International Human Rights

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1

Human Rights and Community Expansion

The Relevance of Human Rights to the Copenhagen Declaration on Social Development and Programme of Action

The Copenhagen Declaration on Social Development recognizes the urgent need to address profound social problems, especially poverty, unemployment and social exclusion, that affect every country and sets as the task of the governments to address both their underlying and structural causes and their distressing consequences in order to reduce uncertainty and insecurity in the life of people.. It adopts a broad view of social development, as meeting the material and spiritual needs of individuals, their families and the communities in which they live.

This can only be achieved through social and people-centred sustainable development.. As an aspect of sustainable development, there is a commitment to the protection of the environment. Social development is inextricably connected wiTheconomic development, for some of its primary goals the eradication of poverty, unemployment and social exclusion depend on it.

The Declaration identifies a number of factors that have prevented the goals of social development from being achieved: chronic hunger, malnutrition, illicit drug trade, organized crime, corruption, foreign occupation, armed conflicts, illicit arms trafficking, terrorism, intolerance, xenophobia and incitement to racial, ethnic, religious and other hatreds. Many of these factors are connected with the violation of human rights. It is therefore not surprising that the Declaration places considerable emphasis on human rights and democracy in order to achieve these goals. Indeed more than any other international declaration, with the exception of the Declaration on the Right to Development the Declaration places human rights at the centre of development. It states, for example, that democracy and transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realization of social and people-centred sustainable development.

At another point it refers to the acknowledgment that social and economic development cannot be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development.

The Declaration places particular emphasis on the eradication of poverty, and this is perhaps its closest connection with human rights. Poverty is the greatest cause of the denial of human rights. It is obvious that poor people enjoy a disproportionately small measure of economic rights such as education, health and shelter. However, they are equally unable to exercise civil and political rights, which would require not only an understanding of the dynamics of society and access to public institutions, but also confidence in themselves.

They are for the most part unable to use the legal process to vindicate their human and legal rights. Nothing destroys confidence so much as poverty. Poverty also compels people into the violation of the rights of others, particularly of their own children and women. Child labour is essential to the survival of millions of families throughout the Third World and, increasingly, so is prostitution.

Bonded labour is a direct result of poverty, and its exploitation by the well off. Poverty produces massive inequalities, and the subordination of some groups to others in circumstances that deny them their basic dignity. The first of the principles and goals enunciated in the Declaration, and a central theme of the Programme of Action, is a commitment to a political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and cultural backgrounds of people. More specifically, governments have agreed to promote democracy, human dignity, social justice and solidarity at the national, regional and international levels; ensure tolerance, non-violence, pluralism and non-discrimination, with full respect for diversity within and among nations.

They have undertaken to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, including the right to development, and to ensure that disadvantaged and vulnerable persons and groups are included in social development.. Particular mention is made of the right of self-determination of all peoples, in particular of peoples under colonial or other forms of alien domination or foreign occupation and support for indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values.

Without trying to exhaust the references to human rights in the Declaration, the last paragraph of the first Commitment is worth quoting: As suggested, reaffirm and promote all human rights, which are universal, indivisible, interdependent and interrelated, including the right to development as a universal and inalienable right and an integral part of fundamental human development, and strive to ensure that they are respected, protected and observed.

Several points about these formulations are worth noting. First, the importance of the language of rights. Repeated references to them might indicate a broad international consensus on human rights and freedoms and attest to the moral and political force of the idea of human rights or at least of its rhetoric. In recent decades the idea of respect for human rights seems to have become a driving force in international and regional policies and conduct, as in the intervention of the United Nations in the restoration of rights and democracy in Bosnia and Herzegovina, Cambodia, East Timor, Haiti and Nicaragua; or in the more specific regional mediations and interventions by the]Organization for Security and Cooperation in Europe.

Extensive references to democracy and human rights in the Declaration are evidence of the desire, if perhaps not necessarily the feasibility, of using human rights as a framework for sustainable development and solving other ailments of humankind. All of this enthusiasm and commitment to human rights must be taken with some caution, for the international human rights movement has been distinguished more by rhetoric than practice. Human rights are understood differently in different places, and the apparent consensus on rights conceals profound differences on, and even conflicts over, values and goals.

Second, the frequent invocation of rights in the different contexts in the Declaration attests to the enlarged scope of the concept and content of human rights. Rights have travelled a long distance from their origins in the emerging liberal economic orders of Europe and the United States since the seventeenth century, when the focus was on civil and political rights as the means to restrict the power of the government and enhance that of economic entrepreneurs. Their philosophical foundations have broadened, fed by various political and intellectual traditions.

A large and diverse number of groups and interests have advanced their claims in the language of rights. The first additions to the classical liberal category of rights were economic, social and cultural rights. Since then specialized instruments have dealt with the claims and rights of vulnerable groups, such as women, children, refugees, migrants, indigenous peoples and people with disabilities. More broadly, but also ambiguously, there is the right to develop-ment, and notions of the preservation of the environment are being woven into the regime of rights. There is now a rich menu of rights, perhaps too rich as some complain, and the rights do not appear to be seamless. The regime of rights guarantees democracy and participation, and the accommodation of diversity. A fundamental assumption of contemporary human rights is social justice, and thus the alleviation of poverty, which is a primary concern of the Declaration.

Social justice has also promoted the idea of equity as between men and women, between groups, and between generations. There is a considerable widening of the range of entitlements of citizens and others, transforming people from supplicants into citizens. The broadening of human rights has focused attention on the state not merely as facilitator but also as provider. The logic of social, economic and cultural rights is positive obligations of the state, necessitating an active role, to ensure basic needs of people, and thus their dignity.

It is not surprising that these developments in the concept and scope of human rights have produced controversy. Behind the seeming consensus on the formulations in the Declaration on rights and democracy lurk several disagreements. How far the apparent disagreements reflect genuine differences of values is hard to say, for there is considerable hypocrisy and posturing in the position of governments.

Human rights have become one of the frameworks for international relations, and the debates about them have become highly politicized. Having said that, it is possible to identify differences in approaches to human rights, and to their contents. These differences have been a major obstacle to a genuine consensus and the feasibility of consistent and effective international action to promote and protect human rights. The challenge to human rights of the Declaration is to achieve coherence of rights, founded on common values and understandings as to their purpose.

There are considerable advantages in using the human rights framework for social develop-ment. Despite the controversies that have prevented unified action on human rights, they seem to attract broad international support and few governments publicly condemn their values. The language of rights has the capacity to evoke a response and to provide moral and legal justification for certain forms of action. The ideology of, and claims based on, human rights have become increasingly effective ways to pressure governments and the international community. The regime of rights provides a basis for international or regional action and justifies the imposition of sanctions

and, in extreme cases, humanitarian intervention.

Human rights standards can also compensate for the weakness of international political institutions and machinery. In contradistinction to the growth of the idea and substance of rights in national systems where they followed the establishment of the apparatus of the state in the international system rights have developed with remarkable speed and are well ahead of the development of political institutions. However, that does not mean there is not sufficient authority or mechanism for their international enforcement.

The framework of rights is feasible because rights are now being defined in detailed terms and there are numerous decisions of courts and other tribunals that have elaborated the parameters of rights and their implications. They are no longer abstract formulations. Moreover, the regime of rights is now complex and multilayered, dealing with different kinds of claims and interests. It speaks to a variety of concerns, and provides doctrines as well as mechanisms for striking a balance between different claims.

Rights are a way to mobilize and empower the disadvantaged, and in many parts of the world this is their principal function. The language of rights makes people conscious of both their oppression and the possibility of change. Rights have been extraordinarily effective as a basis of networking in and across states and have demonstrated the possibility of international solidarity, particularly for women and indigenous peoples. Many non-governmental organizations justify their existence by the need to promote rights and it is the regime of rights that has enabled them to perform their promotional and investigative role, which has generally proved more effective than internal state mechanisms for accountability. It would be fair to say that the human rights regime has sustained civil society in its confrontation with the state.

Even more fundamentally, the regime of rights is crucial because it speaks in the language of entitlements. Poverty is not just a matter of a deprived economic situation; it is defined and sustained, on the part of the poor, by a sense of helplessness and dependence, and by a lack of opportunities, self-confidence and self-respect. It is increasingly being recognized that poverty can only be eradicated if the poor are given a greater share in decisions about programmes of poverty alleviation and their implementation. The language of rights makes it clear that the poor are not the subject of charity or benevolence, but are entitled to a decent standard of living and that civil and political rights are the vehicles for their participation and empowerment.

The effectiveness of the rights regime is, however, diminished by the fact that not all of them have been integrated into the international economic or financial systems, which are market oriented and primarily protect the interests of capitalists. Many types of rights are not favoured by the capitalist system. Historically only those rights have been upheld that support the interests of the dominant classes thus civil and political rights were propounded by a bourgeoisie coming into power.

Today's economic and social rights speak to the claims of the oppressed and the powerless, and the chances of their fulfilment are slim. Developments in human rights have been at the level of rhetoric and to some extent the establishment of institutions, but they have not led to the redistribution of resources or to building the economic base that favours economic justice. Although norms of the human rights regime represent a serious challenge to the international market system, and an alternative

vision, the material forces of the international market system are more powerful than the moral claims and rhetoric of human rights.

One further point needs to be made to establish the context for a rights-oriented strategy: it concerns globalization.. The Declaration correctly identifies the contradictory nature of globalization, on one hand opening up possibilities of increased economic growth, and on the other foreclosing options central to the Copenhagen aspirations, such as those of income redistribution, alleviation of poverty, employment opportunities and equity. It states that the global transformations of the world economy are profoundly changing the parameters of social develop-ment in all countries. The challenge is how to manage these processes and threats so as to enhance their benefits and mitigate their negative effects upon people.

There are grave doubts as to whether this challenge can be met successfully. The inherent tendency of economic globalization is to diminish democracy and to privilege market-oriented rights, reducing the importance and feasibility of social and solidarity rights. It is impossible to discuss the salience of the human rights strategy for the Copenhagen social development envisioned in Copenhagen without taking on board the impact of globalization and the redistributions of power that it has produced.

The Human Rights System

In order to explore the potential of the human rights framework to achieve social development, it is necessary to briefly describe the human rights system. The essential components of the system are ideology, substantive rights, functions, beneficiaries, actors, institutions, procedures and the levels at which it operates. The human rights system is rich in texts, rhetoric and institutions, but it is lacking in material resources to make rights effective. States place interests such as national security or economy, and the cultivation of international relations. Popular consciousness of rights is often dulled by ethnic conflicts or the burden of traditional values and authority.

Ideology

Surprisingly, there is no great consensus on the ideology of rights. There is substantial agreement that the purpose of human rights is to protect human dignity, but there are different views on the source of that dignity. The principal difference lies between those who seek a religious basis for that dignity, and those who seek a secular basis. There is a widespread perception that the origins of the concept of human rights lie in Western, individualist or liberal philosophy and for that reason some in the East argue that it is alien to their own cultures.

Even in the West there is criticism of the individualistic bias of human rights. There are also historical and pragmatic explanations for rights the former consisting of an analysis of the growth of classes and their relationship to the state, and the latter justifying rights in terms of fairness, stability and peace. These differences bear on the acceptance and realization of rights, but perhaps their importance has diminished with the elaboration of rights under the auspices of the United Nations. It has been possible to reach broad agreement on the scope and substance of rights, and the key international instruments have been ratified by a large number of countries adhering to differing religions and cultural traditions.

The ideology of human rights is one of the most powerful forces today largely at the level of rhetoric, but also as justification for action, particularly the collective interventions by the international community in oppressive states. The ideology of

rights and the acceptance that the international community has the overriding responsibility for their protection has been invoked to justify limits on state sovereignty, a cornerstone of the international system.

Levels: International, Regional and National

The national, regional and international levels constitute the global system of rights. Historically, the concept and practice of human rights developed in national systems. Before the establishment of the United Nations, a number of states provided for the protection of rights in their constitutions. The League of Nations and the International Labour Organization facilitated the internationalization of specific rights of workers and minorities, but it is only since the existence of the United Nations that there has been an exponential growth in international human rights law.

The United Nations Charter committed its members to the promotion and protection of human rights. The United Nations marked its entry into this area in 1948 by adopting the Universal Declaration of Human Rights since then many conventions have been negotiated and ratified by member states.

The growth of conventions and institutions at the international level was paralleled by the establishment of the European Convention of Human Rights, providing the first instance of the protection of rights at the regional level. The Convention is enforced by the European Court of Human Rights. Since then, regional systems of human rights have been established for Africa and the Americas, though there are differences in the scope of rights and the method of enforcement.

Another regional system has developed in recent years under the auspices of the OSCE, in which Canada and the United States also participate so far the progress has been in developing norms and in the method of persuasion. There are many advantages in having regional systems: for instance, they take the load off the international system, and bring the pressure of friendly, neighbouring states to bear on offending states. Equally important, they represent the consensus of the states as to the standards of government behaviour acceptable in the region. Perhaps the absence of regional systems in Asia and Pacific-Australasia is due to the lack of this regional consensus. Consequently, regional systems are uneven, wiTheurope's being the best integrated and certainly the most effective.

The third level is the national. It is the most important level for giving legal effect to human rights norms, which is done by guarantees in the constitutions and laws, and by giving effect to international or regional treaties. It is also the most important level for the enforcement of rights; most violations of rights are dealt with, at least in the first instance, in national courts or other human rights institutions. It is at this level that the key struggle for human rights is conducted and the resistance to it waged.

The different levels are being integrated through a regime of treaties that are effective at the national level but supervised at the regional or international level, and through the respect paid by national governments and judiciaries to elaborations of rights by regional or international tribunals. Nevertheless, there is a division of labour between these levels as regards the different functions of the human rights system, to which I now turn.

Functions

One of the most important functions is developing a consensus on rights and interests to be protected. This is often done by interest groups women, minorities,

migrants, corporations and so on. In recent years NGOs have played an important role in lobbying for the recognition of particular interests many norms on indigenous peoples, minorities and protection against torture owe their origin to the efforts of NGOs. Sometimes regional or international conferences have also performed this role.

Once there is a substantial consensus, the task of norm setting can be undertaken. This involves the elaboration of treaties or legislation and has historically been the role of national governments and legislatures.

However, in recent years the international system has played a crucial role. The United Nations has provided the forum for negotiating treaties on human rights. By its nature, norm setting is the responsibility of official bodies, but NGOs have also played a significant role in developing treaties or legislation.

The promotion of respect for rights consists of various activities including information on and education about human rights, and support for the institutions that uphold them. This function is the responsibility of official and non-official bodies. In many countries official human rights commissions have a special responsibility for the propagation of rights. In more authoritarian states, the primary responsibility is discharged by NGOs and social groups, including trade unions.

Closely connected to the respect for rights is mobilization of groups on the basis of rights. Claims of rights have constituted forms of protest and challenges to authority. In so far as one function of rights is the empowerment of vulnerable groups, mobilization is crucial and, since the aim of mobilization is to organize social groups and challenge authorities, human rights defenders are often harassed or even oppressed. Human rights also provide the basis for networking, nationally and internationally. Indigenous peoples and women have been particularly successful in networking, which is almost always the preoccupation of non-official bodies.

Protecting rights is the primary responsibility of the state which together with other official bodies is generally bound to respect human rights and most legal actions are directed at the state's violations of rights. Protecting rights takes various forms, ensuring that:

- There is law and order in which people can enjoy their rights;
- The police and army are trained in human rights norms, and respect and uphold people's rights;
- Institutions in the front line of securing rights, like the judiciary and human rights commissions, are independent and adequately resourced;
- There are effective sanctions against those who violate the rights of others.

The United Nations has played a limited role in protecting rights. The principal UN agency for this purpose formerly the United Nations Centre for Human Rights, now incorporated into the Office of the United Nations High Commissioner for Human Rights has had very limited resources, and had a low profile until the appointment of the current Human Rights Commissioner, Mary Robinson.

Unlike other UN agencies, it had no field offices until recently it now has over 20, supervising the protection of rights and offering technical assistance. The task that receives most attention is enforcing rights, most typically through the judicial process.

In recent years other institutions, such as ombudsmen, and human rights or equality commissions, have been established for the protection of human rights. These

institutions tend to follow less adversarial procedures than courts, and offer mediation and reconciliation. Access to these bodies is also easier, cheaper and more informal than it is to courts, and they tend to be multifunctional, with information and education being a primary responsibility. However, courts remain the final arbiters of violations, and the ultimate authorities for the interpretations of human rights provisions. Therefore the interpretation of judges and legal practitioners, who have a key role in access to the courts, and a well functioning legal system are indispensable for an effective system of enforcement of rights.

The primary institutions for the enforcement of rights are national, but in countries that are part of a regional system of human rights, regional commissions or courts can play an important, supplementary role. The role of the European Court of Human Rights is crucial in that it makes the final interpretations of the European Convention, which are binding on national governments and courts. The international system plays little role in the enforcement of rights. The first steps in international enforcement have been taken with the establishment of tribunals for war crimes in Rwanda and the former Yugoslavia, and with the imminent establishment of the permanent international tribunal as agreed in Rome three years ago.

The international system has an important, or, more accurately, a potentially important, role in the supervision of the protection and enforcement of rights. This supervision takes two forms: one is primarily political and is the responsibility of the OHCHR and the mechanisms associated with it, such as special rapporteurs for countries including Afghanistan and Cambodia, or on themes such as extrajudicial killings, disappearances and violence against women. The other form of supervision is more judicial., the task being performed by specialist, independent bodies set up under human rights treaties.

Most major treaties provide for periodic reports to these bodies; this is the principal means of supervising a state's performance of its treaty obligations. But some treaties also provide for a complaints mechanism, either at the insistence of another state or of a person who alleges that his or her rights have been violated. Even when there is a complaints procedure, the decision of the body is not strictly enforceable, although it provides a valuable opportunity for the body to elaborate the provisions of the treaty and explain the scope of rights protected by it and the permissible derogations.

This has been a particularly valuable aspect of the work of the United Nations Human Rights Committee, set up under the International Covenant on Civil and Political Rights. However, the potential of the supervisory role of the international system has yet to be realised. Until now meagre resources have been provided to the United Nations and the treaty bodies, many of whom can only meet once or twice a year for a fortnight or so and have inadequate secretariat support and virtually no follow-up machinery. This state of affairs is ample evidence of the low priority accorded to human rights by the international community, as is the fact that the international supervisory system is highly fragmented, incoherent and largely ineffective.

Supervision is also exercised at the regional level for states that are members of regional systems, and also at the national level. Some national human rights commissions may be required to produce an annual report but more often this task is performed by national and international NGOs. Of the latter, Amnesty International and Human Rights Watch are well known. It is also worth mentioning that the United States Department of State produces an annual report on the state of human rights in

other countries which is an important aspect of its foreign policy.

Actors and Institutions

The preceding subsections have given some account of the actors and institutions that form part of the human rights system. Here it is sufficient to recapitulate that actors exist at various levels and include official and unofficial bodies. There has been considerable emphasis on strengthening national institutions for the protection of rights since the World Conference on Human Rights, held in Vienna in 1993. The OHCHR has played an important role in the promotion of human rights commissions. As discussed in the upcoming subsection on Democratization: The record, considerable foreign assistance has been given for the strengthening of judicial and legal institutions.

A significant set of actors are civil society institutions, which operate nationally and internationally. The framework of human rights has provided a powerful basis for their growth and networking, and they have played an important role in popular mobilization and aggregating demand. In authoritarian states, they have kept alive the demand for democratization, and brought violations of rights to world attention. They are an important lobby for the protection of human rights, and play a significant supervisory role. They were once seen as troublemakers by governments and international agencies, but now enjoy considerable legitimacy in official circles, and are accepted as an indispensable partner in the pursuit of human rights.

Beneficiaries of Rights

The beneficiaries of rights are human beings. However, most legal systems extend human rights to corporations and other entities at least to the extent that they are capable of exercising them. It used to be that rights were traditionally restricted to citizens, and many constitutions still so restrict their scope.

International instruments are ambiguous; they speak as if rights belong to everyone., with only the political rights being restricted to citizens, but they do not seem capable of enforcing the wider view of entitlement to rights. However, an increasing number of states extend non-political rights to all residents, although some still discriminate against immigrants in civil, economic and social rights. In a globalizing world, the restriction of rights to citizens, especially when citizenship is conceived of in narrow racial or ethnic terms, is a serious limitation on people's exercise of rights.

So long as rights were attached to citizenship, there was a notion of a uniform set of rights. After the international covenants on civil and political, and on economic, social and cultural rights were adopted, available to everyone., the international community turned its attention to specific groups of people.

Conventions for the protection of vulnerable groups racial minorities, women, children, indigenous peoples and migrant workers were adopted.

For the most part, they reiterate the rights that these groups allegedly already enjoy under the two Covenants, but provide a basis for affirmative action, special policies and protective institutions, and networking. These developments were in some cases presaged in national systems for example, India, which adopted special constitutional protection of historically disadvantaged minorities.

The concern with vulnerable groups, particularly minorities, has promoted the concept of group rights. In the classical traditions of human rights, only individuals had rights; those who adhere to this approach are uncomfortable with rights of groups

and newfangled ideas such as the right to development. But the notion of group rights has assumed a particular importance in multi-ethnic societies, where it has in some cases become the organizing matrix of society.

Internationalization of Human Rights and State Sovereignty

From the perspective of the Declaration and the prospects of international action, the degree of internationalization of human rights is a significant factor. The expression internationalization of human rights refers to the process whereby human rights are encapsulated in international instruments, most of which have become binding on signatory states.

The process encompasses the elaboration of human rights, binding states to respect and enforce these rights, and setting up an international system of supervision and enforcement of the obligations of states in respect of human rights. Internationalization of rights also refers to the norms by which states conduct their relations with other states and which international organizations must follow in their work, and it is deemed to have established a new international morality. Because international human rights have been established in what passes for a consensual process, it is often assumed that they are universally valid, as opposed to, for example, democracy, where it is conceded that there is no uniform, universal form.

The result is that states may be more willing to intervene to promote or protect rights than to support democracy or criticize political systems that look authoritarian.

The process has resulted in the translation into international instruments of human rights originally developed in national systems and adopted in several state constitutions. The inscription of these rights in international instruments has expanded the scope of the operation of human rights, bringing an important change in the character and purpose of international law and making individuals and their rights its central concern.

The manner in which a state treated its citizens used to be regarded as an internal affair; it was no business of other states or international organizations. The concept of state sovereignty provided a shield for states against external intervention and even external comment. State sovereignty and non-intervention in the domestic affairs of a state are still the cornerstone of the international order under the United Nations Charter.

But the notion of what is domestic has changed under the Charter's imperative to promote and protect human rights. International instruments have placed special responsibilities on the state with regard to minorities and indigenous peoples, and other vulnerable communities or groups. This change in international law has been reinforced by international and regional instruments, which have placed obligations on states to respect human rights and to account to the international community for the performance of this responsibility.

A number of institutions and procedures have been established since the United Nations was founded to address the question of the violation of human rights by a state. The right of states, regional organizations and the international community to criticize states that violate the human rights of their nationals is increasingly recognized. The eruption of civil wars, often centring on ethnic conflicts, has increased the involvement of the international community in the affairs of states; this involvement

is most dramatically manifested in humanitarian intervention, but also takes the form of mediation and conciliation, strengthening national capacity for the promotion of and respect for human rights, monitoring the observance of treaty obligations, and imposing sanctions.

The lack of immunity for heads of state for torture and similar crimes, and the establishment of an international criminal court, reinforces this trend.

However, it is important to note that this qualification on state sovereignty is not universally accepted. A number of states, among them those that have been victims of imperialism, argue that state sovereignty and a strong state is essential for the protection of the rights of citizens. Foremost among the proponents of this view is China. Sometimes this pragmatic argument is combined with a doctrinal view of state sovereignty, drawing its inspiration from pre-UN days. Russia has, for example, tried to fend off criticism of its conduct in unleashing a brutal war on the Chechens on the grounds that what it does to its own citizens is its own business, squarely within its sovereignty.

The Association of South-East Asian Nations refused to condemn Indonesia for the atrocities that its troops perpetrated in East Timor. The resistance of states to the notion that human rights anywhere is a matter of international concern, justifying international action, is a serious impediment to the enforcement of human rights.

It prevents speedy remedial action by or through the United Nations Security Council. Sanctions or interventions follow only upon brutal repression of groups, resulting in great loss of life. An international consensus on the grounds and modalities for intervention is necessary to prevent extreme violations of human rights. Hesitation about a forthright commitment to the role of the international community in the enjoyment of rights, particularly humanitarian intervention, is no doubt induced by anxieties about the hegemonic power of some states, and the fear that interventions will be selective to serve the interests of powerful countries like the United States.

The Human Rights Industry

Despite the complex structure of the human rights system, those involved in the propagation and promotion of human rights form a small group. At the unofficial level, there are a handful of international NGOs that dominate the scene, enjoy a favoured status with the United Nations and receive most of the media publicity. National NGOs are frequently dependent on them as interlocutors for fundraising and for guidance on tactics and organization.

There are also a small number of Western foundations that sustain this movement and thus exercise a disproportionate influence on the orientation and even the possibility of the human rights movement and a small number of official international, regional and national organizations with human rights mandates.

There is a considerable circulation of personnel between these NGOs, foundations and organizations, and a strong bonding. The term human rights industry is often used, pejoratively, to refer to the self-interest of the aforementioned groups and the way they organize the production, dissemination and implementation of rights. It suggests that their primary commitment is to their own organizations and their dominance of the system, not the protection of rights.

There is no need to buy into all of this cynicism, but there is little doubt that the human rights movement has become highly bureaucratized, hierarchical, even narrow.

The industry having become highly legalistic due to the proliferation of rights, and the mushrooming of the jurisprudence of courts, tribunals and committees, the leadership has passed to lawyers, who for the most part are less concerned with mobilizing mass social movements around rights than with advocacy and lobbying.

The framework of human rights will serve the agenda of the Social Summit only if it is carried to the people, if they believe that their own oppression is clearly linked to the violation of rights, and if they are organized to claim their rights and to base their agenda and organization on them. It is ironic that the people in whose name the legitimacy of rights is claimed are for the most part isolated from participation in human rights movements.

Differences and Controversies over Human Rights

Early differences surrounded the relative claims of civil/political and economic/social rights, and led to their bifurcation and separation into two covenants. The water that has since flowed under the bridge has done little to dilute the opposition of the United States to economic and social rights.

At the same time, many governments in Africa and Asia justify their resistance to civil and political rights on the grounds that they are less important and urgent than economic and social rights. The separation does little to strengthen arguments for the indivisibility of rights and freedoms, or for the equal attention of the world community to them. It laid the foundation for continuing controversy about priorities, sequence and legitimacy of rights. Since then other controversies have come to the fore.

Communicator Change to Rights

The statement in the Declaration, which proclaims rights as universal, indivisible, interdependent and interrelated., is now the official United Nations view of human rights. Powerful cultural and intellectual arguments have been marshalled against this proposition.

The very approach, which gives primacy to human rights, is being contested. Various government leaders in Africa and Asia claim that the traditions of their societies place, and have always placed, special importance on duties, as opposed to the Western preoccupation with rights.

The same emphasis, it is said, is explicit in all the world's major religious and spiritual beliefs. Variations of this argument are espoused by communications in Western countries; they favour social organization and engagement on the basis of responsibilities, not rights to which some communicators attribute many ills of contemporary society.

The argument that rights promote individualism, selfishness and litigiousness, and undermine the cohesion of the community, brings these two groups together. Although these groups seriously misunderstand the nature and dynamics of rights, which are increasingly concerned with peace and justice, and underrate the extent to which the regime of rights incorporates notions of responsibility and the collective good, their opposition to human rights can undermine the goals reflected by human rights.

Cultural Relativist Challenge to Human Rights: Asian Values

Closely connected to this approach is an even more formidable objection to the idea

of universal human rights the objection of cultural relativism. The essence of this argument is that human rights are based on culture and, since cultural values vary, there cannot be any universal human rights.

A version of this approach that has received a great deal of public attention is what has been called Asian values.. The strongest proponents of this approach are a few leaders in Southeast Asia, who argue that the values of Asian, particularly Confucian, culture have provided political stability and economic development, and that these values are oriented to the community. They claim that Asian values emphasize harmony, unlike the confrontation that arises from the exercise of rights.

These leaders were able to persuade Asian governments assembled in Bangkok in April 1993 prior to the World Conference on Human Rights in Vienna to endorse a declaration that is often taken to represent the Asian view of rights, although it did not support all doctrines connected with Asian values.

Once one gets past the ritualistic homage to human rights, there are four major purposes of the 1993 declaration made in Bangkok encompassed by the overarching objective of placing the question of rights within an international relations framework:

- To emphasize the rights of states. It reaffirms the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states and the importance of the right to development, which the proponents of Asian values see as premised on the sovereignty of states.
- To condemn practices associated with the West and the imbalance in the world system. The references to colonialism and apartheid are clearly directed at the West. Asian states such as China, Indonesia or Myanmar with colonies or other forms of foreign occupation, are fully absolved of any wrongdoing. The 1993 declaration deplores Any attempt to use human rights as a conditionality for extending development assistance or as an instrument of political pressure. The West is also targeted indirectly for creating an unjust international economic order and, presumably, poverty, which are the primary causes of the violation of rights.
- To establish that the state is the appropriate framework for the definition and enforcement of rights. The clearest statement appears in paragraph 9, which recognizes that states have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms., and that remedies must be sought and provided primarily through such mechanisms and procedures.
- To establish a framework for the analysis of rights themselves. On one hand, it suggests that, all the talk of universality and indivisibility not with standing, rights are to be understood in the context of national or regional particularities and various historical, cultural and religious backgrounds, and condemns the imposition of incompatible standards.. On the other hand, it draws attention to the contribution Asian states can make to the World Conference with their diverse and rich cultures and traditions. Second, it hints at the priority of economic development for the enjoyment of rights, and states that economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights.

There is little evidence that Asian economic success is due to family or community structures or to any other aspect of Asian values. Instead it is the resources and structures of the state that have played a decisive role in private accumulation and production.

Those of us who live in the more economically successful parts of Asia are not struck by the cohesion of the community, or by the care that the community or family provides, or by benevolent governments, or by a public disdain for democracy. Instead we notice the displacement of the community by the pretensions and practices of the state. Far from promoting reconciliation and consensus, the state punishes its critics, suppresses the freedom of expression without which dialogue is not possible and relies on armed forces rather than persuasion. The doctrine of Asian values thrives on the perception of those who are perched on the higher reaches of the state and the market.

The 1993 NGO Declaration on Human Rights may be contrasted with a statement issued at the same time by Asian NGOs in Bangkok, which was subsequently elaborated in the Asian Human Rights Charter. First, the NGOs emphasize the international provenance of rights and contend that, since rights are universal in concern and value, they override national sovereignty. They state: We are entitled to join hands in solidarity to protect human rights worldwide. International solidarity transcends the national order, to refute claims of State sovereignty and non-interference in the internal affairs of State.. Second, the NGOs believe in the universality and indivisibility of rights.

This conclusion is drawn partly from their views on the purpose of rights the promotion of human and humane development and peace. Development should be informed by rights and democracy so as to ensure a harmonious relationship between humanity and the natural environment.. NGOs strongly support democratization at national and international levels, and favour a broad meaning of self-determination in the national context. For this and other reasons, they deplore the increasing militarization through the region., which is incompatible with peace and human rights. Like the states, the NGOs see a relationship between rights and culture, but they see cultures enriching our experiences and understanding of rights, producing a cosmopolitan and hence truly universal view of rights, rather than retreating behind the barricades of relativism.

They see the empowerment of people as a function of rights, particularly the vulnerable groups, including indigenous peoples, whose right to self-determination has been systematically denied; women; children, whose welfare should be a paramount concern of every state, regardless of considerations of state capacity and security; internally displaced people and refugees, whose rights are violated as a direct result of militarization and armed conflict.; and peasants and workers, who all too often endure the worst cases of human rights abuses in the region.

The Fundamentalist Challenge

Religion occupies an ambiguous position in relation to human rights. Some people claim that it constitutes the foundation of rights and that without the religious notion of the sacredness of the individual, there cannot be a concept of inalienable human rights. Others, preferring a secular and humanistic justification for rights, attribute the violation of rights to religious beliefs and indeed there is much historical evidence that religions have acquiesced to or justified slavery, massacres, intolerance and other forms of oppression. In contemporary times, a fundamental challenge to human rights

comes from fundamentalists of all kinds, who deny the equality of all human beings and support many practices that violate principles, norms and procedures of human rights.

This is most obvious in the case of Muslim fundamentalists., who have based the organization and laws of their states on Islamic principles. A number of Muslim states, which have ratified international human rights conventions, have entered blanket reservations that subordinate these conventions to religious teachings.

However, a number of Islamic scholars and Islamic organizations have used religious texts for interpretations that make Islam compatible with human rights, and have employed that compatibility to mobilize support for human rights. But it is at the ideological level that religions have posed the major challenge to human rights.

Like cultural relativism, religion juxtaposes an alternative normative framework for the organization of society and authority.

Cultural and religious relativism rules out both common action and the criticism of the mores and practices of a society by reference to standards external to the society; and hence the project of universal rights. This approach has a static and unjustified view of culture and ignores the commonality between and the interaction of cultures.

It misunderstands the purpose of contemporary human rights, which it conceives of as the ideology underpinning privilege and hierarchy instead of promoting change. But it does respond to a sense on the part of many people in poorer regions of the world of an economic and intellectual hegemony of stronger states, and of their own marginalization.

It is essential to engage with rather than dismiss cultural and religious relativism if human rights are to provide a common framework of interaction and policy, even though many more people in poorer countries are attracted to the egalitarian and redistributive dimensions of human rights, on which the Copenhagen Declaration builds its programme of action.

Identity Politics

The United Nations version of human rights as universal and indivisible has come under attack from what has been called identity politics.. Identity politics are an attack on what is assumed to be the mores of the dominant group in society, masquerading as the universal. The attack has come from ethnic as well as social minorities, such as women and homosexuals.

Women point to many aspects of the regime of rights that merely reflect patriarchy and the interests of men, and homosexuals argue that many of the values of society are grounded in a particular view of sexuality that ignores their own orientation. The recognition of differences of this kind is not necessarily a challenge to the orthodox view of human rights, and indeed the rights of women and homosexuals can be, and in many jurisdictions have been, accommodated within that view.

However, there is one version of the recognition of difference that does not sit so comfortably with that orthodox view, and it has to some extent inspired international conventions on the rights of indigenous peoples. It has also gained some currency in Canada and is particularly associated with the writings of Kymlicka and Taylor.

Their arguments start from the premise of the autonomy and authenticity of the individual under liberal theory. Liberalism regards the individual as the centre of

society. There are two aspects of individualism that seem to deny special measures for minorities.

The first is the equality of all individuals, or at least of all citizens, who must be equal bearers of rights and obligations under the law or, at least in the public sphere, must meet as equals. The second aspect is that, in order for the individual to find his or her authenticity and exercise his or her autonomy, the public sphere should be neutral in terms of values, culture and religion. Kymlicka and Taylor challenge the conclusion that is drawn from the liberal premise of the centrality of the individual. They argue that individuals do not develop their values or identity in isolation from others, but in association with them.

Taylor contrasts the ideal of equality with the politics of difference, based on the modern notion of identity:

- With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognise is the unique identity of this or that individual or group, their distinctiveness from every one else. The idea is that it is precisely this distinctiveness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of identity.

Kymlicka considers that culture is absolutely essential to the feeling of belonging and participation, and that is the most important of all bearings that a person needs to negotiate his or her way through life. He says, Cultural membership affects our very sense of personal identity and capacity.. The authenticity of one's culture cannot be replaced by other cultures, even if one is given the opportunity to learn its language and medium.

The broader position taken by Kymlicka has been influential and controversial. He regards culture as the most important defining feature of a community; he assumes a consensus within the community on the values of the community; he regards culture as unchanging; and he seems to believe in conflicts between cultures. In all these assumptions he is wrong.

There are serious implications of recognizing the isolation of communities and entrenching their cultures in this way. What justifies discrimination against other cultures that are implicit in this approach? How do we define culture? Can we say that the cultures of Hindus and Muslims are different and antagonistic, when so many customs, habits and much of history unite them, and give them a common identity? Nor does Kymlicka's model acknowledge multiple identities that are so characteristic of the contemporary period. It would seem better to build on this overlapping of identities and values than to foster separation and antagonism, which are the inevitable result of Kymlicka's approach.

Indivisible and Interdependent

Nor can it be said that rights are indivisible and interdependent, except as a rhetorical device. As the scope of rights and freedoms has expanded, the tensions and even contradictions between different sets of rights or at least the tensions surrounding the achievement thereof have become obvious.

These tensions do not arise only between civil and political rights, on one hand, and economic, social and cultural rights, such as between the right to private property

and the right to education or shelter, on the other. They also arise within each set of rights, for example the tension between the freedom of expression and the protection against hate speech or incitement to war.

Nor must we ignore the varying interests, national and corporate, that are served by different rights. There is no agreement among scholars on the effect of civil and political rights on economic development, or vice versa. This has cast doubt on the interdependence of the two sets of rights. A simplistic or high-minded approach that ignores these tensions and contradictions is unlikely to produce an effective policy on human rights that has the capacity to reconcile the various goals of social development.

Search for Consensus

Such agreement as there is has been secured through a variety of compromises. Sometimes it is done by putting together seemingly incompatible claims and propositions. A version of this strategy appears in the Declaration where the commitment to human rights is bracketed with full respect for the various religious and ethical values and cultural backgrounds of people. Another strategy is to pair the traditional bundle of rights with the right to development. This strategy was endorsed at the 1993 World Conference on Human Rights, where the West withdrew its objections to the right to development in return for the acceptance by Asian states of the hallowed formula of universal, indivisible, and interdependent.

At an earlier stage, the right to self-determination played a similar role in the rapprochement of liberal rights and decolonization. It now plays a somewhat different role, as the foundation for democracy. The right to development, which can also be central to the Copenhagen aspirations, is still problematic, conceptually and practically. Attempts to reconcile different approaches and interests have been made by scholars, who emphasize the common values of different cultures and religions, and attempt a synthesis where values differ. It is clear that, despite the formulations in the Declaration and these efforts, there is no effective consensus on human rights and democracy that can be counted on to underpin the strategy of the Declaration.

Democracy

The Right to Democracy: The Legal Foundations

One of the great achievements of the United Nations in the field of human rights was to bring colonial empires to an end. The primary foundation for its work was the principle of self-determination. Both the Covenants contain the right of all peoples to self-determination by virtue of which. They freely determine their political status and freely pursue their economic, social and cultural development.

Despite this broad promise, self-determination did not lead to democracy; it protected against foreign, but not domestic, tyranny. Once colonial rule ended, state sovereignty trumped democracy. However, in recent years self-determination has been revived as a principle for the internal organization of a state based on the right of a people to choose their form of government and to elect and participate in it. Self-determination has been linked to article 25 of the ICCPR.

This article guarantees all citizens, without discrimination, three kinds of rights that are important for the Copenhagen agenda:

- The right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives;

- To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors,
- To have access, on general terms of equality, to public service in [their] country.

The basis of this right was stated more forthrightly in the Universal Declaration of Human Rights: the will of the people shall be the basis of the authority of governments.. The ICCPR also contains a number of rights that are essential to democratic politics, such as freedom of expression, the right of assembly, the right of association, freedom of belief and conscience, and the protection of the rule of law.

Article 25 was not always considered the basis of democracy. The word democracy itself is not used. There is no reference to pluralism, which is deemed to be an essential attribute of democracy. It has been argued that elections under single party systems could satisfy the requirements of the object. In any case, even free elections should not be equated with democracy, which also includes notions of continuing accountability, the rule of law and respect for human rights, especially those of minorities.

However, with the collapse of the Soviet Union it has been possible to read a broader meaning into the object. But it needs to be emphasized that, while today's interpretation favours the broader view, it does not justify intervention by the international community to enforce democracy on a recalcitrant state.

Regional and bilateral sanctions can be imposed if a state's conduct in denying democracy is strongly disapproved of. In combination with regional declarations, it has also been used to require a degree of democratization as a precondition of the membership of an organization. One may compare this approach with that in Asia, where ASEAN clearly repudiated democracy as a criterion of membership when it welcomed Myanmar and Viet Nam to its ranks.

Rights of Minorities to Political Participation

The orientation towards democracy has been reinforced by the favourable development of the rights of minorities from the low point of the ICCPR, which only grudgingly recognized the existence of linguistic, religious and cultural minorities and imposed no positive obligations on the state towards them. When the United Nations began work on an international regime of rights, it emphasized individual rights and carefully avoided giving rights, particularly political rights, to groups. There are trends now, however, towards a greater recognition of cultural and ethnic bases of autonomy.

Article 27 of the ICCPR, until recently the principal United Nations provision on minorities, was drafted to exclude collective rights and was narrowly interpreted. However, in recent years the United Nations Human Rights Committee has interpreted the article in a more positive way, using it to develop collective rights of minorities., including a measure of autonomy, and some positive obligations on the states.

In a series of decisions, the Committee has interpreted the article as a basis for collective rights as a basis for the preservation of the culture and way of life of a minority group, and as a basis for protecting and developing traditional ways of life. Efforts have also been made by that Committee and others to interpret the right to self-determination to mean, where relevant, internal autonomy rather than secession. This broader approach is reflected in the United Nations Declaration on the Rights of

Minorities adopted by the General Assembly in 1992.

Unlike the ICCPR, it places positive obligations on the state to protect the identity of minorities and encourage conditions for the promotion of that identity. The Declaration states that persons belonging to minorities have the right to participate effectively in public life and the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live.

It does not go so far as to require autonomy for minorities, but it lays the foundation for it by recognizing community rights and the importance of identity.

Several initiatives have been taken in Europe, through the OSCE, the Council of Europe and the EU to promote the concept of autonomy and the right of minorities to political participation, although its impact is so far restricted to Europe. This is manifested both in formal declarations and, where appropriate, interventions to solve ethnic conflicts in Europe. Article 35 of the Declaration on the Human Dimension of the CSCE recognizes appropriate local or autonomous administrations as one of the possible means for the promotion of the ethnic, cultural, linguistic and religious identity of certain minorities.

The principal instrument of the Council of Europe is the Framework Convention for the Protection of National Minorities, which protects various rights of minorities, obliges the state to facilitate the enjoyment of these rights, and recognizes many rights of identity.. It obliges state parties to create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

There is no proclamation of a right to autonomy, but the exercise of some of these rights implies a measure of autonomy. The Declaration and statements of principle by the Council of Europe, although not strictly binding, have been used by the OSCE High Commissioner for Minorities and other mediating bodies as a basis for compromise between contending forces, and have thus influenced practice, in which autonomy has been a key factor.

The European Community, now EU, has also used conformity with the Declaration as a precondition for the recognition of new states in Europe. The ability of existing states to confer recognition on entities, especially break-away states, can be a powerful weapon to influence their constitutional structure.

When various republics were breaking away from the Federal Republic of Yugoslavia and the Soviet Union split up, the EC issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, although it was not applied in all cases.

Among the conditions a candidate had to satisfy before it would be recognized was that its constitution contain guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.. Entities requesting recognition were asked to submit evidence that their constitutions conformed to the guidelines and recognition was granted only if the evidence satisfied an EC constitutional tribunal set up for this. Similar principles have been used for admission to the Council of Europe and the EU.

The greater involvement of the United Nations or consortia of states in the settlement of internal conflicts has also helped to develop the concept of self-

determination as implying autonomy in appropriate circumstances, such as in Bosnia, Eastern Europe and Kosovo. However, the birth of new states, following the collapse of the communist order in the Soviet Union, Eastern Europe and the Balkans, has removed some taboo against secession, and the international community seems to be inching towards some consensus that extreme oppression of a group may justify secession.

This position has served to strengthen the internal aspect of self-determination, for a state can defeat the claim of separation if it can demonstrate that it respects political and cultural rights of minorities. A further, and far-reaching, gloss has been placed on this doctrine by the Canadian Supreme Court, which decided in 1999 that Quebec had no right under either the Canadian Constitution or international law to unilateral secession, but that if Quebec were to decide on secession through a referendum, Ottawa and provinces would have to negotiate with Quebec on future constitutional arrangements.

Such a view of self-determination has some support in certain national constitutions, indicating no more than a trend at this stage. Often constitutional provisions for autonomy are adopted during periods of social and political transformation, when an autocratic regime is overthrown or a crisis is reached in minority-majority conflicts, or there is intense international pressure. Propelled by these factors, a number of constitutions now recognize some entitlement to self-government, such as the Philippines in relation to two provinces, one for indigenous peoples and the other for a religious minority; Spain, which guarantees autonomy to three regions and invites others to negotiate with the centre for autonomy; Papua New Guinea, which authorizes provinces to negotiate with the central government for substantial devolution of power; Fiji, which recognizes the right of indigenous peoples to their own administration at the local level; and recently Ethiopia, which gives its nations, nationalities, and peoples the right to seek wide-ranging powers as states within a federation and guarantees them even the right to secession.

In the wake of the break up of the Soviet Union, the Russian Constitution of 1993 provides for extensive autonomy to its constituent parts, whether republics or autonomous areas. The Chinese Constitution entrenches the rights of ethnic minorities to substantial self-government, although in practice the dominance of the Communist Party negates their autonomy. In other instances, the constitution may authorize, but not require, the establishment of autonomous areas, with China again an interesting example, in order to provide a constitutional basis for One Country Two Systems.

Indigenous Peoples

The International Labour Organization Indigenous and Tribal Peoples Convention adopted in 1989, represented a reversal of paternalistic and assimilationist approach followed in the 1957 Indigenous and Tribal Populations Convention. Convention No. 169 recognizes the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.. It notes that their cultural and religious values, institutions and forms of traditional social control are to be preserved.

The system of land ownership and the rules for the transmission of land rights are to be protected. The Draft United Nations Declaration on the Rights of Indigenous Peoples goes even further and proclaims their right to self-determination, under which

they may freely determine their political status and freely pursue their economic, social and cultural development. The principle of self-determination gives them the right to autonomy or self-government in matters relating to their internal and local affairs., which include social, cultural and economic activities, and the right to control the entry of non-members.

It recognizes their collective rights and the right to maintain and strengthen their distinct political, economic, social and cultural characteristics. These ideas have already formed the basis of negotiations between indigenous peoples and the states in which they live, giving recognition not only to their land rights but also to forms of autonomy although African and Asian governments deny the existence of indigenous peoples in their states and the instruments have had little impact there.

Indigenous peoples, particularly in North America, also base their claims on other legal bases:

- Their inherent sovereignty, which predates colonization,
- Treaties with incoming powers.

The United Nations and the international community have shown a concern for the fate of vulnerable communities that was not envisaged in the United Nations Charter. Then the preoccupation was with decolonization, as reflected in the establishment of the Trusteeship Council.

Once a major UN department, its role has diminished. It has been suggested that the change in the emphasis of the United Nations should be registered by transforming the Trusteeship Council into a Council on Diversity, Representation and Governance, with major responsibility for minorities and indigenous peoples.

