights on paper could not make sense of what was occurring on the ground.

To my mind, the question is how to translate the IWRM principles, which represent water as human, environmental and economic rights, into interventions that actually solve problems. How do we work with a continuum of rights, policy, strategy, legislation and, critically, field operations that make a difference and solve problems? The process of distilling water rights into operational strategies is key and I think that we should be guided by principles but focus on the question of ease of manageability. Intakes in Tanzania did not relate to the paper water rights so they were not easing manageability. If those intakes are redesigned, this will assist the paper water rights system, improve manageability and allow us to address the problems that arise in the three phases: critical, scarce (or medial) and bulk.

Endnotes

1   For further details see Lankford and Mwaruvanda (2005); van Koppen et al. (2004).

Right to water: legal forms, political channels[‡]

Peter Newborne*

A recent initiative of the UN has raised to prominence the right to water. Framed in General Comment no. 15, a non-legally binding document, the right as thus interpreted by the UN Committee on Economic, Social and Cultural (ESC) Rights was nonetheless designed to promote binding and enforceable rights under national laws, as a step towards filling the gaps in water services. Whilst this goal is generally accepted, responses to the General Comment have been widely divergent, and discussion of the human right to water mixed with argument over private *versus* public services and pro- and anti-'commodification' of water.

Analysis of three principal legal forms of a right to water – respectively, as a human right, contractual right and property right – helps to understand these divergences. All three legal forms are intended to give rise to legally binding and enforceable rights of access. All are in process of conversion into practice, somewhere. Yet, at the same time as proponents of the latter two quite commonly disregard the human right, or place it as a distant third, advocates of a human right approach criticise – some bitterly – the manner of application of property and contract law in the water sector.

Below, each of these three types of legal construction of rights of access is presented in turn, together with reference to supporting development discourse. A comparison is then made of their key characteristics, to identify common ground, and issues for debate.

Civil and political (CP) aspects are important in all three undermining equitable allocation. Whilst the focus of General Comment 15 is on extending individual access to domestic water supply, it is frequently at the water source that fundamental competition for water resources is played out. More attention should, therefore, particularly be paid to 'upstream' processes of assessment and grant of rights, including permissions for abstraction or diversion from water sources 'in bulk'.

1. Right to water – as a human right

The formulation of the right to water as an ESC right represents a double challenge. As the President of the World Bank has recently commented, to some any talk of 'rights' is inflammatory. Even among development practitioners, there is widely differing familiarity with, and use of, rights discourse. Further, despite the 'indivisibility' of human rights in principle, and the ratification by many States on paper of the two international covenants on ESC rights and CP rights, the reality is that ESC rights have yet to win an equivalent degree of recognition as that attained by CP rights.

General Comment no. 15 interprets Articles 11 and 12 of the International Covenant on Economic and Social Rights (ICESCR) referring, respectively, to the right to an adequate standard of living and the highest attainable standard of health. Consistent with this, the right to water as so interpreted applies primarily to water of acceptable quality 'for personal and domestic uses' – in effect a focus on water supply and sanitation (WSS). The need for access to water for farming and other productive uses is referred to, but, whilst 'water is required for a range of different purposes', to realise many other rights, e.g. to secure livelihoods … 'nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses'.

Integrating the obligation under ICESCR Article 2, the General Comment provides for 'progressive realization' of the right, acknowledging 'constraints due to the limits of available resources'. Obligations with immediate effect are to take steps *towards* full realization – and to guarantee non-discrimination. It also refers to a 'special responsibility' on 'the economically developed States parties' to assist the 'poorer developing States' e.g. by 'provision of financial and technical assistance and necessary aid'.

Some sceptics of the human right seem to have misinterpreted it as a right to free water, but an important feature is 'economic accessibility' of water and water services, defined as 'affordable'.

Publication of the General Comment was timed for the sector's biggest international event, the *World Water Forum*, most recently held in March 2003 in Kyoto. The World Health Organisation was among supporters of this innovation, on the basis that, by constituting a human right, governments would better target resources to those lacking WSS facilities and those least served would be more able to claim them: 'a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies of development' (as stated in the WHO publication at the Forum).