Democratization: The Record

There is no doubt that more countries enjoy democracy now than, say, a decade ago. A number of Eastern and Northern European countries turned to constitutional democracy after the collapse of communism, with considerable assistance from Western Europe and the United States. South Africa achieved a miraculous transition to democracy and a regime of rights; Mozambique put both civil war and authoritarianism behind it; and the largest African state, Nigeria, saw the end of a particularly obnoxious military regime. Northern Ireland is having an uncertain transition to peace, stability and power sharing. Even the United Kingdom, with a long and cherished tradition of parliamentary supremacy, has devolved significant power to Scotland and Wales, and has adopted a Bill of Rights.

Fiji overcame a military regime and its racist successor to achieve a constitution strong on political stability, power sharing, rights and social justice. But in general the picture is less rosy in Africa, Asia and Latin America and, even when there are elections, there is no particular commitment to pluralism, rights, transparency or accountability. Governments are headed by powerful presidents with few limitations on their power.

Constitutional limits on the number of terms that a person may be head of government are ignored or repealed. Restrictions continue on rights, often spuriously in the name of national security or public order. What is particularly depressing is that China, the only permanent member of the Security Council from Asia, Africa and Latin America, has neither democracy nor respect for rights and is a vigourous defender of its authoritarianism. Another member of the Security Council, Russia, has wreaked terrible suffering on the Chechens, committing gross violations of fundamental rights with impunity.

There has been great progress in civil and political rights at the level of constitutions and laws no modern constitution is without an elaborate bill of rights, there are increasing numbers of institutions for the promotion and protection of rights; judicial bodies have developed new doctrines and jurisprudence to strengthen rights; and there are many more meetings on rights, regionally and internationally. But experience also shows that democracy, in the narrow sense of elections and the operation of parliamentary institutions, does not ensure respect for human rights. It also often coexists with corruption, the lack of accountability and the persecution of minorities.

In the area of ethnic difference traditionally the source of great conflict, instability and oppression there has been some progress. Concepts and rules have emerged or are emerging that recognize group identity and confer collective and political rights on minorities. Several ethnic and other civil wars have been brought to an end through negotiated settlements, although many continue and cause great suffering to numerous peoples. Indeed it must be acknowledged that ethnic conflict, or what passes for ethnic conflict, is still the greatest cause of the violation of rights, political instability and oppression.

External Assistance for Democracy and Rights

It is not my purpose to draw a balance sheet of democratization. The Copenhagen Declaration on Social Development is directed importantly to international assistance and cooperation towards its goals, and I want to focus on these efforts for democratization. The end of the Cold War, which to an extent freed major powers from the need to buttress their client states and to destabilize unfriendly states, encouraged the West to invoke the international democracy norms to mount a democratization campaign.

The propping up of dictators became an embarrassment to them, and the people they had oppressed for so long felt emboldened to demand democracy and accountability. It would be wrong, however, to assume that the foreign policy interests of major powers took second place to democracy and human rights; even today foreign interests dominate their policies. Assistance has also come from private foundations and international NGOs, as well as from associations of states, such as the EU, and lately from the United Nations and other international organizations. Only a handful of states are involved in these efforts the most active being Denmark, the Netherlands, Sweden, the United Kingdom and the United States.

External involvement has taken several forms ranging from pressure and sanctions on, or incentives to, recalcitrant dictators; encouragement and support to democratic forces, particularly NGOs; to technical assistance and equipment. To a large extent, the forms of assistance have reflected the West's experience with democracy.

The development or invigouration of civil society has been a major aim, to raise public awareness of rights and entitlements, to raise a sense of responsibility, and to strengthen the capacity of civil society to put pressure on governments to adhere to public morality. Typical forms of assistance to civil society are the establishment or granting of support to NGOs, particularly women's groups; the provision of assistance to professional groups, such as the legal profession and human rights organizations; the strengthening of the media as a vehicle for public debate; and the promotion of freedom of expression and scrutiny of government. A key role is envisaged for NGOs

in the strategy of establishing or mobilizing civil society.

When a government decides to democratize, it is offered assistance To frame a national constitution consistent with a state's prerogative to devise its own constitution. These states have been encouraged to follow a participatory form of constitution making. Most new constitutions contain guarantees of human rights, provide for independent institutions and many other features of constitutionalism. Several constitutions provide for the diffusion of power, in the form of devolution or decentralization.

International assistance has focused particularly on the holding of elections, less so on the electoral system itself. Many official and private groups, local as well as international, are recruited or offer to act as election monitors to ensure the fairness of the process. For a while, democratization was equated to holding elections. It is now being recognized that, while free and periodic elections are a necessary ingredient of democracy, they are far from being sufficient. So assistance has been provided for the strengthening of institutions, particularly those of accountability, including the legislature.

Bilateral and multilateral assistance has been forthcoming for human rights commissions and similar bodies. Major programmes have been undertaken with the help of foreign aid to modernize and strengthen the legal system. This assistance has taken the form of rebuilding courts, especially in states where they were destroyed in civil war; computerizing court facilities; training judges and legal practitioners; promoting the professional association of lawyers; up-grading legal libraries; making legislation and law reports easily available; legal aid; and reform of law and procedure. This approach is motivated by the belief that the rule of law is central to the exercise of democracy, control of corruption and other abuses of power, and the protection of rights.

Fragmented Assistance for Human Rights and Democracy

The current system of assisting democratization and the protection of rights is fragmented. A considerable number of programmes have been undertaken by the]Organization for Economic Cooperation and Development countries, principally on a bilateral basis; there is some co-ordination through the EU mechanisms.

The efforts of international bodies are even more uncoordinated and lacking in direction. The principal economic institutions, the International Monetary Fund and the World Bank, have until recently claimed to be non-political and thus desisted from aiding progressive political initiatives while at the same time supporting other kinds of capitalist-oriented, political policies.

Their recent concern with good governance is connected less with democratic reform than with providing legal and economic conditions for opening markets to foreign capital. United Nations Secretary-General KofiAnnan has taken some lead in centring UN work on human rights. The OHCHR has provided some co-ordination, with the present High Commissioner attempting to play a leading role in the promotion of rights.

Of the UN agencies, the United Nations Development Programme has made the clearest commitment to mainstreaming human rights in its programmes. The more specialized agencies have reviewed their policies to reflect greater engagement with human rights, but the results so far are unimpressive.

Assessment of External Assistance to Democratization

It is too early to pronounce a verdict on external assistance to democratization since these efforts are beginning to be evaluated to determine what methods and institutions work, but some tentative conclusions can be stated. Perhaps the most important point is that external assistance can play only a facilitative role. It can use aid conditionalities to put pressure on the national government, but unless there is overwhelming local demand for democracy backed by effective institutions and popular mobilization, these external pressures are unlikely to yield lasting progress. Rights and democracy have to be struggled for. One reason that South Africa is off to such promising start is that the struggle for democracy was the people's struggle, and the politicization of civil society enables the electorate to put pressure on the government to honour the commitment to democracy and fairness. Foreign governments and international organizations cannot really play a significant role in persuading reluctant presidents to democratize that task has to be left to the people.

Within the scope of assistance that foreign donors can provide, the record is mixed. NGOs, which are the primary engine for change in the face of official resistance, have generally failed, or often have not tried, to mobilize the people. They are essentially lobbying groups, without a mass base of their own, and are excessively dependent on external donors for funding.

Thus strategies and projects that appeal to external donors are taken up by the NGOs, often without critical evaluation of their usefulness or effectiveness in the national context. They are accountable to foreign donors as part of their contractual relationship with them and therefore lay themselves open to the charge of being instruments of foreign governments. It has become fashionable to criticize NGOs for the self-interest of their staff, but there is no doubt that NGOs have made valuable contributions and attracted competent and dedicated people, and there is clearly a role for them as human rights watchdogs. However, it does mean that the mobilization functions tend to be ignored.

Nor do foreign governments keep faith with NGOs. They are more interested in working with governments, and if they have a chance to do so, tend to shift funds away from NGOs. Indeed an astute government can greatly weaken support for NGOs, and the NGOs themselves, by seeming to espouse human rights and democracy.

The limitations of elections for democratization have already been commented on. The broadening of aid to overcome the limitations of elections has had an impact, but not enough to significantly deepen democracy. The media, even where responsible and professional, have not always had the expected results. One example is the press in Kenya, which has been very critical of the president, alleging the most serious corruption and violations of rights, but it does not seem to have embarrassed him or eroded his support among those who have traditionally voted for him basically his ethnic vote. The same can be said about the press in Cambodia.

Reform of the legal system has also had mixed results. The process may have increased the professionalism of the system, but not access to courts and lawyers.

Traditional systems of dispute resolution have been downgraded and, while these are not without their own problems, they did provide easy access to the system, the system was understood by the people, and for the most part accepted by them.

Professionalization increases the costs of the system of justice; affects different groups access unequally, particularly favouring corporations that are able to hire the best lawyers; increases the time lag between the filing and hearing of cases; and makes

the system alien and intimidating to most people. Legal reform has tended to focus on changes that favour the market mechanism and the integration of the national economy into the global, which frequently affects poorer sections of the population adversely.

The context of efforts to promote democratization determines their orientation. The collapse of communism was welcomed as a triumph of liberal democracy. But many more saw it as the triumph of the market.

It is not easy to distinguish support for democracy from support for markets in the efforts of individual or collective Western states to promote rights and democracy abroad. Indeed, it can be said that the support for markets is stronger; the rationale for that support is more powerfully presented than for democracy. The IMF and the World Bank have hijacked democracy and rights through the advocacy of the narrower concept of governance., which is at the bottom of the charter of political and legal institutions for capitalism. In this way, political rights of participation and accountability are not only subordinated to the market, but are actually undermined.

Another weakness of the external support for democratization has been inadequate attention to reinforcing strengthening of economic and social rights. Democracy is often justified by the benefits it brings to the people, through political stability and economic development. Unless people see economic advantages for themselves, their enthusiasm for democracy is likely to wane; economic betterment is what confers legitimacy on a democratic order. External assistance is, of course, provided for health, water, agricultural development and so on, but it is not clearly tied to individual or group entitlements, and is often not enough to improve the lives of most people. Experience has shown that with democratization there is no automatic change for the better in the economy.

Donor-recipient relationships are always difficult, but they are particularly sensitive in the context of assistance for democracy and human rights. They involve an element of pressure, if not direct coercion, at least the coercion that comes from the recipient's knowledge that other forms of assistance by the donor may be at stake if overtures on democratization are not accepted. In some cases, of course, human rights conditionalities have been imposed by the donors.

The evidence suggests that donors who provide assistance across a range of areas are more effective in influencing the recipient's human rights and democracy policies than those who tend to focus principally on rights and democracy. Assistance in this area touches on many points that are closely connected to a state's sovereignty., the election and operation of government, the workings of the legislature, judicial reforms and modernization of the legal system. It also involves the donor's engagement with and assistance to, and sometimes management of, civil society.

Moreover, it is all too easy for the recipient to dismiss rights and democracy as foreign ideas, and to feel or feign particular irritation at the disregard of its own cultural, historical and political traditions. This active and extensive engagement of donors in the politics of the recipient state is likely to cause great tensions, and therefore the extent and modalities of external engagement need to be handled with great care and delicacy, but also firmness when appropriate.

What Makes for Success or Failure

In summary, external assistance can play a useful, but supplementary, role in promoting democracy and respect for rights. It can strengthen the status and resources

of civil organizations and state bodies committed to democratization and rights. But the role that external assistance can play is limited and contingent on a firm commitment of the people or government, or both, to democracy and rights. In the end, the establishment and deepening of democracy depends on the people and government of a state; it has to be endogenously driven to be sure of lasting success.

Social Justice: Economic, Social and Cultural Rights

The Legal Foundations

In adopting the framework of human rights, the Copenhagen Declaration, in conformity with United Nations orthodoxy, places equal importance on all human rights. But realistically, it is economic and social rights that are essential to the Copenhagen agenda. Civil and political rights are undoubtedly important in organizing demands for greater equity, and in themselves for facilitating an open and accountable society.

But the evidence that these rights also lead to economic and social development is not conclusive. So economic and social rights that directly provide housing, food, education and clothing are crucial. Unfortunately, economic and social rights are so far the Cinderella of rights; they are attacked, conceptually, for lacking the qualifications to be called rights, as the beneficiaries and providers are not easily identified, and even when identified the legal process cannot enforce rights.

They are also attacked politically, as increasing state power, and interfering with the autonomy, and assets, of individuals. Thus in so far as economic and social rights are central to the achievement of the Copenhagen agenda, considerable research and lobbying will be necessary to transform these rights into clear and enforceable targets and standards. This will require some intellectual ingenuity and political will, but that it can be done is clear from countries, such as Sri Lanka, that have been able to provide many of these rights despite a relatively poor economy.

The United Nations Charter committed its members to promote higher standards of living, full employment, and conditions of economic and social progress and development and solutions of international economic, social, health and related problems, and international cultural and educational cooperation.

The Universal Declaration of Human Rights contains a number of economic, social and cultural rights: the right to social security, and economic, social and cultural rights indispensable for the individual's dignity and the free development of the individual's personality; the right to work, free choice of employment, just and favourable conditions of work and protection against unemployment, including the right to join trade unions; the right to rest and leisure; the right to a standard of living adequate for family health and well-being, including food, clothing, housing, medical care and necessary social services; the right to education; and the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

These rights formed the core of the ICESCR, but the formulation is too broad to provide sufficient guidance on implementation and the machinery for implementation and supervision is much weaker than for the ICCPR, typified by the omission of any complaints procedure. These rights also find their way into conventions for the protection of women, children, indigenous peoples and migrant workers, and form one

of the core components of the Declaration on the Right to Development in the following expression:

- States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms shall be carried out with a view to eradicating all social injustices.

Several national constitutions require or urge the state to provide similar services, although for the most part they are mandatory only for disadvantaged groups. India and South Africa are two outstanding examples, where the obligations on the state are based on the moral and political recognition of past injustices to particular ethnic or social groups.

The recent Fiji Constitution imposes a legal obligation on the government to institute schemes for preferential policies for poorer communities and groups. Several other countries such as Australia, Canada, Malaysia and the United States, as well as Northern Ireland, also have preferential policies. However, these policies have not always helped the really disadvantaged the resources having been appropriated by the better-off in the various communities, and used for political and patronage purposes. In any case, the resources allocated for these policies are too limited to make a major impact on poverty.

The Record

These provisions have not been used to provide assistance for economic, social and cultural rights in the post-Cold War era in the way political rights in the ICCPR were seized on to promote democracy. A 1998 UNDP report notes that fifty years after the adoption of the Universal Declaration of Human Rights, one third of the developing world's people are enslaved by a poverty so complete that it denies them fundamental human rights... Nearly 12 million children die each year before their fifth birthday. More than 800 million people go hungry.. It also notes that 30 per cent of all children under five are malnourished and that 38 per cent of all adult women are illiterate. Another report observes that nearly 100 million people are homeless, and the number of those without adequate housing exceeds one billion.

It is often claimed that economic, social and cultural rights are different from other rights in that they are not justiciable and cannot be enforced in courts. State obligations under the ICESCR or national constitutions are not enforceable rights of the people. Moreover, because the ICESCR commits member states to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, some national courts have taken the view that the Covenant is not directly applicable in their states but requires national legislation.

However, the United Nations Committee on Economic, Social and Cultural Rights has declared that at least some rights in the Covenant were intended for and are capable of immediate and direct application.

Most arguments advanced about the difficulties of making social and economic rights enforceable are not persuasive, nor is it productive to think of rights only in terms of

judicial enforcement. It is more valuable to focus on the obligations of states; as has been pointed out, a state's obligation in relation to all categories of rights may be seen as involving different types of obligations that can be fulfilled variously by positive action, by refraining from acting, or by creating an environment in which rights can be achieved. There is no reason why the beneficiaries of these rights should not be involved in the planning and implementing of programmes for achieving the rights, or why their access to the appropriate institutions responsible for implementing rights should not be guaranteed.

The fact is that the non-enforceability of economic and social rights springs from the low regard in which these rights are held by dominant national and international groups. Philip Alston has pointed to the low priority given to these rights and the limited resources devoted to their implementation.

He says that denials of the most fundamental economic and social rights continue on a massive scale that affects hundreds of millions of people and offers various explanations for the neglect of economic, social and cultural rights:

- Preeminent among them was the impact of the Cold War and of the ideological struggles between communism and capitalism. This factor changed what was a rational and balanced debate between 1944 and 1947 into a struggle that encouraged the taking of extreme positions and prevented objective consideration of the key issues raised by the concept of economic and social rights.

Another reason is that the implementation of these rights requires skills and expertise that are alien to what has been termed the normative-judicial model of human rights implementation. The result is that the human rights lawyers, the diplomatic representatives, the secretariat officials and the NGO representatives who have come to dominate human rights discussions will feel distinctively ill at ease and ill-equipped to deal with many of the most pressing issues arising from a concern wiTheconomic, social and cultural rights.

Finally, the proposition that minimum core economic and social rights ought to be accorded to every individual is still automatically made subject by decision makers to an economic calculus that will often culminate in various economically compelling reasons as to why such rights simply cannot be recognised. Little attempt has been made to establish criteria for measuring the success of the progressive implementation of these rights.

However, in recent years increasing attention has been paid to economic and social rights as a result of a series of world conferences such as those on women, children and social development. The 1973 Human Rights Conference endorsed the right to development. The current United Nations Secretary-General, KofiAnnan, has tried to make human rights a core concern of the United Nations and its agencies, which has stimulated thinking about the means of mainstreaming human rights into development.

The High Commissioner for Human Rights has entered into agreements with UNDP and other agencies to promote human rights in their work. The World Food Summit of 1996, convened by the Food and Agriculture Organization of the United Nations, noted the appealingly low standards of nutrition of millions of people, particularly children and women, and the terrible consequences of malnutrition and hunger, observing that the problem was not so much the lack of food as the access to

it. The governments of the world pledged themselves to achieving food security for all and as an immediate objective to reducing the number of undernourished people to half the 1996 level by 2015. The OECD has a commitment, together with member states, to reduce the level of poverty by half by 2015.

A number of recent national constitutions have incorporated social and economic rights. National courts had already begun to develop jurisprudence facilitating litigation on these rights. Important impetus to their realization was given with the establishment of the United Nations Committee on Economic, Social and Cultural Rights in 1986, which has done valuable work to clarify and elaborate the provisions of the Covenant, and is developing a system of reporting and supervision. A number of NGOs have been formed to promote these rights.

Courts are now more willing to read ICESCR-type rights into the more justiciable provisions of the ICCPR-type rights. Thus the Indian courts have given a wide definition to the right to life. In one case the Indian Supreme Court held that the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In another case the Supreme Court explicitly used Directive Principles of State Policy to interpret the scope of the right to life giving it a broad meaning to include protection of health, provision of education, and just and humane conditions of work. A recent Indian Supreme Court decision has declared that the right to life guarantees access to medical services, especially in an emergency.

The Court said that the state cannot ignore its constitutional obligation to provide adequate medical services to preserve human life on account of financial constraints, which it must take into account in allocating funds for medical services. The Bangladesh Supreme Court has decided that the right to life is not limited to the protection of life and limb necessary for the full enjoyment of life, but also includes, among other things, the protection of the health and normal longevity of ordinary human beings. Despite these bold moves, the judiciary is neither particularly qualified nor willing to establish entitlements to economic and social benefits and, particularly in Bangladesh or India, unable to enforce judgments that do recognize social and economic rights.

The right to non-discrimination has also provided the basis for the enforcement of social and economic rights. The Canadian Supreme Court has declared that hospitals that run government schemes for health care are in breach of section 15 of the Charter of Rights if they do not provide sign interpreters for deaf patients, for lack of de facto equality.

The Court said that the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. The Court reiterated its earlier view that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15 The United Nations Human Rights Committee has declared that the rights to equality under the ICCPR extend to all rights guaranteed in the ICESCR.

National jurisprudence on economic and social rights will, in conjunction with the General Comments of the United Nations Committee on Economic, Social and Cultural Rights, help to establish or refine details of these rights, which in both the

Covenant and national laws tend to be rather general. Hopefully this clarification and standard setting will increase pressure on governments and international organizations to implement these rights.

It is partly with this view that the Committee has undertaken interpretations of key social rights; it has so far issued guidelines on the rights to housing and food, and is well advanced on the guidelines on education. In 1991 it provided an explanation of what constituted the right to adequate housing as guaranteed in article 11(1) of the Covenant. The Committee defined the right to housing as not only having a roof over one's head, but also the right to live in security, peace and dignity.

It then outlined the following features of the right:

- Legal security of tenure;
- Availability of services, materials, facilities and infrastructure;
- Affordability;
- Habitability;
- Accessibility;
- Location;
- Cultural adequacy.

In 1999 in Comment No. 12, the Committee issued its guidelines on the right to food, which, it said, is not merely a minimum package of calories, proteins and other specific nutrients.

It defined the right to adequate food as consisting of the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture; and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.

The Committee also provided useful guidance on the obligations of states for the provision of social and economic rights, and the ways in which these obligations may be discharged. The state of country's development is not an excuse for not providing these rights; a state must do what it can within its means, and must justify any lack of priority given to its legal obligations. It must also adopt appropriate development strategies for the different sectors to which these rights pertain.

Measures can be legislative, administrative or facilitative, and may include a mix of public and private initiatives. Similarly, remedies can be judicial as well as administrative. An essential step towards progressive implementation is monitoring, with reference to standards and benchmarks. The Committee has also drawn attention to the role of the international community helping states without adequate resources to ensure that their basic needs are met; this role is stipulated in article 56 of the United Nations Charter and article 23 of the Covenant.

These initiatives and developments augur well for the realization of social and economic rights. However, it must be recognized that the dominant economic force of our times globalization runs counter to them and will probably undermine them. It is therefore important to turn to the nature of globalization and to its impact on these rights.

Globalization

Globalization is a compendium of ideas, practices, institutions, directions of change and ideologies. Some of these diminish rights, others promote them, and some do both simultaneously: for example, the Internet and other forms of technology provide more opportunities for both freedom of expression and access to information, and uncover new possibilities for networking, but, at the same time, they greatly increase the influence of corporations and the opportunities for hate speech, pornography and sexual trafficking. That makes it particularly difficult to distinguish between the positive and negative consequences of globalization for rights.

However, even though they are intertwined, it may be possible to distinguish the economic processes of globalization from the more political and social processes. This chapter focuses on the negative consequences for rights, which I believe are dominant, but it would be unwise to ignore the positive potential of globalization.

The economic processes are connected with the development of national market economies and their integration globally on market principles. The market system is driven by the search for profits, which replace older values of reciprocity and social solidarity by the morality of profits.

In order to increase profits, more and more objects, which previously were communal or in other ways inalienable, are brought within the domain of the market as commodities. Historically, this has had the effect of converting commons into private property and breaking up the cohesion of communities. This is all too evident in areas where the market frontier has moved in recent decades, such as in Africa and Asia: migration to cities, the anomie of urban life, the collapse of the extended family, and the replacement of sentiment by money as the basis for human motivation. Throughout history, societies have tried to combat or moderate the natural consequences of the market. The development of trade unions and their politics and the democratization of the state have provided a counterbalance to the predatory tendencies of the market. In the West, the balance between the market and democratic politics produced the welfare state.

Global capitalism is relatively unfettered by regulations. On the contrary, it enjoys the support of powerful capitalist states, most notably of course the United States and the member countries of the EU. A number of international economic institutions especially the IMF, the World Bank and the World Trade Organization share and reinforce the ideology of global capitalism.

These states and institutions have taken it upon themselves to create the political and legal conditions for the global market they favour: removal of barriers to international trade and services, the movement of capital, the global protection of property rights, the privatization of state companies, the deregulation of business activities and the phasing out of welfare services.

All these developments have diminished the capacity of states to provide essential social services to the people. The effects of structural adjustment policies in Africa and the South Pacific, imposed by the IMF and the World Bank, have been little short of disastrous; they have reduced the access of all but the most privileged groups to education, health and nutrition. Even in Europe, where the welfare state was born, there have been severe cutbacks. In East Asia, where welfare was often provided by commercial corporations, benefits have been phased out allegedly because of the corporations inability to compete in the international economy if they have to absorb the costs of welfare.

Several of the negative social and political consequences of globalization are to do with its asymmetries. The obvious asymmetry is that between capital and labour the former may move freely, but not the latter. It is therefore possible for capitalists to move, or threaten to move, their enterprises as a way to negotiate economic concessions from the host state, or to negotiate with workers for low wages and non-unionization. Labour is at a considerable disadvantage in what is clearly an unequal situation.

Likewise, capital is entitled to national treatment wherever it chooses to go, but not migrant workers, who are subject to considerable legal and practical discrimination in host countries. Global capital relies increasingly on part-time or informal forms of labour, which means that workers have little security of employment, and that wages and rates of unionization are low. The result is also that the workforce consists increasingly of women who are more prepared, able or compelled to accept these terms.

To a significant extent, several states are also becoming captives of global capitalism. They dare not impose high taxes for fear of scaring away foreign as well as domestic capital.

In some countries there has been little attempt to enforce industrial safety standards for the same reason. In free economic zones that many countries have established to attract foreign capital, large portions of the national legal and fiscal systems are suspended. States that wish to engage with the international economic system and few think that they can afford not to have to accept complex legal and administrative regimes, granting extensive rights to foreign capital and prohibiting discrimination to support domestic entrepreneurs. The result is that these states are unable to provide basic welfare services to their people.

China's experience is a good illustration of what happens to social and economic rights when the market becomes the dominant matrix of economy. Despite its general economic backwardness, China used to ensure its people equal and decent standards of education, health and shelter.

With the spread of market practices and ideology, these services are being phased out, and becoming commodities that must be purchased on the market. The result is that basic needs are beyond the capacity of millions of people. South Africa is finding that, despite pressures from the historically disadvantaged groups for the satisfaction of basic needs and the constitutional requirements to do so its social policies are effectively governed by its commitment to engage fully with the international economic system.

Globalization and Human Rights

The effects of globalization enable us to gain fresh insights into the nature of rights. Certain kinds of rights are important for globalization property, association, independent judiciary and the rule of law. But globalization does not conceive of social and economic rights it thinks in terms of social and economic benefits as outcomes of markets, not as any kind of preconditions.

It points to various weaknesses of the regime of rights: in an age of mass migrations many rights are restricted to citizens; the human rights regime provides no redress against the violation of rights by non-state institutions, despite the overwhelming power of transnational corporations to determine our life chances; and the basic framework for the protection and enforcement of rights is still the state, while the obligations to protect human rights are international. The international system is vigourous in

elaborating norms, but lacks the jurisdictional basis and often the political will to enforce them. However, most states lack resources to protect human rights, especially economic and social rights.

Globalization has sharpened the distinction between civil and political rights, which it needs, and economic, social and cultural rights, which threaten its dominance. Clearly, rhetoric is less powerful than material forces.

Conclusion and Recommendations

Analysis

The World Summit for Social Development adopted a human rights framework as part of its strategy to eradicate poverty. The observance of human rights facilitates peaceful co-existence and consequently social and political stability. A democratic society is predicated on respect for human rights. This much is generally recognized. Somewhat more controversial is the third proposition underlying the Social Summit strategy that a society that wants to achieve social justice also has to implement social and economic rights. There is a powerful school of thought that argues that social justice is the outcome of the market economic system, and not a contrivance of the state. This school of thought, associated with globalization and the hegemony of the United States, is a principal obstacle to the implementation of social justice. But there are other obstacles too.

Although human rights norms covering key areas of human existence have been negotiated through international collaboration, the machinery for their enforcement at the international level is rudimentary and grossly under-resourced. In most states as well, the system for the enforcement of rights is highly inadequate.

Even though a majority of states profess a primary commitment to human rights, in practice their governments do not wish to encumber their diplomatic relations with the inconvenience of holding other governments accountable for human rights violations the more so if their own economy might suffer from demanding such accountability. For the most part, the so-called human rights and governance conditionalities are little more than blackmail to force states to develop and open their markets to outside investors.

At home, many governments are reluctant to rule by the logic of human rights, and their police and security forces are often implicated in serious violations of rights. Despite the ideology and rhetoric of human rights, human rights activists are looked upon as troublemakers and subjected to harassment and persecution. The truth is that human rights too often threaten powerful vested interests.

Recommendations

If human rights are to become the framework for social development, fundamental reforms in and strengthening of the human rights regime are necessary. The first and the hardest is to accept the implications of the universality of human rights. The concept of universality has been discussed largely in terms of the relevance of a common core of human rights to all societies. But it also has another dimension the responsibility of the world community to ensure that all people, wherever they might be, are guaranteed their rights. Similarly, the concept of the interdependence or indivisibility of rights has to be placed in the context of global responsibility for the promotion of rights.

The West has insisted on the indivisibility of rights because it is suspicious of many governments that have argued that civil and political rights should be postponed until there is a higher level of economic development. If the West is serious about the indivisibility of rights, then it is obliged to ensure that sufficient funds are transferred to poorer countries for the satisfaction of the basic needs of their people. However, it has so far refused to accept the logic of this position, and has shown a marked reluctance to engage in serious negotiations on the implementation of the Declaration on the Right to Development; foreign aid has fallen to 0.22 per cent of gross national product, despite the formula agreed to long ago of 0.77 per cent.

In order to make human rights the framework for social and economic policies, it is necessary to build a genuine international consensus on their value and importance which is hard to do. The more concrete the issues such as child labour, environment, terms of international trade, intellectual property rights where rights really matter, the more differences seem to divide West and the rest. Many international differences are played out in the language of rights; paradoxically this delegitimizes rights, as was the case in Kosovo and East Timor intervention became possible only when President Clinton criticized Indonesia.

Both the West and the East are guilty of double standards. Consensus requires both intellectual effort in uncovering values that unite different religions and cultural traditions, and a willingness to incorporate values that have animated non-Western societies in the international regime of rights. It also requires political will, which is harder to establish for reasons already discussed.

Mainstreaming human rights in development, which should be a special responsibility of multilateral financial and development institutions, in conjunction with state policies and initiatives, is a prerequisite of the Copenhagen Programme of Action. Mainstreaming means that the elimination of poverty should be the principal aim of development projects and, before a project is undertaken, there should be a study of human rights implications.

United Nations agencies have shown some interest in mainstreaming human rights, but it is the Bretton Woods institutions, which wield greater economic clout, that need to be persuaded of the value of social and economic rights. Consideration should be given to establishing a world development fund for social and economic rights., to be financed directly from tax revenues worldwide on specified luxury products.

Social and economic rights must be given the priority that has been denied them. Considerable research and imagination are needed to provide the practical underpinnings of economic and social rights, the modalities for enforcement, and standards and benchmarks for monitoring progress. This will require more funding for this enterprise, the establishment of networks and the commitment of governments.

Together with regional organizations, the United Nations must devote more resources to human rights work more human rights experts should be trained and recruited, more human rights missions should be organized, and more field offices of the OHCHR should be established. The international machinery for the supervision of the observance of human rights should be strengthened. All states should sign protocols that give their nationals the right of direct access to international committees and tribunals this aspect of their work has proved more fruitful than periodic reports by governments.

Furthermore, the United Nations and other international organizations should increase their capacity for dealing with civil conflicts and wars, which today are a major source of suffering and oppression. This suggests the need for better protection of minorities, and a mechanism for swift response to mass violations of rights.

The regime of human rights should be extended to cover the policies and conduct of large private economic corporations. They have power without responsibility. The human rights of millions of people depend on the policies of these corporations.

Neither the state nor the international system is likely to support the struggles of the oppressed which are essentially attacks on the present state and international systems. Therefore the revolutionary potential of rights is likely to remain dormant for the foreseeable future. Popular support for human rights will not be secured so long as poverty is not seen as a concern of the rights regime. But this in turn will not happen until the concept of rights is used to mobilize society to demand greater equity.

Unless there are pressures from civil society, in both the rich and the poor countries, for social justice and respect for human dignity, little progress will be made. A major weakness of the human rights movement has been the inability to involve the masses as subjects rather than objects of rights. In this lies the most fundamental challenge to human rights scholars and activists. The agenda of the World Summit for Social Development has little prospect for success unless there is this transformation in the regime of rights.

2

Disability and a Human Rights Approach to Development

The Social Model of Disability

As set out in more detail in the first briefing note, the social model of disability provides an understanding that is substantially different from the traditional view that disability is essentially about physical or mental deficit or abnormality. Within a social model paradigm impairment is seen as normal for any population.

What disadvantages and disables people with impairments is a complex web of discrimination made up of negative social attitudes and cultural assumptions as well as environmental barriers, including policies, laws, structures and services, which result in economic marginalisation and social exclusion. Of course, this social model analysis is not limited to disability.

It has been used to describe the experience of invalidation, inequality and injustice for all groups that face discrimination. Essentially, the social model offers an analytical framework for understanding why and how this discrimination occurs.

Why Disability is a Human Rights Issue and in Turn a Development Issue

Human rights are a twentieth century phenomenon developed in response to the atrocities of World War II. They set out an internationally accepted moral code by which the intrinsic humanity of every individual is recognised and protected.

Human rights are the fundamental, universal and indivisible principles by which every human being can claim justice and equality. As disability describes the barriers faced by people with impairments to achieving equality and justice, and because disabled people are human beings too, it is axiomatic that disability is a human rights issue. And as with all groups who face discrimination and disadvantage it is the recognition of that intrinsic humanity that is essential to reaching outcomes that result in the full implementation and protection of human rights.

As the 24th Special Session of the UN World Summit for Social Development and Beyond declared, 'The ultimate goals of development are to improve living conditions for people and to empower them to participate fully in the economic, political and social arenas.' This development must be achieved for all people. However, as has been repeatedly documented, access to full and equal participation has been denied to disabled people in almost every country, helping to create conditions that result in them being among the poorest of the poor.

At the same time, being poor is not only about being socially excluded but also makes people much more vulnerable to contracting a whole range of disabling impairments. Poverty and disability are in this sense locked in the embrace of a real

dance of death. This is made far worse in developing countries in the South, where the failure of economic and social development is characterised by widespread and seemingly intractable poverty associated with wars and civil unrest, malnutrition, poor sanitation, lack of immunisation, inadequate health care, few safety provisions and pollution. Such is the music, which gives the dancers no respite.

Human rights are indivisible and universal. Continuing to leave disabled people out of mainstream systems of development by perpetuating discrimination and exclusion violates these rights. From a human rights perspective, development programmes can, therefore, no longer make excuses for not addressing disability, particularly as many development agencies now claim to be working within an explicit human rights framework.

A Human Rights Approach to Development

Since the 1990s many multi-lateral and bilateral agencies have adopted a human rights approach to development. This approach seeks to ensure that each person is seen as having an equal right to freedom, dignity, non-discrimination and protection from the state against abuse of these rights, together with access to economic, cultural and social rights. It is argued that only by empowering all people to be able to make decisions about their lives will it be possible to reduce poverty and achieve the Millennium Development Goals.

The UK Department for International Development has been one of the leaders in developing this approach, which was set out forcefully in White Papers it produced in 1997 and 2000, and in a number of other major documents, including the 2000 target strategy paper, Realising human rights for poor people.

While there are a great many strands to DFID's approach, the main, cross-cutting principles are:

- 'Participation: enabling people to realise their rights to participate in, and access information relating to, the decision-making processes which affect their lives.
- Inclusion: building socially inclusive societies, based on the values of equality and non-discrimination, through development which promotes all human rights for all people.
- Fulfilling obligations: strengthening institutions and policies which ensure that obligations to protect and promote the realisation of all human rights are fulfilled by states and other duty bearers.'

Disabled People's Role and Status

Although disabled people are mentioned in DFID's 2000 target strategy paper on poverty, the way in which their human rights are compromised and the connection between this and poverty is not spelt out. Only by understanding disability from a social model viewpoint, that is with disability being the result of systematic discrimination rather than impairment itself, can the link be made in such a way as to establish a framework for tackling the human rights abuses and poverty which continue to blight the lives of the vast majority of disabled people in the developing world.

And, as many prominent commentators have observed, unless this is done it will

prove impossible to achieve the poverty reduction targets set out in the Millennium Development Goals. Disabled people have been fostering progressive social change by putting a human rights approach to development into practice, often many years before such an approach was adopted by international agencies.

While disabled people's organizations are keenly aware of human rights issues and/or have explicitly adopted the social model as their guiding ideal, generally the projects and organizations have developed through a more prosaic route, people simply trying to understand the oppression they experience and struggling against it at a local or national level. As is often the case, it is only through this kind of struggle that a broader and more socially transforming understanding is achieved.

Nothing about us without us

It is not surprising that different local circumstances mean there is considerable variation with respect to how a human rights approach has evolved. Nonetheless, there is one defining characteristic: all such interventions based on this approach have been controlled by disabled people themselves.

This in turn accords with a key observation made in DFID's target strategy paper that: 'Human rights provide a means of empowering all people to make decisions about their own lives rather than being the passive objects of choices made on their behalf'. For disabled people this is of particular significance since traditionally they have been seen as a group which needs to be looked after by others, not one that can act on their own behalf.

'Nothing about us without us' was the slogan promoted by Disabled Peoples' International at its founding in 1981 and has been used by disability rights activists every since. It has been particularly effective in capturing a key idea of disabled people's struggle for human rights–self determination is essential for achieving equality.

This in turn has helped to unite groups from countries throughout the world in common cause. It has, for example, informed their message to governments taking part in the UN process of elaborating a convention on protecting the rights of disabled people: that in doing this they must listen to the voice of disabled people.

Disability and Human Rights in Action

There are a considerable number of long-term projects developed by disabled people which exhibit implicitly or explicitly a human rights approach, as well as conforming to the DFID's three principles–participation, inclusion and fulfilling obligations–with regard to disabled people.

There are local organizations of disabled people who run income-generating projects such as chicken farms or crafts, operate loan schemes for small businesses, run local community based rehabilitation services and work cooperatively with local elders to raise the status of disabled people in their village and to ensure greater access and self determination.

These groups are often linked to regional and national organizations who provide them with leadership training, capacity building and the most essential information needed to take action on these rights-based activities. It is crucial that both the local and national organizations or groups do not only take part in specific income generation or CBR projects, but are also involved in:

- Ensuring that all policies and programmes that affect disabled people involve disabled people.

- Raising the status and opportunities for self-determination of disabled people both locally and nationally.
- Cooperating with the local community and thereby changing attitudes to disability.

And last, but by no means least:

- Spreading the word–telling other disabled people and the wider community that disability is a human rights issue, how to achieve those rights, giving examples of good practice and how to overcome the obstacles to inclusion and participation.

Two of these projects are briefly outlined in order to show how a human rights approach grew organically out of struggles against the systemic oppression and denial of basic human rights experienced by disabled people and the transforming power of this approach. We also consider an example of how this same approach has been applied at a higher level by disabled people seeking to build a disability dimension into Poverty Reduction Strategy Papers.

Self-Help Association of Paraplegics, Soweto, South Africa

In the 1980s black disabled people in South Africa had little chance of survival in such an inaccessible and hostile environment, let alone the chance to achieve a decent standard of living. In 1981 a group of eight disabled individuals, many of whom had been disabled in the fight against apartheid and unhappy with the prospect of being forced into institutional care, decided to set up a self help association. They wanted to enjoy the simple dignity of being in control of their own lives but realised this meant having to support themselves.

They decided to do this by opening a factory, employing only disabled people, doing sub-contract work for industry. With start-up funding from corporations and trust funds the first SHAP Centre opened in 1983, the second in 1989.

From the outset SHAP has been managed by disabled people and after the initial employment initiative, SHAP expanded its programmes to include transport, sport, education, training, advice and peer support. By doing this it has provided a liberating example to other self-help groups in South Africa who are, in differing circumstances, seeking to follow their lead. One of the crucial elements of SHAP was its economic selfsufficiency.

After an initial injection of start-up aid funding, SHAP functioned and grew as a non-profit making business. This has also set an example to many disabled people's organizations both in the South and North who, without that economic self-sufficiency, can be constrained in their self-determination by funding criteria and the objectives of aid and development funders. Within the context of a human rights approach, the SHAP example is instructive because their initial motivation was about achieving economic independence, not human rights. As Jerry Nkeli, explained: 'In the early 1980s a few of our colleagues in South Africa attended an international conference organized by Rehabilitation International.

The few people who attended that conference were quite privileged and all were from the white community. They came back with a lot of excitement. They had the theory, they knew that it is proper to reject charity and welfare, but they didn't have the numbers.

They met the self-help group in Soweto, who did not know how to philosophize, who didn't know how to contextualize their struggle, but who in a very simple way understood that they did not want charity and wanted to run their own life and who had the numbers.' In other words, the founders of SHAP had grasped the importance of self determination, a central element in the current human rights discourse, 20 years before it was taken up by the aid agencies.

The linking of the two groups of disabled people, from Soweto and those with international experience, the example of the black liberation struggle in the US and the continuing battle against apartheid was the heady mixture out of which the South African disability movement was forged. It is interesting to note that the same meeting of Rehabilitation International, which was to have such a strong impact on SHAP, also prompted the birth of Disabled Peoples' International.

In fact, over 200 disabled people returned to their own countries after that conference and set up national organizations of disabled people whose primary demand was for 'full participation and equality in our society wiThequal rights and responsibilities'. The leaders of SHAP went on to the leadership of Disabled Peoples' South Africa and then on to the world arena of disability rights, creating effective role models for disabled people everywhere.

Andhra Pradesh Rural Poverty Reduction Programme, India

A pilot programme in Andhra Pradesh for reducing poverty, which was funded mostly by the World Bank, contained a 'disability component'.

David Werner, one of the founders of the Projimo Project in Mexico, was brought in as an advisor. The work done in India bears many of the hallmarks of Projimo's participatory approach, essentially involving disabled people in leadership roles and at all stages of the process, including initial planning and the feasibility survey.

The first part of the project was extremely important, because having disabled people leading the local poverty surveys boThencouraged disabled villagers to get involved and offered empowering role models. The survey was designed around a rights-based approach and drew heavily on Paulo Freire's pedagogy of liberation, based on having people describe their world and then through a grounded participatory process arrive at ways to transform it. One of the outcomes of the survey was the setting up of disability 'sangams' at village level so that disabled people could work together to improve their situation, both socially and economically.

In the sangams disabled people are able to define their own needs, the barriers that exist and collectively take action to overcome them. They also organise demands for legal certification and entitlements. Another major goal has been getting disabled children into schools, as well as obtaining the necessary medical care, surgery and assistive devices they need.

Werner writes: 'Within the self-help disability sangams in Mahabubnagar, the interest and potential exist to improve health and rehabilitation services at the village level. Such an empowerment approach could help meet an urgent need for the most vulnerable people. It would also increase respect and opportunities for disabled people. And reduce poverty.' One of the biggest accomplishments the members say they have made is 'to be treated with respect'.

'Now people don't call us "the lame boy" or "the blind girl" but address us by our real names'. The disabled people who initiated this project are not yet fully involved in India's national disability rights agenda, but because of the size of the country and the cultural and political scene, the disability movement has not been able to coordinate nationally with any real coherence. They have, however, had considerable influence on the regional and local environments. In 2003, the World Bank agreed further to support the APRPRP with a credit of US$150 million. Judith Heumann, the World Bank's Advisor on Disability and Development, said: 'The inclusion of the disability community into this project will enable us to reach a group from the poorest of the poor, who are usually forgotten. The efforts of this project should be duplicated in other states'.

DPOs Engage in Formulating Poverty Reduction Strategy Papers

Project work on disability and development remains important, but over the last decade or so, an increasing proportion of aid for the poorest countries has been delivered through World Bank/International Monetary Fund budget support programmes built around Poverty Reduction Strategy Papers and related aid instruments. On the whole, disability and other cross-cutting issues have fared badly in this new aid regime.

On the face of it this may appear somewhat surprising, as a key element in the process of putting together a PRSP is supposed to be consultation with civil society as well as the development of propoor growth strategies. With disabled people clearly being both part of civil society and among the poorest of the poor it might be expected that they would be a key constituency.

However, a recent World Bank survey concluded that the coverage of disability within PRSPs was limited and a '...patchwork of fragmented and uncoordinated interventions'. It was also clear that in PRSPs most references that there are to disability are about social protection, not social inclusion. Because development and spending plans are set out in the PRSPs, if disability fails to get included as a mainstreamed consideration it is likely that the needs of disabled people will continue not to be met. This is why it is so vital that DPOs have a strong voice at every stage of the consultation process.

If this was to happen anywhere in the developing world, Uganda was the most likely country, as it has perhaps one of the strongest disability movements and disabled people are integrated at all levels of government. Nonetheless, it was not until the third PRSP that this was to happen and then not without a concerted political effort by disabled people. The National Union of Disabled Persons of Uganda is the national umbrella Organization for Ugandan DPOs. It was set up in 1987 to give a unified voice to disabled people. It now has almost 70 member groups and works closely with national, regional and local government.

The Organization promotes the social model and sees disability as a human rights issue. The alleviation of poverty is a principle goal of NUDIPU and this is why they lobbied the government so strenuously to become included in developing the Poverty Eradication Action Plan, as the PRSP is known in Uganda. Supported by the Danish Council of Organizations of Disabled People and Action on Disability and Development, NUDIPU developed a detailed submission, the result of research and a broadbased consultation with member groups and disabled people.

But, despite having a nominal place at the table, NUDIPU had all kinds of problems. Technical capacity was a major one, as the PRSP process is extraordinarily complex. There was also pressure from donors and government to get the PRSP settled quickly so that the aid would flow. 'As a result, the PEAP process, in which civil society had been meaningfully involved, became constricted into a six month PRSP process from which they found themselves, to some extent, squeezed out'. Many people also considered that the government, as well as the World Bank and the IMF, were using DPO involvement as a way of legitimising the PRSP process, rather than out of any genuine interest in the rights or needs of disabled people.

Conclusion

A great many more examples could be given of DPOs involved in innovative, human-rights based projects of empowerment and poverty alleviation. Most of these have undoubtedly made a considerable difference to the disabled people they have touched, the problem is that overall they have not succeeded in touching the vast majority who continue to be actively and passively excluded from the mainstream of society. As David Werner writes of the poverty reduction project in Andhra Pradesh: 'Clearly, to substantially reduce poverty in India–or anywhere else–will require transformation of unjust socioeconomic and political structures that go far beyond the village-based health and rehabilitation measures.

But in the meantime, such measures can help the most vulnerable villagers cope a bit more successfully. By coming together to solve their problems in time a critical mass of "people who care for one another as equals" will be reached so that, collectively, they can begin to demand and work for more far-reaching change.' In theory, the PRSP process should be one way to help bring about this 'far-reaching change' as it provides the opportunity for a more democratic formulation of governments' economic policies and a greater opportunity to get disability on the mainstream development agenda. However, as yet this has not happened.

The example of Uganda points to the need for more sustained donor capacity-building support for DPOs so they can take part on equal terms, consult and inform their members and hold their governments to account. It also points to a need for donors and governments to take more seriously as well as genuinely value the contribution from civil society organizations. Donors especially must be more assiduous in discovering methods within the new aid paradigm to encourage governments to do this. Unless this happens, a human rights approach to development will be, as many critics have claimed it is, little more than empty rhetoric to deflect public attention from the resource-draining, poverty engendering political economy of globalisation.