The human right to water also forms a central plank of advocacy by non-governmental organisations for extension of improved WSS services in developing countries. The international NGO, *WaterAid*, has recently created, with partners, a special website

on the Right to Water in which it states that: '…recognising water as a human right' is 'a further tool for citizens and states to use to ensure that there is universal enjoyment of the right to water. This does not mean that overnight all people will gain access to water' or that 'the other routes currently being used to access water should cease; the right to water is simply a further tool' which 'is only powerful if governments and civil society recognise and publicise the right'.

According to a recent study (COHRE, 2004), as yet only South Africa has matched an explicit right to water in its constitution with an explicit right in implementing legislation. COHRE does cite other domestic jurisdictions where issues of accessibility or affordability of water for domestic use are addressed in existing laws. The list of countries to-date incorporating in domestic law either explicitly a human right to water or corresponding obligations on the State to ensure its provision is at present short – but the process is still young.

That it will take considerable time is suggested by the World Bank's World Development Report 2004, 'Making Services Work for Poor People'. Its treatment of health and nutrition services is markedly different from that for drinking water and sanitation. Whereas the WDR recognises that most countries have constitutions that express some commitment to universal access or rights to health care, in relation to water and sanitation there is no mention of such protection and no reference to the human right to water.

So, whilst significant variation between countries in resource availability is no doubt a major issue and governments do not want to be sued for failure to meet obligations which they consider they are presently unable to discharge, it seems that the Bank will not officially recognise a right until a critical mass of its member countries have done so.

2. Right to water – as a contractual right

A second legal means for legitimising a right to water is by contract – under contracts for supply of water services, between a service provider (public or private) and a user, or household of users. The nature of the rights (and obligations) arising depends on each contract's specific terms in the country context – including terms prescribed by regulation. A key term will generally be that the services are supplied in consideration for payment. Cost-recovery from users is seen as an essential means of financing water facilities.

Another high-profile document at Kyoto was the report by the 'World Panel on Financing Water Infrastructure'. The task of the panel of financial experts, chaired by Michel Camdessus, former Director of the International Monetary Fund, was 'to address the ways and means of attracting new financial resources' for 'Financing Water For All' (thus, at least in principle, acknowledging the importance of universality).

In the Camdessus Report there is one mention only of the human right to water. The General Comment is referred to in a preliminary section, but is clearly not seen as setting an agenda, or even a framework, for action. There is no place in the Report's more than 80 recommendations for steps of any kind relating to its realisation (e.g. monitoring of its observance). The goal is seen in terms not of a right of the poor but the 'enabling environment' in which the poor will be able to pay for their own water. The 'matrix of rights and obligations' referred to is of those contractual and legal ones 'that make up a bankable project' including 'its commercial and funding structure'. So, the 'dream' (Chairman's Foreword) of provision of pure water to all will become reality when the necessary financial mechanisms are put in place in all countries.

The Report, however, explicitly recognises limits on affordability. The 'ideal long-term aim' for WSS is 'full cost recovery from users' although in the short term grants are needed, since 'some subsidy is inevitable' for 'poor, isolated or rural communities' where 'affordability is a distant prospect'. 'Tariffs will need to rise in many cases, but the flexible and imaginative use of targeted subsidies to the truly poor will be called for to make cost recovery acceptable, affordable and so sustainable'.

Targeted subsidies may of course include cross-subsidies between those who can and those who cannot pay. An example is the recent amendment to law and practice in England, which removes the right of water companies to disconnect the supply for residential premises and other premises such as schools, children's homes, hospitals, etc. (Box 1).

Box 1: Example of the Right to Water Supply

In the words of a public official at the UK Department of Environment, Food and Rural Affairs (DEFRA) describing this provision of the Water Industry Act 1999 (amending Section 6, WIA 1991): 'The Government believes that water is essential for life and health and it cannot be right for anyone to be deprived of it simply because they cannot afford to pay their bill. The industry regulator … monitors the debt situation and, where the water companies' customer debt increases greatly, it may take this into account in setting companies' price limits. Higher price limits mean that the cost of a company's bad debt will be spread out over their whole customer base.'

If a customer is struggling to pay, s/he will continue to receive water. The requirement of payment remains, but continuance of supply is not specifically conditional on payment, i.e. the duty is 'de-coupled' from the right. So, whilst the customer's arrears of water charges is a legally enforceable debt, water companies may decide not to take court proceedings to recover it. The loss of revenue will be recuperated by other means.

In principle, therefore, the issue of payment need not be a sticking point between proponents of the General Comment and the Camdessus Report. In practice, the reality is that subsidies are costly, and complex to administer, so their use, including their 'pro-poor' targeting, remains a key issue for debate.

3. Right to water – as a property right

A third legal form for assertion of a legal claim to access to water is as a property right, increasingly a right granted by the state to holders of official permits to abstract water from a water source. Such so-called 'formalisation' schemes are already operating or are being introduced in many developing countries. A particular challenge is how these state systems take account of the diversity of existing arrangements for sharing water, including allocation rules based on custom and tradition which are common in more remote – often poorer – areas.

Formalisation has been promoted by international development agencies. For example, in the World Bank's 'Water Resources Sector Strategy: Managing and Developing Water Resources to Reduce Poverty', published just before Kyoto, four countries are cited – Brazil, Mexico, South Africa and Chile – as examples of countries pursuing formalisation where 'there has been substantial progress in recent years'. Whilst recognising that '...there is no unanimity on the concept of water [property] rights, for some see it as an unhealthy commodification of a public good' and that it is not '...simple to introduce rights-based systems for a fugitive resource in administratively weak environments with deep cultural implications', the Bank nevertheless promotes formal registration. A key objective is to provide security and certainty of legal title so that rights-holders may defend and assert their water rights vis-a-vis third parties, may trade them, and use them as collateral for raising finance. For example, the Mexican water rights regime introduced by the 1992 *Ley de Aguas Nacionales* emphasises transferability.

Others question the wisdom of applying this approach unselectively. Whilst traditional systems are not always equitable (or sustainable), nonetheless, as a leading work expresses it (Bruns & Meinzen-Dick, 2000) where states move '...to encompass these local water societies into government systems...almost inevitably, this transformation has altered locally-constituted rules of access to water, often producing state water rights that are a mere parody of the original access rules... these [formalised] rights almost always are less attuned to the particularities of place and time...'.

4. The three rights compared

Table 1 compares key characteristics of these three legal rights to water. A common preoccupation is security: under all three forms the right to water is to be legally binding and enforceable, as a legal 'guarantee' of security (though different types of security, as per the Table).

Uniquely, under the *human right* (consistent with its intended role of setting a normative framework), the availability of affordable water *for all* is explicit, a necessary condition in all cases. Contractual models and accompanying regulation may slowly be moving in that direction, but in the meantime obligations of supply will tend to be carefully delimited in many countries, with only gradual extension of services to areas yielding the lowest rates of cost recovery.

The *contractual* right of access, typically for supply to (individual) households or premises at the 'pipe-end', will depend on the (bulk) permits accorded to service providers, i.e. on the property rights regime. The latter takes effect 'upstream' ('river-end') so is in practice prior in time/space to the former (if not actually in right). This makes the position of administrators to whom assessment and registration of property claims have been delegated (e.g. in a public water rights registry) powerful – and subject to political pressure. As one commentator expresses it, the administrative processes for disposition of the new water rights '...risk being heavily biased towards those who are wealthier, better educated and politically more powerful, perhaps increasing inequity and hurting those who are poorer and more dependent on secure access to water' (Bruns, 1997).

Under the *property* rights regime, protection of the right of access for all persons requires specific regulation. For example, the reforms instituted by the 1998 National Water Act in South Africa are designed to promote 'equitable access to water', and to ensure that institutions 'have appropriate community, racial and gender representation'. These aims are, however, listed amongst eleven 'factors' to be taken into account. These cover a wide range of situations and reflect economic, social, and environmental perspectives which may be conflicting. The question arises which of the declared purposes will be most served in implementation of the Act. As noted above, the preoccupation of many formalisation schemes lies in stimulating trading in water rights – following a market model; if protection for marginalised and vulnerable groups is not

built in, their property claims are likely to receive lower priority.