3

Human Rights and the Social Construction of Sovereignty

The principle of sovereignty is widely considered the grundnorm of international society, and evolving human rights norms are seen as a compensatory international regime, the purpose of which is limit the inhumane consequences of the sovereign order. The principle of sovereignty grants states supreme authority within their territorial borders and denies the existence of any higher authority beyond those borders. Human rights norms, in contrast, place limits on how states can treat their peoples, compromising sovereignty in the name of universal standards of legitimate state conduct. Sovereignty and human rights are thus considered two separate regimes, that stand in a zero-sum relationship—the stronger the principle of sovereignty, the weaker norms of human rights, and vice versa.

There is a fundamental tension, Hedley Bull argues, between the principles that sustain international order—foremost among which is the mutual recognition of sovereignty—and the demands of human justice articulated in human rights norms. 'The basic compact of coexistence between states, expressed in the exchange of recognition of sovereign jurisdictions, implies a conspiracy of silence entered into by governments about the rights and duties of their respective citizens.'

It is this silence, and the atrocities it masks and permits, that have fuelled calls for the qualifying of sovereignty, for the building of a 'global consensus that state sovereignty is conditional upon the protection of at least basic human rights ...' This object takes issue with these views about the institution of sovereignty and the international human rights regime. Treating these as separate, mutually contradictory regimes obscures the justificatory role that human rights principles have performed in the constitution of the modern sovereign order. The organizing principle of sovereignty has never been a self-referential value; it has always been justified with reference to particular conceptions of legitimate statehood and rightful state action.

In the twentieth century, sovereignty has been increasingly justified in terms of the state's role as guarantor of certain basic human rights and freedoms, supplanting the politically impotent legitimating principle of divine right. This is more than a conceptual nicety. Without recognizing the justificatory role that human rights have played in the constitution of the modern sovereign order, we cannot explain key moments in the expansion of that order. Emergent human rights norms provided the moral resources for the delegitimation of colonialism and the subsequent proliferation of new sovereign states in the developing world, and they have played a similar role in the growth of international society since the end of the Cold War.

While these norms have so far failed to prevent many states from systematically violating the human rights of their inhabitants, by defining the terms of legitimate statehood they have been crucial in defining the contours of international society's postwar expansion. In what follows, I argue that the principle of sovereignty and human rights norms are best conceived as two normative elements of a single, distinctly modern

discourse about legitimate statehood and rightful state action.

The protection of basic human rights is integral to the moral purpose of the modern state, to the dominant rationale that licenses the organization of power and authority into territorially defined sovereign units. The tensions that exist between sovereignty and human rights stem not from their separateness, from their status as parallel and antagonistic regimes, the latter instituted to civilize the former, but from the inherently contradictory nature of the modern discourse of legitimate statehood, a discourse that seeks to justify territorial particularism on the grounds of ethical universalism. I demonstrate this discursive connection by showing how appeals to emergent human rights norms delegitimated the institution of colonialism, provided the moral foundations for the norm of self-determination, and thus licensed the proliferation of post-colonial states in Africa and Asia. Here I directly contest a prominent line of argument, articulated by Robert Jackson and others, that sees the development of the international human rights regime as a response to decolonization and the spread of 'ramshackle states' in the Third World.

Sovereignty and Human Rights: A Tale of Two Regimes

Sovereignty is traditionally understood in highly categorical terms. Sovereign states are said to enjoy supreme decision-making authority within their territorial boundaries, while being under no political or legal obligation to observe any overarching authority outside those boundaries. Sovereignty, F. H. Hinsley contends, is 'the idea that there is a final and absolute political authority in the political community ... "and no final and absolute authority exists elsewhere"'. Realists treat sovereignty as an empirical attribute of the state, an assertion that states make about their territorial authority backed by military power, economic resources and perhaps the consent of the people.

Rationalists, in contrast, treat sovereignty as an institution of international society, a deeply embedded organizing principle that licenses the organization of political authority into centralized, territorially demarcated political units. The former emphasize the role of war-fighting and military competition in the rise of the modern international system, the latter stress the emergence of norms of mutual recognition, non-intervention, and self-determination.

Both, however, view sovereignty as an absolute, an empirical or institutional fact that cannot be qualified without nullification. 'Human rights', John Vincent argues, 'are the rights that everyone has, and everyone equally, by virtue of their very humanity'. In holding such rights, all humans are entitled to make claims against other individuals, national communities, and humanity as a whole for the respect and satisfaction of certain civil and political freedoms and social and economic needs. At times these rights have been grounded in reason, need, custom and contract, but in all cases they have been seen as universal and inalienable.

While the idea of universal human rights was first articulated in the seventeenth and eighteenth centuries as a defence against the excesses of monarchical rule, the systematic codification of such rights at the international level has largely, though not exclusively, been a twentieth century development. Shocked into action by the Nazi genocide of Europe's Jewish population, and cajoled by diverse non-state actors, states have progressively 'legislated' an 'international bill of rights', comprising the

Universal Declaration of Human Rights and the two International Covenants on Human Rights, augmented by a web of 'right-specific' treaties, conventions and declarations, spanning everything from worker's rights to the rights of indigenous peoples.

The emergence of the sovereign order and the development of the international human rights regime are usually seen as connected only by way of their mutual incompatibility.

Not only are their generative dynamics thought to be distinct, with war-fighting and strategic competition driving the development of the former and liberal idealism propelling the latter, but the sovereign order is thought by sceptics to stand inviolable against the universalist challenge of the human rights regime and by optimists to be fundamentally compromised by that regime. Taking the first of these positions, Stanley Hoffmann argues that although the post-1945 development of international human rights norms 'has questioned two sacred elements of sovereignty: the right to wage war, and the right to do what you like to your citizens', these norms have had little impact on the realities and dynamics of international politics.

Adopting the rival position, Kathryn Sikkink claims that the 'doctrine of internationally protected human rights offers one of the most powerful critiques of sovereignty as currently constituted, and the practices of human rights law and human rights foreign policies provide concrete examples of shifting understandings of the scope of sovereignty'. Both of these positions view sovereignty in highly categorical terms, and differ only over the corrosive potency of the independently constituted international human rights regime.

The Problem of Explaining International Societal Expansion

The tension between absolute state power and individual freedom makes this tale of two regimes intuitively plausible, yet this analytical separation is heuristically unhelpful in a number of regards. My concern here is with the obstacle this poses for understanding international societal expansion in the late modern era. Such expansion occurs when the basic organizing principle of international society remains constant—where sovereignty, heteronomy or suzerainty continue to structure the distribution of political authority—but where the number of recognized political units within that society increases.

In the history of the modern international society, societal expansion has been an ongoing process, with postwar settlements, imperial breakdown, and state fragmentation fuelling constant, if erratic, growth in the number of sovereign states.

There have, however, been several great moments of societal expansion, where there have been rapid and significant expansions in the membership of international society. In the twentieth century, three such moments stand out: the post-Versailles reconfiguration of the European political order, the decolonization of the European empires in Asia and Africa, and the post-Cold War proliferation of states, primarily in East Europe but also elsewhere, wiTheast Timor being the most recent addition to international society.

Treating sovereignty and human rights as clearly differentiated, mutually antagonistic regimes obscures one of the crucial dynamics that have propelled late modern international societal expansion—the central role that human rights norms

have played in the constitution of the dominant discourse of legitimate statehood, and the importance of this discourse in licensing the proliferation of sovereign units. The limitations of this analytical separation are clearly apparent in Robert Jackson's otherwise insightful writings on decolonization, writings that have sought more nuanced understandings of sovereignty, statehood and the expansion of international society.

Jackson advances a modified rationalist account of the institution of sovereignty, arguing that since the Second World War there has been a fundamental change in the norms governing which political entities are entitled to recognition as fully independent states. Prior to the late 1950s and early 1960s only those countries which demonstrated 'empirical sovereignty'—'the wherewithal to provide political goods for [their] citizens' —were accorded sovereign status. The so-called 'standard of civilization' was used to determine such achievement, and the European powers ensured that membership of international society was an exclusive, jealously guarded right.

This old 'positive sovereignty' game, Jackson argues, has since been supplanted by a new 'negative sovereignty' game, under which weak states have been granted 'juridical sovereignty' without exhibiting any of the trappings of empirical statehood. Only through reference to this change in the meanings attached to the sovereignty regime, Jackson concludes, can we explain the nature and speed of European decolonization.

It was the triumph of the central principle underlying the new negative sovereignty regime—the right to self-determination—which spurred this dramatic expansion of international society. 'Anti-colonialism', he writes, 'looks more and more like a sea change in international legitimacy'. Jackson's thesis that the speed of decolonization can best be attributed to a shift in the institution of sovereignty and the salience of the new international norm of self-determination is not in question here. Three main alternative explanations of decolonization exist, but Jackson persuasively argues that each fails to explain adequately why the process took place when it did, why it happened so quickly, or why it was a system-wide phenomenon spanning all imperial powers and colonies.

The first of these emphasizes how national liberation movements made stable imperial rule increasingly difficult, raising the political, military and economic costs of empire. The problem with this argument is that the strength of these movements varied across empires and colonies, never posing a general threat to the institution of colonialism. As Holland argues, 'Western Europe's status and capacity…was clearly on the wane for most of the twentieth century, and violently so after 1945, but whether that status fell in relation to Upper Volta or the Gold Coast/Ghana is very doubtful.'

The second explanation stresses how the war-ravaged European powers, faced with new demands for domestic social welfare expenditure, could no longer bear the economic costs of empire. Such pressures are undeniable, but it is not certain that they were the main consideration in European decisions to disengage. John Darwin argues that it 'is far from clear that…the economic argument turned decisively against empire and global commitments in the 1940s and 1950s.

Indeed, it seems likely that the economic repercussions of the Second World War encouraged a revival of British interest in parts of their colonial empire and in imperial economic integration generally.' The third explanation focuses on international pressures, particularly the rise of two superpowers both strongly opposed to colonialism.

Once again, though, these pressures were not decisive.

As the Cold War escalated, the Americans toned down their anti-colonialist rhetoric, becoming more sympathetic to British imperial concerns than their wartime lobbying would have suggested, and in any case there is little evidence that pressure from Washington ever significantly swayed British calculations, let alone those of other imperial powers. Undoubtedly, these nationalist, economic, and international factors contributed to decolonization, but Jackson is correct to argue that the generalized nature and speed of European disengagement can be explained only by introducing a fourth, normative factor—the system-wide shift in the sovereignty regime governing international society. Jackson's work flounders, however, when it comes to the relationship between the negative sovereignty regime and international human rights norms.

Jackson claims that the construction of a comprehensive human rights regime was a direct response to the advent of the negative sovereignty game and its attendant right of selfdetermination. In the age of high imperialism, the gradual spread of constitutionalism limited the excesses of power within metropolitan Europe, and the imperial powers granted sovereignty to only those polities that demonstrated a dictated level of 'civility'. The new sovereignty game changed all of this. European colonies now enjoyed a categorical right to self-determination, a right to constitutional autonomy free from external political, economic and normative constraints. In short, they were accorded 'juridical sovereignty' without having to demonstrate 'empirical sovereignty'.

Jackson argues that this led to the proliferation of weak states with neither the empirical capacities to meet the needs of their peoples, nor rulers with the political will to maintain adequate constitutional brakes on the exercise of power. This has resulted in a dramatic increase in human rights violations, an increase that 'is particularly evident outside the West where citizenship often is scarcely more than a nominal status with little or no real purchasing power.'

The construction of international human rights norms, Jackson contends, was a direct response to this change in the membership of international society and associated decline in 'civility'. He writes that the 'new sovereignty game is ... complicated by the emergence of a cosmopolitan regime which seeks to establish the legal status of humans in international relations against the sovereign Leviathan. This norm is not part of the sovereignty game but is a reaction to it: human rights are intended to curb sovereign rights' [my emphasis].

The idea that the right to self-determination ushered in a negative sovereignty regime that bestowed unequivocal rights to rule is widespread. In his classic work on international law, George Schwarzenberger writes that the right to selfdetermination rests on 'pristine sovereignty in the form of lawlessness'. In a similar fashion, Jack Donnelly claims that self-determination meant 'a right of colonial territories to recognition as sovereign states within colonial borders.

Considerations of justice were thus banished from decisions on membership of international society.' Few scholars go as far as Jackson in arguing that the international human rights regime was a specific response to the advent of the right to self-determination, the rise of the negative sovereignty regime, and the proliferation of weak Third World states. Yet it is commonplace for the development of the international human rights regime to be seen as a discrete process, driven largely by Western states, that evolved parallel to, and in conflict with, the politics of self-

determination that transformed the meaning of sovereignty.

In a clear statement of this position, Donnelly argues that the 'death of the classic standard of civilization was accompanied by the entrenchment of a Hobbesian conception of sovereignty. ... The decades following the Second World War, however, also saw the development of an extensive body of international human rights law that recaptured, in a substantially purified form, the morally appealing idea of adherence to shared standards of justice as a condition for full membership in international society.' Jackson's argument about the rise of negative sovereignty regime, decolonization and human rights suffers from two serious weaknesses.

With regard to the first of these, although he provides a painstaking description of the apparent revolution in the rules of the sovereignty game and how this delegitimated European imperialism, he provides no explanation for this transformation. The construction of a new sovereignty regime around the right to self-determination may well have spurred the single most dramatic expansion of international society, but why did these norms emerge when they did and with such salience? This explanatory weakness is compounded by a number of crucial empirical anomalies in Jackson's account of the relationship between the new sovereignty regime and international human rights.

First, he ignores the fact that the most important international human rights instruments—including the relevant provisions of the United Nations Charter, the Universal Declaration, and the two international covenants—were negotiated before or during the most intense phase of decolonization and the proliferation of 'quasistates', not after.

Second, he overlooks the crucial role that 'first wave' post-colonial states—such as India and Pakistan—played in the initiation and negotiation of these instruments, a role in which they strongly supported the importance, and at times even the primacy, of civil and political rights in addition to economic, social and cultural rights.

Third, he obscures the heavy reliance that these states placed on the discourse of human rights in their formulation and advocacy of the right to selfdetermination. The remainder of this object presents an alternative, constructivist account of the international societal expansion that attended decolonization, an account that treats international human rights as integral to the discourse of legitimate statehood that licensed that expansion, not simply a response to the excesses of the post-colonial states it generated.

This account not only explains the phenomenon that Jackson merely describes, it accommodates the significant empirical anomalies in his historical account.

Communicative Action and the Constitution of Sovereignty Norms

To understand processes of international societal expansion it is necessary to abandon the prevailing, highly categorical conception of sovereignty and to treat it instead as a variable, practically constituted institution. This is the view first advanced by critical theorists and taken up more recently by constructivists. In an early statement of this position, Richard Ashley argues that 'sovereignty is a practical category whose empirical contents are not fixed but evolve in a way reflecting the active practical consensus among coreflective statesmen' It is all else a set of norms concerning the legitimate organization of political authority, the content and implications of which vary from one historical and practical context to another.

For those wishing to study sovereignty, therefore, the challenge is not to arrive at a universally valid definition that fixes its meaning and content, but rather, as Thomas Biersteker and Cynthia Weber observe, to explore 'the constitutive relationship between state and sovereignty; the ways the meaning of sovereignty is negotiated out of interactions within intersubjectively identifiable communities; and the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty'. An exploration of this sort must begin with the recognition that sovereignty is a social norm, subject to the same constitutive processes as all other norms, rules and principles.

Like their domestic counterparts, international norms, rules and principles are social artifacts, the normative products of moral debate and dialogue between states about legitimate statehood and rightful domestic and international conduct, products that are reproduced through routinized communication and social practice. Norms, rules, and principles thus have histories, they emerge out of complex processes of communicative action, and they are maintained through the conscious, and at times unconscious, application of taken-for-granted canons and repertoires of appropriate state conduct.

The communicative processes that surround international norm formation vary from one issue and context to another, but they also exhibit a common dialogical structure. When seeking to establish a new norm, rule or principle, or to give an established one new meaning, states will seek to justify their moral claims.

As theorists of communicative action observe, actors engaged in such projects usually try to associate their prescriptions with values that are already accepted as normative within the relevant speech community. As Agnes Heller observes, '[c]ontestants enter the discourse with different values, and they all try to justify their values (as right and true). They do so by resorting to values higher than those which they want to justify, by proving that the latter are but an interpretation of higher values, or that they can be related to these higher values without logical contradiction'.

Specialists on international norm formation have termed this process 'issue-resonance', 'nesting', or 'grafting'. In her study of the rise of developmentalism in Latin America, Kathryn Sikkink argues that '[n]ew ideas are more likely to be influential if they 'fit' well wiThexisting ideas and ideologies in a particular historical setting.'

And in seeking to explain the recently enshrined norm against the manufacture, deployment and use of land mines, Richard Price shows how 'moral entrepreneurs' successfully 'grafted' their claims to established elements of just war doctrine, namely the dictates for civilian discrimination and against unnecessary suffering.

In the communicative processes that generate new international norms, rules and principles, not all 'higher values' have the same justificatory power. Theorists of communicative action have shown that 'identity' values are particularly persuasive, as they define the meaning and nature of legitimate social and political agency. Such values lie at the heart of what Jürgen Habermas calls the 'lifeworld', the 'storehouse of unquestioned cultural givens from which those participating in communication draw agreed-upon patterns of interpretation for use in their interpretive efforts'.

Within domestic society, the best way to further a moral claim is to 'graft' it to prevailing views about what constitutes a fully realised human being, or to beliefs about the ideal community of such beings. At the international level, moral claims that are shown to be consistent with intersubjective beliefs about the behaviour and

goals of ideal states, or to foster the development of such states, carry the greatest weight. Historically, the identity values defining ideal individuals and states have been closely linked, with the latter usually being cast in the service of the former.

Furthermore, domestic and international identity values have changed over time—Renaissance Italian ideas about the ideal individual and state differed markedly from those that prevail today. These insights into communicative action and norm formation are of crucial importance in understanding the social construction of sovereignty regimes.

Sovereignty is an intersubjective organizing principle, a principle that licenses the arrangement of power and authority into territorially-demarcated, centralized and autonomous political units. As John Ruggie observes, it is a principle that specifies 'the basis on which the constituent units are separated from one another'.

Like all social norms, the principle of sovereignty has a history, a history that has involved the same sort of communicative processes that surround the production and reproduction of other social norms.

Just as the construction of issue-specific norms has entailed the grafting of new principles to pre-existing social values, so too has the principle of sovereignty. When sovereign states were constructed in ancient Greece, when they were championed again in Renaissance Italy, when absolutist states were carved out of the declining heteronomous order of medieval Europe, and when the age of revolutions spurned the development of modern nation-states, the idea of sovereignty did not emerge in a moral vacuum; it had to be justified, and that justification has always taken the form of an appeal to higher-order values that define the identity or raison d'être of the state, whether they entail the pursuit of justice, the achievement of civic glory, the protection of a divinely ordained social order, or the advancement of individuals' rights and the celebration of the nation.

Contrary to conventional wisdom, therefore, sovereignty should be viewed as a dependent or secondary principle—an historically contingent prescription about the distribution of power and authority that needs to be grounded in more fundamental existential values. It is mistakenly assumed that sovereignty is the most basic international institution, the normative bedrock of the society of states.

Even constructivists have failed to understand the communicative processes that generate sovereignty regimes, often writing as though sovereignty were a self-referential value that could be upheld without reference to other social values, particularly those pertaining to the 'good' served by centralizing authority within territorially-defined bounds.

Building on Aristotle's observation 'that every state is an association, and that every association is formed with a view to some good purpose', the principle of sovereignty is best understood as but one part of larger complexes of normative values that undergird international societies, complexes that elsewhere I have termed 'constitutional structures' At the heart of these structures lie hegemonic beliefs about the 'moral purpose' of the state, beliefs that define 'the reasons that historical agents hold for organizing their political life into centralized, autonomous political units' These beliefs provide the justificatory foundations for the organizing principle of sovereignty and inform systemic norms of procedural justice. They define the raison d'être of the sovereign state, and specify the terms of legitimate statehood and rightful state action. Their content varies, however, from one historical context to another.

Ancient Greeks tied the moral purpose of the state to the cultivation of bios politikos, a distinctive form of communal life; Renaissance Italians defined it in terms of the pursuit of civic glory; Europeans in the age of absolutism linked it to the preservation of a divinely ordained, rigidly hierarchical social order; and in the modern era, the rationale for the state has been increasingly tied to the protection of individuals' rights.

Human Rights, the Right to Self-determination, and Decolonization

The communicative processes are most palpable at great moments of international societal expansion, when the existing political order is challenged by new claims to sovereignty, grounded in revolutionary, reconfigured, or redeployed ideals of legitimate statehood. At such moments, the prevailing international organization of political authority is portrayed as inconsistent wiThexistent or ascendent conceptions of the moral purpose of the state, thus demanding the dismantling of established sovereign or imperial units to permit the construction of new sovereign states.

This is what occurred at Versailles, with decolonization, and after the Cold War. With regard to the second of these, with which we are concerned here, a conception of the moral purpose of the state that has been ascendent since the middle of the nineteenth century, and which ties legitimate statehood to the protection of individuals' basic human rights, was mobilized by 'first wave' postcolonial states to discredit European imperialism, establish the right to selfdetermination, and license wholesale decolonization.

The Ascendent Moral Purpose of the Modern State

During the seventeenth and eighteenth centuries the legitimacy of European states rested on the divine right of kings, a right that God supposedly bestowed on monarchs giving the authority to ensure the preservation of a divinely ordained, rigidly hierarchical social order. By the latter half of the eighteenth century, the ideological foundations of this rationale were beginning to erode. Mirroring shifts in scientific thought, political and economic theorists abandoned holistic conceptions of society, championing new ideas of political and economic individualism.

The impact of these ideas was profound, with political individualism fuelling the American and French Revolutions, and economic individualism providing the ideological resources for the Industrial Revolution. In the ensuing 50 years, European politics was riven by protracted conflicts over the terms of legitimate rule, compounded by the economic dislocation of traditional patterns of social organization and affiliation.

The ancien régime won a temporary reprieve at the end of the Napoleonic Wars, invoking the constitutional metavalues of absolutism at the Congress of Vienna to shape a new international order. By the middle of the nineteenth century, though, the tide had turned.

Justifying state power and authority by appealing to monarchical right and the need to preserve a divinely ordained social order became more and more untenable, and legitimate statehood and rightful state action were increasingly tied to the representation of individuals' political interests and the protection of their inalienable human rights. This new conception of legitimate statehood was not immediately expressed in the development of an international human rights regime, and the embedding of that regime is still under way.

Constitutionalism and the rule of law had spread to most European states by the end of the nineteenth century, but these changes were primarily the result of domestic political processes, not the consequence of internationally legislated norms.

The 'moral purpose' of the modern state filtered into international society in two phases, structuring the external institutional practices of states first, and prescribing the internal relations between governments and their citizens second. In the first phase, stretching from 1850 to 1945, the influence of modern principles of legitimate statehood and rightful state action on international politics was largely architectural, affecting the nature and functioning of basic institutional practices.

The revolutionary principles that only those subject to the law have the right to legislate, and that laws must apply equally to all of society's members, informed the development of multilateralism and positive international law, resulting in a huge increase in the number of multilateral treaties and associated organizations. Clearly evident in the development of universal conferences of states and the evolution of the International Court of Justice, modern ideals of selflegislation and reciprocally binding rules of conduct became the structuring norms of international governance, ultimately producing the United Nations and the growing edifice of contractual law between states.

Throughout this period, though, the moral gaze of international society was primarily external, with states celebrating the new principles of rule in their relations with one another but shying away from the articulation and codification of international norms concerning the application of such principles within states.

To be sure, the state was no longer seen as the monarch's domain, but the emerging idea of the state as the political manifestation of the nation, and state policies as the political expression of the national interest, encouraged the assumption that when the principle of national self-determination is upheld, the state and society stand in a symbiotic embrace. This focus on international institutional construction, paired with a tragic faith in the pacific benefits of racially defined national self-determination, found their clearest and most problematic expression in Wilsonian internationalism and the Versailles peace settlement.

Nazism put an end to this first phase, pushing the society of states to enshrine modern ideals of legitimate statehood and rightful state conduct in a comprehensive international human rights regime. The Holocaust exposed in stark relief the pathological consequences of an international system that sanctioned a racially-defined principle of national self-determination, and since 1945 the international community has championed, if not adequately defended, the ideal of the ethnically and racially neutral democracy, a democracy in which the civil and political and economic and social rights of citizens and non-citizens are protected and promoted. While the society of states had moved to protect human rights in the past, with tentative steps made in the areas of minority rights, workers rights, and the rights of women, after the Second World War legitimate statehood was more explicitly tied to the protection of basic human rights.

This connection has been articulated in an ever expanding battery of international human rights instruments. These instruments are elaborations on the principles laid down in Articles 55 and 56 of the Charter of the United Nations, which commit member states 'to take joint and separate action' to provide 'higher standards of living, full employment, and conditions of economic and social progress and development', and to cultivate 'universal respect for, and observance of, human rights and fundamental

freedoms for all without distinction as to race, sex, language, or religion'.

Further articulating these principles, the 1948 Universal Declaration of Human Rights defines the simultaneous satisfaction of individuals' economic rights (such as the rights to work and to social security) and civil and political rights (such as the right to vote, to free speech, and to due process) 'as a common standard of achievement for all peoples and all nations…' These obligations were given formal legal status by the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights signed in 1966 and brought into force ten years later.

The progressive development of these human rights instruments has formally enshrined modern ideals of legitimate statehood in the normative fabric of international society, extending the influence of such values from the constitution of basic institutional practices to the prescription of statesociety relations.

'First Wave' Post-colonial States and the International Human Rights Regime

It is widely assumed that the development of the international human rights regime was a Western project, and that developing countries have consistently and vigourously defended their domestic jurisdictions against such norms. In Donnelly's words, 'these newly independent states (understandably) emphasized their sovereign equality, understood in radical legal positivist terms, and met efforts to hold them to minimum standards of humane behaviour towards their own citizens with charges of neo-colonialism'.

While this view correctly captures the general attitude of developing states once decolonization had been achieved, it seriously misrepresents the position of newly independent states in the early stages of the international campaign against colonialism.

Though small in numbers, developing states from Asia and Latin America played a prominent role in the drafting of both the Universal Declaration and the two International Covenants. In fact, states such as India, Pakistan, Brazil, the Philippines, Chile, and Columbia represented an important force in the alliance with several Western states that successfully thwarted attempts by South Africa and Soviet bloc countries to derail international human rights initiatives. It is also common wisdom that developing states have consistently favoured economic and social rights over civil and political rights.

The satisfaction of economic entitlements has certainly become a prominent, if not predominant, feature of the developing world's diplomatic agenda, but this has not always been the case. It was initially intended that there would be only one international covenant, but states disagreed about whether it should include economic as well as civil and political rights. The Soviet Union and its clients argued that the proposed covenant should not only include economic rights, but that these rights should have priority. While other states generally accepted these rights, they vigourously opposed their inclusion in a single covenant along with civil and political rights.

This was partly on the grounds that different categories of rights demanded different implementation mechanisms, but some states—including the leading developing countries—argued that civil and political rights should have priority. In 1951, India and Lebanon argued that 'the two groups of rights were not of equal importance, the full enjoyment of economic, social and cultural rights being …dependent on the assurance of civil and political rights.' Together with leading

Western states, they managed to overturn a former UN decision and force the drafting of two separate covenants.

Throughout the negotiations on the Universal Declaration and the two International Covenants, leading developing countries consistently argued that the protection of human rights was an international concern which circumscribed the state's domestic jurisdiction. In the debate by the Third Committee of the General Assembly on the draft Universal Declaration, the Pakistani representative stated that 'it was imperative that the peoples of the world should recognize the existence of a code of civilized behaviour which would apply not only in international relations but also in domestic affairs'.

In a prophetic statement, the Chilean representative told the General Assembly that 'no one could infringe upon the rights proclaimed in it [the Universal Declaration] without becoming an outcast from the community of states'. These attitudes were reflected in the position that developing states took on the question of implementation and enforcement, an issue that focused on whether individuals and non-governmental organizations should have the right to petition the United Nations directly on human rights violations by their states.

While Sovietbloc countries opposed all implementation measures on the grounds that they violated the state's domestic jurisdiction, and the United States and Britain argued that only states should have the right to petition, leading developing states insisted that individuals and NGOs must have direct access to the United Nations. After unsuccessfully trying to have the right to petition enshrined in the Universal Declaration, a coalition of Western and developing states (including Denmark, India, and Mexico) pushed to have the International Covenant on Civil and Political Rights recognize such a right.

Whatever their subsequent human rights records, if it were not for the early efforts of these states, the Covenant's Optional Protocol— the compromise instrument which allows individuals experiencing human rights violations in signatory states to petition the United Nations Human Rights Committee directly—would probably not exist.

Grafting the Right to Self- determination to Human Rights Norms

Until the late 1950s and early 1960s the world was divided into a hierarchy of political forms, with the system of sovereign states at the pinnacle surrounded by a range of dependent colonies, protectorates, and mandates. In addition to the economic and military gulf separating these entities, the division was based on the European application of a standard of civilization which distinguished between civilized, barbarian, and savage peoples.

This standard consisted of two principal criteria: one political, the other economic, scientific and technological. As we have seen, the former ranked peoples just as to their perceived capacities for civil government. Several British Colonies, wrote John Stuart Mill, 'are composed of people of similar civilization to the ruling country; capable of, and ripe for, representative government: such as the British possessions in America and Australia.

Others, like India, are still at a great distance from that state.' This ranking was reinforced by the idea that European states surpassed all others in material achievement, a prejudice apparently vindicated by the glories of the industrial

revolution. Having placed themselves at the top of the civilizational hierarchy, European states assumed a paternalistic attitude towards other peoples, shrouding their domination in a veil of moral responsibility.

This civilizing mission is still apparent in the Charter of the United Nations which reaffirms the colonial powers' 'sacred trust' to cultivate their dependencies' 'political, and educational development' and 'to assist them in the progressive development of their free political institutions, just as to the particular circumstances of each territory and its peoples and their varying stages of advancement'.

Within the space of two decades this hierarchy was levelled into a radically expanded system of juridically equal sovereign states. Neither the speed nor the generalized nature of this revolution can be explained solely through changes in the balance of material power between the colonizer and colonized—a shift in the norms governing the membership of international society also played a crucial role.

The old sovereignty game, and its associated moral defence of hierarchy, were systematically discredited and supplanted by a new principle that 'all peoples have the right to self-determination' irrespective of their levels of political, economic, and social development. Jackson thoroughly documents this normative revolution, but he fails to recognize that the right to self-determination only triumphed because developing states skilfully grafted it to pre-existing international human rights norms. While the Charter of the United Nations upholds 'the principle of equal rights and self-determination of peoples', this principle only became a serious threat to the institution of colonialism after it had been mobilized by newly independent states in early negotiations over the two International Covenants.

These countries strongly supported the development of the human rights regime, and their campaign for full decolonization explicitly portrayed self-determination as a prerequisite for the satisfaction of such rights. The right to self-determination is plagued by a central ambiguity: it is unclear which communities are entitled to claim or exercise such a right. In the history of modern international society there have been two resolutions to this problem.

The first—embodied in the Versailles settlement—emphasized the rights of racially and ethnically defined nations. As Rupert Emerson observes, 'the peoples involved in the Wilsonian period were ethnic communities, nations or nationalities primarily defined by language and culture ... '. Like Mill, Wilson believed that democracy could function properly only where the population of a state was bound together by linguistic and cultural affinities.

Believing that communities with such affinities could be determined by measuring their 'objective' ethnic characteristics, he and his fellow Americans argued at Versailles that 'their team of experts could provide better evidence of the lines of national divisions and affiliations than could be obtained from plebiscites of the populations concerned'.

This cultural understanding of 'peoples' and 'nations' informed the standard of civilization that the colonial powers invoked to justify their tutelage. The division of the world into civilized, barbarian, and savage peoples was at heart a racial categorization. Western dominance rested on the supposed superiority of European culture, and the primacy of Britain, France, and Germany was attributed to their extraordinary racial qualities.

At the bottom of the hierarchy were the 'dark races' of Africa who were seen as

lacking all civilizational achievement and potential, a condition that licensed ongoing European oversight and control. Somewhere in the middle fell the barbarian peoples of Asia, who were considered educable, long-term candidates for political and economic achievement. By the end of the Second World War two factors had undermined this initial resolution.

Nazism made world leaders fearful of encouraging a resurgence of ethnic nationalism and provided the single most important impetus for the development of international human rights norms. Second, most of the parties interested in claiming self-determination after 1945—the European colonies of Africa and Asia—had multi-ethnic or multi-racial populations.

For these reasons, anti-colonialist movements and their allies in the United Nations made little reference to the integrity of ethnically defined nations in their campaign for decolonization. As Emerson observes, 'in the era of decolonization, ethnic identity [was] essentially irrelevant ... '. Instead, self-determination was portrayed as a necessary prerequisite for the satisfaction of individuals' basic political and economic rights.

This connection between the right to self-determination and human rights was first articulated in 1950 by Afghanistan and Saudi Arabia in the United Nations negotiations that eventually produced the two International Covenants. Laying the groundwork for the eventual inclusion of the right to self-determination in Article 1 of both Covenants, they successfully moved a motion calling on the Human Rights Commission to study 'the right of peoples and nations to self-determination'. Frustrated with the Commission's failure to launch such a study, in 1951 the representatives of Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia, Syria and Yemen, among others, called for the General Assembly to insert an article on the right to self-determination into the draft Covenants.

They argued that this inclusion 'would give moral and legal support to peoples aspiring to political and social independence and would be a valuable contribution to international peace and security. No basic human rights could be ensured unless this right were ensured ... '. This call was reiterated in a February 1952 General Assembly resolution, which explicitly placed self-determination in the service of two higher order values: the need 'to save present and succeeding generations from the scourge of war' (which prefaced virtually all United Nations resolutions), and the need 'to reaffirm faith in fundamental human rights' Later that year developing states escalated their claims, passing a General Assembly resolution that not only asserted the right to self-determination, but also the obligation of European states to decolonize.

'The right of peoples and nations to self-determination', it clearly states, 'is a prerequisite to the full enjoyment of all fundamental human rights'.

These efforts culminated in two victories: the enshrining of the right to selfdetermination in the opening articles of both International Covenants, and the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. The positioning of the right to self-determination at the very beginning of the Covenants clearly signalled its status as a prerequisite for the realization of basic human rights. 'All peoples', Article 1 of both Covenants declares, 'have the right to self-determination.

By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. The 1960 Declaration is generally considered the crucial United Nations resolution on decolonization. It not only begins

by reaffirming 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small', its opening declaration states that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights'.

By linking self-determination to the basic rights and freedoms of all individuals, developing states successfully undermined the paternalism of the European colonial powers. 'Inadequacy of political, economic, social or educational preparedness', the Declaration asserts, 'should never serve as a pretext for delaying independence'. Far from being a categorical right with no strings attached, therefore, the post- 1945 right to self-determination was deliberately and explicitly tied to the satisfaction of basic human rights.

What is more, it was 'first wave' post-colonial states, as well as nationalist elites in colonial territories, who bound the two together, quite deliberately placing the former in the service of the latter.

Given prevailing ideals of legitimate statehood and rightful state action, and the international community's new-found interest in applying these to internal state-society relations, this was an immensely rational strategy, a strategy that artfully appealed to higher order values of political legitimacy to discredit colonialism and establish a right to immediate independence.

The so-called 'third generation' or 'solidarity' right of selfdetermination was self-consciously constructed upon the normative foundations of prior 'first' and 'second' generation political and economic rights of individuals. As Jackson observes, juridical sovereignty became the right of all colonies, producing and protecting an array of empirically weak states, but this right was granted on the grounds that it was a necessary precondition for the satisfaction of basic human rights.

That many developing states have since sought to separate their right to independence from the observance of human rights, or to invoke non-Western values to deny the universality of liberal civil and political rights, does not alter the fact that the campaign against colonialism championed such rights and used them to justify the right to self-determination.

Conclusion

In contrast to the prevailing assumption that sovereignty and human rights constitute separate, mutually antagonistic international regimes, this object has argued that they are better understood as two normative elements of the inherently contradictory modern discourse of legitimate statehood. Lying at the heart of prevailing ideals about the moral purpose of the state, human rights have increasingly provided the justificatory foundations for sovereignty.

This connection is clearly apparent in the communicative processes that have surrounded key moments of late modern international societal expansion. And as the case of decolonization indicates, such expansion is inexplicable without reference to the grafting of the right to selfdetermination, and in turn sovereignty, to emergent international human rights norms. In advancing and demonstrating this argument, two other widespread assumptions have been challenged.

Where it is generally assumed that the construction of the international human rights regime was a Western project, we have seen that 'first wave' post-colonial states played a prominent role in the negotiation of both the Universal Declaration and the

two International Covenants, a role in which they frequently gave priority to civil and political rights over social and economic rights, and in which they backed stronger rather than weaker mechanisms of accountability and enforcement. All of this challenges the assumption made by Jackson and others that the international human rights regime was a reaction to the proliferation of 'ramshackle states' in the Third World.

While the excesses of these states have certainly fuelled the development of the regime, especially since the 1970s, their very existence as recognized, independent polities can only be attributed to the successful mobilization of emergent human rights norms.

In contrast to the constructivist argument advanced here, realist and rationalist approaches struggle to explain late modern international societal expansion. For realists, expansions or contractions in the number of sovereign states are driven by the material capacities that states can marshal to defend or expand their sovereign jurisdiction, territorial integrity, and overseas holdings.

Increases or decreases in the number of states are attributed to the struggle for power, usually expressed in violent conquest, armed secession and major wars. Without denying the potential of such dynamics to produces changes in the membership of international society, they cannot account for the type of large scale expansion that attended decolonization.

The type of generalized, militarily potent, armed struggle that would have been necessary to dismantle all of the European empires in the space of twenty-odd years simply did not exist, and Jackson is correct to argue that this transformation could only have come about through the wholesale delegitimation of colonialism as an institution. Rationalists fare no better in explaining international societal expansion of this magnitude. Despite the considerable effort that Bull and others devoted to describing the expansion of modern international society, and despite Jackson's focus on decolonization, rationalists lack the conceptual and theoretical resources to explain such expansions.

Like constructivists, Bull considers sovereignty to be an institution, but he assumes that its meaning is fixed, which makes his conceptual framework ill-suited to explaining the type of changes in the sovereignty regime that accompanied decolonization. More than this, though, because rationalists treat sovereignty as a discrete institution, not embedded in other constitutive norms and values, they have no way of comprehending the communicative processes that produce transformations in the sovereignty regime. This is where Jackson's argument fails. Although he departs from other rationalists in seeing change in the meaning of sovereignty, by failing to see how sovereignty and human rights are bound together within a single discourse of legitimate statehood, he can only describe, not explain, the direction of that change.

The perspective on sovereignty and human rights advanced here differs from that adopted by other constructivists, but it is by no means incompatible with their positions. While others have not gone so far as to conceive of sovereignty and human rights as components of a single discourse of legitimate statehood, many of their arguments imply such a move.

Constructivists view sovereignty as a variable, practically constituted institution, its precise content and political implications varying with time and context. Constructivists concerned with human rights often attribute some of this variance in

the meaning of sovereignty to the articulation and institutionalization of international human rights norms, suggesting that the discourses of political authority and rights are in dialogue, a dialogue about legitimate statehood. Perhaps the most significant difference, then, between the perspective advanced here and most constructivist work on human rights concerns analytical focus.

Where I have focused on the connection between human rights and international societal expansion, others have focused on the impact of international rights norms on domestic state practices. The first of these projects illuminates the normative dynamics configuring the membership of international society, the second exposes the complex connections between international human rights norms, international organizations, non-states actors, and state compliance. The obvious challenge is for constructivists to bring these two analytical foci together, to produce an holistic and complete understanding of the relationship between international human rights norms and sovereignty.

4

Rights-based Approaches and Human Rights

Over the last 10 to 15 years, talk about economic and social rights has become part of social policy debates in developed countries. Rights-based approaches emphasise participation, yet the debate around economic and social rights is largely driven.

This object examines the extent to which the values which underpin rightsbased approaches are consistent with the values of those whom such an approach is designed to help. The values underlying rights-based approaches and those with experience of poverty are identified and then compared in three ways: in general; in relation to the specific issue of welfare conditionality; and as prescriptions for action. The comparative analysis is facilitated by linking the discussion of values to discussion of the forms of power relationships involved in rights-based approaches and what is valued by those with experience of poverty. While there is considerable overlap between rights-based approaches and what is valued by those with experience of poverty, there are also subtle differences which should not be ignored.

Towards the end of the 20th century, talk about rights, particularly economic and social rights, entered social policy discourse. Even in Australia, where all attempts to establish guarantees of rights within the legal system have failed, the influence of UN treaties or conventions can be seen in policy statements and documents in specific policy sectors.

For example, one of the most important elements of the Convention on the Rights of the Child is set out in Art 12, which calls on state parties to 'assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'.

While consultation with children can be tokenistic or undermined by bureaucratic structures, the principle of seeking children's views has become part of policy rhetoric, if not practice. For example, one of the four rights set out in the South Australian Charter of Rights for Children and Young People in Care is 'the right to understand and have a say in decisions that affect you'. Rights-based approaches differ from past practice in the emphasis on obligation, in particular the obligation of the state to ensure its citizens are able to exercise their economic and social rights and by acknowledging that all citizens are entitled to exercise such rights.

Thus the Office of the High Commissioner for Human Rights defines a rights-based approach as one that 'links poverty reduction to questions of obligation rather than welfare or charity'. Governments become 'duty-holders' who are obliged to guarantee the rights of all citizens, including those who are marginalised or disadvantaged. Welfare recipients become rights-holders who are assisted by the state, not as an act of paternalistic benevolence, but as an entitlement. As with any normative framework, rights talk has generated a mixed response.

For some, rights-based approaches provide a powerful social instrument for challenging the sites and uses of power. Others point to the fact that institutionalising human rights is a social process which itself involves the use of power. Compared to civil and political rights, economic and social rights require a much greater level of active intervention by government before such rights can be realised.

The International Covenant on Economic, Social and Cultural Rights recognises that the adoption of legislative measures may be highly desirable in many instances, but leaves it up to individual states to determine whether legislation is necessary.

The belief that legislation, though important, is not sufficient to ensure a full realisation of rights is reflected in the covenant, which for some rights lists the steps to be taken by state parties in order to achieve full realisation of a particular right. In all cases, the steps refer to broad policy goals and programmes rather than specific legislative measures. For example, in relation to the right to work, the covenant lists 'technical and vocational guidance and training programs' and 'policies and techniques to achieve steady economic development and full and productive employment' as some of the steps to be taken.

Furthermore, guidelines governing the type of reporting required under the covenant clearly indicate that states should provide details of non-legislative measures such as policies, programmes or techniques, as well as all relevant laws. In establishing the principle of progressive achievement,1 the covenant also recognises that full realisation of economic and social rights requires a significant amount of resources and state parties are given considerable discretion in determining the level of financial resources devoted to policies and programmes designed to achieve realisation of economic and social rights.

Thus, economic and social rights are contingent on available resources and progressively realised through a range of measures, not all of which will be based on legislation and give rise to enforceable rights.

Cox notes that governments are increasingly relying on activities which are not codified in law, citing the example of aged care in Denmark, where elderly people enjoy the right to be cared for in their own home, but this right is not stated in law and its realisation is dependent on the amount of money local communities, which fund home care activities, allocate to aged care.

Carney argues that a similar process is underway in Australia, where recent welfare-to-work reforms have converted rule-based norms into discretionary powers under the control of government departments. Increasing levels of conditionality applied to welfare entitlements are seen to further erode the 'rights' of social security clients. Given the debate around rights-based approaches and, in particular, the claim that rights-based approaches have the potential to challenge existing power structures, it is worth considering the extent to which the values which underpin rights-based approaches are consistent with the values of those whom such an approach is intended to help.

In this object, we have taken the views of people with experience of poverty about what they want from government and service providers as indicative of what they value. The remainder of this object is organised as follows. First, four general principles or values underlying all rights-based approaches are identified. This is followed by a discussion of what is valued by those with experience of poverty. The values underlying rights-based approaches are then compared to the values of those with experience of

poverty, first in general, then in relation to a specific issue—welfare conditionality—and finally as a prescription for action. Linked to the discussion of values is discussion of the forms of power involved in rights-based approaches and what is valued by those with experience of poverty.

Rights-based Approaches

As noted earlier, the realisation of economic and social rights requires a range of different forms of intervention by government, and under the ICESCR governments have considerable discretion in how they choose to institutionalise such rights. While there is no single agreed rights-based approach, all rights-based approaches derive from the international human rights framework from which a set of common principles or values can be identified. The first of these is that the inherent dignity of the human person is the basis of all rights.

The second is that participation is the way in which individuals are able to live with dignity. Consequently, the Office of the High Commissioner for Human Rights has suggested that in terms of the policymaking process, this principle obliges governments to facilitate participation by affected groups at all stages of the policy process, from initial conception through to implementation and evaluation.

Thus, empowering rights-holders to be active participants in decision-making processes that affect their lives is a key component of rights-based approaches, with some political theorists arguing that participation is a basic right upon which all other rights rest. From a rights-based perspective, participation should not be confined to decision-making at the local level, but should encompass broader decision-making forums that impact on policy-making at the national and international level.

In addition, duty-holders have an obligation to encourage right sholders to pursue the legal defence of their rights within national and international jurisdictions. While the ICESCR provides for gradual realisation of economic and social rights, taking into account the level of financial resources available to individual governments, the third principle underlying rights-based approaches is that realisation of economic and social rights must start from the bottom up. That is, governments are obliged to concentrate their efforts on the most vulnerable or disadvantaged groups in society.

The fourth principle concerns governmental accountability. Geiringer and Palmer argue that the stipulation in Art 2(1) of the ICESCR that state parties use 'all appropriate means' in moving towards full realisation of economic and social rights requires some degree of governmental accountability to its own citizens in addition to its periodic reports to the United Nations. These principles illuminate the type of power relationships involved in rights based approaches.

Larmour identifies seven types of power relationships, of which five are relevant to this discussion of human rights approaches—that is, first dimensional or coercive power, where one party has the power to force another to do something that they would rather not do; second dimensional or agenda setting power; infrastructural power, which involves the transfer of resources in order to empower the recipient; disciplinary power, where one party tries to make the other party want what they want so that the second party takes responsibility for achieving the desired outcome; and, finally, the form of power that is linked to knowledge and expertise.

Clearly, the most important type of power relationship involved in rights-based approaches is infrastructural power. Governments exercise infrastructural power when

they provide resources that enhance the capacity of rights-holders to participate in decision-making processes that affect their lives. However, genuine participation, which equates to the top three rungs of Arnstein's ladder of citizen participation,2 involves a rebalancing of second dimensional power. In addition, the principle of governmental accountability has the potential to shift the balance of second dimensional power slightly from governments towards rights-holders as governments are forced to report on progress towards full realisation of economic and social rights.