General Comment 15 foresaw these difficulties. Despite its focus on WSS, it sought to place the human right to water in the wider context of water resources management. It includes the obligation on States parties to 'ensure that there is adequate access to water for subsistence farming' and the obligation on States parties to 'respect' includes refraining from 'any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation'. Indigenous peoples' access to water resources on their ancestral lands is to be protected from encroachment and unlawful pollution. States should provide resources for them to design, deliver and control their access to water.

Table 1: Comparison of Legal Forms of the Right to Water

Characteristics	Human rights (as per General Comment 15)	Contractual right (under contracts for water services)	Property right (as per typical formalisation scheme
Security	Emphasis on security of person (health & nutrition, under ICESCR Arts 11 & 12)	Emphasis on security and continuity of supply	Emphasis on security of property and its continuity, to give certainty of title
Water use(s)	Focus on personal and domestic uses of each individual user	Typically, focus on urban use (including personal and domestic uses) under individual contracts for supply to premises	Can relate to both domestic and productive uses, in urban/rural contexts; will tend to operate through bigger 'bulk' abstraction permits, to municipality, irrigation district, community group etc.
Priority	Priority of personal/domestic use above other uses	Priority between uses not addressed by individual supply contracts: instead issue of public policy for regulator in service providers' terms of reference	Existence of priority in principle depends on enabling law/ regulations and in practice mechanisms applying it, including for mediating competing claims (agricultural, industrial, urban etc.)
Location/time	Focus on pipe-end, 'downstream', but also aspires to protect access 'upstream' at 'river-end' (or borehole).	Takes effect 'downstream', at pipe-end	Takes effect 'upstream' at river-end
Economic/ social	'Water should be treated as a social and cultural good, and not primarily as an economic good'	Focus on commercial and financial aspect, but contract may also reflect social concerns e.g. through tariffs	Focus on economic and financial aspects (e.g. tradeability and 'bankability')
Payment	Not free water, but 'affordable' with freedom from arbitrary disconnection…	Not free water – subject to payment	Typically, fee for registration of rights and regular charges during permit term
Universality?	…*for all*, irrespective of race etc.	Not specifically universalised, but tariffs may be designed to provide subsidies for poor; careful targeting will be required to reach poorest.	Not specifically 'pro-poor': water users follow permit application procedure; typically, expressed aim includes recognition of existing uses (including customary).

5. Right to participate: pursuing political channels

Such management of water allocation is necessarily political. CP aspects of the human right to water are touched upon in the General Comment: 'The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water'. However, the right to participate, under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), has been fully interpreted in another General Comment, no. 25 – issued in July 1996 by the Human Rights Committee.

In General Comment 25, the connection between the right to participate and other CP rights is noted: 'Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly

and association' with 'full enjoyment and respect for the rights guaranteed in [ICCPR] articles 19, 21 and 22, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election and to advertise political ideas'. As noted, 'the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25'.

It is exercise of these CP rights which will be critical in the process towards realisation of the goal of sufficient accessible water for all. In practice, this means that water users, in seeking to assert and defend their claims (under each or all of the three legal forms), may most effectively combine different modes of action (Table 2) for a range of types of citizen action which may be pursued in the water domain.

Table 2: Political Participation and Related Citizen Action on Water Policy/Management

National	Representation or direct participation in national elected assembly/bodies	Public hearings • Engagement in national policy and planning processes such as PRSPs, sectoral planning • Lobbying for change through representational system • Open advocacy: intermediate groups supporting rights claims • Interactions with water officials
State/provincial	Representation or participation in state/provincial elected bodies	
Regional	Representation or participation at river basin level in management 'councils'	• Informal advocacy through contacts, e.g. interactions with sympathetic officials • Engagement in local governance planning e.g. on public service priorities
Local	Representation or participation in: • River management 'committees' at sub-basin level • Irrigation districts • Other associations of water users • Municipal/local elected bodies • Community groups	• Informal negotiation over entitlements to resources • Meetings between water users • Use of media and campaigning

Adapted from Moser and Norton (2001).

An innovation in many countries – noted in Box 2 – is the introduction of river basin councils and committees with openings for public participation (for example, under the EU 'Water Framework Directive'). In terms of future benefits from participation in these, much will depend on the power (alongside responsibility) which is genuinely transferred to these hydrographically-defined entities from conventional political and administrative bodies – i.e. this is a political channel with potential, but which needs to evolve if its value is to be realised in practice.