What do People with Experience of Poverty Want from Government and Service Providers?

When asked about their life experiences and what they want from government and service providers, the desire for dignity and respect is almost always mentioned—regardless of the age of respondents, their gender or where they live. For example, the UK Commission on Poverty, Participation and Power noted that 'the lack of respect for people living in poverty was one of the clearest and most heartfelt messages which came across to us'.

The same message was received by the Hume City Council when they talked to people from Indigenous communities, people from culturally diverse communities, women, those not in the workforce, people with a disability, older people and younger people:

- The desire for respect was by far the most important theme that emerged from discussions with those people who are experiencing, or who belong to particular community groups that are at a higher risk of experiencing poverty.

Clients of a range of welfare services in NSW and Victoria identified dignity and respect as two essential ingredients of a decent life, the desire for which was fuelled by the demeaning nature of interactions with government officials, an experience shared by people in the United Kingdom:

- Complaints were not about the quantity of payments ... the problem was punitive and disrespectful treatment. Governments were not just at fault because they didn't deliver but because what they delivered came at such a heavy price in terms of self-respect and dignity.
- You shouldn't have to be made to feel as though you are useless. We feel very angry sometimes that people are ignorant of the fact that we are humans as well and we do need to be respected.

Being treated with dignity and respect means being recognised as a person rather than a 'problem' and being listened to without being judged. Clients of welfare services clearly identify the importance of this form of emotional support:

- People often think it is all about money. We don't necessarily need money, we need help dealing with being on welfare, we need help with all the shit about being worthless and useless and doing nothing. We need someone who knows what I'm going through, to sit down with me and sort all of this crap out.

While being accepted and being listened to are important, people with experience of poverty want more than a passive form of listening. People living in poverty want their expertise to be acknowledged and heard. For example, in the many conversations Mark Peel had with people living in Inala in Brisbane, in Broadmeadows in Melbourne

and in Mount Druitt in Sydney, this desire came through very strongly:

- Justice was about being respected, trusted and listened to because what you had to say was important ... What mattered to them was acknowledgment of capacity and intelligence.
- If they wanted one thing to change, it was that they be treated as knowledgeable, that outsiders should expect to learn and to listen.

Being listened to because what you have to say is considered valuable is a sign of respect and an acknowledgment of competency, both of which are valued by those with experience of poverty. For example, for participants in a personal loan pilot in Melbourne run by the Brotherhood of St Laurence and Community Sector Banking:

- Obtaining a loan was more than just money, dignity, inclusion, trust and respect. It was an opportunity to not be just a passive recipient of welfare, but to gain some self-esteem by taking a positive active role in the process.

Thus, agency—the ability to take control of your life—is clearly linked to dignity and respect, and being treated with dignity and respect can increase feelings of selfrespect and a sense of agency. As one participant in the personal loan pilot explained, having a relationship with a mainstream bank:

- Gave me the confidence to go ask somewhere else for credit ... this time I walked in with my head high and I said I want this and that.

People with experience of poverty often identify feelings of powerlessness and a lack of control over their lives. Choice is therefore important, because in choosing individuals are able to exercise control and agency. Thus, pensioners living in residential care in Melbourne experience greater financial stress than do pensioners living in rental accommodation, because they retain control over much less of their pension.

Access to services, such as affordable public transport, is valued because being able to use these services increases people's choices. When people with experience of poverty talk about receiving resources, they do so in instrumental terms—that is, the resources are valued because they increase agency. For example, clients of welfare services in New South Wales and Victoria are critical of the lack of access to dental services, because having bad teeth makes it harder to compete for jobs.

The desire of many welfare recipients for information and assistance before their lives reach a crisis point is further evidence of the value placed on agency:3 People with experience of poverty often identify feelings of powerlessness and a lack of control over their lives. Choice is therefore important, because in choosing individuals are able to exercise control and agency.

Thus, pensioners living in residential care in Melbourne experience greater financial stress than do pensioners living in rental accommodation, because they retain control over much less of their pension. Access to services, such as affordable public transport, is valued because being able to use these services increases people's choices. When people with experience of poverty talk about receiving resources, they do so in instrumental terms—that is, the resources are valued because they increase agency. For example, clients of welfare services in New South Wales and Victoria are critical of the lack of access to dental services, because having bad teeth makes it harder to compete for jobs. The desire of many welfare recipients for information and assistance

before their lives reach a crisis point is further evidence of the value placed on agency:3

- I know what has happened and I know what I want to do, I just need someone to help me get the right information ... what I need to do to get there.

The high priority placed on receiving information and getting access to resources which will increase agency indicates that those with experience of poverty are happy with governments exercising infrastructural power—power which is exercised in order to 'empower' the powerless. However, individuals with experience of poverty place an even higher priority on being able to exercise power that is linked to knowledge and expertise.

Those with experience of poverty want their knowledge and expertise to be recognised; they want to be able to exercise the form of power linked to knowledge and expertise, because exercising this form of power is a powerful symbol of their worth as a human being, as well as a means of exercising second dimensional power. However, the desire to exercise second dimensional power is not absolute.

Those with experience of poverty are not seeking to dominate or control negotiations to the exclusion of all other interests.

What is important is a rebalancing of second dimensional power.

As Mark Peel observed:

- People did not expect to receive the world on a platter. As they said only the rich presume that as their right. They did not expect immediate changes in their situation but they did expect to be listened to, to play some part in defining what they needed and to be treated with respect.

Children and young people also want to exercise this nuanced form of second dimensional power. Few young people and fewer children want to be given sole decision-making responsibility, but most want to have their say and have their wishes taken into account when decisions are being made, rather than being asked to endorse a course of action decided by others. As a 12-year-old boy who had experienced the care and protection system put it:

- I might want to see my grandma. I might want to see my cousins. I might want to see my uncles or my aunties. I should be able to say 'yes, I do' or 'no, I don't'. I should have some say.

Comparing the Two

It is clear from the considerable overlap between the values underpinning rights-based approaches and what is valued by those with direct experience of poverty. Rights-based approaches recognise the dignity of the human person as the basis of all rights and, for people with experience of poverty, being treated with dignity and respect is more important than anything else:

- You can put up with the struggle, you know, just get by, if you get respect and if you're treated right.

Similarly, the principle of governmental accountability is consistent with the desire of people with experience of poverty for:

- 'Someone to make and keep a promise'. In their version of social justice, powerful people should be held to account in the same way they were ... 'You see, the difference is we pay for our mistakes. They don't. We have to understand

> limitations and forgive them and be reasonable and make the best of it. They don't. That's not fair.'

Participating in decision-making processes that affect their lives is clearly important to those with experience of poverty who value choice and agency, but the emphasis on encouraging rights-holders to pursue a legal defence of their rights is not necessarily shared by those with experience of poverty. Indeed, the language of rights seems to be largely confined to the non-poor. People with experience of poverty do not talk about claiming a legally defensible 'right' to a job, accessible public transport or health services; they talk instead about 'fair' access to resources and opportunities, which more closely equates to the principle that realisation of economic and social rights must start from the bottom up.

Those with experience of poverty place greater emphasis on receiving information or accessing resources which will increase agency—for example, receiving information about services which may help them get a job—than claiming their 'right' to a job. For example, in a 1997 telephone survey of 6897 jobseekers which gathered information about jobseekers' needs and expectations of service quality, as well as those aspects of service most valued by jobseekers, the desire for dignity and respect and the desire for information that would help them gain employment were all valued highly. Of much less importance was information about rights and information about rules and regulations.

So far, discussion of rights-based approaches and what is valued by those with experience of poverty has been confined to general principles. But these general principles are only ever given force in specific contexts. Discussion now turns to a specific issue, that of welfare conditionality, which is regarded by many as incompatible with rights-based approaches but is a defining characteristic of Australia's welfare system.

In residualist systems, welfare conditionality is used as a rationing device—a way of ensuring that benefits and payments go to those in greatest need. Using welfare conditionality in this way is consistent with the principle that, when faced with resource constraints, realisation of economic and social rights has to begin with those most in need.

However, more recently a second layer of conditionality has been added to residualist welfare systems, with conditionality being used as a way of modifying behaviour—that is, some welfare payments have become dependent on an individual accepting their responsibility to undertake certain activities deemed socially desirable, such as actively looking for paid employment or ensuring their children attend school. The legitimacy of linking rights and responsibilities in this way has been widely debated with many arguing that rights-holders have a right to health, employment or an adequate standard of living simply by virtue of their humanity, and consequently do not have to do anything to 'earn' such rights.

Others argue that conditionality imposes additional burdens on the most vulnerable and disadvantaged, such as the homeless or those with multiple disabilities, or on 'third parties', particularly the children of those who are penalised for not meeting benefit requirements, such as applying for jobs or attending job interviews. While it is not the intention of this object to resolve the debate about whether welfare conditionality is a legitimate part of rights-based approaches, it is clear that in imposing conditionality with the aim of modifying behaviour, governments are exercising

different forms of power from those associated with the key elements of rights-based approaches.

When governments introduce conditions, such as participation in the Work for the Dole programme, as a requirement for receipt of unemployment benefits, they are exercising a disciplinary form of power—that is, governments want welfare recipients to take responsibility for themselves for ensuring that they are 'work ready'.

This disciplinary power can be exercised through first dimensional power—as, for example, when those deemed to have demonstrated a pattern of work avoidance are obliged to undertake 'full-time' Work for the Dole—or it can be exercised in a non-coercive way—as, for example, when individuals volunteer to have a portion of their welfare payments managed on their behalf by Centrelink. Justifications for conditionality fall into three main camps.

Contractualist justifications centre on the belief that there is an implied contract between citizens and the state, where the state agrees to support its citizens in times of need if the citizen accepts their responsibilities, of which the most important is the responsibility to work. On the other hand, paternalistic justifications are based on the belief that imposing conditions is in the best interests of those in receipt of welfare payments because such individuals are so defeated by poverty and disadvantage that they are incapable of fulfilling their own desire to work or to look after their family without the threat of penalties or sanctions. Unlike contractualist arguments, paternalistic justifications do not emphasise the reciprocal obligations of the state—that is, welfare recipients are obliged to meet the conditions imposed upon them by the state because doing so will improve their lives, not because the state has already provided services and programmes that will enable welfare recipients to overcome poverty and disadvantage.

The third justification for welfare conditionality, derived from the writings of communitarian theorists, is based on the belief that people have a responsibility to be good parents, neighbours or citizens—not because the state has provided certain benefits or support, but because of the responsibility individuals owe to each other.

But what do recipients of social welfare services believe? For a sample of welfare service users living in Bradford in the north of England, the legitimacy of welfare conditionality is dependent on the specific policy sector. While accepting that individual behaviour could be a contributing factor to the need for health care, the overwhelming majority of respondents believed access to health care should be unconditional:

- I feel there are just too many different criteria on which to apply a value judgment, it would be impractical to apply it. You can't just take an isolated thing whether it be smoking, weight or age or nice person/bad person … The universal thing is the only real way out of it. You could say that people who do dangerous sports or whatever are endangering their health so there is nowhere to draw the line really.

On the other hand, conditionality in the housing sector was considered appropriate, particularly in situations where individuals repeatedly reneged on agreements, ignored warnings and continued to engage in behaviour which had a negative impact on their neighbours:

- If they have been notified of the rule and they are a nuisance, yes I think that the council or housing association has got a right to evict them … I think they

should get a warning first, not just throw them out. There should be a procedure like.

Support for conditional unemployment payments fell between the two, with more than half believing it was reasonable to expect those receiving unemployment benefits to accept specific work or training responsibilities because this would increase their chance of finding a job, or because respondents believed it was desirable that those in receipt of a benefit contribute in some way to the community.

However, a substantial minority, who tended to see unemployment in terms of structural rather than individual failings, did not believe it was appropriate to make the receipt of unemployment benefits conditional on fulfilling certain duties or obligations:

- If there are no jobs people should be paid unemployment benefits.

This nuanced approach to conditionality is consistent with Australian studies of community attitudes. For example, Eardley, Saunders and Evans found that support for conditionality was high when applied to young unemployed people, but only 36 per cent of those surveyed believed an unemployed parent should be forced to undertake mutual obligation activities and only 25 per cent of those surveyed believed it was appropriate to impose obligations on unemployed people who had a disability.

While elements of contractualist, paternalist and mutualist justifications can be found in the views of welfare service recipients, what these studies indicate is that users of social welfare services would agree with White's conclusion that:

- There is nothing intrinsically objectionable about welfare contractualism ... legitimacy ... is difficult to assess in isolation from the character of the rest of the welfare system, indeed of the rest of the economic system as a whole.

In other words, those who are often subject to the exercise of coercive power as part of the provision of assistance do not automatically condemn the use of such power. Indeed, criticisms of the compulsory nature of mutual obligation in workfare schemes such as the Work for the Dole programme are largely confined to commentators, advocacy and service delivery agencies.

Participants are more concerned with the lack of flexibility in programme design and implementation, which means the programme is unable to meet individual needs. For example, some older job seekers want access to accredited training so that they can move into new areas of employment while others do not, preferring wage subsidy schemes that would enable them to work in a real workplace in the private sector where they could demonstrate their skills and abilities to employers. Once again, the emphasis of those with experience of poverty is centred on the ways in which the programme can help them achieve their goal—getting a job—rather than concern about the exercise of first dimensional power.

Rights-based approaches can be seen both as an international system of treaties, visionary statements and commitments and as a conceptual framework that allows policy-makers to 'recharacterise and guide what we do and how we do it'. The remainder of this part of the object considers what would need to change in 'what we do and how we do it', if the values of those with experience of poverty are taken as a conceptual framework.

The biggest challenge facing policy-makers and service providers lies in allowing those with experience of poverty to exercise the form of power that is linked to

knowledge and expertise. Policy-makers and service providers are comfortable with the exercise of infrastructural power, but allowing service users to exercise the form of power that is linked to knowledge and expertise cuts across the strong streak of paternalism that still exists in the social welfare sector.

In other words, it challenges the belief of all professionals involved in delivering social welfare programmes that they know what is best for their clients, just as it challenges the belief of academics and policy experts that their ideas or the latest policy fad will solve particular policy problems. Allowing those with experience of poverty to exercise the form of power that is linked to knowledge and expertise means policy-makers and professionals involved in the delivery of social welfare services must at times surrender control over outcomes, even if placing power in the hands of individuals means that outcomes are less than what policy-makers and welfare professionals believe they could be.

There are agencies already doing this, in spite of the ongoing frustration experienced by their staff when clients choose not to make changes that the staff believes would be beneficial. For example, staff involved in Anglicare Tasmania's Acquired Injury and Home Support Service are committed to the principle of treating their clients with dignity and respect, which means giving them choice—choice over who is employed as their personal support worker and choice over how allocated hours are used.

Even when staff members see clients who choose to make goal-oriented plans for how allocated hours are used improve their quality of life while others do not do so well, they remain committed to the principle of letting clients decide.

As the preceding example illustrates, clients want different things. Some clients want personal support workers who are trained to care for people with spinal cord injuries; others are more concerned about the personality of the support worker—whether they 'hit if off'.

Therefore, making assumptions about what clients want is dangerous. As Renee, a young Aboriginal woman who was interviewed for Judith Brett and Anthony Moran's book Ordinary People's Politics, explains, even well-meaning assumptions which incorporate sessions from past policy failures do not always hold true:

- My sister doesn't want to be part of the Aboriginal community any more. She thinks it is destructive, and that the violence and abuse has caused all her problems ... [M]y sister's happy to be removed. She'd rather be in care because she's getting all the things Mum couldn't provide. It's not that she doesn't like Mum, but she'd rather be out of there.

For Renee, the answer lay in treating each person as an individual and listening to what they wanted for their life:

- Renee ... stressed repeatedly that people trying to help should talk with the children and have more faith in their resilience, and that the current situation should not just be seen in terms of the previous generation's experience.

Treating everyone as an individual and allowing them to choose means that services have to be flexible—flexible in terms of both what is provided and how long assistance is provided. This level of flexibility is often difficult to achieve in an environment where services are under-resourced and accountability frameworks emphasise upward accountability, rather than downward accountability. But, as noted

earlier, for those with experience of poverty, exercising the form of power that is linked to knowledge and expertise is a means of rebalancing, not dominating, the exercise of second dimensional power.

Therefore, finding a balance between the demands of upward and downward accountability should not be impossible.4 Re-orienting service provision to fully reflect the values of those whom the service is designed to assist would require greater emphasis on the provision of information to clients or programme participants about available services, and how to access these services as a way of strengthening the exercise of infrastructural power.

As noted earlier, individuals want this sort of information and the success of service models based on care in the community requires it. Unfortunately, clients and programme participants often report difficulties in accessing relevant information:

- Unless you actually enquire about what services are available then people are not normally keen to tell you. So you actually have to do a lot of prying and literally ask specific questions about what is available and what is not. There is never one person. It is always several people and you will find a lot of people will do a lot of buck passing and say 'we don't handle that' and they will say you need to speak to this person or that and before you know it you have spoken to fourteen different people and you still don't have the answers you need.

Giving clients choice, providing flexible services which are responsive to individual needs and placing greater emphasis on the provision of information are all consistent with rights-based approaches.

This indicates that, far from being yet another imposition on 'the poor' by experts who believe that they know best, rights-based approaches provide a conceptual framework that allows policy-makers and those involved in the delivery of social welfare services to recharacterise what they do and how they do it in ways that are largely consistent with the values of those whom they are trying to help.

Conclusion

In setting forth arguments for the development of an Australian system for the protection of human rights, Hilary Charlesworth characterises human rights as 'a framework for debate over basic values and conceptions of a good society'. Recognising that this debate should be conducted by all groups in society, not just those with the power to influence what is done and how it is done, this object asked: To what extent are the values which underpin rights-based approaches consistent with the values of those such an approach is intended to help? A comparison of the general principles underlying all rights-based approaches to what is valued by those with experience of poverty reveals considerable overlap.

Those with experience of poverty value dignity and respect above all else and place a high priority on choice and agency and on receiving information which will enhance their capacity to exercise choice and agency, all of which is consistent with rights based approaches, where the inherent dignity of the human person is seen as the basis of all rights and participation in decision-making processes is seen as the way in which individuals are able to live with dignity.

However, as Arnstein noted in her analysis of forms of citizen participation,

genuine participation involves a redistribution of power, and when the forms of power involved in rights-based approaches and what is valued by those with experience of poverty are compared, slight differences emerge. For those with experience of poverty, it is important to participate in decisionmaking processes through the exercise of power that is linked to knowledge and expertise. In other words, those with experience of poverty want to be treated as knowledgeable and to participate in decision-making processes because their knowledge and expertise are respected, rather than—as would be the case under rights-based approaches—because they have a 'right' to participate.

While the outcome—participation—is the same, the basis for that participation is different. This difference is also evident when attitudes to welfare conditionality are examined. For many advocates of rights-based approaches, welfare conditionality is not consistent with such an approach because individuals have a right to health or employment and therefore should not have to do anything to earn what is theirs by right. On the other hand, with the exception of health, those with experience of poverty are less concerned about claiming something by right and more concerned about enhancing their capacity to achieve their goals.

But what are the practical implications of this difference? The discussion of what would need to change if the values of those with experience of poverty are taken as a conceptual framework revealed that the recommended actions are entirely consistent with rights-based approaches. The considerable overlap between the values which underpin rights-based approaches and what those with experience of poverty value means that those committed to a human rights framework for the development of social policy do not have to make major changes to what they do and how they do it if they wish to fully reflect the values of those with experience of poverty. What is needed, however, is an awareness of the sources of second dimensional power and an increased understanding of what is already being done, as well as what could be done, to incorporate the knowledge and expertise of those with experience of poverty into the process of policy-making, implementation and evaluation.

5

National Human Rights Bodies

This part examines the significance of National Human Rights Bodies in protecting and promoting human rights. Through diverse examples it shows the various bodies that can be set up by parliament or government to safeguard individual and group rights.

It explains National Human Rights Institutions and the internationally recognized set of principles used as the basis for their establishment. It also talks about other special commissions including commissions of inquiry that may be set up to address specific human rights violations.

Parliament has the power to create agencies outside of parliament that are tasked with promoting and protecting human rights. These include National Human Rights Institutions, Ombudsmen and specific sectoral commissions and law commissions that constantly review and recommend legislative changes. Regrettably, once established many are under-resourced financially and in terms of staff.

Often reports and recommendations are not tabled or disregarded and the independence from political power curbed. Nevertheless ensuring strong, autonomous, well-resourced bodies with 'teeth', mandated to promote and protect human rights and monitor compliance is another means by which parliamentarians can bring human rights home and ensure a culture of human rights becomes embedded in governance and society.

National Human Rights Institutions

Commonwealth Jurisdictions have established National Human Rights Institutions (NHRI). These vary in name, role, structure and effectiveness, but what they have in common is their power as a statutory body, mandated to not only promote human rights, but also to investigate alleged violations of human rights.

An effective NHRI is the chief body a state can provide to its citizens for seeking recourse, should their rights be violated. A basic set of internationally recognize standards, known as the Paris Principles, provides the bare minimum for the establishment and operation of NHRIs.

The key criteria of the Paris Principles are that the NHRI:

- Is independent, and that this is guaranteed by statute or constitution;
- Is autonomous from government;
- Is plural and diverse, including in membership;
- Has a broad mandate which is based on universal human rights standards;
- Has adequate powers of investigation;
- Has sufficient resources to carry out their functions.

The Commonwealth has also developed a set of Best Practice Principles; and the Abuja Guidelines on the Relationship Between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions outlines the important relationship between these bodies and suggestions for further developing this relationship in a Commonwealth context.

Some constitutions specifically provide for the creation of the NHRI, for instance, South Africa. Elsewhere, parliament has the power to create an NHRI through legislation. NHRI mandates go beyond examining individual cases to looking at conditions that create human rights violations, to research and training, and importantly to public education on human rights.

NHRIs can usually only make recommendations on cases, rather than enforce its own orders or force the government into action this means that parliament has a particular responsibility to closely monitor the NHRI's reports to parliament and take action to prevent further such abuses. Importantly, broad mandates allow NHRIs to examine not just narrow areas such as equality and discrimination but the whole gamut of rights.

However, sometimes specific situations or themes require special attention. Australia, for instance, appointed an Aboriginal and Torres Strait Islander Social Justice Commissioner in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence, and in response to the social and economic disadvantage faced by Indigenous Australians. The Commissioner who is a member of Australia's NHRI, the Human Rights and Equal Opportunity Commission, puts indigenous issues before the Federal Government and the Australian community to promote understanding and respect for the rights of Indigenous Australians.

Parliamentary responsibility includes ensuring that the NHRIs' reports are received promptly, debated and discussed at length and that recommendations are acted upon including enacting policies and laws to ensure their implementation. In some countries, this is done through a specific committee. In Sri Lanka a Select Committee on Human Rights reviews the functioning of the Human Rights Commission.

Subject Specific Commissions

The work of National Human Rights Institutions can be supported by additional subject specific commissions that give prominence to a particularly important human rights issue. They are also a practical way of drawing in quality expertise, and ensuing that sufficient funds are dedicated to dealing with human rights issues that may be particularly challenged in the national context.

Examples of these in the Commonwealth include Pakistan's National Commission on the Status of Women with the mandate to review all laws, rules and regulations affecting the rights of women and make recommendations towards ending discrimination and achieving gender equality. The South African Commission on Gender Equality is a constitutional body that monitors all sectors of society to ensure that they are promoting gender equality. The Commission carries out research into all existing legislation from a gender perspective and also scrutinizes all impending laws with the same purpose.

The mandate of the United Kingdom's Commission for Racial Equality extends

beyond examining government human rights violations and includes the activities of private sector bodies too. The Commission gives advice to people who think they have suffered discrimination or harassment and promotes policies and practices to help ensure equal treatment for all in both private businesses and public organizations. In 2004 the CRE started a formal investigation into the police service of England and Wales, and in its interim report noted that more than 90% of race equality schemes it had investigated failed to meet minimum standards by law.

While the final report is still pending, it has begun enforcement action against fourteen police forces and eight police authorities—if they fail to produce a lawful scheme within 90 days, they could face an enforcement order from the High Court.

The Ombudsman

Historically, the Offices of the Ombudsman have dealt mainly with individual cases of maladministration. In recent years however, as human rights have increasingly been recognized as being central to effective democracy and good governance, the mandates have broadened to encompass the government's performance in protecting human rights. This is particularly significant because the Ombudsman is an independent and impartial body, and usually has powers to make recommendations directly to parliament and/or to mediate disputes.

A recognition of the importance of following up on these recommendations is seen in Namibia where the 1990 Ombudsman Act of 1990 set up a Standing Committee on the Reports of the Ombudsman to consider the reports. Even where a human rights mandate is not explicitly mentioned in many of the Ombudsman Acts, human rights issues are often dealt, for example, when complaints are made against the police and/or prison authorities. Ombudsmen are also increasingly assuming responsibilities in the area of promoting human rights, through educational activities and information programmes. In Lesotho, one of the objectives of the office of the Ombudsmen is to develop and implement "a client driven public awareness programme on fundamental human rights". In some countries in Eastern Europe specific Human Rights Ombudsman has been established.

While not specific to human rights, many countries have established Ombudsmen—some with a specific sectoral mandate, while others have more general oversight powers. In Fiji, the link between the Ombudsman and human rights protection is very clear—the Ombudsman is also the constitutionally mandated Chairperson of the Fiji Human Rights Commission.

Ghana's Commission on Human Rights and Administration of Justice is actually a combination of a national human rights institution and an ombudsman.

It not only looks at violations of human rights by serving public officers but also examines complaints about unequal access to recruitment or services by state agencies, corruption and misappropriation of public money by officials, in addition to looking at practices and actions by private persons and enterprises that violate constitutional rights and freedoms. In Papua New Guinea, the Ombudsman Commission has recently set up a specific Human Rights part to manage the increasing number of human rights cases the Office has been receiving. In Malawi, the Ombudsman is mandated to investigate and take legal action against government officials responsible for human rights violations and other abuses.

In South Africa, the National Public Protector, as the office of the Ombudsman is

called, can among other things investigate 'improper prejudice suffered' as a result of 'violations of human rights'. Notably, Ombudsmen are particularly significant as human rights protectors in small states, where financial and human resources may militate against setting up both an NHRI and an Ombudsman.

Where Ombudsmen's offices already exist, urgent consideration should be given to specifically including human rights in their mandate, along with additional financial resources to enable the Ombudsman to properly fulfil this. Ombudsman's recommendations on human rights issues can be seriously considered by parliament and regarded as a priority.

Ad Hoc Commissions of Inquiry

Ad hoc committees and commissions are sometimes set up outside parliament to examine issues of current or on-going concern. They may sit in closed or open session and examine an issue in minutiae, call for evidence from government bodies and civil society and take expert and lay opinion. *Ad hoc* commissions can examine particular cases or patterns of human rights violations, such as ethnic and race riots, regime violence or systematic government failure to protect the rights of citizens.

For instance, the Ugandan Government established a Commission of Enquiry in 1986 to investigate the human rights abuses committed by past governments from independence till the date it seized power. This culminated final report, including recommendations to incorporate human rights education in schools, universities, and army training. In the Maldives in 2003, a Presidential Commission was appointed to look into the death of Hassan Evan Naseem, which sparked off prison riots that later spilled into the streets.

6

Theoretical Distinctions: Natural and Legal Rights

Natural and legal rights are two types of rights theoretically distinct just as to philosophers and political scientists. Natural rights, also called inalienable rights, are considered to be self-evident and universal. They are not contingent upon the laws, customs, or beliefs of any particular culture or government. Legal rights, also called statutory rights, are bestowed by a particular government to the governed people and are relative to specific cultures and governments. They are enumerated or codified into legal statutes by a legislative body.

The theory of natural law is closely related to the theory of natural rights. During the Age of Enlightenment, natural law theory challenged the divine right of kings, and became an alternative justification for the establishment of a social contract, positive law, and government—and thus legal rights —in the form of classical republicanism. Conversely, the concept of natural rights is used by some anarchists to challenge the legitimacy of all such establishments.

The idea of human rights is also closely related to that of natural rights; some recognize no difference between the two and regard both as labels for the same thing, while others choose to keep the terms separate to eliminate association with some features traditionally associated with natural rights. Natural rights, in particular, are considered beyond the authority of any government or international body to dismiss.

The Universal Declaration of Human Rights is an important legal instrument enshrining one conception of natural rights into international soft law. the legal philosophy known as Declarationism seeks to incorporate the natural rights philosophy of the United States Declaration of Independence into the body of American case law on a level with the United States Constitution.

The idea that animals have natural rights is one that has gained the interest of philosophers and legal scholars in the 20th century, and as such, even on a natural rights conception of human rights, the two terms may not be synonymous. While the existence of legal rights has always been uncontroversial, the idea that certain rights are natural or inalienable also has a long history dating back at least to the Stoics of late Antiquity and Catholic law of the early Middle Ages, and descending through the Protestant Reformation and the Age of Enlightenment to today.

The Stoics held that no one was a slave by their nature; slavery was an external condition juxtaposed to the internal freedom of the soul.

Seneca the Younger wrote:

- It is a mistake to imagine that slavery pervades a man's whole being; the better part of him is exempt from it: the body indeed is subjected and in the power of a master, but the mind is independent, and indeed is so free and

> wild, that it cannot be restrained even by this prison of the body, wherein it is confined.

Of fundamental importance to the development of the idea of natural rights was the emergence of the idea of natural human equality. As the historian A.J. Carlyle notes: "There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca.... We think that this cannot be better exemplified than with regard to the theory of the equality of human nature."

Charles H. McIlwain likewise observes that "the idea of the equality of men is the profoundest contribution of the Stoics to political thought" and that "its greatest influence is in the changed conception of law that in part resulted from it." Cicero argues in De Legibus that "we are born for Justice, and that right is based, not upon's opinions, but upon Nature." Centuries later, the Stoic doctrine that the "inner part cannot be delivered into bondage" re-emerged in the Reformation doctrine of liberty of conscience.

Martin Luther wrote:

- Furthermore, every man is responsible for his own faith, and he must see it for himself that he believes rightly. As little as another can go to hell or heaven for me, so little can he believe or disbelieve for me; and as little as he can open or shut heaven or hell for me, so little can he drive me to faith or unbelief. Since, then, belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own affairs and permit men to believe one thing or another, as they are able and willing, and constrain no one by force.

17th-century English, philosopher John Locke discussed natural rights in his work, identifying them as being "life, liberty, and estate", and argued that such fundamental rights could not be surrendered in the social contract. Preservation of the natural rights to life, liberty, and property was claimed as justification for the rebellion of the American colonies. As George Mason stated in his draft for the Virginia Declaration of Rights, "all men are born equally free," and hold "certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity."

Another 17th-century Englishman, John Lilburne who came into conflict with both the monarchy of King Charles I and the military dictatorship of Oliver Cromwell governed republic, argued for level human basic rights he called "freeborn rights" which he defined as being rights that every human being is born with, as opposed to rights bestowed by government or by human law.

The distinction between alienable and unalienable rights was introduced by Francis Hutcheson. In his Inquiry into the Original of Our Ideas of Beauty and Virtue, Hutcheson foreshadowed the Declaration of Independence, stating: "For wherever any Invasion is made upon unalienable Rights, there must arise either a perfect, or external Right to Resistance. Unalienable Rights are essential Limitations in all Governments." However, Hutcheson placed clear limits on his notion of unalienable rights, declaring that "there can be no Right, or Limitation of Right, inconsistent with, or opposite to the greatest publick Good." Hutcheson elaborated on this idea of unalienable rights in his *A System of Moral Philosophy*, based on the Reformation principle of the liberty of conscience.

One could not in fact give up the capacity for private judgment regardless of any

external contracts or oaths to religious or secular authorities so that right is "unalienable". As Hutcheson wrote, "Thus no man can really change his sentiments, judgments, and inward affections, at the pleasure of another; nor can it tend to any good to make him profess what is contrary to his heart. The right of private judgment is therefore unalienable."

In the German Enlightenment, Hegel gave a highly developed treatment of this inalienability argument. Like Hutcheson, Hegel based the theory of inalienable rights on the de facto inalienability of those aspects of personhood that distinguish persons from things. A thing, like a piece of property, can in fact be transferred from one person to another.

But the same would not apply to those aspects that make one a person, wrote Hegel:

- The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else. When I have thus annulled their externality, I cannot lose them through lapse of time or from any other reason drawn from my prior consent or willingness to alienate them.

Thus in discussion of social contract theory, "inalienable rights" were said to be those rights that could not be surrendered by citizens to the sovereign. Such rights were thought to be natural rights, independent of positive law. However, many social contract theorists reasoned that in the natural state only the strongest could benefit from their rights. Thus people form an implicit social contract, ceding their natural rights to the authority to protect them from abuse, and living henceforth under the legal rights of that authority. But many historical apologies for slavery and illiberal government were based on explicit or implicit voluntary contracts to alienate any "natural rights" to freedom and self-determination.

The de facto inalienability arguments of the Hutcheson and his predecessors provided the basis for the anti-slavery movement to argue not simply against involuntary slavery but against any explicit or implied contractual forms of slavery. Any contract that tried to legally alienate such a right would be inherently invalid. Similarly, the argument was used by the democratic movement to argue against any explicit or implied social contracts of subjection by which a people would supposedly alienate their right of self-government to a sovereign as, for example, in Leviathan by Thomas Hobbes. Ernst Cassirer,

- There is, at least, one right that cannot be ceded or abandoned: the right to personality...They charged the great logician [Hobbes] with a contradiction in terms. If a man could give up his personality he would cease being a moral being.... There is no pactum subjectionis, no act of submission by which man can give up the state of free agent and enslave himself. For by such an act of renunciation he would give up that very character which constitutes his nature and essence: he would lose his humanity.

These themes converged in the debate about American Independence. While Jefferson was writing the Declaration of Independence, Richard Price in England sided with the Americans' claim "that Great Britain is attempting to rob them of that liberty

to which every member of society and all civil communities have a natural and unalienable title."

Price again based the argument on the de facto inalienability of "that principle of spontaneity or self-determination which constitutes us agents or which gives us a command over our actions, rendering them properly ours, and not effects of the operation of any foreign cause. Any social contract or compact allegedly alienating these rights would be non-binding and void, wrote Price:

- Neither can any state acquire such an authority over other states in virtue of any compacts or cessions. This is a case in which compacts are not binding. Civil liberty is, in this respect, on the same footing with religious liberty. As no people can lawfully surrender their religious liberty by giving up their right of judging for themselves in religion, or by allowing any human beings to prescribe to them what faith they shall embrace, or what mode of worship they shall practise, so neither can any civil societies lawfully surrender their civil liberty by giving up to any extraneous jurisdiction their power of legislating for themselves and disposing their property.

Price raised a furor of opposition so in 1777 he wrote another tract that clarified his position and again restated the de facto basis for the argument that the "liberty of men as agents is that power of self-determination which all agents, as such, possess." In Intellectual Origins of American Radicalism, Staughton Lynd pulled together these themes and related them to the slavery debate:

- Then it turned out to make considerable difference whether one said slavery was wrong because every man has a natural right to the possession of his own body, or because every man has a natural right freely to determine his own destiny. The first kind of right was alienable: thus Locke neatly derived slavery from capture in war, whereby a man forfeited his labour to the conqueror who might lawfully have killed him; and thus Dred Scott was judged permanently to have given up his freedom. But the second kind of right, what Price called "that power of self-determination which all agents, as such, possess," was inalienable as long man remained man. Like the mind's quest for religious truth from which it was derived, self-determination was not a claim to ownership which might be both acquired and surrendered, but an inextricable aspect of the activity of being human.

Meanwhile in America, Thomas Jefferson "took his division of rights into alienable and unalienable from Hutcheson, who made the distinction popular and important", and in the 1776 United States Declaration of Independence, famously condensed this to:

- "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights."

In the nineteenth century, the movement to abolish slavery seized this passage as a statement of constitutional principle, although the U.S. constitution recognized and protected slavery. As a lawyer, future Chief Justice Salmon P. Chase argued before the Supreme Court in the case of John Van Zandt, who had been charged with violating the Fugitive Slave Act, that:

- "The law of the Creator, which invests every human being with an inalienable

> title to freedom, cannot be repealed by any interior law which asserts that man is property."

Many documents now echo the phrase used in the United States Declaration of Independence. The preamble to the 1948 Universal Declaration of Human Rights asserts that rights are inalienable: "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Article 1, §1 of the California Constitution recognizes inalienable rights, and articulated some of those rights as "defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

However, there is still much dispute over which "rights" are truly natural rights and which are not, and the concept of natural or inalienable rights is still controversial to some. Contemporary political philosophies continuing the liberal tradition of natural rights include libertarianism, anarcho-capitalism and Objectivism, and include amongst their canon the works of authors such as Robert Nozick, Ludwig von Mises, Ayn Rand, and Murray Rothbard.

A libertarian view of inalienable rights is laid out in Morris and Linda Tannehill's The Market for Liberty, which claims that a man has a right to ownership over his life and therefore also his property, because he has invested time in it and thereby made it an extension of his life. However, if he initiates force against and to the detriment of another man, he alienates himself from the right to that part of his life which is required to pay his debt: "Rights are not inalienable, but only the possessor of a right can alienate himself from that right—no one else can take a man's rights from him."

Legal Rights Documents

The specific enumeration of legal rights accorded to people has historically differed greatly from one century to the next, and from one regime to the next, but nowadays is normally addressed by the constitutions of the respective nations. The following documents have each played important historical roles in establishing legal rights norms around the world. The Magna Carta required the King of England to renounce certain rights and respect certain legal procedures, and to accept that the will of the king could be bound by law. The Declaration of Arbroath established the right of the people to choose a head of state.

The Bill of Rights declared that Englishmen, as embodied by Parliament, possess certain civil and political rights. The Claim of Right was one of the key documents of Scottish constitutional law. United States Declaration of Independence succinctly defined the rights of man as including, but not limited to, “Life, liberty, and the pursuit of happiness” which later influenced “liberté, égalité, fraternité” in France. Article 13 of the 1947 Constitution of Japan, and in President Ho Chi Minh’s 1945 declaration of independence of the Democratic Republic of Vietnam.

An alternative phrase “life, liberty and property”, is found in the Declaration of Colonial Rights, a resolution of the First Continental Congress. Also, Article 3 of the Universal Declaration of Human Rights reads, “Everyone has the right to life, liberty and security of person.” Virginia Statute for Religious Freedom Written by Thomas Jefferson in 1779, the document asserted the right of man to form a personal relationship with God without interference by the state. The Declaration of the Rights of Man and of the Citizen was one of the fundamental documents of the French

Revolution, defining a set of individual rights and collective rights of the people. The United States Bill of Rights, the first ten amendments of the United States Constitution, was another influential document.

The Universal Declaration of Human Rights is an over-arching set of standards by which governments, organisations and individuals would measure their behaviour towards each other. The preamble declares that the "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..." The European Convention on Human Rights was adopted under the auspices of the Council of Europe to protect human rights and fundamental freedoms. The International Covenant on Civil and Political Rights is a follow-up to the Universal Declaration of Human Rights, concerning civil and political rights.

The International Covenant on Economic, Social and Cultural Rights is another follow-up to the Universal Declaration of Human Rights, concerning economic, social and cultural rights. The Canadian Charter of Rights and Freedoms was created to protect the rights of Canadian citizens from actions and policies of all levels of government. The Charter of Fundamental Rights of the European Union is one of the most recent legal instruments concerning human rights.

Natural Rights Theories

The existence of natural rights has been asserted by different individuals on different premises, such as a priori philosophical reasoning or religious principles. For example, Immanuel Kant claimed to derive natural rights through "reason" alone. The Declaration of Independence, meanwhile, is based upon the "self-evident" truth that "all men are... endowed by their Creator with certain unalienable Rights." Likewise, different philosophers and statesmen have designed different lists of what they believe to be natural rights; almost all include the right to life and liberty as the two highest priorities. H. L. A.

Hart argued that if there are any rights at all, there must be the right to liberty, for all the others would depend upon this. T. H. Green argued that "if there are such things as rights at all, then, there must be a right to life and liberty, or, to put it more properly to free life." John Locke emphasized "life, liberty and property" as primary. However, despite Locke's influential defence of the right of revolution, Thomas Jefferson substituted "pursuit of happiness" in place of "property" in the United States Declaration of Independence.

Thomas Hobbes

Thomas Hobbes included a discussion of natural rights in his moral and political philosophy. Hobbes' conception of natural rights extended from his conception of man in a "state of nature". Thus he argued that the essential natural right was "to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own judgement, and Reason, he shall conceive to be the aptest means thereunto." Hobbes, to deny this right would be absurd, just as it would be absurd to expect that carnivores might reject meat or fish stop swimming.

Hobbes sharply distinguished this natural "liberty", from natural "laws", described generally as "a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of

preserving his life; and to omit, that, by which he thinketh it may best be preserved."

In his natural state, just as to Hobbes, man's life consisted entirely of liberties and not at all of laws–"It followeth, that in such a condition, every man has the right to every thing; even to one another's body.

And therefore, as long as this natural Right of every man to every thing endureth, there can be no security to any man... of living out the time, which Nature ordinarily allow men to live." This would lead inevitably to a situation known as the "war of all against all", in which human beings kill, steal and enslave others in order to stay alive, and due to their natural lust for "Gain", "Safety" and "Reputation".

Hobbes reasoned that this world of chaos created by unlimited rights was highly undesirable, since it would cause human life to be "solitary, poor, nasty, brutish, and short". As such, if humans wish to live peacefully they must give up most of their natural rights and create moral obligations in order to establish political and civil society. This is one of the earliest formulations of the theory of government known as the social contract. Hobbes objected to the attempt to derive rights from "natural law," arguing that law and right though often confused, signify opposites, with law referring to obligations, while rights refer to the absence of obligations.

Since by our nature, we seek to maximize our well being, rights are prior to law, natural or institutional, and people will not follow the laws of nature without first being subjected to a sovereign power, without which all ideas of right and wrong are rendered insignificant—"Therefore before the names of Just and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants..., to make good that Propriety, which by mutual contract men acquire, in recompense of the universal Right they abandon: and such power there is none before the erection of the Commonwealth." This marked an important departure from medieval natural law theories which gave precedence to obligations over rights.

John Locke

John Locke was another prominent Western philosopher who conceptualized rights as natural and inalienable. Like Hobbes, Locke was a major social contract thinker. He said that man's natural rights are life, liberty, and property. It was once conventional wisdom that Locke greatly influenced the American Revolutionary War with his writings of natural rights, but this claim has been the subject of protracted dispute in recent decades.

For example, the historian Ray Forrest Harvey declared that Jefferson and Locke were at "two opposite poles" in their political philosophy, as evidenced by Jefferson's use in the Declaration of Independence of the phrase "pursuit of happiness" instead of "property". More recently, the eminent legal historian John Phillip Reid has deplored contemporary scholars' "misplaced emphasis on John Locke," arguing that American revolutionary leaders saw Locke as a commentator on established constitutional principles. Thomas Pangle has defended Locke's influence on the Founding, claiming that historians who argue to the contrary either misrepresent the classical republican alternative to which they say the revolutionary leaders adhered, do not understand Locke, or point to someone else who was decisively influenced by Locke.

This position has also been sustained by Michael Zuckert. Locke, there are three natural rights:

- *Life:* Everyone is entitled to live once they are created.

- *Liberty:* Everyone is entitled to do anything they want to so long as it doesn't conflict with the first right.
- *Estate:* Everyone is entitled to own all they create or gain through gift or trade so long as it doesn't conflict with the first two rights.

The social contract is a contract between a being or beings of power and their people or followers. The King makes the laws to protect the three natural rights. The people may not agree on the laws, but they have to follow them. The people can be prosecuted and/or killed if they break these laws. If the King does not follow these rules, he can be overthrown.

Thomas Paine

Thomas Paine further elaborated on natural rights in his influential work Rights of Man emphasizing that rights cannot be granted by any charter because this would legally imply they can also be revoked and under such circumstances they would be reduced to privileges:

- It is a perversion of terms to say that a charter gives rights. It operates by a contrary effect—that of taking rights away. Rights are inherently in all the inhabitants; but charters, by annulling those rights, in the majority, leave the right, by exclusion, in the hands of a few.... They...consequently are instruments of injustice.

The fact therefore must be that the individuals themselves, each in his own personal and sovereign right, entered into a contract with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.

Debate

Various definitions of inalienability include non-relinquishability, non-salability, and non-transferability. This concept has been recognized by libertarians as being central to the question of voluntary slavery, which Murray Rothbard dismissed as illegitimate and even self-contradictory. Stephan Kinsella argues that "viewing rights as alienable is perfectly consistent with—indeed, implied by—the libertarian non-aggression principle. Under this principle, only the initiation of force is prohibited; defensive, restitutive, or retaliatory force is not."

The concept of inalienable rights was criticized by Jeremy Bentham and Edmund Burke as groundless. Bentham and Burke, writing in the eighteenth century, claimed that rights arise from the actions of government, or evolve from tradition, and that neither of these can provide anything inalienable. Presaging the shift in thinking in the 19th century, Bentham famously dismissed the idea of natural rights as "nonsense on stilts". By way of contrast to the views of Burke and Bentham, the leading American revolutionary scholar James Wilson condemned Burke's view as "tyranny."

The signers of the Declaration of Independence deemed it a "self evident truth" that all men are "endowed by their Creator with certain unalienable Rights". Critics, however, could argue that use of the word "Creator" signifies that these rights are based on theological principles, and might question which theological principles those are, or why those theological principles should be accepted by people who do not adhere to the religion from which they are derived.

In "The Social Contract," Jean-Jacques Rousseau claims that the existence of

inalienable rights is unnecessary for the existence of a constitution or a set of laws and rights. This idea of a social contract—that rights and responsibilities are derived from a consensual contract between the government and the people—is the most widely recognized alternative. Samuel P. Huntington, an American political scientist, wrote that the "inalienable rights" argument from the Declaration of Independence was necessary because "The British were white, Anglo, and Protestant, just as we were. They had to have some other basis on which to justify independence." Different philosophers have created different lists of rights they consider to be natural. Proponents of natural rights, in particular Hesselberg and Rothbard, have responded that reason can be applied to separate truly axiomatic rights from supposed rights, stating that any principle that requires itself to be disproved is an axiom.

Critics have pointed to the lack of agreement between the proponents as evidence for the claim that the idea of natural rights is merely a political tool. For instance, Jonathan Wallace has asserted that there is no basis on which to claim that some rights are natural, and he argued that Hobbes' account of natural rights confuses right with ability. Wallace advocates a social contract, much like Hobbes and Locke, but does not base it on natural rights: We are all at a table together, deciding which rules to adopt, free from any vague constraints, half-remembered myths, anonymous patriarchal texts and murky concepts of nature.

If I propose something you do not like, tell me why it is not practical, or harms somebody, or is counter to some other useful rule; but don't tell me it offends the universe. Other critics have argued that the attempt to derive rights from "natural law" or "human nature" is an example of the is-ought problem. However, the term "natural" in "natural rights" refers to the opposite of "artificial", rather than meaning "physical" as it does in the sense of ethical naturalism, which just as to G.E. Moore does suffer the is-ought problem in the form of the naturalistic fallacy. Hugh Gibbons has proposed a descriptive argument based on human biology. He claims that Human Beings were other-regarding as a matter of necessity, in order to avoid the costs of conflict.

Over time they developed expectations that individuals would act in certain ways which were then prescribed by society and that eventually crystallized into actionable rights. There is also debate as to whether all rights are either natural or legal. Fourth president of the United States James Madison, while representing Virginia in the House of Representatives, believed that there are rights, such as trial by jury, are social rights, that arising neither from natural law nor from positive law but from the social contract from which a government derives its authority.

Claim Rights and Liberty Rights

Some philosophers and political scientists make a distinction between claim rights and liberty rights. A claim right is a right which entails responsibilities, duties, or obligations on other parties regarding the right-holder. In contrast, a liberty right is a right which does not entail obligations on other parties, but rather only freedom or permission for the right-holder. The distinction between these two senses of "rights" originates in American jurist Wesley Newcomb Hohfeld's analysis thereof in his seminal work Fundamental Legal Conceptions.

Liberty rights and claim rights are the inverse of one another: a person has a liberty right permitting him to do something only if there is no other person who has

a claim right forbidding him from doing so; and likewise, if a person has a claim right against someone else, that other person's liberty is thus limited. This is because the deontic concepts of obligation and permission are De Morgan dual; a person is permitted to do all and only the things he is not obliged to refrain from, and obliged to do all and only the things he is not permitted to refrain from.

A person's liberty right to x consists in his freedom to do or have x, while a person's claim right to x consists in an obligation on others to allow or enable him to do or have x. For example, to assert a liberty right to free speech is to assert that you have permission to speak freely; that is, that you are not doing anything wrong by speaking freely.

But that liberty right does not in itself entail that others are obligated to help you communicate the things you wish to say, or even that they would be wrong in preventing you from speaking freely.

To say these things would be to assert a claim right to free speech; to assert that others are obliged to refrain from preventing you from speaking freely or even perhaps obliged to aid your efforts at communication. Conversely, such claim rights do not entail liberty rights; *e.g.* laws prohibiting vigilante justice do not thereby condone or permit all the acts which such violent enforcement might otherwise have prevented. To show, a world with only liberty rights, without any claim rights, would by definition be a world wherein everything was permitted and no act or omission was prohibited; a world wherein none could rightly claim that they had been wronged or neglected.

Conversely, a world with only claim rights and no liberty rights would be a world wherein nothing was merely permitted, but all acts were either obligatory or prohibited. The assertion that people have a claim right to liberty—*i.e.* that people are obliged only to refrain from preventing each other from doing things which are permissible, their liberty rights limited only by the obligation to respect others' liberty—is the central thesis of liberal theories of justice.

Second-order Rights

Hohfeld's original analysis included two other types of right: besides claims and liberties, he wrote of powers, and immunities. The other two terms of Hohfeld's analysis, powers and immunities, refer to second-order liberties and claims, respectively. Powers are liberty rights regarding the modification of first-order rights, *e.g.* the U.S. Congress has certain powers to modify some of U.S. citizens' legal rights, inasmuch as it can impose or remove legal duties. Immunities, conversely, are claim rights regarding the modification of first-order rights, *e.g.* U.S. citizens have, per their Constitution, certain immunities limiting the positive powers of the U.S. Congress to modify their legal rights. As such, immunities and powers are often subsumed within claims and liberties by later authors, or grouped together into "active rights" and "passive rights".

These different types of rights can be used as building blocks to explain relatively complex matters such as a particular piece of property. For example, a right to use one's computer can be thought of as a liberty right, but one has a power right to let somebody else use your computer, as well as a claim right against others using the computer; and further, you may have immunity rights protecting your claims and liberties regarding the computer.

Positive and Negative Rights

Rights talk is a common theme in contemporary moral discourse. We speak freely of having all sorts of different rights. Our rights may or may not include a right to freedom of speech, life, non-interference, equal pay for equal work, etc. If somebody cares about it, you can bet someone, somewhere, has described it as a right. What's not always mentioned, but well worth getting clear about, is whether certain rights are positive or negative, as well as why this makes a difference to our moral decision-making. Some rights are negative rights. Negative rights are typically rights to not be subjected to certain conditions, such as a right to freedom of speech or autonomy. Negative rights are often some varietal of a right to non-interference.

They impose duties on others to leave you alone and let you do things that are important to you, like speak your mind or make your own decisions. They also carry a great deal of normative weight, in that we place great importance upon not violating the negative rights of other people.

Some of our rights are not negative, but positive. Positive rights are usually rights to receive some benefit, such as a right to an education or accessible health care. Positive rights differ substantially from negative rights. First, negative rights are usually based on something about the bearer. Humans have a negative right to autonomy because humans are the sorts of creatures that make choices that matter to them. But positive rights are often not based on things about the bearer.

Some positive rights, like a right to be paid for work that you do, are based on agreements. Other positive rights are based on idealized conceptions of human interaction, such as a right to health care or clean water. Most importantly, positive rights are less stringent than negative rights. While I do you great harm by violating your right to autonomy, it's not necessarily true that I do you comparable harm by violating your right to health care. Your right to autonomy clearly correlates to a duty of non-interference for me, but it's less obvious what my duties are, if any, in virtue of your right to accessible health care. Positive rights less obviously correlate to identifiable duties for others, and violating them is often seen as preferable to violating a person's negative rights. Why does this distinction matter? There are at least two important implications.

First, rights often come into conflict with one another. When you are making a difficult moral decision that will lead to the inevitable violation of someone's rights, it might be helpful to identify what sorts of rights are at risk. If you have the option, you may be better off violating someone's positive right rather than a much more stringent and cherished negative right. The other important implication for this distinction is in the realm of public policy. There is very little resistance to the enshrinement of negative rights into law.

Most of them are already protected, and any that are not safeguarded are usually held in sufficiently high esteem that resistance to granting them the force of law is not significant. But positive rights are far trickier, and few politicians make the distinction between positive and negative rights, often because of the rhetorical strength of disguising a positive right as a negative one. For example, many politicians are pressing for a universal health care system, from the claim that people have a right to health care. This is a convincing statement if one treats a right to health care like a negative right. Unfortunately, there is no obvious sense in which health care can be a negative right, because there is nothing about being a person that clearly entails a negative right to health care. However, this does not mean that we cannot have a

positive right to health care. Positive rights can be the product of agreements.

If a society agrees that everyone has a positive right to health care, they are essentially creating this positive right. However, because positive rights are less stringent, it is an open question what sorts of duties a right to health care would impose on others. Whatever your views may be on the subject of a negative or positive right to health care, it is clear that the distinction makes a difference for how we think about rights in general. Not only can this distinction help us to resolve difficult moral dilemmas, it is also a useful tool for recognizing when rights talk is being employed as a rhetorical mechanism for political gains.

Differences between Positive and Negative Rights

Negative rights are often used to defend political rights such as freedom of speech, private property, a fair trial, freedom of worship and the right to be considered innocent until proven guilty. Positive rights may be called up to protect the person, property, right to counsel, public education, health care, social security, or a minimum standard of living. In the 'three generations' of human rights—liberty, equality and fraternity - negative rights are often linked with 'first-generation rights' or the liberty rights. Liberty rights pertain to the protection of basic human freedom such as speech, life and worship. Positive rights, on the other hand, are associated with 'second-generation rights' or the equality rights such as employment, health care or housing rights.

Both rights are covered by the Universal Declaration of Human Rights. Classical liberals and libertarians maintain that positive rights do not exist until they are established by a contract. The constitution often times guarantee negative rights such as the right to expression but not often include positive rights. Positive rights however are created from other laws or as a result of other laws such as the need to provide public and free education, unemployment assistance and health care benefits. The rights are considered inalienable even absolute necessity. Positive and negative rights can be viewed as obligations instead of rights in order to clearly differentiate between the two. Negative obligation then is an obligation not to do while positive obligation obliges one to do something.

Criticism

Critics argue that the distinction between negative and positive rights is a false dichotomy. Some draw attention to the question of enforcement to argue that it is illogical for certain rights traditionally characterised as negative, such as the right to property or freedom from violence, to be so categorised. While rights to property and freedom from violence require that individuals refrain from fraud and theft, they can only be upheld by 'positive' actions by individuals or the state. Individuals can only defend the right to property by repelling attempted theft, while the state must make provision for a police force, or even army, which in turn must be funded through taxation.

It is therefore argued that these rights, although generally considered negative by libertarians and classical liberals, are in fact just as 'positive' or 'economic' in nature as 'positive' rights such as the right to an education. Jan Narveson, the view of some that there is no distinction between negative and positive rights on the ground that negative rights require police and courts for their enforcement is "mistaken".

He says that the question between what one has a right to do and who if anybody enforces it are separate issues. If rights are only negative then it simply means no one

has a duty to enforce them, although individuals have a right to use any non-forcible means to gain the cooperation of others in protecting those rights.

Therefore, he says "the distinction between negative and positive is quite robust." Libertarians hold that positive rights, which would include a right to be protected, do not exist until they are created by contract. However, those who hold this view do not mean that police, for example, are not obligated to protect the rights of citizens. Since they contract with their employers to defend citizens from violence, then they have created that obligation to their employer.

A negative right to life allows an individual to defend his life from others trying to kill him, or obtain voluntary assistance from others to defend his life—but he may not force others to defend him, because he has no natural right to be provided with defence. To force a person to defend one's own negative rights, or the negative rights of a third party, would be to violate that person's negative rights.

Other advocates of the view that there is a distinction between negative and positive rights argue that the presence of a police force or army is not due to any positive right to these services that citizens claim, but rather because they are natural monopolies or public goods—features of any human society that arise naturally, even while adhering to the concept of negative rights only.

Robert Nozick discusses this idea at length in his book Anarchy, State, and Utopia. Some critics go further to hold that any right can be made to appear either positive or negative depending on the language used to define it. For instance, the right to be free from starvation is considered 'positive' on the grounds that it implies a starving person must be provided with food through the positive action of others, but on the other hand, as James P. Sterba argues, it might just as easily be characterised as the right of the starving person not to be interfered with in taking the surplus food of others.

He writes: What is at stake is the liberty of the poor not to be interfered with in taking from the surplus possessions of the rich what is necessary to satisfy their basic needs. Needless to say, libertarians would want to deny that the poor have this liberty.

But how could they justify such a denial? As this liberty of the poor has been specified, it is not a positive right to receive something, but a negative right of non-interference. The discussion often centres on the nature of rights themselves; some philosophers argue that rights are purely moral principles rather than legal rules that should be enforced by governments. Thus, in this view, one person's negative right does not impose a moral obligation on anybody else to affirmatively protect that right against aggressors; the obligation is only to refrain from violating it themselves: a negative obligation.

Individual and Group Rights

Group rights are rights held by a group rather than by its members separately, or rights held only by individuals within the specified group; in contrast, individual rights are rights held by individual people regardless of their group membership or lack thereof. Group rights have historically been used both to infringe upon and to facilitate individual rights, and the concept remains controversial. Group rights are not straightforwardly human rights because they are group-differentiated rather than universal to all people just by virtue of being human.

In Western discourse, individual rights are often associated with political and

economic freedom, whereas group rights are associated with social control. This is because in the West the establishment of individual rights is associated with equality before the law and protection from the state. Examples of this are the Magna Carta, in which the English King accepted that his will could be bound by the law and certain rights of the King's subjects were explicitly protected. By contrast, much of the recent political discourse on individual rights in the People's Republic of China, particularly with respect to due process rights and rule of law, has focused on how protection of individual rights actually makes social control by the government more effective.

For example, it has been argued that the people are less likely to violate the law if they believe that the legal system is likely to punish them if they actually violated the law and not punish them if they did not violate the law. By contrast, if the legal system is arbitrary then an individual has no incentive to actually follow the law.

Racism

Group rights may have a negative connotation in the context of colonialism, legalised racism and white nationalism. In this context group rights award rights to a privileged group. For example, in South Africa under the former apartheid regime, which classified inhabitants and visitors into racial groups. Rights were awarded on a group basis, creating first and second class citizens.

In the United States individual rights for all by virtue of being human were only established after the Civil War, in 1868, with the Fourteenth Amendment to the Constitution. The Fourteenth Amendment was intended to secure rights for former slaves and amongst others includes the Due Process and Equal Protection.

Affirmative Action

In the modern context, 'group rights' are argued for by some as an instrument to actively facilitate the realisation of equality. In a society where there is already equality before the law for all citizens, 'equality' is often an euphemistic reference to material equality. This is where the group is regarded as being in a situation such that it needs special protective rights if its members are to enjoy living conditions on terms equal with the majority of the population. Examples of such groups may include indigenous peoples, ethnic minorities, women, children and the disabled.

This discourse may takes place in the context of negative and positive rights in that some commentators and policy makers conceptualise equality as not only a negative right, in the sense of ensuring freedom from discrimination, but also a positive right, in that the realisation of equality requires redistributive action by others or the state. In this respect group rights may aim to ensure equal opportunity and/or attempt to actively redress inequality. An example this is the Black Economic Empowerment programme in post-Apartheid South Africa.

The South African government seeks to redress the inequalities of Apartheid by giving previously disadvantaged groups economic opportunities previously not available to them. It includes measures such as Employment Equity, skills development, reverse racism, ownership, management, socio-economic development and preferential procurement. The South African Bill of Rights, contained in the South African Constitution contains strong provisions on equality, or the right to equality.

But the Bill of Rights states that "discrimination... is unfair unless it is established that the discrimination is fair." This implies that the rational behind the Black Economic Empowerment programme is fair, despite infringing the absolute application

of the right to equality. Government programmes of reverse discrimination or positive discrimination exist in a number of countries: the British government seeks to favour historically disadvantaged groups at the expense of members of a historically dominant group in the areas of university admissions or employment.

Similarly, non-quota race preferences is in place in the United States for collegiate admission to government-run educational institutions. Group rights in such a context may aim to achieve equality of opportunity and/or equality of outcome. Such affirmative action can be controversial as they are in conflict with the absolute application of the right to equality, or because some members of the group that is intended to benefit from such programmes criticizes or opposes them.

Constitutions

In the United States, the Constitution outlines individual rights within the Bill of Rights. In Canada, the Canadian Charter of Rights and Freedoms serves the same function. One of the key differences between the two documents is that some rights in the Canadian Charter can be overridden by governments if they deliberately do so and "the resulting balance of individual rights and social rights remains appropriate to a free and democratic society" after the change. In practice, the Quebec government used the provision frequently in the early 1980s as a protest, and since then to maintain a ban on non-French public signs for five years.

The government of Saskatchewan has used it for back-to-work legislation, and the government of Alberta sought to use it to define marriage as strictly heterosexual. In contrast, in the United States, no such override exists even in theory; even a constitutional amendment could not remove these rights entirely, as they are considered inalienable under the natural rights principles the Constitution is founded upon.

Philosophies

In the MINARCHIST political views of libertarians and classical liberals, the role of the government is solely to identify, protect, and enforce the natural rights of the individual while attempting to assure just remedies for transgressions. Liberal governments that respect individual rights often provide for systemic controls that protect individual rights such as a system of due process in criminal justice.

Collectivist states are generally considered to be oppressive by such classical liberals and libertarians precisely because they do not respect individual rights. Interceding within that spectrum for the actual availing of collective governance to be allotted systematization and their undivided agency, but relegated for the regulation of such freedom towards constructed entities is the federative process. A faculty of federalism that lends to relative de-standardization of governance under its auspices, unlike libertarian or socialistic manners of state. Federated structures allow for diversity of power distribution between the alternating group and individual interest schemata where neither liberal nor collective type governing alone can codify in variation.

Ayn Rand, developer of the philosophy of Objectivism asserted that a group, as such, has no rights. A man can neither acquire new rights by joining a group nor lose

the rights which he does possess. The principle of individual rights is the only moral base of all groups or associations. She maintained that since only an individual man can possess rights, the expression “individual rights” is a redundancy, but the expression “collective rights” is a contradiction in terms.

Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities.

7

Declarations on Human Rights

Cairo Declaration on Human Rights in Islam

The Nineteenth Islamic Conference of Foreign Ministers held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H,

- Keenly aware of the place of mankind in Islam as vicegerent of Allah on Earth;
- Recognizing the importance of issuing a Document on Human Rights in Islam that will serve as a guide for Member states in all aspects of life;
- Having examined the stages through which the preparation of this draft Document has so far, passed and the relevant report of the Secretary General;
- Having examined the Report of the Meeting of the Committee of Legal Experts held in Tehran from 26 to 28 December, 1989;
- Agrees to issue the Cairo Declaration on Human Rights in Islam that will serve as a general guidance for Member States in the field of Human Rights.

Reaffirming the civilizing and historical role of the Islamic Ummah which Allah made as the best community and which gave humanity a universal and well-balanced civilization, in which harmony is established between hereunder and the hereafter, knowledge is combined with faith, and to fulfill the expectations from this community to guide all humanity which is confused because of different and conflicting beliefs and ideologies and to provide solutions for all chronic problems of this materialistic civilization. In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah. Convinced that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization as well as a self motivating force to guard its rights; Believing that fundamental rights and freedoms just as to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands.

Which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah; Do hereby and on the basis of the principles declare as follows:

- *Article* 1:
  - All human beings form one family whose members are united by their

subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.

  - All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds.

- *Article* 2:
  - Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason.
  - It is forbidden to resort to any means which could result in the genocidal annihilation of mankind.
  - The preservation of human life throughout the term of time willed by Allah is a duty prescribed by Shari'ah.
  - Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason.
- *Article* 3:
  - In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate or dismember dead bodies. It is required to exchange prisoners of war and to arrange visits or reunions of families separated by circumstances of war.
  - It is prohibited to cut down trees, to destroy crops or livestock, to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.
- *Article* 4: Every human being is entitled to human sanctity and the protection of one's good name and honour during one's life and after one's death. The state and the society shall protect one's body and burial place from desecration.
- *Article* 5:
  - The family is the foundation of society, and marriage is the basis of making a family. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right.
  - The society and the State shall remove all obstacles to marriage and facilitate it, and shall protect the family and safeguard its welfare.

- *Article* 6:
  - Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.
  - The husband is responsible for the maintenance and welfare of the family.
- *Article* 7:
  - As of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be safeguarded and accorded special care.
  - Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah.
  - Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the shari'ah.
- *Article* 8: Every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligations in case such eligibility is lost or impaired, the person shall have the right to be represented by his/her guardian.
- *Article* 9:
  - The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind.
  - Every human being has a right to receive both religious and worldly education from the various institutions of teaching, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner that would develop human personality, strengthen man's faith in Allah and promote man's respect to and defence of both rights and obligations.
- *Article* 10: Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.
- *Article* 11:
  - Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty.
  - Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States peoples to support the struggle of colonized peoples for the liquidation of all forms of and occupation,

and all States and peoples have the right to preserve their independent identity and econtrol over their wealth and natural resources.

- *Article* 12: Every man shall have the right, within the framework of the Shari'ah, to free movement and to select his place of residence whether within or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the Shari'ah as a crime.
- *Article* 13: Work is a right guaranteed by the State and the Society for each person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the society. The employee shall have the right to enjoy safety and security as well as all other social guarantees. He may not be assigned work beyond his capacity nor shall he be subjected to compulsion or exploited or harmed in any way. He shall be entitled—without any discrimination between males and females—to fair wages for his work without delay, as well as to the holidays allowances and promotions which he deserves. On his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.
- *Article* 14: Everyone shall have the right to earn a legitimate living without monopolization, deceit or causing harm to oneself or to others. Usury is explicitly prohibited.
- *Article* 15:
  - Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or the society in general. Expropriation is not permissible except for requirements of public interest and upon payment of prompt and fair compensation.
  - Confiscation and seizure of property is prohibited except for a necessity dictated by law.
- *Article* 16: Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author; and he shall have the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles of the Shari'ah.
- *Article* 17:
  - Everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would favour a healthy ethical development of his person and it is incumbent upon the State and society in general to afford that right.
  - Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.
  - The States shall ensure the right of the individual to a decent living that

may enable him to meet his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

- *Article* 18:
  - Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property.
  - Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.
  - A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.
- *Article* 19:
  - All individuals are equal before the law, without distinction between the ruler and the ruled.
  - The right to resort to justice is guaranteed to everyone.
  - Liability is in essence personal.
  - There shall be no crime or punishment except as provided for in the Shari'ah.
  - A defendant is innocent until his guilt is proven in a fast trial in which he shall be given all the guarantees of defence.
- *Article* 20: It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without hisconsent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.
- *Article* 21: Taking hostages under any form or for any purpose is expressly forbidden.
- *Article* 22:
  - Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.
  - Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil just as to the norms of Islamic Shari'ah.
  - Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.

  - It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination.
- *Article* 23:
  - Authority is a trust; and abuse or malicious exploitation thereof is explicitly prohibited, in order to guarantee fundamental human rights.
  - Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.
- *Article* 24: All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.
- *Article* 25: The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly during its 62nd session at UN Headquarters in New York City on 13 September 2007. While as a General Assembly Declaration it is not a legally binding instrument under international law, just as to a UN press release, it does "represent the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions".

The UN describes it as setting "an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalisation."

Purpose

The Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It also "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations".

It "prohibits discrimination against indigenous peoples", and it "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development".

Negotiation and Ratification

The Declaration was over 22 years in the making. The idea originated in 1982 when the UN Economic and Social Council (ECOSOC) set up its Working Group on Indigenous Populations (WGIP), established as a result of a study by Special Rapporteur José R. Martínez Cobo on the problem of discrimination faced by indigenous peoples.

Tasked with developing human rights standards that would protect indigenous peoples, in 1985 the Working Group began working on drafting the Declaration on the Rights of Indigenous Peoples. The draft was finished in 1993 and was submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which gave its approval the following year.

The Draft Declaration was then referred to the Commission on Human Rights, which established another Working Group to examine its terms. Over the following years this Working Group met on 11 occasions to examine and fine-tune the Draft Declaration and its provisions. Progress was slow because of certain states' concerns regarding some key provisions of the Declaration, such as indigenous peoples' right to self-determination and the control over natural resources existing on indigenous peoples' traditional lands.

The final version of the Declaration was adopted on 29 June 2006 by the 47-member Human Rights Council with 30 member states in favour, two against, 12 abstentions, and three absentees. The Declaration was then referred to the General Assembly, which voted on the adoption of the proposal on 13 September 2007 during its 61st regular session. The vote was 143 countries in favour, four against, and 11 abstaining.

The four member states that voted against were Australia, Canada, New Zealand and the United States, all of which have their origins as colonies of the United Kingdom and have large non-indigenous immigrant majorities and small remnant indigenous populations. Australia and New Zealand have since changed their votes in favour of the Declaration, in 2009 and 2010 respectively. The abstaining countries were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine; another 34 member states were absent from the vote. Colombia and Samoa have since endorsed the document.

Reaction

Support

In contrast to the Declaration's rejection by Australia, Canada, New Zealand and the United States, United Nations officials and other world leaders expressed pleasure at its adoption. Secretary-General Ban Ki-moon described it as a "historic moment when UN Member States and indigenous peoples have reconciled with their painful histories and are resolved to move forward together on the path of human rights, justice and development for all." Louise Arbour, a former justice of the Supreme Court of Canada then serving as the UN's High Commissioner for Human Rights, expressed satisfaction at the hard work and perseverance that had finally "borne fruit in the most comprehensive statement to date of indigenous peoples' rights."

Similarly, news of the Declaration's adoption was greeted with jubilation in Africa and, present at the General Assembly session in New York, Bolivian foreign minister David Choquehuanca said that he hoped the member states that had voted against or abstained would reconsider their refusal to support a document he described as being as important as the Universal Declaration of Human Rights. Bolivia has become the first country to approve the U.N. declaration of indigenous rights. Evo Morales, President of Bolivia, stated, "We are the first country to turn this declaration into a law and that is important, brothers and sisters.

We recognize and salute the work of our representatives. But if we were to remember the indigenous fight clearly, many of us who are sensitive would end up crying in remembering the discrimination, the scorn." Stephen Corry, Director of the international indigenous rights organization Survival International, said, "The declaration has been debated for nearly a quarter century.

Years which have seen many tribal peoples, such as the Akuntsu and Kanoê in Brazil, decimated and others, such as the Innu in Canada, brought to the edge. Governments that oppose it are shamefully fighting against the human rights of their most vulnerable peoples. Claims they make to support human rights in other areas will be seen as hypocritical."

Criticism

Prior to the adoption of the Declaration, and throughout the 62nd session of the General Assembly, a number of countries expressed concern about some key issues, such as self-determination, access to lands, territories and resources and the lack of a clear definition of the term indigenous. These concerns were expressed by a group of African countries, in addition to the final four that voted against the adoption of the declaration.

Ultimately, after agreeing on some adjustments to the Draft Declaration, a vast majority of states recognized that these issues could be addressed by each country at the national level. The four states that voted against–continued to express serious reservations about the final text of the Declaration as placed before the General Assembly. Two of the four opposing countries, Australia and New Zealand, have since then changed their vote in favour of the Declaration.

Australia

Australia's government opposed the Declaration in the General Assembly vote of 2007, but has since endorsed the declaration. Australia's Mal Brough, Minister for Families, Community Services and Indigenous Affairs, referring to the provision regarding the upholding of indigenous peoples' customary legal systems, said that, "There should only be one law for all Australians and we should not enshrine in law practices that are not acceptable in the modern world."

Marise Payne, Liberal Party Senator for New South Wales, further elaborated on the Australian government's objections to the Declaration in a speech to the Senate as:

- Concerns about references to self-determination and their potential to be misconstrued.
- Ignorance of contemporary realities concerning land and resources. "They seem, to many readers, to require the recognition of Indigenous rights to lands which are now lawfully owned by other citizens, both Indigenous and non-Indigenous, and therefore to have some quite significant potential to impact on the rights of third parties."
- Concerns over the extension of Indigenous intellectual property rights under the declaration as unnecessary under current international and Australian law.
- The potential abuse of the right under the Declaration for indigenous peoples to unqualified consent on matters affecting them, "which implies to some readers that they may then be able to exercise a right of veto over all matters of state, which would include national laws and other administrative measures."
- The exclusivity of indigenous rights over intellectual, real and cultural property, that "does not acknowledge the rights of third parties—in particular, their rights to access Indigenous land and heritage and cultural objects where

appropriate under national law." Furthermore, that the Declaration "fails to consider the different types of ownership and use that can be accorded to Indigenous people and the rights of third parties to property in that regard."

- Concerns that the Declaration places indigenous customary law in a superior position to national law, and that this may "permit the exercise of practices which would not be acceptable across the board", such as customary corporal and capital punishments.

In October 2007, former Australian Prime Minister John Howard pledged to hold a referendum on changing the constitution to recognise indigenous Australians if re-elected. He said that the distinctiveness of people's identity and their rights to preserve their heritage should be acknowledged. On 3 April 2009, the Rudd government formally endorsed the Declaration.

Canada

The Canadian government said that while it supported the spirit of the declaration, it contained elements that were "fundamentally incompatible with Canada's constitutional framework," which includes both the Charter of Rights and Freedoms and Section 35, which enshrines aboriginal and treaty rights.

In particular, the Canadian government had problems with Article 19 and Articles 26 and 28. Minister of Indian Affairs and Northern Development Chuck Strahl described the document as "unworkable in a Western democracy under a constitutional government." Strahl elaborated, saying "In Canada, you are balancing individual rights *vs.* collective rights, and document... has none of that. By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution."

He gave an example: "In Canada... you negotiate on this... because don't trump all other rights in the country. You need also to consider the people who have sometimes also lived on those lands for two or three hundred years, and have hunted and fished alongside the First Nations."

The Assembly of First Nations passed a resolution in December 2007 to invite Presidents Hugo Chávez and Evo Morales to Canada to put pressure on the government to sign the Declaration on the Rights of Indigenous Peoples, calling the two heads of state "visionary leaders" and demanding Canada resign its membership on the United Nations Human Rights Council. On 3 March 2010, in the Speech From the Throne, the Governor General of Canada announced that the government was moving to endorse the declaration. "We are a country with an Aboriginal heritage. A growing number of states have given qualified recognition to the United Nations Declaration on the Rights of Indigenous Peoples. Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada's Constitution and laws."

New Zealand

In 2007 New Zealand's Minister of Mâori Affairs Parekura Horomia described the Declaration as "toothless", and said, "There are four provisions we have problems with, which make the declaration fundamentally incompatible with New Zealand's constitutional and legal arrangements." Article 26 in particular, he said, "appears to require recognition of rights to lands now lawfully owned by other citizens, both

indigenous and non-indigenous. This ignores contemporary reality and would be impossible to implement."

In response, Mâori Party leader Pita Sharples said it was "shameful to the extreme that New Zealand voted against the outlawing of discrimination against indigenous people; voted against justice, dignity and fundamental freedoms for all."

On 7 July 2009 the New Zealand government announced that it would support the Declaration; this, however, appeared to be a premature announcement by Pita Sharples, the current Minister of Mâori Affairs, as the New Zealand government cautiously backtracked on Sharples' July announcement. However in April 2010 Pita Sharples announced New Zealand's support of the declaration at a speech in New York. On 19 April 2010 it was announced by Pita Sharples that New Zealand endorsed the UN declaration.

United States

Speaking for the United States mission to the UN, spokesman Benjamin Chang said, "What was done today is not clear.

The way it stands now is subject to multiple interpretations and doesn't establish a clear universal principle." The U.S. mission also issued a floor document, "Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples", setting out its objections to the Declaration. Most of these are based on the same points as the three other countries' rejections but, in addition, the United States drew attention to the Declaration's failure to provide a clear definition of exactly whom the term "indigenous peoples" is intended to cover.

United Kingdom

Speaking on behalf of the United Kingdom government, UK Ambassador and Deputy Permanent Representative to the United Nations, Karen Pierce, "emphasized that the Declaration was non-legally binding and did not propose to have any retroactive application on historical episodes. National minority groups and other ethnic groups within the territory of the United Kingdom and its overseas territories did not fall within the scope of the indigenous peoples to which the Declaration applied."

Universal Declaration of Human Rights

The Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris. The Declaration has been translated into at least 375 languages and dialects.

The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are entitled. It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws.

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. In 1966 the General Assembly adopted the two detailed Covenants, which complete the International Bill of Human Rights.

History

Conception

European philosophers of the Age of Enlightenment developed theories of natural law that influenced the adoption of documents such as the Bill of Rights of England, the Bill of Rights in the United States, and the Declaration of the Rights of Man and of the Citizen in France. National and International pressure for an international bill of rights had been building throughout World War II.

In his 1941 State of the Union address US president Franklin Roosevelt called for the protection of what he termed the "essential" Four Freedoms: freedom of speech, freedom of conscience, freedom from fear and freedom from want, as its basic war aims. This has been seen as part of a movement of the 1940s that sought to make human rights part of the conditions for peace at the end of the war.

The United Nations Charter "reaffirmed faith in fundamental human rights, and dignity and worth of the human person" and committed all member states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

When the atrocities committed by Nazi Germany became public knowledge around the world after World War II, the consensus within the world community was that the United Nations Charter did not sufficiently define the rights it referenced. A universal declaration that specified the rights of individuals was necessary to give effect to the Charter's provisions on human rights.

Drafting

Canadian John Peters Humphrey was called upon by the United Nations Secretary-General to work on the project and became the Declaration's principal drafter. At the time Humphrey was newly appointed as Director of the Division of Human Rights within the United Nations Secretariat. The Commission on Human Rights, a standing body of the United Nations, was constituted to undertake the work of preparing what was initially conceived as an International Bill of Rights. The membership of the Commission was designed to be broadly representative of the global community with representatives of the following countries serving: Australia, Belgium, Byelorussian Soviet Socialist Republic, Chile, China, Cuba, Egypt, France, India, Iran, Lebanon, Panama, Philippines, United Kingdom, United States, Soviet Union, Uruguay and Yugoslavia.

Adoption

The Universal Declaration was adopted by the General Assembly on 10 December 1948 by a vote of 48 in favour, 0 against, with 8 abstentions. The following countries voted in favour of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay and Venezuela.

Despite the central role played by Canadian John Humphrey, the Canadian Government at first abstained from voting on the Declaration's draft, but later voted in favour of the final draft in the General Assembly.

Structure

The underlying structure of the Universal Declaration was introduced in its second draft which was prepared by Rene Cassin. Cassin worked from a first draft prepared by John Peters Humphrey. The structure was influenced by the Code Napoleon, including a preamble and introductory general principles.

Cassin compared the Declaration to the portico of a Greek temple, with a foundation, steps, four columns and a pediment. Articles 1 and 2 are the foundation blocks, with their principles of dignity, liberty, equality and brotherhood. The seven paragraphs of the preamble, setting out the reasons for the Declaration, are represented by the steps. The main body of the Declaration forms the four columns. The first column constitutes rights of the individual, such as the right to life and the prohibition of slavery.

The second column constitutes the rights of the individual in civil and political society. The third column is concerned with spiritual, public and political freedoms such as freedom of religion and freedom of association. The fourth column sets out social, economic and cultural rights. In Cassin's model, the last three articles of the Declaration provide the pediment which binds the structure together. These substances are concerned with the duty of the individual to society and the prohibition of use of rights in contravention of the purposes of the United Nations. With regard to the Communist block's abstentions, the 9 December Velodrome d'Hiver meeting of 20,000 Parisiens at the invitation of World Citizen Garry Davis and his "Conseil de Solidarité" who had interrupted a General Assembly session on 22 November to call for a world government, provoked its abstention rather than voting against the human rights document.

Eleanor Roosevelt in her column "My Day" wrote on 15 December that "Garry Davis, the young man who in Paris as a citizen of the world...has succeeded in getting the backing of a few intellectuals and even has received a cablegram from Albert Einstein telling him, from Professor Einstein's point of view, that the United Nations has not yet achieved peace.

The United Nations, of course, is not set up to achieve peace. That the governments are supposed to do themselves. But it is expected to help preserve peace, and that I think, is it doing more effectively day by day...During a pleneary session in the General Assembly, this young man tried to make a speech from the balcony on the subject of how incompetent the United Nations is to deal with the questions before it.

How much better it would be if Mr. Davis would set up his own governmental organisation and start then and there a worldwide international government. All who would join him would learn that they had no nationality and, therefore, not being bothered by any special interest in any one country, everyone would develop...a completely cooperative feeling among all peoples and a willingness to accept any laws passes by this super government."

Preamble

The Universal Declaration begins with a preamble consisting of seven paragraphs followed by a statement "proclaiming" the Declaration. Each paragraph of the preamble sets out a reason for the adoption of the Declaration. The first paragraph asserts that the recognition of human dignity of all people is the foundation of justice and peace in the world. The second paragraph observes that disregard and contempt for human

rights have resulted in barbarous acts which have outraged the conscience of mankind and that the four freedoms: freedom of speech, belief, freedom from want, and freedom from fear–which is "proclaimed as the highest aspiration" of the people.

The third paragraph states that so that people are not compelled to rebellion against tyranny, human rights should be protected by rule of law. The fourth paragraph relates human rights to the development of friendly relations between nations. The fifth paragraph links the Declaration back to the United Nations Charter which reaffirms faith in fundamental human rights and dignity and worth of the human person. The sixth paragraph notes that all members of the United Nations have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

The seventh paragraph observes that "a common understanding" of rights and freedoms is of "the greatest importance" for the full realisation of that pledge. These paragraphs are followed by the "proclamation" of the Declaration as a "common standard of achievement" for "all peoples and all nations", so that "all individuals" and "all organs of society" should by teaching and education, promote respect for these rights and freedoms and by progressive measures, national and international, secure their universal and effective recognition and observance.

The Preamble is:

- Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
- Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
- Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
- Whereas it is essential to promote the development of friendly relations between nations,
- Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
- Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
- Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
- Now, Therefore the general assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education

to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Human Rights Set Out in the Declaration

The following reproduces the articles of the Declaration which set out the specific human rights that are recognised in the Declaration.

- *Article* 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- *Article* 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
- *Article* 3: Everyone has the right to life, liberty and security of person.
- *Article* 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
- *Article* 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- *Article* 6: Everyone has the right to recognition everywhere as a person before the law.
- *Article* 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- *Article* 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- *Article* 9: No one shall be subjected to arbitrary arrest, detention or exile.
- *Article* 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
- *Article* 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty just as to law in a public trial at which he has had all the guarantees necessary for his defence.
  - No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

- *Article* 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
- *Article* 13
  - Everyone has the right to freedom of movement and residence within the borders of each state.
  - Everyone has the right to leave any country, including their own, and to return to their country.
- *Article* 14:
  - Everyone has the right to seek and to enjoy in other countries asylum from persecution.
  - This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
- *Article* 15:
  - Everyone has the right to a nationality.
  - No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.
- *Article* 16:
  - Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
  - Marriage shall be entered into only with the free and full consent of the intending spouses.
  - The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- *Article* 17:
  - Everyone has the right to own property alone as well as in association with others.
  - No one shall be arbitrarily deprived of his property.
- *Article* 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
- *Article* 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
- *Article* 20: Everyone has the right to freedom of peaceful assembly and association.

  - No one may be compelled to belong to an association.
- *Article* 21:
  - Everyone has the right to take part in the government of their country, directly or through freely chosen representatives.
  - Everyone has the right of equal access to public service in their country.
  - The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.
- *Article* 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
- *Article* 23:
  - Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
  - Everyone, without any discrimination, has the right to equal pay for equal work.
  - Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
  - Everyone has the right to form and to join trade unions for the protection of his interests.
- *Article* 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
- *Article* 25:
  - Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
  - Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
- *Article* 26:
  - Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
  - Education shall be directed to the full development of the human personality

and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

  - Parents have a prior right to choose the kind of education that shall be given to their children.
- *Article* 27:
  - Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
  - Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- *Article* 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.
- *Article* 29:
  - Everyone has duties to the community in which alone the free and full development of his personality is possible.
  - In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
  - These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
- *Article* 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Commemoration: International Human Rights Day

The adoption of the Universal Declaration is a significant international commemoration marked each year on 10 December and is known as Human Rights Day or International Human Rights Day.

The commemoration is observed by individuals, community and religious groups, human rights organisations, parliaments, governments and the United Nations. Decadal commemorations are often accompanied by campaigns to promote awareness of the Declaration and human rights. 2008 marked the 60th anniversary of the Declaration and was accompanied by year long activities around the theme “Dignity and justice for all of us”.

Significance and Legal Effect

Significance

In the preamble, governments commit themselves and their peoples to measures to secure the universal and effective recognition and observance of the human rights

set out in the Declaration. Eleanor Roosevelt supported the adoption the UDHR as a declaration, rather than as a treaty, because she believed that it would have the same kind of influence on global society as the United States Declaration of Independence had within the United States.

In this she proved to be correct. Even though not formally legally binding, the Declaration has been adopted in or influenced most national constitutions since 1948. It also serves as the foundation for a growing number of international treaties and national laws and international, regional, national and sub-national institutions protecting and promoting human rights.

Legal Effect

While not a treaty itself, the Declaration was explicitly adopted for the purpose of defining the meaning of the words "fundamental freedoms" and "human rights" appearing in the United Nations Charter, which is binding on all member states. For this reason, the Universal Declaration is a fundamental constitutive document of the United Nations. Many international lawyers, in addition, believe that the Declaration forms part of customary international law and is a powerful tool in applying diplomatic and moral pressure to governments that violate any of its substances.

The 1968 United Nations International Conference on Human Rights advised that it "constitutes an obligation for the members of the international community" to all persons.

The declaration has served as the foundation for two binding UN human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the principles of the Declaration are elaborated in international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of Discrimination Against Women, the United Nations Convention on the Rights of the Child, the United Nations Convention Against Torture and many more.

The Declaration continues to be widely cited by governments, academics, advocates and constitutional courts and individual human beings who appeal to its principles for the protection of their recognised human rights.

Reaction

Praise

The Universal Declaration has received praise from a number of notable people. Charles Malik, Lebanese philosopher and diplomat, called it "an international document of the first order of importance," while Eleanor Roosevelt, first chairwoman of the Commission on Human Rights that drafted the Declaration, stated that it "may well become the international Magna Carta of all men everywhere." 10 December 1948. In a speech on 5 October 1995, Pope John Paul II called the UDHR "one of the highest expressions of the human conscience of our time." And in a statement on 10 December 2003 on behalf of the European Union, Marcello Spatafora said that "it placed human rights at the centre of the framework of principles and obligations shaping relations within the international community."

Criticism

Islamic Criticism

Some Islamic countries have criticised the Universal Declaration of Human Rights for its perceived failure to take into the account the cultural and religious context of Islamic countries.

In 1982, the Iranian representative to the United Nations, Said Rajaie-Khorassani, articulated the position of his country regarding the Universal Declaration of Human Rights, by saying that the UDHR was "a secular understanding of the Judeo-Christian tradition", which could not be implemented by Muslims without trespassing the Islamic law.

On 30 June 2000, Muslim nations that are members of the Organization of the Islamic Conference officially resolved to support the Cairo Declaration on Human Rights in Islam, an alternative document that says people have "freedom and right to a dignified life in accordance with the Islamic Shari'ah". However, this document does not guarantee freedom of religion or gender equality, the root of many criticisms against its usage.

Education

Some proponents of alternative education, particularly unschooling, take issue with the right to compulsory education stated in Article 26. In the philosophies of John Holt and others, compulsory education itself violates the right of a person to follow their own interests:

- No human right, except the right to life itself, is more fundamental than this. A person's freedom of learning is part of his freedom of thought, even more basic than his freedom of speech. If we take from someone his right to decide what he will be curious about, we destroy his freedom of thought. We say, in effect, you must think not about what interests you and concerns you, but about what interests and concerns us.

Property Rights Criticism

Some libertarians have criticised the Declaration for its inclusion of positive rights that they believe must be provided by others through forceful extraction thereby negating others rights. Libertarian natural law theorist Frank Van Dun said of the document:

- The UD's distinctive "rights" are incompatible with that doctrine [of natural rights]. Enforcement of one person's economic, social, or cultural rights necessarily involves forcing others to relinquish their property, or to use it in a way prescribed by the enforcers. It would, therefore, constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by others. It would also deny a person the right to improve his condition by accepting work for what he considers an adequate wage.

The Right to Refuse to Kill

Groups such as Amnesty International and War Resisters International have advocated for "The Right to Refuse to Kill" to be added to the UDHR. War Resisters International has stated that the right to conscientious objection to military service is primarily derived from, but not yet explicit in, Article 18 of the UDHR: the right to

freedom of thought, conscience and religion. Steps have been taken within the United Nations to make this right more explicit; but those steps have been limited to secondary, more "marginal" United Nations documents. That is why Amnesty International would like to have this right brought "out of the margins" and explicitly into the primary document, namely the UDHR itself.

- To the rights enshrined in the Universal Declaration of Human Rights one more might, with relevance, be added. It is "The Right to Refuse to Kill."

Bangkok Declaration

In the Bangkok Declaration adopted by Ministers of Asian states meeting in 1993 in the lead up to the World Conference on Human Rights, Asian governments reaffirmed their commitment to the principles of the United Nations Charter and the Universal Declaration of Human Rights. They stated their view of the interdependence and indivisibility of human rights and stressed the need for universality, objectivity and non-selectivity of human rights.

American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man was the world's first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights by less than a year. The Declaration was adopted by the nations of the Americas at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948, the same meeting that adopted the Charter of the Organization of American States and thereby created the OAS. The Declaration sets forth a catalogue of civil and political rights to be enjoyed by the citizens of the signatory nations, together with additional economic, social, and cultural rights due to them.

As explained in the preamble:

- "The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty."

Although strictly speaking a declaration is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds it to be a source of binding international obligations for the OAS's member states. While largely superseded in the current practice of the inter-American human rights system by the more elaborate provisions of the American Convention on Human Rights, the terms of the Declaration are still enforced with respect to those states that have not ratified the Convention, such as Cuba and the United States.

Paris Principles

The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991. They were adopted by United Nations Human Rights Commission as Resolution 1992/54 of 1992 and Resolution 48/134 of 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights. In addition to exchanging views on existing arrangements, the

workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights instruments.

Five Stipulations

The Paris Principles list a number of responsibilities for national institutions, which fall under five headings. *First*, the institution shall monitor any situation of violation of human rights which it decides to take up. *Second,* the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and general compliance and implementation with international human rights instruments.

Third, the institution shall relate to regional and international organizations. *Fourth*, the institution shall have a mandate to educate and inform in the field of human rights.

Fifth, some institutions are given a quasi-judicial competence. “The key elements of the composition of a national institution are its independence and pluralism. In relation to the independence the only guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable.”

8

Global Exodus and Human Rights

Introduction

Current migration flows have placed the issue of migration high on the international agenda. The magnitude and complexity of the phenomenon is such that international migration can no longer be considered peripheral to the mainstream of development policies.

Today, every country is affected in some way by migration—either as country of origin, transit or destination, or sometimes a combination of these. In 2005, 191 million people, representing three per cent of the world population, resided outside the country of their birth. Almost one in every ten persons living in the more developed regions of the world is a migrant compared to one out of every seventy persons in the less developed regions.

Sixty per cent of all the world's migrants live in the more developed regions. The largest number of migrants live in Europe, followed by Asia and Northern America. Female migrants make up half of all international migrants. Female migrants outnumber male migrants in developed countries. Three-quarters of all international migrants are concentrated in only 28 countries and one in five international migrants lives in the United States of America.

The almost 200 million persons living outside their country of birth are international migrants of one type or another—whether living abroad voluntarily or forced by circumstances beyond their control; whether seeking a better life or simply a different one; whether legally admitted to residence or living a clandestine existence on the margins of society. And all–irrespective of their national origin, their race, creed or colour, or their legal status–share with the nationals of their host community both a common humanity and rights and responsibilities including the right to expect decent and humane treatment.

While for many the migration process is an empowering experience, the reality for some is one of exploitation and abuse, either limited to the migration journey or experienced while in the country of destination. Migrant women and children are particularly vulnerable to exploitation, and therefore require special attention to ensure that their human rights are respected. International migrants are a heterogeneous group. From highly skilled professionals to the young men and women who are smuggled across borders to work in sweat shops, they include people who have been in the country for decades and those who arrived only yesterday.

In many situations, migrants are integrated into the economy and society of the country in which they live, their rights are respected, and there are few obstacles to their ability to contribute economically, socially and culturally. In other situations, however, migrants' rights are less respected, and in order to lead secure and productive lives, they need human rights protection and are indeed entitled to it. It is often

migrants with irregular status that are most in need of this protection.

Today, migration is at the forefront of political and legislative agendas in many countries and is also a topic of continued public debate at the international level. While this debate has centered either on the perceived challenges posed by migration, or on its contribution to development and poverty alleviation, the inextricable connection between migration, development and human rights has been insufficiently explored.

The core principle of the international human rights regime is that human rights are universal, indivisible, inalienable, and interdependent. As set forth in the Universal Declaration of Human Rights, migrants are first and foremost human beings, included in the "everyone" of Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The principle of universality implies that States of origin, transit, and destination are all responsible for the protection of migrants' human rights.