All these types of citizen action entail processes of dialogue, confrontation and negotiation, to arrive at recognition of rights – rights which may be incorporated, and by iterative process consolidated, in law.

6. Research agenda

In contexts of increasing demand and intensifying competition for water access, systems of allocation of water rights are very important, particularly 'upstream' property rights. Research is required to take stock of evolving formalisation practice. Issues for investigation include the following. How may citizen action be best applied in the water domain, particularly under property registration schemes, e.g. a first hurdle may be access to information held at 'public' registries? How is water access for poor populations and customary users being assessed and reflected in official titles – part of the wider search for equity of water allocation under formal and informal systems alike? How appropriate in relation to water is the concept of 'certainty' of title, especially in situations of increasing uncertainty caused by climatic phenomena? Land is a much less 'fugitive resource' than water, yet land registration has proved to be a complex process – and a long one. For example, in England and Wales, registration of interests in land is over a century old and national coverage is still uncompleted. An alternative 'fast-track' approach, as adopted for example in relation to water rights registration in Mexico, raises doubts as to how competing rights claims are being assessed and prioritised (if at all). On the basis that institutions and mechanisms for flexible and adaptable water resource management are needed, how is formal registration of water rights helping to meet the challenge?

Endnotes

‡   This paper was first published as an ODI Briefing Paper (July 2004).

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Appendix 1: International Human Rights Instruments

At the heart of the international human rights framework lies the International Bill of Rights. This consists of the:
- Universal Declaration on Human Rights (UDHR) (1948);
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);
- International Covenant on Civil and Political Rights (ICCPR) (1966).

Five additional treaties join these to form the core human rights treaties, each with their own monitoring body:
- International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) (1965);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984);
- Convention on the Rights of the Child (CRC) (1989);
- International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW) (1990).

There are also a range of other international human rights instruments with varying legal status, such as the Indigenous and Tribal People's Convention (1989) and the Declaration on the Right to Development (1986).

Extensive information about the international human rights framework, its instruments and monitoring bodies can be found on the website of the Office of the High Commissioner of Human Rights (http://www.ohchr.org/english/law/index.htm).

Appendix 2: Millennium Development Goals and Targets

Goal 1   **Eradicate extreme poverty and hunger**
Target 1: Halve, between 1990 and 2015, the proportion of people whose income is less than $1 a day
Target 2: Halve, between 1990 and 2015, the proportion of people who suffer from hunger

Goal 2   **Achieve universal primary education**
Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling

Goal 3   **Promote gender equality and empower women**
Target 4: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015

Goal 4   **Reduce child mortality**
Target 5: Reduce by two-thirds, between 1990 and 2015, the under-five mortality rate

Goal 5   **Improve maternal health**
Target 6: Reduce by three-quarters, between 1990 and 2015, the maternal mortality ratio

Goal 6   **Combat HIV/AIDS, malaria, and other diseases**
Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS
Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases

Goal 7   **Ensure environmental sustainability**
Target 9: Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources
Target 10: Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation
Target 11: Have achieved by 2020 a significant improvement in the lives of at least 100 million slum dwellers

Goal 8   **Develop a global partnership for development**
Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development, and poverty reduction (both nationally and internationally)
Target 13: Address the special needs of the Least Developed Countries (includes tariff- and quota-free access for Least Developed Countries' exports, enhanced program of debt relief for heavily indebted poor countries [HIPCs] and cancellation of official bilateral debt, and more generous official development assistance for countries committed to poverty reduction)
Target 14: Address the special needs of landlocked developing countries and small island developing states (through the Program of Action for the Sustainable Development of Small Island Developing States and 22nd General Assembly provisions)
Target 15: Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term
Target 16: In cooperation with developing countries, develop and implement strategies for decent and productive work for youth
Target 17: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries
Target 18: In cooperation with the private sector, make available the benefits of new technologies, especially information and communications technologies

Appendix 3: Rights in Action Publications

Many of these publications can be downloaded from our website: www.odi.org.uk/rights

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Brief Biographies of Speakers

Robert Archer
Robert Archer is the Executive Director of the International Council on Human Rights Policy in Geneva. Prior to this, he was a Policy Adviser at Christian Aid. He has degrees in philosophy and literature from Cambridge University and in African Studies from the School of Oriental and African Studies (London). Robert has taught and done research in Madagascar, and is the author of books on Madagascar and South Africa.