This year, the United Nations is commemorating the 60th Anniversary of the Universal Declaration of Human Rights. The Declaration embodies the fundamental universalist idea that all human beings have rights. The Convention Relating to the Status of Refugees was one of the first treaties concluded after the Universal Declaration of Human Rights was adopted. It is the key legal document defining the status of refugees, their rights and the legal obligations of States. The 1967 Protocol removed geographical and temporal restrictions from the Convention.

In 1990, the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. "The Convention opened a new stage in the history of efforts to establish the rights of migrant workers and to ensure that those rights are protected and respected." In 2000, the United Nations General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, which entered into force in 2003 and 2004, respectively.

The Protocols supplemented the Convention against Transnational Organized Crime to prevent and combat trafficking in persons and smuggling of migrants, protect and assist the victims of human trafficking, and strengthen the cooperation among States. The importance of migration was furthermore raised at various United Nations conferences. In 1994, the International Conference on Population and Development in Cairo pointed to the need to address all root causes of migration, especially those related to poverty.

It set as its objective the encouragement of more cooperation and dialogue between countries of origin and destination in order to maximize the benefits of migration to those concerned and increase the likelihood that migration has positive consequences for the development of both sending and receiving countries. In 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, was a landmark in the struggle to eradicate all forms of racism.

The Conference recognized that migration increased as a result of globalization, particularly from the South to the North, and stressed that policies towards migration should not be based on racism, racial discrimination, xenophobia and related intolerance. Furthermore, the Durban Conference called for a review, and where necessary, revision of any immigration policy inconsistent with international human

rights instruments, with a focus on the elimination of all discriminatory policies and practices against migrants. The deprivation of the human right to development is one of the causes of migration itself.

The Universal Declaration of Human Rights states that "everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." The necessity to integrate the analysis of migration and development policies is supported by the indivisible, universal and interdependent character of human rights—all human beings have human rights everywhere—for migrants, in their countries of origin, countries of transit and countries of destination.

A human rights approach which emphasizes State responsibility for the promotion of economic, social, cultural, civil and political rights ab initio may recast development policies in a way that would reduce emigration caused by the inability of States to ensure the exercise of nationals of their right to development. More work is needed to implement the goals of the 1986 United Nations Declaration on the Right to Development, "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals." The need to treat migration and development policies together has now been given global prominence by the Global Forum on Migration and Development (GFMD).

The Global Forum is an initiative of the international community to address the relation between migration and development in a practical and action-oriented way. The GFMD was proposed by the UN Secretary- General and his Special Representative on International Migration and Development at the High Level Dialogue on International Migration and Development on 14-15 September 2006 within the framework of the General Assembly of the United Nations. Its inaugural meeting was held in Brussels in July 2007 under the chairmanship of the Government of Belgium.

This year the Global Forum is being hosted in Manila by Government of the Philippines. International migration has tended to be seen primarily in development terms, as a response to disparities in income levels and as a means to create employment opportunities. Unemployment and poverty are often the 'push factors' which impel individuals to leave their home countries, while cross border differences in wage levels and labour demand are the 'pull factors' which direct them to more developed economies.

Migrants contribute to development in their home countries through remittances, and to their host countries through their work and cultural diversity, and—in some countries—to population growth and change in age structure. However, not enough attention has been paid to the role of human rights during the migration process or to the ways in which a lack of respect for the human rights of migrants in the countries of destination reduces their ability to contribute to development.

When migration is not also approached from this perspective, two difficulties arise: first—and self evidently—the protection of migrants is not given priority and secondly, where migration is seen only in economic terms, migrants may come to be regarded more as commodities, rather than as individuals entitled to the full enjoyment of their human rights. Traditionally, both in countries of origin and in recipient States, such

an approach has been largely underpinned by cost-benefit analyses. For instance, remittances have become an important source of income for many countries of origin, while many industries and service providers in host societies benefit from a migrant-based labour force. There is general agreement that the beneficial effects of migration in terms of poverty reduction, development and wealth creation is higher than the human resources and financial costs spent by States to invest in new technologies to protect their borders and for the provision of social services.

While this type of analysis is necessary, it is incomplete because it fails to take into account the right to human dignity of all migrants. It is often violence, social and economic exclusion, poverty, lack of access to basic services, inequality of opportunities, and multiple aspects of discrimination that force people to leave their communities and livelihoods.

Human dignity is also at stake in countries of destination when migrants are subject to violence, abuse and discrimination.. If countries of origin and destination are to reap the full development benefits of migration—not just counted in terms of volume of remittances and cheap labour, respectively, but also in terms of the linguistic and cultural value that migrants may bring—it is essential to address the social and human rights aspect of migration as well as the more obvious economic gains. International Migration and Human Rights.

Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights considers the human rights framework governing migration, arguing that migrants are not simply agents of development, but human beings with rights which States, exercising their sovereign right to determine who enters and remains in their territory, have an obligation to protect. Indeed, respecting and protecting the human rights of migrants enables them to contribute to development and share in its benefits; this includes the development of migrants, their countries of origin and their host countries. The report seeks to provide States with guidance in order to promote lawful conditions of migration and manage it using a human rights-based approach. It is first and foremost the responsibility of governments to protect the human rights of migrants.

International human rights provisions can also be enforced in international and domestic courts in cases brought by individuals and public institutions (public defence, ombudspersons, etc.). However, no international human rights provision, or any other law is “selfenforcing”. It is principally through the vigilance of civil society that violations of human rights are brought to light. Civil society organizations, including non-governmental organizations, labour unions, migrant associations, and religious bodies have an important role to play in the efforts to protect the human rights of all categories of migrants.

The introduction highlights the magnitude and complexity of current migration flows and points out the important role of human rights in the migration and development discourse.

Definitions

There is a lack of universally accepted definitions in the area of international migration. Definitions in this area are often vague, controversial or contradictory. This stems to some extent from the fact that migration is a phenomenon which has traditionally been addressed at the national level. Therefore the usage of migration

terms differs from country to country. Furthermore, within a country, terms can vary in meaning or implication. Definitions may also vary just as to a given perspective or approach.

International Migrant

Irregular Migrant

An irregular migrant is every person who, owing to undocumented entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country (also called clandestine/ illegal/ undocumented migrant or migrant in an irregular situation).

Female Migrant

Women and girls who move from their country of origin in ever increasing numbers make up the ranks of female migration. Indeed, over the last five decades there has been a steady increase of female migration. Women now move around more independently and no longer solely in relation to their family position or under a man's authority.

Migrant Child

The category of migrant child refers to the person who is just as to the law of the relevant country, below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Unaccompanied migrant children can be defined as migrant children who migrate across national borders separately (though not necessarily divorced) from their families, and include within this definition four broad categories defined by the primary purpose of travel:

1. Children who travel in search of opportunities, whether educational or employment related;
2. Children who travel to survive—to escape persecution or war, family abuse, dire poverty;
3. Children who travel for family reunion—to join documented or undocumented family members who have already migrated;
4. Children who travel in the context of exploitation."

Migrant Worker

A documented migrant worker is a person who enters a State, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.

- The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.
- The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week.
- The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year.

- The term “seafarer”, which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national.
- The term “worker on an offshore installation” refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national.
- The term “itinerant worker’’ refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation.
- The term “project-tied worker” refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer.
- The term “specified-employment worker” refers to a migrant worker:
  - Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty;
  - Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill;
  - Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief;
  - Who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work.
- The term “self-employed worker” refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Environmental Migrant

An environmental migrant is characterized as a person who, for compelling reasons of sudden or progressive change in the environment that adversely affects his/her life or living conditions, is forced to leave his/her habitual home and cross a national border, or chooses to do so, either temporarily or permanently.

Environmental migrants may be distinguished between two categories:

- Environmentally motivated migrants are defined as those persons who “pre-empt the worst by leaving before environmental degradation results in devastation of their livelihoods and communities. These individuals may leave a deteriorating environment that could be rehabilitated with proper policy and

effort." Their movement may be temporary or permanent.

- Environmental forced migrants are defined as those persons who "are avoiding the worst. These individuals have to leave due to a loss of livelihood, and their displacement is mainly permanent. Examples include displacement or migration due to sea level rise or loss of topsoil."

Refugee and Asylum Seeker

Refugee

The term refugee shall apply to any person who:

- Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section;
- As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

International refugee law and, more generally, the international refugee protection system provides for a specific regime of human rights protection for a specific category of persons: those who can no longer rely on their country of nationality or habitual residence for respect, protection and fulfilment of their human rights and fundamental freedoms. The working definitions of who has suffered persecution are left to adjudication by national legal systems and can vary from country to country.

Asylum Seeker

An asylum seeker is a person seeking to be admitted into a country as a refugee and awaiting decision on his/her application for refugee status under relevant international and national instruments. Persons seeking asylum flee persecution based on race, religion, nationality, membership of a particular social group or political opinion, or political reasons, including conflict and war. In case of a negative decision, they must leave the country and may be expelled, as may any alien in an irregular situation, unless permission to stay is provided on humanitarian or other related grounds.

Types of Migration

Forced Migration

Forced migration is a general term to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, arising from natural or man-made causes, such as movements of refugees and internally displaced persons as well as people displaced by political instability, conflict, natural or environmental disasters, chemical or nuclear disasters, famine, or development projects.

Transit Migration

Transit migration refers to the regular or irregular movement of a person through any State on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

Return Migration

Return migration refers to the "movement of a person returning to his/her country of origin or habitual residence usually after spending at least one year in another country. This return may or may not be voluntary. Return migration includes voluntary repatriation."

Trafficking and Smuggling

While there are often overlaps of migration methods between human trafficking and migrant smuggling, the key difference between the smuggling of migrants and human trafficking is the element of exploitation. This difference is clarified by the international definitions of trafficking and smuggling provided under the respective United Nations Protocols.

Those who are smuggled are left to their own devices at the point of destination whereas those who are trafficked remain under the control of their traffickers who continue to exploit them at the point of destination. Trafficking in persons and smuggling of migrants are distinct, but they represent overlapping issues. Their legal definitions contain common elements. Actual cases may involve elements of both crimes or they may shift from one to the other. Many victims of human trafficking begin their journey by consenting to be smuggled from one State to another. Smuggled migrants may later be tricked or coerced into exploitive situations and thus become victims of human trafficking.

Trafficking in Persons

Trafficking in persons is a crime against a person that involves the abuse of his/her human rights through exploitation. Human trafficking can also involve legal migration methods between States. It can occur internally within countries and does not necessarily have to be transnational in nature. Alternatively, human trafficking can involve the kidnapping or abduction of a person who is then consequently subjected to forced migration.

Human trafficking often involves a number of additional offences against the trafficked persons that are also in violation of human rights, for example, rape, physical abuse or unlawful confinement. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines human trafficking under Article 3 (a) as follows:

"Trafficking in persons shall mean the recruitment, transportation, transfer,

harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

Smuggling of Migrants

Smuggling of migrants refers to assisting a person who is not a national or permanent resident to enter and remain in a State without complying with the necessary requirements for legally entering and remaining in the State. In addition to smuggling *per se*, the Smuggling of Migrants Protocol also covers the offence of enabling illegal residence.

The intention in establishing this offence is to include cases where the entry of migrants is through legal means, such as visitors' permits or visas, but the stay is through resorting to illegal means. In response to improved border control measures, the number of irregular migrants who turn to the services of smugglers to migrate has risen significantly. In order to maximize their profits, it is increasingly the case that smugglers knowingly offer migration services that are more risky in order to lower transport and facilitation of entry costs and increase the cost of smuggling. Smuggling of migrants is always transnational in nature. The United Nations Protocol on the Smuggling of Migrants by Land, Sea and Air defines migrant smuggling under Article 3(a) as follows:

"Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

Key Migration-Related Terms

Immigrant

An immigrant is a person belonging to, or owing an allegiance to, one State and moving into another State for the purpose of settlement.

National

The term national equals the term citizen and refers to a person, who, "either by birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil and political rights and protection; a member of the State, entitled to all its privileges; a person enjoying a nationality of a given State." The term non-national includes temporary foreign workers, refugees, successful and unsuccessful asylum-seekers, trafficked persons and undocumented individuals. The category also encompasses stateless persons, those people who have never acquired citizenship of the country of their birth, have lost their citizenship and have no claim to citizenship of another State, children born in States that recognize only the jus sanguinis principle of citizenship; and children born in a State to non-nationals who inherit their parents' statelessness.

Non-Refoulement

The 1951 Convention Relating to the Status of Refugees laid down the principle

of non-refoulement just as to which "no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This principle cannot be "claimed by a refugee, whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." "The concept of nonrefoulement also includes the prohibition of any form of forcible removal, whether direct or indirect, to a threat to torture, cruel, inhuman or degrading treatment or punishment."

Detention of Migrants

In this report the term detention is used to indicate both administrative deprivation of liberty, or remand custody, and incarceration or imprisonment resulting from criminal charges or sentencing.

The Legal Framework

Respect for the human rights of all migrants is a fundamental duty of all States and must underly all policies and practices with respect to their treatment by public authorities in all situations. Laws, policies and practices in the country of origin, transit and destination all impact on the protection of the human rights of migrants.

The protection of migrants is a key issue in the current era of globalization. Indeed, as it is becoming increasingly obvious that economic globalization also implies increased human mobility, the protection of people on the move needs to be revisited to address new challenges.

Migrant labour is now vital to many developed as well as less developed economies, while migrants' remittances have become the lifeline for numerous households in countries of origin. The economic importance of migration calls for appropriate measures to address its human dimension, including notably migrants' rights and responsibilities. A range of human rights instruments exists at the international level promoting the human rights of all migrants, including specific instruments on the protection of women and children that apply equally to migrant women and children.

While governments have broad sovereign powers in determining nationality, admission, conditions of stay and removal of non-nationals, once a non-national is in the territory of a State, the State must respect and ensure the human rights of "all individuals within its territory and subject to its jurisdiction… without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Prima facie, therefore, the rights contained in these instruments are guaranteed to all persons present in a State: nationals and non-nationals alike, regardless of legal status, gender or age. International human rights instruments constitute a legal framework for the protection of all migrants. The status of irregular migrants should not be used as justification for the violation of their rights.

Over the last few decades, as more States have agreed to binding international human rights treaties, a major change has taken place in the way in which the rights of non-nationals are protected. This has involved a shift beyond the classic system of diplomatic and consular protection by the migrants' State of nationality, towards the

direct protection of the individual under international human rights norms. While States may expel or remove migrants who are illegally on their territory, international human rights law is clear in its requirement that the State should generally protect their rights without discrimination for as long as they remain on its territory, irrespective of their immigration status.

Expulsion must not breach international law and human rights may be relevant in the determination of the lawfulness of an expulsion. At the centre of all human rights treaties is the prohibition of discrimination, which prescribes equal protection to nationals and non-nationals alike.

The fundamental rights protections contained in the two International Covenants; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICES CR), and in the conventions prohibiting racial discrimination (International Convention on the Elimination of All Forms of Racial Discrimination, ICERD), protecting the rights of children (Convention on the Rights of the Child, CRC), prohibiting discrimination against women (Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW), prohibiting torture (Convention Against Torture, CAT), and prohibiting discrimination against disabled persons (Convention on the Rights of Persons with Disabilities, CRPD), apply universally to nationals and to all migrants, regardless of their immigration status.

Thus the International Covenant on Civil and Political Rights (ICCPR) protects the rights of 'all individuals within its territory and subject to its jurisdiction' without distinction; it guarantees to all persons equality before the law and equal protection by the law without any discrimination. The Human Rights Committee has set out the general rule—with narrow exceptions—that each of the rights under the Covenant must be guaranteed without discrimination between nationals and non-nationals.

It has noted that the Covenant does not recognize the right of non-nationals to enter or reside in a State's territory; that consent for entry may be given subject to conditions relating, for example, to movement, residence and employment; and that a State may also impose general conditions upon a non-national who is in transit.

However, once within the territory of a State, non-nationals are entitled to the rights set out in the Covenant. The Committee has been explicit that enjoyment of these rights is not limited to nationals: "but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party." Similarly, in its 2004 General Recommendation on Discrimination against Non-Citizens, the Committee on the Elimination of Racial Discrimination (CERD) urged States to ensure that legislative guarantees against racial discrimination "apply to non-citizens regardless of their immigration status."

The International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) applies the human rights contained in the general human rights instruments to the specific situation of migrant workers and members of their families and in addition requires States to collaborate in combating irregular migration.

Under the Convention, States are required to:

- Take measures against the dissemination of misleading information,

- Detect and eradicate irregular movement of migrants,
- Impose effective sanctions on those who organize and operate such movements.

The creation of the post of the Special Rapporteur on the Human Rights of Migrants by the United Nations was an effort to "examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation."

The mandate of the Special Rapporteur was created in 1999 by the Commission on Human Rights, pursuant to Resolution 1999/44. Among the main functions of the Special Rapporteur are to take into account a gender perspective when requesting and analyzing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women. Ms. Gabriela Rodríguez Pizarro from Costa Rica served as Special Rapporteur from 1999 to 2005. Since 2005 Mr. Jorge A. Bustamante from Mexico holds this position.

The Special Rapporteur of the Subcommission on the Promotion and Protection of Human Rights, Mr. David Weissbrodt, prepared a final report on the rights of non-citizens, which provides a synthesis of the general principles of and specific exceptions to the rights of non-citizens under international human rights law together with a brief identification of some of the areas in which these rights are not being respected.

The report concludes that there is a large gap between the rights that international human rights law guarantee to non-nationals and the realities they must face. In many countries there are institutional and endemic problems confronting non-nationals. A review of international migration law reveals an impressive machinery of instruments defining and protecting the human rights of migrants.

There is no need for further instruments, but there is a need to intensify efforts across the board to ensure that the human rights commitments States have entered into at the international level are effectively put into practice.

In the multi-faceted migration and development equation, it is vital to strengthen the role and action of human rights instruments and mechanisms in protecting the human rights of migrants and in addressing their vulnerability, especially in consideration of the most vulnerable groups of migrants including children, women and irregular migrants.

This should proceed in parallel with educating duty bearers about their obligations and responsibilities to protect migrants.

Promotion of Lawful Conditions of Migration

The shared responsibility of States to protect the human rights of migrants is reflected in Part VI of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), entitled "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families". It provides concrete guidance for the consultation and cooperation among States in order to develop migration policies that are consistent with human rights norms. It is essential that States maintain appropriate services to deal with issues of international migration.

Such services should formulate and implement migration policies as well as exchange information, consult and cooperate with the competent authorities of other

States. They should also be responsible for providing appropriate information on policies, laws and regulations relating to migration and employment and on agreements with other States in this field. Finally, these services should be in charge of providing assistance to migrants regarding authorizations and formalities in preparation for their orderly migration.

The provision of information is especially important in the case of prospective female migrants who have less access to adequate information about legal channels of migration. Being equipped with insufficient information gives women less chance of migrating legally and therefore forces them to migrate clandestinely. When legal channels are not available, many women see trafficking or smuggling as the only option to cross the border. This places them at increased risk of exploitation and abuse. Women are among the most vulnerable throughout the migration process.

The provision of reliable information is crucial for the promotion of lawful conditions of migration. In fact, lack of information may often cause migrants to unwittingly break laws and regulations, or may lead them to leave their country of origin without proper preparation, rendering their life in the country of destination more difficult. Provision of information about lawful conditions of migration should go hand in hand with appropriate measures against the dissemination of misleading information, such as that provided by smugglers and traffickers. Countries of origin, transit and destination should increase their efforts to eradicate smuggling and trafficking of migrants that cause the death of hundreds of people every year and trauma for thousands more. This phenomenon can only be combated through close cooperation of all countries concerned.

Effective sanctions should be imposed on persons and groups which organize the smuggling and trafficking of migrants, while recognizing the needs for protection of the victims of these crimes. Victims of trafficking should be dealt with in full compliance with the Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking. States must also take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection.

Migrants in an irregular situation are among the most vulnerable persons in any society and are not in a position to defend themselves against exploitation by their employers. Many female migrants are found in the informal sector of the economy, which points to a transnational labour market composed of networks of women who work as housekeepers, personal caretakers, street vendors, waitresses and bartenders, among other activities. Working without adequate protection makes women more vulnerable to exploitation and human rights abuses, including low wages, illegal withholding of wages, and illegal and premature termination of employment. Women are often found in gender-segregated and unregulated sectors of the economy which are typically unprotected by local labour legislation.

The plight of migrant domestic workers merits special attention, as their human rights are least protected. Countries of destination should therefore make it their priority to ensure that the basic rights of irregular migrants or those in the informal economy are protected, including their right to equal treatment with respect to remuneration and conditions of work. As reflected in the preamble of the Migrant Workers' Convention (ICRMW), the enforcement of equality of treatment of irregular

migrant workers will remove the incentive for employers to have recourse to their services. Migrants search for work in countries where the labour market is in need of their services. Efforts to end employment of workers in an irregular situation should thus go hand in hand with opening up channels for lawful migration in order to meet the local labour demand.

Cooperation among countries of origin and countries of destination can prove very helpful in this respect, both for discouraging irregular migration and for encouraging applications for lawful migration. Strict supervision of recruitment operations in countries of origin is also an important tool in preventing unlawful practices, including trafficking.

Guidance can be found in Article 66 of the Migrant Workers Convention (ICRMW), which restricts the right to undertake operations for the recruitment of migrant workers to the public services of the country of origin, or, if a bilateral agreement exists, the public services of the country of employment. A public recruitment body may also be established by virtue of a bilateral or multilateral agreement between countries.

As far as private agencies or employers are concerned, they should only be allowed to recruit migrant workers if they have obtained the requisite authorization by the public authorities of the countries concerned and under their supervision.

Female Migrants

Although differences exist regarding the sex distribution among the various regions in the world, women comprise nearly half of all migrants today, approximately 94.5 million or 49.6 per cent of the 190.6 million persons worldwide living outside their countries of origin in 2005. Female migrants account for 52.2 per cent of all migrants in the developed countries and constitute 45.7 per cent of all international migrants in developing countries. A number of human rights instruments exist to protect the rights of women and girls who migrate.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) addresses the rights of migrant workers and their family members in both regular and irregular situations during the entire migration process: departure, transit, destination and return, and provides useful guidance for States on how to ensure that migration is managed humanely.

The complementary ILO Convention 97 on Migration for Employment provides specific standards regarding female migrant worker employment and occupation. The Convention for Suppression of the Traffic in Women and Children provides protection for women seeking employment in another country. Regulations require the protection of migrant women not only at the points of departure and arrival, but also during the journey. Among other international mechanisms relevant to female migrants is the Protocol of Palermo including the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime requiring States to take measures to promote the rights of female migrants.

Standards for protecting female migrants' rights are also found in the Programme of Action of the International Conference on Population and Development, the Beijing

Declaration and Platform for Action, and General Assembly Resolution 58/143 on Violence against Women Migrant Workers. A number of protection mechanisms deriving from the United Nations Charter are relevant to promoting the rights of migrant women as well.

The mandate of the Special Rapporteur, established by the Human Rights Council, is one such mechanism. Of particular relevance for female migrants are the Special Rapporteurs on (a) Violence against Women; (b) Trafficking in Persons, especially Women and Children; and (c) the Human Rights of Migrants. The Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, reiterated the need for a comprehensive approach to female migrants' human rights in order to ensure that women and girls who migrate had a framework for protection and enjoyed rights appropriate and adequate to their particular vulnerable situations.

The ICPD Programme of Action specifically referred to the objective of eliminating discriminatory practices against documented migrants, especially women, children and the elderly. It stated that women and children who migrate as family members should be protected from abuse and denial of their human rights by their sponsors, and urged governments to consider extending their stay, within limits of national legislation, should the family relationship dissolve.

The Beijing Platform for Action called for, inter alia, the provision of gender-sensitive human rights education and training for public officials, including police and military personnel, corrections officers, health and medical personnel, and social workers, including people who deal with migration and refugee issues.

It urged governments to "promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women and actively encourage, support and implement measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel and judicial, medical and social workers, as well as those who deal with minority, migration and refugee issues, and develop strategies to ensure that the revictimization of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices."

Migrant Children

The Convention on the Rights of the Child (CRC) defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". Whether on their own or in company with adults (family or non-family), children as migrants move across borders in search of survival, security, education, improved standards of living and protection from abuse. The CRC and its Optional Protocols are an effective point of reference for all children affected by migration, regardless of their migration status.

International human rights instruments on migration, such as the International Convention on the Rights of All Migrant Workers and Members of their Families and the ILO Conventions, also provide comprehensive guidance on ensuring the rights of migrant children. The ICRMW provides for the rights of migrant children, regardless of their immigration status, to have a name, to registration of birth and to a nationality. It also provides the basic right of access to education on the basis of equality of

treatment with nationals of the State concerned and provides expressly that such access shall not be refused or limited by reason of the irregularity of the child's stay in the country.

The Committee on the Rights of the Child, a body of independent experts that monitors the implementation of the Convention on the Rights of the Child, advises that a State which ratifies the Convention on the Rights of the Child, takes on obligations under international law "to ensure the realization of all rights in the Convention for all children in their jurisdiction."

In its general comment No. 6, the Committee stated: "the enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children—including asylum—seeking, refugee and migrant children—irrespective of their nationality, immigration status or statelessness."

Four fundamental principles of the CRC provide a basis for all actions that States may take to respect, protect, promote and fulfill the rights of children:

1. *Non-Discrimination*: CRC Article 2 states, among other things, that children should not be discriminated because of their nationality, ethnic origin or other status.
2. *Best Interests of the Child*: CRC Article 3 states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This implies, regarding migrant children, that programmes and services (health, education, etc.) should be provided on the basis of children's best interests with no relevance to the status of their documentation. The best interests of the child must also be the key concern whenever decisions are made on repatriation measures to countries of origin.
3. *Life, Survival and Development*: The right to survival is related to the right to an adequate standard of living, the highest attainable standard of health, nutritious food and clean drinking water. The right to development includes systems of formal education as well as community and informal structures which provide opportunities for children to participate in a range of cultural and social activities. CRC Article 27 states that States Parties should take appropriate measures to assist parents and others responsible for the child to implement the right of adequate living and to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child. Furthermore, vital to survival and development of the child is CRC Article 19 protecting the child from violence and exploitation.
4. *The Right of the Child to be Heard and Participate*: Children have the fundamental right to formulate and express opinions about all matters that affect them. The CRC establishes the principle that children's views should be heard and given due attention, taking into account "the age and maturity of the child." Therefore experiences of migrant children should inform decisions about the ways in which their rights will be respected. This right to be heard must be fully respected and satisfied in both administrative and judicial

procedures related to their migration status. States Parties have a clear and precise obligation to assure the children's right to a say in situations that may affect them.

Legislative reform can support a comprehensive and rights based approach that fulfils the socio-economic and other fundamental rights of all migrant children, regardless of their nationality or migration status.

All policy and legal initiatives dealing with the effects of migration on children need to focus on drawing up new sets of rules and regulations to address migration concerns and to protect the best interests of the child. In many countries, human rights instruments, including the CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have been "successfully incorporated into diverse legal systems. This process of alignment of national legislation with human rights instruments, with the CRC in particular, is important as it underlies principles such as the indivisibility of rights and the importance of partnerships in realizing children's rights."

These rights include the basic requirements for family support, access to social services (including education and health care), protection of children in conflict with the law and specific matters, such as protection from harmful traditional practices, freedom to cross borders to reunite with parents and access to information they need to make decisions about their own lives. This principle should be a primary consideration in making choices between differences presented by migrant communities and the integration of migrants into the receiving culture, such as facilitating preservation of some cultural traditions that strengthen their sense of identity.

The best interests of the child should also influence decisions on deportation of undocumented adult migrants or migrants who fail to comply with restrictions on work authorization. The Working Group on Arbitrary Detention is of the opinion that unaccompanied juvenile irregular migrants should not be detained under immigration powers (whether for reasons of establishing their identity, facilitating their removal to their country of origin, preventing them from absconding or other such grounds usually put forward by States) at all, as such detention would not be lawful under the limitations provided for by article 37 (b) CRC, notably being a measure of last resort.

As the Committee on the Rights of the Child has asserted, "In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof." Furthermore, Article 24 of Paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) states that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to measures of protection, required by his status of minor, on the part of his family, society and the State. The International Convention for the Suppression of the Traffic in Women and Children provides protection for migrant children of both sexes in another country. The Convention requires States to provide protection for migrant children during the entire migration process in the country of origin, transit and destination.

Migrant Workers

The Fundamental Rights of Migrant Workers

Labour rights provided for in all international labour conventions apply to migrant workers. In particular, Member States have an obligation to respect, promote and realise, in good faith and in accordance with the International Labour Organization (ILO) Constitution, the principles concerning the rights stipulated in the fundamental conventions. This obligation derives from membership in the ILO and from the endorsement by Member States of the principles set out in the Constitution and in the Declaration of Philadelphia.

The 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up is clear in this respect. The Fundamental Principles and Rights at Work are grouped into four sets: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Each set corresponds to two fundamental labour conventions. All migrant workers, regardless of their status, should enjoy these rights.

Freedom of Association and the Effective Recognition of the Right to Collective Bargaining

Freedom of association and the right to collective bargaining both empower migrant workers and enable them to better access other human rights. By exercising these rights, workers can participate in the development of national and international economic policies as well as policies in the workplace. Recognizing the right of migrant workers to organize and participate in collective bargaining will increase the effectiveness of such policies.

The Elimination of All Forms of Forced or Compulsory Labour

The abolition of forced labour is essential to the protection of fundamental freedoms and is related to income and human capital formation, which are likely to be depressed by forced labour.

Trafficking of human beings is one of the manifestations of forced labour in international migration. The exploitation it entails turns migration into a negative experience for migrant workers as well as for countries of origin and destination. Confiscation of travel documents also leads to forced labour situations.

The Effective Abolition of Child Labour

An increasing number of unaccompanied children are crossing international borders to work, which makes the elimination of child labour particularly important. Child labour adversely affects the present and future lives of working boys and girls by affecting their health and depriving them of education. Precluding human capital formation, child labour is also detrimental to development in the children's countries.

The Elimination of Discrimination in Respect of Employment and Occupation

Equality and non-discrimination are basic principles underlying human and labour rights. In a world of Nation-States where rights derive from citizenship, these principles are of utmost importance for the protection of workers who are outside their countries of origin. Treating migrant workers with equality and non-discrimination has a positive impact upon migrant workers' countries of origin and destination. It enables workers

to reach their full working potential, enhance their earnings, improve their living conditions (and the living conditions of their families), contribute to development in their countries of origin and increase their participation in the economy of the countries of destination.

The Protection of the Specific Rights of Migrant Workers

Discharging its constitutional obligation to protect the rights of workers employed in countries other than their own, the ILO has adopted two international labour conventions specific to the subject. Even though focused on protection, the two conventions also include provisions relevant to development in countries of origin. In the review, reference will be made to the 1990 International Convention on the Rights of All Migrant Workers and Members of their Families, which has built upon the ILO conventions.

The ILO has also recently adopted a non-binding text, the ILO Multilateral Framework on Labour Migration. Going further than the conventions, the Framework brings together aspects of protection of migrant workers with those relating to the contribution of labour migration to development. The main provisions of the Framework will also be reviewed.

The Labour Rights Framework

The Migration for Employment (Revised) Convention, 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), as well as their accompanying Recommendations, provide a framework for the basic components of a comprehensive labour migration policy, the protection of migrant workers, the development of their potentials and measures to facilitate as well as to control migratory movements.

They also provide minimum standards of protection for all migrant workers. More specifically, these instruments call for measures aimed at regulating the conditions in which migration for employment occurs, controlling irregular migration and labour trafficking and detecting the informal employment of migrants, with the aim of preventing and eliminating abuses.

The concept of the rights of irregular migrant workers was inspired not only by the basic principle of respect for the dignity of all human beings, but also by the desire to discourage recourse by employers of irregular migrants, by making such recruitment less economically beneficial. In addition, the two conventions call for measures related to the maintenance of free services to assist migrants.

They define parameters for recruitment and contract conditions, and for appeals against unjustified termination of employment or expulsion. The two instruments further include provisions on the participation of migrants in job training, on their promotion as well as on family reunification. Most importantly, the two instruments call for the adoption of a policy to promote equality of treatment and opportunity between migrants in regular situations and nationals in employment and occupation in the areas of access to employment, remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings.

Article 6 of Convention No. 97 on Migration for Employment provides for equality

of treatment in respect, inter alia, of:

- Remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holiday with pay, restrictions on home work, minimum age for employment, apprenticeship and training;
- Accommodation;
- Social security (legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency, which is covered by a social security scheme), subject to specific limitations provided for by appropriate arrangements, national laws or regulations;
- Employment taxes, dues or contributions payable in respect of the person employed.

Part II of Convention No. 143 applies to regular migrant workers and provides for equality of opportunity and treatment with national workers. While Convention No. 97 also provides for equality of treatment, only Convention No. 143, concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, expands this to include equal opportunity. In relation to access to employment, Part II of this Convention permits States to restrict the principle of equality of treatment in certain circumstances. States can, for example, restrict access to limited categories of employment or functions where this is necessary in the interests of the State and can also make the free choice of employment subject to temporary restrictions during a prescribed period, which may not exceed two years.

Neither Convention No. 97 nor 143 extends equality of treatment to migrant workers in irregular status. It is noteworthy that the two conventions, especially Convention No. 143, have incorporated the principles of the fundamental Discrimination (Employment and Occupation) Convention, 1958, prohibiting discrimination against migrant workers on the basis of race, colour, sex, religion, national extraction, political opinion and social origin. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) is a fundamental element for the protection of the human rights of migrants since it applies to all aspects of the life of migrants including the migrant's family and the situation of women and children, and explicitly recognizes the rights of undocumented migrants.

Another positive element of the Convention is its broad vision of rights; although it is intended to regulate the rights of workers, it is not limited to the employment context but regulates the entire spectrum of workers' rights. The Convention articulates even more broadly the principle of equality of treatment between migrant workers and nationals before courts and tribunals, with respect to remuneration and other working conditions, as well as with regard to migrant workers' access to urgent medical assistance and education for their children. In the Migrant Workers' Convention (ICRMW), equality and nondiscrimination extend to migrant workers in irregular situations, in accordance with national laws.

Thus, the ICRMW does not depart substantively from the fundamental rights protected in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICES CR), and other universal human rights treaties, but it does articulate these rights in ways which take

into account the particular situation of migrant workers and their families.

It seeks to establish basic principles for their treatment and to establish norms which will contribute to the harmonization of States' attitudes towards migration through acceptance of these basic principles. It also requires action by States to 'prevent and eliminate clandestine movements and trafficking', and to 'eliminate' the employment of irregular migrants by employers.

The ICRMW first sets out the rights to be enjoyed by all migrant workers, regardless of their immigration status. It states explicitly that the enjoyment of these rights does not imply any right to regularization of the situation of undocumented migrants.

These protected rights include: the right to leave any country and to return to one's country of origin; the right to life; prohibition of torture; prohibition of inhuman or degrading treatment; prohibition of slavery and forced labour; freedom of opinion and expression; freedom of thought, conscience and religion; right to join a trade union; prohibition of arbitrary or unlawful interference with privacy, home, correspondence and other communications; prohibition of arbitrary deprivation of property; the right to liberty and security of persons; safeguards against arbitrary arrest and detention; recognition as a person before the law; right to procedural guarantees; prohibition of imprisonment, deprivation of authorization of residence and/or work permit and expulsion merely on the ground of failure to fulfill a contractual obligation; protection from confiscation and/or destruction of identification card and other documents; protection against collective expulsion; right to recourse to consular or diplomatic protection; principle of equality of treatment in respect of remuneration and other conditions of work, terms of employment and social security; right to receive urgent medical care; right of a child of a migrant worker to a name, registration of birth and nationality and to access to education on the basis of equality of treatment; respect for the cultural identity of migrant workers and members of their families; right to transfer to the State of origin earnings, savings and personal belongings; and right to be informed on the rights arising from the Convention and dissemination of information.

Often these rights are articulated in terms which reflect the specific circumstances of migrants. Thus, where a migrant worker is deprived of his liberty, the State must 'pay attention to the problems that may be posed to his family'. The Convention makes unauthorized confiscation of documents an offense, and gives migrant workers the right to information about their conditions of admission. The Convention then provides additional rights to regular migrant workers: for example, to be 'temporarily absent' from the State of employment without effect upon their authorization to stay or work, to freedom of movement, and to equality of access to education, housing, social and health services.

It also provides for protection of the unity of the families of migrant workers and for the facilitation of family reunification and for a right to transfer earnings and savings—remittances—to their home countries. In its last substantive part, the Convention sets out a framework for promoting 'sound, equitable, humane and lawful' conditions for the management of international migration. This includes consultation and cooperation between States; policy making and exchange of information; the 'orderly return' of migrants at the end of their contracts or where they are irregular; collaboration to prevent and eliminate illegal or clandestine movements, and the employment of irregular workers.

Finally, non-discrimination and equality of treatment are cornerstones of the widely ratified International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICES CR). Together with international labour standards, human rights norms, in particular those contained in the ICES CR, also protect employment rights, including the right to 'just and favourable conditions of work', non discrimination, fair wages, safe and healthy working conditions, and reasonable working hours.

Work must be 'decent work', which respects the rights of workers in terms of conditions of work safety and remuneration, and provides an income allowing workers to support themselves and their families. Article 14 of the Migrant Worker (Supplementary Provisions) Convention No. 143 provides for the right of regular migrant workers to geographical mobility and for recognition of occupational qualifications acquired outside the territory of the State Party, including certificates and diplomas.

The ILO Multilateral Framework on Labour Migration comprises non-binding principles and guidelines for a rights-based approach to labour migration. It is a guide for the formulation of labour migration policies that guarantee the rights of migrant workers, reinforcing their protection and enhancing their contribution to development. Principles 8 and 9 are dedicated to the protection of migrant workers. Principle 8 stipulates that the human rights of migrant workers, regardless of their status, should be promoted and protected. This principle refers to the ILO 1998 Declaration and to the relevant human rights instruments adopted in the context of the United Nations.

Principle 9 states that all international labour standards apply to migrant workers, that protection requires a sound legal foundation based on international law and that national migration laws and policies should be guided by ILO standards in the areas of employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction and hotels and restaurants. A separate principle is dedicated to prevention and protection against abusive migration practices such as smuggling and trafficking. The same principle calls on governments to work towards preventing irregular labour migration.

Protection of Migrant Workers from Abuses by Private Employers

States' duties under international law are not limited to respecting, protecting, and fulfilling human rights through the acts of State institutions and officials. States are also obliged to protect individuals against violations by private persons. This is of great importance to migrants, since many migrants work for private employers, in the informal economy and in domestic work. These who are employed in private households tend to be isolated with no supporting networks. Domestic work is often undervalued as informal work and not recognized under labour law or labour codes.

As a result, most domestic workers have not been able to enjoy the fundamental rights that they are entitled to. States must take positive measures to ensure that private persons or entities do not, for example, inflict cruel, inhuman or degrading treatment or punishment on others within their power.

They must also protect individuals from discrimination by the private sector in relation to work or housing. States must take measures to protect migrant women

and children from 'slavery disguised.... as domestic or other kinds of personal service.' States must also take steps to regulate working conditions in the informal economy, including domestic and agricultural work, and must monitor compliance by private sector employers with legislation on working conditions through an effectively functioning labour inspectorate.

Refugees

Refugee law is an integral part of human rights. The Convention on the Status of Refugees was one of the first treaties enacted after the Universal Declaration of Human Rights was adopted, due to the centrality of the refugee problem in the entire concept of international human rights in the post-war period.

At first sight it should seem implicit enough that refugee protection is fundamentally part of human rights. Yet, this is a relationship that is not well understood. In some quarters, the very kinship between the refugee protection regime and that of human rights is even contended. Refugee protection is human rights protection.

The institution of asylum "derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the 1948 Universal Declaration of Human Rights." International refugee law and, more generally, the international refugee protection system provides for a specific regime of human rights protection for a specific category of persons: those who can no longer rely on their country of nationality or habitual residence for respect, protection and fulfilment of their human rights and fundamental freedoms. International refugee law is thus embedded within human rights law. Central to the realization of the right to seek asylum is the principle of non-refoulement.

The principle of non-refoulement embodied in Article 33 of the Convention Relating to the Status of Refugees encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his/her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement.

This prohibits any form of forcible removal, whether direct or indirect, to a threat to life or freedom or to torture, cruel, inhuman or degrading treatment or punishment. It includes deportation, expulsion, extradition, "rendition" and non-admission at the border.

Many asylum-seekers and even refugees continue to be deported as illegal migrants as part of migration control measures. Asylum-seekers are particularly vulnerable to deportation if detained. The 1951 Convention Relating to the Status of Refugees is the key legal document in defining who is a refugee, his/her rights and the legal obligations of States.

The Preamble to the 1951 Convention summarizes the objectives of international protection:

- "To assure refugees the widest possible exercise of...fundamental human rights and freedoms" which all "human beings [should] enjoy...without discrimination as to race, religion or country of origin." The contracting States agreed to treat refugees within their territories at least as favourably as States treat their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

The 1967 Protocol Relating to the Status of Refugees removed geographical and temporal restrictions from the Convention. By accession to the Protocol, States undertake to apply the substantive provisions of the 1951 Convention to all refugees covered by the definition of the latter, but without limitation of date. “Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States Parties to the Convention. The Convention and the Protocol are the principal international instruments established for the protection of refugees and their basic character has been widely recognized internationally.” International protection is thus premised on human rights principles. The different human rights instruments, mechanisms and procedures complement international refugee law tools.

Smuggled Migrants and Victims of Trafficking

The United Nations Convention against Transnational Organized Crime and its Protocols on Trafficking in Persons and Smuggling of Migrants are indispensable instruments for the waging of a coordinated fight against these activities. It is essential that the differences between the smuggling of migrants and trafficking in persons are understood before an effective policy response to both crimes can be developed and implemented. While both human trafficking and migrant smuggling prey on the vulnerabilities of people and their desires to migrate, they are ultimately two distinct crimes.

The UN Trafficking Protocol is the first international instrument to identify trafficked persons as victims of crime. In doing so, it supports the implementation of national measures that recognise and respond to their status as victims of crime including providing victims with information on court proceedings, protecting their identity during the criminal justice process, and providing access to protection and support services. The Protocol on the Smuggling of Migrants by Land, Sea and Air seeks to prevent and combat the smuggling of migrants.

Although there has been increased attention and action on the part of many countries regarding the issue and responses to trafficking in persons and the smuggling of migrants, there remains a considerable number of countries where specific legislation on human trafficking and migrant smuggling is lacking, or where only certain elements of the Trafficking and Smuggling Protocols are being addressed. Many States lack the capacity and expertise to implement legislation in line with the Protocols. The Trafficking Protocol has been ratified by many States, signaling their commitment to combat human trafficking under national legislation; however it is often the case that the comprehensive approach to human trafficking embodied by the Protocol is not fully implemented within national responses to human trafficking.

The criminalization of human trafficking is often well developed, but such criminalization requires the support of measures for the protection of trafficked victims under national legislation in order for it to be most effective. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, in its part VI, also obliges States to collaborate with the view to preventing and eliminating illegal or clandestine movements of migrants, and to take measures to detect and eradicate such movements and to impose effective sanctions on persons, groups or entities who organize such movements.

In 2004, the United Nations Commission on Human Rights established the mandate of the Special Rapporteur on Trafficking in Persons which focuses on the

human rights aspects of the victims of trafficking in persons, especially women and children. The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking provide practical, rights-based approach policy guidance on the prevention of trafficking and the protection of trafficked persons and with a view to facilitating the integration of a human rights perspective into national, regional, and international anti-trafficking laws, policies and interventions.

Migrants in Detention

Fundamental human rights standards exist to safeguard the protection of migrants deprived of their liberty. Article 9 of the Universal Declaration of Human Rights establishes that “no one shall be subjected to arbitrary arrest or detention”.

This universally recognized principle is also enshrined in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which states that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

“Furthermore, as enshrined in article 10 of ICCPR, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This implies not only the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, but also that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs.”

Article 16 (4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, states “Migrant Workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.”

Paragraphs 8 and 9 of the same article state respectively “migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used; and Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.”

Regarding arbitrary detention, the Body of Principals for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES 43/173) reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of a judicial or other authority. In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness of his/her detention. In the interception of migrants lacking documentation, many States employ administrative detention of irregular migrants in connection with violations of immigration laws and regulations, which are not considered to be a crime and may include, inter alia, overstaying a permit or nonpossession of valid identification or visa documents.

The objective of administrative detention is to guarantee that another administrative measure, such as deportation or expulsion, can be implemented. Sometimes administrative detention is also employed on the grounds of public security and public order, *inter alia*, or when an alien is awaiting a decision on refugee status or on admission to or removal from the State.

Administrative detention should last only for the necessary time for deportation or expulsion to become effective. The Human Rights Committee noted that "detention should not continue beyond the period for which the State can provide appropriate justification." The Working Group on Arbitrary Detention states that a maximum period should be set by law, and the detention may in no case be indefinite or of excessive length.

When foreign nationals are arrested or detained, Article 36 of the Vienna Convention on Consular Relations of 1963 provides that, if requested, the authorities of the receiving State must then notify the Consulate of the sending State without delay that its national has been deprived of his/her liberty. Any communication shall be facilitated and consular access to the detainee shall be granted.

Advances in Protection Mechanisms of Human Rights by Region

International human rights instruments bind States to abide by international principles when drafting legislation and policies that affect the welfare of migrants, but it is the sovereign right of States to regulate the entry of aliens with the terms and conditions of their stay. Regional differences exist regarding the acceptance of key instruments on the protection of international migrants.

While the Convention and Protocol Relating to the Status of Refugees enjoy general acceptance with ratification by 144 countries, many Member States are not yet inclined to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Effective implementation of the Convention could face serious difficulties if not widely accepted. The majority of African countries have ratified the key instruments regarding international migration. In the Americas, many countries have ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air.

There is also general acceptance for the International Convention on the Protection of the Rights of All Migrant Workers and their Families, and at present, 15 countries in the region have ratified it. Countries in the Asia and Pacific region have made a significant step towards the adoption of regulations and policies that affect the welfare of migrants by ratifying international conventions on the protection of migrants.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Protocol against Smuggling of Migrants, both adopted in 2000, have been ratified by 20 countries in the region, indicating the strong commitment of governments to combating such crimes.

As in other regions, ratification of the Migrant Workers Convention is fairly low compared to other core UN conventions. Currently, 8 countries have ratified it in the region. Despite disappointing levels of ratification, the Migrant Workers Convention still has a significant meaning within international law, as it is the broadest framework for the protection of migrants' rights and for guidance of States on how to develop

migration policies while respecting the rights of migrants. The entry into force of the 1990 Migrant Workers Convention in 2003 allows it to be cited as an authoritative standard. In practice, this has made it an instrument of reference for non-ratifying countries as well as States Parties, even those that have not agreed to be bound by its standards.