Andrew Bonwick
Andrew Bonwick has been working for Oxfam GB for the past 5 years and is currently their Protection Adviser. Prior to this, he worked in the field for the International Committee of the Red Cross. Andrew has an MA from Cambridge University, a Postgraduate Diploma in Law and is currently completing a Masters in Public International Law at the London School of Economics.

Lord W Brett
Bill Brett has been Director of the ILO London Office since January of 2004. He has had a long and committed career in the trade union movement and was General Secretary of the Institution of Professionals, Managers and Specialists from 1989-99. Bill was the Chairperson of the ILO Governing Body from 2002-3 and, prior to that, he was Vice-Chairperson of the same Governing Body, and Chairperson of the Workers' Group of the ILO Governing Body, holding both positions between 1993 and 2002. He has been a member of the House of Lords since 1999.

David Brown
David Brown is a Research Fellow at the Overseas Development Institute, where he is a member of the Rural Policy and Governance Group. He is a political sociologist who worked overseas for twelve years as an academic and NGO representative in West Africa. He has undertaken research and advisory work throughout the developing world. Prior to joining ODI, David lectured in development management for nine years at the University of Reading. He has written widely on social development issues, particularly in the forest sector.

Andy Carl
Andy Carl is co-founder and Director of Conciliation Resources. From 1989-94, he was Senior Programmes Coordinator for International Alert (London) and, prior to that, National Coordinator of the Central America Human Rights Committee, UK (1986-89). He has degrees in literature from the University of California at Berkeley (BA) and Trinity College, Dublin (MPhil). Andy is on the Steering Group of the Reflecting on Peace Practice project and served on the board of the Conflict, Development Peace Network's Executive Committee until 2002.

Mac Chapin
Mac Chapin is co-founder and Director of the Center for the Support of Native Lands, an organisation which assists indigenous peoples to defend their lands, natural resources and cultures. He has spent more than 35 years working with indigenous peoples, primarily in Central and South America. Mac has a degree in history from Stanford University (BA) and degrees in anthropology from the University of Arizona (MA, PhD).

Christine Chinkin
Christine Chinkin is Professor of International Law at the London School of Economics and an Overseas Affiliated Faculty member at the University of Michigan School of Law. She is the author of numerous articles on international law, dispute resolution and human rights and several books, including *Gender Mainstreaming in Legal and Constitutional Affairs* (2001) and *Gender, Minorities and Indigenous Peoples* (with F. Banda) (2004). Christine has been a consultant on issues of international law, women's human rights, trafficking and post-conflict reconstruction with the Asian Development Bank and the UN.

Mandeep Dhaliwal
Mandeep Dhaliwal is a Programme Officer in the International HIV/AIDS Alliance's Policy, Research and Good Practice Team in London. She obtained her M.D. in Canada, after which she completed her internship and residency in internal medicine. From 1994 to 2000 Mandeep undertook an extensive project with sex workers in Mumbai, India. Her experience and knowledge of medical, legal and ethical issues relating to HIV/AIDS in India have made her one of the best-known experts in this field.

Owen Davies QC
Owen Davies is joint Head of Chambers at Garden Court Chambers in London. His practice areas include public law, with challenges in fields such as human rights and the environment. In 1995 he successfully represented the World Development Movement in their challenge against the use of the UK overseas aid in Malaysia in the Pergau Dam case. Owen has published a number of articles on human rights, criminal law, law and information technology, public law, extradition, humanitarian laws of war, and German legal affairs. He teaches advocacy at the Inner Temple and seminars on judicial review as part of the Bar Continuing Education programme.

Marianne Haslegrave
Marianne Haslegrave served as a consultant for Partnerships on Sexual and Reproductive Health and the MDGs with the Millennium Project. She is also Director of the Commonwealth Medical Trust (Commat), an organisation for health professionals and their associations, working on sexual and reproductive health, medical ethics and the right to health. Marianne was a member of the UK delegation at the Fifth Asian Conference on Population in Bangkok in December 2002 and at the International Conference on Population and Development in Cairo in 1994. At the UN Special Session on HIV/AIDS, she was a member of the Commonwealth Secretariat delegation.

Bruce Lankford

Bruce Lankford is a Senior Lecturer in Natural Resources at the School of Development Studies, University of East Anglia. He has been working in agricultural water management since 1983, mainly at the irrigation system level in sub-Saharan Africa. Bruce's research interests cover livelihood, legal, institutional and basin approaches to the governance of water. In the last two years, projects have involved capacity building and institutional analysis of water user associations in Kyrgyzstan; studies of sectoral water transfer in Chennai, India; and livelihoods research and investigations related to the productivity and allocation of water in Tanzania.

John Mackinnon

John Mackinnon is a development economist who has advised on poverty reduction and poverty monitoring in a number of countries including Uganda, Rwanda and Ethiopia. He was a Research Officer at the Centre for the Study of African Economies at the University of Oxford before becoming a freelancer. Now based in London, John is currently writing a book on ethics, examining the philosophical basis for assessing the quality of people's lives.

Simon Maxwell

Simon Maxwell became Director of the Overseas Development Institute in 1997. He is an economist who worked overseas for ten years, in Kenya and India for UNDP, and in Bolivia for the UK Overseas Development Administration; and then for 16 years at the Institute of Development Studies at the University of Sussex, latterly as Programme Manager for Poverty, Food Security and the Environment. He has written widely on poverty, food security, agricultural development and aid. Simon's current research interests include global governance, economic and social rights, social exclusion and the dissolving boundary between North and South.

Andy McKay

Andy McKay is Professor of Economics and International Development at the University of Bath and was a Research Fellow in the Poverty and Public Policy Group in the Overseas Development Institute. He is also a founder member and Associate Director of the Chronic Poverty Research Centre. Andy's work at ODI focused on three main themes: poverty analysis in relation to monitoring poverty reduction strategies; inequality; and pro-poor growth.

Lyla Mehta

Lyla Mehta is a sociologist and has worked as a Research Fellow at the Institute of Development Studies, University of Sussex since 1998. She has conducted research on the dynamics of water scarcity, forced displacement and resistance to large infrastructure projects and conceptual issues around the 'public' and 'private' nature of water. Lyla has extensive field experience in India and more recently has begun research in South Africa. She is the author of *The Politics and Poetics of Water: Naturalising Scarcity in Western India* and is on the scientific steering committee of the Global Environmental Change and Human Security Project.

Katarina Tomasevski

Katarina Tomasevski is Professor of International Law and International Relations at the University of Lund, external Professor at the Centre for Africa Studies, University of Copenhagen and founder of the Right to Education Project. She was the Special Rapporteur on the right to education of the United Nations Commission on Human Rights from 1998 to 2004. Katarina has published extensively on human rights. Her most recent books are *El asalto a la educación* (2004) and *Education Denied: Costs and Remedies* (2003).

Peter Uvin

Peter Uvin is the Henry J. Leir Professor of International Humanitarian Studies and the Director of the Institute for Human Security at the Fletcher School. He holds a PhD from the Graduate School of International Studies at the University of Geneva. His books include *Human Rights and Development* (2004) and *Aiding Violence: The Development Enterprise in Rwanda* (1998). Peter has worked as a practitioner and a consultant in the field of development in many African countries (but foremost in Rwanda and Burundi) for a multitude of bilateral, and multilateral agencies and NGOs. He serves on the editorial board for Kumarian Press and the *Journal of Peacebuilding and Development*.

Anneke Van Woudenberg

Anneke Van Woudenberg joined Human Rights Watch in 2002 as the Senior Researcher on the Democratic Republic of Congo (DRC). Since 1999, she has focused on humanitarian and human rights issues in the DRC working as the Country Director for Oxfam GB during the height of the war. Anneke has provided regular briefings on the situation in the DRC to the United Nations Security Council, US Congress, the British Parliament and the European Parliament. She has written numerous reports and briefing notes on human rights in the DRC and is a regular commentator in the international press. She has a Masters Degree in International Relations from the London School of Economics.