In addition, some world regions have independent human rights bodies, connected to regional inter-governmental bodies, while others are covered by regional offices of the United Nations High Commissioner for Human Rights (OHCHR). The OHCHR maintains regional offices for Central Africa, Eastern Africa, Southern Africa, Western Africa, Central Asia, Southeast Asia, the Pacific, Latin America and the Middle East regions, each of which has its own migration streams and issues.

Africa

In 1969, the Organization of African Unity created a new treaty to broaden the United Nations definition of "refugee" to include, "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." In 1981, Member States of the Organization of African Unity adopted the African Charter on Human and People's Rights, which entered into force in 1986, to promote and protect human and people's rights.

The charter of the Organization of African Unity stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples. In Article 2 of the charter, Member States pledge to promote international cooperation having due regard for the Charter of the United Nations and the Universal Declaration of Human Rights. The Charter also established the African Commission on Human and Peoples' Rights, which is charged with ensuring the promotion and protection of human and peoples' rights throughout the African continent, complemented and reinforced by the African Court on Human and Peoples' Rights. Since 2004, the African Commission on Human and Peoples' Rights has had a Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa. The African Special Rapporteur has monitored and reported on violations of the human rights of migrants and asylum seekers, as well as engaged in promotional activities with States in the region.

The Americas

Over the years, countries in the Americas have adopted numerous international instruments which became the building blocks of a regional system for the promotion and protection of human rights. The very beginning was the American Declaration of the Rights and the Duties of Man, approved in 1948 creating the Organization of American States (OAS).

This declaration constituted the initial system of protection. The American Declaration highlights universality in its opening paragraphs "[T]he essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality" and in Article 17, "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." In 1959, the Inter-American Commission on Human Rights (IACHR) was created to monitor observance of the rights stipulated in the American Convention.

The Inter-American Council of Jurists was entrusted with the preparation of a draft convention on human rights and the creation of an inter-American court for the protection of human rights.

In 1969, the OAS convened an Inter-American Specialized Conference on Human Rights which adopted the American Convention on Human Rights. The Convention entered into force in 1978, with the purpose of consolidating in this hemisphere a system of personal liberty and social justice based on respect for the essential rights of man. The Convention also established the means of protection, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights have paid close attention in the past decade to the human rights of migrants and asylum seekers.

In 1984, the Inter-American Commission broadened the definition of refugee applicable in the region through its Cartagena Declaration to include: “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

Since 1997, the Inter-American Commission on Human Rights has appointed one of its own Commissioners as Special Rapporteur on Migrant Workers and their Families. The creation of the office of the Special Rapporteur shows the interest that OAS Member States have in a group characterized by special vulnerabilities and that thus is particularly prone to human rights violations.

The Special Rapporteur has been active in the promotion and protection of the human rights of migrants in the region, issuing annual reports and making country visits, among other activities. The Inter-American Court for Human Rights has worked extensively to protect the human rights of migrants and has developed an important Consultative Opinion on the legal status and rights of undocumented migrants.

Furthermore, the Regional Conference on Migration, a regional body established in 1996 by countries in North and Central America, has frequently taken up the issue of the protection of the human rights of migrants in the region. In general, there is a relatively high degree of cohesion and formal commitment to international instruments relating to the human rights of migrants in Latin America and the Caribbean, which is reflected in the high participation of countries in the formulation processes.

Together with the existence of the Special Rapporteurs of the United Nations (both Latin Americans), the organs of the OAS developed several initiatives that serve; *inter alia*, to support the process of the Summit of the Americas. In addition, in inter-governmental for a on migration and sub-regional agreements on integration—such as in MERCOSUR, countries have shown an understanding regarding aspects that affect the integrity of all migrants, although without binding action.

Lastly, there are significant commitments in the process of the Ibero-American Summit, especially after the agreements of Salamanca (2005), which established international migration as a central issue of the Ibero-American Community and started on the path to design a coordinated agenda based on the principle that migration is a common good, part of its heritage and essential for its social development and

cohesion, Montevideo (2006) and Santiago (2007) and with the launch of the Ibero-American Forum on Migration and Development. Latin American civil society actively defends the human rights of migrants, with successful initiatives that have provided significant inputs into the work of the United Nations. The role of civil society organizations is relevant in this area, but much remains to be done in order to move forward.

Asia and Pacific

Despite the growth of international migration in Asia and the Pacific, protecting the rights of migrants remains on the fringes of discussion.

A notable shortcoming in policy debates has been the rights of migrant workers. While there are bilateral agreements between some countries of origin and destination in the region, mostly through memoranda of understanding, these primarily regulate the movement of workers and have little impact on the treatment that migrant workers receive in the country of employment.

Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe. It entered into force in 1953. All 47 members of the Council of Europe are signatories of the Convention. Based on the Universal Declaration of Human Rights, the European Convention aims to represent the collective enforcement of certain rights set out in the Universal Declaration.

Besides laying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of obligations entered into by Contracting States. Three institutions were entrusted with the responsibility of enforcing the obligations: the European Commission on Human Rights (1954), the European Court of Human Rights (1959) and the Committee of Ministers of the Council of Europe composed of the Ministers of Foreign Affairs of the Members States or their respective representatives.

The European Court has developed an extensive jurisprudence on the human rights of migrants, applying both European law and treaties as well as international human rights documents including the Convention on the Rights of the Child and the Convention and Protocol Relating to the Status of Refugees. Its decisions cover issues ranging from the relative weight to be accorded the right to family unity and the power to deport as well as decisions interpreting the meaning of “refugee”.

Challenges of Protecting the Human Rights of Migration

One of the main challenges in the protection of the human rights of migrants is the ratification, implementation and enforcement of existing human rights instruments. Inequality and discrimination persist and the objective of universal ratification has not been achieved.

The challenge is to protect the rights of migrants by strengthening the normative human rights framework affecting international migrants and by ensuring that its provisions are applied in a non-discriminatory manner at the national level. In many cases, migrants’ rights are undermined because the legal and normative framework affecting migrants is not well articulated or because officials are not familiar with the

framework, do not comprehend its implications and do not know how to put it into practice or monitor its implementation.

It is essential to create awareness of migrants' rights and build national capacity to formulate and implement migration policy that respects the human rights of migrants. Protection of the human rights of migrants is ultimately the responsibility of the State.

However, cooperation between governments in countries of origin, transit and destination, as well as non-governmental organizations, civil society and migrants themselves is essential to ensure that international human rights instruments are implemented and that migrants are aware of their rights and obligations.

Implementation is a major obstacle to migrants' enjoyment of rights. In many countries, laws do protect migrants but are incompletely implemented: migrants may not know about their rights; the administrative procedures to claim them are highly complex; and some government administrations do not do everything that is possible to ensure that migrants are adequately protected. States fear that these treaties would impede on their sovereign right to decide upon admission; some governments lack the capacity to implement long-term migration policies that would include the provisions of an ambitious treaty like the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

The human rights-based approach of international treaties regarding migration may at times clash with States' current priorities, which are often dominated by security concerns. The search for cheap labour underlies attitudes towards migration and may jeopardize the protection of migrants' labour rights. Moreover, international human rights treaties are inadequately known and understood.

This particularly applies to irregular migrants, whose situation makes them more vulnerable and who may be afraid of possible denunciations in case they claim the rights that are afforded to them by both national laws and international instruments. Vulnerable groups also include elderly migrants, those with disabilities and indigenous peoples.

As migrants, the elderly, those with disabilities and the indigenous are often marginalized and excluded from mainstream society. Lacking supportive social networks and access to basic social services, many of them are dependent on others for survival.

While the elderly may also suffer from age discrimination and abuse, the disabled and indigenous peoples often suffer from discrimination merely because they are different. Safeguarding the human rights of these vulnerable groups should be part of the overall strategy of ensuring migrants' rights.

In many regions where States have neglected human rights obligations vis-àvis migrants, or limited their entitlements to deter further immigration, demographic factors and market forces exercise pressure on governments to improve conditions for migrant workers, especially in times of increased international competition for both skilled and unskilled labour. Leaving respect for human rights to the forces of the market is not acceptable. A human rights-based approach calls for recognition of the fact that migrants have rights regardless of their skills-level and legal status. Practical measures are indispensable to the implementation of migrants' rights and should therefore be based upon a normative framework and should be guided by the

international human rights law regime that defines migrants' rights.

Implementing rights first implies knowing exactly what rights are to be afforded to migrants. In many countries, this is still a contested issue, particularly as far as irregular migrants are concerned. It is important to recall that all migrants, including those in irregular status, enjoy the human rights set out in the Universal Declaration of Human Rights and further elaborated in the core international human rights instruments.

In order to ensure an effective platform for the protection of the human rights of migrants, it is necessary to be cognizant of the international human rights instruments, eradicate the prejudices that impede their effective implementation, and demonstrate their validity. It is essential for all stakeholders including immigration officers, migration policy makers, law enforcement officials, the migrants themselves as well as the public at large to know the international legal framework governing migration and displacement, including international human rights instruments.

Awareness of applicable laws, and knowledge of legal definitions (such as 'refugee' and 'migrant worker') and distinctions, *e.g.* between human trafficking and the smuggling of migrants, are often not as widespread as they should be. As realizing a human rights-based approach to migration requires multistakeholder engagement, a better understanding of the rights and obligations of States, migrants and other stakeholders under international law must be promoted at all levels of governance and across sectors.

Indeed, the link between training and the protection of the human rights of migrants was stressed by Gabriela Rodriguez Pizarro, the former United Nations Special Rapporteur on the Human Rights of Migrants: "Training of key stakeholders including ministry officials, consular officials, border guards, social and legal counselors is essential in offering adequate protections to migrants… it should assist in sending the message that a human rights approach to migration does not mean 'opening the borders to all migrants' rather ensuring that migration can take place in a human, orderly and dignified manner." Fostering cooperation between States also implies a common understanding of the principles underlying migrants' protection.

Given the transnational nature of migration flows, cooperation is indeed necessary—as no State alone is able to govern the cross-border movements of people. Yet, evidence shows that States have different approaches to migration management and, consequently, sometimes divergent views on their policy priorities in terms of migration management.

This fact points to the need for common standards that make cooperation possible. Only if States attempt to speak the same language and share the same conceptions of what migrants' rights are about can they truly engage in not only discussions, but also actual cooperation. Moreover, standards are crucial in guaranteeing the universal distribution of rights.

It has become clear that migrants constitute a heterogeneous category: there are documented and undocumented migrants, migrant workers and family members, skilled and low-skilled migrants, men and women, etc. In practice, such heterogeneity may generate differential treatment among migrants: skilled migrants would be better treated than their unskilled counterparts, migrant workers would be welcome but not their family members, migrant women suffer from specific discriminatory problems, etc. Not all migrants face the same vulnerability vis-à-vis the protection of their rights.

While arguments of principle in favour of a strong international human rights law regime abound, reality indicates that some States display reluctance towards migrationrelated conventions.

This applies to International Labour Organization (ILO) Conventions 97 on Migration for Employment and 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers as well as to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), ratified by 39 States. Still, 79 States have ratified or acceded to at least one of these three legal standards/conventions on migration and migrant workers; a number of States have ratified two of them and several have ratified all three complementary instruments. The low level of ratification of these three treaties is only partially remedied by the fact that migrants are protected by other—and more widely ratified—human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

A new impetus should be given to the ratification of human rights instruments. To a large extent, renewed and coordinated efforts involving both non-governmental organizations (NGOs) and international organizations have given a new visibility to these treaties, in particular to the ICRMW. In addition, the contemporary interest in international migration management, indicated, inter alia, by recent events such as the High-Level Dialogue on International Migration and Development and the Global Forums on Migration and Development, provide a key opportunity to bring fresh air to international human rights law.

For instance, the second Global Forum on Migration and Development will address the protection of migrants and will focus on practical means to improve migrants' empowerment and protection. This issue of protection will be tackled from both the perspective of sending countries (aiming at protecting nationals living abroad) and of destination countries (responsible for ensuring the human and labour rights of the people living on their territory), with particular emphasis on how States can cooperate to advance and ensure the protection of migrants. The Global Commission on International Migration (GCIM) emphasized that international cooperation in the field of migration is conditional on a minimum level of national capacity.

This also applies to the respect for and fulfillment of international human rights obligations. A pragmatic approach may require acknowledging the fact that some States do not have the capacities to fulfill all human rights obligations immediately and thus need to work towards "progressive delivery based on current capacities." Nevertheless, this should not preempt the responsibility to apply core human rights principles, such as the principle of non-discrimination. It certainly calls for long-term commitments to capacity-building based on predictable funding. The sustainability of such efforts will depend on the successful transition from international engagement to local ownership, which should be well planned and managed.

Irregular Migrants

Irregular migration is not only a phenomenon occurring between developed and developing countries, but in all parts of the world. The abusive conditions under which irregular migrants may move and live are well documented. While the causes of irregular migration are as numerous as the phenomenon is diverse, it has been strongly argued that control measures alone are insufficient to tackle irregular migration and

that a comprehensive approach is required, including the need to adopt a package of more "constructive" measures.

The protection of the rights of this vulnerable group forms an integral aspect of such a comprehensive approach which also comprises the need to address informal labour markets where both national and migrant workers are found; provide more regular avenues for migrant workers to be able to meet the demand for labour in all sectors of a destination country's economy; and give serious consideration to the regularization of those with irregular immigration status. An important way of addressing the phenomenon of irregular labour migration is to effectively protect the rights of those with irregular status in order to undermine any incentives employers and intermediaries might have in encouraging such movements.

For decades many States have responded to persistent irregular migration by intensifying border controls, with the incorporation of a human rights perspective to varying degrees. State measures of border enforcement, anti-trafficking initiatives and immigration control measures have ranged from an increased use of the armed forces or military methods of policing the border, confiscation of the proceeds of trafficking, tougher sanctions against the employers of undocumented migrants and commercial carriers that bring to their borders foreigners without proper documentation, radar surveillance, and detention and expulsion of unwanted aliens. This has also involved, inter alia, fingerprinting, the erection of walls and the deployment of semi-military and military forces and hardware in the prevention of migration by land and sea.

While many of these measures fall legitimately under the auspices of managing incoming migration flows, they can fail to take into account both the international human rights framework that exists to universally protect all people on foreign territory, regardless of nationality, and can result in abuses of the foreign-born population in all stages of the migration process (including transit and return).

Despite the increasingly complex methods necessary to manage migration, States and other governmental and non-governmental interlocutors need to better incorporate the protection of migrants into these measures (*e.g.* through training and capacity building, and through development and implementation of migration management policies). This position is not intended to excuse irregular migration, nor encourage it, but rather to underscore the importance of States to adhere to international human rights standards during engagement with all migrants, whether documented or not.

Accordingly, States should take measures to further promote legal migratory channels and revise policies and practices to incorporate enhanced protection of migrants during all phases of the migration process. The United Nations Development Programme (UNDP) Human Development Report notes that in both richer and poorer countries, one of the greatest challenges for migrants is their legal status.

There is a 'sea of gray' between full citizenship and legal status. This uncertainty affects migrants' full participation and entitlements in society, such as receiving health and education services and ability to enter the work force without being subjected to discrimination. States should cooperate with a view to fostering regular migration and investing in providing legal protection to migrant workers, instead of just focusing on security aspects.

Female Migrants

Over the last few decades there has been a steady increase of female participation

in international migration movements. In 2005, female migrants accounted for 49.6 per cent of all international migrants. However, there are differences in the sex-distribution of migrants among the various regions in the world. Female migrants account for 53.4 per cent of all international migrants in Europe and 51.3 per cent in Oceania, exceeding therefore the number of male migrants, while they comprise only 44.7 per cent in Asia and 47.4 per cent in Africa.

The percentage of female migrants in sub-Saharan Africa has increased from 40.6 per cent in 1960 to 47.2 per cent in 2000. In comparison, the share of female migrants in Eastern and South-Eastern Asia increased over the same period from 46.1 per cent to 50.1 per cent in 2000. The causes of the regional differences can be found in the regulations administrating the admission of migrants in the various countries of destination and those governing the departure from countries of origin, in conjunction with the correlation of factors determining the status of women in the countries of origin and destination.

The stock of female migrants has actually grown at a faster pace than the stock of male migrants in the most important countries of destination, in developed as well as developing countries. But equal numbers do not necessarily translate into equal treatment. It is becoming increasingly evident that migration is not a “gender-neutral” phenomenon: men and women display differences in their migratory behaviours and face different opportunities, risks and challenges, including factors leading to irregular migration; vulnerability to human rights abuses, exploitation, and discrimination; and health issues.

The experience of female migrants differs from that of men from the moment women decide to migrate. While historically women tended to migrate for marriage or family reunification, recent decades have seen an increase in women migrating independently and as main income-earners. Today, female migrants make up approximately half of all migrants. The increased female migration has raised both prospects and challenges. Female migration has a tremendous potential. It can advance gender equality and women’s empowerment through opportunities that it opens for greater independence and self-confidence. It can be a vehicle for enhancing the status of women by breaking through oppressive gender roles. It can give rise to structural and institutional changes as well as changes in mind set, understanding and lifestyle. It can redress social and economic imbalances.

Migration provides women with income and the status, autonomy, freedom and self-esteem that comes with employment. Women become more assertive as they see more opportunities opening up before them. However, gender inequalities, including violence against women, can increase with migration, therefore generating risks and vulnerabilities. In some environments, female migration is accompanied by human rights violations, exploitation and abuse.

Female migration can also involve a significant amount of tension, especially since it often breaks through established values and practices and produces higher psychological costs for women than men. Female migrants often face multiple discrimination in the migration process on account of their nationality, immigration or social status as well as gender. The continued abuses suffered by many women migrants, who fulfill important but often undervalued tasks in host societies, and the frequent absence of formal protection in national labour legislation raise important questions in safeguarding the human and labour rights of female migrant workers.

Addressing gaps in many countries' legislation in recognizing domestic work as formal employment, with the same conditions of work and protections as other workers, would make significant inroads into addressing challenges faced by many migrant women. Finally, the exploitation and abuse migrant women face in the context of trafficking in human beings requires strong government responses in the areas of prevention, protection and prosecution.

Women should be made aware of their options, regarding the migratory process itself, and conditions in the country of destination, so that they can make informed decisions. While the fact that women are migrating on their own rather than as part of family migration seems to indicate greater freedom and choice, very often this is not the case at all. Discriminatory applications of migration law expose women to greater risks of human rights abuse.

While most migration policies are not designed to favour one gender over the other, women can be denied entry due to restrictions imposed on admission of migrants for female types of occupations. Restrictive regulations which give women less chance of migrating legally than men force them to migrate clandestinely. When legal channels are not available, many women see trafficking or smuggling as the only option to cross the border.

This places them at increased risk of exploitation and abuse. The more opportunities there are for regular channels of migration, the less incentive will there be for trafficking of people, exploitation and serious abuse of migrants in the countries of origin, transit and destination. Some women turn to, or are lured by, "brokers" to help them migrate clandestinely leaving them open to discrimination, exploitation, violence and abuse.

Many become victims of human trafficking. Girls and women victims of trafficking, refugees, transit and irregular female migrants are most vulnerable to human rights abuse. Their situation is exacerbated by the failure of countries to address this tragedy. Female victims of trafficking have little recourse to the law. Many of them are in the country illegally and are afraid to report abuses and seek help from local authorities. They are literally slaves of their traffickers, trapped in a situation over which they have no control. Many of the women suffer extreme violence, illnesses and diseases, and irreparable physical and psychological harm.

Women migrants who are forced into sex work are also at great risk of contracting HIV/AIDS. Female migrants who flee conflict situations are also often subjected to gender based violence, sexual abuse and exploitation. Refugee camps do not always provide protection from such abuse. Also of concern is the growing number of transit migrants, although female migrants represent only a small proportion of all migrants in transit. The exact magnitude of transit migration is unknown since data on the inflows and outflows of foreigners, both legal and undocumented, as well as information on their duration of stay and their intentions are not available. Migrants stay for extended periods in transit countries voluntarily or because of a growing difficulty to move onwards.

The vulnerability of female migrants increases with the prolongation of the migratory process. Female migrants who are victims of sexual assault in countries of transit demonstrate the need for special protection schemes to ensure the right to physical integrity and protection from criminal assault. Although legal channels to migration exist, there is no guarantee that female migrants will obtain the jobs that they were promised.

Many women and girls typically apply for advertized jobs as babysitters, models, hairdressers, dancers or waitresses with friends or relatives acting in some cases as recruiters. Once in the country of destination, they realise that these jobs do not exist. Instead they find themselves in the hands of traffickers who often violate victim's rights by seizing passports or other identity documents, not living up to promises or contracts, withholding pay, and forcing women into subjugation or even sex work.

The rule of law and effective criminal justice systems actively addressing the crimes of human trafficking and migrant smuggling are essential for the protection of migrants' rights and of those who are trafficked and smuggled. Adequate legal frameworks and institutions in the countries of destination are essential to ensure that justice is served and that victims receive compensation for the suffering they endure. Strengthening the criminal justice response to migrant smuggling and human trafficking is a core element.

When designing such policies, upholding human rights and protecting the safety and lives of migrants must be paramount. Many female migrants lack access to much-needed health services. National and local health authorities typically pay little attention to the health conditions of international migrants. Policymakers rarely address issues of family planning or reproductive health of migrants but focus more on infectious diseases that migrants might bring into the country. Even when health services are available, other obstacles, including language and communication problems, cultural differences regarding the perception of health and health care, and lack of information about what is available often prevent women migrants from seeking medical care and health services. Female migrants are less likely to seek prenatal services than nationals, especially when their official status is uncertain.

Female migrants who have been sexually abused or forced into sex work and live with HIV/AIDS often do not seek medical attention out of shame or fear. Female genital mutilation (FGM) is another issue that has caused concern in countries receiving migrants from countries where this practice is prevalent, because of the presence of gynecological problems and psychological trauma associated with FGM.

In dealing with irregular migration of women, States must take into account that during the migration process women's health conditions could have been negatively affected through FGM and reproductive healthrelated illnesses and should therefore provide necessary services to avoid further complications or even the death of female migrants. The lack of sex-disaggregated migration data and gender-sensitive research is a major challenge.

Good data on flows of international migrants and cyclical migration, as well as research on the root causes of migration and the extent of human rights abuses are essential to sensitize policymakers to the needs of female migrants and for evidence-based gender-sensitive policy formulation and programme implementation addressing the needs of female migrants. Data and research are needed to identify the gaps in gender equality throughout the entire migration process, develop strategies to close those gaps, and monitor implementation.

This knowledge may help in the process of managing migration. The international women's rights regime acknowledges the different rights of women at distinct stages of their lives. To protect the human rights of female migrants throughout the entire migration process, it is essential to consider female migration from a life cycle approach,

examining the situation of women and girls before they migrate, as they migrate, their situation abroad, and upon return to the country of origin. Insufficient attention to female migration holds back development and reduces the possibility of achieving the Millennium Development Goals (MDGs). The international community should be made aware of the contributions of female migrants to countries of origin and destination. Effective measures must be taken to combat misconceptions and misleading information on the female migratory profile.

Existing laws and international instruments and agreements should be strictly enforced, and legal protection systems should be put in place to ensure the protection of the human rights of female migrants. Such protection mechanisms should include, inter alia, laws and policies in compliance with international human rights standards, including laws and policies that recognize the right of female migrants to available, accessible, acceptable and high quality basic services; freedom from discrimination based on sex, origin, religion, etc.; the right to access to justice, including legal assistance in cases where female migrants need it; effective institutions that promote and protect the rights of female migrants, including the judiciary and national human rights institutions such as ombudspersons and national human rights commissions; and mechanisms ensuring respect and protection of the rights of female migrants, such as redress and reparation procedures in case of violations of human rights.

All policies and legislation concerning international migration should be human rightsbased. Strategies in the country of origin, transit and destination should encompass protection mechanisms relevant to female migrants.

Migrant Children

Children are crossing international borders in greater numbers and face many risks in the process. Children and women are particularly vulnerable to trafficking, abuse and exploitation, especially during prolonged migratory processes. Risks for children are even greater when they travel unaccompanied, separated or without documentation.

Even when migrating with their families, however, the migration process is not risk free. Migrant children are often confronted with serious institutional, social and psychological barriers, especially when parents occupy marginal positions in the country of destination. In labour sending countries, a growing number of children are left behind by one or both parents. In host countries, migrants and their families are often vulnerable to discrimination, poverty, insecurity and social marginalization. For undocumented migrants, there are additional concerns such as under-paid wages, lack of access to educational, health and basic social services as well as the possibility of arrest, detention and repatriation. The rights of all children affected by migration processes have, therefore, become a matter of growing concern to the global community.

However, there is also a growing awareness of the value of promoting, protecting and fulfilling children's rights in view of the accompanying empowering effect that can enable them to claim their rights. Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification should be dealt with in a positive, humane and expeditious manner. States Parties should further ensure that the submission of such a request should entail no adverse consequences for the applicants and for the members of their family. A child whose parents reside in different States should have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.

Towards that end and in accordance with the obligation of States Parties the right of the child and his or her parents to leave any country, including their own, and to enter their own country should be respected. The right to leave any country should be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Convention on the Rights of the Child.

Children of migrant workers, whether they have migrated with their parents or were born in the host country, may be denied access to basic services, including health and education, with language difficulties often being a serious impediment to the latter. Children who are not in school, whether due to denial of access or the pressure to contribute to family earnings, become vulnerable to the worst forms of child labour, including commercial sexual exploitation.

When children migrate with parents or are born to migrants in destination countries, the benefits of a better standard of social services may be reduced by disadvantages such as discrimination, xenophobia and racism, relative poverty, language barriers, unequal rights and the lack of integration policies. Migrant children may also be the subject of adult decision- making by members of the family or others, which in some cases also exposes them to significant harm.

The vast majority of children who migrate do so for the purpose of family reunification. Several countries apply extreme measures, allowing only their own nationals the opportunity to emigrate, including for the purpose of family reunification. Migrants then have no option but to seek irregular ways to migrate and this places children at high risk, particularly when they travel unaccompanied. Legal identity, a problem faced by all migrants, is particularly difficult for children. In some countries, children born to foreign parents do not generally qualify for citizenship. Irregular migrants may also face difficulties in obtaining birth registration for their children. Children without identification documents are usually excluded from formal schooling, and it may be difficult for them to socialize and to create social networks because of language and cultural barriers.

In addition, migration puts unique stresses on children–leaving a familiar social context and extended family network; entering a new place, culture, and language; and harsh conditions endured before or during the transition. The stress can be even more intense for adolescents. Migrant children who do not connect in some meaningful way with their peers, family or school are at an increased risk of depression, self-harm, including suicide, substance abuse, failing or dropping out of school, mental health problems and entering into conflict with the law. The impact of migration on children, especially girls, must be seen in the broader context of poverty and conflict, and within the perspectives of vulnerability and resilience, gender relations and children's rights.

From a gender and rightsbased approach, it is important to foster constructive solutions to better meet the challenges faced by children and adolescents moving from one country to another in search of security, and protection, and improved standard of living. Migration should be positioned within the context of a human rights framework that provides protection for all children, adolescents and women affected by migratory processes. States that are parties to international human rights treaties are obligated to offer protection to the rights of non-nationals as well as direct protection to children as long as they remain in their territory.

Migrant children become non-nationals or aliens once they leave home and cross national borders and face a new social environment, but these circumstances should not imply a restriction of their human rights, whatever their migration status. Whether on their own or with family, children are increasingly becoming migrants in search of survival, security, improved standards of living, education or protection from abuse. Also affected are children left behind by one or both parents and children living in areas with high migration rates. Policies should take cognizance of how migration affects these children and protect their rights by enhancing access to benefits of migration while simultaneously protecting against vulnerabilities.

The CRC and the CEDAW provide the rights and gender framework within which the special needs of migrant women and girls can be addressed. These treaties oblige States to maintain a gender perspective in migration laws and policies, particularly in receiving countries. These areas require greater attention from researchers as well as policy and law makers dealing with migration issues. The challenge for policy and law makers is to establish rules and regulations that meet the requirements of international conventions, including the CRC and CEDAW. “Protection gaps” and grey areas exist in irregular and mixed migration flows.

The increasing numbers of unaccompanied children crossing borders, including through irregular maritime migration, puts them at risk and exposes them to exploitation, abuse and violation of their rights. Unaccompanied migrant children may suffer deportation or repatriation measures, or be detained, without respect for their best interests. Migrant children may be separated from their parents, *e.g.* when they are deported from the country of residence, which may be in breach of provisions contained in universal human rights treaties, protecting the family as the fundamental part of society. Moreover, the principle of best interests of the child is not always properly considered in family reunification policies and measures.

Irregular migration occurs in the absence of documents and often involves human smugglers and traffickers. There is a need for specific rights and gender-based responses and approaches to address concerns, especially as it relates “to migrants deemed ‘irregular’ by the authorities who fall outside the international refugee protection framework but who nevertheless need humanitarian assistance and/or different kinds of protection.” Poverty, lack of access to education, unemployment, gender inequality and risk of HIV/AIDS increase vulnerability to irregular migration and trafficking. Protection gaps for mixed migration flows are substantial and need to be addressed urgently.

It is important to identify migrant children within mixed movements, so as to ensure access to protection and meet their needs. In countries of origin, the migration of parents has created new challenges for children left behind, including family instability, increased household responsibilities, social stigmatization and limited access to essential services, such as health, education, etc.

The educational achievement of children left behind is often compromised by their obligations to fulfill household duties and care for younger siblings. An assessment of the Millennium Development Goals indicates that the goals can be fully achieved only if the promotion and protection of children’s rights is made an integral part of programming strategies and plans.

Children left behind may be at greater risk of drug abuse, teenage pregnancy,

psychosocial problems and violent behaviour. Children left behind must be covered by gender-sensitive social protection policies to ensure that all forms of discrimination and victimization are avoided; further, to be effective, social policies must be adapted to the specific circumstances faced by vulnerable children.

International organizations and governmental stakeholders play a crucial role in raising awareness of the situation of migrant children and in promoting the appropriate response from governments and civil society regarding the adaption of respective legislation for the promotion and protection of the rights of migrant children in accordance with the CRC.

Moreover, there is a significant lack of information about migrant children or those who are left behind in countries of origin. Without accurate reliable data on the numbers of children affected by migration, including migrant children, it is difficult to develop and implement suitable programmes and policies to respond to their needs and promote the realization of their rights. Even without extensive substantiation, it is clear that the impact of migration on children is a matter of growing concern worldwide.

Migrant Workers

Linkages between Protection of Rights, Decent Work and Development

The linkages between protection of rights and development are articulated in international labour conventions, in discussions at the International Labour Conferences and other international fora as well as in authoritative documents, such as the International Labour Organization (ILO) Multilateral Framework. Analyses have revealed that deficits in decent work are at the origin of migration flows. In other words, the inability of workers to exercise their right to work in their own countries pushes them to migrate in search of employment.

The Conceptual Underpinning

ILO Director-General, Juan Somavía: "...gains from migration and protection of migrant rights are indeed inseparable. Migrant workers can make their best contribution to economic and social development in host and source countries when they enjoy decent working conditions, and when their fundamental human and labour rights are respected."

Despite the positive experiences of many migrant workers, a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia, as well as social exclusion.

The granting and denial of visas based on the particular national origin of the applicant and on the grounds of national security are some of the common realities facing migrant workers and which is a cause of concern. These developments erode the potential benefits of migration for all parties, and seriously undermine its development impact. The workers most vulnerable to abuse of human and labour rights are women migrant workers, especially domestic workers, migrant workers in irregular status, trafficked persons and youth migrants.

Low skills add to the vulnerability of migrant workers while skilled workers are in a better position to protect their rights. Great differences exist in the labour profiles

of male and female migrants. Men and women circulate differently in the global economy.

Education and skills enhancement opportunities for girls and women are limited in many sending countries. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) describes the need for equal rights with men in the field of education and in particular to ensure, on a basis of equality, their conditions for career and vocational guidance. With less educated women ending up predominantly in the service and welfare sectors, in traditionally female occupations with precarious working conditions, many women migrants, especially those found in the informal sector of the economy are without adequate protection.

This makes women more vulnerable to exploitation and human rights abuses, including low wages, illegal withholding of wages, and illegal and premature termination of employment because they are often found in gender-segregated and unregulated sectors of the economy, including domestic work, entertainment, and the sex industry which often are unprotected by local labour legislation. The fact that gender roles are traditionally established and that men often do not share the domestic chores, particularly looking after children on a daily basis, makes it even more difficult for women to develop personally and professionally. The CEDAW calls on countries of destination to support measures at the work place to prevent discriminatory treatment of female migrants and facilitate the integration of women including by enforcing labour rights and encouraging the host community to accept them as contributing members of society.

To reduce female migrants' vulnerability and marginalization, their cultural diversity needs to be respected. Countries of origin should facilitate the migrants' return and reintegration into society especially for those who have been victims of human rights abuse and human trafficking.

A number of issues are at the intersection of protection and development. Wages of migrant workers, significant parts of which become the remittances they send back home, are one such issue. Remittances are the most tangible way in which migrant workers contribute to poverty reduction, employment creation and development in their countries of origin.

Article 9 of Convention No. 97 on Migration for Employment states that each party to the Convention undertakes to permit, taking into account national laws and regulations, the transfer of such part of the earnings and savings as the migrant may desire. Article 47 of the ICRMW provides that migrant workers shall have the right to transfer their earnings and savings and that States concerned shall take appropriate measures to facilitate such transfers.

Non-payment or underpayment of wages denies migrant workers part or all of their incomes and deprives their countries of origin of remittances that could be used for reducing poverty and promoting development. Ensuring the payment of wages as such is laid down in the Protection of Wages Convention of 1949, and is a right that has important implications for migrant workers and their countries of origin.

The Committee on Migrant Workers emphasized that equality in remuneration and conditions of employment on the one hand protects migrant workers from abuse and, on the other hand, removes the incentive for employers to resort to irregular recruitment or employment. In countries of destination, migrant workers are better able to meet labour demand, use their entrepreneurial skills and enlarge the supply

of goods and services when they have access to training, skill recognition and labour mobility, in equality with native workers. Remuneration and social security benefits allow them, as consumers, to increase demand for goods and services and thus to contribute to economic growth.

The exercise of these rights also contributes to preserving the competitiveness of native workers in labour markets of countries of destination. Allowing migrant workers to work for a lower pay, for longer hours and/or without access to social security can reduce the cost of their labour compared with national workers, thereby undermining the latter's chances in their own labour markets. Social integration of migrant workers and their families, manifested in their exercise of the rights to work, to education, to housing and other relevant rights, allows them to raise their productivity and the level of their contributions to the economies of countries of destination.

Rights of migrant workers, the use of their full potential and their contributions to development would be furthered by the licensing and supervision of recruitment and placement services. The Private Employment Agencies Convention 1997 (No. 181) and its Recommendation (No. 188) draw the parameters of policy in this respect. Temporary migration is an issue of importance in current discussions on the protection of rights and development. Its goal is to help meet specific short to mediumterm demand for labour in countries of destination, while avoiding the permanent loss of skills and the detrimental consequences for development in countries of origin.

These are worthy considerations. However, the proliferation of temporary migration schemes should not lead to the curtailment of the rights of migrant workers in the work place, especially regarding the principles of equality of treatment with national workers and non-discrimination.

The view that such programmes necessarily involve a trade off of migrant numbers with their rights undermines the framework of migrant protection and rights elaborated in international instruments. "It is extremely important that those programmes [of temporary and circular migration] are in strict compliance with the relevant international human rights instruments, in particular to ensure non discrimination with regard to remuneration and other conditions of work. The ILO Multilateral Framework has provided some guidelines on this issue. The most relevant is Guideline 5.5 which calls for: "ensuring that temporary work schemes respond to established labour market needs, and that these schemes respect the principle of equal treatment between migrant and national workers, and that workers in temporary schemes enjoy the rights referred to in principles 8 and 9 of this Framework." Guideline 9.9 calls for ensuring that "restrictions on the rights of temporary migrant workers do not exceed relevant international standards." Less concern about human rights is usually voiced in the current discourse on skilled and highly-skilled migrants.

Rather, the discussion is framed in terms of migrants' value as human capital and focused on potential modes of sharing human resources ("a mobile and global pool of professionals") among States. Indeed, often the language applied to highly skilled migrants and diasporas reflects associations of resource extraction, using terms such as "tap into," "harness" and "leverage". Not only is this at odds with a human rights-based perspective, it also neglects the fact that many migrant associations and diaspora organizations represent an elite not because of their educational achievements or abundant resources, but because they choose to act.

Refugees

Serious human rights or humanitarian law violations are at the origin of refugee flows. Refugee protection itself is about upholding human rights of individuals during displacement. Voluntary return of refugees in safety and dignity is only possible if root causes generally linked with serious human rights violations have been addressed in a sustainable manner. Speaking broadly of humanitarian action, the Inter-Agency Standing Committee (IASC) has stated: "Protection of human rights is intrinsic to effective humanitarian action." This statement points to the fact that human rights violations and resulting protection issues are usually a central element of complex crisis situations. They are also typically at the heart of the problem that has contributed to, or been exacerbated by, armed conflict.

Current Refugee Protection Challenges

The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that over 16 million people were refugees at the end of 2007. As of the end of this year, roughly one third of all refugees were residing in countries in the Asia and Pacific region. The Middle East and North Africa region hosted a quarter of all refugees, while Africa and Europe were host to respectively 20 and 14 per cent of the world's refugees. The Americas had the smallest share of refugees–9 per cent.

Thousands of persons in various countries of the world, who are fearful of applying for refugee status or who are denied that status, go underground and become illegal migrants. The right to seek asylum is often threatened where asylum-seekers are part of mixed population movements. Many who flee persecution and conflict are unable to use legal means to reach safety and undertake perilous journeys with those fleeing poverty or precarious living conditions. In the process, they frequently face torture, rape, abuse and exploitation by smugglers, pirates, officials and others. Unaccompanied and separated children caught up in irregular movements are at particular risk of sexual and labour exploitation.

The right to seek asylum is jeopardized if shipmasters do not rescue those in distress and when governments are unwilling to disembark those rescued, including asylum-seekers. States' protection responsibilities are relatively clear where individuals are intercepted or rescued in territorial waters, but differences remain over protection obligations outside such waters. The right to seek asylum is also jeopardized by difficulties regarding access to fair and effective asylum procedures or those which are poorly developed, not based on timely and accurate country of origin information, or duly sensitive to age, gender and diversity. Refugee recognition rates for asylum-seekers of certain nationalities diverge widely among and within States.

The right to life, liberty and security of person is central to the enjoyment of asylum. Yet physical insecurity is increasingly the hallmark of many situations of displacement. Cases of camps attacked by rebel groups and forced recruitment of children by armed groups pose problems in a number of operations. Insecurity also restricts humanitarian access by the United Nations Office of the High Commissioner for Refugees (UNHCR), and other United Nations and non-governmental organization partner staff, and exposes refugees to high risk. As noted by United Nations Secretary-General, Ban Ki-Moon, critical humanitarian access to civilian populations is often currently "anything but safe, certainly not timely and far from unhindered." In many situations, sexual and genderbased violence remains a major problem for asylum-seekers and refugees, particularly women and girls.

Many are exposed to rape, the risk of HIV infection, attack, abduction, honour

killings, female genital mutilation, child marriage, sexual harassment, and other violations of the rights to life, freedom from torture, cruel, inhuman or degrading treatment and an effective remedy.

Their abuse is often linked to anti-migrant sentiments, reflected in the policies and frameworks of the countries of destination and transit designed to manage migratory flows in a purely restrictive manner. Refugee camps do not always provide protection from such abuse. Caught up in general antiforeigner violence or specifically targeted, asylum seekers are sometimes forced to move to other parts of the country or even killed. Refugee protection has become more complex in recent years due to the increasing difficulty in availing access to asylum systems resulting from heightened security considerations.

Many who have been refused asylum remain in the country of destination and, together with those who have overstayed their visas or crossed borders without the proper documents, contribute to the growing numbers of irregular or undocumented migrants. Irregular migrants often cannot fully exercise their human rights, lack basic health services and face abuse and exploitation. States increasingly resort to the detention of asylum-seekers and refugees, including children. Sometimes detention periods are prolonged, at times even indefinite.

In some situations, conditions are so overcrowded and poorly ventilated, without the most basic amenities or nutrition, as to amount to inhuman and degrading treatment. In some cases detention has resulted in death. Continuing difficulties in securing access to the right to work for asylum-seekers and refugees reflect reluctance on the part of many States to allow foreigners access to national labour markets. Yet, access to employment is essential to realizing other human rights and is inherent to human dignity. It can protect against sexual and gender-based violence and is integral to achieving self-reliance and durable solutions.

The right to a standard of living adequate for health and well-being, including to clothing, housing and medical and necessary social services is related to numerous rights, access to which should be granted on a non-discriminatory basis, including as regards national origin, physical or mental disability, or health status (for instance, regarding HIV/AIDS). It encompasses access to safe, potable water and adequate sanitation and access to health-related education and information, including on sexual and reproductive health.

In urban environments, many asylum-seekers and refugees are unable to access housing, health-care and other services, whereas due to resource constraints, facilities often remain poor in refugee camps. The right to adequate food is critical to the enjoyment of all other human rights. It has become an urgent issue particularly in light of the most recent rise in food commodity prices, diminishing food stocks and resulting in shortfalls in delivery of humanitarian assistance in a number of displacement situations.

Addressing the Challenges and Gaps

States bear the primary responsibility for protecting the human rights of all persons within their territory or subject to their jurisdiction.

Recurring global protection challenges are brought to the attention of the Executive Committee of the UNHCR Programme (ExCom) for its guidance, including through ExCom Conclusions. In the field of refugee protection and international migration,

the High Commissioner's Dialogue on Protection Challenges, involving a wide range of stakeholders, took place in Geneva in December 2007 to discuss refugee protection, durable solutions and international migration.

The meeting recognized that there are protection gaps in mixed flows, especially as regards migrants deemed by the authorities "irregular" who fall outside established protection frameworks, but who otherwise need humanitarian assistance or other kinds of protection. The Dialogue called for rightsbased approaches in addressing these gaps and placing all migrants' human rights and dignity to the fore.

Other global issues may be addressed, such as those issued to assist States in properly applying the refugee definition contained in Article 1 of the 1951 Convention, addressing gender-based persecution, or determining when victims of trafficking are at risk of persecution on refugee grounds if returned.

Why is it necessary at all to envisage refugee protection in reference to human rights? In answering this question, in the first instance, the importance and validity of the refugee law and protection regime in its own right must be reaffirmed. This regime clearly lays down the duties and obligations that are owed to refugees and the rights they are entitled to claim as a matter of international law. Refugee law and protection have, over the years become well-known, accepted and essentially adhered to across the world.

This predictability is critical in actual, concrete actions to protect refugees whether through diplomatic means or judicial litigation. All this deserves to be respected, re-validated, nurtured and further developed. To assert the relationship between this regime and that of human rights protection is, however, not only about making an academic point, although that is useful in its own right in advancing the knowledge and awareness that still needs to be fostered on this issue. The emphasis is, however, also useful as a reminder, which remains necessary from time to time, that refugees are not some obscure technicality but are, after all, human beings.

They bear human rights, and the imperative to respect and advance those rights as do all other human beings. The connection thus plays both a tactical and operational function. Even in situations where the 1951 Refugee Convention is applicable because of accession, reference to human rights of refugees, and not only refugee law entitlements, has a strong rhetorical and reinforcing function. But in those countries which have not acceded to the 1951 Convention or any other international or regional refugee instruments, human rights law comes to provide the essential bedrock for protection advocacy and action. For all these reasons, every opportunity must be taken to elaborate, foster and make known the nature and interconnections between the two regimes.

Smuggled Migrants and Victims of Trafficking

Developing effective responses to address human trafficking and migrant smuggling, as issues of irregular migration that impact on the human rights of those who are trafficked or smuggled, raises many challenges.

At the point or country of origin, traffickers and smugglers alike take advantage of people's vulnerabilities, particularly those who may be desperate to migrate in an attempt to establish a better life.

Traffickers and smugglers look to profit from the vulnerabilities of people by offering them incentives and the means to migrate looking for better opportunities.

Smuggled migrants may suffer violence, sexual abuse and other life threatening situations along their migration route to the destination point.

Trafficked victims may suffer the same and are subject to exploitation. Once at the destination, smuggled migrants' status as illegal immigrants makes them vulnerable to abuse and discrimination while trafficked victims will suffer exploitation at the hands of their traffickers. It is essential that the differences between trafficking in persons and smuggling of migrants are understood before an effective policy response to both crimes can be developed and implemented. There are increasing reports of abuse by smugglers inflicted against those who are smuggled. In this regard, smugglers and the activity of people smuggling has the potential to seriously endanger the life and health of those who are smuggled.

The death and serious injury toll from smuggling has dramatically increased in recent years, indicating the potentially serious human rights abuses that smugglers can inflict against those who employ their services.

Knowledge and Awareness of Trafficking in Persons and Smuggling of Migrants as Crimes Against Human Rights

When responding to instances of human trafficking and migrant smuggling, it is often the case that law enforcement and criminal justice practitioners will approach the investigation and prosecution with a focus on targeting the smugglers and traffickers for their role in the facilitation of illegal immigration.

At the same time, they often look to deport those who are illegal immigrants as a result of being trafficked and/or smuggled. Human trafficking is often incorrectly treated by law enforcement officials as a crime of illegal immigration first, before it is recognized as a crime against the person who has suffered extreme human rights violations from having been exploited.

While trafficking in persons and smuggling of migrants often involve illegal methods of migration, it is not always the case. More knowledge and awareness among law enforcement and criminal justice practitioners of the human rights aspect of human trafficking and migrant smuggling needs to be developed.

Responding to human trafficking from a human rights-based approach (as opposed to an approach that targets only the traffickers) works to protect and support the trafficked victims as well as to benefit the criminal investigation and prosecution case. Where trafficked persons are treated as victims of crime as opposed to illegal immigrants, they are more likely to assist in the criminal investigation and recover from their trafficking ordeal. Smuggled migrants need to be recognized by law enforcement and criminal justice practitioners as potential victims of human rights abuse.

Smuggled migrants may have been subject to human rights abuse during the journey, at the border crossing, during periods of illegal stay in the destination country, in detention facilities or during the course of removal. Smuggled migrants, regardless of their immigration status, have the right to have their human rights and dignity upheld and prioritized at all stages by those who deal with their case from discovery and identification, to detention, to removal—where such cases permit—to the granting of asylum.

A Comprehensive Policy Response

to Human Trafficking

A comprehensive and multi-disciplinary approach comprising and balancing repressive strategies is needed in order to effectively tackle the issue of human trafficking, suppressing the organized crime networks and prosecuting the traffickers, as well as empowering potential and actual victims of trafficking. A comprehensive policy response should begin with prevention to help combat trafficking; provide protection and support for the victims and ensure that traffickers are prosecuted. Effective action against trafficking in persons must take into account the recognition and promotion of the rights of victims of trafficking.

Prevention is Key to the Anti-Trafficking Response

Preventive measures to fight trafficking in persons should be multi-disciplinary, address all root causes of trafficking, including both supply and demand side and foster opportunities to migrate legally and safely. The main goal of prevention mechanisms is the reduction of vulnerability to trafficking and the increase in livelihood options for individuals at risk, with special focus on women and children. There is an urgent need to address issues of human rights violations in countries of origin to prevent vulnerability.

Governments should train local and national authorities and sensitize the public at large to promote understanding of human trafficking and take action against it. It is essential to raise the awareness of potential and actual victims, warn of the risks and dangers of trafficking and inform about legal and safe migration channels. On the supply side, measures should include the empowerment of persons at risk, and include efforts to spur socio-economic development, employment generation, gender-equality, and anti-discrimination measures. States should foster stronger links between antitrafficking measures and existing national action plans, particularly national employment plans, development plans, child protection plans, gender equality plans and national migration plans.

Local community development, socio-economic development and employment generation schemes as well as micro-credit schemes are often not accessible to women. Such schemes should actively target women and other vulnerable groups at risks of being trafficked and returned trafficked victims, so as to support their social and economic reintegration. If legal and safe migration channels would be available as an alternative to irregular migration, the dependency of migrants on the abusive intermediary network would decrease.

Therefore, stronger cooperation between countries of origin, transit and destination is essential. In order to prevent abuse, authorities should monitor the practices of licensed recruiters. On the demand side, it is essential to reduce the need for cheap exploitative labour in all sectors in countries of destination. Victims are trafficked mostly into the unprotected, unregulated, informal sectors of the destination economies. Even if legal migratory channels are enhanced, these will most likely not target the informal sector. Countries of destination should take a standardsbased approach to trafficking and migration in order to foster migrants' rights and migrant workers' rights both for the formal and informal sectors of the economy.

They should furthermore ensure the enforcement of these labour and protection standards and promote measures to address the protection of the rights of workers in the informal sector. This calls for collaboration with trade unions, migrant associations and employers.

Protection and Support for Trafficked Victims

Victim protection and support schemes are an essential element of a comprehensive and effective response to human trafficking. Trafficked victims need safety, support and care while undergoing social and economic reintegration once their distress has ended.

They require protection from further exploitation and access to medical and psychological care, including voluntary and confidential counseling. Victims should be given access to confidential HIV testing on a voluntary basis. Where victims are given the opportunity to recover from their trafficking ordeal with professional support, they are more likely to cooperate in the criminal investigation and provide evidence against their traffickers. Effectively responding to human trafficking therefore requires a balanced approach that is based on enforcing the law against the traffickers and protecting the human rights of trafficked victims.

It should be the victim's right to access protection and support services on an unconditional basis. Despite an increased awareness of the need to identify trafficked persons as victims of crime and also of the human rights violations suffered by those who are trafficked, many States have yet to establish effective victim protection and support mechanisms. The challenge for national authorities is to protect the rights of migrants while maintaining border security. While States have the right to detain and remove irregular migrants, they have the responsibility to do so using measures which respect human rights and the safety and dignity of the individual.

States also have a role to play in reducing the causes of involuntary migration through greater rights protections in home countries. Situations of poverty, lack of access to education, gender inequality and high unemployment make people vulnerable to irregular migration. Many States view human trafficking and migrant smuggling as a 'victimless' crime which impacts on the security of a State and this prevents adequate protection of the human rights of trafficked and/ or smuggled persons.

Prosecution

International cooperation is essential to uncover and combat transnational trafficking networks. Traffickers must be brought to justice. Governments should effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors. It is essential to ensure that trafficking, its component acts and related offences constitute offences under national law and extradition treaties. Perpetrators, including those who recruit and harbor trafficked persons, must be prosecuted and their assets confiscated.

Employers who hire trafficked persons should be punished. While countries are stepping up their efforts to crack down on trafficking, challenges remain, including inadequate data, lack of government programmes, corruption and resilience of criminal syndicates that frequently change tactics and utilize legal businesses and mechanisms as fronts.

The Capacities of Criminal Justice and Law Enforcement to Respond to Trafficking in Persons and Smuggling of Migrants

Although combating human trafficking appears to be high on the agenda of Member States, it is evident that even with legislation in place, many national law

enforcement and criminal justice practitioners do not have the necessary knowledge, expertise or capacity to fight trafficking in persons in an effective and multi-dimensional manner, including responding to the human rights aspect of the crime.

It is essential that the professional skills of law enforcement and criminal justice practitioners be developed through education and training to specifically and effectively respond to this crime not only through law enforcement, but also by addressing human rights violations suffered by trafficked victims.

The response capacity of States is even more limited with respect to the smuggling of migrants. Law enforcement efforts are often limited to border controls without being embedded in a wider comprehensive policy framework. Smuggled migrants often end up in detention centres, jail or face deportation because of their illegal status.

There is little regard or concern displayed towards the human rights abuses they may have suffered during their journey or for the protection of their human rights in the destination country. It has been increasingly reported that human rights of irregular migrants in detention and jail facilities are often not respected or upheld.

For countries of origin, offering pre-departure training for migrants and informing the public about the dangers of human trafficking is considered good practice. So is proactive consular outreach and assistance, including through the posting of trained labour attachés. During the discussions on migration and development leading up to the High Level Dialogue on Migration and Development, it was stressed that migrants must assume their share of responsibility by being informed and aware of the impact of their personal (or communal) decision to migrate. Migrants themselves are expected to seek information about the risks of migration.

They are not just held co-responsible for their own security. Migrants are also seen as having an active role to play in their successful integration, which often entails learning the language of the host society and knowing one's rights and responsibilities.

In 2007 the Global Initiative to Fight International Human Trafficking (UN.GIFT) was launched by the United Nations Office on Drugs and Crime (UNODC) to raise awareness among business leaders of the need to effectively manage and monitor global supply chains. The Global Initiative is based on a simple principle: human trafficking is a crime of such magnitude and atrocity that it cannot be dealt with successfully by any government alone. In addition, information campaigns targeting shareholders and consumers are being discussed as a means to encourage them to use their leverage and provide companies with stronger incentives to comply with labour rights standards.

Migrants in Detention

Migrants, especially irregular migrants who lack legal status and migrants who are victims of smuggling and trafficking, are particularly vulnerable to detention, restriction on their freedom of movement or deprivation of their liberty, usually through enforced confinement, either in the receiving country or during transit (by land or sea). The most frequent violations and abuses suffered by migrants in detention are identified, based on the information provided in the recent reports of the Special Rapporteur on the Rights of Migrants. Administrative measures of detention are undertaken often without regard for the individual status of the migrant.

The various challenges can be grouped under two main categories including:

1. The legislative framework of protection mechanisms of migrants in detention and,
2. The conditions of migrants kept in detention.

"Deprivation of liberty of migrants must comply not only with national law, but also with international legislation. It is a fundamental principle of international law that no one should be subjected to arbitrary detention. International human rights norms, principles and standards... apply to all individuals, including migrants and asylum-seekers, and to both criminal and administrative proceedings."

Irregular migrants are particularly vulnerable to deprivation of liberty both in the context of criminal and administrative proceedings. In some cases, national immigration regulations criminalize and punish in an attempt to discourage irregular migration.

Irregular migrants therefore become particularly vulnerable to criminal detention for such reasons as irregularly crossing international borders, using false identification, overstaying their visas, irregular stay or leaving their residence without authorization. "Victims of trafficking and smuggling commit infractions or offences, such as irregular entry, use of false documents and other violations of immigration laws and regulations, which make them liable to detention.

The law of some countries punishes as criminal offences or administrative infractions irregular entry, entry without valid documents or engaging in prostitution, including forced prostitution. Victims of trafficking are thus often detained and deported without regard for their victimization and without consideration for the risks they may be exposed to if returned to their country of origin." The Working Group on Arbitrary Detention holds the view that criminalizing the irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary detention.

Moreover, irregular migrants detained for immigration offenses considered a criminal offense by the receiving State should be given the opportunity to appeal before an independent judiciary, but are not afforded such protection in practice. In such cases, detention of migrants may become arbitrary. In international and regional human rights law, arbitrary arrest and detention is expressly prohibited and migrants' nationality or lack of legal status in the destination country cannot excuse States from their obligations under international law to ensure due process guarantees and dignified and humane treatment while migrants are held in detention.

Despite these standards, the Special Rapporteur has received numerous reports that in certain cases detention can become prolonged and the detainees subject to ill-treatment. Migrants in detention often face increased risk of physical or sexual abuse and violation. Differences exist between immigration regulations among States, making oversight of detention conditions and States' adherence to international standards in this practice a challenge. Some States entirely lack a legal regime governing immigration and asylum procedures that, when in place, can help to manage detention practices. Others have enacted immigration laws but often do not provide for a legal framework for detention.

Some States have legislation which provides for a maximum period of detention, whereas others lack a time limit. With such diversity in national policy and law governing detention and expulsion, it is important that irregular migration is seen as

an administrative offense and irregular migrants processed on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals.

Migrants are often not informed of their rights to appeal and of the status of their situation. If detention centres do not provide for judicial review of administrative detention of migrants, the lack of awareness of the right to appeal and the lack of access to free legal counsel may prevent migrants from exercising their rights in practice.

Even in the presence of legitimate claims, the difficulty of receiving assistance impedes the exercise of the rights of the migrant in detention. Moreover, incidents in which detainees are not informed about their rights and status of detention, in a language they understand, have been repeatedly reported. When lawyers and interpreters are not available, migrants in detention may feel intimidated by immigration officers and obliged to sign documents without understanding their implications. Migrants and asylum-seekers are sometimes detained at airport transit zones and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies before being returned to their countries.

The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the State's decision to be detained and returned and to apply for asylum, even in the presence of legitimate claims. In practice, some States misleadingly label migrant detention centres as "transit centres" or "guest houses" and "detention" as "retention" in the absence of legislation authorizing deprivation of liberty. Foreign nationals can be detained if immigration officers have reasonable grounds to believe that the migrant is inadmissible, a danger to the national public, unlikely to appear for future examinations etc. "The failure to provide legal criteria can result in *de facto* discriminatory patterns of arrest and deportation of irregular migrants.

At times migration authorities stop migrants at the border and take them arbitrarily to the police station where they are asked for money or sexual favours in exchange for their release. Cases of prolonged detention because of refusal to pay were reported." Migrants belonging to certain ethnic groups or nationalities are more likely to be intercepted and detained than others. The absence of internal monitoring and external inspection mechanisms in detention centres gives rise to abuse and violence.

Often no particular provisions exist regarding detention of children or other vulnerable groups such as women and irregular migrants, which gives rise to the violation of basic human rights. Irregular migrants in detention often do not receive legal, medical, social or psychological assistance and protection.

"Migrants sentenced to imprisonment for immigration offences are detained with common criminals and subjected to the same punitive regime; they are not always separated from the rest of the prison population and have difficulties in understanding and communicating... There are often no arrangements to provide culturally appropriate foods and to allow them to practise their faiths. Racist attacks against migrants detained with common prisoners were also reported [by the Special Rapporteur on the Rights of Migrants]. Prison personnel in most of the cases do not receive specific training on how to deal with foreign detainees." The poor conditions of certain detention centres lead to serious deterioration in the living standards of foreign

nationals, including inadequate access to medical treatment and other services, poor hygienic conditions, the absence of separated space for men and women, and adults from minors etc. Furthermore, freedom of movement is limited within the detention facility.

Migration, Globalization and the Right to Development

Globalization: Setting the Stage for Easier and Faster Circulation of People

Migration is among the constants in the history of mankind. People have moved either to explore new horizons, for survival or in search of better means of livelihood, or were forced to move because of persecution. With globalization came expanded market opportunities and more affordable and accessible communications and transportation facilities. This meant ease in the flow and transfer of factor endowments, including people. Globalization has thus set the stage for the easier and faster circulation of people but such mobility could either be facilitated or hampered by a country's unilateral policies, bilateral agreements, regional and multilateral arrangements.

The existing need of many developed and developing countries for foreign labour is a reality, primarily due to their ageing populations and the absence or lack of locals or nationals to fill key occupations. Despite this need, many countries remain conservative in opening up their markets for foreign workers. The approach taken by most countries in need of migrant labour is that of "cautious, selective opening-up", either through unilateral policies or bilateral arrangements that allow them to choose specific countries and occupational groups to access their labour markets for a specified duration or on a seasonal basis.

Commitments to facilitate the entry and stay of foreign personnel for work or provision of service remain very limited at the regional and multilateral fora. This is despite the fact that, from the trade perspective, liberalizing the movement of labour was estimated to bring global welfare gains of US$ 356 billion, with benefits accruing both to labour sending and labour receiving countries. If the share of foreign workers grew to three per cent of the labour force of rich countries it would involve an increase of 14 million people over 25 years (roughly 500,000 a year). The global gains would therefore be US$ 675 billion a year by 2025.

For the labour sending countries, tapping one of their comparative advantages, *i.e.*, abundant labour supply helps ease unemployment pressures at home, siphons in additional resources for the economy through remittances, ushers in improvements in human capital and allows the economy to benefit from technology and skills transfer and investments from returning workers. On a more macro level, remittances to developing countries estimated at US$251 billion in 2007, are a significant source of foreign exchange for these countries and have been associated with reduction in poverty, improvements in school attendance, better health care practices and gender empowerment.

Migrant remittances provide a safety net to migrant households in times of hardship and contribute to the stability of recipient economies. Remittances, however, remain private small transfers and cannot replace official development assistance of large public flows. Remittances do not lessen the responsibility of the receiving

government to put in place adequate social protection mechanisms. Migrants contribute to the development of their countries of origin through remittance flows, investment and business ventures, and skills and technology transfer.

As migration affects the development of both sending and receiving countries, codevelopment initiatives should be scaled up and should include projects such as:

- Effective monitoring of migration flows with the eventual aim of ensuring return or facilitating circular migration,
- Supporting migrants and diaspora communities' linkups and investment interests with their communities of origin,
- Setting-up training institutions and other infrastructure for human resource replenishment so that they may contribute to development,
- Adopting ethical recruitment policies, among others. Co-development mechanisms between migrant-sending and migrant-receiving countries could encourage the progressive realization of the right to remain in the country of origin through the improvement of economic, social, and cultural conditions in the countries of origin.

Article 2 of the International Covenant on Economic, Social and Cultural Rights on inter-state cooperation underlies this approach. Migrants are important vehicles for transmitting "social remittances" including new ideas, products, information and technology. Migrants can also make use of enhanced skills and knowledge acquired abroad once they return to their countries of origin.

For labour receiving countries, foreign workers fill in shortages of key personnel for the efficient production of goods and services and, more importantly, for the provision of health, education and Focusing on the Economic Dimensions of Migration and Remittances The World Bank focuses largely on the economic dimensions of migration and remittances from a development perspective.

The World Bank focuses largely on the economic dimensions of migration and remittances from a development perspective. The Bank's work on the development aspects has implications for migrants' rights, especially the right of migrants and their families back home to a decent livelihood, to have access to education and health care, and to be free from hunger and poverty. The Bank plays a global advocacy role in providing evidencebased analysis of the gains of migration for migrants, as well as the countries of origin and destination.

The Bank's flagship Global Development Finance 2003 report, Global Economic Prospects 2006 report and other publications have highlighted the size and importance of migrant remittances and their beneficial role in reducing poverty and enhancing child health, education and small-business investments Migrant remittances provide a safety net to migrant households in times of hardship and contribute to the stability of recipient economies. computer-related and IT-related services.

All of these have key implications for efficiency and productivity of the economy and essential services delivery. The World Trade Organization (WTO) provides an avenue for facilitating the movement of service providers on a temporary basis through the General Agreement on Trade in Services (GATS) or Mode 4 in the GATS parlance. The GATS Mode 4 of supply of services (presence of natural persons) describes the process by which an individual moves to the economy of consumer to provide a certain

service, whether on his/her own behalf or on behalf of his/ her employer. Through a schedule of commitments, WTO members specify categories of service providers or employees of service providers that are granted access into their territories.

Given that Mode 4 covers only a small subset of migration and that present commitments are limited mostly to movement of intra-corporate transferees, business visitors and highly-skilled professionals, most labour movements still occur outside the multilateral context. Some developing and least-developed countries, stressing Mode 4 as among the modes of export interest to them, have continually sought for the expansion of commitments by major destination countries in occupations and skill sets that are of interest to them, including movement of contractual service suppliers and independent service suppliers at all skill levels.

At the regional level, regional and subregional free trade agreements also include provisions facilitating the movement of people, but as at the multilateral level, these, too, are beset with challenges. The Southern African Development Community (SADC), has signed a new Protocol on the 'Facilitation of Movement of Persons in SADC' aimed at enabling the movement of people to other countries in the region. The Protocol, which is subject to ratification in order to take effect, has the objective of facilitating: the entry into a Member State without the need for a visa for a maximum period of 90 days per year for a bona fide visit and in accordance with the laws of the Member State; permanent and temporary residence in the territory of another Member State; and working in the territory of another Member State.

The experience of countries implementing bilateral mobility agreements provides examples of best practices for improving the development potential of migration, including the realization of economic, social, cultural, civil and political rights, and access to justice.

The international community is increasingly conscious of the need to take a holistic view of migration—one that goes beyond a purely economic or security perspective to also incorporate the social and cultural aspects of this global phenomenon—if the problems related to today's migration flows are to be addressed effectively and humanely. Cooperation between countries of origin, transit and destination is critical for guaranteeing the protection of migrants' rights and minimizing the potential negative impact of migration for the long-term development of the country of origin. As the adoption of the Protocol is linked with the intricacies of the process of removing border control, allowing people to freely settle and obtain jobs where they want remains a far-fetched reality.

Migration and Development Linkages

Every human being has the intrinsic right and desire to improve his/her living conditions, including through search for better livelihood opportunities within and outside his/her country of birth. The deprivation of the human right to development is one of the causes of migration itself. The International Convention on Economic Social and Cultural Rights recognizes the right to work, including the right of everyone to the opportunity to gain a living by work which he/she freely chooses and accepts, as well as the enjoyment of just and favourable conditions of work, and the continuous improvement of living conditions.

Every country has the right to development, and the more developed among them have the moral responsibility to help the developing and least developed countries

achieve their development objectives. The mandate to promote the development of all persons becomes clear from Article 22 of the Universal Declaration of Human Rights: “Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

The Declaration on the Right to Development confirms that “the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations.” Thus, “steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and the implementation of policy, legislative and other measures at the national and international levels.” The Declaration further asserts that: “States have primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”

It also places the human being at the centre of a development process respectful of human rights. Models of economic development which create structural inequality promote irregular migration and place the human rights of millions of people at risk. The 1994 International Conference on Population and Development (ICPD) Programme of Action and the 1999 Bangkok Declaration on Irregular Migration draw conceptual connections between migration and development and urge States which receive irregular migration to aid developing countries and countries with economies in transition to reduce irregular migration through programmes which address poverty reduction, social development, and the achievement of sustained economic growth.

The human rights to civil and political participation are integral to the democratic development of public policies which protect economic, social, and cultural rights. “The forms of political organization and participation in decision-making processes that exist in different societies are closely linked with the degree of equity obtaining there. If socioeconomic inequalities are acute, vast sectors of the population will find that the aspiration of exercising their rights as nationals is a virtually unattainable one. Exacerbation of tensions resulting from socio-political exclusion tends to lead to various forms of instability and violence, which generally result in forced movements of population.” Effective development policies can reduce the need to migrate.

Human rights can guide the development of linked migration and development policy initiatives at the national, regional, and international level. “Many less-developed countries have identified labour export as important in reducing unemployment, improving the balance of payments, securing skills and investment capital, and stimulating development.” The overall objective is to avoid migration as a matter of necessity by promoting positive human development outcomes and economic opportunities in developing countries.

At the same time, it is recognized that under certain circumstances migration can contribute to development through remittances, the acquisition of skills by migrants, and the promotion of entrepreneurship in the country of origin through specific programmes assisting migrants to re-integrate in their home country.

Specific mechanisms and ethical recruitment may address issues of brain drain. A thin semantic line often separates commitments to support migrants in their efforts to promote development, and formulations that come close to suggesting their

instrumentalization for the purpose of ensuring mutually agreeable and beneficial arrangements among States. Linking the question of international migration to the issue of development has opened up new avenues for dialogue and collaboration among governments, revolving around the identification of mutual interests and the creation of "win-win" situations.

While it is important to capitalize on the current political momentum, those supporting and driving this process should be mindful of avoiding inconsistencies in the migration and development discourse with regard to human rights. A case in point is the often made argument that the protection of migrants' rights will enhance the development gains to be reaped from migration. To quote Mary Robinson, former United Nations High Commissioner for Human Rights: "Respect for migrants' rights actually contributes to economic and social development in sending and receiving countries.

Migrants who have opportunities for decent and legal work contribute more to development than those who are exploited." Human rights–and the rights-holders–should not be portrayed as means to an end. It should not be implied that migrants are obliged to "pay back"–by contributing to development–for being treated decently.

While States should assume responsibility for providing an enabling and empowering environment for migrants, a human rights-based approach implies that they must not patronize them in the exercise of their talents and initiative, and the use of their funds. The most effective way of ensuring this may be an honest commitment to including all groups of migrants in participatory consultations and decision-making processes on international migration and development.

The international community works at large to promote development, reduce poverty and achieve the Millennium Development Goals (MDGs): poverty reduction, promoting education, improving maternal health, promoting gender equality, reducing child mortality, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability and developing a global partnership for development.

Although the link between migration and development is increasingly recognized, the relationship between migration and the Millennium Development Goals has not been adequately explored. Studies have pointed to migration's positive impact in realizing some of the MDGs.

Remittances have directly benefited poor households in many countries with the money sent by relatives working abroad making daily subsistence affordable and access to health and educational services and amenities such as appropriate housing, electricity, water, sanitation more readily realizable for families left behind. Women migrants also benefit from improvements in skills and education and equality in household decision-making. While migration could be a positive factor for development and the advancement of the rights to livelihood and development, it is likewise acknowledged that many migrants can be exposed and subject to conditions that deny them some rights, including those relating to their conditions at work and the upholding of their dignity.

In most instances, it is the women and the less-skilled who are most vulnerable. Information is rife on abuses committed by employers of domestic women workers, especially those who are hired as temporary contract workers, or those who are undocumented. For low-skilled women, the incidence of abuse is striking, with some of them being treated like slaves and prisoners, subjected to physical, emotional,

psychological and sexual abuse. One trap for the current human rights discourse on migration is to regard and promote human rights as the reserve of the vulnerable. Indeed, most discussions on human rights pertain to weak members of migration movements: female migrants, lower-skilled migrant workers and the undocumented, who often occupy so called “3 D work” (difficult, dirty, dangerous); as well as victims of trafficking, especially women and children.

While it is undisputable that all these groups are entitled to and in need of human rights protection, it is also important to note that their vulnerability is not a fact of nature, but the result of social, cultural, economic and political factors that need to be addressed, including: inequalities, marginalization, lack of access to resources and information, lack of knowledge and skills, limited or no involvement in decision making. Most importantly, it is the lack of voice of “the vulnerable” that cannot be remedied by focusing attention and efforts on protection alone, without pressing for greater representation and participation at the same time.

A holistic approach which applies human rights standards to both the fundamental causes and impacts of irregular migration may, in the long run, reduce the human rights violations against irregular migrants by reducing their desperation and vulnerability.

As such, a human rights approach to migration and development can form part of a set of strategies to ensure the dynamism, flexibility, and competitiveness of the economies of host and sending countries, thus fostering the positive effects of migration for host societies and countries of origin.

A human rights approach to migration will not only help to develop economic opportunities or guide the integration of migration, but also ensure that the concerns of the most vulnerable in a receiving society are addressed and the benefits of migration equitably shared.

Emphasizing State responsibility for the promotion of economic, social, and cultural rights *ab initio* may recast development policies in a way that would limit emigration, taking on issues beyond the capacity of migrants themselves to fund development in their countries of origin. More work is needed to implement the goals of the 1986 United Nations Declaration on the Right to Development. “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.”

Countries of origin may also be impacted by the migration of their nationals, especially those who provide essential services, such as health and education. Such migration often leads to “brain drain”—the migration of the best and brightest—resulting in inadequate service provision at home. Examples of brain drain have been highlighted in many African countries, particularly the flight of medical practitioners and health-care personnel.

The Impact of Climate Change on Migration

Environmental factors have long had an impact on global migration flows. The scale of such flows, both internal and cross border, is expected to rise over the next decades as a result of gradual deterioration of environmental conditions and anthropogenic, or man-made, climate change and its effects. Both gradual environmental change and extreme environmental events influence population migration patterns but in different ways.

The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment report identified the following more specific climate change impacts that have potential for triggering or increasing population migration: increases in the areas affected by droughts, increased tropical cyclone activity both in frequency and intensity, increased incidence of rising sea level (excludes tsunamis) and increased climate variability. These environmental changes will occur slowly over a long period of time with small but cumulative manifestations.

While predictions of the number, characteristics and location of people who would be forced or choose to migrate as a result of these processes still need to be refined using new methodologies to estimate flows, figures will be on the increase, with millions more vulnerable people on the move. Gradual forms of environmental change may most acutely affect those depending directly on fragile ecosystems to sustain farming, fishing and similar livelihoods. People affected by these changes endeavor to adapt through various measures, one of which being migration.

Environmentally induced migration flows can often be of temporary or seasonal nature, with migrants trying to diversify their risks against declining local earnings without cutting off ties with their communities at home. In some cases, entire households migrate abroad temporarily waiting for improvement in environmental conditions at home. In other situations, some household members migrate, sending remittances to sustain basic standards of living, while others stay behind caring for local assets and livelihood means. However, if local areas become uninhabitable and the environmental degradation irreversible, then migration can become long-term or even permanent.

This scenario poses two challenges. First, there exists the need to better determine where to draw the line between voluntary and forced migration by better defining the tipping point. Second, persons forcibly displaced across international borders remain without any specific protection today as they do not qualify as refugees or any other category under special protection of present international law.

Predicting the impact of gradual deterioration in environmental conditions on migration patterns is complicated by a variety of factors that are part of the decision making process to migrate, including economic, social, cultural, civil and political factors and how they interact at the individual, household, community and national levels.

Baseline data are needed to analyse the phenomenon of environmentally induced migration, develop conceptual and methodological tools to model different migration scenarios and formulate appropriate policies to ensure that the human rights of migrants are protected. Within the scope of other efforts aimed at improving the quality and availability of census and survey information, quantifying and locating vulnerable populations is undoubtedly a priority.

Health and Migration

Health and migration are linked and interdependent. Indeed, many of the same disparities that drive the global spread of disease also drive migration. That is not to say that movement should be stopped, but rather that the health implications have to be managed.

Governments are increasingly recognizing the need for a comprehensive approach to migration health that goes beyond infectious diseases and border control to include

migration related health vulnerabilities, communicable diseases, mental health, occupational health, health implications of climate change as well as access to health care and human rights issues. With more people travelling faster and to more destinations, migration health is today a major public health concern.

The re-emergence of tuberculosis in developed parts of the world, the rapid spread of HIV (Human Immunodeficiency Virus) and SARS (Severe Acute Respiratory Syndrome) are only a few examples of the critical relationship between population mobility and health.

While migration itself is not, under normal circumstances, a risk to health, conditions surrounding the migration process can increase vulnerability for ill health. Some of the health risk factors are related to the circumstance before departure. Migrants depart with health profiles which have been influenced by their socio-economic status and accessibility to health-care services in their communities of origin. For instance, migrants who are fleeing poverty or conflict are likely less healthy than migrants who move by choice.

The health of migrants is also affected by the conditions surrounding their movement. Irregular migrants, trafficked and smuggled persons as well as those forced to move because of natural or man-made disasters, are most vulnerable to poor health conditions, violence and lack of access to adequate health care during the migration process.

Risk factors upon destination are often related to the legal status of migrants, which too frequently determines the level of access to health and social service. Further factors defining vulnerability to ill health and risk behaviours are stigma, discrimination and linguistic and cultural barriers. Finally, the return of migrants to their place of origin may imply returning to a location with high disease prevalence compared to the place where the migrant resided temporarily, or it may imply introduction of health conditions acquired during the migration process, into the home community.

The implications of migrant health extend well beyond the migrants themselves. Indeed, there are important public health considerations for the entire society. Inadequate attention to health in the migrant community will be felt sooner or later by society at large. In that sense, well managed migration health promotes the well being of all, protects global public health, and can facilitate integration and contribute to social and economic development. The need for coordinated and sustained action to address migration related health challenges was addressed at the World Health Assembly of the World Health Organization (WHO) in May 2008. A Resolution on Migrant Health was adopted by the WHO Member States.

The resolution, which promotes equitable access to health services without discrimination on the basis of gender, age, religion, nationality or race, urges Member States, WHO and its partners to promote the inclusion of migrant's health in regional health strategies; to develop/support assessments and studies and share best practices; to strengthen the capacity of service providers and health professionals to respond to migrant needs; to engage in bilateral and multilateral cooperation; and to establish a technical network to further research and enhance the capacity to cooperate. Migrants have inalienable rights that States have an obligation to uphold.

The right of everyone to enjoy the highest attainable standard of physical and mental health is an inherent human right as recognized in major human rights

instruments, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination, among others. Programming success often relies on empowering individuals to discuss issues that concern them and to claim their rights to life, health, information, freedom from discrimination, and to be part of the social and economic life in the countries of destination.

Addressing the stigma associated with disease and infection, for instance HIV, and bringing the issue into the public sphere are critical to protecting the rights of those affected. Programmes must be designed with participation of the people (rights holders) they are intended to serve, and must have clear-cut strategies to be inclusive at all levels, from national plans to community-led interventions.

In addition, legal mechanisms should be established or reinforced to ensure compliance of the different duty bearers (governments, service providers, community leaders) to meet their responsibilities to people affected. Although the Joint United Nations Programme on HIV/AIDS (UNAIDS), IOM and WHO have stated that there is no public health rational for limiting the freedom of movement of people living with HIV, some 67 countries deny the entry, stay or residence of HIV-positive non-nationals in their countries. Labour migrants often bear the brunt of such restrictions as they are often subject to mandatory testing of HIV without free and informed consent, and respect for confidentiality.

Concretizing the Right to Development through Migration

The challenge centres on how to manage the migration and development nexus in a holistic manner so that it becomes more a positive factor of economic and human development benefitting not just one segment of the population but the majority. Migration policies must be linked to development policies and *vice versa* and should be seen as complementing each other. The level of development of both sending and receiving countries plays a role in migration decisions. For the sending country, the level of economic development defines the types of movements, length of stay, disposition to overstay or enter a country without proper documentation. Receiving countries, in general, attract migrants from countries where there are less opportunities of earning a decent living at home.

While countries of origin and destination have specific obligations with respect to the migrant, gains from migration are maximized and costs minimized if sending and receiving countries cooperate in the following areas, *inter alia*,: mitigating brain drain through human resource training and capacity-building (*e.g.,* retraining and education programmes, twinning arrangements and exchange of experts), facilitating return migration (*e.g.,* by providing incentives and possibilities for lucrative investments, offering preferential interest rates on savings, transfer pension or social security contributions to the home country to be collected by the migrant upon return, providing other social benefits such as educational and health insurance grants, allowing for return and circular migration) and adopting ethical recruitment policies to discipline recruitment of personnel in occupations with shortages such as health and education; maximizing the benefits from remittances through facilitating and supporting co-development projects, including encouraging entrepreneurship and small-scale

businesses, addressing problems of corruption and the lack of access to credit; addressing protection of migrants and the promotion of their rights, most notably of women and the less skilled who are most vulnerable.

For sending countries, it is important to distribute the benefits of migration, including by improving essential services delivery and access to basic services such as education and health, supporting agricultural infrastructure and other forms of assistance, investing in infrastructure and technological development to better utilize migrants' contributions to the economy including their acquired knowledge and training. In all these efforts, it is important that migrant-receiving governments provide support as well.

Such efforts need coherent migration management—a management that looks at migration throughout the migration life cycle (*i.e.,* pre-, during- and post-migration) and that involves the sending and receiving governments and other stakeholders, including the migrant and the employers, and international and nongovernmental organizations through codevelopment and solidarity frameworks.

Effective and coherent migration management is key to ensuring that a balance is achieved in the attainment of development and socio-economic goals. The longterm goal should be to generate adequate employment and sustainable economic growth so that migration becomes a matter of choice rather than a necessity.

Making Migration Work for Development

The United Nations has put the debate on international migration and development on the international agenda through the convening in 2006 of the High Level Dialogue on International Migration and Development. That meeting ushered in the reinvigoration and the expansion of the Global Migration Group and the holding of the Global Forum on Migration and Development to explore further ways of strengthening the commitment for genuine and effective international cooperation on the issue of migration and development.

In 2007, a resolution on international migration and development adopted by consensus by the General Assembly, called upon relevant United Nations bodies, other intergovernmental, regional and sub-regional organizations, "to continue to address the issue of migration and development with a view to integrating migration issues,... within the broader context of the implementation of internationally agreed development goals, including the Millennium Development Goals and respect for human rights."

A "triple win" situation is possible. First of all, there is a need to treat migration and development in a comprehensive manner to ensure that the human and socioeconomic development and dimensions are embedded in migration policy. This requires putting in place policies and setting up institutions that would play a role in each stage of the migration process, *i.e.,* pre-, during and post-migration—from preparing and informing the migrants of their rights and where they could get assistance in their area of destination to putting in place mechanisms to maximize the benefits from remittances (including by channeling them into more productive uses) and minimizing the costs of remittance transfers. In all these, there are roles that the sending and receiving governments could play, either individually or jointly, but always in coordination with each other.

Furthermore, it is important to ensure policy coherence and explicit understanding nationally that migration policy should form part of an over-all development strategy

and that migration should be considered as just one means towards attaining and realizing development goals but not as a goal in itself. For countries of origin, this means making labour mobility part of their development strategies relating to labour, employment, trade and human resource development policy. Coherence also requires aligning migration policies with the realization of human rights and socio-economic development goals.

This means, inter alia:

- Crafting appropriate policies and incentives, including devising a concrete government plan and establishing institutions and offices to handle migration, labour and employment policies in a holistic manner ensuring the protection of the human rights of migrants,
- Advocating for better working conditions and addressing social protection (especially of less-skilled women who are most vulnerable), xenophobia and social marginalization through information dissemination and awarenessraising as part of the pre-departure orientation programme or through migrant resource centres and representations in major destination countries,
- Setting-up databases to maintain links and networks to allow migrants to be updated regarding the opportunities at home,
- Putting in place mechanisms to maximize the benefits and minimize the costs of migration.

The sensitivities of countries of destination regarding the acceptance of foreign workers that overstay are understandable. Effective migration management by both sending and receiving countries is a preferred option rather than barring migration altogether, given the complementary needs of sending and receiving countries when it comes to labour mobility.

Effective migration management takes into account a mix of incentives and penalties including putting in place incentives to facilitate return, such as financial return incentives, re-entry programmes, investment incentives that provide grants and subsidies, low-interest loans, tax breaks, entrepreneurship training, housing and educational subsidies, etc. and imposing mechanisms to discourage overstaying such as posting financial security bonds, mandatory savings schemes or pension contributions to be collected upon return, strict enforcement of laws on employers and migrants, etc. to discourage overstay.

Ultimately, it is imperative for countries of origin to set the stage to facilitate return by building a stable political and economic environment at home. Mechanisms should be put in place to allow for the possibility of return/re-entry, include appropriate duration of stay, make (temporary) return attractive, *e.g.,* by allowing migrants to engage in productive activities and providing possibilities for the utilization of their acquired knowledge and training, including technology, at home.

The sending and receiving country governments could pool some “transit migrants or circular migrants” funds (from contributions from beneficiaries of migration– governments, migrants, employers) to serve as seed money for any activity that would contribute to ensuring circular or return migration and/ or other pro-development projects.

In order to maximize development impacts, it is imperative to have meaningful

commitments in liberalization efforts at the unilateral, bilateral, regional and multilateral levels and at different skill levels or occupation groups. Often, destination countries institute unilateral policies for specific occupations with vacancies and target source countries to fill the shortages or enter into bilateral arrangements, again with specific terms and obligations for countries of destination and origin. While such arrangements facilitate access, they do so only for some chosen occupations and are afforded only to select countries. Thus they lack the predictability of access which is important for developing and least developed countries, whose comparative advantage is their abundant labour. Such schemes are also vehicles for abuse of workers.

It is therefore imperative to devise a framework involving both sending and receiving governments and other stakeholders that would enable the migration community to operate in an environment of comfort and where migration could take place in an orderly manner and under mutually-acceptable conditions. Thus, it is important that demands of developing and least developed countries for better and more predictable access of their service personnel/workers be reflected in commitments at the multilateral level as well as in regional integration frameworks.

In this regard, it is important to further explore how GATS Mode 4 commitments at the World Trade Organization (WTO) could be made more meaningful.

Among the proposals made to facilitate market access in the on-going GATS negotiations at the WTO include: undertaking broader commitments to cover skill sets demanded by sending countries including those de-linked from commercial presence, removal or substantial reduction of economic or labour market needs tests which serve as discretionary barriers to entry, specification of the duration of stay and providing for possibilities of renewal. Requests have also been made for alternative assessment of qualifications *i.e.,* demonstrated competence in lieu of university degrees and for more basic verification of skills and competence in the absence of mutual recognition arrangements (MRAs).

Some WTO members have also suggested greater transparency of regulations and administrative procedures, including sources of information/ contact points relating to the movement of service suppliers and for these to be included as additional commitments in the countries' schedule of commitments. Regional North-South arrangements could also serve as vehicles to market openness as in the context of the economic partnership agreements (EPAs). As there has been an observed trend towards "cautiousness" on the part of receiving countries towards market opening, there is a need to cushion their "fears" and veer away from protectionism by raising awareness of the costs and benefits of migration through sustained dialogue among key stakeholders, including between labour and global enterprises. Results of such dialogue must be communicated to the general public to assuage negative sentiments regarding migration and to policymakers to base migration-related policies on facts.

In this light, there is a need to sensitize receiving country constituents regarding the development impacts of migration and awareness that migration is not a one-way street but a phenomenon that impacts on both the sending and the receiving country's development. In relation to the points and to give substance to claims regarding the benefits of migration, there is a need to intensify and consolidate work on migration and labour mobility and to establish mechanisms for information and research exchange.

As to research and analysis, in-depth studies on the following are required:

- Migration and development linkages, including:
  - Key indicators for understanding migration policies' impact on development and development policies' impact on migration, including developing a conceptual framework and tools to better understand and "measure" these linkages and their impacts,
  - The appropriate policy mix to meet key Millennium Development Goals, including poverty reduction, gender empowerment, improvements in education and health conditions, through migration,
  - Specific country case studies where communities have benefitted from (or have been negatively affected by) migration using the MDGs as the development benchmark,
- Opportunities for trade, investment and developmental links between countries of origin and countries of destination,
- "Job-availabilities"/"employment opportunities" on a per sector, skill set, gender and age, country/group of country basis to enable sending countries to review and reinforce their supply capacities to meet the demands of the external market,
- Remittances and their productive uses, highlighting the role played by sending and receiving governments, the diaspora population and migrant communities in the sending and receiving countries, either individually or in cooperation with each other (co-development initiatives),
- Best practices in migration management and maximizing migration and development linkages, preferably kept in a single database to be managed by a group of States (*e.g.,* through the Global Forum on Migration and Development process) or organizations (*e.g.,* through the Global Migration Group) to serve as a rich source of information for stakeholders,
- Brain drain, circular migration and temporary worker schemes,
- Fostering recognition of qualifications,
- Documentation, research and analysis of the extent of migrants' violation of human rights.

Such studies will provide useful information to assess the human rights situation of migrants.

The on-going discussions, debate and work on migration and development issues, including by the Global Migration Group and the Global Forum on Migration and Development, should be sustained and scaled-up and the rich information, data and best practices arising from all these should produce lessons and serve as useful tools in untangling the intricacies of migration and development.

The ultimate aim is to emphasize the complementary nature of migration and development, both as phenomena and at the policy level and to reach a "comfort zone" for all stakeholders where migration would finally be seen as beneficial for all.

Migration Data and the Human Rights Perspective

Official statistics can provide useful information to monitor and assess the

effectiveness of measures to safeguard the rights of migrants. Some data collection systems provide critical information about vulnerable groups, such as asylum seekers, victims of trafficking or children migrating on their own (unaccompanied minors). Available statistics also permit, under certain circumstances, to estimate the number of migrants in an irregular situation who, because of such irregularity, tend to be more vulnerable to human rights violations. Administrative data can be used to monitor the implementation of human rights instruments at the country level. International organizations and special rapporteurs often rely on the compilation of national data to report on the compliance of States Parties with the international treaties that they have ratified.

For purposes of understanding the extent to which a receiving State and its institutions are successful in safeguarding the rights of migrants, the information of greatest interest is that relative to the foreign population, since non-nationals are more likely than nationals to be in situations where their human rights are not fully respected. Data on the number of foreigners living in a country can be obtained from population censuses provided they record the country of citizenship of persons enumerated. The Principles and Recommendations for Population and Housing Censuses, Revision 2, population censuses should record both the country of birth and the country of citizenship of each person enumerated.

Having information on both of those characteristics allows the identification of migrants who are non-nationals and those who are nationals of the country they find themselves in and permits, therefore, an assessment of differential outcomes between those two groups. When differences exist, they may be indicative of problems in safeguarding the rights of non-nationals.

Census data on population by citizenship often provide information on the number of stateless persons, a group that requires special attention because stateless persons cannot avail themselves of the national protection of a State. Tabulations of the enumerated population by country of citizenship should present the number of stateless persons as a separate category.

Although stateless persons are not necessarily migrants, statelessness often arises as a result of international migration. Among the roughly 200 countries or areas that have carried out censuses since 1960, 77 have reported the number of stateless persons. Countries having large numbers of stateless persons tend to be those that have emerged recently from the disintegration of larger States. Consistent reporting of such data by all countries would allow a better monitoring of the success of efforts to reduce statelessness in accordance with international instruments. Comparisons between nationals and non nationals by sex can be especially useful in determining whether foreign women face more barriers to the enjoyment of the full array of human rights than their male counterparts or than women who are nationals.

For instance, analysis of differences in the labour force participation of women and men of different citizenships has been useful in unveiling major differences among groups having different nationalities and has provided the basis for further research into how overt or covert discrimination prevents some groups of non-nationals from fully enjoying their labour rights.

Migrant women may also face particular large numbers of stateless persons tend to be those that have emerged recently from the disintegration of larger States. Consistent reporting of such data by all countries would allow a better monitoring of

the success of efforts to reduce statelessness in accordance with international instruments.

Protection challenges during and after the migration process. For instance, available data suggest that migrant women are more vulnerable to human trafficking and related abuses than migrant men. Children and young persons below the age of majority are more vulnerable than adults when faced with situations in which their basic human rights may be at risk. It is therefore important for countries to disseminate data on flows of international migrants classified by age group and sex as well as information on the number of unaccompanied minors and on migrant children separated from their families.

One problem in gathering the data required to assess the prevalence of human rights violations is that, when migrants find themselves in irregular situations, they are unlikely to contact local authorities to report the abuses they may be experiencing, especially if the migrants concerned are not aware of the rights they are entitled to. Proactive action by countries of origin to inform their emigrants of the rights they are entitled to while abroad and to provide protection through embassies or consulates abroad can go a long way in eliciting the necessary information from migrants.

Using Data in Assessing the Respect for Human Rights: Some Examples

Over the years, the special rapporteurs appointed by the United Nations Commission on Human Rights have often relied on appropriate data to document the extent of human rights violations, as showed in their *ad hoc* reports. In 1999, the Commission appointed a Special Rapporteur on Migrant Workers. In 2002, for instance, the Special Rapporteur used administrative data provided by the Filipino Overseas Workers Welfare Administration to document the extent to which migrant workers from the Philippines were being subject to arbitrary detention in countries of destination.

Data were also presented on the number of cases in which Filipino migrant workers had been subject to abusive conditions by unscrupulous employers and the number of cases in which migrant workers had had problems related to identity documents. The Special Rapporteur has also relied on data from various sources to document the prevalence of violence against migrant women and the extent to which women have fallen prey to trafficking.

The reports of the Special Rapporteur have thus played a crucial role in documenting abuses, quantifying their prevalence and encouraging corrective action. The institutionalization of data collection as a means of ensuring that there is adequate evidence to assess the degree to which human rights are respected is perhaps most advanced in the case of refugees and asylum-seekers. Thus, the availability of comprehensive data at both the aggregate and the case by case levels permits monitoring the compliance of States Parties with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

The Convention itself has contributed to lay the basis for data collection by stipulating, in Article 35(2), that national authorities have to cooperate with the United Nations by providing statistical data on refugees. The large number of countries that have ratified the 1951 Convention and made it part of their national legislation as well as the capacity of the United Nations High Commissioner for Refugees to maintain offices in more than 120 countries have contributed to the institutionalization of a nearly global data collection

system focusing on refugees and the timely dissemination of the data available. Non-governmental organizations play a crucial role in monitoring the human rights situation of migrants and in documenting violations.

Amnesty International, for instance, includes in its annual report on the State of Human Rights a country-by-country review of the status of refugee protection and, as appropriate, respect for the rights of migrants. The Cingranelli-Richards (CIRI) Human Rights Data Project makes publicly accessible a database on quantitative information indicating government respect for 13 internationally recognized human rights. The database presents annual data for 195 countries covering the period, 1981-2006. The data gathered relate mainly to nationals, although information on non-nationals is presented for a few countries. In various parts of the world, research centres carry out surveys and produce reports based on quantitative information about various aspects of the human rights of migrants.

The Way Forward

Despite these examples of active data compilation and analysis, most countries still do not undertake the consistent collection and dissemination of data relevant for the analysis of the respect of the human rights of migrants. Given that the 2010 round of censuses is already ongoing, it is urgent for countries interested in migration to follow closely the United Nations recommendations on population and housing censuses relative to the recording of country of birth and country of citizenship so as to obtain a timely and comprehensive baseline for the further analysis of international migration and its interrelations with the challenges of safeguarding the human rights of migrants.

Availability of such data and their detailed tabulation by age and sex can provide the basis for developing other data collection initiatives to shed light on problem areas relative to the respect of the human rights of migrants. In addition, better use could be made of administrative statistics generated during the admission or return of international migrants to assess outcomes from the perspective of human rights.

Information on the success rate of asylum-seekers in obtaining asylum or temporary permission to stay; the characteristics of persons sponsoring migrants for family reunification and the timing of the process; the naturalization of foreign nationals; information on the types of contracts used in hiring temporary migrant workers and on the number of violations reported or investigated could all shed light on the determinants of relevant migration outcomes and on whether laws and regulations governing them are being applied fairly and consistently with universally recognized human rights. While census authorities are generally disposed to transparency in their processes of data collection and diffusion, other agencies with equally important data often are not.

Law enforcement and migration agencies tend not to facilitate access to data in their possession, nor are they always amenable to suggestions from independent scholars regarding models for data collection. The data they generate are often not accessible to those who seek to monitor the human rights of the migrants. It would be important to elicit the collaboration of those agencies and to assist in devising guidelines for the appropriate and systematic dissemination of some of the administrative data they collect.